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JAMMU AND KASHMIR

1952

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(C. N. 1)

A. I. R. (39) 1952 JAMMU AND KASHMIR 1

JIA LAL KILAM, J.

Rasul Dar and another, Accused — Applicants v. Mt. Jani, Non-Applicant.

Criminal Transfer Application Nos. 16 and 17 of 2008, D/- 25 Sawan 2008.

Criminal P.C., (1898), S. 526 (1), (a) — Fair and impartial trial not possible — Confinement of one accused for absence of another.

The mere fact that the Magistrate thought that one of the accused persons was responsible for the absence of some other accused, would in no way justify the action of the Magistrate in having placed him in judicial lock up, on the contrary the Magistrate ought to have realised that depriving people of their liberty in such an unceremonious manner is nothing short of unlawful imprisonment. No provision of law exists anywhere by which a Magistrate can confine a person for the absence of another man. Anxiety to secure a speedy trial does not justify the use of such methods. The mere fact that the other accused appeared before the Court on the subsequent day of the arrest and confinement of the accused would not make the illegal act legal and shall certainly create a strong and a reasonable apprehension in the mind of the accused that a fair and impartial trial or inquiry cannot be had before the Court in which the trial is pending. Chitaley's Criminal P. C. (Page 2907) cited with approval. (Paras 4, 5)

Anno: Criminal P.C., S. 526, N. 5.

M. A. Hafiz, for accused. M. S. Kak, for Non-Applicant.

ORDER.: These are two transfer applications submitted by the accused in two criminal complaints: 'Jani v. Aziz Dar' & others and Jani v. Rasul Dar & others — pending in the Court of the District Magistrate, Anantnag and will be disposed of by this order.

(2) The first complaint Jani v. Aziz Dar & others was lodged on 16th Baisakh 2007 under Section 345, R.P.C., The case went on for some time when it was adjourned to 5th Jeth 2008 for recording defence evidence. On that day one of the accused Mohamad Dar absented himself on ground of illness and an application to that effect was submitted by him to the Court. This application of his was rejected by the Court on the ground that it was not accompanied by a medical certificate. A bailable warrant was, therefore, issued against Mohamad Dar. About accused No. 1 (Aziz Dar) it was stated in the order that he was responsible for the absence of Mohamad Dar accused, and it was therefore ordered that he shall be confined in the judicial lock-up as long as he does not produce Mohamad Dar. In pursuance of this order Aziz Dar was put in the judicial lock-up. On the next day, i.e., 6th Jeth 2008 Mohamad Dar presented himself before the Court and it was ordered by the Court that "Rasul Dar" accused be now released from custody. Here it may be stated that Rasul Dar was not an accused in this case, nor was Rasul Dar ordered to be put in custody in this case. I wonder how Aziz Dar accused No. 1, for whose being placed in custody the order was made on 5th Jeth 2008, was released on 6th Jeth 2008, when the order for release was made for another person by name Rasul Dar who was not at all an accused in this case.

(3) The other complaint — Jani v. Rasul Dar & others was lodged on 16th Chet 2007. The order for summoning the accused was made on the same day. The order of the next day, i.e., 17th Chet 2007 shows that the complainant Jani and accused No. 1, Rasul Dar were present and the case was fixed for 11th Baisakh 2008. On 11th Baisakh the other two accused did not appear to have been served and the case was fixed for 5th Jeth 2008. On 5th Jeth 2008 another queer order was made by the Court in which the Magistrate writes that "the two accused are absent because of the delaying tactics of the accused No. 1. "He therefore ordered that accused No. 1 be put in the judicial lock-up On the following day the other accused also presented themselves before the Court with the result that Rasul Dar was released from custody.

(4) In the applications now before me, it is urged that the Magistrate's mind is working in a manner which would not infuse any great confidence in his capacity to deal with the case in a fair way. It was further argued that the orders that have been passed by the Court whereby some accused in both the cases were illegally sent to the judicial lock-up shows that the accused persons cannot get impartial justice from him. An explanation was called from the Magistrate as to why he should have adopted a procedure which is warranted neither by law nor by any other civilized canons of justice. By his explanation he has not at all improved his position and does not seem to have realised that the action taken by him in putting the accused in confinement without any rhyme or reason and on a mere suspicion that they may be responsible for the absence of the accused is to say the least a flagrant misuse of powers and a mere travesty of justice. All that he says is that the two accused in two different complaints were ordered to be confined in judicial lock-up only for the purpose of securing the presence of the other accused. The mere fact that the Magistrate thought that the accused persons placed in confinement were responsible for the absence of some other ac

cused, would in no way justify the action of the Magistrate in having placed them in judicial lock up. On the contrary the Magistrate ought to have realized that depriving people of their liberty in such an unceremonious manner is nothing short of unlawful imprisonment. As against this the Magistrate has shown that he has quite a scanty regard for the sacred character of human liberty. No provision of law exists anywhere by which a Magistrate can confine a person for the absence of another man. It is however for the Government to see how to put a check to the unbridled misuse of one's official powers, but for my part I would like to note down that the Courts of law should always maintain a dignified attitude of impartiality. They should not act in a manner smacking of undue pressure. Acting thus is sure to go a long way in undermining the confidence which every citizen is expected to have and should have in course of law.

(5) It has been argued on behalf of the non-applicant Jani that the Magistrate acted in the manner in which he did for no other reason but that of ensuring a speedy trial of the case. But anxiety to secure a speedy trial does not justify the use of methods in vogue in medieval times, when unbridled vagaries of human mind took the place of law. The law on the subject has been enunciated in the following words:

"The law has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might endanger suspicion and distrust of the tribunal and so to promote the feeling of confidence in administration of justice which is so essential to social order and security." (See Chitaley's Criminal P. C. page 2907).

Besides that what ground had the Magistrate to hold that the other accused whom he ordered to be confined in the judicial lock-up were responsible for the absence of the other accused? The mere fact that the other accused appeared before the Court on the subsequent day of their arrest and confinement of the accused persons would not make an illegal act legal and shall certainly create a strong and a reasonable apprehension in the mind of the accused persons that a fair and impartial trial or inquiry cannot be had before the Court in which the trial is pending.

(6) Under these circumstances, I have no otner alternative before me but to order that the two cases — Jani v. Aziz Dar & others and Jani v. Rasul Das & others — be transferred from the Court of the District Magistrate Anantnag to some other Court. I, therefore, order that the two criminal complaints (Jani v. Aziz Dar and others and Jani v. Rasul Dar & others) pending in the Court of the District Magistrate Anantnag be transferred to the Court of the Sub Judge Magistrate Anantnag (Addl. District Magistrate, Anantnag).

D.H. *Petitions allowed.*

(C. N. 2)

A. I. R. (39) 1952 JAMMU AND KASHMIR 2

JANKI NATH WAZIR C. J. AND JIA LAL KILAM J.

Janki Nath Kaul, Petitioner v. State.

Criminal Misc. Appln. No. 14 of 2008, D/- 20 Bhadoon 2008.

(a) (Jammu and Kashmir) Ordinance (VIII (8) of 2006) S. 11 — Power of High Courts under S. 561-A Criminal P. C. not taken away.

All that has been taken away from the High Court is the power of revision and nothing more, and the High Court has got powers to see if substantial justice is done in a case started under the provisions of the ordinance. A I R (33) 1946 P C 169 and A I R (30) 1943 Pat 18 Disting. (Para 3)

(b) Criminal P. C. (1898) S. 403 — Prosecution under Ordinance VIII(8) of 2006 — Discharge — Fresh prosecution — Sanction — (Jamu and Kashmir) Ordinance VIII(8) of 2006.

One J. was prosecuted along with some other accused persons in the Court of Magistrate Srinagar for offences under Ss. 3 and 4 of Ordinance No. VIII of 2006 and Sec. 409 R. P. C. The prosecution was launched on 30th Sawan 2007. The Magistrate accepted the request of the prosecuting Sub-Inspector to withdraw the case against J. and an order of discharge was passed in favour of J.

Held that if J. was to be proceeded against under the provisions of the Ordinance after his discharge, he could not be proceeded against in the same proceedings. A fresh prosecution was absolutely necessary. J having once been discharged, a fresh complaint and a fresh prosecution was necessary, but for such fresh prosecution, sanction from the Revenue Minister was necessary. A I R (23) 1936 Cal 356 Rel. on. (Paras 4, 5)

Anno. Cr. P. C. S. 403 N. 13.

(c) Criminal P. C. (1898) S. 561-A — Applicability to proceedings under Ordinance VIII (8) of 2006 — Ordinance (VIII (8) of 2006) S. 9.

Section 561-A Criminal P. C. is not contrary to any of the provisions of Ordinance No. VIII of 2006 and as such it can apply to the proceedings taken in Special Magistrate's Court when the facts of the case warrant its application. (Para 6)

Anno: Cr. P. C. S. 561 A. N. 1.

Janki Nath Bhat, for Petitioner — Assistant Advocate General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('46) A I R (33) 1946 P C 169: (47 Cri L J 933) (Pr 3)

('36) A I R (23) 1936 Cal 356: (37 Cri L J 758 F B) (Pr 4)

('43) A I R (30) 1943 Pat 18: (44 Cri L J 273 FB) (Pr 3)

JIA LAL KILAM J: This is an application by one Janki Nath Kaul minor under S. 561-A Criminal P. C. and arises out of the following facts:

(2) Janki Nath Koul was prosecuted along with some other accused in the Court of Pandit Lassa Kak Special Magistrate Srinagar for offences under Ss. 3 and 4 of Ordinance No. VIII of 2006 and .S. 409 R. P. C. The prosecution was launched on 30th Sawan 2007. On 8th Bhadon 2007 an application was made to the Special Magistrate by the Prosecuting A. S. P. (Mr. J. N. Zutshi) whereby he sought permission to withdraw the case against Janki Nath Kaul. The Magistrate by an order of the same day accepted the request of the prosecuting Sub-Inspector, and an order or discharge was passed in favour of Janki Nath Koul. The case proceeded on against the other accused and Janki Nath Koul, was examined as a witness for the prosecution. On 29th Bhadoon 2007 the learned Magistrate framed charges against two of the accused by name Niranjan Nath and Akbar Shah under S. 4 of Ordinance No. VIII of 2006 and discharged accused Nos. 4 to 7. In the meanwhile the Court of the Special Magistrate Srinagar was abolished and the case was transferred to the Court of the Sub-Divisional Magistrate Anantnag who was invested with powers to try the cases under the aforesaid ordinance. The prosecution moved the Special Magistrate Anantnag to take proceedings against Janki Nath also. The special Magistrate by his order dated 9th Magh 2007 ordered that Janki Nath be arraigned along with the

other accused to stand his trial in the case. It may be stated here that the case was withdrawn by the prosecuting A. S. P. after he had been allowed by the District Magistrate Kashmir to do so. The learned Sub-Divisional Magistrate held that the District Magistrate was not empowered to withdraw the case unless he was specially authorised by the Government to do so. Against this order Janki Nath went in revision to the District Magistrate Kashmir who by his order dated 20th Baisakh 2008 rejected the same. Janki Nath has now submitted this application to this Court under S. 561-A Criminal P. C. with the prayer that the order by which he has been impleaded as an accused, be set aside. It may be stated here that the Court of the Sub-divisional Magistrate held a de novo trial and framed charges against Janki Nath under Ss. 3 and 4 of the Ordinance No. VIII of 2006.

(3) A preliminary objection has been taken by the learned Assistant Advocate General against the maintainability of the present petition. He bases his argument on S. 11 of the aforesaid Ordinance which runs as follows:

"Notwithstanding the provisions of the Code of Criminal Procedure, 1989 or of any other law for the time being in force save as provided in this ordinance, no Court shall have authority to revise any order or sentence of a Special Magistrate or to transfer any case from any such Magistrate or make any order under S. 491 of the Criminal P. C. 1989."

His argument is that according to S. 11 no Court shall have authority to revise any order of a Special Magistrate. He further argues that an application under S. 561-A is in essence an application for revision and as such this Court cannot entertain the present application. In support of his argument he has drawn our attention to 'Kumar Singh v. Emperor', A I R (33) 1946 P C 169 and 'Banwari Gope v. Emperor', A I R (30) 1943 Patna 18. In A I R (33) 1946 P C 169 it has been held that

"No Court can claim inherent jurisdiction to exercise powers expressly taken away by legislation. Section 26 of the Special Criminal Courts Ordinance, 1942, expressly takes away all powers of Revision by the High Court and consequently the High Court does not possess inherent jurisdiction to interfere with the order of a Special Magistrate acting under that Ordinance."

Sec. 26 of the Special Criminal Courts Ordinance of 1943 is reproduced both in A I R (33) 1946 P C 169 and AIR (30) 1943 Pat 18. The rulings given in these two judgments are based upon S. 26, and so far as the law that has been enunciated in these two rulings on the basis of that section is concerned, we have absolutely no quarrel and we are rather in respectful agreement with the view taken therein. But when we compare S. 26 of the Special Criminal Courts Ordinance with S. 11 of Our Ordinance, we find that the law enunciated in these rulings cannot be deduced from S. 11 of our Ordinance. S. 26 of the Special Criminal Courts Ordinance runs as follows:

"Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatever authority made or done, there shall, save as provided in Ordinance, be no appeal from any order or sentence of a Court, constituted under this ordinance and, save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under S. 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court."

Now a perusal of S. 11 of our Ordinance and S. 26 of the Special Criminal Courts Ordinance would show that the concluding sentence of the latter ordinance which runs as follows: "or have any jurisdiction of any kind in respect of any proceedings of any such Court."

is not to be found in S. 11 of our Ordinance. The concluding sentence in S. 26 to which reference has just now been made, takes away the jurisdiction of any kind from all Courts including a High Court in respect of any proceedings taken by any Court as constituted under the Special Criminal Courts Ordinance. But as against this, as already pointed out, this sentence does not find its place in S. 11. This would mean therefore that all that has been taken away from this Court is the power of Revision and nothing more. It may be stated here that the power or Revision given to this Court is by Statute. Section 561-A Criminal P. C. makes only a declaration of those powers which are always inherent in this Court for making such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. There will be always circumstances in which the prescribed rules of procedure may be abused or may be so used as to give a mere formality to an Act without conforming to the spirit of law, and thus obstruct, instead of facilitating, the administration of justice. It is true that the powers under S. 561-A are not so wide as those given by S. 439. These powers have to be exercised very cautiously and not capriciously or arbitrarily, so that real and substantial justice is done. But even inherent powers can be taken away by the Statute. No Court can exercise inherent powers which have been specifically taken away by the statute. Now in S. 26 of the Special Criminal Courts Ordinance of 1943 jurisdiction of any kind with respect to proceedings before a Court under that Ordinance has been taken away from the High Court. But not so here. By our ordinance only the revisional powers of this Court have been taken away as would become evident by reference to S. 11 of our ordinance. S. 11 of our ordinance is more or less identical in language with S. 26 of the Special Criminal Courts Ordinance, with this difference that the concluding sentence of S. 26 does not find place in S. 11 of our ordinance. The question is as to why the legislature of this country has omitted this sentence? We must presume that whatever the legislature does is done with a purpose, and we have no reason to disagree with the learned counsel appearing on behalf of the applicant who argues that the legislature has purposely omitted this sentence from S. 11 of our Ordinance, and this has been done to reserve the inherent powers of the High Court to do justice in extraordinary circumstances. We, therefore, are of the opinion that the powers declared inherent by S. 561-A Criminal P. C. have not been taken away from this Court and that this Court has got powers to see if substantial justice is done in a case started under the provisions of our ordinance.

(4) It is argued on behalf of the applicant that the accused having been discharged, he could not be impleaded again as an accused in the same proceedings from which he has been discharged. He has drawn our attention to S. 494 of the Criminal P. C. in which it is laid down that after the Public Prosecutor with the consent of the Court has withdrawn from the prosecution of an accused, the accused shall be discharged in respect of such offence or offences. He concedes that an order of discharge would not bar a fresh complaint on the same facts. But he submits that the accused could not be proceeded against in the same proceedings along with the other accused in which he had once appeared as a witness. In support of his argument he has drawn our attention to 'Harihar Sinha

v. Emperor', A I R (23) 1936 Cal 356 which is a full Bench judgment consisting of five learned Judges. It has been held in this judgment that

"It is obvious that if the accused is again charged in the same proceedings with the same offence, the provision that 'he. shall be discharged in respect of such offence or offences" has no real effect. In my view the words in question mean 'shall be discharged from those proceedings and not put back into them 'He may be tried again in other proceedings on the same charge, but not in those proceedings."

In the head note of this judgment this ruling has been summarised in the following words:

"Where the case against an accused is withdrawn under S. 494(a) he is discharged from those proceedings and cannot be put back into them. He may be tried again in other proceedings on the same charge, but not in those proceedings."

We are in respectful agreement with this enunciation of law, and from this authoritative pronouncement it becomes obvious that if Janki Nath Koul was to be proceeded against under the provisions of the Ordinance after his discharge, he could not be proceeded against in the same proceedings. A fresh prosecution was absolutely necessary.

(5) There is yet another point in the case. It was on the 9th of Magh 2007 that the Special Magistrate ordered that proceedings against Janki Nath be started under the provisions of the said ordinance. We have already seen that Janki Nath could not be impleaded in the pending proceedings and fresh proceedings had to be started against him. But this the Sub-divisional Magistrate could not do, because the Ordinance (No. 8 of 2006) under which proceedings were started against Janki Nath, and the other accused was amended on 7th of Bhadoon 2007 and the relevant amendment was that no prosecution for contravention of the provisions of this Ordinance or any order made under this Ordinance shall be instituted without the previous sanction of the Revenue Minister. We do not find any sanction of the Revenue Minister on the file sanctioning the prosecution of Janki Nath. Janki Nath having once been discharged, a fresh complaint and a fresh prosecution was necessary, but for that no sanction was secured from the proper authority. The learned Assistant Advocate General requested us to give him time to see if sanction was obtained from the Revenue Minister, but he has told us now that no sanction was ever given by him.

(6) A faint attempt was made by the learned Assistant Advocate General at establishing that the Sub-divisional Magistrate was acting as a Special Magistrate and as such he was not subordinate to the High Court, as the Court of the Special Magistrate was constituted by a special Ordinance. But a reference to Sub-s. (3) of S. 9 of the said ordinance would show that except in matters not coming within the scope of Sub-Ss. (1) and (2) of S. 9 the provisions of the Criminal P. C. of 1898 so far as they are not inconsistant with this ordinance shall apply to the proceedings of a Special Magistrate. Sub-s. (1) and (2) of S. 9 provide that a Special Magistrate is not bound to adjourn a trial for any reason unless in his opinion it is necessary to make an order of adjournment, and it is further provided therein that when once an accused may be tried in his absence if he has once appeared before a Special Magistrate and if his absence has been brought about by the accused himself for the purpose of impeding the course of justice, and if the behaviour of the accused in Court has been such as in the opinion of the Special Magistrate is likely to impede the course of justice. Section 11, as already dealt with above, excludes the interference of other Courts in Revision. Barring these special rules of procedure it is obvious that the Criminal P. C. shall apply in its entirety to the proceedings which are taken in the Court of a Special Magistrate, provided they are not inconsistent with this Ordinance. In our opinion S. 561-A Criminal P. C. is not contrary to any of the provisions of this Ordinance (No. VIII of 2008) and as such it can apply to the proceedings taken in special Magistrate's Court when the facts of the case warrant its application.

(7) Under these circumstances we are of the opinion that the proceedings that have been started against Janki Nath Kaul are against law and should not continue. Exercising our powers under S. 561-A Criminal P. C. we order that the proceedings pending against him in the Court of the District Magistrate (Special Magistrate) Anantnag be quashed and his bail bond be cancelled.

D.H. *Order accordingly.*

(C. N. 3)

A. I. R. (39) 1952 JAMMU AND KASHMIR 4

JIA LAL KILAM, J.

Jagat Ram Aryan, Applicant v. State.

Criminal Misc. Appln. No. 32 of 2008, D/- 27-7-51.

(a) *Public Safety — (Jammu and Kashmir) Public Security Act S. 3 — Power of High Court — Criminal P. C. (1898), S. 491.*

Under S. 3 of the Public Security Act the sufficiency or insufficiency of material which might have satisfied the detaining authority effecting the detention of a person is a matter for the decision of that authority alone which passed the order of detention. The High Court has, however, power to examine the correctness of the recital about satisfaction of the detaining authority contained in any such order and if it comes to the conclusion that the recital is incorrect, it may declare the order to be invalid and the detention of the individual concerned to be illegal. (Para 3)

Anno: Cr. P. C. S. 491 N. 7.

(b) *Public Safety — Jammu and Kashmir Public Security Act, S. 3 — Detention under — Grounds for, need not be supplied to detenu — Preventive Detention Act (1950), S. 7 — Applicability.*

For purposes other than defence, foreign affairs and security of India, the Public Security Act is in force so far as the State of Jammu and Kashmir is concerned and detention can be ordered under its provisions.

Consequently, an order passed under S. 3 of the Public Security Act cannot be said to be invalid merely because the detenu is not supplied with the grounds of detention. The provisions of S. 7 Preventive Detention Act cannot apply to such a case and the provisions of Public Security do not provide for supplying such grounds to the detenu. (Para 4)

(c) *Public Safety — Jammu and Kashmir Public Security Act, S. 3 - Prior order of externment — Subsequent immediate order of detention — Validity — Criminal P. C. (1898) S. 491.*

A wavering mind can never be treated as "a mind satisfied" which is pre-requisite for passing an order under S. 3 of the Public Security Act.

Where on the oral report of a police an order for externment was passed against the detenue but the magistrate shortly after passed an order of detention against the detenu:

'Held' that the order of detention was not valid inasmuch as the prior order of externment showed that the magistrate was not satisfied as to the necessity of the action taken later on. (Para 7)

(d) *Public Safety — Jammu and Kashmir Public Security Act, S. 3 — Order of detention under, passed and signed by a sub-divisional Magistrate at a time when that sub-division had been converted into a district and when he had ceased to exist as*

sub-divisional Magistrate — Order is invalid — Criminal P. C. (1898) S. 491. *(Para 8, 10)*

M. S. Kak, H. N. Dar and Ram Nath Balgotra, for Applicant — Asst. Advocate General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) A I R (35) 1948 All 414: (49 Cri L Jour 726) (Pr 9)

('43) A I R (30) 1943 Cal 377: (208 Ind Cas 493 SB) (Pr 5)

('48) Cri Misc Appln No 92 of 2005 (J & K) (Pr 3)

ORDER: This is an application under S. 491 Criminal P. C. submitted by one Jaget Ram Aryan who is this time a detenu in the Central Jail Srinagar. In his application the detenu submits that he was suffering from some lung trouble and had gone for X-Ray examination to Jammu where he was advised by his Medical Adviser to go to some cooler place. In pursuance of this advice, the applicant proceeds, that he went to Ramnagar and stayed there with his son-in-law for some days, and then came back to Udhampur en route to Kishtwar on 29th Jeth 2008. In his application he further states that at Udhampur while he was waiting for a 'orry to carry him to Batote on 30th Jeth 2008, he was called to the office of the District Magistrate Udhampur where he was informed by him that he was holding meetings with Sangh people in Udhampur and thus making his presence there undesirable, and he was ordered to leave Udhampur district within 24 hours. According to the detenu he was served a written order and was made to sign it in token of his having taken notice of it. Thereupon he says that he left the District Magistrate's Court and was proceeding towards the lorry stand when he was again called back and another order, and this time, of detention was served on him. The applicant states further that he is politically-minded Harijan and has been taking part in politics for the last 16 years. As a member of the Assembly the detenu says that he was responsible for the successful passage of a number of useful pieces of legislation such as the Removal of Beggar rules, compensation to workmen etc. He also affirms that he is a firm believer in Hindu Muslim unity and during the last disturbances he was deputed by both Hindus and Muslims of Kishwar to carry their submissions to the Government of Kashmir regarding the posting of military in that area. In the end he says that he was accompanied by his daughter to Udhampur but after his arrest he was not even allowed to meet her, and he knows nothing about her whereabouts. This application is supported by an affidavit.

(2) As against this, the learned Assistant Advocate General produced before me an affidavit by Agha Nasir. Agha Nasir I hear is the District Magistrate in Udhampur, but he has not described himself as such in the affidavit. This affidavit I shall discuss in detail at its proper place. But meanwhile I would like to make reference to some ill-conceived allegations that have been made by the applicant in his application about the District Magistrate Udhampur, which to say the least about them, are simply wild and reckless. May be that the applicant is chafing under a supposed or real wrong done to him. May be that these allegations are the effusions of an afflicted heart, but no amount of affliction, even genuine, can justify the use of unseemly language. Hard words break no bones, but they certainly leave behind a very bitter taste in the mouth. Recklessness in expression, use of wild language is to my mind quite unworthy of a person who claims to be a politician. One would expect a right sort of behaviour on behalf of politically minded people. Sobriety in expression, coolness in thought and strict regard for truth must be the guiding factors in the life of politicians particularly in these days of democracy when we find politicians charged with very great responsibilities. I have no hesitation in placing on record that the allegations made against the person of the District Magistrate are not at all true.

(3) But much though I deprecate the attempt of the detenu at dragging the person of the Udhampur District Magistrate into the present controversy yet I am of the opinion that this application is going to succeed. In arriving at the conclusions I have solely drawn upon the detention order and the affidavit of the detaining authority, I have relied only on those statements of the detenu which have either been supported by Agha Nasir's affidavit or not contradicted by it specifically. Now in the order of detention it is given that the detaining authority was satisfied through police and other sources that there were reasonable grounds to believe that the applicant had acted and was likely to act in a manner prejudicial to public safety and peace. It is a well settled principle of law that under S 3 of the Public Security Act the sufficiency or insufficiency of material which might have satisfied the detaining authority effecting the detention of a person is a matter for the decision of that authority alone which passed the detention. In fact this is the view that has been expressed by me as early as 2005 in a similar case 'Devi Saran v. State', Criminal Misc. Appln. No. 92 of 2005. To this view I adhere even at the present moment and I make no apology in quoting here in extenso a passage from the said judgment:

> "The material which is produced before such authority may not be sufficient for a Court of law for determining whether it was necessary to keep the detenue in detention. But the Court cannot substitute its own judgment for the judgment of the authority ordering detention, nor can the Court go into the question whether the grounds which satisfied the detaining authority were reasonable or sufficient. It is not a matter which can be scrutinized or inquired into by a Court of law. If the authority detaining a person affirms that it was satisfied that the person was acting in a manner prejudicial to public safety or peace and the order was drawn in strict confirmity with the terms of law, the Court cannot question the fact of his satisfaction. The best judge to decide what is reasonable satisfaction is the person who effects the arrest. But when all this is said this Court has yet power to see as to whether the person who effects the arrest was a matter of fact satisfied or not. If it can be established that the person was not as a matter of fact satisfied, that there were reasonable grounds for believing that any person was acting in a manner prejudicial to the public safety or peace then this Court has jurisdiction to interfere."

From the above enunciation of law it becomes clear that the High Court has power to examine the correctness of the recital about satisfaction of the detaining authority contained in any such order and if it comes to the conclusion that the recital is incorrect, it may declare the order to be invalid and the detention of the individual concerned to be illegal. Such being the state of law, we shall have to see now as to whether the recital about satisfaction in the said order is correct and secondly if the order has been passed according to law.

(4) Before proceeding further, I might examine one main argument which has been advanced by the learned counsel on behalf of the detenu. Much stress has been laid upon the fact that no grounds of detention have been revealed to the detenu at the time of his arrest which according to the learned counsel makes the detention illegal. In

support of this argument reference has been made to the Preventive Detention Act of 1950 assented to by the President of the Indian Union on 25-2-1950. It is argued that this Preventive Detention Act of 1950 supplants the Security Act now in force here in the State. But the learned counsel appearing on behalf of the detenu has missed the relevant passage in the Preventive Detention Act of 1950, which would show that the Preventive Detention Act of 1950 shall not apply to the State of Jammu & Kashmir except to the extent to which the provisions of this Act relate to preventive detention for reasons connected with defence, foreign affairs and security of India. To meet this argument it was vehemently pressed by the learned counsel that acting against public safety and peace itself comes within the purview of acting against the defence and security of India as occurs in Section 1 of the Preventive Detention Act of 1950. It is further argued that under Section 7 of this Act grounds for the order of detention must be disclosed to the person affected by the order of detention. It is true that if the detention of a person is brought about under the provisions of the Preventive Detention Act of 1950 for any reasons connected with the foreign affairs, defence or security of India even by the Kashmir Government, the grounds of the order should be disclosed to the person detained and if such grounds are not disclosed to him at the time of his detention or soon after, such detention would be invalid. But the learned counsel appearing on behalf of the detenu has clean forgotten that the detention of the person (Jagat Ram Aryan) has not been brought about for any reasons which are connected with defence, foreign affairs or security of India. The detention order against him has been passed for his acting in a manner prejudicial to public safety and peace and not for any reasons which are connected with defence, foreign affairs or the security of India. As such the Preventive Detention Act of 1950 cannot have any bearing with the facts of the present case. It is, therefore, obvious that the applicability of Section 7 of this Act, so far as the disclosure of the grounds of detention is concerned, does not apply. According to the Security Act as is in force in the State, no grounds of detention need be disclosed to the detenu. It is argued on behalf of the detenu that such an interpretation would lead to very anomalous results. The learned counsel's argument in this behalf is that acting prejudicially to the defence, foreign affairs or security of India is more reprehensible act than acting against public safety and peace in a state or in a corner of a State. It is pointed out that for an act which is of a major serious character, grounds of detention have to be disclosed to the detenu, but for a minor dereliction he can be kept in detention for an unlimited period of time without any judicial scrutiny. To all this the learned counsel adds that under Section 9 of the Preventive Detention Act of 1950 (Union Act) any person detained under its provisions can get his case scrutinized by an Advisory Board constituted of members qualified to be appointed as Judges of the High Court. But such a provision does not exist in the Statute as obtains in our State. All this may look or may even be anomalous in character, but it cannot be lost sight of that the Courts of law have to administer the law as it is. If there are any anomalies or anachronisms in law, it is for the public opinion to assert itself and make the legislature of the country to bring about amendments in law. But as long as law is not changed, the Courts of law have to administer the law at it is. I definitely hold that for purposes other than defence, foreign affairs and security of India, the Public Security Act is in force so far as the State of Jammu and Kashmir is concerned and detention can be ordered under its provisions.

(5) But all this casts a greater duty on this Court to exercise its powers of scrutiny according to law with very great vigilance. It is true that abnormal circumstances can only be met by abnormal legislation. "In time of emergency" it has been pointed out by Calcutta High Court (in a case reported as 'Shilenath v. A. E. Porter', AIR (30) 1943 Cal 377) that

> "the executive have to be given extraordinary powers which may have the effect of keeping out to some extent judicial scrutiny of acts done by the executive."

But I am in respectful agreement with their Lordship's in their view that when through some unexpected crevice in these barriers against judicial scrutiny, a voice against an illegal act does reach the High Courts it becomes their duty to be vigilant and to see that the liberty of none of the State subjects is touched except in strict compliance with law and neither the clouds of war nor the dust of political upheaval must be allowed to obscure the vision of the High Courts or blur that strict scrutiny which the High Courts must always bring to bear upon any action which savours of oppression or injustice. It can be denied by no sane person that acting like this is the duty for this Court.

(6) Now let us go to the merits of the case. As has already been pointed out, the detaining authority in his order states that he was satisfied through police reports and other sources about the sections of the detenu which were prejudicial to public safety and peace. In Para. No. 6 of his affidavit, the detaining authority writes that the reports about the prejudicial activities of the detenu were oral. Reading the affidavit along with the order, the meaning of the detaining authority becomes obvious: that the police came to him and told him by words of mouth that the detenu was acting prejudicially to public safety or peace. The detention order if read without the help of the affidavit, would lead one to the inference that the reports which were sumbitted to him by the police were in writing. But as no written reports were made to him by the police, the detaining authority came forward with the statement that the reports were made orally. Since no written reports were made to the detaining authority, it would simply show that there was no record with the police existing against the detenu, I presume that the police send their diaries regularly about the undesirable activities of the people to the Magisterial head of the District. Since the detaining authority says that the reports submitted to him by the police were oral, it further shows that the detenu was not even mentioned in the diaries. This by itself would show that the detention of the man was brought about not as a result of mental satisfaction of the detaining authority about the prejudicial activities of the detenu. This, at any rate, makes it at least questionable as to whether the detaining authority was a matter of fact convinced of the necessity of the action taken by him.

(7) But the matter does not stop here. In para. No. 4 of his application the detenu has stated that the first order which was passed against him was that he should leave the limits of Udhampur district within 24 hours. It may be stated here that the detenu does not belong to Udhampur district but belongs to Kishtwar which is in Doda district. He further states in his application that even the Sub-Inspector of Police, Udhampur while coming out of the Court of the District Magistrate publicly declared before Jagan Nath Vakil and others that an externment order was passed against the detenu. This allegation of the detenu has not been denied by the detaining authority in his affidavit which is fairly detailed document. Therefore for the purpose of this case I must treat this allega-

tion as correct. If there was no substance in this allegation of the detenu, there was nothing to prevent the detaining authority from challenging it in his affidavit because the allegation is such as has a very important bearing upon the decision of this case. It now becomes clear that at the time the detaining authority made the externment order, he did not find it necessary to pass a detention order. This shows that in the first instance when the externment order was made, the detaining authority was not satisfied about the necessity of the action taken later on. Rather it goes to show that the mind of the detaining authority was wavering till then. A wavering mind can never be treated as "a mind satisfied" which is pre-requisite for passing an order under Section 3 of the Public Security Act. As such I am definitely of the opinion that the order of detention cannot be brought strictly within the purview of Section 3 of the Public Security Act.

(8) There is yet one more point which is indeed very important in the whole case and would show the slipshod manner in which action is taken by responsible officers when even the liberty of a citizen is being dealt with. The order of detention passed by the detaining authority has been signed by him as Sub-Divisional Magistrate. Now it may be stated here that Udhampur had ceased to be a subdivision from 5th Jeth or at the most from 25th Jeth 2008 and had become a full-fledged district. The Wazir Wazarat, thenceforth came to be called as Deputy Commissioner with enhanced powers. All Deputy Commissioners were appointed ex-officio as District Magistrate in each district. This order of the Government has been published in the Government Gazette of 25th Jeth 2008. The order of detention has been made on 12th June 1951 corresponding to 30th Jeth 2008. From this it becomes clear that there existed no sub-divisions on that day and no Sub-Divisional Magistrates, and if an order is made by a person in exercise of powers of an officer who does not exist, and whose territorial jurisdiction also does not exist, such an order cannot stand even for a minute.

(9) In 'Ganesh Prasad v. Makhna', AIR (35) 1948 All 414 it has been held that

"whenever powers of this kind or indeed other special statutory powers are conferred they must be exercised by the authority in the manner specified in the Statutes in strict conformity with the provisions thereof and the Court can see whether this is done."

(10) Now in this case we find that the Sub-Divisional Magistrates having ceased to exist, and their territorial jurisdiction also having ceased to exist, no order could be passed by a person who was once a Sub-Divisional Magistrate but had ceased to exist as such. Under these circumstances I hold that the order passed by Agha Nasir in his capacity as Sub-Divisional Magistrate is an order passed by an unauthorised person and as such it cannot be sustained. Taking all this into consideration, I hold that the detention of Jagat Ram Aryan of Kishtwar is improper and that he be released from custody forthwith.

K.S. *Detenu released.*

(C. N. 4)

A. I. R. (39) 1952 JAMMU AND KASHMIR 7

(*BOARD OF JUDICIAL ADVISERS.*)

NIAMAT ULLAH, PRESIDENT, SHIAM KRISHNA DAR AND IQBAL AHMAD, MEMBERS.

Degambar Sain v. Pt. Lachhman Dass, Opposite party.

Reference No. 1 of 1951, D/- 18-6-51.

Debt-Laws — Jammu and Kashmir Distressed Debtors' Relief Act (16 (XVI) of 2006), S. 29 (1) and (4) — As amended by Act (24 (XXIV) of 2007) — Scope — Suit not relating to debt as defined by Act can be transferred to Conciliation Board — 'Distressed debtor', meaning of — Word 'amount' in S. 29 (4) if can be construed ejusdem generis with debt — (Interpretation of Statutes.)

A suit not relating to debt as contemplated by the Distressed Debtors' Relief Act as amended by Act XXIV of 2007 can be transferred to the Board of Conciliation under S. 29 of the Act. (*Paras 8, 19*)

In substituting the word 'amount' for the word 'debt' in S. 29 (4) of the Act by the Amendment Act (XXIV of 2007) the legislature had some object in view and the object could only be to make S. 29, applicable not only to cases of debts but also to others. One of the recognised canons of construction of a Statute is to interpret it so as to avoid imputing an absurdity to the legislature. To accept the contention that the scope of S. 29, is precisely the same with a new word "amount", as it was before when the word "debt" occurred therein, will clearly amount to imputing to the legislature a futile act which served no legislative purpose. (*Para 11*)

The term 'Distressed debtor' as defined in S. 2 must be taken in relation to each debt due from him and not qua all debts due from him. The term is a relative term and a person is impressed with the character of 'distressed debtor' in relation to one or more of the debts due from him but not as regards others which do not fall within the definition. (*Paras 14 and 19*)

The amendment made by Act XXIV of 2007 has recast the whole of Section 29 and Sub-s. (4), as now stands is radically different to the original Sub-s. (4) under S. 29 as amended. (*Para 15*)

The word 'amount' in Section 29 cannot be contrued 'ejusdem generis' with the word 'debt' as the word 'amount' does not follow the word 'debt.' Unless there is a genus or category there is no room for the application of the 'ejusdem generis' doctrine. (*Para 17*)

Anno: Civil P.C., Preamble N. 7.

(b) *Debt Laws— Jammu and Kashmir Distressed Debtor's Relief Act (16 (XVI) of 2006), Ss. 18 and 29 — Order of civil Court transferring or refusing to transfer case to Conciliation Board — When open to revision — Test.*

Under Section 18 of the Act, any order, right or wrong, which the Court is empowered to pass under the Act, cannot be challenged in revision. If, however, the Order which the Court has passed, is in excess of the jurisdiction conferred upon it by the Act, it cannot be one passed under the Act. Such order can be challenged in revision. The test in each case will be whether in passing an order the Court acted within its jurisdiction and this will depend upon the circumstances of each case.

Hence an order of civil Court that a case should or should not be transferred to the conciliation Board under Section 29, even if erroneous, will not be open to revision if the Court had jurisdiction to decide the question. (*Pr 20*)

Jaswant Singh, Assisant Advocate-General, for the State. L. N. Sharma and H. N. Dar, for Opposite Party.

Case referred to:

('50) Civil Revn. No. 62 of 2007 FB (J & K) (Pr 1)

NIAMAT ULLAH (President): This is a reference under Section 71 (1) of the Jammu & Kashmir Constitution Act, 1996, by Shree Yuvaraj Bahadur in the exercise of the powers conferred on him by the Proclamation of His Highness the Maharaja Bahadur published in the Gazette Extraordinary dated the 7th Har, 2006. The Board are required to tender their "advice" on the first two out of several questions decided by a Full Bench of the High Court in Civil Revision No. 62 of 2007: 'Dewan Degambar Sain v. Pt. Lachhman Dass.'

(2) The precise questions, on which the Board are called upon to advise, will be quoted at a more appropriate place later on.

(3) To make opinion of the Board on this reference self-contained it is necessary to state concisely the circumstances which have led to it.

(4) Under the Jammu and Kashmir Constitution Act, 1996, His Highness the Maharaja Bahadur has plenary power of legislation. Under Section 5 of that Act all powers, legislative, executive and judicial, in relation to the State and its Government are declared to be vested in His Highness. These powers have now devolved on Shree Yuvaraj Bahadur under the Proclamation above referred to. It is clear that the legislative machinery in the State is simple and legislation can be expeditiously made on the advice of those on whom the responsibility of day to day administration rests.

(5) In order to relieve indebtedness of the State subjects, particularly agricultural communities, Act No. XVI of 2006, styled "The Jammu & Kashmir Distressed Debtors' Relief Act" was passed and regional Conciliation Boards were constituted. The scheme of the Act is to have all 'debts" liquidated through tribunals, designated in the Act as Conciliation Boards, within a short period. Section 4 requires every debtor and creditor to apply to the Conciliation Board for settlement of the debt in which he may be interested. Obviously it is to the interest of the debtor to move the Board but the creditor is also required to approach it on pain of his debt being extinguished in default of his making an application within three months from the date a Conciliation Board is established for the area in which the debtor resides or holds any land. It is not, however, every debt which can be liquidated through the Board. The word "debt" has been given a technical meaning. It signifies pecuniary liabilities of a debtor in cash or kind, except no less than seven categories of his pecuniary obligations. The Act, as it originally stood, excepted, 'inter alia', "debts incurred by a trader for purposes of trade." Other exceptions need not be mentioned for the purposes of this reference. The jurisdiction of the Conciliation Board is limited to debts amounting to Rs. 5,000/- or less.

(6) In the first instance the Conciliation Board is to endeavour to bring about amicable settlement between the debtor and the creditor, failing which the Board is to make its own award considering all the circumstances including the past history of the loan and the equities of the particular case. The order of the Conciliation Board is executable as a decree of the civil Court. In conducting its own proceedings the Conciliation Board has power to decide all relevant questions arising before it. An appeal lies to a Special Judge to be appointed by the State for hearing such cases and subject to the result of the appeal the Conciliation Board's order is declared to be final and no revision or a regular suit impugning its order is maintainable. Section 29 of the Act, which is the centre of controversy, originally ran as follows:

"29. Transfer of pending suits, applications and proceedings to the Board: (1) All suits, applications for execution and proceedings for the recovery of any debt against a person pending at any time in any civil or revenue Court shall if the total amount of debts due from him on the relevant date does not exceed five thousand rupees or such larger sum as the Government may prescribe for any particular area, be transferred to the Board to which an application for settlement of the debts of such person under Section 4 lies.

'Explanation': In this Sub-section the "relevant date" means the date of establishment of the Board competent to hear the applications under Section 4.

(2) When an application for adjustment of debts made to a Board under Section 4 includes a debt in respect of which a suit, application for execution or proceedings is pending before a civil or revenue Court, the Board shall give notice thereof to such Court in the manner prescribed. On the receipt of such notice, the Court shall transfer the suit, application or proceedings as the case may be, to the Board.

(3) When any such application or proceeding is transferred to the Board under Sub-section (1) or Sub-section (2) the Board shall proceed as if an application under Section 4 has been made to it.

(4) If the Board to which any suit, application or proceeding is transferred under Sub-section (2) were to find that the total amount of debt exceeds Rs. 5,000/- or such larger sum as the Government may have prescribed for that particular area, it shall transfer the suit, application or proceedings to the Court from which it had been transferred to the Board, after the disposal and subject to the result of the appeal where an appeal is filed, and after the expiry of the period prescribed in Section 17 for an appeal where no appeal is filed."

The framer of the Act, apparently, intended that Sections 4 and 29 treated as complementary provisions would enable the Conciliation Board to be seized of all cases of indebtedness and it would be able to liquidate all debts within its territorial jurisdiction in a comparatively short period. Section 18, which bars revision occurs in such a setting as to give the impression that it bars the jurisdiction of "civil Courts", (including the High Court) to entertain suits or revisions from the orders of the Board but by its terms it is comprehensive enough to bar an appeal or revision against the order of a civil Court under Section 29 already quoted. Section 18 may usefully be quoted in this connection:

"18. 'Bar of civil Court of jurisdiction'. Save as otherwise provided in this Act, no civil Court shall entertain:

(a) any suits, or application for revision—
  (i) to question the validity of any procedure or the legality of any order or agreement made under this Act or
  (ii) to recover any debt recorded as wholly or partly payable under an agreement made in accordance with Section 13 from any person who, be a debtor, was party to such agreement, or
  (iii) to recover any debt which has been deemed to have been duly discharged under the provisions of this Act.
(b) any suit for declaration, or any suit or application for injunction, affecting any proceedings under this Act before a Board."

(7) The working of the Act revealed certain imperfections in its provisions and several amendments had to be made to achieve its object. It is not relevant to refer to all those amendments in detail except the one which was, apparently, necessitated by the suit brought by Dewan Degamber Sain against Pt. Lachhman Dass in the Court of the City Judge, Jammu for recovery of Rs. 4,999/2-3. The suit was instituted on 17th Jeth, 2006. A question arose, apparently, at the instance of the debtor, as to whether the suit should be transferred to the Conciliation Board under Section 29. It was contended by the creditor that the debt to which the suit related was one incurred by a trader for the purpose of trade and was not, therefore, a debt as defined, with the result that the Conciliation Board had not jurisdiction to deal with it. It should be noted that Section 29, as it then stood, required the civil Court to transfer a suit relating to a "debt." The City Judge held that

the loan had not been taken by a trader for the purposes of trade and that accordingly the suit was transferred to the Board of Conciliation having jurisdiction. From that decision an application for revision was made to the High Court and Wazir, C. J., heard it on 4th Phagan, 2007. In the meantime by the amending Act XXIV of 2007, important amendments were made to the definition of "debt" and Section 29 (1). In the latter Sub-section the word "debt" was deleted and the word "amount" was substituted therefor.

(8) On the face of it the object of the amendment was to make Section 29 applicable not only to suits and other proceedings for recovery of what is a debt as defined but also for enforcement of all pecuniary liabilities not exceeding Rs. 5,000/-. The word "amount" is undoubtedly more comprehensive than the technical term "debt." Wazir, C. J., was referred to this amendment made during the pendency of the revision and in view of the importance of the question arising therefrom he formulated four questions and referred them for decision by a Full Bench. The first two of those questions, which are the subject of the present reference, are as follows:

> "(1) Can a suit not relating to debt as contemplated by the Distressed Debtors' Relief Act be transferred to the Board (of Conciliation)?
>
> (2) Does a revision lie against an order deciding that the case should or should not be transferred to the Board (of Conciliation)?."

(9) The first question, in the context in which the Full Bench framed it, directly arose from the amendment of Section 29 which had replaced the word "amount" for the word "debt." It seems to have been contended before the High Court that the view of the City Judge that the debt had not been incurred by a trader and was not, therefore, within one of the exceptions contained in the definition of "debt", was wrong. To repel this contention it was argued on the opposite side that even if the view of the City Judge was wrong it was nevertheless an "amount" as substituted by the amendment. The amendment was made retrospective in terms which make it applicable to pending cases. It provides that "it shall be deemed to have come into force from the date the Jammu & Kashmir Distressed Debtors' Relief Act (XVI of 2006) came into force."

(10) The trend of the argument before the Full Bench of the High Court seems to have made a grievance of the fact that the amendment was made for the purposes of the particular case then pending and that there was some impropriety in the action of the legislature. Courts have to administer the law as they find it and are not concerned with the wisdom or propriety of an enactment. This Board may, however, note that no interest of the State was involved in the matter and the only reason which appears to have led to the amendment was a desire to give effect to the policy underlying the Act and to shut out a loop-hole which was forcibly illustrated by the case pending in the High Court. The entire frame-work of the Act reveals an anxiety on the part of the State to liquidate all debts within a reasonable time and if there are lacunae in the Act which admit of revisions to the High Court being interposed between the order of the civil Court under Section 29, transferring the case to the Conciliation Board, and the actual decision by the latter, such lacunae should be filed in. Where the legislative machinery is simple and admits of expeditious amendment which is calculated to further the policy of an Act, the legislature will act quite properly in making the amendment. Amendment pending litigation is not unknown in the Union of India where public policy required it. The Board, therefore, are of opinion that the questions arising in the case should not be approached with any prejudice arising from the speedyy amendment of the Act.

(11) Arguments were addressed to the Board on the construction of the word "amount" occurring in Section 29 as amended. It is contended that having regard to the other provisions of the Act it should be taken to mean "debt" as defined. If this view is correct, the legislature had done something futile and meaningless in substituting the word "amount" for the word "debt." We must take it that the legislature had some object in view in making the amendment. The object could only be to make Section 29 applicable not only to cases of debts but also to others. It will be absurd to assume that the legislature intended that Section 29 should apply only to a "debt" as defined, though that word was deliberately deleted and more comprehensive word "amount" was substituted therefor. One of the recognised canons of construction of a Statute is to interpret it so as to avoid imputing an absurdity to the legislature. To accept the contention that the scope of S. 29 is precisely the same with a new word "amount", as it was before when the word "debt" occurred therein, will clearly amount to imputing to the legislature a futile act which served no legislative purpose.

(12) The majority of the Judges composing the Full Bench held, as a result of their examination of the Act, that the amendment has made no difference in the scope of Section 29 and that the word "amount" should be limited in its significance to the word "debt" as defined in the Act. They were led to this conclusion because they thought certain inconsistencies will result from giving an extended meaning to the word "amount." They have observed that "the provisions of Section 29 have to be harmonised and not to be allowed to become inconsistent with other parts of the Act." They have referred to a number of decided cases in support of that view. As a rule of construction the proposition is unexceptionable. But it is equally imperative that the intention of the legislature clearly and unmistakably declared should not be disregarded. Any apparent inconsistency or anomaly should be avoided by so interpreting the other provisions of the Act as to make them consistent with such intention.

(13) The most serious difficulty which is said to arise from giving its natural meaning to the word "amount" in Section 29 arises from the definition of the word "Distressed Debtor" which is defined as

> "a person who owes a debt on his own behalf or as a surety for some one else and whose total assets do not exceed Rs. 5,000/-."

It is argued that where a person owes several debts one or some of which do not amount to a debt or debts as defined, Section 29 (4) will be in conflict with sub-section (1) thereof. It is contended with reference to the definition of "Distressed Debtor" that if any one of his debts to which he is subject is a debt as defined, he is impressed with the character of distressed debtor and if all the cases against him as regards all those debts, be transferred to the Board it will not be in a position to re-transfer such cases as, in its view, do not relate to "debts" as defined. To understand the full implication of this argument it is necessary to examine sub-section (4) which runs as follows:

> "(4) If the Board to which any suit or proceeding is transferred under Sub-section (1) or Sub-section (2) finds:
>
> (i) that such suit or proceeding is not in respect of a distressed debtor as defined in Section 2, or
>
> (ii) that the total amount of debts owed by such debtor exceeds Rs. 5,000/- or such larger sum as the Government may have prescribed for

the area in which such debtor resides or holds land,

it shall re-transfer the suit or proceeding to the Court from which it has been transferred to the Board.

'Explanation': The word "proceeding" in this section includes an appeal, an application for revision and an application for execution."

(14) It is true that the word "debt" occurs in the definition of "Distressed Debtor" and the Conciliation Board has to retain on its file only such cases as involve "debts" as defined. The anomaly suggested is that unless Section 29 is limited to cases of debts and not extended to amounts in the larger sense the Conciliation Board cannot treat the "Distressed Debtor" as such for some cases and not as regards others. It is said that the definition of "Distressed Debtor" is "absolute", that is to say, once it is shown that he owes a debt as defined he should be taken to be a distressed debtor qua all debts due from him even though some of them fall within the exceptions contained in the definition of the word "debt." The whole difficulty is obviated if the term "'Distressed Debtor" is taken in relation to each debt due from him. He is a distressed debtor qua one debt and not so qua another. The Board are of opinion that no violence is done to the language employed in the definition of the "Distressed Debtor" if that term is construed in the manner indicated. In any case the violence which would be done to the meaning of the word "amount" by limiting it to "debt" as defined, is immeasureably greater than any supposed or real difficulty arising from the definition of the term "Distressed Debtor."

(15) The result of the interpretation of the term "distressed debtor", which the Board accept, will be that on the one hand all suits and other proceedings pending in a civil Court in which an "amount" of money is claimed must be transferred to the Conciliation Board without any further question as regards the nature of the liability involved. When the matter is considered by the Conciliation Board it will scrutinize the nature of debts and decide which of them are "debts" as defined and will retain on its file only such cases as relate to such debts. Any suit or proceeding involving an "amount" which is not a debt as defined, will be retransferred to the civil Court. The Conciliation Board has been made the sole authority for determining the nature of the debt. It's decision cannot be challenged by suit or revision and this ensures speedy disposal of the cases before it, whereas if the civil Court is to determine the nature of the liability a revision may, in certain cases, lie to the High Court which is calculated to arrest the further progress of the liquidation proceedings before the Conciliation Board. It has been argued that this view will render the civil Court as a mere post office. The Board are not impressed by this argument. In the first place cases are conceivable in which the civil Court may have to apply its mind to the question whether it should transfer the case to the Board. In the second place since suits and proceedings cannot be instituted except in the civil Court its initial jurisdiction has to be invoked and it is no serious objection that it has to act as a post office in receiving the plaint and other applications and forwarding the same to the Conciliation Board.

(16) The amendment made by Act XXIV of 2007 has recast the whole Section 29 and Sub-section (4) as now stands is radically different to the original Sub-section (4). It seems clear enough that the legislature intended that the term "Distressed Debtor", as defined in Section 2, should be taken in the sense explained above. The Board think that it is a relative term and a person is impressed with the character of "distressed debtor" in relation to one or more of the debts due from him but not as regards others which do not fall within the definition.

(17) Another argument, which found favour with the majority of the Full Bench, is that the word "amount" should be taken 'ejusdem generis' with the word "debt." The rule of ejusdem generis is that "the general word which follows particulars and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended. Unless there is a genus or category there is no room for the application of the ejusdem generis doctrine." (See Maxwell page 337, 9th Edition.) In Section 29 the word "amount" does not follow the word "debt" and there is no room for the application of that doctrine. What is argued is that the word "debt" occurring in Section 2 (the defining section.), preceds the word "amount" in Section 29. The two expressions are separated by no less than 26 sections. Neither in context nor sequence is there any relation between the two words. The case is not one of genus or category immediately followed by a more general expression. Moreover, the history of the amendment should not be over-looked and it shows that the word "amount" was deliberately intended to be taken in a wider sense.

(18) The Board have dealt with the question of construction at great length in deference to the view expressed by the majority of the Full Bench; otherwise, the question presented no difficulty to their own mind. As stated before the circumstances in which and the purpose for which the amendment was made leave no doubt in their mind that the word "amount" was substituted for the word "debt" in Section 29 to meet the difficulty in all such cases as were similar to the case which led to the decision of the Full Bench.

(19) The Board have no hesitation to answer the first question in the affirmative.

(20) The second question is whether a revision lies against an order transferring or refusing to transfer a case to the Conciliation Board. In the view taken by the Board of the scope of Section 29, it will seldom give rise to an occasion for revision. Normally the civil Court will transfer all suits and applications for execution without approaching the merits thereof and it is the Conciliation Board which will subject the debts to scrutiny. It is not, however, beyond the pale of possibility that the civil Court may pass some judicial order. On that assumption the maintainability or otherwise of a revision to the High Court is to be determined by the terms of Section 18 which provides that no civil Court (including the High Court) shall entertain an application for revision "to question the validity of any procedure or the legality of any order or agreement made under this Act." Any order, right or wrong, which the Court is empowered to pass under the Act, cannot be challenged in revision. If, however, the order which the Court has passed is in excess of the jurisdiction conferred upon it by the Act, it cannot be one passed under the Act. Such order can be challenged in revision. The test in each case will be whether in passing an order the Court acted within its jurisdiction and this will depend upon the circumstances of each case. The Board's answer to the second question, therefore, is that if the decision of the Court "that the case should or should not be transferred to the Board was given where it had no jurisdiction to decide such question, a revision will lie. But if it had such jurisdiction no revision will

lie, even if such a decision be incorrect. The second question, as framed, is in the nature of an abstract question and the Board's reply is necessarily of the same nature. As already stated, the circumstances of each case will have to be considered to determine whether a revision lies. The Board answer the second question as above.

(21) Let the reference be returned with the opinion of the Board herein before recorded.

K.S. *Answer accordingly.*

[C. N. 5.]

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(*BOARD OF JUDICIAL ADVISERS*)

NIAMAT ULLAH, PRESIDENT, SHIAM KRISHNA DAR AND SIR IQBAL AHMAD, MEMBERS,

Ahad Lone, Appellant v. Mt. Azizi, Respondent.

Appeal No. 14 of 1950, D/- 1-8-1950.

Muhammadan Law — Succession — Custom.

A custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. Where a Muhammadan dies leaving his mother and a brother, their shares according to Muhammadan Law, are; mother 1/6th and brother the remaining 5/6th both taking in absolute right. The Muhammadan Law, however, stands superseded by a custom under which the mother instead of taking 1/6th in absolute right takes the whole for life and the brother, instead of taking only 5/6th immediately, takes the whole after the termination of the interest of the mother. The life interest becomes vested in the mother and the remainder becomes immediately vested in the brother. The daughters of the brother do not succeed collaterally but they succeeded to the vested interest which their father possessed and though the latter died in the life-time of the mother his interest does not cease but devolves upon his daughters who became entitled to the share after the termination of the limited interest of the mother. The transferee from the mother having taken transfers of property in which his transfer had only a limited interest cannot be entitled to any payment by the daughters as a condition precedent to a declaration being granted to them. 29 Cal 828, P C Rel. on. (Para 4)

Hirday Nath Dar, for Appellant; Janki Nath Bhan; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('02) 29 Cal 828: (29 Ind App 178 P C) (Pr 4)

('09) 3 Ind Cas 207 (Cal) (Pr 4)

('36) 38 PLR J & K 86 (Pr 3)

NIAMAT ULLAH, PRESIDENT: The following pedigree will explain the position of the parties to this litigation:

JAMAL DAR (died in S. 1975)

1st Wife	2nd Wife
Ahad Dar (died in 2000)	Mst. Frechi (Deft. 1)
	Wali Dar (Issueless-died in 1977).

Mt. Azizi (Pltf. 1) | Mt. Ashmi (Pltf. 2) | Mt. Khatuni (Dft. 3).

(2) After the death of Jamal Dar in 1975, the property in dispute, which belonged to him, was mutated in the names of his two sons, Ahad Dar and Wali Dar. On the death of Wali Dar in 1977, his mother Mt. Frechi applied for mutation of names claiming the entire share of her son. Ahad Dar contested her application but on the statement of Mt. Frechi, in which she claimed a limited interest terminable on her death or re-marriage, he appears to have acquiesced in the mutation of names being effected in her favour. By an agreement, dated 10th Har, 1992, Ahad Dar agreed to give a portion of the produce of the land to Mt. Khatji in consideration of the latter leaving him in possession of her share. It is not disputed that Ahad Dar obtained possession under the agreement or possibly was already in possession, and that after his death, which occurred in 2000, the share in dispute as well as his own came into the possession of his daughters, namely, the two plaintiffs and the third defendant.

(3) On 13th Maghar, 1999, Mt. Frechi executed a deed of mortgage which was followed by a sale-deed, dated 16th Magh, 1999, in respect of her share in favour of the defendant-appellant, Ahad Lone. The suit ,which has given rise to this appeal, was then brought by the plaintiffs for a declaration that the aforesaid mortgage-deed and the sale-deed are invalid and ineffective as against her interest in the property conveyed thereby, in as-much as, Mt. Khatji had only a life interest. The plaintiffs based their claim on the allegation that Ahad Dar had made his daughters 'Khana Nishin' daughters and by a custom, applicable to the family, they rank as the sons of their father and entitled to all the rights of inheritance as if they were his sons. All the three Courts below have concurred in finding that the plaintiffs were made 'Khana Nishin' daughters by Ahad Dar and therefore, according to the custom, pleaded by the plaintiff, they were entitled to rank as sons of Ahad Dar. The City Judge, Srinagar, however, held, and his view was accepted in appeal by the District Judge — that according to the custom proved in the case 'Khana Nishin' daughters are entitled to succeed to the property of their father but are not entitled to inherit collaterally. On that finding the plaintiffs were unsuccessful in the first two Courts. In a second appeal to the High Court, a Division Bench reversed the decrees of the Courts below, holding that Mt. Frechi had a limited interest terminable on her death or re-marriage according to her statement in the mutation proceedings to which Ahad Dar was a party. The learned Judges do not state in so many words, that there was an implied family arrangement to the effect that after the death or re-marriage of Mt. Frechi, Ahad Dar would succeed so as to vest the estate in Ahad Dar immediately. But the following observation indicates that there was some such idea in the minds of the learned Judges. They say:

"The mutation order dated 20th Baisakh, 1977, quotes the statement of Frechi to the effect that she was in possession as the widow of Jamal Dar and was entitled to remain in possession until her death or re-marriage. By the mutation order it was held that Wali Dar was the son of Frechi and that the mutation of Wali's estate would be in favour of Frechi until her death or re-marriage after which the question of the title of Ahad would be taken. This being the order it was no longer necessary for Ahad to contest and he did not contest."

Later on the learned Judges note:

"Ahad was the person who would be entitled to the property as full owner on the death or re-marriage of Frechi and therefore Frechi's possession could not be adverse to him."

This observation was made in repelling the plea of adverse possession put forward on her behalf. It is plain that in the circumstances, appearing from the mutation proceedings, Mt. Frichi could not be

in adverse possession. The learned Judges eventually held that "while this intervening interest (Frechi's) was existing, Ahad died and his heirs are entitled to succeed to him." Reliance was placed in the High Court on '38 PLR., J & K p. 86', for the proposition that 'Khana Nishin' daughters cannot inherit the property of her brother under the customary law. The High Court distinguished this case on the ground that the plaintiffs in the present case are not suing for possession but only for declaration as reversioners and that the question as to who will be entitled to possession will fall to be decided on the death of Frechi. In this view the learned Judges granted the declaration prayed for by the plaintiffs.

(4) The learned Advocate for the defendant-appellant has reiterated his client's contention that the plaintiffs are not entitled to sue as 'Khana Nishin' daughters with respect to the property of their uncle who was a collateral relation. It was also argued that Ahad Lone, the transferee of Mt. Frechi, is entitled at least to payment of the consideration which he actually advanced to Mt. Frechi. The Board may say at once that this last contention has no force. Ahad Lone having taken transfers of property in which his transferor had only a limited interest he cannot be entitled to any payment by the plaintiffs as a condition precedent to a declaration being granted to them. As regards the main contention, namely, whether the plaintiffs as 'Khana Nishin' daughters, are entitled to sue for a declaration that the transfers made by Mt. Frechi do not affect their reversionary interest, the Board are of opinion that the effect of the custom found by the lower Courts has not been properly assessed. It is a well established rule of law and it was so held by this Board in 'Dewan Jewan Nath Madan v. Rasul Gadoo', relying on 'Ram Nundun Singh v. Janki Koer', 29 Cal 828 and 'Janeswari Babusin v. Ekradeswar Singh', 3 Ind Cas 207, that a custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. It was further held there that "not only each custom but each alleged separate incident of a custom must be proved to exist as Customary Law". Now, Mt. Frechi was entitled to succeed by custom to the estate of her son for life or till her re-marriage and thereafter the estate would devolve upon her sons' brother. The evidence does not take us so far that succession to her son's estate would open on her death as would be the case under Hindu Law and that the heir then found to be nearest would succeed. Any analogy derived from Hindu Law will be misleading. A Hindu widow fully represents the estate of her husband which cannot vest in any of his collateral relatives during her life-time. She is the surviving half of her husband and the husband is supposed to live in her person. These notions cannot be assumed where a muslim female is entitled to a life estate under a custom unless the evidence shows unmistakeably that the same incidents are part of the customary law. On the contrary where, as in this case, a person dies leaving his mother and a brother, their shares according to Mohammadan Law, are: mother 1/6th and brother the remaining 5/6th both taking in absolute right. The Mohammadan Law, however, stands superseded by a custom under which the mother instead of taking 1/6th in absolute right takes the whole for life and the brother, instead of taking only 5/6th immediately, takes the whole after the termination of the interest of the mother. The evidence takes us no further in this. It follows that a life interest becomes vested in the mother and the remainder becomes immediately vested in the brother. There is no warrant for the proposition that the vesting of the remainder shall remain in abeyance till the mother dies and the nearest collaterals then existing will acquire a vested interest. In this view the Board base their conclusion on two grounds:

(1) In the mutation proceedings, following the death of Wali Dar, Mt. Frechi and Ahad tacitly agreed that the latter would succeed to the share of Wali Dar after the death or re-marriage of Mt. Frechi who would have a limited interest. The result of such an understanding was that the interest in remainder immediately vested in Ahad Dar;

(2) The custom proved in the present case had the effect of vesting the interest in remainder in Ahad Dar as already explained. In either view Ahad Dar's interest devolved on his death on his daughters. The case is not one in which the plaintiffs succeed collaterally but they succeeded to the vested interest which their father possessed and though the latter died in the life-time of Mt. Frechi, his interest did not cease but devolved upon his daughters who became entitled to the share after the termination of the limited interest of Mt. Frechi.

(5) In the result the Board humbly advise His Highness to affirm the decree of the High Court and to dismiss the appeal with costs.

D.H. *Appeal dismissed.*

[C. N. 6.]

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(BOARD OF JUDICIAL ADVISERS)

NIAMAT ULLAH, PRESIDENT; SHIAM KRISHNA DAR AND SIR IQBAL AHMAD, MEMBERS.

Jana and others, Applicants v. Ghulam Nabi Non-Applicant.

Review Application No. 3 of 1950, D/- 11-6-1951.

(a) Civil P. C. (1908), Order 47, Rule 1 — No review on ground of erroneous finding of fact.

An application for review cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding. *(Para 2)*

Anno: C. P. C. O. 47, R. 1, N. 17-A.

(b) Civil P. C. (1908), Order 47, Rule 1 — Question which might and ought to have been raised not raised — No review for deciding such question.

Where a question based on certain amendment which might and ought to have been raised before the Board at the time when the appeal was heard is not raised, no review can be granted for decision of such question. *(Para 1)*

A. N. Bhan ,for Applicants.

NIAMAT ULLAH, PRESIDENT.: This is an application for review in which a decree passed by His Highness on the recommendation of the Board is sought to be reviewed on two grounds. One of them is that the documents of 1944, which has been held by this Board to be not valid and genuine should be considered to be valid and genuine.

(2) There can be no manner of doubt that an application for review cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding. The second question which is said to be one of law is that certain amendments to the Tenancy Law have since been made. It is contended that the amendments were in force at the time when the case was heard by the Board. No question based on such amendment was argued. Whether the contention

of the learned Counsel has any substance or not, need not be considered as the matter might and ought to have been raised at the time when the appeal was heard by the Board. It is too late to entertain an absolutely new ground on which the decree of the High Court is sought to be reversed. In these circumstances the application of review has no force and the Board humbly advise His Highness to reject it.

K.S. *Application dismissed.*

[C. N. 7.]

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JANKI NATH WAZIR C. J.

Isher Singh and others, Accused v. Mt. Nirmal Kaur, Opposite Party.

Case No. 48 of 2008, D/- 5-10-1951.

Criminal P. C. (1898) S. 350 (1) — Case re-transferred to original Magistrate.

Where a case is transferred from one Magistrate to another, but before the latter has recorded the evidence, the case is re-transferred to the original Magistrate, the accused cannot ask for a 'de novo' trial before the original Magistrate as that Magistrate is not "another Magistrate" as contemplated by the Section. A I. R. (28) 1941 Lah 322, Rel. on; A. I. R. (21) 1934 Mad. 475 and A. I. R. (13) 1926 Nag. 220. Not foll. (*Para 5*)

Anno: Cr. P. C., S. 350, N. 14 Pts. 1 and 2.

Lok Nath Sharma, for Accused; Jaswant Singh, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases)

('41) AIR (28) 1941 Lah 322: (43 Cri L J 165) (Pr 5)

('34) A I R (21) 1934 Mad 475: (35 Cri L J *1363*) (*Prs. 3, 4*)

('26) AIR (13) 1926 Nag 220: (90 Ind Cas 450) (Pr 3)

ORDER: This is a transfer application preferred by Isher Singh accused praying that the case pending before Mr. R. P. Rampal, Magistrate First Class, Jammu, be transferred to the Court of some other Magistrate.

(2) The facts which gave rise to this application briefly stated are these. A complaint was brought by Mt. Nirmal Kaur under S. 376 of the Ranhir Penal Code against Isher Singh in the Court of Mr. R. P. Rampal, Magistrate First class, Jammu. The Magistrate recorded the evidence and framed the charge against the accused. The Magistrate was then transferred and before the succeeding Magistrate the accused availed of the benefit under S. 350 of the Criminal Procedure Code. The succeeding Magistrate started 'de novo' trial and issued summons to the witnesses. He did not examine any witness and the original Magistrate was re-transferred to Jammu. An application was made by the complainant before the Additional District Magistrate for the transfer of the case to Mr. R. P. Rampal Magistrate who originally tried the case on the ground that the case will be expeditiously disposed of by him. The Additional District Magistrate transferred the case to Mr. R. P. Rampal Magistrate First Class who originally was seized of the case. The accused has preferred an application in this Court for the transfer of the case from the Court of Mr. Rampal Magistrate First Class to the Court of some other Magistrate.

(3) On behalf of the applicant it is argued that the Additional District Magistrate should not have transferred the case to the Court of Mr. Rampal, Magistrate first class, on the ground that the case would be expeditiously disposed of as the accused will not be able to avail of the benefit of S.350, Cr. P. C. It has been urged that the view taken by the Additional District Magistrate is erroneous inasmuch as the accused is not barred from taking the benefit of S. 350, Cr. P. C. in the Court of the present Magistrate. In support of this contention reliance is placed on 'Ramalingam v. Emperor', AIR (21) 1934 Mad 475 and 'Krishnaji v. Kashirao', A I R (13) 1926 Nag 220.

(4) In A I R (21) 1934 Mad. 475 it has been held that the grant of a 'de novo' trial by the successor of a Magistrate has the effect of wiping out the prior proceedings and hence if the case is transferred to the file of the old Magistrate even he cannot proceed with the trial from the point where he had left it. For where on having taken charge the accused asked for a 'de novo' trial and the succeeding Magistrate issues summons to the prosecution witnesses, this fact shows that the succeeding Magistrate has taken cognizance of the case and that whoever is to hear the case, in such circumstances must hear it 'de novo'. The same view is taken in the Nagpur case referred to above.

(5) In the present case the succeeding Magistrate asked the accused whether he would like to take the benefit of S. 350 Cr. P. C. or not. The accused having asked for 'de novo' trial the Magistrate issued summons to the witnesses but he did not examine any witness. The case has been transferred to the original Magistrate and the question is whether the Magistrate can start the case from the point where he had left it. In 'Ghaus Mahomed v. Emperor', A I R (28) 1941 Lah 322, originally, most of the evidence in the case had been heard by the Magistrate D but the case went to another Magistrate on account of the transfer of D to another District. Subsequently, however, it was re-transferred to D under the orders of the High Court with the object of saving the necessity of a 'de novo' trial. The second Magistrate to whom the case had gone on the transfer of D had not recorded any evidence at all. All that he had done was to order a 'de novo' trial at the request of the accused; it was held that since the successor of D had not heard or recorded any evidence in the case at all the condition laid down in S. 350 (1) was not fulfilled and therefore proviso (a) to S. 350 (1) was also not applicable. In this case the Madras authority has been considered and the view taken by the Madras ruling has not been followed. I fully agree with the view taken in the Lahore Case. The succeeding Magistrate not having recorded the evidence, the case is transferred to the Magistrate who originally tried the case and the accused cannot ask for 'de novo' trial before the original Magistrate as that Magistrate is not 'another Magistrate' as contemplated by S. 350 (1) Cr. P. C.

(6) This application, is therefore rejected.

V. R. B. *Application rejected.*

[C. N. 8.]

A. I. R. (39) 1952 Jammu and Kashmir 14

JIA LAL KILAM, J.

Ahmed Bhat Kalwal and others, Accused v. the State.

Criminal Revn. Petn. No. 38 of 2008 D/- 29th Assuj 2008.

Public Gambling Act (1867) S. 5 — Search warrant — Defects in — Wrong procedure — Effect.

Where the warrant was issued in the name of an officer who was not correctly designated in it, and the said officer did not follow the direction given in the warrant and also exceeded the authority that was given to him and the house which was searched was not the one mentioned in the warrant:

Held that the conviction of the accused could not be sustained: A I R (24) 1937 Cal 54 and A I R (23) 1936 All 109, Rel on. (Paras 6, 7)

Anno: Pub Gam Act, S 5 N 2.

J. L. Chowdhury, for Accused; Assistant Advocate General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) A I R (23) 1936 All 109: (37 Cri L J 354) (Pr 7)

('37) A I R (24) 1937 Cal 54: (38 Cri L J 784) (Pr 7)

ORDER: Ahmad Bhat Kalwal, Sultan Kalwal, Khaliq Bhat, Sultan Bhat Ghani Khan, Qadir Khan, Nabir Dar, Malla Karim and Hassan Sheikh have been convicted under various provisions of the Gambling Act. Ahmad Bhat has been convicted under Ss. 3/4 of the said Act and sentenced to pay a fine of Rs. 25/-. The other accused were convicted under S. 4 of the said Act and all of them excepting Hassan Sheikh were ordered to pay a fine of Rs. 15/- each. Hassan Sheikh was sentenced to pay a fine of Rs. 25/-, and in default of payment of fine all the accused were ordered to undergo one month's simple imprisonment. On appeal, the learned Sessions Judge, Srinagar, upheld the convictions of the accused persons, but reduced the sentence of fine to Rs. 5/-. All the accused persons have now come up in revision to this Court.

(2) It appears that a warrant under S. 5 was issued by the Superintendent of Police, Srinagar, authorizing Pt. Dinanath, a Police officer, to enter the house of Ahmad Bhat alias Kalwal s/o Karim Bhat, and to arrest him along with any other persons found gambling there, and also to seize any instruments of gambling found there. He was further authorized to use as much force as was necessary for executing the said warrant and also to effect a search of the house in case the instruments of gambling were kept hidden. Armed with this authority, on 8th Kartik 2007 Pt. Dina Nath went into a house shown in the plan Ex. 2 as the place where gambling was going on, and arrested nine accused persons. He also seized some instruments of gambling and also some cash both from the place where the gambling is alleged to have taken place and also from the persons of the accused. A formal complaint was laid against the accused persons on 25th of Katik 2007.

(3) On behalf of the prosecution three witnesses namely, Noor-ud-Din Bhat, Ghulam Ahmad Shah and Dina Nath, Station House Officer, Maharajgunj, were produced. Before proceeding further, I think an examination of the warrant issued by the Superintendent of Police would facilitate the decision of this Revision application. The warrant has been issued in the name of Dina Nath who has been described therein as Afsar Mohtamin Station Maharajgunj. In the formal complaint laid before the Magistrate Dina Nath describes himself as Senior Sub-Inspector S. H. O. Maharajgunj. Dina Nath was authorised to enter the house of Ahmad Bhat alias Kalwal s/o Karim Bhat and to effect the arrest of the gamblers present there in presence of some respectable witnesses. He was also authorised to make a search of the house or of the persons of the accused in case the instruments of gambling were kept hidden.

(4) Now to my knowledge there is no police officer of the designation of Afsar Mohtamim Station Maharajgunj. Dina Nath describes himself in a different language. He calls himself as Senior Sub-Inspector of Police S. H. O. Maharajgunj. This is understandable, but to be frank Afsar Mohtamin Station cannot easily be followed. May be that there is another officer by name Dina Nath who is Afsar Mohtamim Station, but there is no evidence on record to show that an officer of the designation of Afsar Mohtamim Station is identical with an officer who describes himself as Senior Sub-Inspector S. H. O. This is an initial defect in the warrant, which could have been easily avoided had the Superintendent of Police who has affixed his signature to the warrant gone through its contents before signing it. Then the warrant contains a direction that the procedure as laid in the Gambling Act should be followed. Now we see that Pt. Dina Nath was authorised to arrest the accused persons in presence of respectable witnesses. But Dina Nath in his statement says only this much that he arrested the accused persons while they were in the act of gambling. True, that the two witnesses, Nur-ud-Din and Ghulam Ahmad Shah who have been produced on behalf of the prosecution say that the accused were arrested in their presence, but about their respectability we have no evidence. No question has been put to them about their respectability, and Pt. Dina Nath also does not say that they were respectable persons. Nur-ud-Din admits that he was not known to Pt. Dina Nath and that he was simply roaming about near Bohri Kadal when he was met by Pt. Dina Nath who told him "just come along with me." The second witness Ghulam Ahmad Shah has been declared hostile by the prosecution. This would certainly not point to the respectability of the two witnesses which is a condition precedent for them to be witnesses of arrest and search.

(5) Then again we find from the warrant that Dina Nath was authorised to search the persons of the accused only if the instruments of gambling were not forthcoming. He was not authorised to search their persons for recovering any cash. But from Ex. P4 we find that he searched the persons of the accused and recovered some money from them.

(6) From the above discussion it would become evident that the warrant was issued in the name of an officer who was not correctly designated in it, and that the said officer did not follow the directions given in the warrant and also exceeded the authority that was given to him.

(7) The matter does not stop here. The warrant has been issued for arresting gamblers in the house of Ahmad Bhat alias Kalwal s/o Karim Bhat. We have a plan of the place where gambling is alleged to have taken place. This plan is marked Ex. P2 and has been duly proved by Pt. Dina Nath S. H. O. Maharajgunj. In this plan the house in which gambling is alleged to have taken place is shown to belong to Sulla Kalwal. The name of Ahmad Kalwal does not appear there. The inference is obvious. The learned Assistant Advocate General tried to argue that Sulla Kalwal and Ahmad Kalwal are two brothers living in the same house. In support of his argument he drew my attention to a portion of the statement of Dina Nath Sub-Inspector where it is stated that the house where the gambling was taking place,belonged to Ahmad Bhat Kalwal. But in the next line we find the same Dina Nath stating that personally he knew nothing about this gambling house, because it is not situate within his jurisdiction. Nur-ud-Din the other witness says that he does not know the accused persons. In cross-examination he says that he knows the brother of Ahmad Bhat Kalwal by name Sulla Kalwal. He further on says that he does not know even this much as to whether Ahmad Bhat Kalwal's family resided in that house or not, Ghulam, Ahmad Shah has been declared hostile by the prosecution. He says that Ahmad Bhat Kalwal is a labourer by profession and that his house is not a gambling house. From the statements of these witnesses it cannot be found as a matter of fact that the house wherefrom the alleged gamblers were arrested belonged to Ahmad Bhat Kalwal. When these statements are read with Ex. P2 in which the house where gambling was alleged to have taken place is described as belonging to Sulla Kalwal. It becomes very difficult to hold and even impossible that the house where the gambling was alleged to be taking place belonged to Ahmad Bhat Kalwal. Such being the facts I am afraid the convictions of the accused persons cannot be maintained. In 'Baijnath v. Empror', A I R (24) 1937 Cal 54, it has been laid down that:

> "Before the prosecution could rely on S. 6 (of the Gambling Act) it is absolutely necessary for them to show that the place where the petitioners were found gambling was the place named in the warrant. Now, neither the learned Magistrate nor the learned Judge came to a specific finding upon this absolutely essential point. In view of the evidence given by the search witness the case of the petitioners appears to be absolutely correct and the house searched was not the house named in the warrant at all. In these circumstances these convictions cannot be supported".

In the same judgment it is further laid down that:

> "Before the prosecution can rely on the presumption under S. 6, it is absolutely necessary for them to show that the place where the accused is found gambling really is the place named in the search warrant."

In 'Thakurdas v. Emperor', A I R (23) 1936 All 109, it has been laid down that:

> "In order to entitle the prosecution to invoke to its aid the presumption under S. 6 of the Act, the prosecution must prove affirmatively that the search was in accordance with the provisions of S. 5 of the Act, and where this fact is not proved the conviction of the accused cannot be sustained merely on the strength of the presumption referred to in S. 6."

In this case I do not find that the house which has been searched is not the one mentioned in the warrant, but I have also pointed out that there are defects in the warrant as well and that the procedure has not been followed as is conceived by law.

(8) I, therefore, accept this Revision petition set aside the conviction of all the accused persons and remit the sentence of fine. In case the fine has been paid, it shall be refunded to the accused persons.

V.R.B. *Revision allowed.*

[C. N. 9.]

A. I. R. (39) 1952 Jammu and Kashmir 15

JANKI NATH WAZIR, C. J.

Radha Kishen, Applicant v. Sona Khandi, Respondent.

Civil Revision No. 46 of 2007, D/- 26th Jeth 2006.

Provincial Small Cause Courts Act (1887), Art. 8 — Rent — Meaning of.

The word 'rent' is used in respect of immovable property like land, house and shops. The word 'rent' therefore, has distinct meaning from the word 'hire' and unless suits for hire are specifically excluded from the cognizance of Court of Small Causes it cannot be held that the suit for hire would not lie in the Court of the Small Causes. Thus the suit for the recovery of hire for boats is not excepted under Article 8: 7 Ind Cas 553 (Cal), Rel. on. (*Para 2*)

Anno: Pro. S. C. Act Art. 8, N. 2.

S. N. Dar, for Applicant.

Case referred to:

('10) 7 Ind Cas 553: (14 Cal W N 994) (Pr 2)

ORDER.: This is a revision against the order of the Judge Small Causes returning the plaint to the plaintiff for being presented to the proper forum. The respondent in spite of service is not present.

(2) The sole question involved in this application is whether the suit as framed by the plaintiff is cognizable by the Small Causes Court or not. The suit is for the recovery of Rs. 220/- as hire for two boats for a period of three years. The learned Judge Small Causes has remarked that the suit is excepted under Article 8, of Schedule 2 of Small Cause Courts Act which reads under:

> "A suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the High Court with authority to exercise jurisdiction with respect thereto."

The Counsel for the applicant has argued that the amount is not claimed as rent but hire for the use of the boats for a period of three years. It is true that the word 'rent' has not been defined in the Small Cause Courts Act but the word 'rent' is used in respect of immovable property like land, house and shops. The dictionary meaning of the word 'rent' as has been stated by the trial Court is that rent includes hire for machinery. But hire for machinery is not excluded from the cognizance of Small Cause Court. It is only the recovery of

rent other than the house rent that is excluded from the cognizance of the Court of Small Causes. In my opinion the hire of the boats will not be excepted from the cognizance of the Court of Small Causes. It is only the rent other than the house rent which has been excepted. If we stretch the meaning of rent to include hire as well then the hire of machinery and other movable articles would also be excepted from the cognizance of the Court of Small Causes. That is not the scheme of the Act. This view is further supported by a reference to the Limitation Act. Article 50 of the Limitation Act provides the period of limitation for the hire of animals, vehicles and boats or house-boat furniture while Article 110 provides for limitation for the arrears of rent. The word 'rent' therefore, has distinct meaning from the word 'hire' and unless suits for hire are specially excluded from the cognizance of Court of Small Causes it cannot be held that the suit for hire would not lie in the Court of Small Causes. In 'Prohlad Patni v. Shashadhar Rai', 7 Ind Cas 553 (Cal), it has been held that a suit to recover a sum payable under a contract by the defendant for plying boats in a private ferry is not a suit for rent within the meaning of Article 8, of Schedule II of the Provincial Small Cause Courts Act and a Small Cause Court has jurisdiction to try the suit.

(3) I, therefore, allow this application, set aside the order of the Judge, Small Causes Court and direct that the suit be entered on its original number and disposed of according to law. The respondent is not present. There will be no order as to costs.

Revision allowed.

D.H.

[C. N. 10.]

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JANKI NATH WAZIR C. J. AND JIA LAL KILAM J.

Mt. Rahati, Plaintiff-Appellant v. Ghulam Mohd. Soofi and another, Defendants-Respondents.

Second Appeal No. 87 of 2007 D/- 22nd Assuj 2008.

Limitation Act (1908), Art. 182(2) — "Where there has been an appeal" — Appeal against order refusing to set aside ex parte decree.

Clause (2) of Art. 182 of the Limitation Act does not state in its strict grammatical construction, that the appeal must be against the decree in the suit. Where there has been an appeal against the order of the trial Court refusing to set aside the exparte decree, the limitation for execution of the decree shall start from the date of the order dismissing the appeal and not the date of the decree of the trial Court. A I R (19) 1932 P C 165 Applied. A I R (24) 1937 Pat 337, Relied. (Paras 6, 7)

Anno: Limitation Act Art. 182 N. 34, 46.

R. K. Koul, for Appellant; A.N. Bhan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('32) A I R (19) 1932 P C 165: (60 Cal 1) (Pr 6)

('46) A I R (33) 1946 Cal 375: (I L R (1946) 1 Cal 637) (Pr 5)

('37) A I R (24) 1937 Pat 337: (16 Pat 306) (Pr 6)

WAZIR C. J.: This is second appeal filed by the decree holder and arises out of execution proceedings.

(2) Mt. Rahati, plaintiff decree-holder, instituted a suit for partition against Sultan Soofi and Mohd. Soofi defendants. A final decree was passed in the partition suit on 5th of Poh 2002. Ghulam Mohd. Soofi, one of the defendants, instead of filing an appeal against the final decree made an application before the trial Court for setting aside the ex parte final decree on 1st Phagan 2002. This application was dismissed on 7th Chet 2002. He went up in appeal against the order of the trial Court dismissing the application for setting aside the ex parte decree. His appeal was dismissed on 20th Assuj 2004 by the District Judge Kashmir. The decree-holder took out execution of the final decree on 24th Chet 2004. The judgment-debtors raised several objections and one of the objections was that the execution application was barred by time. The executing Court over-ruled this objection of the judgment-debtors and held the application within time. The judgment-debtors appealed and the learned District Judge overset the order of the Executing Court and held that the execution application filed by the decree-holder was barred by time. The decree-holder has come up in further appeal to this Court.

(3) In this second appeal the question to be decided is whether the execution proceedings are or are not barred by limitation. The matter depends upon the construction of Article 182 Clauses (2) and (3) of the Limitation Act. It is contended on behalf of the decree-holder appellant that the case falls under Cl. (2) of Art. 182 of the Limitation Act which reads as under:

> "Where there has been an appeal, the date of the final decree or order of the Appellate Court or withdrawal of the appeal."

In support of this contention it is argued on the one hand that the disposal of the appeal against the order refusing to set aside the ex parte decree comes within the meaning of Cl. (2) of the above Article of the Limitation Act and the starting point of the limitation for the execution of the decree will be from the date the appellate order is passed, i.e. 20th of Assuj 2004 and not from 5th of Poh 2002, when the final decree was passed.

(4) It has been argued on behalf of the respondents that the starting point of limitation under Cl. (2) of Article 182 would be from the date of the final decree or order of the appellate Court where appeal has been filed against the order or decree passed in the suit itself.

(5) There has been divergence of opinion on this point of different High Courts in India. The learned District Judge has taken the view that as the appeal has not been filed against the final decree or order arising out of the suit, therefore, the case will not fall within Cl. (2) of Art. 182 and the starting point of limitation will be from the date of the final decree and as the execution application has been filed three years after the final decree it was held to be barred by time. In support of this view reliance is placed on a ruling of Calcutta High Court reported as 'Haris Chandra v. Dines Chandra', A I R (33) 1946 Cal. 375.

(6) We have very carefully examined all the rulings on this point of different Indian High Courts as well as the Privy Council and we

are of opinion that the view taken by the District Judge is not sound. Clause (2) of Art. 182 of the Limitation Act does not state in its strict grammatical construction, that the appeal must be against the decree in the suit. These are words which we are asked to read into the Article by implication, and we see no ground in principle for so reading them. In 'Nagendra Nath Dey v. Suresh Chandra Dey', A I R (19) 1932 P. C. 165, their Lordships have held that there is no definition of appeal in the Civil Procedure Code but there is no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term and that it is no less an appeal because it is irregular or incompetent. In this case it has been remarked:

"that the question must be decided upon the plain words of the Article; where there has been an appeal, time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of period of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub-judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

In conformity with the Privy Council decision that the matter must be decided on the plain words of the Article, the order of the appellate Court of 20th Assuj 2004 should be held the proper date from which the period of limitation should start. It is true that their Lordships were not dealing with an actual appeal against an order refusing to set aside an ex parte decree, as we are here, but with an appeal against the decree itself which was sought to be executed, and the immediate result of their decision was to hold that, even if such an appeal were irregular in form & one to which the judgment-debtors were not parties, it was none the less an appeal within the meaning of Art. 182. But the principles contained in the passages quoted above are wide enough to cover the present case and other cases of similar nature. In 'Dedhraj Lachminarayan Firm v. Bhagwan Das' A I R (24) 1937 Pat 337, it was held that the definition of an appeal given by their Lordships would apply to an appeal against an order refusing to set aside an ex parte decree and with this view we respectfully agree. If we were to accept the contention of the learned counsel for the respondent that the appeal as mentioned in cl. (2) should be taken to be an appeal against the decree or order passed in the suit then it would be expected that the legislature would have made it quite clear by inserting the words 'where there has been an appeal against that decree or order', but the words used in cl. (2) are 'where there has been an appeal, the date of the order or the appeal'. In restricting the appeal against the decree or order in the suit we have to read the words 'against the decree or order in the suit' in cl. (2) which do not find place there.

(7) We are therefore of opinion that the time will start to run against the decree-holder from the 20th of Assuj 2004, when the appellate Court dismissed the appeal of the judgment-debtor against the order of the trial Court refusing to set aside the ex parte decree. Taking 20th of Assuj 2004, as the starting point of limitation the application of the decree-holder is within time.

(8) We, therefore, allow this appeal and set aside the order of the lower appellate Court and restore that of the executing Court. In view of the circumstances of the case, the parties are left to bear their own costs in this Court.

(9) KILAM J., I agree.

R.G.D. *Appeal allowed.*

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JIA LAL KILAM, J.

Ghulam Rasul and others, Applicants v. Ghulam Qadir and others, Non-Applicants.

Civil Revn. No. 52 of 2007, D/- 18th Jeth 2008.

Civil P. C. (1908), S. 35 — Successful party — Right to receive costs.

Costs awardable under Section 35 are in the discretion of the Court, but that discretion has to be exercised in a judicial manner on the basis of sound legal principles and not arbitrarily. One of such principles is that a successful party is entitled to costs, unless he is guilty of such misconduct as would disentitle him in the eye of law. Even then it is necessary for the trial Judge to record reasons for his not awarding costs to the successful party. (*Paras 2, 3*)

(*Note: In this case the High Court in revision set aside the order passed by the lower Court directing the successful party opposing a pauper application to bear his own costs.*)

Satya Pal, for Applicants.

ORDER.: Ghulam Qadir made an application for permission to sue as a pauper. He impleaded Ghulam Rasul and others as non-applicants in that application. After recording evidence, the learned First Additional Munsiff rejected his application. The learned Munsiff held that "the applicant had properties sufficient to pay court-fees." As regards costs, the Munsiff recorded that "the parties will bear their own costs." The non-applicants have come in revision to this Court challenging the correctness of the order made by the Munsiff as regards costs.

(2) The learned counsel appearing on behalf of the applicants in this Court has drawn my attention to Sub-clause (2) of Section 35 of the Civil Procedure Code, which lays down that "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing." I find that the learned trial Munsiff has not given any reasons for not awarding costs to the successful party. It is true that costs awardable under Section 35, Civil Procedure Code, are in the discretion of the Court, but it has to be borne in mind that discretion has to be exercised in a judicial manner on the basis of sound legal principles and not arbitrarily. The exercise of discretion depends upon the circumstances of each case. The circumstances,

however, will include the length of time spent in the trial, the number of witnesses examined and the conduct of the parties both before and after the proceedings were started.

(3) In this case I find that as many as five witnesses were examined on behalf of the parties and the inquiry in this application lasted for more than two years. Under these circumstances there is no reason why the applicants in this application should not be awarded costs. The general rule is that a successful party is entitled to costs, unless he is guilty of such misconduct as would disentitle him in the eye of law. Even then it is necessary for the trial Judge to record reasons for his not awarding costs to the successful party.

(4) Taking all this into consideration, I set aside the order of the trial Court as regards costs and order that costs in this case be awarded to the successful party, i.e., the applicants in this revision application.

(5) The non-applicant, in spite of service, is not present. This order has been passed ex parte against him.

V.S.B. *Revision allowed.*

A. I. R. 1952 Jammu and Kashmir 18

JIA LAL KILAM, J.

Skattar Singh, Plaintiff-Appellant v. Rawela, Defendant-Respondent.

Second Appeal No. 94 of 2007, D/- 26th Poh. 2008.

Transfer of Property Act (1882), Ss. 5 and 109 — 'Transfer' — Meaning of — Lease — Subsequent partition between lessors — Evidence Act (1872), S. 116.

The partition is a transfer of property within the meaning of Section 5 and Section 109 as it has been held to be a mixture of surrender and a conveyance of rights in a property.

The defendant had by virtue of a rent deed taken on lease a small house from the plaintiff. This house was the part of some joint property which was owned by four persons including the plaintiff. These persons who were related to each other as brothers or cousins effected a partition of their joint property and this house which was rented out to the defendant fell to the lot of other three persons:

Held that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once had ceased to exist so far as he was concerned and those rights were now vested in his co-sharers to whom the exclusive ownership had been transferred by partition. On the date of transfer (in this case partition) the relationship of landlord and tenant ceased to exist between the plaintiff and the defendant. Therefore the defendant was not debarred from pleading that he was not bound by any relationship of landlord and tenant so far as he and the plaintiff were concerned. Chitaley's T. P. Act cited with approval. (Paras 3, 4)

Anno : T. P. Act, S. 5 N. 4; Evidence Act, Section 116 N. 9

R. C. Nanda, for Appellant; D. N. Mahajan, for Respondent.

JUDGMENT : This is a plaintiff's second appeal against a judgment of the learned Senior Subordinate Judge, Jammu, dated 13th Poh. 2007, whereby the judgment and decree of the trial Court (Sub-Registrar Munsiff, Second Class, Jammu) dismissing the plaintiff's suit for ejectment and rent was confirmed.

(2) It appears that the defendant-respondent had by virtue of a rent deed dated 8-9-2001 taken on lease a small house from the plaintiff; and the rent fixed per month was Rs. 4. This house appears to have been the part of some joint property which was owned by three or four persons including the plaintiff. On 28th Phagon 2002 these persons who are related to each other as brothers or cousins effected a partition of their joint property and this house which was rented out to the defendant fell to the lot of Kaunsal Singh, Balwant Singh and Wasawa Singh. Thereafter the defendant executed another lease deed in the name of Kaunsal Singh to whose lot along with others the said house had fallen. The plaintiff thereafter kept quiet for a period of more than three years and meanwhile, as alleged by the defendant, the defendant went on paying rent to Kaunsal Singh. After a period of more than three years the plaintiff issued a notice on 21st Jeth 2006 to the defendant demanding the arrears of rent from him. This notice was given to the defendant on the basis of the original lease deed which was executed by him in favour of the plaintiff. Both the Courts have come to the conclusion that the tenancy which once existed between the plaintiff and the defendant terminated on the day when the partition was effected between the plaintiff and his other co-sharers in the property.

(3) The argument of the appellant's learned counsel is that whatever may have taken place between the plaintiff and his other co-sharers would not give a right to the defendant to deny that the title of the landlord. According to S. 116 of the Evidence Act a tenant cannot deny the title of a landlord during the continuance of the lease. But the question in this case is: does the tenancy continue in the present case? The defendant-respondent's learned counsel has referred to Section 109 of the Transfer of Property Act which lays down that:

> "If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it....."

The other question is as to whether the partition is a transfer of property within the meaning of Section 5 and Section 109 of the T. P. Act. There is ample authority for the proposition that a partition is a transfer of property as it has been held to be a mixture of surrender and a conveyance of rights in a property. Reference may in this connection be made to a number of rulings which have been noted by Chitaley on page 252 of his commentary on the Transfer of Property Act. From this it becomes abundantly clear that after the transfer it is the transferee who possesses all the rights of the lessor and the rights of the original lessor automatically cease to exist. Putting it in more plain words it comes to this that on the date of transfer (in this case partition) the relationship of landlord and tenant ceased to exist between the plaintiff and the defendant. Therefore the defendant is not debarred from pleading that he is not bound by any relationship of a landlord and tenant so far as he and the plaintiff are concerned.

(4) The plaintiff's learned counsel has further argued that the defendant now has attorned to only one of the three persons to whom the house in question was allotted on partition. From this he wants to argue that the subsequent lease deed is not a valid lease and that the original lease deed must be therefore treated as operative. This may or may not be so, but it does not make any difference. It is a matter subsisting between the owners of the property. If the owners of the property think that Kaunsal Singh has misbehaved, they can take him to task, but the plaintiff does not come into the picture at all. So far as the plaintiff is concerned, we have got only to see as to whether he has a present right of ejecting the defendant or not. We have seen by reference to Section 109 of the T. P. Act that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once have ceased to exist so far as he is concerned, and those rights are now vested in his co-sharers to whom the exclusive ownership has been transferred by dint of partition referred to above.

(5) There is one more point in the case which shows that the plaintiff has taken the same position which has been visualized above. After the partition that was brought about between him and his other co-sharers, he maintained a studied silence. Never did he make any demand for rent from the defendant, nor did he raise even his little finger for bringing about his ejectment. By such conduct of the plaintiff it becomes further clear that he had lost all interest in the property. It is now too late in the day for him to come in the Court and demand rent and to seek ejectment of the defendant.

(6) I do not, therefore, find any force in this second appeal which is dismissed with costs.

D.H. Appeal dismissed.

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JANKI NATH WAZIR, C.J., AND JIA LAL KILAM, J.

Mohd. Sadiq and others, Appellants v. Jamal Sooji and others, Respondents.

First Appeals Nos. 53 and 1 of 2007, D/- 20-9-1951.

Jammu and Kashmir High Court Rules and Orders, Vol. III, R. 16 — Valuation for appeal — Suit for pre-emption of house.

In a suit for pre-emption of a house, forum of appeal is not determined by the value of property put in the plaint but by the price determined by the trial Court. AIR 1925 Lah 41, AIR 1936 Lah 133, Distinguished. (Para 4)

S. N. Dar, for Appellants; H. N. Dhar, for Respondents.

Cases referred to:

('25) AIR 1925 Lah 41: (76 Ind Cas 196) (Pr 4)
('36) AIR 1936 Lah 133 (Pr 4)

JUDGMENT.: This is plaintiffs' first appeal and arises out of a suit instituted by plaintiff's pre-emptors to pre-empt the sale of a house made by the vendors in favour of the vendee defendants for Rs. 5,000.

(2) The plaintiffs' case was that they have the right to pre-empt the sale on the basis of contiguity; that the price mentioned in the sale-deed is much more than actually paid by the vendees to the vendors, that in fact Rs. 2,000/- were paid by the vendees to the vendors. The defendants resisted the suit on the ground that the plaintiffs have no right to pre-empt the sale inasmuch as their house is not contiguous to the property in dispute. It was further alleged that the price mentioned in the sale-deed was actually paid by the vendees to the vendors.

(3) The trial Court found that the plaintiffs had right of prior purchase and further found that the price paid by the vendee was Rs. 3,000/-. The plaintiffs' suit was decreed on payment of Rs. 3,000/- to the vendees defendants. Both the plaintiffs and the vendees defendants have come up in appeal to this Court.

(4) A preliminary objection was raised on behalf of the vendees respondents that the appeal of the plaintiffs would not lie to this Court but would lie to the District Judge. It is argued that the original value of the property in the plaint would determine the forum of appeal and not the price determined by the trial Court. In support of this contention reliance was placed on two rulings of the Lahore High Court, 'Malah v. Bishen Singh', AIR (12) 1925 Lah 41 and 'Jagdish Ram v. Mt. Chinto', AIR (23) 1936 Lah 133. In AIR (12) 1925 Lah 41, it was held that when the value of pre-emption suit for the purpose of jurisdiction calculated at thirty times the land revenue of the land in dispute was less than Rs. 5,000/- but a decree was passed in the suit ordering payment of a sum larger than Rs. 5,000/- an appeal arising from the suit lay under Section 39 (1) (a) of the Punjab Courts Act to the Court of the District Judge and not to the High Court. The same view was taken in AIR (23) 1936 Lah 133. These two cases referred to by the counsel for the respondent are not helpful to him inasmuch as they relate to the pre-emption suits in regard to the agricultural land whereas the present suit filed by the plaintiffs is to pre-empt a sale of a house and not agricultural property paying land revenue. In regard to agricultural property paying land revenue the jurisdictional value is to be determined by specific rules whereas there are no rules for determining the price of the house property and it is laid down in Rules and Orders of this Court, Vol. III on page 309, Rule 16, that there is no provision in the Suits Valuation Act in regard to classes of suits mentioned below and they do not admit of being disposed of by Rules under Part I nor are they dealt with by directions under Part II of the Regulation and the value of such suits must be left to judicial decision as occasion arises. These suits are suits for houses; suits of pre-emption in respect of houses; suits for removal of attachment of houses, etc. etc. It is, therefore, clear that in regard to pre-emption suits in respect of houses the decision of the Courts determining the price will determine the forum of appeal. According to the trial Court the market price of the house is Rs. 3000 and, therefore the appeal would lie to the High Court and not to the District Judge.

(5) The next question for consideration is as to what is the price of the house in dispute. (After going through the evidence, their Lordships held that the price paid was Rs. 2,700/- and then concluded:)

(6) We, therefore, allow the appeal of the plaintiffs and reduce the amount of price from Rs. 3,000/- to Rs. 2,700/-. The appeal of the defendants is dismissed. The parties will get and pay costs in proportion to their success and failure in this Court.

R.G.D. *Appeal allowed.*

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BOARD OF JUDICIAL ADVISERS

NIAMAT ULLAH, PRESIDENT; SHIAM KRISHNA DAR AND SIR IQBAL AHMED MEMBERS

Sultan Sofi and others, Appellants v. Shaban Sofi and others, Respondents.

Appeal No. 1 of 1951, D/- 18-6-51.

Jammu and Kashmir Right of Prior Purchase Act (1993), Ss. 14 and 15 — Words "agricultural land" in Section 14 includes agricultural land in village and also in urban area—"Immovable property" does not include agricultural land.

The words 'argicultural land' occurring in Sec. 14 include agricultural land in an urban area as well as in a village. It is equally clear that the expression "immovable property" in this section does not include agricultural land. It follows that on the literal construction of the section the owners of contiguous properties have no right of pre-emption in respect of agricultural land wherever it may be situated. The words 'immoveable property' in Ss. 14 and 15 were not intended by the framers of the Act to include agricultural land. Having provided by Section 14 that agricultural land, regardless of its situation, can be the subject of pre-emption by the four classes of persons therein mentioned it could not have intended that such land should be again provided for in S. 15 and the right of prior purchase given to quite a different set of persons. (Paras 6, 8)

S. N. Dar, for Appellants; Jaswant Singh and J. N. Butt, for Respondents.

NIAMAT ULLAH, PRESIDENT: This appeal raises a question as to the interpretation of the fourteenth & fifteenth Sections of the Right of Prior Purchase Act, 1993, hereafter called the State Act.

(2) On Magh 25, 2001, the respondent No. 5, Pt. Jai Lal Sopori executed a sale-deed in respect of 4 Kanals 17 Marlas of land situated in Charamghari Mohalla in the city of Srinagar in favour of the appellants for an ostensible consideration of Rs. 5,000/-. The property thus sold is Malyari land included in Khewat No. 1 of Zilla Chhattabal, comprising Khasra Nos. 1334, 1337, 1338, 1339 asessed to Government Revenue of Rs. 10-14-3.

(3) The respondents Nos. 1 to 4 who are owners of property contiguous to property sold claim the right to pre-empt this property under Cl. 6 of the fifteenth section of the State Act and they would be so entitled if that section be held applicable to the cause.

(4) The fourteenth and fifteenth sections of the State Act describe two separate categories of pre-emptors, the former in relation to "agricultural land" and the 'village immoveable property' and the latter in relation to 'urban immoveable property'. But the expression "agricultural land" as used in the fourteenth section and the expression "urban immoveable property" as used in the fifteenth section, unless restricted by other provisions of the Act, are wide enough in both cases to apply to agricultural land situate in a city and the main controversy in the case is whether the 'agricultural land' as used in the fourteenth section should be restricted to villages & the urban immoveable property in section fifteen should be given its ordinary meaning or whether 'agricultural land' in section fourteen be given its ordinary meaning and the 'urban immoveable property' in section fifteen should receive a restricted interpretation so as to exclude agricultural land in a city.

(5) The two Courts below have concurrently held that the agricultural land within a city is to be regarded as the urban immoveable property for the purpose of fifteenth section of the Act. Whether this view is correct is the sole question for the consideration of the Board in this appeal.

(6) In taking this view the provisions of the fourteenth section have not been given due consideration and if this had been done, the process of reasoning leading to the conclusion arrived at by the lower Courts would have presented (prevented?) considerable difficulty. The fourteenth section opens with the provision that "the Right of Prior Purchase in respect of 'agricultural land' and 'village immoveable property' shall vest in four categories of persons none of which includes the owners of property contiguous to the property sold". There can be no doubt that the words 'agricultural land' occurring in this section include agricultural land in an urban area as well as in a village. It is equally clear that the expression "immoveable property" in this section does not include agricultural land. It follows that on the literal construction of section fourteen the owners of contiguous properties have no right of pre-emption in respect of agricultural land wherever it may be situated. It is, however, contended that having regard to the provisions of the fifteenth section "agricultural land" occurring in the fourteenth section should be taken to refer to such land in a village. The contention is based on the opening sentence of the fifteenth section which provides that "the Right of Prior Purchase in respect of urban immoveable property shall vest" among others, in the owners of property contiguous to the property sold. It is said that the expression 'urban immoveable property' within the limits of a town must include agricultural land within such limits.

(7) There is no doubt that if this definition of urban immoveable property be imported in the fifteenth section and no account be taken of the fourteenth section the argument would be sustainable. But neither section can be ignored in determining the Right of Pre-emption claimed by owners of contiguous properties. The drafting is extremely unsatisfactory and the apparent conflict arising from the language of the two sections has to be obviated by a reasonable construction of the two sections. It seems to the Board that the decisive question is whether the definition of "urban immoveable property" should be imported in the fifteenth section.

(8) Now, the 3rd section of the Act which defines various terms employed in the Act expressly provides that "unless there is anytning repugnant in the subject or context", the words defined have to be taken to mean in terms of the definitions. In other words, the subject or context in any part of the Act would give rise to a conflict between two provisions thereof the definition is to be disregarded. As al-

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ready shown a serious conflict arises between the fourteenth and fifteenth sections if the expression "urban immoveable property" occurring in the latter be taken in the extended sense according to the definition. On the other hand, reading the two sections together it is clear that property has been classified into three categories, namely, (1) Agricultural Land which means land which is not occupied as the site of any building in a town or village and is occupied as and lent for agricultural purposes or for purposes subservient to agricultural or pasture (C. F. definition of land in Jammu and Kashmir Alienation of Land Act, 1995 in S. 2 adopted by S. 3 of the Right of Prior Purchase Act) wherever situated whether in a city or in a village, (2) Village Immoveable Property and (3) Urban Immoveable Property. This classification clearly indicates that the words 'immoveable property' in Ss. 14 and 15 were not intended by the framers of the Act to include agricultural land. Having provided by the fourteenth section that agricultural land, regardless of its situation, can be the subject of pre-emption by the four classes of persons therein mentioned it could not have intended that such land should be again provided for in the fifteenth section and the right of prior purchase given to quite a different set of persons. The construction of the fourteenth section, which found favour with the lower Courts, would insert the words "in a village" after the words "agricultural land" or the word "village" before them, which is not permissible. The words "agricultural land" in section fourteen are unqualified and there is no justification for adding the word "village" before them or the words "in a village" after them.

(9) Accordingly the Board are of opinion that the fifteenth section of the Act is not applicable to the case and that the right of prior purchase is to be determined according to the fourteenth section which does not entitle owners of property contiguous to the property sold.

(10) The land in suit is admittedly agricultural land. It seems to have been common ground between the parties that the respondents 1 to 4 are entitled to pre-empt if the fifteenth section is applicable which as already held, is not the case. But they may be entitled to pre-empt under S. 14 and this question should be decided. The result is that this appeal should be allowed, the decrees of the lower Courts set aside and the suit of the respondents 1 to 4 remanded to the trial Court for disposal according to law. The Board think that in view of the unsatisfactory drafting of the Act, which was largely responsible for this litigation, the parties should bear their own costs so far incurred. The Board humbly advise His Highness accordingly.

R.G.D. Appeal allowed.

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JIA LAL KILAM, J.

Ghulam Mohd., Accused v. The Municipal Committee, Srinagar; Opposite Party.

Criminal Ref. No. 63 of 2007, D/- 19th Jeth 2008.

Criminal P. C. (1898), Ss. 263 (g) and 342 — Summary trial — Examination of accused if obligatory — Non-compliance — Effect.

The provisions of S. 342 are mandatory and the procedure of examining the accused so as to enable him to explain any circumstances appearing against him has to be followed even in summary trials.

Hence where in a summary trial the accused has been convicted on his own plea without his being examined under S. 342 and the record has not been prepared according to law, the conviction cannot be sustained. AIR 1951 All 410, Rel. on. (Para 2)

Anno: Cri. P. C., S. 263, N. 6; S. 342 N. 3.

Assistant Advocate-General, for Opposite Party.

Case referred to:

('51) AIR (38) 1951 All 410: (1950 All L J 529) (Pr 2)

ORDER.: The accused was summarily tried for an offence under Sections 89 & 177 of the Municipal Act by the City Magistrate Srinagar and sentenced to pay a fine of Rs. 2/-. The allegation against him was that he had created an oven which was obnoxious to public health. He was ordered to remove the oven within fifteen days, failing which he was further ordered to pay Rs. 2/- per day as long as the oven was not removed. Against his conviction and sentence, the accused went in revision to the learned Sessions Judge, who has made the present reference with the submission that the order of the Magistrate whereby the accused was convicted and sentenced be quashed. The learned Sessions Judge has submitted that the record has not been prepared according to law and and has on this ground recommended the setting aside of the conviction.

(2) I agree with the learned Sessions Judge. But there is yet one more point which has escaped the notice of the Sessions Judge. The accused has been convicted merely on his own plea of guilt. But he has not been examined under Section 342, Criminal P.C., which is mandatory provision so far as the procedure to be followed in criminal cases is concerned. This procedure of examining the accused so as to enable him to explain any circumstances appearing against him has to be followed even in summary cases. In 'Sukhdeo Singh v. State', AIR (38) 1951 All 410, it has been held that:

> "A trying Magistrate, who omits to record the statements of the accused as nearly as possible in the words used by him by this omission, prevents the appellate or the revisional Court from examining whether he has or whether he has not correctly interpreted that statement. A Magistrate cannot be permitted to follow such a course. It is, therefore, of the utmost importance that the procedure prescribed by S. 243, Criminal P. C., should be strictly and literally followed and that any departure from it should not be lightly ignored.
>
> "The provisions of Sections 242 and 243 apply to summary trial by reason of S. 262, Criminal P.C. Hence, where in a summary trial of the accused for an offence under S. 112, Railways Act. The Magistrate while explaining the particulars of the offence to the accused does not state that accused had fraudulent intention to defraud the Railways administration and the accused admits the commission of the offence but the record of plea merely shows that the 'accused pleads guilty to the charge' there is sufficient compliance with S. 263 (g) read with S. 243 and therefore a conviction based on such plea cannot be sustained."

I am in respectful agreement with the enunciation of law made in this authority. I, therefore, accept this reference and while quashing the conviction of the accused, order that the case be remanded to the trial Court for re-trial.

K.S. *Reference accepted.*

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BOARD OF JUDICIAL ADVISERS

NIAMAT ULLAH, PRESIDENT; SHIAM KRISHNA DAR AND SIR IQBAL AHMED MEMBERS

Satar Mir, Appellant v. State.

Criminal Appeal No. 3 of 1951, D/- 11-6-51.

Penal Code (1860), S. 302 — Evidence of murder — Motive, how far relevant.

Where in a trial for murder, there is direct evidence of a reliable character no question of motive can arise. This is, of course, subject to the consideration that the absence of motive may throw doubt on the truth of the direct evidence but if making all allowances for it, the direct evidence can be trusted, the question of motive presents little difficulty.

Hence the mere fact that the motive alleged by the prosecution is inadequate is not in itself a ground for not convicting the accused. (Para 8)

Anno : Penal Code, S. 300 N. 42.

Pt. Raghunath Vashnavi, Advocate as amicus curiae; Assistant Advocate-General, for the State.

CHOWDHARY NIAMAT ULLAH, PRESIDENT: This is an appeal by one Satar Mir who was convicted by the Sessions Judge Jammu, for offences under Ss. 302, 307 and 397, R. P. C and sentenced to life imprisonment. His appeal to the High Court was dismissed. On the recommendation of the Board, leave to appeal to His Highness was granted, the High Court having previously refused such leave.

(2) The story for the prosecution presents some unusual features which induced the Board to entertain the appeal for a careful scrutiny of the evidence and the circumstances of the case.

(3) It appears that Lalman (P.W. 4) owns a Water Mill at Shonsh, Police Station Doda, which has been mentioned in the evidence as "Garrat". He had allowed three brothers Habib, Ahmad and Sultan to work it for their own benefit without any liability to pay rent therefor. Sometime late at night between the 16th and 17th Jeth 2006, two of them, namely, Habib and Ahamdoo, were murdered outright and the third, Sultan, received serious injuries which left him in a state of unconsciousness. It seems that the assailant or assailants took him to be dead and left him in that condition. This tragedy happened in the single room in the Garrat which used to be occupied by the three brothers at night. The occurrence was not discovered till about the noon of the following day when Mst. Fazli (P.W. 3) the mother of the victims arrived at the Garrat and found her sons in the condition already stated. A blood-stained hoe was found lying nearby. According to her evidence Sultan was alive but in an unconscious state (Be-hal). He did not utter anything at that time. She managed to send one Ahmad Lone (P.W. 7) to Lalman, the proprietor of the Garrat, to inform him of the tragedy. Lalman immediately sent word to Amarchand Nambardar (P. W. 6) and the Chowkidar Vid Lal (P.W. 5) conveying the news brought by Ahmad Lone. They immediately arrived on the scene of occurrence. Amarchand endeavoured to help Sultan recover consciousness by pursuading him to take a little milk. He succeeded in his effort and Sultan was able to speak in a few moments. He said that a Mir of Ladhwana had caused the death of his brothers and injuries to him. Thereupon Lalman and Vid Lal Chowkidar proceeded to make the first information report. The Police Station was at a distance of about 17-18 miles and it was not till the 18th Chet that the first information report was recorded. This document is a combination of a written information addressed to the Deputy Inspector, Police Station Doda, in the handwriting of one Hans Raj who figures as an attesting witness together with another person who likewise attested it. Underneath this written information appears the statement of Lalman in which it is stated that Ahamdoo and Habib who were his tenants were murdered at his Garrat and their brother, Sultan, had been seriously wounded. He went on to state that according to Sultan a certain Mir of Ladhwana, whose name was not known, had committed the murders and caused injuries to him (Sultan). At a further description it was stated that the assailant had worn some black clothing made of Patoo. At the end of Lalman's statement there is an obscure passage in which it is stated that enquiry had been made in the presence of the Lambardar, Amarchand, and the Chowkidar and "the statements are appended hereto". It is not stated whether these are the statements of the Lambardar and Chowkidar or the substance of what Sultan had stated in their presence. No such statements were referred to in the Courts below and the point does not seem to be of any importance.

(4) In the meantime further disclosures were made at the Garrat and it transpired that the accused Satar Mir who hailed from Ladhawana was staying in the cattle shed of one Teju (P.W. 9) with some cattle which he was taking to some place. Teju's evidence shows that the accused asked him for some accommodation for himself and his cattle and that as his cattle shed was vacant he allowed him to occupy it. On receipt of this information Amarchand and two other Chowkidars, Vid Lal and Rahman, went to Teju and asked him to accompany them to the Garrat. They also took with them the accused who was there, saying that men were wanted for a "watch" (Pehra Dena Hai). The real object of Amarchand and the Chowkidar was to have the accused identified by Sultan.

(4a) When the accused appeared face to face before Sultan the latter identified him as the assailant. Thereupon the accused attempted to run away but was immediately caught and tied with a rope so as to prevent his escape. He is said to have then confessed his guilt.

(5) Sub-Inspector Mela Ram arrived on the scene on the 19th. The distance between the Police Station and the Garrat is 17 to 18 miles and no undue delay seems to have occurred in the commencement of the investigation. He prepared the usual plan of the scene of occurrence but it was not till the 27th Chet that the house of the accused was searched, and some utensils and other articles of domestic and personal use were taken possession of. They were identified as the property of the deceased and Sultan. Charge under S. 397, R.P.C. relates to these articles which, according to the prosecu-

tion, the accused had taken possession of after he murdered the two brothers and caused injuries to the 3rd. The charge under S. 307 is in respect of the injuries received by Sultan. The one under S. 302, of course, relates to the murders of Habib and Ahmad.

(6) In view of the confession made by the accused before the arrival of the Police one would have expected that the investigating officer would produce the accused for a confessional statement being recorded under S. 164, Criminal P. C. This was not done. The omission would have thrown doubt on the story that the accused had made a confession in the presence of the Lambardar and others before the arrival of the Police; but all doubt is set at rest by the fact that in his statement before the Sessions Judge, while retracting his confession made before the Magistrate, the accused admitted that he had made a confession to Amarchand and others but accounted for it on the plea that he had been tied up by them and hence he confessed. He had made a confession before the Committing Magistrate in the course of his statement under S. 342, Criminal P. C. on the 17th Har, 2007, fully three months after the occurrence. In retracting it before the Sessions Judge he stated that he had made it because of threats held out by the Police. He was at that time not in the custody of the Police and there is no reason to suppose that the Police, who made no attempt to extort a confession and have it recorded under S. 164, Criminal P. C. in the course of investigation, threatened him at or about the time when the accused made his statement in the course of the enquiry before the Magistrate. Nor is there any reason to think that the accused was tied with a rope by Amarchand and others to extort a confession. It is more probable that he was so secured as he had attempted to run away as is stated by the witnesses for the prosecution in jurisdiction of his being tied up with a rope.

(7) A retracted confession is always a source of anxiety to the Courts and where a confession is made and recorded under S. 164, Criminal P. C. while the accused was in the custody of the Police and which is subsequently retracted, little value is rightly attached to it. In the present case the position is quite different as already mentioned. The confession before the Magistrate was made after the accused had been in the Jail lock-up for a considerable length of time. He knew that he nad previously made a confession before Amar Chand and others and stuck to it subsequently. At the trial, where he had legal advice, he retracted it. He did not deny the fact that he had made a confession on two occasions but accounted for his conduct in the one case by alleging ill-treatment on the part of Amarchand and others and in the other by alleging threats held out by the Police. His allegations as regards the circumstances in which he had made the two confessions are not supported by any evidence nor do the probabilities of the case support those allegations. On the contrary, there is overwhelming evidence which has been believed by the two Courts below and the Board find no reason to differ from them after a careful examination of all the circumstances revealed by it and the probabilities of the case in so far as they bear on the voluntary character of the confessions.

(8) The unusual features of the case to which reference has been made earlier are: (1) The motive alleged by the prosecution is said to be inadequate and (2) that one single individual could not have caused injuries to no less than three persons, which proved fatal in the case of two and nearly so in the case of the third. The Board have given anxious consideration to both these aspects of the case. The evidence of Sultan (P. W. 2) together with the confession of the accused which, if believed, disposes of the question of motive altogether. Where there is direct evidence of a reliable character no question of motive can arise. This is, of course, subject to the consideration that the absence of motive may throw doubt on the truth of the direct evidence, but if making all allowances for it the direct evidence can be trusted the question of motive presents little difficulty. Human nature being what it is a man's passion may be aroused at times by some very trifling circumstance, particularly, where his mind suffers from some sort of temporary abnormality, (of course, not amounting to insanity). Cases frequently occur where in a momentary fit of passion a person whose mind is so constituted as to be enraged by something which would make little impression on the mind of another commits a serious offence which he afterwards sincerely repents. What is said to have happened in the present case is that the accused, who suffered from the pangs of hunger and who had first tried another Garrat for a small quantity of flour, arrived at Lalman's Garrat where he obtained a small quantity of flour for two annas (or four annas as mentioned at one place in the evidence) from the three brothers. He had asked for more but his request was not acceded to. He cooked a loaf of bread which did not satisfy his hunger. After taking his frugal meal in the evening he slept in the room occupied by the three brothers. He seems to have nourished a grievance and brooded over his own life and that of the other three who had a large quantity of flour in their possession. The evidence does not make it clear but it seems likely that some mild altercation had taken place between the two. Even apart from it, it is conceivable that the accused felt more keenly than he should have done, the refusal of the three brothers to give him more flour. On the whole, the Board are not satisfied that the motive alleged in the present case is so inadequate as to justify a total rejection of the evidence of Sultan and the accused's own confession deposed to by a number of witnesses whose veracity is not open to challenge nor has it been challenged on any reasonable ground.

(9) As regards the improbability arising from the fact that the accused single handed caused such injuries to three persons as to cause the death of two and almost fatal injuries to the third, it should be borne in mind that after taking his meal the accused slept in the room occupied by the three brothers. At one stage of the argument it was suggested that the room was too small to afford accommodation to no less than four persons but it was ascertained from a piece of evidence on the record that the room is 21 x 9 and thereupon the learned counsel did not press this contention. There was no light in the room; the accused had picked up a hoe which was lying on the spot and attacked his sleeping victims. It may be that

the attack on the first victim was likely to have aroused the other two, but it is equally likely that before they realized what was happening he knocked down the remaining two in quick succession. According to the post mortem report the injuries which caused the death of Habib were on his head and face; similarly the injuries received by Ahmad were on the upper part of the body including head and face. Sultan received two injuries one near his left ear and the other near his right eye. It is clear that all the three received their injuries in a lying posture or while they were getting up. The Board are of opinion that the fact that the accused caused all these injuries with a hoe is not so improbable as to make the case for the prosecution doubtful to any appreciable degree.

(10) It was suggested that the recovery of the articles from the house of the accussed on a search made after several days is worthy of no consideration as the same might have been planted. If the case for prosecution had rested wholly or even mainly on such recovery the Board would have paused to make a more thorough examination of this part of the case, but as they are of opinion that the charge of murder has been established, they do not consider it worthwhile to adopt that course. The sentence of life imprisonment for the offence of murder would cover lesser sentences for other offences and it is needless to consider how far the recovery of the articles from the house of the accused can be due to the same having been planted in his house for the purpose of securing additional evidence to support the charge of murder.

(11) In the result, the Board are satisfied that the Sessions Judge and the High Court rightly arrived at the conclusions at which they did and humbly advise His Highness to dismiss the appeal.

K.S. Appeal dismissed.

A. I. R. 1952 Jammu & Kashmir 24

JANKI NATH WAZIR C. J. AND SHAHMIRI J.

Garibu and others, Appellants v. Bhagat Lakhshami Narain, Respondent.

Civil Second Appeal No. 45 of 2006, D/- 14-1-1952.

(a) Civil P. C. (1908), S. 100 — That a person had been in adverse possession of property and had acquired mortgagee right by prescription is finding of fact. (Para 4)

Anno : Civil P. C., Ss. 100-101 N. 36.

(b) Civil P. C. (1908), S. 100 — Concurrent findings of fact — Interference with.

It is true that concurrent findings of facts are binding on the second appellate Court and cannot be challenged in second appeal but when they are based wholly upon surmises or conjectures without any positive evidence to support them, they can be set aside in second appeal. (Para 4)

Anno : Civil P. C., Ss. 100 and 101 N. 54.

(c) Limitation Act (1908), Art. 144 — Adverse possession — Burden of proof — Nature of evidence.

It is a fundamental principle of law that when the question of acquisition of title by adverse possession has to be determined, clear and definite evidence relating to different points of time should be adduced by the person who asserts that his possession has been adverse for a statutory period and he has thus acquired title by prescription. (Para 6)

Anno: Limitation Act, Articles 142 and 144 N. 87, 96.

(d) Evidence Act (1872), S. 114 — Defendant in possession need not prove his title — Plaintiff who is seeking possession has to prove his title to it — Defendant has prima facie title against all the world except the true owner. (Para 9)

Anno : Evidence Act, S. 114 N. 26.

L. N. Sharma, for Appellants; D. N. Mahajan, for Respondent.

WAZIR C. J.: This is defendant's second appeal and arises out of a suit instituted by plaintiff Lakhshami Narain for possession of a house and the adjoining vacant land situate in Mohalla Gandoo Ki Chhawani, Jammu. The case for the plaintiff, as disclosed by the plaint, was that he was the brother of one Bishen Dass and is his legal heir. L. Bishen Dass had acquired mortgagee rights by virtue of adverse possession over the land in dispute and the defendants without any right or title are in possession of the property in dispute. Hence the suit for possession.

(2) The defendant resisted the suit on the ground that they had inherited the land from one Lassue and are the owners of the property mentioned in the plaint. The plaintiff has thus no right to possession.

The trial Court of City Judge, Jammu, struck two important issues; (1) Had the possession of Bishen Dass over the property in dispute become adverse? (2). Is the plaintiff a legal heir of Bishen Dass? The trial Court found both the issues in favour of the plaintiff and decreed his suit. On appeal the learned District Judge affirmed the findings arrived at by the trial Court and dismissed the defendant's appeal. The defendants have come up in further appeal to this Court.

It is necessary to give the facts in detail which have given rise to this controversy between the parties. Nihal Chand and Hardial secured a mortgage with possession of the property in dispute on 4th of Besakh, 1974, from one Lassu Doom for Rs. 70/-. The mortgage deed was executed on that date and was registered on 19th Besakh 1974. A rent note was simultaneously executed by the mortgagor in favour of the mortgagees. On 29th of Jeth, 1975, Nihal Chand and Hardial mortgagees received Rs. 90/- from Bishen Dass and made an endorsement on the rent note stating therein that they have received the mortgage money from Bishen Dass and the mortgage deed be returned to the mortgagor. By virtue of this rent note L. Bishen Dass is alleged to have stepped into the shoes of the mortgagees and completed his title as a mortgagee by prescription. On 2nd Jeth, 2002, a suit was brought by L. Bishen Dass against Mst. Mani, her husband Thoru and their son Sangara for ejectment from the property in dispute. The suit was dismissed. He filed appeals before the District

Judge and the High Court but was unsuccessful. Bishen Dass died leaving no issue and Lakhshami Narain, the present plaintiff claiming to be his legal heir, brought the present suit out of which this appeal has arisen.

(3) The sole question for consideration in this 2nd appeal is whether adverse possession of L. Bishen Dass over the property in dispute has been established. The Courts below have held that the plaintiff has proved the adverse possession of his predecessor-in-interest who acquired mortgagee rights by virtue of prescription.

(4) A preliminary objection has been raised on behalf of the respondent that both the Courts below have concurrently held that Bishen Dass has been in adverse possession of the property in dispute and had acquired mortgagee rights by prescription. This being a finding of fact is conclusive in second appeal. It is true that concurrent findings of facts are binding on this Court and cannot be challenged in second appeal but when the findings of fact are based wholly upon surmises or conjectures without any positive evidence to support them, they can be set aside in second appeal. In this case it is contended on behalf of the appellants that there is no evidence to support the finding arrived at by the Courts below in regard to the adverse possession of Bishen Dass over the property in dispute. We have been taken through the evidence and we find that the contention of the appellant's counsel is correct. The plaintiff had to show that from S. 1975 to 1987 the plaintiff's predecessor in interest remained in adverse possession over the property in dispute and thus perfected his inchoate title of a mortgagee. There is no satisfactory evidence produced to show that L. Bishen Dass ever was in possession of the property after the rent note was endorsed in his favour by the original mortgagees. The Courts below have been impressed by the evidence of one Tek Chand who resides in the neighbourhood of the property in dispute. He has stated that the property belonged to L. Bishen Dass and the defendants were his tenants. A suit was filed by Bishen Dass against the present tenants for ejectment and in that suit it was held that the relationship of landlord and tenant was not established and the suit was dismissed. In face of that finding in the suit which was between the same parties the evidence of Tek Chand has no weight.

(5) Another fact which appears to have influenced the Courts below is that in an execution application, Sant Singh versus Pheru, the judgment-debtor Pheru filed written objection that he had no property and from this fact inference is being drawn that Pheru had no property and he was holding possession of the propetry in dispute on behalf of Bishen Dass. It may be pointed out that Pheru's admission that he had no property would not in any way lead to the inference that the property in dispute was in the possession of Bishen Dass.

(6) It has been further remarked by the learned District Judge in his judgment that:

"Jaswant Singh, plaintiff's witness has been produced who is a Record-keeper of the Municipality and he states that a notice to Bishen Dass was issued by the municipality for a site situated in Gandu Ki Chhawani. From the record produced in the Court and from the oral evidence it is fully proved that Bishen Dass acquired the rights of mortgagee of the property in dispute. Although the mortgage deed was not registered yet he remained in possession of the mortgaged property for more than twelve years and was letting it off during this period and as such he had full rights of mortgagee by lapse of time."

It is clear how the learned District Judge has drawn the inference from the notice issued to Bishen Dass in regard to a certain property in Gandu Ki Chhawani that the property in dispute was in the possession of Bishen Dass. There is not an iota of evidence to show that Bishen Dass has ever given the property on rent or realized any rent from any tenant during the period of 1975 to 1987. The finding of the learned District Judge that Bishen Dass had acquired full rights of mortgagee by lapse of time is, therefore, based on no evidence at all.

(6a) It is a fundamental principle of law that when the question of acquisition of title by adverse possession has to be determined, clear and definite evidence relating to different points of time should be adduced by the person who asserts that his possession has been adverse for a statutory period and he has thus acquired title by prescription. In this case no evidence has been adduced to show that Bishen Dass ever realized rent from the tenants after the rent note was endorsed in his favour by the mortgagees.

(7) Moreover, there is another circumstance which goes to show that Bishen Dass never asserted his rights as a mortgagee. From the endorsement on the rent note it appears that the mortgage deed had to be returned to the mortgagor. If Bishen Dass wanted to step into the shoes of the mortgagees he would have retained the mortgage deed in his own possession and would not have allowed the mortgagee to mention in the endorsement that it would be returned to the mortgagor. The learned counsel for the respondent has not been able to explain as to why it was stated in the endorsement that the mortgage deed should be returned to the mortgagor when the person in whose favour the endorsement was made wanted to exercise the rights of mortgagees himself.

(8) It has been contended on behalf of the appellants that the plaintiff has not been able to establish that the property in dispute is the same as is alleged to have been mortgaged in the year 1974. We have examined the boundaries given in the plaint and the boundaries which are mentioned in the mortgage deed. We find that the boundaries in the plaint are quite different from the boundaries given in the mortgage deed. No satisfactory explanation is forthcoming as to why the boundaries of the properties are different. It has been suggested by the counsel for the respondent that on account of lapse of time the boundaries have changed. It was for the plaintiff respondent to prove that the boundaries given in the mortgage deed have changed into the boundaries as given in the plaint. No effort seems to have been made to establish the identity of the property. There is the statement of a person residing in the neighbourhood but we find that that statement is so vague and indefinite that it does not establish satisfactorily the identity of the property in dispute.

(9) Lastly it is contended by the respondent's counsel that the defendant appellants have not been able to show that they are the heirs of Lassu and are thus the owners of the property. It is not necessary for the defendants to prove their title to the property. They are already in possession of the property and it is the plaintiff who is to prove the title to the property before he can get possession of it. The defendants are already in possession and, therefore, prima facie, they have a good title against all but the true owner.

(10) Having given our best consideration to the facts and circumstances of the present case, we are satisfied that the plaintiff has failed to establish the plea of adverse possession set up by him over the property in dispute. We, therefore, allow the appeal, set aside the decree passed by the Courts below and dismiss the plaintiff's suit with costs throughout.

R.G.D. Appeal allowed.

A. I. R. 1952 Jammu and Kashmir 26

JIA LAL KILAM, J.

Amir Chand v. Lok Nath.

Criminal Misc. Appln. No. 99 of 2008, D/- 10-1-1952.

(a) Penal Code (1860), S. 420 — Ingredients of offence — False representation to accused's knowledge at time of making it must be proved.

The main ingredients of an offence of cheating are that there should be deception of a person so as to fraudulently or dishonestly induce that person to deliver any property to any person or to consent that any person shall retain any property or intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. From this it follows that a wilful misrepresentation of a definite fact with intent to defraud would be cheating. Along with this, it has to be shown that the representation made was false to the accused's knowledge at the time when it was made. An act would not come within the definition of cheating if the representation has turned out to be untrue at a future date. (Para 4)

Where the accused made a representation to the complainant that he would supply labour and in pursuance thereof he got two sums of money at different times as an advance but ultimately failed to act according to the representation and the complainant did not allege anything more than this, the act would not come within the definition of cheating. (Para 5)

Anno: Penal Code, S. 420 N. 3, 4, 6 & 11.

(b) Criminal P. C. (1898), S. 561A — To prevent abuse of the process of Court.

Where a prosecution has been started in the subordinate Court on a complaint in respect of the offence of cheating but the facts disclosed in the case merely show that it is a case of breach of contract which can be redressed in civil Court, the High Court would, in exercise of its inherent powers under S. 561A, Criminal P. C., quash the proceedings in order to prevent the abuse of the process of the Court. AIR 1938 Mad 129, Foll. (Prs 8, 10)

Anno: Cr. P. C., S. 561A N. 4.

K. D. Raina, for Appellant; Ch. Inder Dass, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras ('38) AIR 1938 Mad 129: (39 Cri L J 261) (Pr 6)

ORDER: This is an application under S. 561-A of the Criminal P. C. submitted by one Amir Chand for quashing criminal proceedings pending against him in the Court of the Sub-Judge Magistrate Jammu. The complaint against him has been brought on the following facts:

(2) That Amir Chand entered into an agreement with the complainant Lok Nath who is a partner of Magotra & Kohli Forest Lessees whereby he stipulated to supply labour to the complainant The allegation in the complaint further is that the accused made a false representation that he possessed means to supply labour and took Rs. 1000/- as an advance for this purpose. In addition to this, he took a further sum of Rs. 1000/- as advance on 18th Baisakh 2008 and also Rs. 70/-. The complaint further runs that the accused did not possess any labour nor had he ever any intention to supply it. He simply wanted to cheat the complainant of Rs. 2,070/- thereby causing wrongful gain to himself and wrongful loss to the complainant. A preliminary statement was taken by the Magistrate in which the complainant simply stated that the accused had stipulated to supply labour in pursuance of which he took Rs. 2,070/-, and that the accused did not supply labour as stipulated by him. The trial Court passed an order that there were grounds to suspect that an offence under S. 420, R. P. C., had been committed and ordered bailable warrants to be issued against the accused. The accused has now submitted an application under S. 561-A, Criminal P. C., praying for the quashing of the said proceedings.

(3) In his application under S. 561-A Criminal P. C., the accused has stated that the facts reveal a case of a civil nature but they have been forced to take a criminal complexion so as to make a criminal Court as an instrument for the recovery of debt or damages for breach of contract. His prayer is that the proceedings against him be quashed.

(4) That the accused had entered into an agreement with the complainant for supply of labour is admitted by the accused. The simple question which therefore arises is as to whether the present case is one of a breach of contract or cheating? The main ingredients of an offence of cheating are that there should be deception of a person so as to fraudulently or dishonestly induce that person to deliver any property to any person or to consent that any person shall retain any property or intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. From this it follows that a wilful misrepresentation of a definite fact with intent to defraud would be cheating. Along with this, it has to be shown that the representation made was false to the accused's knowledge at the time when it was

made. An act would not come within the definition of cheating if the representation has turned out to be untrue at a future date.

(5) From this discussion it would become clear that if it can be established that the accused made a false representation at the time when he entered into an agreement with the complainant, and induced him to part with money, then certainly this act would be cheating. But if the accused changed his mind at a later date and did not fulfil the contract, it would not be cheating at all. Now in the case before us we find that the accused had made a representation that he would supply labour to the complainant and in pursuance thereof he got two items of money at two different times. The complainant also in his statement does not say anything more than that. I think this would not come within the definition of cheating.

(6) In 'CHIDAMBARAM CHETTIAR v. SHANMUGAM PILLAI', AIR 1938 Mad 129, it has been held that

"In the world of business, things are often done which are betrayals of confidence and deceptions which arouse moral indignation, but are nevertheless civil wrongs which can be righted by civil Courts and are not crimes which can be punished by criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create a new crime in order to compel men to confirm to a high standard of probity in business dealings or to force them to execute their promises."

(7) As regards powers of the High Court, in the same judgment we find

"Inherent jurisdiction of this Court to pass an order necessary to prevent abuse of the process of any Court is not questioned and indeed has been clearly expressed in S. 561-A Criminal P. C. Since prevention is always better than cure, the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crime, is one that must never be shirked."

(8) I am in respectful agreement with the enunciation of law made in the above ruling. In the present case all that I can find is a breach of contract which can by no stretch of imagination be brought within the definition of cheating. If the complainant thinks that a promise has been broken, the civil Courts are there to help him. But in no case shall the complainant be allowed to make use of a criminal Court for redressing civil wrongs.

(9) Even the trial Court which issued processes was not sure that an offence of cheating was disclosed by facts, as becomes evident from the words: "that there is suspicion to hold that an offence under S. 420, R. P. C. has been committed" which are used in the order of that trial Court issuing process.

(10) I, therefore, in exercise of the inherent powers vested in this Court order that the criminal proceedings pending against the defendant in this Court of the Sub-Judge Magistrate Jammu be quashed. I further order that the bail bonds (if any) of the accused be discharged and he be set at liberty.

K.S. Proceedings quashed.

A. I. R. 1952 Jammu & Kashmir 27

JANKI NATH WAZIR C. J.

Hari Chand, Plaintiff-Applicant v. Karam Chand, Defendant-Opposite Party.

Civil Revn. No. 62 of 2008, D/- 24-1-1952.

Provincial Small Cause Courts Act (1887), S. 25 — Interference on question of fact.

Normally the finding of fact recorded by the trial Court is not interfered with in revision but when the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a finding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision. (Para 4)

Anno: Prov. Small Cause Courts Act, S. 25 N. 11.

B. L. Suri, for Applicant; G. L. Gupta, for Opposite Party.

ORDER: This is a revision application and arises out of a suit instituted by Karam Chand plaintiff against Hari Chand for the recovery of Rs. 98/- as arrears of rent up to the end of Magh 2007 in the Court of City Judge exercising powers of Judge Small Causes.

(2) The plaintiff's case was that the defendant agreed to pay rent at the rate of Rs. 18/- p.m. for some rooms which he had taken of the house in possession of the plaintiff. A rent note was executed by the defendant in favour of the plaintiff and the tenancy commenced from 1st Besakh 2006. The defendant admitted that he had taken some rooms on rent from the plaintiff but has denied the rate of rent to be Rs. 18/- p.m. The defendant pleaded that by an oral agreement the plaintiff agreed to charge only Rs. 10 and not Rs. 18/- as mentioned in the rent note. It was further pleaded that some electric and water charges have been paid by the defendant in excess of his share and Rs. 25/4/- are due from the plaintiff in that behalf.

(3) The trial Court of Judge, Small Causes, found that there was no variation in the terms of the rent note and decreed the plaintiff's suit in full.

(4) The defendant has come up in revision to this Court and it is argued on his behalf that the trial Court has not considered the documentary and oral evidence produced by him to show that the rate of rent was only Rs. 10/- and not Rs. 18/- p.m. as mentioned in the rent note. Normally the finding of fact recorded by the trial Court is not interfered with in revision but when the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a finding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision. In this case the defendant has produced Diwan Chand Sub-Inspector of Police who has stated that the plaintiff agreed to charge only Rs. 10/- p.m. from the defendant instead of Rs. 18/-. This oral evidence is further supported by a money order receipt produced by the defendant in which the defendant has written that he has paid rent at the rate of Rs. 10/- and has sent by Money order Rs. 100/- to the plaintiff. The plaintiff has accepted the amount as the rent of the

house at the rate of Rs. 10/- p.m. This Money order receipt fully supports the oral evidence of Diwan Chand, the defendant's witness. The trial Court has not considered the Money order receipt which has been produced by the defendant in which it is definitely stated that the rent paid by him is at the rate of Rs. 10/- which was accepted by the plaintiff. The plaintiff also admits in the plaint that he has received Rs. 100/- by Money order from the defendant. It is, therefore, abundantly clear that the plaintiff agreed to charge Rs. 10/- from the defendant for the rooms which he has let out to him.

(5) It is contended on behalf of the defendant applicant that the plaintiff had agreed to charge Rs. 10/- from the defendant as the monthly rent from the date of the tenancy but from the written statement filed by the defendant it appears that the oral agreement was entered into on 5th or 6th of Har, 2007, by which the plaintiff agreed to receive Rs. 10/- p.m. which shows that up to the end of Jeth 2007 the defendant is liable to pay at the rate of Rs. 18/- p.m. as agreed to by him in his rent note executed in favour of the plaintiff. Diwan Chand, his own witness, on whom great reliance is placed has stated that he did not know whether the arrears of rent had to be charged at the rate of Rs. 18/- or Rs. 10/- p.m. In these circumstances the defendant is liable to pay rent at the rate of Rs. 18/- p.m. as agreed to in the rent note up to the end of Jeth 2007 and from the 1st of Har the defendant is liable to pay Rs. 10/- p.m. as the rent of the house according to the oral agreement between the parties.

(6) The revision application is, therefore, allowed to this extent that the decretal amount is reduced from Rs. 98/- to Rs. 50/- as the arrears of rent due from the defendant. The parties shall pay and recover costs to the extent of their failure and success.

K.S. Decree modified.

A. I. R. 1952 Jammu & Kashmir 28
JIA LAL KILAM J.

Sant Ram and others, Applicants v. State.

Criminal Misc. Appln. No. 106 of 2008, D/- 4-1-1952.

(a) Criminal P. C. (1898), S. 497 — Granting bail in non-bailable offences — Principles — Duty of police to put up accused for trial as early as possible pointed out.

It is true that the granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not abused. Coming into contact with the prosecution witnesses and exerting undue influence over them will certainly be sufficient for not granting them bail or for cancelling the bail. But at the same time it should be duty of a Court to see that an accused is not locked up or hampered in his defence simply on the ground that an allegation was made against him that he was tampering with the evidence. The general policy of law is to allow bail, rather than to refuse bail. The law presumes an accused person to be innocent till his guilt is proved, and as presumably innocent person he is entitled to every freedom to look after his own case. Extension of concession of bail to an accused gives him better opportunity of looking after his case. But he will certainly lose this privilege in case he misbehaves.

In cases in which death has taken place, a speedy investigation is always called for and such cases should be produced before Courts without any unnecessary loss of time. If investigations are left pending before the police for a long time, the possibility of the witnesses forgetting important facts or their being won over by the other side or the danger of some important evidence being lost cannot be excluded. The accused persons should not be allowed to continue in police custody for an unlimited period of time simply because the police does not produce the challan in time.

(Paras 2, 5)

Anno : Criminal P. C., S. 497 N. 4, 7.

(b) Criminal P. C. (1898), S. 497 — Application for cancellation of bail — Proof of fact that witnesses are being intimidated by accused — Evidence that can be tested by cross examination must be tendered and not affidavit — Criminal P. C. (1898), Ss. 74, 526, 539A.

There are only three sections in the Criminal P. C., namely Ss. 74, 526 and 539A according to which a fact may be got proved by an affidavit. It follows from this that an affidavit not covered by these sections is not legal evidence. In an application for cancellation of bail the fact the witnesses were intimidated by the accused persons ought to be proved by such evidence as can be tested on the touchstone of cross-examination and not by affidavit.

(Para 4)

Anno : Cr. P. C., S. 497 N. 7.

(c) Evidence Act (1872), Sec. 60 — Witness not deposing as to the fact from personal knowledge but stating that it was brought to his notice by another person — Evidence is hearsay. **(Para 3)**

Anno : Evidence Act, S. 60 N. 4.

Suraj Prakash, for Applicants; Assistant Advocate-General, for the State.

ORDER: This application arises out of the following circumstances: As a result of a clash between two groups it is alleged that a death did take place in one group and some grievous hurts were caused to some people in the other group. On 6th Assuj 2008 the police registered two cases: one under S. 302/148/325 and the other under S. 148, R.P.C. against some persons belonging to these two different groups. In the case under S. 148 R.P.C. the accused applicants were arrested on 27th Assuj 2008, and on an application made by them to the Tahsildar Magistrate they are admitted to bail on 29th Assuj 2008. On 8th Katik 2008 an application was submitted by one Matu Ram that the accused persons were misusing their liberty and were intimidating and threatening the prosecution witnesses. A prayer was made that their bail may be cancelled. The Tahsildar Magistrate before whom this application of Matu Ram was presented ordered that evidence in support of the allegation be produced before

him. In this connection two persons by name Gyan Singh and Natha Singh P.Ws. submitted two affidavits in which they stated that they were intimidated and threatened with dire consequence by the accused persons in case they appeared as witnesses against them. The Tahsildar Magistrate further examined the Court Sub-Inspector as a witness. His statement which has been treated by the learned Sessions Judge as corroborative evidence of the affidavits of Gyan Singh and Natha Singh will be soon discussed. The accused persons also were given notices of the application submitted by Matu Ram. They too have given counter-affidavits to the effect that the allegations made against them by Matu Ram are baseless and false and that they are not in any way misusing their liberty. The Tehsildar Magistrate believed in the affidavits of Gyan Singh and Natha Singh and ordered cancellation of the bail of the accused persons on 22nd Katik 2008. The accused persons are since then in police custody.

(2) The case, as already seen was registered on 6th Assuj 2008 and since then the challan has not been presented before the Court. I wonder why these cases should have been allowed to hang fire for such an abnormal length of time. I think in cases in which death has taken place, a speedy investigation is always called for and such cases should be produced before Courts without any unnecessary loss of time. If investigations are left pending thus before the police for such a long time, the possibility of the witnesses forgetting important facts or their being won over by the other side or the danger of some important evidence being lost cannot be excluded. If the police were more vigilant of their duties and had produced the challan in proper Court without any delay, perhaps no necessity of putting such an application as the present one would have arisen. But I do not think that the accused persons should have been allowed to continue in police custody for an unlimited period of time simply because the police does not produce the challan in time.

(3) After the Tehsildar Magistrate had cancelled their bail, the accused persons approached the Court of Sessions. The learned Sessions Judge relied upon the affidavits of Natha Singh and Gyan Singh and rejected their application submitted under Section 498 of the Criminal P. C. The learned Sessions Judge has also noted in his order that these affidavits are supported by the statement of the Court Sub-Inspector. I have gone through the statement of the Court Sub-Inspector and I find that he does not state any thing from his personal knowledge. All that he says is that the fact that the witnesses were being intimidated was brought to his notice. This evidence is hearsay and I wonder how it was treated by the learned Sessions Judge as corroborative.

(4) Then the only material before us is the two affidavits on behalf of the applicant and a number of affidavits on behalf of the accused persons. Now in this behalf I would like to note down that when the Tehsildar Magistrate had ordered the production of evidence before him, it was necessary for him to have taken down the statements of witnesses produced on either side and he should have given each party an opportunity of cross-examining them. This the Tehsildar Magistrate has not done. On the contrary he has treated the affidavits as legal evidence. So far as I have been able to lay my hands upon, there are only three sections in the Criminal P. C., i.e., Ss. 74, 526 and 539-A according to which a fact may be got proved by an affidavit. It follows from this that an affidavit if not covered by these sections is not legal evidence. Now in this case the fact that the witnesses were intimidated by the accused persons ought to have been proved by such evidence as could be tested on the touchestone of cross-examination.

(5) Apart from this, all that we have got in this case is an "oath" against an "oath". No reasons have been given by the Courts below as to why the affidavits on behalf of the accused persons should not be believed. It appears to me that the accused persons belonging to the other group having been involved in an accusation of death have not been released on bail and it must certainly have caused a heart-burning to the members of that group that the accused belonging to the other group against whom the accusation is of an offence of a lesser gravity should have been released on bail, and hence their anxiety to see that the accused in the other group were also placed in custody. It is true that the granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not abused. Coming into contact with the prosecution witnesses and exerting undue influence over them will certainly be sufficient for not granting them bail or for cancelling the bail. But at the same time it should be duty of a Court to see that an accused is not locked up or hampered in his defence simply on the ground that an allegation was made against him that he was tampering with the evidence. The general policy of law is to allow bail, rather than to refuse bail. The law presumes an accused person to be innocent till his guilt is proved, and as a presumably innocent person he is entitled to every freedom to look after his own case. Extension of concession of bail to an accused gives him better opportunity of looking after his case. But he will certainly lose this privilege in case he misbehaves.

(6) Now in this case I have found that the allegations that the accused were abusing their liberty have not been substantiated; besides that we have just seen that they have been now in the lock-up for the last two months, and even now the challan has not been produced before the Court. I, therefore, order that the accused persons mentioned in the application may be released on bail of Rs. 1000/-. (Rs. one thousand only) with one surety each. They must also execute personal bonds to the extent of the same amount. On furnishing their bail bonds and personal bonds, they shall be released forthwith. The bail shall be given to the satisfaction of the Tehsildar Magistrate Ranbirsinghpura.

R.G.D.

Order accordingly.

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BOARD OF JUDICIAL ADVISERS

NIAMAT ULLAH, PRESIDENT; SHIAM KRISHNA DAR AND SIR IQBAL AHMED MEMBERS

Sh. Raghunath Devi, Appellant v. Kh. Samad Gashru, Respondent.

Civil Appeal No. 2 of 1950, D/- 18-6-51.

(a) Civil P. C. (1908), O. 8, R. 3 — In pleadings gift denied in a general way but no specific plea taken in regard to attestation of the deed — At the trial execution of deed fully proved but evidence silent in regard to its attestation — Party held was not bound to call evidence in regard to attestation and rejection of the deed on this ground held not justified. **(Para 5)**

Anno: C. P. C., O. 8, R. 3 N. 1.

(b) Civil P. C. (1908), S. 100 — Question whether document is sham.

The question whether a particular transaction is a sham one or not, is a question of fact and in such a matter the Board is bound by the concurrent findings of fact arrived at by the Courts below. (Para 7)

Anno: C. P. C., S. 100 N. 54.

Lok Nath Sharma, for Appellant; L. Nanak Chand, for Respondent.

SHIAM KRISHNA DAR MEMBER: This appeal raises a question as to the validity of a deed of gift dated Magh 10, 1994, executed by Dewan Chet Ram, the Respondent No. 2, in favour of his wife, the appellant.

(2) The subject-matter of the gift is 419 Kannals 13 Marlas of joint land situated in Rakh Asham, Tesil Raramulla. Notwithsanding the gift the respondent No. 2, continued in possession of the property and on Har 17, 2002, he executed a usufructuary mortgage of the property which was the subject-matter of the gift in favour of the respondent No. 1 which later on was compulsorily registered at the instance of respondent No. 1.

(3) Since then the two titles, one under the gift and the other under the mortgage, have been in controversy. The appellant first initiated mutation proceedings and obtained a mutation order in her favour and subsequently instituted a suit for a declaration of title and for an injunction restraining the respondents from interfering with her rights and possession which suit, however, was dismissed for default of prosecution. The respondent No. 1 in his turn, instituted a suit to enforce the mortgage out of which this appeal has arisen, in which the validity of both the gift and of the mortgage came in controversy again. Both the Courts below have found in favour of the mortgage and against the gift. The validity of the mortgage has been concluded by the findings of fact arrived at by the Courts below and does not arise for the consideration of the Board. The validity of the gift, however, still remains to be finally determined in this appeal.

(4) The Courts below have avoided the gift upon 2 grounds firstly that it is not proved that the document was executed and attested as required by law and, secondly that it was a sham transaction and was never intended to be acted upon.

(5) The gift was made by a registered instrument which, on the face of it, bears the attestation of two witnesses. In the pleadings the gift was denied in a general way but no specific plea was taken in regard to the attestation of the instrument. At the trial the scribe of the deed and one attesting witness was called who fully proved the execution of the document but the evidence was silent in regard to its attestation. The Courts below reiying upon the absence of any evidence in regard to the attestation of the deed have held its attestation not proved. But as no specific plea was taken in the pleadings in regard to the attestation of the document, the appellant was not bound to call any evidence in regard to this attestation and the rejection of the deed of gift on this ground might not be justified.

(6) But the other finding of the Courts below, namely that the gift represents a sham transaction presents a more serious difficulty in the way of the appellant. The gift was made by husband in favour of his wife. Notwithstanding the gift the husband remained in possession and enjoyment of the property and after 8 years' possession made a mortgage of it for a valuable consideration on a representation that he was its full owner and, as such, competent to mortgage. The wife did not obtain mutation till after the mortgage was made.

(7) Relying upon these facts the Courts below have come to the conclusion that the transaction was a sham one not intended to be acted upon. The motive of the transaction is somewhat obscure and immediate possession of the property is not necessary for the validity of a gift. But the question whether a particular transaction is a sham one or not, is a question of fact and in such a matter the Board is bound by the concurrent findings of fact arrived at by the Courts below.

(8) In order to escape this difficulty the appellant contends that in the pleadings no specific plea was taken in regard to the sham nature of the transaction and no definite issue was raised about it and a finding of fact based upon a matter which has not been the subject of a pleading and of a proper issue is not binding upon the Board. It is not absolutely clear that there is any real variation between the pleading and the proof in this case. But in any case, the appellant had sufficient notice of this attack upon the gift and she made no complaint in the Courts below that she had been taken by surprise and it is not possible at this stage of the proceedings to accept this contention and either to set aside the finding of the Courts below absolutely or to remit the case for fresh investigation.

(9) The Board will, therefore, humbly advise His Highness to dismiss this appeal with costs.

D. H. Appeal dismissed.

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JANKI NATH WAZIR C. J. AND JIA LAL KILAM J.

Hiranand Dobey, Appellant v. Jyoti Ram Goel, Respondent.

First Appeal No. 6 of 2008, D/- 1st Chait 2008.

(a) Limitation Act (1908) Art. 182—Revival of application.

The question whether an application is only ancillary to a previous application or is a fresh application depends upon the circumstances of each case and is to be decided in reference to the order passed thereon. Where a previous application has been stayed or consigned to records and the second application is similar in scope to the previous one, it will be treated as an ancillary application in continuation of

the previous one. If, however the character of the application is changed and fresh reliefs are sought by means of a subsequent application, then it may come within the purview of a fresh application. Similarly if the proceedings on the prior application have come to an end, then the subsequent application would certainly be a fresh application. Where the order that had been passed was simply that "the decree-holder is not present, nor is his Mukhtar present. Let this application be consigned to records. The Attachment of the house shall remain intact", this would show abundantly that the execution proceedings were not brought to a close, but that they were kept pending. If the subsequent application presented contains only this much that the previous application was simply consigned to records and that the attachment of the house was kept intact and the prayer made is that the attached house be put on sale and this is exactly what was prayed for before there is not a fresh relief sought but all that is prayed for is a revival of a previous application. AIR 1950 Cal 12, disting. (Para 5)

Anno: Lim. Act Art. 182 N. 143.

(b) Indian Independence (Legal Proceedings) Order (1947) S. 4 — Execution pending on appointed day — Jurisdiction of Court to continue execution.

Before partition there was a reciprocity between the Courts in British India and the State Courts and the decrees passed by the State Courts were executed by the Courts in British India and 'vice versa.' At the time when the decree was passed by the Lyallpur Court, it was executable by the State Court. But after the partition which came about in the year 2004 Lyallpur Court became a foreign Court. If the proceedings are initiated for the first time on a day after 15th August 1947 in an Indian Court for the execution of a decree passed by a foreign Court, at a time when that foreign court was not a foreign Court, the execution could not be taken out in that Court. But if the execution proceedings were pending on the appointed day i.e. 15th August 1947 in any Court in India, that Court would continue to have jurisdiction in that matter irrespective of the fact that certain new relations had come into existence between India and Pakistan. Where the execution application was consigned to records for default of appearance on 19th Bhadon 2004, that is to say, much after 15th August 1947 (31st Sawan 2004) the Court at Jammu would continue to have jurisdiction in the matter irrespective of the fact as to whether Lyallpur Court became a foreign court or not. AIR 1951 Simla 255, Rel. on. (Paras 3, 4)

(c) Civil P. C. (1908) S. 11 — Execution proceedings — Point that subsequent execution application was not a fresh application finally decided by executing Court — Point cannot be re-opened in a subsequent application. (Para 3)

Anno: C. P. C., S. 11 N. 23.

Ram Lal Anand, for Appellant; G. L. Gupta, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.
('50) AIR 1950 Cal 12: (53 Cal WN 817) 6
('51) AIR 1951 Simla 255: (ILR (1951) Punj 111) 3

JIA LAL KILAM J.: This first appeal arises out of the following facts:

(2) Firm Beli Ram Barkat Ram secured a money decree from a Lyallpur Court (Now in Pakistan) against Jyoti Ram Goel on 30th August 1937. On an own application by the decree-holder the Lyallpur Court transferred the decree to the Court of the District Judge at Jammu for execution. The District Judge forwarded the execution application which was presented to him on 1st Assuj 1994 to the Court of the Senior Sub-Judge for disposal according to law. A house belonging to the Judgment debtor was attached in pursuance of the execution of this decree; one Pandit Ram Chand Dobey preferred an objection petition against the attachment of the said house but his petition was dismissed by the executing Court. Pt Ram Chand Dobey then brought a regular suit seeking a declaration to the effect that he was the owner of the said house. This suit was decreed on 19th Sawan 1997. During the pendency of the suit, the execution proceedings started by the decree holder remained pending and nothing solid was done in the case. On 5th Sawan 1997 when the execution application came up before the learned Judge, the counsel appearing on behalf of the decree-holder was not present and the Court ordered that the execution application be consigned to the records, but added that the attachment of the house be kept intact. Meanwhile the decree holder appealed against the judgment which gave a declaration of ownership to Ram Chand Dobey.

The Decree holder was successful and on a second appeal the High Court by its order dated 12th Magh 1999 affirmed the decree of the lower appellate court. On 24th Bhadon 2000 the decree-holder again took out execution. For long the Judgment debtor could not be served and Pandit Ram Chand Dobey too in the meanwhile preferred an application for the stay of the execution proceedings on the ground that he had made an application for special leave to appeal to the Board of Judicial Advisers. All this lengthened the proceedings inordinately. After all the execution proceedings came up for hearing before the then Senior Sub-Judge (Mr. M. S. Naqishbandi) who disposed of the objection of the Judgment debtor regarding the second execution application being without time as untenable. The auction proceedings of the house which was previously attached were started, but soon after the execution application of 24th Bhadon 2000 too was consigned to records on 19th Bhadon 2004 for default of the decree holder's presence, but it was provided in this order as well that the house would continue to remain under attachment.

In the meanwhile the decree holders sold the decree to Lt. Col. Hiranand who presented the present execution application on 18th Bhadon 2007. It is obvious that the present execution application was submitted nine days after the statutory period of three years. To this execution application two main objections have been taken by the judgment debtor. Firstly that the execution is beyond time & secondly

that the execution cannot proceed because it is of a decree of a foreign court.

(3) Before proceeding further, it may be stated here that before partition there was a reciprocity between the courts in British India and the state courts and the decrees passed by the state courts were executed by the courts in British India and 'vice versa'. At the time when the decree was passed by the Lyallpur court, it was executable by the state courts. But after the partition which came about in the year 2004 Lyallpur court became a foreign court. Taking this stand on this ground the judgment debtor pressed his objection that the decree which is now being sought to be executed on 18th Bhadon 2007 being a decree of a Court which had now become a foreign Court, it cannot be executed at this stage. The Senior Subordinate Judge before whom this fresh execution application was submitted considered both these objections, and arrived at the finding that the present execution application is to be treated as within time, since Lt. Col. Hiranand the purchaser of the decree was on active service for two or three years before the present execution application was submitted.

But he adds that the execution application submitted immediately before the present one was barred by time. That application was preferred on 24th Bhadon 2000 whereas we have already seen that the order of consignment to records of the previous execution proceeding was passed on 5th Sawan 1997. On this ground the learned Senior Sub-Judge held that the second execution applcation dated 24th Bhadon 2000 was barred by time. This point had already been considered by Mr. M. S. Naqishbandi Senior Sub-Judge on 10th Jeth 2003 who had held that the execution application was not dismissed on 5th Sawan 1997, but was simply consigned to records because of the absence of the counsel of the decree holder. Relying upon a ruling of this court, Mr. Naqishbandi held that this order was not an order of dismissal of the execution application but a mere routine order passed on account of the absence of the counsel of the decree holder. He, therefore, held that the subsequent application made on 24-8-2000 is not a fresh application so as to come within the mischief of the relevant provisions of the Limitation Act.

This point having been finally decided on 10th Jeth 2003 it could not be reopened now. Besides that we think that the order passed on 10th Jeth 2003 by Mr. Naqishbandi holding the second execution application as within time was quite in accordance with law and therefore we do not agree with the learned Senior Sub-Judge that the second application was not within time. We, therefore, hold that both the second and the present execution application are quite within time. But then remains the question as to what would be the effect of the fact that the court passing the decree is now a foreign court. No argument is necessary to come to the conclusion that if a decree is at this time passed by a court in Pakistan, it cannot be executed in a Jammu court for the simple reason that all those courts are foreign so far as our courts are concerned. But the question in the present case is not so simple. At the time when the decree was passed by the Lyallpur court, it could very easily be executed in the courts of our state. But the present execution application has been submitted in the year 2007 when Pakistan was a settled fact and the Lyallpur court was quite a foreign one.

This question has in a general manner come up before some Indian High courts. The learned counsel for the respondent has drawn our attention to 'SAID-UL-HAMID v. FEDERAL INDIAN INSURANCE CO. LTD., NEW DELHI' AIR 1951 Simla 255. In this judgment it has been held that a court in the Union of India has no jurisdiction to entertain an application for execution after 15-8-1947 of a decree passed by a court in Pakistan before that date. In this case a decree was passed against a resident of New Delhi by a Lahore court on 27-6-1947. The decree was transferred to the court of the District Judge at Delhi for execution but the decree holder made default in appearance on 11th October 1947 and the execution proceedings were dismissed for default. The decree-holder thereafter sued out execution on 15th April 1948. But it was held that the decree could not be executed.

In this judgment reference has been made to Art. 4 of the Indian Independence (Legal Proceedings) Order 1947, which runs as follows:

> "Notwithstanding the creation of certain new provinces and the transfer of certain territories from the province of Assam to the province of East Bengal by the Indian Independence Act 1947—
>
> (i) All proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court in the Province of Bengal the Punjab or Assam) shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day."

(4) Now according to this Article proceedings pending immediately before the "the appointed day" in any civil court in India shall be continued in that court as if the said Act had not been passed and such court will be presumed to have jurisdiction in those proceedings. From this it would follow that if a proceeding was pending in a court on the appointed day, i.e., 15th August 1947, then the court will continue to have jurisdiction in that matter. In the case before us we find that the execution application was consigned to records for default of appearance on 19th Bhadon 2004, that is to say, much after 15th August 1947 (31st Sawan 2004) which was the appointed day. Therefore the court at Jammu would continue to have jurisdiction in the matter irrespective of the fact as to whether Lyallpur court became a foreign court or not.

We are in respectful agreement with his Lordship's view that if the proceedings are initiated for the first time on a day after 15th August 1947 in an Indian court for the execution of a decree passed by a foreign court, at a time when that foreign court was not a foreign court, the execution could not be taken out in that court. But if the execution proceedings were pending on the appointed day i.e., 15th August 1947 in any court in India, that court would continue to have jurisdiction in that matter irrespective of the fact that certain new relations had come into existence between India and Pakistan. Therefore the Jammu court had full jurisdiction in the matter. But the respondent's learned counsel, taking his stand on

the Simla ruling has argued that even though the Jammu court had jurisdiction to continue proceedings in the matter even after 15-8-1947 (31st Sawan 2004) yet since the execution proceedings were consigned to records on 19th Bhadon 2004 the present execution application presented in 2007 cannot be entertained since it aims at the execution of a foreign decree.

He has relied on the following passage in the judgment of the Simla High Court:

"Between 11-10-1947 and 15-4-1948 there were no proceedings pending in the court of the Senior Sub-Judge at Delhi. On 15-4-48 the decree-holder made an application for the execution of the decree within the meaning of O. 21 Rr. 10 and 11 Civil P. C. The proceedings therefore in which objection as to the jurisdiction of Delhi court was raised were initiated for the first time on 15-4-1948 and could not be said to be pending immediately before the appointed day in the court of the Senior Sub-Judge at Delhi."

It may again be pointed out here that the decree was passed by the Lahore court on 27-6-1947. The execution was dismissed by the Delhi court on 11-10-1947.

(5) But the question in the case before us is as to whether the execution application submitted in 2007 is a fresh application for the execution of the decree passed by the Lyallpur court or whether it is in continuation of the previously instituted application which was pending on 15th August 1947. It goes without saying that the question whether an application is only ancillary to a previous application or is a fresh application depends upon the circumstances of each case and is to be decided in reference to the orders passed thereon. It has been held by almost all the Indian High Courts including this court that where a previous application has been stayed or consigned to records and the second application is similar in scope to the previous one, it will be treated as an ancillary application in continuation of the previous one. If, however, the character of the application is changed and fresh reliefs are sought by means of a subsequent application then it may come within the purview of a fresh application.

Similarly if the proceedings on the prior application have come to an end, then the subsequent application would certainly be a fresh application. Let us now apply these principles to the facts of the present case. The order that has been passed on 19th Bhadon 2004 is simply that

"the decree-holder is not present, nor is his Mukhtar present. Let this application be consigned to records. The attachment of the house shall remain intact."

This would show abundantly that the execution proceedings were not brought to a close, but that they were kept pending. The subsequent application presented on 18th Bhadon 2007 contains only this much that the previous application was simply consigned to records and that the attachment of the house was kept intact. The prayer made was that the attached house be put on sale. This is exactly what was prayed for before. This would show that there is not a fresh relief sought but all that was prayed for was a revival of a previous application which also contained a prayer for the same relief as sought now.

(6) The respondent's learned counsel has made reference to 'DOMINION OF INDIA v. HIRALAL' AIR 1950 Cal 12 in which it has been held that:

"From after 15th August 1947 the Jamalpur court has become, in relation to the court of small Causes, Calcutta, a foreign court and the judgment on the basis of which a decree had been passed on 15th May 1947 by that Court is a foreign judgment. Accordingly provisions of S. 13 read with S. 44-A will be attracted. Pakistan is not a reciprocating territory and hence the court of Small Causes cannot entertain an application for starting proceedings in execution proceedings in execution of such decree after 15th August 1947."

With this view we are in respectful agreement, but it cannot be applicable to the facts of this case as the execution was sued out in the State Court much earlier than 15th August 1947.

(7) We, therefore, are of the opinion that since these execution proceedings were pending in the court of the Senior Sub-Judge Jammu on 15th August 1947, the Jammu Court will continue to have jurisdiction in this matter. We further find that the subsequent execution application of the year 2007 was merely an ancillary application, in continuation of the previous application and that the execution proceedings were at no time brought to a close and were pending all along. We, therefore, accept this appeal and set aside the order of the Senior Sub-Judge Jammu and order that the decree is executable. In view of the important point of the law involved in the case, we leave the parties to bear their own costs in this Court.

B/D.H. Appeal allowed.

A. I. R. 1952 JAMMU AND KASHMIR 33

WAZIR, C. J.

Ghulam Mohd. Sheikh, Applicant v. Ahad Sheikh and others, Non-Applicants.

Civil Revn. No. 89 of 2008, D/- 6-6-1952.

(a) Civil P. C. (1908), O. 1, R. 10, O. 23, Rr. 1 and 3 — Partition suit — Compromise between plaintiff and one set of defendants — Decree in terms of compromise and withdrawal by plaintiff — Court has no jurisdiction to transfer other set of contesting defendants as plaintiffs.

Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff it will simply dismiss the suit of the plaintiff which he has withdrawn, but there are some exceptions to this rule as have been recognised in partition suits, account suits and partnership suits. In these suits if the plaintiff intends to withdraw from the suit the Court may not dismiss the suit merely because the plaintiff has withdrawn from the suit; it will transpose the defendants who have vested rights as plaintiffs and the plaintiffs as defendants in the suit and allow the suit to proceed. The Court has to see whether or not the defendant will be prejudiced if the plaintiff is allowed to withdraw from the suit. The test to be applied is whether the defendant will be able to seek his remedy in a separate suit without any legal impediments. Mere inconvenience to a defendant would not justify the Court to disallow the plaintiff from withdrawing the suit. (Para 5)

Where in a suit for partition and accounts the Court passes a decree in terms of the compromise entered into between the plaintiff and some of the defendants, the Court has no jurisdiction thereafter to transpose the remaining defendants who also claim a share in the property, as plaintiffs and the plaintiff as defendant. It is open to these defendants to file a separate suit to enforce their rights. (Para 5)

Anno: C. P. C., O. 1, R. 10, N. 34, 35 and 36; O. 23, R. 1, N. 1; O. 23, R. 3, N. 20.

(b) Civil P. C. (1908), O. 23, R. 1 — Suit for partition — Preliminary decree — Plaintiff withdrawing from suit — Suit cannot be dismissed.

In a suit for partition if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. AIR 1934 Mad 337, Ref. (Para 5)

Anno: C. P. C., O. 23, R. 1, N. 10

L. N. Sharma, Sunder Lal, H. N. Dhar and Nanak Chand, for Applicant; J. L. Chaudhari, for Non-Applicants.

REFERENCE Para

('34) AIR 1934 Mad 337: (57 Mad 892) 5

ORDER: These are two revision applications against the order of the learned District Judge dated 9th Phagan, 2008 and arise out of the following circumstances.

(2) Gulam Mohd. Sheikh filed a suit for partition and for rendition of accounts and he further alleged that relinquishment deed executed by him on 23rd of Sawan, 2005, was fraudulently obtained and may be cancelled. The suit was brought against his two brothers, Ahmad Sheikh, defendant No. 1 and Rehman Sheikh, defendant No. 2 and his sisters, Maala Bibi, defendant No. 3 and Asha Bibi, defendant No. 4. The defendants Nos. 1 and 2 resisted the suit on the ground that the plaintiff had no right left in the property as he had relinquished his share by the deed which he executed on 23rd Sawan 2005. Defendants Nos. 3 and 4 claimed a share in the property left by their father. On 26th Magh 2008 defendants Nos. 3 and 4 made an application before the trial court stating therein that defendants Nos. 1 and 2 intended to compromise the suit with the plaintiff and their names should be transposed as plaintiffs in the case. On 29th Magh 2008, the plaintiff put in an application before the court for the withdrawal of the suit. The application of the plaintiff and of the defendants 3 and 4 came up for hearing on the 7th of Phagan, 2008, and the court heard the parties at length in regard to their respective applications. On the 9th Phagan the court accepted the application of the plaintiff and passed a decree in terms of the compromise arrived at between the plaintiff on the one hand and defendants Nos. 1 and 2 on the other. It was remarked by the trial court that the decree will not affect the rights of defendants Nos. 3 and 4. The Court ordered that defendants 3 and 4 may be transposed as plaintiffs in the suit and allowed the suit to proceed. Against this order Ahmad Sheikh defendant No. 1 has preferred a revision application and a separate revision application has been filed by the plaintiff. These revision applications will be disposed of by this order.

(3) The counsel for the applicants have drawn my attention to the following remarks of the learned District Judge in his judgment:

"To-day the statements of the plaintiff and defendant Nos. 1 and 2 and the counsel for the defendant Nos. 1 and 2 were recorded on the back of the application, which in fact is a compromise deed, but is styled as an application for the withdrawal of the suit. This alleged withdrawal application is signed by both the plaintiff and the defendants Nos. 1 and 2. The plaintiff has admitted that the FARKHATI executed by him in favour of the defendants Nos. 1 and 2 was a correct one and that the defendant Nos. 1 and 2 had agreed to pay him Rs. 5000/- as mentioned in First FARKHATI. There is also a stipulation about the transfer of the immoveable property, which is a portion of the suit property.

Therefore it is evident that the plaintiff and the defendants Nos. 1 and 2 have compromised the dispute. As the plaintiff wants to withdraw from the suit and has compromised the dispute with defendants Nos. 1 and 2 and attest it, therefore, the decree in terms of the compromise so far it does not affect the rights of defendants Nos. 3 and 4 is passed in favour of the defendants Nos. 1 and 2 and the plaintiff,"

and has argued that the decree having been passed in the suit filed by the plaintiff it was not open to the court to transpose defendants Nos. 3 and 4 as plaintiffs in the same suit which was pending but had been decreed by the trial Court.

(4) There appears to be a good deal of force in this contention. The suit in which the defendants Nos. 3 and 4 made an application that they may be transposed as the plaintiffs was decided by the trial Court by passing a decree in terms of the compromise and that Court had no jurisdiction after the decree was passed in the suit to proceed in the same suit by transposing defendants as plaintiffs and the plaintiffs as defendants.

(5) The next question for consideration is whether or not the trial Court could permit the plaintiff to withdraw from a partition suit in which defendants Nos. 3 and 4 had also claimed some share in the property in dispute. Ordinarily when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff it will simply dismiss the suit of the plaintiff which he has withdrawn but there are some exceptions to this rule as have been recognised in partition suits, account suits and partnership suits. In these suits, if the plaintiff intends to withdraw from the suit the Court may not dismiss the suit merely because the plaintiff has withdrawn from the suit, it will transpose the defendants who have vested rights as plaintiffs and the plaintiffs as defendants in the suit and allow the suit to proceed. The Court has to see whether or not the defendant will be prejudiced if the plaintiff is allowed to withdraw from the suit. In other words, the Court has to determine that if the plaintiff is allowed to withdraw from the suit whether the defendant will be able to seek his remedy in a separate suit without any legal impediments. This is the test which has to be applied by the Court in a partition, partnership or ac-

count suit in determining whether the plaintiff should or should not be allowed to withdraw from the suit. Mere inconvenience to a defendant would not justify the Court to disallow the plaintiff from withdrawing the suit. Applying this test to the present suit, it will be clear that the defendants have their independent right in the property left by their father. There is no legal impediment to defendants Nos. 3 and 4 to claim their share in the property left by their father by a separate suit. It is true that they may have to incur slight additional expense in bringing a separate suit but that by itself would not justify the Court from withholding the permission to the plaintiff to withdraw from the suit. In suits for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. The same view has been taken in 'SEETHAI ACHI v. MEYAPPA CHETTIAR', AIR 1934 Mad 337. I am, therefore, of opinion that the District Judge was not correct in transposing the defendants Nos. 3 and 4 as plaintiffs in the suit. The defendants Nos. 3 and 4 can, if they are so advised, file a separate suit for their definite share in the property left by their father.

(6) In these circumstances, I allow these applications and vacate the order of the District Judge transposing defendants Nos. 3 and 4 as plaintiffs in the suit. In view of the peculiar circumstances of this case I leave the parties to bear their own costs in this Court.

B/K.S. Order set aside.

A. I. R. 1952 JAMMU AND KASHMIR 35
KILAM, J.

Ramzan Khan, Appellant v. Ghani Sufi and another, Respondents.

Second Appeal No. 51 of 2008, D/- 17 Har 2009.

T. P. Act (1882), Ss. 116 and 106. — Tenant holding over without consent of lessor — Dispossession by landlord — Subsequent obtaining of possession — Effect — He can be ejected without any notice.

A tenant holding over after the expiry of the period of his lease without the consent of the lessor will be treated as a tenant by sufferance and can be sued for ejectment at any time without any previous notice to quit. If such a tenant is dispossessed by the lessor and after some days he again obtains possession, the original lease will not be renewed and he can be ejected without any notice to quit as required by S. 106: AIR 1935 Pat 271, Rel. on.; Chitaley's T. P. Act, S. 116, N. 2, Ref. (Para 2)

Anno: T. P. Act S. 116, N. 2, 13, S. 106, N. 32.

L. N Sharma, for Appellant; Sunder Lal, for Respondents.

REFERENCE Para

('35) AIR 1935 Pat 271: (155 Ind Cas 367) 1

JUDGMENT: This is a defendant's second appeal against a judgment of the learned District Judge, Kashmir, dated 14th Poh 2008, whereby the judgment of the trial court decreeing the plaintiff's suit for ejectment was upheld. The main point urged in this appeal is that the decree of ejectment passed by the trial court was against law, because the notice to quit purporting to have been issued under section 106 of the Transfer of Property Act by the plaintiff to the defendant was invalid, as it was not a fifteen days notice nor did it expire with the end of the month of tenancy. In the present case, the lease was for a period of one year. After the expiry of this period, the defendant tenant continued to remain in possession of the leased property. This would have been treated as a month to month lease terminable on the part of either the lessor or the lessee by 15 days' notice expiring with the month of the tenancy, provided that the lessee had remained in possession of the property with the consent of the lessor. Reference may in this connection be made to 'RAMSUNDER TEWARI v. DULHIN BATASO KUER', AIR 1935 Pat 271. If the consent of the lessor is not there, then the lessee will be treated only as a tenant by sufferance. Such a lessee can be sued for ejectment at any time without any previous notice or demand of possession.

(2) Now, in this case, we have no evidence, direct or circumstantial, that the defendant-lessee remained in possession of the leased property after the termination of the lease with the consent of the lessor. On the contrary, we have it in the written statement of the defendant-lessee that he was turned out from possession of the shop in the year 2004. He remained out of possession for a number of months when, according to him, he was again put into possession by some people. This makes it evident that the tenancy, if at all is subsisted after the original period of lease had expired, by any means such as the tenant holding over, came to an end in the year 2004, when admittedly the defendant-leassee was turned out of possession of the shop. If after a lapse of some months, he is again put in possession by some people, the original lease cannot be revised. The law on the subject has been summarised in Note No. 2 to section 116 of 'Chitaley's Transfer of Property Act' in the following words that

> "there must be a continuity of possession by the lessee without any break at the determination of the original lease. If after the determination of the lease, the lessee is dispossessed by the lessor and is afterwards admitted on the property by him, there can be no renewal of the old lease."

Such being the position, the question that the notice to quit was not a 15 days' notice and did not expire with the end of the month of tenancy, is not at all relevant and can be no defence against ejectment.

(3) Under these circumstances, I find no force in this second appeal which is rejected with costs. The learned counsel appearing on behalf of the defendant-appellant made a request that he may be granted leave to file a Letters Patent Appeal. I do not find that the point of law involved in this appeal is in any way obscure or difficult and as such leave cannot be granted.

A/K.S. Appeal dismissed.

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JIA LAL KILAM AND SHAHMIRI JJ.

Atta Mohammad, Appellant v. *State.*

Criminal First Appeal No. 55 of 2006; Cri. Ref. No. 10 of 2006 and Cri. Revn. No. 58 of 2007, D/- 15 Katik 2007.

(a) Penal Code (1860), S. 302 — Sentence — Discretion — How to use — (Criminal P. C. (1898), S. 367 (5)).

The sentence under S. 302, Penal Code is no doubt in the discretion of the Sessions Judge, but he has to exercise that discretion in accordance with the well known judicial principles and not quite arbitrarily in violent disregard of those principles. [Para 3]

Anno. Penal Code, S. 302 N. 2, Pt. 6; Criminal P. C., S. 367, N. 14.

(b) Criminal P. C. (1898), Ss. 164, 364 and 533 — J. and K. General Criminal Rules, Ch. XII R. 10 — Non-compliance with provisions of Ss. 164 and 364 and of instructions under R. 10 — Irregularity is of substance and not curable under S. 533.

Where the confessional statements are not recorded in the manner required by Ss. 164 and 364 Criminal P. C., there is no "Memorandum of Enquiry" entered before the statements were recorded as required by R. 10 of Ch. XII, General Criminal Rules, the statements are recorded in a narrative form and the questions put to the accused and the answers given by them have not been entered and the memorandum containing the requisite certificate at the end of the statement under S. 164 is not recorded, the defects are defects of substance and not being formal defects are not curable under S. 533, Criminal P C. The defects render the statements inadmissible in evidence and even extrinsic evidence of the Magistrate that he had complied with such requirement does not remedy the defect. A. I. R. 1937 Nag. 220, *Rel. on*; A. I. R. 1939 Rang. 219, *Referred.* [Para 6]

Anno. Criminal P. C., S. 164, N. 39; S. 364, N. 10; S. 533, N. 4, 5.

(c) Evidence Act (1872), S. 133 — Evidence of accomplice — Corroboration by retracted confession — Validity.

A retracted confession is in itself a tainted piece of evidence and stands in need of corroboration and it is absolutely unsafe to seek corroboration of the accomplice evidence by retracted confession: 3 J. & K. L. R. 102 and 3 J. & K. L R. 172, *Rel. on.* [Para 6]

Anno. Evi. Act, S. 133, N. 4, 6, 11.

(d) Evidence Act (1872), Ss. 30, 133 — Approver's statement not implicating himself — Necessity of corroboration — (Criminal P. C. (1898), S. 337).

Though an accomplice is not an incompetent witness it is unsafe to base a conviction on his statement unless it is corroborated in material particulars. Where the approver states himself to be a mere by-stander and throws the whole guilt on other accused, his evidence stands in a greater need of corroboration than that of an accomplice who admits to have taken an appreciable part in the perpetration of the offence. [Para 7]

Anno. Evi. Act, S. 30, N. 8; S. 133, N. 5; Cri. P. C., S. 337, N. 17.

(e) Criminal P. C. (1898), Ss. 364, 533 — Discovery of axe and statement of accused that he committed murder with it — No question put to accused about discovery or his statement in examination under S. 364 — Magistrate cannot use the discovery and the statement in convicting accused. [Para 8]

Anno. Cri. P. C., S. 364, N. 10; S. 533, N. 4.

(f) Evidence Act (1872), S. 27 — Accused in police custody — Statement by, leading to discovery of an axe — Accused further stating that he killed deceased with the axe — Portion of the statement only leading to discovery of axe is admissible — Statement as to killing is not admissible. A. I. R. 1947 P. C. 67, *Rel. on; Case law referred.* [Para 8]

Anno. Evi. Act, S. 27, N. 7, Pt. 3.

A. N. Bhan, Amicus Curiæ — for Appellant; *Assistant Advocate-General, for the State.*

REFERENCES : Courtwar/Chronological / Paras

('36) A I R 1936 P C 253 (2) : (37 Cri L J 897). 6
('47) A I R 1947 P C 67 : (48 Cri L J 533) 8
('34) A I R 1934 All 81 : (35 Cri L J 385 FB) 6
('32) 56 Bom 172 : A I R 1932 Bom 286 : (33 Cri L J 396) 8
3 J & K L R 102 6
3 J & K L R 172 6
('29) 10 Lah 283 : A I R 1929 Lah 344 : (30 Cri L J 414 FB) 8
('37) A I R 1937 Mad 618 : I L R (1937) Mad 695 : (38 Cri L J 1027 FB). 8
('37) A I R 1937 Nag 220 : (38 Cri L J 642). 6
('39) A I R 1939 Rang 219 : (40 Cri L J 691). 6

Shahmiri J. — This judgment shall dispose of (1) an appeal preferred by Atta Moh'd against an order of the Sessions Judge, Kashmir, convicting the appellant under S. 302 read with S. 109, R. P. C. and sentencing him to one year's rigorous imprisonment, (2) a reference submitted by the Sessions Judge of Kashmir under S. 374, Criminal P. C. seeking confirmation of the sentence of life imprisonment passed by him on Ghulam Moh'd accused under S. 302, R. P. C., and (3) a revision application filed by the Assistant Advocate General for enhancement of the sentence of both Ghulam Moh'd and Atta Moh'd convicts.

[2] The prosecution story, as disclosed by Moh'd Hussain approver, briefly is as follows :

The approver Moh'd Hussain, the two accused and Mukhta Lone deceased belonged to village Naloosa Reshwari, Bijhama. The approver owed Rs. 100 to Mukhta Lone deceased. He wanted to clear off this debt by borrowing the amount from Ghulam Moh'd accused. On 8th Sawan 2006 he went to Ghulam Moh'd and asked him to advance a sum of Rs. 100 to him so that he might repay the loan to Mukhta Lone. Ghulam Moh'd, accused thereupon, suggested to the approver that they should do away with Mukhta Lone and then he would not have to pay the money to him. The approver then asked Ghulam Moh'd the reason why he wanted to do so. Ghulam Moh'd replied that some days back he had cut some trees in the vicinity of the deceased whereupon he had picked up a row with him saying that the whole village would have to pay compensation to the Forest Department for this illicit felling. Ghulam Moh'd then asked the approver to fetch Atta Moh'd, who had also a grievance against the deceased, for consultation. Mukhta Lone deceased enjoyed a easement of passage on the land of Atta Moh'd and this caused an irritation to the latter. The approver brought Atta Moh'd and then all three of them took an oath on the Holy Book that they would kill Mukhta Lone. It was decided that on the following evening they would go to the cattle shed of Mukhta Lone where he used to pass the night and which was at some distance outside the village Abadi and there perpetrate the foul deed. It is

also said that when these three were having consultation together Imam Din Chowkidar, P. W. 3, passed that way and saw them sitting together.

On the following evening according to the plan the approver and Ghulam Moh'd accused came to the Chinar tree from where they had to go together to the cattle shed. Atta Moh'd did not come in time and the two decided to go to the cattle shed by themselves. Ghulam Moh'd accused was armed with an axe. When their feet steps were heard near the cattle shed, Mukhta Lone deceased enquired who it was, Ghulam Moh'd accused replied that his brother-in-law, Ghulam Nabi had gone to fetch fuel and as he had been rather late in his return, he had come to look for him lest he might be attacked by some bear. While they were thus talking together the deceased bent low to kindle fire and Ghulam Moh'd accused lifted his axe and struck one blow with it on the head of the deceased with the result that he died instantaneously and his brain came out of his head. They returned to the Chinar tree and on the way Ghulam Moh'd cleaned the axe. Atta Moh'd had in the meantime come to the Chinar tree. Ghulam Moh'd told him that he had come rather late and the thing had been done. Ghulam Moh'd further said that he would now go to Baramulla to create alibi. On the next morning Ghaffar Lone P. W. 6, the son of the deceased, went to the cattle shed, as usual, carrying tea for his father and there he saw that his father had been done to death. He came back and informed his uncle, Abdulla Lone P. W. 5. Abdullah Lone submitted a written report to the Police Bijhama in which he stated that his brother Mukhta Lone had been murdered and that he had got an axe wound in his head. He added that the whole village was against his brother Mukhta Lone on account of some dispute over the land of Ghaffar Sheikh, son of Salam Sheikh, which was in possession of the deceased. He thought his brother had been murdered on account of the conspiracy of all the people in the village. The case having been registered the police took up the investigation and the post mortem examination of the dead body of Mukhta Lone was performed by Dr. Jaggan Nath P.W. 1 on 10th Sawon 2006. The doctor found an oblique compound fracture of the skull through the left parietal and occipital bone with dimension of 8" x 3" x 4" pretruding through which a portion of lacerated cerebrum was detected. There was also an interior injury corresponding to the exterior injury on the base of the skull. The cause of death in the opinion of the doctor was the penetrating injury on the brain substance as a result of some direct violence on the vault of the skull. The injury appeared to have been caused by a sharp-edged weapon. The police had also found an axe on the spot which they had sent along with the dead body to the medical officer for examination vide Ex. P. C., on the back of Ex. P. C., the doctor recorded his opinion that the injury would be caused by that axe.

[3] We have heard the learned counsel for the parties. The learned Assistant Advocate General in support of his revision application filed with a view to secure enhancement of sentences in respect of both the convicts has contended that the Sessions Judge has acted illegally in awarding a sentence of one year's rigorous imprisonment on Atta Moh'd, whom he has convicted under S. 302 read with S. 109, R. P. C., as he was bound to pass on him the same punishment as is provided for S. 302, R. P. C., i.e., death or if extenuating circumstances were found, lesser penalty of life imprisonment. He has also strenuously argued that if the Sessions Judge was satisfied that Ghulam Moh'd was guilty of the offence of murder in this case under S. 302, R. P. C., he should have passed the sentence of death on him and that the reason that he had given for passing the alternative penalty of life imprisonment were absolutely without any substance. This is what the learned Sessions Judge has said in this respect; "Regarding the punishment we have to take various points into consideration. Mohmad Hussan had gone to borrow money to (?) Ghulam Mohammad. Ghulam Moh'd had suggested that Mukhta Lone should be put an end to. He wanted the help of Mohammad Hussan and Atta Mohammad to accomplish the act. He murdered Mukhta Lone with the help extended to him by Atta Mohammad and Moh'd Hussain. The present is obviously, therefore, a case in which the penalty of death is not warranted." Instead of disclosing any circumstances which would go towards mitigating the crime these remarks clearly put the case of Ghulam Moh'd accused in the worst light and aggravate his offence. It is really surprising that a Sessions Judge who had a long experience in the Judicial Department should have assigned such reasons for awarding the lesser penalty under S. 302, R. P. C. The sentence no doubt is in the discretion of the Sessions Judge, but he has to exercise that discretion in accordance with the well known judicial principles and not quite arbitrarily in violent disregard of those principles. In order to decide this revision application and to see if in this case of the two convicts higher sentences are called for in the interest of justice it is necessary to examine their cases and to ascertain if the offences with which they are charged have been brought home to them. Atta Mohammad convict has also, as already indicated, filed an appeal against his conviction.

[4] The evidence against Ghulam Moh'd convict consists in the main of the testimony of the approver which has already been summarised above. The learned Sessions Judge has sought corroboration of the accomplice evidence by the retracted confession of Atta Moh'd accused and by the discovery of another axe Ex. P. 1 alleged to have been produced by Ghulam Moh'd before the police

on 13th Sawan 2006, and by the evidence of motive. Atta Moh'd simply participated in the conspiracy to murder Mukhta Lone. Both Ghulam Moh'd and Atta Moh'd have pleaded not guilty.

[5] It appears that the police caught hold of both the accused and the approver in the very early stage of the investigation though Ghulam Mohammad accused was not formally arrested till 14th Sawan 2006. It is clear from the statement of Ali Mohammad P. W. 8, the witness for the recovery of the axe Ex. P. 1, that both the accused Ghulam Mohammad and Atta Mohammad were in the hands of the police at least one day before the axe Ex. P. 1, was recovered by the police. The inspector of police Pt. Nand Lal P. W. 22, has not stated how he got information about Gulam Mohammad accused and how his suspicion fell upon him. He says that it was the result of a secret enquiry held by him. The prosecution story, however, is that on 13th Sawan 2006, Ghulam Mohammad told the police that he would produce the axe Ex. P. 1 with which he had killed the deceased before them. Ghulam Mohammad is alleged to have taken the police along with Ali Mohammad P. W. 8 and Ghulam Mohammad Khan zaildar P. W. 9, to a streamlet running near his house and from there he brought out the axe and handed it over to the police. Thereupon the recovery list Ex. P. 1 was prepared by the police in which it was stated that Ghulam Mohammad produced the axe from the water stating that he had killed the deceased with it. On 15th Sawan 2006 the approver and the two accused were produced before Mr. Bharat Bushan, Tehsildar Magistrate First Class, for recording their statements under S. 164, Criminal P. C. The Magistrate, however, recorded their statements on the 16th. In his confessional statement before the Tehsildar Atta Mohammad admitted that the approver came to take him to Ghulam Mohammad and that all three of them met near the land of Ghaffar Sheikh and there Ghulam Mohammad told him that he would kill Mukhta Lone and that he and the approver should help him in the matter. He has also stated therein that Ghulam Mohammad told him that he was cross with the deceased, because he had quarrelled with him in connection with the felling of certain trees. He adds that he agreed and it was decided that the next evening they would meet near some place from where they would go to kill the deceased. The next evening he went to the rendezvous. He was rather late and he found that Ghulam Mohammad had already returned after committing the murder. Ghulam Mohammad also washed the stains on the axe and rebuked him for turning up late. Ghulam Mohammad, however, did not depose anything incriminating against himself in his statement under S. 164. He denied all knowledge of murder. He, however, identified the axe Ex. P. 1, as belonging to Rehman Lone sawyer who had cut his fuel some days before the occurrence. He could not say whether the sawyer had left the axe at his residence or taken away. He added that the police had made him to confess before them by using threats and coercion.

[6] I have looked into the confessional statement recorded by Mr. Bharat Bushan, Tehsildar Magistrate First Class. These have not been recorded in the manner required by Ss. 164 and 364, Criminal P. C. and the instructions contained in the General Criminal rules. There is no "Memorandum of Enquiry" entered before the statements were recorded as required by R. 10 of Chap. XII, General Criminal Rules. The statements have been recorded in a narrative form and the question put to the accused and the answers given by them have not been entered in them as required by S. 364, Criminal P. C. The Magistrate has also failed to record the memorandum containing the requisite certificate at the end of the statements as required by S. 164 Criminal P. C. Mr. Bharat Bushan (P. W. 3) was examined as a witness in this case and has stated that he told the accused that they were not bound to make the statements and that they would be used against them and that he was satisfied that the statements were voluntary. But no question was put to him why he did not comply with the requirements of Ss. 164 and 364, Criminal P. C. and the instructions contained in the General Criminal Rules. While merely formal defects in recording confessional statements may be curable under S. 533, Criminal P. C., it has been held in a number of cases by the Indian High Courts and even by their Lordships of the Privy Council that only formal defects could be cured under S. 533 and not the defects of substance. Failure to record the certificate at the foot of the statement under S. 164, Criminal P. C. or where no attempt has been made by the Magistrate to comply with the requirements of Ss. 164 and 364, Criminal P. C. makes such a statement inadmissible in evidence and even extrinsic evidence of the Magistrate that he had complied with such requirement does not remedy the defect. In this connection the following passage from *Neharoo Mangtu* v *Emperor*, A. I. R 1937 Nag. 220 may be quoted with advantage :

"The practice of allowing defects in the formalities in recording confessions to be cured by the applications of S. 533, Criminal P. C., has been permitted of late years with considerable frequency in the Courts in India and any omissions on the part of Magistrates recording confessions to comply with the formalities laid down in Ss. 164 and 364 of the Code have been allowed to be condoned by the evidence of the Magistrate themselves as witnesses for the prosecution. The practice, and the theory underlying it, is crystallized in a Full Bench judgment of the Allahabad High Court in *Mahomed Ali* v. *Emperor*, A.I.R. 1934 All. 81. This practice has now received a check by a very recent ruling of their Lordships of the Privy Council in *Nazir Ahmed* v. *King-Emperor*, A.I.R. 1936 P. C. 253, where the practice is emphatically condemned, and, by implication, the decision of the Allahabad High Court overruled. as also numerous decisions to the same effect in the Lahore

High Court; the case itself, A.I.R. 1936 P. C. 253 (2), came from Lahore. It was laid down in the matter of constructions that Ss. 164 and 364 must be looked at and construed together and that it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. It was also observed that the practice of allowing Magistrate as witnesses to depose to confessions was inproper and that, where matters could be put on record and would be admissible when so put, there were the strongest reasons of policy for supposing that the Legislature designed that such matters should be available in that form and in no other. We, must hold therefore that the evidence of the Magistrate, Mr. Purankar is, in the circumstances, inadmissible and that the recorded confession is accordingly ineffective."

A reference may also be made in this connection to *King* v. *Saw Min*, A.I.R. 1939 Rang. 219. It is exceedingly surprising that all these defects should have escaped the notice of the Sessions Judge and that instead he should come out with a long panegyric on the regularity and the propriety of these statements. He has laid great stress on the fact that the Magistrate did not record the statements of the accused forthwith and kept them in judicial custody for one day before he took down their statements. The Sessions Judge should have known that no judicial lockup in the real sense of the word could have existed in Bijhana. The formal control of the lockup might have been with the Magistrate but the Magistrate himself admitted that it was the police that exercised the real control over the lockup. In these circumstances the facts that the accused persons were allowed one day to think over the matter does not in any way add to the weight of these statements. I would, therefore, hold that both the statements of Ghulam Moh'd. and Atta Moh'd. recorded by Mr. Bharat Bhusan Tehsildar Magistrate First Class, on 16th Sawan are inadmissible and should be excluded from consideration against the accused persons. But even if these statements were admissible in evidence what value could be attached to them? It is again regrettable that the learned Sessions Judge has failed to take notice of the pronouncements made on the subject by the Indian High Courts generally and by this Court and the Board in particular. He should have known that a retracted confession is in itself a tainted piece of evidence and stands in need of corroboration and that it is absolutely unsafe to seek corroboration of the accomplice evidence by retracted confession. This is what the Hon'ble Board of Judicial Advisers have said about the retracted confession in *Sona Wani* v. *State*, 3 J. & K. L. R. 102:

"It is unsafe to found a conviction on a retracted confession unless it is corroborated in material particulars and the corroboration comes from independent sources. This rule necessarily applies with greater force when a retracted confession is considered against a co-accused. But as against the maker of the confession also the aforesaid rule of purdence cannot be ignored. As compared to the testimony of an accomplice, which is on oath, a retracted confession should require greater corroboration and further, on the principle, that one tainted evidence cannot corroborate another tainted evidence, accomplice evidence ought not to be accepted as corroboration of a retracted confession."

The same rule of caution is laid down in another Board case, *Sayan* v. *State*, 3 J. & K. L. R. 172:

"It is necessary that this (approver's) evidence should be corroborated independently as to material particular. There is also the confession of the appellant himself. But since it had been retracted it must also be corroborated in the same way."

[7] It would thus appear that so far as Atta Moh'd. is concerned there is no evidence against him except that of the approver which remains entirely uncorroborated except in so far as one Imam Din Chowkidar P. W. 13 has been produced to show that he saw the approver and the two accused sitting together one day before the murder. In the first place this evidence does not furnish any corroboration in any material particular so far as the offence of murder or even abetment of murder is concerned. In the second place the person who has given this evidence can in no sense be described as a disinterested witness, as he is a Chowkidar and directly under the control of the police and this fact alone is sufficient to discredit his testimony. Now let me consider the intrinsic merit of the statement of the approver. Does his story ring true? Though an accomplice is not an incompetent witness, it is unsafe to base a conviction on his statement unless it is corroborated in material particulars. Does this approver appear to be a person on whose evidence some reliance can be placed? A bare perusal of his statement shows that he places the whole guilt on Ghulam Moh'd. accused and at no stage does he assign to himself a conspicous part in the plotting or execution of the nefarious crime. He makes Ghulam Moh'd. the moving spirit of the conspiracy and so far as the actual murder is concerned the approver is no worse than a mere bystander. The reason why he joined the conspiracy and that which he imputes to Ghulam Moh'd can hardly be sufficient motive for committing a crime of this character. The evidence of such a man would stand in greater need of corroboration than that of an accomplice who admits to have been taken an appreciable part in the perpetration of the deed. It would thus appear that so far as Atta Moh'd is concerned the prosecution has entirely failed to prove the case against him and he deserves a clear acquittal.

[8] Now let us examine what other evidence is against Ghulam Moh'd. I have already shown that the approver's evidence in this case requires a greater amount of corroboration than in any other such case and that the confessional statement of Atta Moh'd even if it would be held admissible was of little value against the maker himself and of no significance whatsoever against the co-accused Ghulam Moh'd. As I have already indicated the Sessions Judge has made an effort to seek corroboration of the accomplice evidence by the discovery of the axe Ex. P. 1. The Sessions

Judge has in his judgment clearly admitted that the axe Ex. P. 1 was produced by the accused Ghulam Moh'd while he was in the practical custody of the police. He, however, used this discovery of the axe and the statement made by Ghulam Moh'd that he had killed the deceased with it against the accused under S. 27, Evidence Act. I will subsequently show that the Sessions Judge was entirely wrong in using the confessional part of this statement against the accused. But even if he could do so, he has acted in an exceedingly unfair manner and in utter disregard of the rules of procedure in using this discovery and the statement without putting it to the accused in his examination. The record will show that neither the Committing Magistrate nor the Sessions Judge asked any question from the accused if he had produced this axe before the police in the manner in which he is alleged to have done it. No question whatsoever regarding this discovery has been put to the accused. Even the statement made by the accused under S. 164 about the axe referred to above was not put to him, although the Sessions Judge has not hesitated to use it against him.

In the absence of obtaining any explanation from the accused in regard to this discovery even the Learned Assistant Advocate had to concede that the Sessions Judge had conducted the trial in a most unfair manner and that he could not support the conviction. He, however, wanted the case to be remanded for trial. But it is no use doing so. The Assistant Advocate-General made an attempt to show that the recovery in fact had not taken place before the police and that really the accused had in the first instance produced the axe before Ali Moh'd P. W. 8 and Ghulam Moh'd Khan P. W. 9. There are some indications in the statements of Ali Moh'd and Ghulam Moh'd Khan that when the accused produced the axe Ex. P. 1 the police was at some distance from them. But even they did not deny that the accused had been in practical police custody one day before the discovery. On the other hand the evidence of inspector Nand Lal, P. W. 22, and the recovery list Ex. P. L go entirely against these indications. Pt. Nand Lal has clearly admitted in his examination-in-chief before the Sessions Judge that Ex. P. 1 was produced before him by the accused stating that he had killed the deceased with it. Exhibit P. 1 as already indicated, bears this out. The Sessions Judge has treated the recovery as one made before the police and not before person not connected with the police. This being so, the Sessions Judge was entirely wrong in admitting the confessional part of the statement made by the three witnesses Nand Lal, Ali Moh'd and Ghulam Moh'd Khan referred to above. Whatever conflicting views might have been taken by the different High Courts in India in regard to the admissible portion of such statements made by accused persons under S. 27, Evidence Act, the majority view always was that the statement like the one made in this case was entirely inadmissible and should be excluded from consideration against the accused. In studying this point I find that conflict on it had been set entirely at rest by the recent Privy Council ruling reported in *Pulukuri Kottayya* v. *Emperor*, A.I.R. 1947 P. C. 67. This confirms the view taken by the Lahore High Court in *Sukhan* v. *Emperor*, 10 Lah. 283, corresponding to A.I.R. 1929 Lah. 344 (F.B.) and also that in *Ganu Chandra* v. *Emperor*, 56 Bom. 172, corresponding to A. I. R. 1932 Bom. 286 and overrules *Athappa Goundan* v. *Emperor*, A. I. R. 1937 Mad. 618 (F.B.). The pronouncement made by their Lordships of the Privy Council is so important that I cannot forego the temptation of quoting the following two paragraphs therefrom :

"Section 27, which is not artistically worded, provided exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to give in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which related distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of S. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban by the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26 added by S. 27 should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section equivalent to the object produced; the fact discovered embraces the police from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user or the past history of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife, knives were

discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

'High Courts in India have generally taken the view as to the meaning of S. 27 which appeals to their Lordships, and reference may be made particularly to *10 Lah. 253 and 56 Bom. 172* on which the appellants rely and with which their Lordships are in agreement. A contrary view has, however, been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court in *I. L. R. 1937 Mad. 695* where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under S. 27. In that case the Court has to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag which according to the confession had been used in, or were connected with, the commission of the murder and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of the proof. and the other link must be forged in manner allowed by law."

In view of what has been stated above the only piece of corroborative evidence against the accused is that of the discovery of the axe unaccompanied by any confessional statement. Though this discovery cannot be used against the accused because of the failure of the Sessions Judge to discharge his duty properly, it cannot improve the prosecution case if it were so used. It will be seen that this discovery is not free from reasonable suspicion. Originally the police had discovered an axe on the site of the murder. The axe had been sent to the Medical Officer who performed the post mortem examination and he had given his opinion that the wound on the dead body could have been caused by that axe. It appears that the blade of that axe was only 5" long while the injury was 8" long. As the police failed to secure any independant piece of evidence for the purpose of corroborating the approver's evidence it is possible to visualize that they decided to plant this discovery on the accused person. This axe had a blade 8" long and this would fit in with the injury on the dead body. In any case such discovery even if it were genuine would be of little value. Such axes are found in everybody's house and no adverse inference can be drawn from their production by an accused person. There was nothing in this axe which would connect it with the murder. There is, therefore, no credible evidence against Ghulam Mohammad accused as well. I have already stated that the evidence relating to motive is exceedingly weak and no reliance can be placed on it. Even if it would be relied upon, it cannot in any way be sufficient to corroborate the accomplice evidence in regard to the fact of murder.

[9] In these circumstances, we reject the revision application filed by the Assistant Advocate General and in doing so hold that the prosecution has failed to prove the case against both the accused persons, Ghulam Mohammad and Atta Mohammad. We, therefore, set aside their convictions and sentences and acquit them. They shall be released forthwith unless wanted in some other case.

This appeal of Atta Mohammad will be deemed to have been accepted and the reference submitted by the Sessions Judge rejected.

B/D.R.R. *Revision dismissed and accused acquitted.*

A. I. R. 1952 Jammu and Kashmir 41

JIA LAL KILAM J.

State v. *Dr. Abdul Majid and others (Accused.)* —*Applicants.*

Criminal Revn. No. 36 of 2006, D/- 31 Jeth 2007.

(a) (J. & K.) Enemy Agents Ordinance (8 of 2005), S. 9 (3)—Order of acquittal by Special Judge — Revision against. is competent.

The wording used in S. 9 (3) of the Ordinance is almost the same as used in S. 435, Criminal P. C., and though the word 'revision' is used in neither of them, a revision application is competent against an order of acquittal passed by the Special Judge, inasmuch as sub-s. 3 of S. 9 empowers the reviewing judge to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. [Para 3]

(b) (J. & K.) Enemy Agents Ordinance (8 of 2005), S. 9 (3) — Revision against order of acquittal by Special Judge — Reviewing Judge, powers of —Only retrial can be ordered. (Criminal P. C. (1898), S. 439).

While hearing a revision application under S. 9 (3), a Reviewing Judge can, by virtue of S. 9 (2) of the Ordinance, exercise only those powers as are enumerated in S. 439, Criminal P. C. Under S. 439 (4) the High Court is not authorised to convert a finding of acquittal into one of conviction. The only order which the Reviewing Judge can, therefore, pass, when he makes up his mind to accept the revision petition, is to order a retrial. [Para 4]

Anno. Cr. P. C., S. 439 N. 13.

Assistant Advocate General — for the State; M. A. Hafiz, M. A. Latif and Inder Das—for Applicants.

Order. —This is a revision application submitted by the learned Assistant Advocate General against an order of acquittal passed by L. Mulk Raj, Special Judge, Srinagar, whereby the non-applicants, Dr. Abdul Majid Inayat Ullah, Habib Ullah and Mohi-ud-din Pukhta were acquitted. The case against the non-applicants along with

many others was tried under the provisions of the Enemy Agents Ordinance. No appeal is permissible under the provisions of this ordinance, but the learned Assistant Advocate General submitted this revision application under S. 9 sub-s. (3) of the said Ordinance. In his application the learned Assistant Advocate General has made out that the facts proved against the non-applicants accused are incompatible with their innocence and that the evidence against them has not been properly weighed by the learned Special Judge.

[2] This application came up for hearing at Jammu when the non-applicants Rajas Inayat Ullah and Habib Ullah and Mohi-ud-din Pukhta made their appearance. Dr. Abdul Majid was not present. In view of the fact that Rajas Inayatullah and Habibullah and Mohi-ud-din Pukhta made their appearance at a far off place like Jammu, I did not think it proper to postpone the case and drag the accused over and again to Jammu, simply because Dr. Abdul Majid did not make his appearance. I heard arguments on their behalf at Jammu, but reserved my orders till a later date when I should have heard Dr. Abdul Majid also. Dr. Abdul Majid has made his appearance now and the case on his behalf has been argued by Mr. Hafiz.

[3] Mr. Hafiz has raised a preliminary objection that no revision is permitted by the provisions of the Enemy Agents Ordinance. But this objection of the learned counsel is untenable, inasmuch as sub-s. (3) of S. 9 of this Ordinance empowers the reviewing judge to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying himself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed. The wording used in this section is almost the same as used in S. 435, Criminal P. C., and if the word "revision" is not used in this section, it makes no difference, as the word "revision" is not used in S. 435, Criminal P.C., even. Therefore I am of opinion that a revision application of the kind submitted by the learned Assistant Advocate General is competent and this Court has got ample powers to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying as to the correctness, legality or propriety of any sentence awarded or order passed.

[4] The second point that has been raised in this behalf by the learned Advocate appearing on behalf of the accused is as to whether this Court has, while hearing a revision application, got the power to convert a finding of acquittal into a conviction. The learned Assistant Advocate General has argued that the reviewing judge has power, while hearing a revision application submitted under sub-s. (3) of S. 9 to alter an acquittal into a conviction. I am afraid I cannot agree with the interpretation put by the learned Assistant Advocate General on sub-s. (3) of S. 9. Sub-s. (3) of S. 9 gives power to a reviewing judge to exercise any of the powers which are exercisable by him in the case of such proceedings as are submitted to him for review under sub-s. (1) of S. 9. Under sub-s. (2) of S. 9 the reviewing judge can exercise in his discretion any of the powers exercisable under S. 439, Criminal P. C., by the High Court in the case of any proceedings to which the said section refers. From this it becomes clear that a reviewing judge can exercise only those powers while hearing a revision application under sub-s. (3) of S. 9, Enemy Agents Ordinance as are enumerated in S. 439, Criminal P. C. Sub-s. (4) of S. 439, Criminal P. C., lays down amongst other things that this section shall not be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. Such being the state of law, the only order that can be passed, in case the reviewing judge makes his mind to accept the revision petition, is to order a re-trial.

[5] Now the question is, do the facts of the present case warrant a re-trial. To answer this question, I think I shall have now to go to the facts of the case.

[6-8] (After examining the facts relating to each accused the judgment proceeds as follows:—) The result of all this is that the police has not done in this case what was expected of them to have done, and in view of my finding already recorded that I can only order a re-trial. I do not think that the present is the time when I should send the case back for re-trial and give an opportunity to the prosecution to fill up gaps in the case. I, therefore, agree with the trial judge that the case against this accused is not free from doubt. Before bringing this order to a close, I would like to make mention of one fact. The learned Assistant Advocate General who argued the case with care and ability drew my attention to the facts involved in Ghulam Naqi's case who had produced certain articles before the police on the basis of which a conviction was recorded against him, which was upheld by me. But it has to be borne in mind that the police in Ghulam Naqi's case acted with greater promptitude and regularity than in the case of Dr. Abdul Majid and thus excluded the possibility of a doubt cropping up. Ghulam Naqi's house was searched and a number of incriminating articles were recovered from that place. True, that no responsibility was fastened upon Ghulam Naqi on the basis of those recoveries, but that was simply due to the fact that those articles were recovered from the joint possession of more than one person. But the fact remains that somebody in house in which Ghulam Naqi also resided had brought those articles in that house. Later on Ghulam Naqi himself produced some incriminating articles before the police. All this distinguishes the case of the present accused from that of Ghulam Naqi.

[9] Under these circumstances I do not find myself in a position to take a different view from the one already taken by the learned trial judge

and as such I dismiss this revision application. The bail bonds of the accused are discharged.

B/D.R.R. *Revision dismissed.*

A. I. R. 1952 Jammu and Kashmir 43

JANKI NATH WAZIR C. J. AND JIA LAL KILAM J.

Mt. Khatji — Appellant v. *Rehman Wani — Respondent.*

Second Appeal No. 80 of 2006, D/- 31st Jeth 2007.

Muhammadan law — Marriage — Minor—Right to repudiate — Marriage of minor daughter contracted with consent of father — No option to repudiate on attainment of puberty.

Under the Muhammadan law, the understanding is the essential *sine qua non* of a capacity to enter into a marriage contract and even if a boy or girl has attained the age of puberty, if he or she is devoid of understanding, there cannot be any valid marriage under any circumstances whatever. In the case of a boy or a girl who has attained the age of discretion but has not attained the age of puberty, the marriage is not valid unless the legal guardian has consented to it. If the guardian happens to be the father who has consented to the marriage then the minor cannot exercise her option of avoiding the marriage on attaining puberty: A. I. R. 1938 Cal. 71, *Disting.* [Para 4]

Sunder Lal — for Appellant; Janki Nath Bhan—for Respondent.

REFERENCE : ...../ Para

('38) A. I. R. 1938 Cal. 71 : (I. L. R. (1938) 1 Cal. 139) 2

Wazir C. J. — This is civil second appeal and arises out of a suit instituted by the plaintiff in the Court of Munsiff Anantnag for the cancellation of her marriage with the defendant. The plaintiff, Mt. Khatji, alleged that during her minority she had been contracted in marriage by unauthorized persons and that her marriage was void and may be cancelled. The suit was resisted by Rehman Wani defendant on the ground that the plaintiff had been married to him by her father and the marriage was valid. The trial Court held that the plaintiff was a minor at the time of marriage. He further found that she was not contracted in marriage by her father who was alive at the time of the alleged marriage and, therefore, the marriage was not binding upon her. The plaintiff's suit was decreed. On appeal the learned Senior Subordinate Judge, Srinagar found that the plaintiff's marriage with the defendant was performed with the consent of the plaintiff's father, and, therefore, the marriage could not be repudiated by the plaintiff on her attaining puberty. The plaintiff's suit was accordingly dismissed and she has come up in further appeal to this Court.

[2] The counsel for the appellant has argued that the plaintiff's marriage with the defendant was void ab initio in asmuch as the plaintiff contracted herself in marriage with the defendant as a sui juris through a vakil and as she was a minor her marriage was void. It is further argued that even if the father has approved of the marriage, it will not make the marriage valid and the plaintiff minor has the option to avoid the marriage on attaining puberty. In support of this contention reliance is placed upon a ruling of the Calcutta High Court reported as *Joygun Nessa Bibi* v. *Mahomed Ali Biswas*, A. I. R. 1938 Cal. 71. In this case it has been held that when a Muhammadan girl who has not attained puberty but has attained the years of understanding, contracts a marriage herself, that is to say acting herself and not through a guardian, but with the approval of her father, the marriage is not a nullity, but it is subject to the exercise of the option of puberty. The facts of this case are somewhat different from the case which we are dealing with. In Calcutta case the father was not present at the time of the marriage. He did not act as a guardian of the minor for fear of being prosecuted under the Child Marriage Restraint Act and the girl who was a minor contracted the marriage herself and the father approved of this marriage and settled the terms of Kabinnama. It was held that when the girl who had attained the age of understanding contracted the marriage herself the marriage was not void but the girl could exercise her option of puberty if she so desired. In the present case the father was present at the time of marriage and had given his consent to the marriage of his daughter with the defendant.

[3] It has been further argued that the consent of the father was not sufficient to validate the marriage. The father as a guardian should have contracted the plaintiff in marriage and then the marriage would have been binding on the plaintiff minor. It is true that in Muhammadan law a boy or a girl who has not attained puberty is not competent to enter into a contract of marriage but if the girl has attained the age of discretion and enters into a contract of marriage through a guardian other than the son, father, or agnatic grandfather she can exercise her option of ratifying the marriage or repudiating the marriage on attaining puberty; but if the father contracted the plaintiff in marriage then her option of puberty is lost and the marriage is binding on her. On this point Mr. Ameer Ali in his work on Muhammadan law reproduces this passage from Fatwai-Alam-Giri which has been also quoted in its entirety by Baillie in his Digest. The quotation runs thus :

"Amongst the conditions which are requisite for the validity of a contract of marriage are understanding, puberty and freedom in the contracting parties with this difference. Whilst the first requisite is essentially necessary for the validity of the marriage as a marriage cannot be contracted by a majnu (non compos mentis) or a boy without understanding. The other two conditions are required only to give operation to the contract as the marriage contracted by a minor possessed of understanding is dependent for its operation on the consent of his guardian."

[4] It is clear from this that the understanding is the essential *sine qua non* of a capacity to enter into a marriage contract and even if a boy or girl has attained the age of puberty, if he or she is devoid of understanding, there could not be any valid marriage under any circumstances whatever. In the case of a boy or a girl who has attained

the age of discretion but has not attained the age of puberty, the Law seems to be this that the marriage is not valid unless the legal guardian has consented to it. If the guardian happens to be the father who has consented to the marriage then the minor cannot exercise her option of avoiding the marriage on attaining puberty.

[5] In Tyabji's Muhammadan Law, s. 69, cl. (2), p. 155 it is stated that a marriage contracted by the minor himself is voidable at his option on his attaining puberty, notwithstanding that his guardian had approved of it, provided that such guardian was other than the son, father or agnatic grandfather. The option is prolonged untill the minor is acquainted with the fact that he has such a right.

[6] In the present case the defendant has produced five witnesses and has also produced the Nika-Nama. All these witnesses are attesting witnesses of the marriage deed. From their evidence, it appears that the father of the plaintiff was present at the time of the marriage and had affixed his thumb impression on the Nika-Nama. Khaliq Mir, the father of the plaintiff, has stated in the Nika-Nama that he has made the defendant as his pisar parwarda. It is, therefore, abundantly clear that the father consented to the marriage of the plaintiff as her guardian. The plaintiff has produced Ramzan Mir and Sultan Mir who are her close relations and are interested in the cancellation of her marriage with the defendant. Their testimony has rightly been discarded by the Court below.

[7] From the oral and documentary evidence it is clear that the father gave his consent to the marriage of his minor daughter with the defendant and the plaintiff cannot, therefore, avoid her marriage on her attaining puberty.

[8] In the result this appeal fails and is dismissed with costs.

B/D.R.R. *Appeal dismissed.*

A. I. R. 1952 Jammu and Kashmir 44

JANKI NATH WAZIR C. J. AND JIA LAL KILAM J.

Kanshi Ram and others — Appellants v. *Bhagtu and others—Respondents.*

Revenue Appeal No. 12 of 2008, D/- 23-4-1952.

(a) Tenancy Laws — Jammu & Kashmir Tenancy Act, S. 57A— Tenant ejected by person other than landlord — Tenant cannot apply under S. 57A for reinstatement.

An application under S. 57-A can be filed only if a tenant is dispossessed by a landlord otherwise than in due course of law, but if a tenant is dispossessed by a person other than the landlord he cannot invoke S. 57-A, Tenancy Act, in order to regain his possession. [Paras 5, 6]

(b) Tenancy Laws — Jammu and Kashmir Tenancy Act, S. 57-A— Order under ultra vires— Interference in appeal.

Where in a case to which S. 57-A has no application, the Collector passes an order reinstating a tenant-at-will who had been dispossessed by a trespasser, the order even if ultra vires and illegal will not be interfered with by the High Court in appeal because it would not be equitable to order restoration of possession to a person who is admittedly a trespasser. [Para 8]

Ishwar Singh, — for Appellants; S. R. Baru — for Respondents.

REFERENCES: Courtwar / Chronological / Paras.

('89) 3 Pun. Re. 1889. 5
('13) 84 Pun. Re. 1913 : (19 Ind. Cas. 346). 5

Wazir C. J. — Bhagtu and others made an application under S. 57-A, Tenancy Act to the Collector Kathua for summary reinstatement on half portion of Khasra Nos. 596, 597, 593, 599, 600, 601, 602 and 607/2. In the application they alleged that they have been in possession of half portion of these Khasra numbers as tenants at-will from S. 2001 up to S. 2007 and in Kharif 2007 they have been forcibly dispossessed by Sant Ram and others appellants. The Collector sent this application to Tehsildar Jasmergarh for enquiry. Before the Tehsildar the respondents stated that the Patwari has wrongly entered the applicants as being in possession of half portion of the Khasra numbers mentioned above and that the applicants have never been in possession of the land in dispute. The appellants alleged that they are entered as occupancy tenants in the Revenue papers over half portion of the land comprised of the Khasra Numbers stated above and that the applicants not being their tenants cannot seek restoration of possession under S. 57-A, Tenancy Act. The Tehsildar found that the applicants had been in possession of half portion of the land from S. 2001 to S. 2007 and are entitled to be reinstated. The collector accepted the findings of the Tehsildar and ordered restoration of the possession to the applicants. The applicants were accordingly put in possession of the half portion of the Khasra Numbers mentioned in their application.

[2] Against this order Sant Ram and others who are entered as occupancy tenants over half portion of the land, have come up in appeal to this Court. It was argued on behalf of the appellants that S. 57-A, Tenancy Act would not apply to the case of the respondents inasmuch as they were not recorded as tenants under the appellants. The main question for consideration in this appeal, therefore, was whether the respondents who are not recorded as tenants under the appellants had a right to move the Deputy Commissioner under S. 57-A, Tenancy Act, for being reinstated on the land from which they had been dispossessed. The law point raised by the appellants was of great importance and as this point was likely to be raised in many other cases, the appeal was referred for decision to a Division Bench.

[3] Mr. Ishwar Singh Advocate appears on behalf of the appellants and has argued that the appellants are entered as occupancy tenants in respect of half portion of the Land in dispute. The respondents are not their tenants and they have been dispossessed of their holding by persons other than the persons admitted to be, or recorded as, landlords and they could not be reinstated under S. 57-A, Tenancy Act.

[4] It is a common ground between the parties that Bhagtu and others applicants respondents are not entered as tenants under Sant Ram and others appellants. The entry in the Fard Girdawari shows that they are in possession as tenants at will-over half portion of Khasra numbers stated in the application along with Sant Ram and others who are recorded as occupancy tenants over the other half. Section 57-A has been inserted under S. 57 in the Tenancy Act by a recent amendment which came into force in S. 2005. From the scheme of the Act, it appears that S. 57-A has been incorporated in order to protect a tenant from being ejected before enquiry is held and he is declared as a protected tenant. Section 56, Tenancy Act, gives relief to a tenant who has been wrongfully dispossessed or ejected otherwise than in execution of a decree or in pursuance of an order under S. 49 or S. 50, Tenancy Act. Section 57 provides a summary reinstatement of a tenant who has been wrongfully ejected during the settlement operations. Section 57-A gives relief to a tenant who has been dispossessed otherwise than in due course of law before his rights of protected tenancy are determined. It would be clear from the above provisions that protection is given to a tenant from being arbitrarily dispossessed by the landlord. The legislature has particularly used the word "tenant" in S. 57-A who may apply to the Collector of the District in which the tenancy is situate for summary reinstatement on any land from which he has been ejected.

[5] The learned counsel for the respondents argued that the protection given to the tenant is against any one who may or may not be a landlord. We do not agree with him in the interpretation sought to be placed on the provisions of S. 57-A. The use of the word "tenant" in S. 57-A, Tenancy Act, clearly indicates that the protection is given to the tenant only against a landlord and not against a trespasser. Tenancy Act governs the relationship of the landlord and tenant alone. Section 84, Tenancy Act, enumerates all those applications and proceedings which can be disposed of by the Revenue officers alone and civil Courts' jurisdiction is totally barred in regard to those proceedings. Clause (g) of S. 84 deals with applications made under S. 57 by a tenant wrongfully dispossessed. In S. 57 although there is no mention of the word landlord yet the tenant is given protection only against the landlord and not against any one else. Similarly in S. 57-A, Tenancy Act, summary reinstatement can be ordered in favour of the tenant if he has been dispossessed otherwise than in due course of law. The tenant cannot avail of S. 57-A, Tenancy Act if he is dispossessed by a person other than a landlord. As S. 57-A has been inserted in the Tenancy Act of the State and no such provision is found in any Tenancy Act in other parts of India, so rulings on all force are not available, but there are cases of the Punjab High Court in which it has been held that a suit for recovery of possession by occupancy tenant, who has been illegally dispossessed by person other than the landlord, would be cognizable by a civil Court. In Revenue Court the suit by an occupancy tenant would lie only against the landlord and not against a person other than a landlord as under S. 50 which corresponds to S. 56 of our Tenancy Act, protection is given to a tenant only against the landlord and not against any one else. Reliance may be placed on *Mian Singh* v. *Fatha*, 3 Pun. Re. 1889 and *Kesar Singh* v. *Mangal Singh*, 84 Pun. Re. 1913.

[6] We are, therefore, of opinion that application under S. 57-A can be filed only if a tenant is dispossessed by a landlord otherwise than in due course of law, but if a tenant is dispossessed by a person other than the landlord he cannot invoke S. 57-A, Tenancy Act, in order to regain his possession.

[7] It is argued on behalf of the respondents that they were in rightful possession of the property before they were dispossessed by the appellants. They have got back the possession by the order of the collector which is *ultra vires* and illegal. In other words it is argued that a rightful claimant has got the possession of the property and it will not be just and equitable that a rightful claimant should be dispossessed by the order of this Court in appeal.

[8] The appellants have admitted in their objections that they are not the landlords in respect of half of the share of land of which they had taken possession. They admit that they took possession of the lands as trespassers. Under the order of the Collector the trespassers have been dispossessed and the respondents who are admittedly tenants-at-will have been put in possession. The respondents have no doubt better title to the possession of the land than the appellants. It will not be equitable for this Court to order restoration of the possession to the trespassers who admit themselves as such. In case the appellants think that they have better title to be in possession of the land in dispute than the respondents, they may, if so advised, seek their remedy in the civil Court.

[9] This appeal is accordingly dismissed but we leave the parties to bear their own costs in this Court.

B/K.S. *Appeal dismissed.*

A. I. R. 1952 Jammu and Kashmir 45

JIA LAL KILAM J.

Qadir Chhandu—Petitioner v. *State.*

Criminal Revn. No. 87 of 2006, D/- 18th Har. 2007.

(a) (J & K) Food Offences (Enhanced Penalties) Ordinance (3 of 2006), S. 11—Order by Special Magistrate —Appeal to Sessions Judge — Revision to High Court against order in appeal not barred.

It is only an order or sentence of a Special Magistrate which cannot be revised under S. 11 of the Ordinance, but when once an order is passed by the Special Judge in appeal against the order of a Special Magistrate, a revision application against such an order is not barred by S. 11: A. I. R. 1943 All. 26, *Disting.* [Para 5]

(b) Interpretation of Statutes — Intention of Legislature — Not relevant.

Whatever may have been the intention of the legislature in passing a certain legislation, the Court is to be guided not by what the legislature had in mind, but what they have expressed in cold print. [Para 6]

Anno. Civil P. C., Pre. No. 7.

Assistant Advocate General — for the State.

REFERENCE : ...../ Para
('43) A. I. R. 1943 All. 26: (44 Cri. L. J. 216 F. B.) 3

Order. — This is a revision application directed against an order of the learned Sessions Judge Kashmir dated 28th Magh 2006. The accused was convicted under ss. 3 4 of Ordinance III [3] of 2006 and was sentenced to four months' rigorous imprisonment and a fine of Rs. 5 and in default of payment of fine he was ordered to undergo one months' further rigorous imprisonment. On appeal, the learned Sessions Judge upheld both the conviction and sentence.

[2] The allegation against the accused is that he is a registered Hanji and that he was put in charge of 109 khirwars and 11½ traks of Shali by the Government for effecting sale amongst the ration ticket-holders under the supervision of the Ghat Munshi and that he had out of this Shali sold illegally four traks to one Qadir Gujri for a consideration of Rs. 6. Both the Courts below have found unanimously on the basis of the evidence led in the case that the accused had as a matter of fact sold Shali to Qadir and had thereby contravened the relevant provisions of Ordinance III [3] of 2006. I do not find myself in a position to take a different view from the one taken by the Courts below.

[3] There is, however, one point which needs some discussion. The learned Assistant Advocate-General has argued that in view of s. 11 of Ordinance III [3] of 2006, no revision can lie to this Court. Section 11 lays down amongst other things that no Court shall have authority to revise any order or sentence of a Special Magistrate. From this the learned Assistant Advocate General deduces that a revision is incompetent even against the order of a Sessions Judge passed by him in appeal against an order of the Special Magistrate. In support of his argument he has drawn my attention to *Salig Ram* v. *Emperor*, A. I. R. 1943 ALL. 26 (F.B.). In this case convictions were recorded against certain accused by a Special Magistrate acting under an ordinance known as Ordinance II [2] of 1942. One of the accused preferred a revision application to the High Court, but the Court held that no revision was competent in view of S. 26 of the Ordinance which made provision about the exclusion of interference by other Courts. Section 26 of this Ordinance runs as follows :

"Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance and save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under S. 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court."

Now a reference to s. 26 of the Ordinance would make it clear that the exclusion of the High Court to hear revision of a sentence passed under the provisions of the said Ordinance is with respect to all Courts constituted under that Ordinance and not of a particular Court. But a reference to our section would show that the exclusion of interference in revision is limited only to the orders or sentence passed by a Special Magistrate. Ordinance II [2] of 1942 referred to in the Allahabad judgment has made provision for the appointment of Special Magistrates and Special Judges, the latter having been appointed for hearing appeals from the judgments of the Special Magistrates and Special Judges. In s. 26 of the said Ordinance II [2] of 1942 the words used being "a Court constituted under this Ordinance," it is obvious that neither a revision could lie against an order of a Special Magistrate nor against that of a Special Judge who may have heard an appeal against the order of a Special Magistrate. But, as against this, s. 11 of our Ordinance III [3] of 2006 runs as follows :

"Notwithstanding the provisions of the Code of Criminal Procedure, 1989 or of any other law for the time being in force as provided in this Ordinance, no Court shall have authority to revise any order or sentence of a Special Magistrate or to transfer any case from any such Magistrate or make any order under S. 491, Criminal P. C., 1989."

[4] In this section all that we find is that no court shall have authority to revise the order or sentence of a Special Magistrate. Section 11, barring some verbal changes here or there which has made its meaning a little bit obscure, is more or less the same as S. 26 of Ordinance II [2] of 1942, with this difference that the exclusion of interference in Ordinance II [2] of 1942 is for all Courts constituted under that Ordinance, while in our section it is only the Special Magistrate who has been given this protection. According to S. 13 of Ordinance II [2] of 1942 a Special Judge was constituted to hear appeals of the Special Magistrates but according to S. 8 of our ordinance the provisions of the Criminal Procedure Code of 1989 which provide for appeals from conviction, have been made applicable to all sentences imposed for offences under this ordinance. Besides that under sub-s. (3) of S. 9 the provision of the Criminal Procedure Code, so far as they are not inconsistent with the ordinance have been made applicable to the proceedings of a Special Magistrate. The result is that an appeal against an order passed by a Special Magistrate shall lie to a Sessions Judge and secondly the Criminal Procedure Code would apply in all proceedings before a Special

Magistrate, excepting where there is a provision to the contrary in the ordinance.

[5] The foregoing makes it abundantly clear that it is only an order or sentence of a Special Magistrate which cannot be revised under S. 11 of our Ordinance, but when once an order is passed by the Special Judge, in appeal against the order of a Special Magistrate, a revision application against such an order is not barred by S. 11.

[6] The learned Assistant Advocate General argues that the intention of the legislature was to have saved the judgment of a Session Judge passed in appeal in cases arising out of this ordinance, from revisions. Whatever may have been the intention of the legislature in this behalf, one is to be guided by not what the legislature had in mind but what they have expressed in cold print. In S. 11 of our ordinance we find that "no court shall have authority to revise the order or sentence of a Special Magistrate." If the intention of the legislature was as is argued by the learned Assistant Advocate General, there was nothing to prevent them from adding the words "or an order of the Sessions Judge passed in appeal." On the contrary, it appears to me that the intention of the legislature here was to save from revision only the orders and sentence of the Special Magistrate and not of any other court.

[7] Under these circumstances I am of the opinion that this revision application is competent. But as already stated, the offence having been brought home to the accused, this revision application is dismissed.

B/D.R.R. *Application dismissed.*

A. I. R. 1952 Jammu and Kashmir 47

JANKI NATH WAZIR C. J.

Town Area Committee, Sopore — Applicant v. *Abdul Khaliq—Non-applicant.*

Civil Revision No. 7 of 2009, D/- 14th Sawan 2009.

Municipalities—Jammu & Kashmir Towns Area Act (VII [7] of 1997), S. 38 (1) Proviso — Notice can be waived — Plea of want of notice taken at late stage when limitation for fresh suit had expired—Plea held waived—(Civil P. C. (1908), S. 80).

Before an action is brought against a Town Area Committee or against any servant of a Town Area Committee, in respect of anything done, one month's notice has to be given to the Town Area Committee. The notice is for the protection of the Committee and it is for the committee to insist upon the notice or to waive it.

Plea of want of notice which is a clear bar to the institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendant, the defendant must be deemed to have waived the privilege of notice. A. I. R. 1931 Cal. 175, *Rel. on;* A. I. R. 1947 P. C. 197, *Disting.* [Paras 6, 9]

Anno. Civil P. C., S. 80, N. 15.

L. N. Sharma—for Applicant; Sunder Lal—for Non-applicant.

REFERENCES: Courtwar/Chronological/ Paras.

('47) A. I. R. 1947 P. C. 197: (I. L. R. (1948) Mad. 214). 11
('42) A. I. R. 1942 Bom. 339: (204 Ind. Cas. 89). 9
('31) A. I. R. 1931 Cal. 175: (130 Ind. Cas. 894). 9
('41) A. I. R. 1941 Mad. 446: (1941-1 Mad. L. J. 328). 3
('44) A. I. R. 1944 Mad. 544: (I. L. R. (1945) Mad. 263). 3

Order. — This is a revision application against the order of the Munsiff Sopore and arises out of a suit instituted by Abdul Khaliq seeking injunction against the defendant Town Area Committee restraining the defendant from removing the wire fencing round the grave-yard. The defendant had served a notice on the plaintiff on 2nd of Poh 2007 calling upon the plaintiff to remove the wire fencing from the graveyard as according to the defendant the plaintiff had encroached upon the land belonging to the defendant. The plaintiff filed a suit in the Court of Munsiff Sopore for injunction. The written statement was filed by the defendant in which it was pleaded that the suit was not maintainable. The trial Court struck various issues and one of the important issues was whether the present suit was maintainable under the provisions of Town Area Act. An application was made by the defendant on 18th of Jeth, 2008, requesting the Court to decide the legal issues first before deciding other issues in regard to facts. The learned trial Court acceded to the request of the defendant and heard arguments on the legal issues on 8th of Assuj 2008. Both these legal issues were decided in favour of the plaintiff.

[2] The defendant has come up in revision to this Court and it is argued on his behalf that the suit filed by the plaintiff was not maintainable in asmuch as the plaintiff had not complied with the mandatory provision of S. 38 proviso to Part 2 of the Town Area Act which runs as follows:

> Notwithstanding anything contained in the Limitation Act IX [9] of 1995, all prosecutions of any servant of a Town Area Committee and all actions which may be lawfully brought against a Town Area Committee or against any servant of a Town Area Committee in respect of anything done or alleged to have been done in pursuance of this Act, shall be instituted within six months from the date of the act complained of and not afterwards:
>
> Provided that no such suit shall be instituted until the expiration of one month after notice has been given stating the cause of action and the name and the place of abode of the intending plaintiff and the plaint shall contain a statement that such notice has been given.

It is contended that as the plaintiff did not give any notice as required under the above proviso to S. 38, Part (2), the plaintiff's suit could not proceed and should have been dismissed by the trial Court.

[3] In support of this contention reliance is placed on *Marina Ammayi* v. *Secy. of State*, A. I. R. 1941 Mad. 446 wherein it is held that S. 80 is explicit and mandatory and if a notice is not given under this section to the Collector, the Court is bound to dismiss the suit; and that it is not open to the Collector to waive the plea of want of notice under S. 80, Civil P. C. The same view was taken in another case by the Madras High Court in

Govt. of Madras v. *Vellayan Chettiar*, A. I. R. 1944 Mad. 544 in which it has been held:

"Section 80 is express, explicit, and mandatory and admits of no implications or exceptions. When the section has not been complied with the Court has no jurisdiction to try the suit against Government. The language of the section is imperative and consequently there can be no question of waiver and no question of estoppel. It is very desirable that the objection that S. 80 has not been complied with should be taken at the earliest possible moment but failure to do so will not deprive the section of its force."

[4] Against this decision of the Madras High Court an appeal was taken to the Privy Council. Their Lordships reversed the view taken by the Madras High Court that the notice required to be given under s. 80, Civil P. C. cannot be waived. Their Lordships laid down that:

"there appears to be no reason why the notice required to be given under S. 80 should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required. If in a particular case he does not require that protection and says so, he can lawfully waive his right to the notice."

[5] After this decision of the Privy Council, it is settled law that the notice required to be given under s. 80 is for the protection of the authority concerned and if in a particular case the authority concerned does not require that protection, he can lawfully waive his right to the notice.

[6] In the present case s. 38, Town Area Act requires that before an action is brought against a Town Area Committee or against any servant of a Town Area Committee, in respect of anything done, one month's notice has to be given to the Town Area Committee. The notice is for the protection of the Committee and it is for the Committee to insist upon the notice or to waive it. The question for consideration in this case is whether or not the defendant Committee had waived the plea of want of notice.

[7] The learned counsel for the applicant argued that in para 7 of the written statement, it was specifically mentioned that the Committee acted strictly under the provisions of the Town Area Act and the plaintiff was not competent to file a suit, and it can be inferred from para 7 of the written statement that the plea of want of notice was not waived by the defendant. I have gone through the whole of the written statement filed by the defendant and I am of the opinion that neither expressly nor impliedly the defendant took the plea of want of notice in his written statement. No doubt an issue has been raised whether the suit filed by the plaintiff is maintainable or not but from this issue it cannot be gathered that the defendant had taken the plea of want of notice in his written statement. Under s. 41, Town Area Act, it is provided that the plaintiff could file an appeal before the Wazir Wazarat and the order of the Wazir Wazarat is final and could not be challenged in civil Court. The defendant pleaded in para 7 of the written statement that the suit was not maintainable and this plea of non-maintainability of the suit might refer to the plaintiff's sole remedy by way of appeal to Wazir Wazarat and not by a suit in a civil Court.

[8] The learned counsel for the applicant argued that his client made an application on 18th Jeth 2008 praying that the legal issues in the case may be decided first and it is argued that by this application the defendant wanted to bring it to the notice of the trial Court that the suit could not be maintained on account of want of notice as required under s. 38, Town Area Act. In the application it is nowhere mentioned that the suit is defective for want of notice. The arguments were heard by the Court on 8th Assuj 2008 and on that day the defendant for the first time argued that the suit was not maintainable as no notice was given to the defendant as required under s. 38, Town Area Act.

[9] The question for consideration is whether the defendant should be deemed to have waived the plea of want of notice or not. In the written statement, as pointed out above, the plea of want of notice has not been taken either expressly or impliedly. It has been held in *Purna Chandra* v. *Radharanee Dassya*, A. I. R. 1931 Cal. 175, that pleas of want of notice under s. 80, Civil P. C. which is a clear bar to the institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendant, the defendant must be deemed to have waived the privilege of notice. The same view has been taken by a Division Bench of the Bombay High Court, *Hirachand Himatlal* v. *Kashinath Thakurji*, A. I. R. 1942 Bom. 339, wherein it has been laid down that

"it is open to the party protected by S. 80 to waive his right to a notice and his waiver binds the rest of the parties. Any prejudice to the plaintiff caused by the delay in the defendant being deemed to have waived his right to notice, even though delay, however long, would not necessarily by itself be a ground for holding that he has waved it."

[10] In the present case it was for the first time on 8th Assuj 2008 that the defendant's counsel in his arguments brought it to the notice of the trial Court that the suit was defective for want of notice. On that date the plaintiff could not bring a fresh suit as it would have been barred by time. The period prescribed under Town Area Act for bringing such a suit is within six months from the date of the act complained of and not afterwards. The cause of action arose to the plaintiff on 2nd Poh 2007 and the plaintiff could bring the suit within six months from the date, i. e. up to 2nd Har 2008. The plea in regard to want of notice was taken by the defendant on 8th Assuj 2008 in the course of arguments before the trial Court. On that date the plaintiff could not bring a fresh suit as it would be clearly barred. The delay in taking up the plea of want of notice has in this

case greatly prejudiced the plaintiff and the defendant, therefore, should be deemed to have waived the pleas of want of notice.

[11] The learned counsel for the applicant has drawn my attention to para 17 of the judgment of their Lordships of the Privy Council *Vellayan Chettiar* v. *Govt. of Province of Madras*, A. I. R. 1947 P. C. 197 which is as follows :

"Their Lordships are therefore of opinion that the appellants have not established any facts upon which the respondents must be deemed to have waived proper notice or are estopped from asserting want of proper notice. If in the result the appellants find themselves precluded by the Limitation Act from prosecuting any action which might otherwise have been open to them, that is a fortuitous result for which the respondents cannot be held responsible."

It is argued that in case the plaintiff is prejudiced on account of delay on the part of the defendant in taking up the plea of want of notice that should not be taken to mean that the defendant should be deemed to have waived the plea of notice.

[12] In the Privy Council case the facts were quite different from the present case. The suit was brought by the plaintiff in a Court which had no jurisdiction. The defendant had not taken up the plea of want of notice in the Court which had no jurisdiction to try the suit. When the suit was presented before the Court which had jurisdiction to try the suit the defendant took up the plea of want of notice. It was held by their Lordships that there was no duty cast upon the defendant to take up the plea of want of notice in a Court which had no jurisdiction to try the suit and the defendant, therefore cannot be estopped from asserting want of proper notice in a proper forum.

[13] In the above case their Lordships of the Privy Council considered whether the principle of estoppel applied in the case of the defendant or not and held that the defendant could not be estopped from pleading want of notice as he was not under any duty to do so in a Court which had no jurisdiction to entertain the suit. In the present case the suit was filed in a Court which had jurisdiction to try the suit and it was the duty of the defendant to take up the plea of want of notice at the earliest opportunity. It is not open to the defendant to take up the plea of want of notice at a time when the plaintiff is not in a position to file a fresh suit due to bar of limitation. Calcutta and Bombay High Courts have held that where the plaintiff is prejudiced due to delay of the defendant in taking up the plea of want of notice the defendant should be deemed to have waived that plea, and the view taken by their Lordships of the Privy Council in A. I. R. 1947 P. C. 197 does not militate against the decision in these cases. The defendant, not having taken up that plea till the time when the plaintiff's suit was barred by limitation the defendant should be deemed to have waived his right to take the plea of want of notice.

[14] In the result this application is dismissed with costs.

B/R.G.D. *Application dismissed.*

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JANKI NATH WAZIR C. J. AND KILAM J.

Malla Mahmadoo and others — *Appellants* v. *State.*

Criminal First Appeals Nos. 39, 44 and 45 of 2006, D/- 23 Har 2007.

(a) Criminal P. C. (1898), S. 342 - Confessional statement recorded under – Use of, against co-accused — (Evidence Act (1872), S. 30).

A confessional statement of an accused recorded under S. 342, Criminal P. C., cannot be used against his co-accused in the same trial, as the expression 'is proved' in S. 30, Evidence Act, means that the confession to be proved must have existed before the trial i. e., must have been recorded before the commencement of the trial : A. I. R. 1923 All. 322 ; A. I. R. 1931 Mad. 820 ; A. I. R. 1933 Oudh 86 ; A. I. R. 1940 Nag. 287 and A. I. R. 1940 Cal. 250, *Rel. on.* A. I. R. 1936 Lah. 337, *Dissent.* [Para 15]

Anno. Criminal P. C., S. 342, N. 27; Evidence Act, S. 30, N. 1.

(b) Evidence Act (1872), S. 30—Confession must implicate confessor.

Section 30, conceives of a confession in which the confessor takes the fullest measure of guilt upon his shoulders and does not in any way plead or even suggest a mitigating circumstance. [Para 5]

Anno. Evidence Act, S. 30, N. 3.

(c) Evidence Act (1872), S. 3—Belief and knowledge —Distinction—Fact known by Court needs no proof — (Words and Phrases –'Belief' and 'knowledge').

A distinction has to be drawn between the words "belief" and "knowledge". A belief will be inculcated in the mind of a person by various factors, by evidence of witnesses or by inferences from given premises. But not so with knowledge. Knowledge is gained by a person by making use of his perceptional faculties and is clearly distinguishable from belief.

A fact, therefore, that has already come to the knowledge of the Court during the trial does not need being proved and cannot be proved so as to make the Court believe in its existence. Proof is needed of a fact which the Court does not know or believes to exist. [Para 15]

Anno. Evidence Act, S. 3, N. 5.

Lock Nath Sharma and Shyam Lal — for Appellants ; Assistant Advocate-General—for the State.

REFERENCES : Courtwar/Chronological/ Paras

('23) A.I.R. 1923 All. 322 : (25 Cri. L. J. 305)	6, 8
('30) A.I.R. 1930 Bom. 354 : (31 Cri. L. J. 1137)	12
('40) A.I.R. 1940 Cal. 250 : (41 Cri. L. J. 563)	10
('35) A.I.R. 1935 Lah. 35 : (37 Cri. L. J. 75)	8
('36) A.I.R. 1936 Lah. 337 : (31 Cri. L. J. 508)	10, 15
('31) A.I.R. 1931 Mad. 820 : (32 Cri. L. J. 1099)	7
('40) A.I.R. 1940 Nag. 287 : (41 Cri. L. J. 886)	9
('33) A.I.R. 1933 Oudh 86 : (34 Cri. L. J. 124)	7
('37) A.I.R. 1937 Sind 218 : (38 Cri L. J. 965)	13

Kilam J.—These are three first appeals by Malla Mahmadoo, Gulla Mir and Hasan Nanwai against an order of the learned Special Magistrate dated 25th Poh 2006 and will be disposed of by this judgment. The three accused-appellants, Malla Mahmadoo, Gulla Mir and Hasan Nanwai were proceeded against in his Court under s. 406 and other sections of the Ranbir P. C., and were sentenced as under: Malla Mahmadoo to five years' rigorous

imprisonment and RS. 500 fine, and in default of payment of fine to undergo rigorous imprisonment for a further period of two years; Gulla Mir to two years' rigorous imprisonment with a fine of RS. 200, and in default of payment of fine to undergo rigorous imprisonment for a further period of one year and Hasan Nanwai to one year's rigorous imprisonment with a fine of RS. 100 and in default of payment of fine to undergo rigorous imprisonment for a further period of six months.

[2] The case against Malla Mahmadoo is that he was put in charge of 300 mds. of wheat which were meant to be doled out as relief to the people residing in Devar. His duty was to have weighed out the wheat to people who had secured slips from the Ghat Munshi. It is alleged that out of this wheat which was in his charge he sold two mds. of wheat for a sum of RS. 65 to accused 3 Hasan Nanwai. This wheat is alleged to have been carried by Gulla Mir accused 2 to Hasan Nanwai accused 3 through two persons by name Akbar Dar and Mohd. Dar. The prosecution allegation further is that when this wheat was in the process of being carried away by Hasan Nanwai, the news leaked out and the neighbouring villagers came and seized the wheat and set the police machinery in motion.

[3] The prosecution has produced a number of witnesses in this case, two of whom Akbar Dar and Mohd. Dar have been produced to prove the actual embezzlement committed by the accused Malla Mahmadoo. Gulla Mir has made a statement under s. 342, Criminal P. C. in which he has more or less accepted the prosecution case. His statement has been treated by the trial Magistrate as a confession and has been used against accused 1 under s. 30, Evidence Act. Hasan Nanwai also does not deny the factum of his having purchased some wheat from Amir Mir, father of Gulla Mir, but adds that Amir Mir had made a stipulation with him to supply Kashmir wheat, but he supplied him Punjabi wheat instead. He does not drag in Malla Mahmadoo in the affair and states that he did not know that the wheat was given to him from out of the Government stocks. Malla Mahmadoo denies having given any wheat to Gulla Mir. He says that he was engaged on daily wages to weigh out shali to different people who were holding slips issued by the Ghat Munshi and that the keys of the room where the wheat was stored remained with the Ghat Munshi during the night. Malla Mahmadoo was charged under s. 409, R. P. C., Gulla Mir under s. 409/109, R. P. C., and Hasan Nanwai under s. 409/109, R. P. C. Hasan Nanwai was, however, convicted under s. 411. All the accused were sentenced as mentioned above.

[4] This case is a very badly investigated one. The police at the outset got four people by name Samad Shah, Ghani Dar, Mohd Dar and Akbar Dar examined under s. 164, Criminal P. C., as carriers of the wheat. These four persons were produced to state their having been engaged by Gulla Mir for carrying wheat from the shop where the Government stocks of wheat lay to the house of Gulla Mir where from it is alleged to have been handed over to Hasan Nanwai. But later on we find that these four persons dwindled to only two, Samad Shah and Ghani Dar dropped out and only two persons Mohd Dar and Akbar were produced at the trial to prove the fact of carrying wheat from Malla Mahmadoo to Gulla Mir's house. These two witnesses have not been cross-examined as to the statements that they had made under s. 164, nor was their attention specifically drawn to that portion in which they had stated that the carriers of this wheat were four persons, i.e., Samad Shah, Ghani Mir, Mohd. Dar and Akbar Dar, and as such this portion of the statement cannot be used to contradict their statements. The learned counsel appearing on behalf of the accused has not questioned these witnesses in the light of their previous statements and if he has failed to do what was expected of him, even the learned Magistrate has fared no better. The copies of the statements recorded under s. 164, Criminal P. C. were on the file. We would have expected the Magistrate to have got this most important point cleared by the prosecution. But, nonetheless, the fact remains that the police had got four people examined as the alleged carriers of this wheat and the police itself had produced the copies of the statements of these four persons along with the Challan. From all this it becomes quite obvious that at one time the case of the police was that four people were the carriers, but at the trial they shifted their ground and their case came to be that only two people were the carriers. Under such circumstances, it is not at all easy for us to rely or act upon the evidence of the two witnesses by name Mohd. Dar and Akbar Dar. It is the police itself which has put material on the file to discredit their veracity.

[5] The learned Special Magistrate has, along with pinning his faith in the veracity of these two witnesses treated the statement of Gulla Mir recorded under s. 342, Criminal P. C. as a confessional statement which could be taken into consideration against accused 1 Malla Mahmadoo. In his judgment the learned Magistrate observes that "the statement of Gulla Mir which adversely effects him can be taken into consideration against accused 1 under the provisions of s. 30, Evidence Act." Section 30, Evidence Act, runs as follows :

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

Before dealing with the arguments that have been advanced in this connection by the learned counsel appearing for the parties, we would like to make it clear that s. 30, Evidence Act, conceives

of a confession in which the confessor takes the fullest measure of guilt upon his shoulders and does not in any way plead or even suggest a mitigating circumstance. But a reference to the statement of Gulla Mir would show that his so-called confession falls very short of the ingredients that go to make up a full-fledged confession. Gulla Mir nowhere in his statement says that he had guilty knowledge or privity of guilt with Malla Mahmadoo.

[6] But apart from this, it is vehemently contested by the counsel appearing on behalf of Malla Mahmadoo that the statement of Gulla Mir made under S. 342, Criminal P. C., even though it may be treated as a confession, cannot be taken into consideration against Malla Mahmadoo accused 1. His argument is that a confession made by an accused where he is in the dock along with his other co-accused, cannot be proved against a co-accused. According to the learned counsel it is only those confessions that have been recorded before the accused are arraigned in the dock, that can be used against a co-accused. In support of his argument, the learned counsel has drawn our attention to *Mahadeo Prasad* v. *Emperor*, A. I. R. 1923 ALL. 322 in which it has been held that :

"Evidence cannot be received against an accused person which he has no power to submit to cross-examination. Secondly an accused person cannot himself give evidence. Nobody could pretend that the administration of justice would be assisted, if upon one accused making a confession implicating his colleague in the dock, his colleagues were thereupon allowed to cross-examine him: there is nothing in the Procedure Code suggesting such a proceeding. To use therefore a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of the criminal law. What is contemplated by S. 30 is formal proof by the prosecution of a confession previously made. When you prove a confession made by a person, you tender evidence at the trial that on some previous occasion, he did in fact make a confession and that is the only thing which was ever contemplated by the section."

[7] This view finds support in a Madras judgment reported as *In re Marudamuthu Padayachi*, A. I. R. 1931 Mad. 820 in which it has been held that :

"A confession of accused 1 made from the dock in the magisterial proceedings admitting his own guilt and accusing accused 2 cannot be considered by the Court as against accused 2."

The Oudh Chief Court has also taken a similar view. In *Kunwar Sen* v. *Emperor*, A. I. R. 1933 Oudh 86 it has been held that S. 30 applies only to statements made before and proved at the trial. The expression "is proved" used in this section seems hardly applicable to statements made at the trial.

[8] The Lahore High Court was also at one time of the same view, though in a subsequent judgment of the same Court a different view has been taken. In *Nawab* v. *Emperor*, A. I. R. 1935 Lah. 35 the word "proved" occurring in S. 30, Evidence Act, has been held to mean "proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial." In this case a passage occurring in *Mahadeo Prasad* v. *Emperor*, A. I. R. 1923 ALL. 322 referred to above was quoted with approval.

[9] This view has found further support in *Mt. Sumitra* v. *Emperor*, A. I. R. 1940 Nag. 287. Their Lordships in course of a very well-reasoned judgment with which we find ourselves in respectful agreement, have laid down the law in the following words :

"There is obviously a difference between proof of a confession and proof of a fact. The definition of the word 'proved' given in S. 3, Evidence Act, relates to proof of a fact in issue and not a statement recorded by the Court in the presence of the persons under trial. Section 30 speaks of the proof of a confession and not proof of a fact in issue. The word 'confession' used there clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot therefore signify any matter which comes on the record at the end of the prosecution evidence.

There is a distinction between a confession made by an accused person before the trial and one made by him when examined under S. 342. In the former case, he admits his guilt without knowing or testing the whole of the evidence against him and against the other suspects. He spontaneously chooses to make a clean breast of the whole thing. The confession being an admission of his own guilt is admissible as evidence against him under S. 21, Evidence Act. That being so, a duty is cast on the Magistrate who records a confession under S. 164, Criminal P. C. to warn the person making the confession that he is not bound to make a confession but that if he does so it might be used as evidence against him. The confession becomes thus admissible against him as evidence unlike the statement that he makes under S. 342, Criminal P. C. That statement comes after the prosecution has put forward the entire evidence and the accused is asked to state only for the purpose of enabling him to explain any circumstances appearing in the evidence against him. The answers given by the accused can only be taken into consideration against him in the same enquiry, or trial although they can be 'put in evidence' for or against him in any other enquiry or trial for any other offence."

[10] In *Tahsinuddin Ahmad* v. *Emperor*, A. I. R. 1940 Cal. 250 their Lordships of the Calcutta High Court have observed that :

"The statements made by the accused under S. 342, Criminal P. C. are to be considered by the Court and the Court should draw such an inference from the answer of the accused or refusal to answer as it thinks just. The Court in some cases may draw even an inference against the accused from his answer or refusal to answer. *But the Court is not entitled to draw any inference against a co-accused from the answer of one accused given in response to questions put to him under the provisions of this Section.*"

As against this, the learned counsel on behalf of the Crown has drawn our attention to *Dial Singh* v. *Emperor*, A. I. R. 1936 Lah. 337. In this case it has been held that :

"A confession made at the close of prosecution by one of several accused persons who are being jointly tried implicating himself, and such other persons can be taken into consideration against such other persons, but this evidence would be a weakest kind and the value to be attached to such evidence would be a matter for determination in each particular case. If such a confession is made before a Magistrate at the close of the case for the prosecution, the accused whom it affects has an opportunity of nullifying its effects by his defence evidence and also by cross-examining the prosecution witnesses after the charge."

In this case the learned Judge (Rangi Lal J.) who delivered the judgment on behalf of the Bench, while dissenting from the Allahabad judgment quoted above, has stated in his judgment :

"Finally the Learned Judge (of the Allahabad High Court) remarked that a confession could be "proved" only by tendering evidence to show that it was made on a previous occasion. We have to point out with great respect that in arriving at this conclusion, the Learned Judge and the Learned Judges of the Madras High Court overlooked the definition of "Proved" in S. 3, Evidence Act. That definition is:

"A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

[11] If a confession is made before the Court itself it "is a matter before it" and the Court must believe it to exist. It must, therefore, be said to be "proved". A fact can be proved not only by "evidence" as defined in s. 3, Evidence Act, but also by other matters before the Court. A confession recorded by the Court itself would not be "evidence" but would be a matter before the Court. We are therefore, of opinion that the language of s. 3, Evidence Act does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial.

[12] The Learned Assistant Advocate General has further drawn our attention to *William Cooper* v. *Emperor*. A. I. R. 1930 Bom. 354. But this ruling far from supporting him, lends its support to the applicant's case. The Bombay High Court has laid down the law that there is no provision in s. 342, Criminal P. C., which would seem to allow the statement made by one accused person to be taken into consideration against other accused in the same trial. This is exactly the case here. In this case what is treated as Gulla Mir's confession is a statement made under s. 342, Criminal P. C., and according to the Bombay ruling relied upon by the learned Assistant Advocate General, a confession made under s. 342, cannot be proved against a co-accused in the same trial. We shall, however enter into a fuller discussion of this point immediately.

[13] Another judgment relied upon is that of Sindh reported as *Rajhuman Kundanmal* v. *Emperor*, A. I. R. 1937 sind 218. This is a single Bench judgment of that Court. In this judgment the learned Judge has adopted a different course from either of the two views, discussed above. In this ruling it has been laid down by the Learned Judge that "s. 30, Evidence Act clearly contemplates that the statement of one accused is admissible against his co-accused." According to this view a confession made before a trial begins is excluded from being taken into consideration. This goes counter to the views of all the High Courts, and would not perhaps be relied on by the prosecution.

[14] Now coming to s. 342, Criminal P. C. This section lays down the procedure for the examination of an accused after the prosecution evidence is recorded. In sub-s. (3) of s. 342, Criminal P. C., it is laid down that

"the answers given by the accused may be taken into consideration in such enquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

A reference to sub-s. (3) of s. 342, Criminal P. C., would make it abundantly clear that it excludes the possibility of a confessional statement made by an accused recorded under s. 342, Criminal P. C., to be used against a co-accused such answers as are given by the accused can be used only for or against him and not against others. We do not find any indication in this section which would go to show that the answers given by one accused under this section could be considered against his other co-accused.

[15] Coming now to the Lahore judgment reported as *Dial Singh* v. *Emperor*, A. I. R. 1936 Lah. 337, their Lordships have held that a confession made before a Court during trial is a matter before it, and the Court must believe it to exist. It must therefore be said to be proved and can therefore be used against a co-accused in the same trial. As against this, the meaning given to the phrase "is proved" as it occurs in s. 30, Evidence Act by the majority of the Indian High Courts is that the confession to be proved must have existed before the trial had begun, i. e., must have been recorded, before the trial of the case commenced. The Lahore High Court has based its interpretation upon the definition of the word "Proved" as given in s. 3, Evidence Act. A reference to s. 3, Evidence Act, would show that

"A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".

With all respects for the Learned Judges, we are of the opinion that this definition itself excludes the consideration of a confessional statement made by an accused under s. 342, Criminal P. C., against a co-accused of his, because in order to hold that a fact is proved, the Court must be in a position to believe, after consideration of the circumstances, that it is true or is so probable that a prudent man would, under the circumstances of the case, act upon the supposition that it so exists. Now with regard to statement that is recorded by the Court under s. 342, neither the question of belief in its existence nor of the probability of its existence arises. Such a statement is within the knowledge of the Court itself and the belief in its existence or in the probability of its existence is out of question. A distinction has to be drawn between the words "belief" and "knowledge". A belief will be inculcated in the mind of a person by various factors: by evidence of witnesses or by inferences from given premises. But not so with knowledge. Knowledge is gained by a person by making use of his perceptional faculties

and is clearly distinguishable from belief. Therefore according to the ordinary canons of interpretation a fact that has already come to the knowledge of the Court during the trial does not need being proved and cannot be proved so as to make the Court believe in its existence. Proof is needed of a fact which the Court does not know or believes to exist.

[16] Under these circumstances we find ourselves in accord with the majority view of the Indian High Courts and hold that a confessional statement recorded under s. 342, Criminal P. C., cannot be considered against a co-accused in the same trial.

[17] We have already seen that the two witnesses Mohd. Dar and Akbar Dar are not reliable witnesses, because they have given statements against what was the case of the prosecution in the beginning. Therefore we find no evidence to hold that the accused Malla Mahmadoo did as a matter of fact pass out the alleged quantity of wheat from the stocks over which he had no dominion.

[18] But the matter does not stop here. It was argued on behalf of the accused that Malla Mahmadoo was not in charge of stocks of wheat. He was only a weighman whose function was to weigh out shali to different people who held slips issued by the Ghat Munshi. It is a fact that shali was not put initially in his charge, but this too is a fact that during the day he used to have dominion over the property when the distribution was made. But yet it has to be shown by the prosecution that he has made a mis-appropriation of that wheat which was in his charge. The case of the prosecution is not that some wheat was put in his charge out of which he accounted for a certain quantity and left the remaining quantity unaccounted. We have it in the evidence of many prosecution witnesses including Mohd. Dar that nobody had ever complained against Malla Mahmadoo that he had given to somebody a lesser quantity than what was due to him, and thereby saved some quantity which he later on misappropriated. Not only is there no such prosecution case as would have gone to show or even allege that the accused had not accounted for the whole quantity of wheat put in his charge, but there is positive evidence on the record to show that 300 mds. of wheat meant for Devar were completely accounted for by Malla Mahmadoo and no shortage was detected (vide Ghulam Mohd. Ghat Munshi). The learned Special Magistrate has stated in his judgment in this connection:

"It is sought to challenge this direct evidence by presumptive proof. The stray admission of the Ghat Munshi as elicited in cross-examination that the stock was fully accounted for cannot be accepted to be correct and serves as an illustration of the cases where book adjustments are at variance with actual facts. The Ghat Munshi was principally responsible for the stock and he had no option to say otherwise. A different statement would have exposed him to grave dereliction of duty and carelessness bordering on to criminal negligence."

One wonders what does he mean by "actual facts". Has it been proved or even alleged by the prosecution that 300 mds. wheat which were in charge of Malla Mahmadoo were not fully accounted for or that a shortage was detected? Even if we assume that it was Malla Mahmadoo who had sold wheat to Hasan Nanwai through Gulla Mir, yet in view of the fact that it is not proved that it was the same wheat or out of the same wheat which was put in his charge that the alleged sale was effected, Malla Mahmadoo cannot be proceeded against under s. 409, Ranbir P. C. The ingredients of s. 409, are that the property must be entrusted to a person or he must have some dominion over that property and who dishonestly misappropriates or converts that property to his own use or dishonestly uses or disposes of that property. Taking this into consideration, criminal breach of trust can never be brought home to the accused. It has positively to be established that breach of trust was made of the property entrusted to him or at least he had failed to account for the quantity put in his charge. This has not been proved in the present case. May be that he is guilty of an offence under some other law (assuming that he has in fact sold the property to Hassan Nanwai through Gulla Mir) but he cannot be proceeded against under s. 409, Ranbir P. C.

[19] We, therefore, hold that no offence is proved against Malla Mahmadoo. As regards Gulla Mir, he has been convicted under s. 409/109, Ranbir P. C. We have already recorded our opinion that it is not proved that Malla Mahmadoo has committed an offence under s. 409, Ranbir P. C. As such the question of abetment of an offence under s. 409, does not arise. Hassan Nanwai has been convicted under s. 411, Ranbir P. C. The fact that the wheat recovered from his possession not having been proved as being the subject of criminal breach of trust, his conviction also cannot stand.

[20] The result is that we accept these appeals and acquit Malla Mahmadoo, Gulla Mir and Hassan Nanwai and order that they be forthwith released if not required in some other case. Fine, if paid, shall be refunded.

[21] Let a copy of this judgment be attached to all the three appeals.

B/D.R.R. *Appeals allowed.*

A. I. R. 1952 Jammu & Kashmir 53

KILAM J.

Lachhman and others — Appellants v. *Aziz Ganai and others—Respondents.*

Revenue First Appeal No. 6 of 2009, D/- 8-7-1952.

(a) Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980) — Suit by three persons owning certain piece of land for ejectment of tenant on ground that it was required for their bona fide personal cultivation — Plaintiffs already in joint possession of 28 kanals and 10 marlas of Abi and kukshki land standing in the name of all of them—Each one of the plaintiff's cannot be said to be in cultivating possession of 17

kanals of land — Plaintiffs held were entitled to a decree. [Para 5]

(b) Tenancy Laws — Jammu & Kashmir Tenancy Act (2 of 1980), (as amended by Act 7 of 2005), S. 15A — Claim to status of protected tenant — Proof.

Under S. 15A, before a tenant can successfully claim the status of a protected tenant he has got to prove that he had held continuously the land in dispute for a period of six years from the commencement of the Jammu and Kashmir Tenancy (Amendment) Act (7 of 2005) that is from 4th Maghar 2005. In the alternative he has to prove that he had held the land continuously for a period of not less than seven months immediately preceding the date of commencement of that Act, that is, he must prove his cultivating possession from 4th Baisakh 2005 to 4th Maghar 2005.

Hence, if the tenant has come into possession of the land only in the year 2007 and never before, he cannot claim the status of a protected tenant. [Paras 6, 9]

(c) Evidence Act (1872), S. 35—Revenue records — Presumption of correctness attaches to entries therein —Statement of Patwari based on such record as to fact of possession of a particular person at a particular time cannot be lightly brushed aside. [Para 8]

Anno. Evi. Act, S. 35, N. 11.

Hirday Nath Dhar—for Appellants.

Judgment. — This is a plaintiffs' appeal and has arisen out of an ejectment suit brought against the tenant which was dismissed by the Collector Anantnag on 17th Phagon 2008. The plaintiffs are the owners of a plot of land measuring 7 Kanals and 13 marlas in Khewat No. 67, Khasra No. 293-min and situate in village Hablish, Tehsil Kulgam. They wanted possession of this land to cultivate it personally. Hence the present suit. The allegation in the plaint further is that the land in their cultivating possession does not exceed 25 Kanals, that is to say a trifle more than 8 Kanals per head, which is much less than 17 Kanals which each one of them is entitled to cultivate personally according to law.

[2] The defendant has resisted the suit on the ground that the plaintiffs are not cultivators by profession nor do they know the art of agriculture and that he (the defendant) has got the right of protected tenancy in the said land.

[3] The following issues have been raised in the case:

(1) The plaintiffs to prove that each one of them is not cultivating personally 17 Kanals of land and they want the land in dispute for their personal cultivation and which makes the defendant liable to ejectment.

(2) The defendant to prove that he is a protected tenant and as such is not liable to ejectment.

(3) In case of failure to prove issue No. 2, the defendant to prove as to what, if any improvements have been effected by him in the land and what is the amount of compensation to which he may be declared entitled.

[3a] The plaintiffs have produced Shankar Nath Patwari, Azizilone Moma Dar and Sri Kanth as their witnesses and besides that plaintiff 2 has also appeared as his own witness. The defendant has produced Ghaffarlone and Aba Shah. (After discussion of the evidence of these witnesses His Lordship proceeded.)

[4] *As regards issue No. 1.* — It is admitted both by the plaintiffs' and the defendants' witnesses that the plaintiffs have in their cultivating possession about 28 Kanals of land out of which 3 Kanals and 10 marlas are Khushki. It means that each one of the plaintiffs has in his cultivating possession not more than 9½ Kanals of Abi and Khushki land. The learned Collector has by a curious process of reasoning arrived at the conclusion that:

"Since the plaintiffs 1 to 3 live together and no partition has taken place amongst them, therefore, it could not be proved by them that each one of them does not keep 17 Kanals of land in his cultivating possession and, therefore, it has not been proved that each one of them is entitled personally to cultivate 17 Kanals of Abi land or 33 Kanals of Khushki land."

[5] I have carefully gone through the relevant provisions of the Tenancy Act including all the amendments that have been effected in the Act, and I have not been able to find a single provision which might even remotely assist the Learned Collector in his wonderful proposition of law that has been enunciated by him in his judgment. The question that he should have kept before his mind's eye was not as to whether the defendant possessed any land or not, but the main question was as to how much land was in the cultivating possession of each one of the plaintiffs. It does not require any great flight of imagination or arithmetical sense to arrive at the conclusion, that since only 28 Kanals of land are in the cultivating possession of these three persons, each one of them cannot be said to possess more than 9 Kanals of land in his cultivating possession. In fact if these three persons (plaintiffs) have to be treated even as a one unit even then all the three combined together are entitled to keep in their physical cultivating possession not less than 51 Kanals of Abi land. The matter would have been different if the entries were not in the name of all the three plaintiffs. But here the entries of ownership are in the names of all the three plaintiffs, and as such there is no reason as to why they should be deprived of a benefit which the law ensures them. The plaintiffs living in separation or jointness is of no moment; it is a matter of domestic concern for them and convenience is the sole guiding factor.

Now remains the question as to whether the plaintiffs bona fide require the land in dispute for their personal cultivation. The defendant's witnesses have stated (as already referred to above) that the plaintiffs till the land with their own hands. Their womenfolk also assist them, and that the plaintiffs know the art of husbandry as good as any other peasant. Lastly they have said that the plaintiffs cannot make their ends meet with the scanty yield from their land, hence their anxiety to cultivate the land personally. In face of this unequivocal statement of the defendant's own witnesses, it requires a bold feat of imagination to hold that the plaintiffs do not bona fide require the land for personal cultivation. Issue No. 1 is, therefore, held to be proved.

[6] *As regards issue No. 2.*—The burden of this issue raised with regard to his being a protected tenant has rightly been placed upon the defendant. According to S. 15-A, Jammu and Kashmir Tenancy Act :

"A tenant shall be deemed to be a protected tenant and recorded as such in respect of any land not exceeding 17 Kanals of Abi or 33 Kanals of Khushki in the Kashmir province including the Frontier district of Ladakh and Gilgat and 33 Kanals of Abi or 65 Kanals of Khushki in the Jammu province if—(a) he has held such land continuously for a period not less than seven months immediately preceding the date of commencement of the Jammu and Kashmir Tenancy (Amendment) Act (7 of 2005) or for a period not less than six years any time after the date of commencement of the Act, mentioned above, and (b) has cultivated such land personally during the period mentioned in cl. (a)."

According to this definition, a tenant before he can successfully claim the status of a protected tenant has got to prove that he had held continuously the land in dispute for a period of six years from the commencement of the Act (7 of 2005). Obviously the defendant cannot base his claim on this provision because it would be in the year 2011 that he will be held entitled to make such a claim and that too if he held continuously the land in dispute till then. In the alternative he has to prove that he had held the land continuously for a period of not less than seven months immediately preceding the date of commencement of the Jammu and Kashmir Tenancy (Amendment) Act (7 of 2005). The Jammu and Kashmir Tenancy (Amendment) Act (7 of 2005) came into force on 4th Maghar 2005. Seven months immediately preceding the date of commencement of this Act would carry us to 4th Baisakh 2005. Therefore it is obvious that the defendant, in order to get the status of a protected tenant, must prove that he was in the cultivating possession of this land from 4th Baisakh to 4th Maghar 2005.

[7] The two witnesses produced by the defendant, namely, Ghaffar Lone and Aba Shah have given very vague statements. For instance, Ghaffar Lone says that the defendant was in the cultivating possession of this land for the last 2 or 4 years, though Aba Shah places the period at four years. They do not mention the year or month when the possession of the defendant started. The contradiction and vagueness in their statements is obvious.

[8] As against this, the Patwari has stated in unmistakable and unambiguous terms that the entry with respect to the defendant being in cultivating possession of the land started only in the Rabi of 2007. Prior to the year 2007, according to the Patwari and his record, the defendant has never been shown in cultivating possession of this land, but without assigning any reason the Collector has brushed aside the evidence of the Patwari, though supported by revenue records. It is wonderful that the learned Collector has written in his judgment that there has been no rebuttal on behalf of the plaintiffs to the fact that "the defendant has been in cultivating possession of this land even in 2005". The Patwari is a revenue officer—may be a petty revenue officer—but he has in his charge important revenue record about which the law raises a presumption of correctness. If the learned Collector was of the opinion that the Patwari's record was a fabrication and therefore unbelievable, he should have said so in clear terms. But on the contrary we do not find a faint reference in his judgment to the Patwari's statement or to his record.

[9] I, therefore, have no hesitation in holding that the defendant has not been able to rebut the presumption of correctness which attaches to the revenue record on the basis of which the Patwari has given his statement. I, therefore, hold that the defendant came into possession of this land only in the year 2007 and never before, and as such he cannot be treated as a protected tenant. The Issue No. 2 is decided against the defendant.

[10] The witnesses produced by the defendant and also the plaintiffs have unanimously stated that the defendant has not effected any improvements in this land, and as such no question of compensation arises. This issue is held not proved.

[11] The result is that this appeal is accepted and the plaintiffs' suit for ejectment decreed, but taking into consideration the peculiar circumstances of this case, I leave the parties to bear their own costs throughout.

B/K.S. *Appeal allowed.*

A. I. R. 1952 Jammu & Kashmir 55

KILAM J.

Mt. Noor Bibi—Accused v. *State.*

Criminal Revn. No. 74 of 2007, D/- 10 Assuj 2007.

J. & K. Egress and Internal Movement (Control) Ordinance (2005), S. 3 — Attempt to commit offence—What is — Accused going towards border with intention to cross over to Pakistan — Arrest at 160 yards from border—Held, offence was not completed—(Penal Code (1860), S. 511).

Before the commission of an offence, an accused has got to go through three preliminary stages; first that of intention to commit the offence, secondly preparation to commit and thirdly, attempt to commit it. Mere intention to commit an offence is not punishable. Nor is preparation to commit it. It is only when the preparation merges itself in attempt that the act becomes punishable by law. [Para 2]

Where a woman was going towards the border with the intention to cross over to Pakistan but was arrested when she had 160 yards more to cover and tried for an offence under S. 3 of the Ordinance.

Held that (1) the Section was designed to deal with the action of those persons who make an attempt to cross the border without permission. There could be no presumption that anybody who moved towards the border wanted to cross over. The offence would commence only when a step was taken towards crossing the border. [Para 4]

(2) that her action amounted to a mere preparation and not an attempt and as before actually reaching the border line she might have changed her mind and come back, benefit of doubt should be given to her. 8 Mad. 5 and A. I. R. 1932 Mad. 507, *Rel. on.* [Para 3]

Anno. I. P. C., S. 511 N. 2.

Assistant Advocate General—for the State.

REFERENCES: Courtwar/Chronological/ Paras
('84) 8 Mad. 5 : (1 Weir. 330) 4
('84) 8 Mad. 6 4
('32) A. I. R. 1932 Mad. 507 : (33 Cri. L. J. 582) 4

Order.—In this case the accused was charged under s. 3, Egress and Internal Movement (Control) Ordinance 2005 and was sentenced to six month's rigorous imprisonment by the Munsiff Magistrate, Ranbirsinghpura. On appeal, the learned Sessions Judge maintained the conviction, but reduced the sentence to three months' rigorous imprisonment.

[2] The woman (accused) was arrested at a place in the state territory which was at a distance of 160 yards from the border the woman, it is alleged, was going towards the border with the intention of crossing over to Pakistan. The only question in this case is as to whether an offence under s. 3, Egress and Internal Movement (Control) Ordinance 2005 has been brought home to her. The learned Assistant Advocate General has argued that the accused was guilty only of an attempt to commit the said offence. But I am afraid I cannot agree with him even to this extent. Before the commission of an offence, an accused has got to go through three preliminary stages first that of intention to commit the offence, secondly preparation to commit and thirdly, attempt to commit it. Mere intention to commit an offence is not punishable by the Ranbir P. C. Nor is preparation to commit it. It is only when the preparation merges itself in attempt that the act becomes punishable by law.

[3] In this case we have the statement of the accused that she had intended to go to Pakistan and that she was moving towards the border and it is in evidence that when she had 160 yards more to cover she was arrested. It is obvious from this statement that actual offence had not been committed. Was her moving towards the border an attempt or mere preparation ? It is clear that moving towards the border is by itself no offence. The offence will be said to have been committed when the border is crossed. If an accused is arrested on the border while trying to cross over, it shall be called an attempt, but if an accused is moving towards the border and has yet a good bid of distance to cover, can it be said to be an attempt or a mere preparation ? I think it is mere preparation and not an attempt and that too for the simple reason that before actually reaching the border line, the woman (accused) may have changed her mind and repented her action and come back.

[4] The section to my mind is designed to deal with the action of those persons who make an attempt to cross the border without permission. There can be no presumption that anybody who moves towards the border wants to cross over. Rather the offence would commence only when a step is taken towards *crossing* the border. In this case such a commencement had not taken place. In an old Madras case, *Queen-Empress* v. *Ramakka*, 8 Mad. 5 and *Palani* v. *Sivalinga*, 8 Mad. 6, where

"a woman with the intention of committing suicide by throwing herself in a well actually ran towards it when she was seized by a person, it was held that she was not guilty of an attempt to commit suicide, because she might have changed her mind and she was caught before she did anything which might be regarded as the commencement of the offence."

In *Narayanaswamy Pillai* v. *Emperor*, A. I. R. 1932 Mad. 507 the accused was found travelling in a bus to Tranquebar carrying 165 tolas of Opium which somebody had given to him at Chidambaram with instructions to meet him at a place in French Territory and to give it to him. The accused in this case was charged under s. 7 read with s. 20, Dangerous Drugs Act. In this case it was held by Walsh J. that "there was no attempt to commit the crime but mere preparation for its committal." The learned Judge in the concluding portion of his judgment states that "It seems to me that he (accused) must be given the benefit of doubt that he might have repented of his intention before reaching French Territory." There is no reason why I should not give the benefit of doubt to the woman that she might also have repented of her action of going to Pakistan territory before she had reached the border which was yet 160 yds. away.

[5] The learned Assistant Advocate-General has argued that in view of the accused's statement, a conviction must follow. In her statement all that she says is that she was proceeding towards Pakistan territory. This to my mind does not exclude the possibility of her having changed her mind before she had actually reached the border. Her intention may have been to go to Pakistan, but her intention had practicalised itself only to the extent of preparation. There was yet a gap between preparation and attempt and physically too there were 160 yds. between the border and the place of arrest which left enough space and time at her disposal to ponder over the whole affair and even change her mind.

[6] I, therefore, am of the opinion that offence under s. 3, Egress and Internal Movement (Control) Ordinance of 2005 has not been brought home to the accused. I accept this revision petition and order that she be forthwith released unless required in connection with some other case.

B/D.R.R. *Revision petition accepted.*

END

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KUTCH JUDICIAL COMMISSIONER'S COURT

1952

JUDICIAL COMMISSIONER :

The Hon'ble Shri N. C. Vakil, B.A., LL.B.

GOVERNMENT PLEADER :

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T. P. Act *(contd.)*
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——*S. 68 (1) (d)*—Mortgage of undivided share of coparcenary property—Right to recover mortgage money 18*d*
——*Ss. 105, 106* — Rent settled for one year to be paid from month to month as it fell due—Tenant to vacate, at any time when called upon to do so — Tenancy held one at will and not for fixed period — No notice to quit is required—Even after expiry of 12 months, tenancy still remains tenancy at will and not from month to month 13*a*
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——*S. 108 (m)*—*See* Landlord and tenant 19

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A. I. R. (39) 1952 KUTCH 1 (C. N. 1)

VAKIL, J. C.

Bhailal Ganpatram (Mandvi) Plaintiff, Appellant v. Keshavji Motichand, Defendant-Respondent.

First Appeal No. 31 of 1950, D/- 6-10-1951.

(a) *T. P. Act (1882) S. 60 — Mortgage whether subsisting — Burden of proof — Evidence Act (1872) Ss. 101 to 103.*

In order to succeed in a suit for redemption, a plaintiff must not only show the alleged mortgage but he must further show that it was a subsisting mortgage. The expression 'subsisting mortgage' means a mortgage which is not extinguished when the equity of redemption is extinguished by act of parties or by operation of law. An equity of redemption is extinguished by act of parties if a mortgagee purchases it from his mortgagor. When a mortgage alleged is either admitted or proved, it may be presumed in a proper case having regard to the circumstances of the case, that it is a subsisting mortgage if it is shown that the equity of redemption therein was not extinguished by operation of the law of limitation, but not so where the mortgage is denied.

(Held in this case the equity of redemption was not extinguished by transfer to the mortgagee). (Paras 6, 6a)

Anno: T. P. Act, S. 60 N. 22; Evidence Act, Ss. 101 to 103 N. 58.

(b) *T. P. Act (1882), S. 60 — Decree against mortgagee — Execution sale — Failure to raise objection by mortgagor — Presumption.*

In a Court-sale, only the right, title and interest of the judgment-debtor passes. Hence, from the fact that no objection was raised on behalf of the heirs of the mortgagors to the property being sold as of the ownership of the mortgagee it cannot be inferred that the property was sold to the mortgagee by the mortgagor and the equity of redemption was extinguished. (Para 7)

Anno: T. P. Act, S. 60 N. 22.

(c) *T. P. Act (1882), S. 60 — Suit for redemption — Delay — Presumption.*

Delay short of the period of limitation does not bar a right. The doctrine of delay and laches is an equitable doctrine and in deciding the question whether a presumption should be raised against a suitor on the ground of delay, consideration such as common course of natural events, human conduct and public and private business have to be taken into account. Where the mortgage was for a substantial amount, the mortgagor died after the mortgage amount became due, there was no direct male descendant. Under the circumstances, delay in enforcing rights of redemption is understandable. If the defendant conversant with Court affairs and particularly conversant with the execution proceeding in which property was put to sale purchases the property without making an inquiry about title of judgment-debtor mortgagee he cannot be heard to say that due to delay he was prejudiced as loss of evidence was occasioned. From delay in enforcing rights of redemption a presumption cannot be made that the property was purchased by the mortgagee from the mortgagor. (Para 12)

Anno: T. P. Act, S. 60 N. 22.

(d) *Civil P. C. (1908), O. 34 R. 1 — Suit for redemption — Non-joinder of person interested in equity of redemption.*

Non-joinder of a person interested in the equity of redemption is not necessarily fatal to the suit for redemption and if the plea about non-joinder is clear as regards a particular person, such person can be added as a party defendant during the pendency of the suit. (Para 14)

Anno: C. P. C., O. 34 R. 1 N. 6, 19.

(e) *Civil P. C. (1908), O. 34, R. 1 — Suit for redemption — Necessary parties — Heirs of original mortgagee.*

The original mortgagee's heirs are not necessary parties to a suit for redemption where his right, title and interest are sold. He has, therefore, no interest in the mortgage security. Persons owning interest in mortgage security which is transferred absolutely but who are liable to render account may properly be joined as parties to the suit. If they are not so joined and if the defendant on record can show that it is not possible to render account for the period during which the mortgage property was in their possession, equitable orders might be made. These are matters to be considered at the time of taking accounts. But it cannot be held that such per-

sons are necessary parties to the suit and as they are not joined, the suit is bad. (*Para 15*)

Anno: C. P. C., O. 34 R. 1, N. 6. 19.

M. M. Mehta and D. P. Joshi, for Appellant; S. U. Bhansali, for Respondent.

JUDGMENT: This appeal arises out of a suit brought by the appellant against the respondent for redemption of a mortgage dated the sixth day of the first half of the month of Bhadrapada St. 1945. The mortgage was executed by one Joshi Dharamshy in favour of one Datubhai Dosani for 6001/- Koris in respect of a 'vadi'. It was alleged in the plaint that in execution of a money decree against Datubhai Dosani, the latter's mortgagees' right in the vadi was put to sale and was purchased by the respondent in S. Y. 1968. It was further alleged that the plaintiff purchased equity of redemption from the heirs of the mortgagor by two separate deeds in the year S. Y. 2002 and thus he became entitled to bring the suit under appeal. The plaintiff, therefore, sued for redemption on an account taken in accordance with the terms of the mortgage bond.

(2) The defendant did not admit the plaint mentioned mortgage and contended that Datubhai Dosani was the full owner of the property which he purchased in the Court-sale. It was denied that transferors of the plaintiff were the heirs of the original mortgagor. It was contended that the heirs of Datu Dosani were necessary parties to the suit. The other contentions related to costs incurred for repairs and improvement of the property in suit.

(3) The lower Court found that Dharamshi had mortgaged the property in suit as alleged by him. It, however, held that it was not shown to be a subsisting mortgage. The lower Court further found that only one of the executants Prabhulal was heir of Dharamshi Natha and that it was not proved that Manubai was another heir of the mortgagor. It was held that the suit was not bad for non-joinder of the heirs of Datubhai as parties to the suit. No findings on issues Nos. 10 and 11 about costs incurred for repairs and improvements were recorded by the lower Court. As the lower Court held that there was no subsisting mortgage, the suit was dismissed. Plaintiff has, therefore, preferred the present appeal.

(4) In appeal, the learned Advocate for the appellant contended that the lower Court erred in holding that there was no subsisting mortgage. The learned Advocate for the respondent contended that the lower Court erred in holding that plaintiff was entitled to maintain the suit as purchaser from the heirs of Dharamshy. It was further contended that the heirs of Datubhai were necessary parties to the suit. In view of these contentions, the following points for determination arise in appeal. (1) Was the mortgage sought to be redeemed a subsisting one? (2) Whether appellant had purchased equity of redemption to enable him to maintain the suit? (3) Whether the suit was bad for non-joinder of parties?

(5) Point No. 1: A certified copy of the mortgage deed in suit is produced at Ex. 25/1. It is, therefore, no longer disputed that Dharamshy Natha had mortgaged the property in suit with Datubhai Dosani. The Lower Court however dismissed the suit holding that plaintiff failed to show a subsisting mortgage. The reasons given by the lower Court for coming to that conclusion are that at the time of the auction-sale, nobody came forward to allege that Datubhai was a mortgagee of the property; Datubhai had constructed structures on the property; for 35 years since the date of the auction-sale none of the heirs of Dharamshi came forward alleging that the property was in mortgage with Datubhai; In st. 1985, the present defendant spent money in constructing a building on this property; though the period provided in the mortgage bond for redemption was 12 years, the original mortgagor or his heirs did not care to redeem on an account taken though it was alleged that annual income considerably exceeded interest and that plaintiff had merely purchased litigation by finding out some persons as heirs of the mortgagors.

(6) It is undoubtedly a correct proposition of law that in order to succeed in a suit for redemption, a plaintiff must not only show the alleged mortgage but he must further show that it was a 'subsisting mortgage." The expression 'Subsisting mortgage' means a mortgage which is not extinguished. Speaking generally a mortgage is extinguished when the equity of redemption is extinguished by act of parties or by operation of law. An equity of redemption is extinguished by act of parties if a mortgagee purchases it from his mortgagor. In cases of old mortgages, in which clear evidence about date of a mortgage and the period provided for redemption is not forthcoming the question whether a mortgage is subsisting one arises for consideration in view of the fact that the law prescribes a period during which redemption could be had.

(6a) In the former Kutch State, the law did not provide any period of limitation for redemption of a mortgage. What the deft. obviously meant, though he did not say so precisely was that Datu Dosani had become full owner of the property before the auction-sale held in St. 1968. As defendant had denied the plaint mortgage, he did not state precisely that the mortgagee purchased equity of redemption in a particular year for a particular sum from the mortgagor or from his heirs. It seems that defendant did not do so deliberately leaving the plaintiff to prove a subsisting mortgage. But, when a mortgage alleged is either admitted or proved, it may be presumed in a proper case having regard to the circumstances of that case, that it is a subsisting mortgage if it is shown that the equity of redemption therein was not extinguished by operation of the law of limitation.

(7) The Court sale took place in the year St. 1968. The original mortgagor died in the year, 1963. He had no male issue. It is, therefore, possible that his daughters or daughters' heirs might not have raised any objection to the property being sold as of the ownership of Datubhai Dosani. It is well-known that in a Court-sale, only the right, title and interest of the judgment-debtor passes. Hence, from the fact that no objection was raised on behalf of the heirs of the mortgagors to the property being sold as of the ownership of Datu Dosani, it cannot be inferred that the property was sold to Datubhai. In this connection, reliance was placed by the redemption on two petitions sent by some persons from Bombay to the Court in response to notices to show cause why the Court sale should not be confirmed Ex. 31/1, Ex. 32/2. In these petitions, it was stated that the property was first sold in Bombay. The persons who are alleged to have made these statements were not examined. I, therefore, fail to see

how they became admissible in evidence. It is quite evident that when heirs of a judgment-debtor make such statements, they do so to delay confirmation of sale. No such sale deed executed and registered in Bombay was produced in the case.

(8) The mortgage was a chit-tham which is the technical term used in this part of the country. According to the terms of the mortgage, income of the property was to be set on against interest and an account was to be kept. A period of 12 years was provided for redemption. In St. 1957, the mortgagor was alive. It was urged that Dharamshi took no steps to redeem in S. Y. 1957 as the mortgagee had by that time become full owner of the property. At the sale time, it was contended that Dharamshy was merely a mortgagee from Charan and evidence was led to show that the Charan transferred his equity of redemption in favour of Datubhai. The later contention, if accepted, shows that Dharamshi who was a mortgagor vis-a-vis Datubhai had his equity of redemption in tact. To reconcile this apparently contradictory contentions, it was urged that in St. 1957, Dharamshi must have transferred his equity of redemption in favour of Datubhai. These contentions cannot be accepted from the mere fact that Dharamshy did not care to redeem the property in St. 1957. It was pointed out that according to the plaintiff, the income was considerable. For aught we know, in St. 1957, the principal amount and even some amount for interest might be due and the mortgagor might have no means to redeem. Hence the inference drawn by the lower Court from this circumsfance is not the only inference possible.

(9) Defendant has, however, led oral evidence in support of his contention. Defendant had no personal knowledge as he got interest, after the Court sale. One Ladha was examined at Ex. 33 but the witness made confusion by stating that there was talk of getting vadi of Abbas Vora in favour of Kantilal. Somjee Ex. 34 had got old connection with the defendant as a client and as a debtor. He deposed to a talk by one Meghjee that the vadi was purchased from the Charan. Jusa Ex. 36 was serving with the defendant. Natha Ex. 37 stated that Bhima told Jumabhai that he wanted to sell his right and he was told to pass a deed on taking money. It is evident that dead men tell no tales and it is easy to get much evidence which cannot be relied on. It appears that defendant has made a belated effort to keep the property with him by leading such evidence. The lower Court does not seem to have even referred to this evidence.

(10) It is said that Datubhai constructed structures on the vadi and that he would not have done so, if the property was in mortgage with him. The mortgage deed shows that there were some structures on the property. Either these structures might have been got repaired or additions and alterations might have been made. It appears that according to the terms, generally included in such mortgage bonds, the mortgagee becomes entitled to kharajat, an expression which is not necessarily confined to costs of necessary repairs. It is, therefore, possible that the mortgagee might have made additions and alterations to suit his convenience. It is further said that the present defendant constructed a bungalow on the property by incurring substantial costs. It may be accepted that the defendant did so thinking that Datubhai was the full owner as the property was accordingly sold at the Court sale though it was contended on behalf of the appellant that the present defendant was the clerk of the pleader who filed the execution petition to put the property to sale. The contention urged was that the heirs of the mortgagee would not have kept silent and allowed the defendant to construct a building over the land if the equity of redemption was not extinguished. It is quite evident that the heirs of the mortgagor who were not his direct descendants must not have cared for the property till they were approached by the present plaintiff for transfer of their rights. Hence, it could not be inferred that the equity of redemption must have been sold to the mortgagee.

(11) In this connection, it was urged that a lawyer who worked as a power of attorney holder of the plaintiff had unearthed such old transactions of mortgages by having access to registration office and had got such suits filed. It often happens that persons entitled to certain rights are not interested in agitating them due to uncertainties about Court-litigation. If a person happens to purchase such rights, it cannot be said that the rights so purchased are merely of a speculative character and an inference be raised from these facts that property must have been sold.

(12) Finally reliance was placed on delay from which an inference against the plaintiff could be made. Delay short of the period of limitation does not bar a right. It was contended that delay causing prejudice to a defendant and occasioning loss of evidence might raise a presumption against a plaintiff. In considering the question of delay the pertinent fact to be borne in mind is that according to local law, there was no statutory period prescribed for redemption. The doctrine of delay and laches is an equitable doctrine and in deciding the question whether a presumption should be raised against a suitor on the ground of delay, consideration such as common course of natural events, human conduct and public and private business have to be taken into account. The mortgage was for a substantial amount. The mortgagor died after the mortgage amount became due. There was no direct male descendant. Under these circumstances, delay in enforcing rights is understandable. Defendant cannot complain that delay has prejudiced him. As a person conversant with the working of law Courts, he was expected to inquire about title of the judgment-debtor before he purchased the property at Court sale particularly when the mortgage was evidenced by a registered instrument and plaintiff's titles were referred to in it. It was urged that defendant could get evidence to substantiate his case that the mortgage was extinguished as by the passing of the time, the heirs of Dosani could not be traced. In a petition filed in execution proceeding for sale of the property, it was stated that the wadi was called Joshi Dharansangji wadi. Defendant was unable to deny that he had written Ex. 32/3. Defendant explained that he had no reason to inquire about title of others and none came forward to declare his rights over the property. If a person conversant with Court affairs and particularly conversant with the execution proceeding in which property was put to sale purchases the property without making an inquiry, though the statement in Ex. 32/3 was sufficiently clear to induce him to inquire about the title of judg-

ment-debtor, he cannot now be heard to say due to delay he is prejudiced as loss of evidence is occasioned. I cannot, therefore, accept that from delay in enforcing rights, a presumption should be made that the property was purchased by the mortgagee. The mortgagee who had taken care to obtain title deeds would not have failed to get a registered document for sale of the equity of redemption.

(13) The lower Court, therefore, erred in holding that the equity of redemption was transferred to the mortgagee and hence plaintiff was not entitled to maintain the present suit.

(14) Point No. 2. Plaintiff purchased the equity of redemption from Manubai, widow of Jamnadas Damodar and from Prabhudas Gopaldas. Kantilal, in his evidence stated that Manubai and Prabhudas were the only two surviving heirs to the property of Dharamshi. The lower Court found relying on the evidence of the plaintiff's witness Hansaraj Ex. 24 that Devkabai had predeceased Dharamshi and hence Manubai widow of the son of Devkabai did not get any interest in the equity of redemption. The further question whether there were other heirs, besides Prabhudas, to the property of Dharamshy was not considered by the lower Court. It was contended on behalf of the respondent that plaintiff had not purchased interest of the heirs of Puribai, a third daughter of Dharamshi and hence he was not entitled to sue. What Hansraj stated was that at the time of the death of Dharamshy, only Puribai survived him. No doubt Valibai was one of the daughters of Dharamshi. Now the question is whether she had survived her father. Reliance was placed on the evidence of Meghji Ex. 30 who stated there all the three daughters of Dharamshi predeceased him. If that was so, on the death of Dharamshi, Gopalji and Jamnadas would have been entitled to the equity of redemption as it is not shown that Valibai had left any heirs. At any rate, non-joinder of a person interested in the equity of redemption is not necessarily fatal to the suit and if the plea about non-joinder was clear as regards a particular person, such a person would have been added as a party defendant during the pendency of the suit. Plaintiff is, therefore, entitled to maintain the present suit for redemption.

(15) The last contention is that heirs of Datu Dosani should have been made parties to the suit. It could not have been urged that Datu Dosani's heirs were necessary parties as his right, title and interest were sold. He has, therefore, no interest in the mortgage security. Persons owning interest in mortgage security which is transferred absolutely but who are liable to render account may properly be joined as parties to the suit. If they are not so joined and if the defendant on record can show that it is not possible to render account for the period during which the mortgage property was in their possession, equitable orders might be made. These are matters to be considered at the time of taking accounts. But it cannot be held that such persons are necessary parties to the suit and as they are not joined, the suit is bad.

(16) Result of my findings stated above is that the decree dismissing the suit be reversed and the suit be remanded back to the trial Court for taking account, for declaring the amount due and for passing a redemption decree. Hence the following order is made.

ORDER

Appeal is allowed. The decree passed by the lower Court dismissing the suit is set aside and the suit is remanded back to the lower Court for taking account, for declaring the amount due to the defendant and for making a redemption decree in accordance with law. Costs of this appeal to be costs in the cause.

D.H. *Appeal allowed.*

A. I. R. (39) 1952 KUTCH 4 (C. N. 2)

VAKIL, J. C.

Node Gulmamad Bhachu and others (accused), Applicants v. The Kutch State.

Criminal Revn. Appln. No. 46 of 1951, D/- 11-10-1951.

(a) Criminal P. C. (1898), S. 439 — Finding of fact — Interference in revision.

The High Court will not, as a general rule, interfere with findings of fact particularly when they are concurrent findings of fact of the lower Courts unless it is shown that the findings are not based on evidence or are patently erroneous. *(Para 3)*

Anno: Criminal P. C., S. 439 N. 15.

(b) Evidence Act (1872), S. 45 — Expert opinion — Evidentiary value when direct evidence is led.

When direct evidence is led and accepted, it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert opinion. *(Para 4)*

Anno: Evi. Act, S. 45 N. 3.

(c) Penal Code (1860), Ss. 34, 149 and 325 — Charge under S. 325/149 — Conviction under S. 325/34 — Legality — Criminal P. C. (1898) S. 236.

A person charged with having committed an offence under S. 325 read with S. 149 can be convicted under S. 325 read with S. 34 if the elements necessary for charge under S. 325 read with S. 34 are proved and the accused is not put to any disadvantage. A I R (16) 1929 Pat 11 Rel. on. *(Para 5)*

Anno: Penal Code, S. 34 N. 3, 7; S. 149 N. 5. Criminal P. C., S. 236 N. 1.

(d) Penal Code (1860), S. 34 — Common intention — Evidence of.

Where four persons armed with sticks go to a place where the complainant is found and belabour him as he was keeping illicit relation with woman of their family, it is evident that they had a preconcerted design and consequently, common intention to belabour the complainant and having regard to the weapons carried, it should be inferred that common intention was to cause grievous hurt and not simple hurt. *(Para 6)*

Anno: Penal Code, S. 34 N. 1.

D. P. Joshi, for Applicants; C. P. Pandya, P. P. for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('18) A I R (5) 1918 Pat 146: (19 Criminal L J 789) (Pr 5)

('29) A I R (16) 1929 Pat 11: (30 Criminal L J 205) (Pr 5)

ORDER: The applicants and another were tried by the Magistrate first Class Abdasa of offences punishable under Ss. 147 and 325, I.P.C. Each of the applicants was convicted of the offence punishable under S. 325, I. P. C., and was sentenced to undergo rigorous imprisonment for 12 months and to pay a fine of Rs. 200/-. The co-accused of the applicants was found not guilty of any of the two offences and the applicants were found not guilty of the offence under S. 147. The applicants appealed to the Sessions Court, Kutch against their con-

victions and sentences passed on them. The Sessions Court confirmed their convictions and sentences passed on them and dismissed the appeal.

(2) The Prosecution case was that the complainant Viramjee had gone on 24-11-1950 at 8 P. M. to his friend Alujee. While he was returning back, the applicants belaboured him causing grievous hurt to him. A witness Chinubha was also belaboured. As a result of injuries caused to him, the complainant had sustained a compound fracture of the bone of one of his legs. The defence was that the complainant was trying to outrage modesty of a woman Aminabai and on hearing her cries, the applicants one after other, went to the spot to her rescue. Both the lower Courts believed the prosecution evidence led. They have not accepted the defence version supported by the evidence of the defence witness including Aminabai.

(3) It was urged before me that the Lower Courts erred in relying on the Prosecution evidence and in discarding the defence evidence. It was pointed out that the reason given by the complainant for going to the house of Alubhai was not true and that the trial Court believed that the complainant had gone to the house of Aminabai. It was urged that the trial Court should have accepted the defence version and defence evidence particularly when there was no satisfactory evidence to show that Aminabai was a mistress of the complainant as found by the lower Courts. It has been pointed out more than once that this Court will not as a general rule interfere with findings of fact particularly when they are concurrent findings of fact of the lower Courts unless it is shown that the findings are not based on evidence or are patently erroneous. It may be that the complainant might have found it inconvenient to admit that he had gone to the house of Aminabai. There was prosecution evidence led to show that Aminabai was the mistress of the complainant and this evidence was accepted by both the lower Courts. On the other hand, it is hard to believe that the complainant thought of outraging the modesty of Aminabai in a residential locality, not far away from the houses of the applicants who are related to her. It appears that defence was innovated to set up a plea of self defence.

(4) As regards the injuries caused to the complainant, it was urged that according to medical opinion, it was possible that a compound fracture could be caused by a fall. This is the opinion of an expert. When direct evidence is led and accepted, it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert opinion. There can be no doubt from the evidence that the complainant was belaboured and he got the particular injury as he was belaboured.

(5) It was then contended that the applicants who were charged under Ss. 147 and 325 could not have been convicted for the offence under S. 325 read with section 34 in the absence of a specific charge. As there was no clear evidence as to who gave the blow which resulted in fracture, and as there were originally five accused before the trial Court, the principle of vicarious liability, enunciated in S. 149 I. P. C. was resorted to. As only four accused were found guilty, the trial Court resorted to S. 34 I. P. C. The question is whether accused persons charged with having caused grievous hurt by implication of S. 149 could be convicted of that offence by application of the principle of common intention enunciated in S. 34 I. P. C. The learned Advocate for the applicants contended that it could not be so done and relied on a case reported in 'Ritbaransingh v. Emperor', A I R (5) 1918 Pat 148. In that case, on the facts of the case that the theory that the assault on a particular man was induced and carried out by a preconcerted design was negatived. A person charged with having committed an offence under S. 325 read with S 149 could be convicted under S. 325 read with S. 34 if elements necessary for charge under S. 325 read with S. 34 are proved and the accused is not put to any disadvantage vide 'Bhondu Das v. Emperor'. A I R (16) 1929 Pat 11.

(6) It was then contended that the evidence did not justify a finding about existence of common intention to cause grievous hurt. It was argued that when the fight was sudden, S. 34 could not be made applicable and mere presence did not show existence of common intention to commit the particular offence committed. It is clear from the evidence that the applicants went to the place of the offence near the house of Aminabai to assault the complainant. Aminabai was their relation. They did not like that the complainant should misbehave with Aminabai. They found out that the complainant was about to come out of the house of Aminabai and they belaboured him there. Where four persons armed with sticks go to a place where the complainant is found and belabour him as he was keeping illicit relation with a woman of their family, it is evident that they had a preconcerted design and consequently common intention to belabour the complainant and having regard to the weapons carried, it should be inferred that common intention was to cause grievous hurt and not simple hurt.

(7) It is thus clear that each of the applicants was rightly convicted of the offence under S. 325 read with S. 149 and that there is nothing which calls for the interference of this Court. Having regard to the enormity of the injuries caused the sentence is neither harsh nor excessive. This application must, therefore, be dismissed.

(8) Application is dismissed.

K.S. *Revision dismissed.*

A. I. R. (39) 1952 KUTCH 5 (C. N. 3)

VAKIL, J. C.

Laxmibai, Plaintiff-Appellant v. Thaker Naranji Kalyanji and another, Defendants-Respondents.

Civil Reg. 1st Appeal No. 33 of 1950, D/- 11-10-1951.

(a) *Hindu Law — Joint Hindu family — Constitution of.*

Where the father had started business in milk by opening milk shops and the father and the sons joined together in carrying on that business the business became a joint family business. A I R (13) 1926 Bom 408 Rel. on. A I R (32) 1945 All 164 Disting, AIR (35) 1948 P C 108, Ref. (Para 4)

(b) *Hindu Law — Widow — Maintenance.*

Though there is severance of the Joint family status, the widow of a member would be entitled to be maintained out of the income of Joint family property acquired by Joint exertions until a partition is effected. (Para 6)

(c) *Hindu Law — Joint family property — Self acquisition.*

Where a member does not keep a separate account of his self-acquisition and acquisition by joint exertions he must be regarded to have thrown the self-acquisition in common stock. (Para 7)

Ramji R. Thacker, for Appellant; N. V. Bhatt and K. N. Mankad, for Respondents (Nos. 1 and 2 respectively.)

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(745) A I R (32) 1945 All 164: (I L R (1945) All 135) (Pr 4)

('26) A I R (13) 1926 Bom 408: (50 Bom 443) (Pr 4)

('48) 50 Bom L R 643: (A I R (35) 1948 P C 108) (Pr 4)

JUDGMENT: This appeal arises out of a suit brought by the plaintiff appellant to recover from the defendants respondents maintenance at the rate of Rs. 30/- per month, to recover Rs. 190/- as arrears of maintenance and to recover her stridhan ornaments detailed in the plaint or in the alternative a sum of Rs. 3,000/- as their price. Plaintiff alleged that she married Devji, son of defendant No. 1 and brother of defendant No. 2 in the year St. 1996. Her husband was living as a member of the Joint family consisting of himself and of the defendants. The Joint family had acquired joint family property mentioned in the plaint. Her husband died in the year St. 2001. For some time after her husband's death, defendants paid her maintenance at the rate of 30/- Koris a month, but they stopped doing so a few months before the suit. Defendants had got her stridhan ornaments mentioned in the plaint worth Rs. 3,000/-. As defendants did not give her maintenance and did not return back her ornaments, plaintiff was obliged to bring the suit under appeal to obtain the reliefs stated above.

(2) Defendants did not admit plaintiff's right to get maintenance. It was denied that plaintiff's husband was a member of the joint Hindu family of himself and the defendants. It was contended that the property mentioned in the plaint belonged to defendant No. 2 as his self acquisition. It was denied that defendants had got plaintiff's stridhan ornaments. It was explained that as plaintiff was a widow of their family, she was given maintenance though she had no right to it.

(3) The lower Court found that plaintiff's husband Devji was not a member of the joint family with the defendants and that the property in suit was not joint family property. It was further found that defendants had not got plaintiff's ornaments. Result of these findings was that plaintiff's suit was dismissed. Plaintiff has, therefore, preferred the present appeal.

(4) In appeal all the findings recorded by the Lower Court on the questions of facts were disputed. The pertinent questions to be considered are whether defendants and Devji were members of a Joint Hindu Family possessing Joint Family property, and if yes, what maintenance plaintiff is entitled to recover from the defendants. Another question to be considered is whether defendants were in possession of the plaint mentioned ornaments of the plaintiff. For consideration of the first mentioned question, some relevant facts may be stated. Defendant No. 1 had two sons called Kanji defendant No. 2 and Devjee. Defendant No. 1 had not got any ancestral property or ancestral business, except one varandi which he had sold many years back. Defendant No. 1 was doing some sundry business after he migrated many years back to Karachi. He seems to have returned back to Kutch in the year St. 1983. It seems that Kanjee was born in St. 1970 and Devjee was born about three years thereafter. When defendant 1 came back to Kutch, his sons were aged 13 and 10 respectively. It is not clear as to what business defendant 1 did after he returned back to Kutch. In the year St. 1988, a shop to sell milk etc. was opened in Bhuj. It is alleged that defendant No. 2 opened this shop. But it is admitted that Devjee used to do work in this shop. To show that defendant 1 or Devjee had nothing to do with this shop, defendant 2 alleged that his father used to sell him milk of his (Defendant No. 1's) cows for his business in the shop. Defendant No. 2 further stated that in St. 1994, Devjee opened a separate shop. Defendant 1 admitted that he used to take income of both the shops as they all used to live together. It thus appears that when Kanjee was aged 18 and Devjee was aged 15, defendant No. 1 opened a milk shop in St. 1988. Defendant 1 had got cows. The shop was attended by both the brothers. Plaintiff's witness Trikamjee on whom the Lower Court had placed reliance stated that the shop was opened by defendant 1 and defendant 1, defendant 2 and Devjee used to work in this shop. Defendant 1 stated that he arranged for the second shop attended by Devjee in St. 1994. It is thus clear that defendant 1 had started business in milk by opening both the shops in St. 1988 and 1994. By this time, Devjee had attained majority and all the adult members joined together in carrying on that business as members of a Joint Hindu Family. The business, therefore, became a Joint Family business. The learned Advocate for the respondent 2 relied on a case reported in 'Kailashi v. Shanker', A I R (32) 1945 All 164. In that case, it was held that if a business was started by an adult member of the family separately, the mere fact that his sons who were dependant on him and were being maintained by him, gave him some help in carrying on the business would not necessarily make the business cease to be his own business and make it the Joint Family business of himself and his sons. In the present case, sons themselves, were carrying on business. This is not a case of only giving some help to the father. It was further observed in the Allahabad case cited above that when the sons grew up, the father and the sons might so conduct themselves that from their conduct, it might become apparent that it was either expressly or impliedly agreed that the business which upon its start was a separate business of the father had become the Joint business of the father and the sons. The learned Advocate for the respondent 2 relied on a case reported in 'Peareylal v. Nanakchand', 50 Bom L R 643. In that case the Judicial Committee held that onus lay heavily on one who alleged a business as a Joint family business where there was no ancestral property. In the present case, defendant No. 1 had allowed the shops to be managed by his sons. Trikamjee, P. W. 3, stated that since last five years, the shop was running in the name of Kanjee. In the judgment of the Allahabad High Court, a case of the Bombay High Court reported in 'Haridas v. Devkunvarbai', AIR (13) 1926 Bom 408 was referred to as an instance of implied consent. In the Bombay case, it was observed that where a father and his sons acquired property by Joint labours and were joint in food and worship, they must be regarded as having constituted a Joint Hindu Family.

(5) It is thus clear that till the month of Chaitra St. 1997, when Devjee began to live separately, defendants and Devjee were members of a Joint Hindu Family and were carrying on Joint family business. Defendant 1 used to keep income of the business and defray expenses. In the year St. 1997, Devjee began to live separately. It was plaintiff's case that though Devjee began to live separately, all the family affairs were managed by defendant No. 1 and income of the shop run by Devjee was also taken by him. It is an admitted fact that Devjee was asked to live separately as he was an addict. In St. 1999, Devjee started a Pan Biri Shop. In that year, both the shops were closed. Devjee was then driving Tonga till he died in St. 2001. He was living in hired houses. Plaintiff's father stated that Devjee used to spend his income in drinking. This evidence shows that Devjee used to keep his income with him. It thus appears that after Devjee began to live separately, he managed the shop and his affairs and he used to keep his income with him. Thus in St. 1997, there was not

only a cesser in commensality. There was a severance of the Joint Family status.

(6) Though there was severance of the joint family status, plaintiff would be entitled to be maintained out of the income of Joint family property acquired by Joint exertions unless a partition was effected. From the evidence, it appears that Devjee took the shop run by him and Kanjee and defendant 1 took the other shop. The question is whether there was any Joint family property acquired by Joint exertions. In the plaint, it was alleged that a house, a godown and a shop were acquired by Joint exertions. Plaintiff stated that all these properties existed when her husband died. Her father stated that he did not know when the properties were purchased. Manilal P. W. 4 stated that the house was in mortgage when his father and defendant 1 had got it redeemed 5 or 7 years ago (St. 2000). Thus plaintiff was not able to lead clear evidence to show that all these properties were acquired by Joint exertions before Devjee began to stay separately in St. 1997. It appears from defendant's evidence that the shop was purchased in St. 1999. The sale deed of the year St. 1999 (Ex. 8) is in defendant's name. It was purchased for 3500/- Koris. Defendant 1 stated that he entered into an agreement to purchase the house in Karachi for 1500/- Koris. From Ex. 7 and from the evidence of defendant 2, it appears that on 19-11-1936 (1992), defendant 1 had entered into an agreement to purchase a house and a house-site. It appears that in pursuance of this agreement, the house was purchased in St. 1996, and the site was purchased in St. 2003 or 2004 on termination of the litigation for redemption. There is no clear evidence about Joint acquisition by Joint exertion in St. 1997. It appears from the evidence of defendant 1 that pots etc. were divided. Defendant 1 would like the Court to believe that he divided all the property he had in two parts. No list of any such division was made. Defendant's witness Dayaram D. W. 7 stated that Devjee took house-hold articles which he required. It thus appears that Devjee got the shop run by him and he also got some house-hold articles. But he does not seem to have got anything out of the property earned by Joint exertions. Defendant 1 had to admit that he had got 3000/- Koris when Devjee began to stay separately. Moreover, by this time, the house was also acquired. Devjee has not got any share in this property. The site was purchased in St. 2003 or 2004. Defendant 1 had to pay 2900/- Koris for it. He says that he paid sale consideration of 2900/- Koris from defendant No. 2. But he had got 3,000/- Koris with him. There is, therefore, reason to believe that he purchased the site out of that amount, though he took the sale deed in the name of defendant 2. There is every reason to believe that the sum of 3,000/- Koris was acquisition by Joint exertion. Hence both the house and the site (godown) must be regarded as Joint family property.

(7) The shop was purchased in St. 1999. It is in evidence that defendant 2 was doing well in business and was prospering. What actually happened was that Devjee could not prosper as he took to drinking. He was wasting money in drinking. Defendant 2 developed his business. It is, therefore, quite possible that he purchased the shop out of his earning. As the shops were divided, it is but just to hold that the earning which defendant 2 got after Devjee began to live separately in St. 1997 was his self-acquisition. It cannot be, therefore, held that plaintiff was entitled to be maintained out of the shop purchased by defendant 2. As regards the other two properties, it is true that defendant 1 had paid 1,500/- Koris as his self-acquisition when he entered into the agreement to purchase the house and the site. But he must be regarded to have thrown that money in common stock. He had not kept a separate account of his self-acquisition and acquisition by Joint exertions. Plaintiff is, therefore, entitled to be maintained out of the house and the site (godown).

(8) On behalf of respondent 2, much stress was laid on the fact that Kanjee paid the mortgage amount to the father of P. W. No. 4. But it is an admitted fact defendants and Devjee were living jointly till St. 1997. Kanjee was therefore not expected to have any separate earning out of the shop. No doubt, defendant 1 had stated in his will Ex. 1 that he had taken 2500/- Koris from Kanjee. But he had admitted that till St. 1997 he used to take all income from the shops which was thrown in common stock. The Lower Court does not seem to have taken into consideration the fact that in St. 1997, defendant 1 had got 3,000/- Koris with him and this amount must be considered as Joint acquisition.

(9) Plaintiff is, therefore, entitled to get maintenance from income of the house and the godown. Plaintiff has led no evidence about rent that can be realised. The house is used for residence. It, therefore, does not yield any income. Plaintiff is entitled to a right of residence in the house. The godown was purchased for 3500/- Koris. Having regard to the rise in the value of property and corresponding rise in rents, it can be estimated that the godown must yield about 15/- per month as net rent. Plaintiff is, therefore, entitled to get Rs. 5/- as her husband's share of the income. She is further entitled to get Rs. 5/- per month for her right of residence, so long as separate arrangement for her residence is not made in it.

(10) Now I turn to consider the plaintiff's claim for ornaments. First it is necessary to consider what stridhan ornaments plaintiff had got. She stated that she had got one necklace weighing 8 Gadianas, one Mangalsutra weighing 5 Gadianas, one chandan-churi weighing 8 Gadianas, a Pati weighing 6 Gadianas, rings weighing 3 Gadianas, 4 bangles weighing 8 Gadianas, four chudlis weighing half a Tola of gold, Mohan Mala, earrings etc., she admits that she has sold Pati weighing 6 Gadianas and bangles weighing 8 Gadianas. Chain or Mohan Mala was sold by Devjee. Plaintiff's father stated that the ornaments given to the plaintiff at the time of her marriage weighed 60 Gadianas. There is no evidence besides the interested word of the plaintiff and her father to show ornaments weighing 60 Gadianas were given to the plaintiff at the time of her marriage. Defendant 1 stated that plaintiff was given one bracelet, one chain, one Pati, four bangles etc. weighing 23½ Gadianas. He explained that he had not the financial condition to give ornaments weighing 60 Gadianas. He denied having got prepared a necklace and a Mangalsutra weighing 13 Gadianas. These ornaments must have been given in public at the time of marriage. But plaintiff was not able to lead any independent evidence to show that ornaments alleged by her were given to her. It is quite apparent that in St. 1996, defendant 1 was not in a very affluent condition. He could not have, therefore, given to plaintiff ornaments weighing 60 Gadianas.

(11) It is plaintiff's case that defendant 1 has got her ornaments except those which she and her husband sold. When Devjee began to live separately he must have taken away ornaments of his wife with him. Plaintiff admitted that she had taken some ornaments with her. She stated that as her husband sold the chain, her father gave remaining ornaments to defendant 1. This must have happened in St. 1998 or 1999. Bhawanjee, plain-

tiff's father, P. W. 2 stated that ornaments were given to defendant 1 just after marriage. Plaintiff examined Mavji P. W. 7 to say that after Devjee's death, defendant 1 had given to plaintiff a necklace and a Pati for use on occasions through his father. But plaintiff admitted that she had sold Pati and four bangles. Hence it is possible that she might have sold the necklace as well. Plaintiff's husband was following avocation as a Tonga-driver before his death. It is possible that accustomed to drinking he might have sold not one ornament but many more. Plaintiff's father stated that Devjee used to spend his earning in drinking. When plaintiff was staying with defendant No. 1 after her husband's death, she might have given two ornaments to defendant No. 1. When she began to stay separately, these ornaments were kept with defendant No. 1 as stated by P. W. Manji. She must have obtained these ornaments and used them for her maintenance as defendant 1 ceased giving her maintenance. There is, therefore, no reason to differ from the conclusion arrived at by the Lower Court that defendant No. 1 had not got any ornament of the plaintiff.

(12) Result of my findings stated above is that plaintiff will be entitled to get maintenance from the defendants at the rate of Rs. 10/- per month including cash payment for her right of residence. Properties mentioned at serial Nos. 2 and 3 in the schedule attached to the plaint shall be charged for plaintiff's maintenance. Plaintiff shall get Rs. 67/- as arrears of maintenance before the suit. She shall also get Rs. 210/- for maintenance till 30-9-51. She shall further get maintenance at the rate of Rs. 10/- per month from 1-10-51 becoming due on 1-11-51 and so on. Her suit for ornaments or in the alternative for Rs. 3,000/- as their price will be dismissed. Looking to the result, plaintiff shall pay 3/5th of the taxed costs of the defendants in the suit and in appeal and bear her own. Plaintiff shall pay Court-fees in suit and in appeal on Rs. 5525/- and defendants shall pay Court-fee in suit and in appeal on Rs. 1265/-. Hence the following order is made.

'ORDER'

Appeal is partly allowed and decree passed by the Lower Court is varied as under:

1. It is declared that plaintiff is entitled to recover from the defendants maintenance at the rate of Rs. 10/- per month including cash payment for her rights of residence assessed at Rs. 5/- per month till her life. The property mentioned at serial Nos. 2 and 3 shall remain charged for the plaintiff's maintenance declared above. Future payments shall begin from 1-11-51. In case of default plaintiff shall be entitled to recover the amount of maintenance decreed to her from the property charged as stated above to the extent of 1/3rd. share therein.

2. Plaintiff shall also be entitled to get Rs. 275/- as arrears of maintenance from the defendants. In case defendants fail to pay the amount so decreed, plaintiff to recover that amount in the manner stated in para one above.

3. The decree passed by the Lower Court dismissing plaintiff's suit for ornaments for their price is confirmed and appeal is dismissed to that extent.

4. Except the claim awarded as stated in para one above, the decree passed by the Lower Court is confirmed and plaintiff's appeal to that extent is dismissed.

5 Plaintiff shall pay 3/5th of the taxed costs of the defendants in suit and as appellant shall pay 3/5th of the taxed costs of the respondents in one set and bear her own.

6. Plaintiff shall pay Govt. Court-fees on Rs. 5525/- due in the lower Court and in appellate Court and defendants shall similarly pay Government Court-fees on Rs. 1265/-.

7. For Court-fees to be paid by the plaintiff there shall be first charge on the subject-matter of the suit.

8. A copy of the decree to be sent to the Collector, through the Government Pleader, Kutch.

D.H. *Appeal partly allowed.*

A. I. R. (39) 1952 KUTCH 8 (C. N. 4)

VAKIL J. C.

Mehta Jutha Premji, Defendant-Appellant v. Faria Meghji Uga and others, Plaintiffs-Respondents.

Civil Misc. Appeal No. 2 of 1950, D/- 5-10-1951.

(a) Kutch (Courts) Order (1948), S. 32 — Effect on, by making Civil P. C. (1908) applicable in Kutch. (Quaere). *(Para 2)*

(b) Evidence Act (1872), Ss. 101, 103 — Redemption suit — Subsisting mortgage — Onus — Both sides producing evidence — Effect — Civil P. C. (1908), O. 34 R. 7.

In a redemption suit once a mortgage was admitted onus is on the mortgagee to show that there was subsequent sale of the equity of redemption in his favour. Where mortgage is not admitted, but plaintiff proves that the property in suit was once mortgaged, he will have to give further evidence of a subsisting mortgage. When by the law of the land, no statutory period for redemption is prescribed, the question whether a mortgage is a subsisting one is to be decided on evidence direct and circumstantial led in the case. Where indentures are executed and registered, the defendant will always be able to produce the best evidence, viz. a conveyance of sale in his favour. If law of registration is not in force, it may be expected that some sort of conveyance to evidence sale of the equity of redemption would be passed. Plaintiff in such a case has merely to give negative evidence to show a subsisting mortgage. A mortgagor is entitled to redeem within the statutory period of limitation or when there is no such period prescribed, at any time. The Courts will be inclined to presume a subsisting mortgage and to view the evidence in the light of the presumption made. If it were to be otherwise, it would be difficult, if not impossible, for the plaintiff to show the subsisting mortgage and the mortgagees could defeat the mortgagor's suit for redemption on a plea of subsequent sale. Hence in appreciating the evidence led on the question of a subsisting mortgage, it should be borne in mind that though the initial onus is on the plaintiff suing for redemption, the question of onus may become immaterial when evidence is led on both sides and one of the facts to be considered is absence of a conveyance evidencing the alleged subsequent sale. A I R (14) 1927 Lah 574 and A I R (17) 1930 PC 91, Ref. *(Para 9)*

Anno: Evi. Act, Ss. 101, 103 N. 9, 58; Civil P. C., O 34 R. 7 N. 3.

K. N. Mankad, for Appellant No. 8; P. R. Thacker, for Respondent (Faria Meghji).

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) A I R (17) 1930 P C 91: (11 Lah 199) (Pr 9)

('27) A I R (14) 1927 Lah 574: (103 Ind Cas 215) (Pr 9)

JUDGMENT: Respondent No. 1 brought the suit under appeal for redemption of a mortgage

alleging that appellant was in possession of a specified portion of the property mortgaged as a transferee of mortgagees' rights. The appellant denied that the property in his possession was the subject-matter of the plaint mentioned mortgage and contended that the said property was first acquired by him as a mortgagee and then equity of redemption in it was purchased by him. The trial Court accepted appellant's defence and dismissed the suit against him. On appeal, the lower appellate Court came to a contrary conclusion. The lower appellate Court, therefore, reversed the decree of the trial Court in so far as it dismissed the suit against the appellant and passed a decree for redemption. The appellant had counter-claimed for costs of repairs in accordance with the law then in force. The lower appellate Court directed the trial Court to inquire into the said counter-claim of the appellant. It is quite obvious that the present appeal could not have been filed under O. 43, Criminal P. C. It is a second appeal.

(2) The learned Advocate for the respondent No. 1 contended that a second appeal did not lie and in any case, as the Code of Civil Procedure Act V of 1908 was made applicable after the Kutch (Courts) Order, 1948 was made, the finding on questions of fact by the lower appellate Court were binding on this Court. The question as to how the provisions of S. 32 of the Kutch (Courts) Order, 1948 are affected by the provisions of the Civil P. C. will have to be considered in a proper case. As the appeal has ben argued at length and as I see no reason to differ from the conclusions arrived at by the lower appellate Court, it is unnecessary to decide that contention in this appeal.

(3 and 4) (His Lordship considered the documentary evidence and continued:) The conclusion, therefore, is clear that the Bheni in defendant 8's possession was also the subject-matter of mortgage in Exs. 5/1 and 6/1, and this conclusion is strengthened by the fact that defendant No. 8 did not produce the mortgage deed of St. 1924.

(5) On behalf of the appellant reliance was placed on the description of the property as given in the plaint. It was to be conceded that description in boundaries was not very precise. But the original mortgage deeds were produced. It is possible that this somewhat defective description in the plaint might have induced the appellant to raise this particular contention. Reliance was placed on Ex. 22/1 and it was contended that the property described in it was different. This document has been referred to above. It is true that one Bheni is described in it. This matter is considered above. I am not prepared to accept that on reading Ex. 10/1 and 22/1 it could be held that the property described Ex. 22/1 was not included in Exs. 5/1 and 6/1. It is true that there are two different Bhenis, stated in Ex. 22/1 and Ex. 10/1. But from the facts and circumstances discussed in the preceding para., it is clear that what was originally one Bheni was converted in two by the two mortgagees for their separate use. It was contended that the expression, "Kumbhawalla Bheni" used in Ex. 22/1 did not necessarily show that it was the Bheni mentioned in Exs. 5/1 and 6/1 as Kumbha might have got more than one Bheni. But it is not shown that Kumbha had a Bheni to the south which he had mortgaged with one of the mortgagees mentioned in Exs. 5/1 and 6/1.

(6) The trial Court did not consider the facts and circumstances discussed above and allowed itself to be led away by other considerations. The finding recorded by the trial Court on this issue was obsessed by the fact that it accepted the defendant's contention that the equity of redemption was purchased by defendant 8's father. Before the lower appellate Court, it seems to have been argued that the Bheni in possession of defendant No. 8 was of Kheta as in Ex. 5/1 and Ex. 6/1 the southern direction stated was that to the South was the Bheni of Kheta. There is no evidence led to show that the predecessor-in-title of defendant No. 8 was a mortgagee from Kheta. The reasons given by the lower appellate Court in setting aside the finding of the trial Court on this issue are sound. I, therefore, do not accept the contention that the lower Court erred in holding that the disputed land was included in the original mortgagors Exs. 5/1 and 6/1.

(7) Another contention raised by the appellant was that he had become full owner of the property in his possession. In other words, the equity of redemption in the property in his possession was purchased by his father in the year St. 1930. The trial Court accepted this contention but the lower appellate Court came to a contrary conclusion. (His Lordship considered the documentary and oral evidence and proceeded:) The lower appellate Court was, therefore, right in not placing reliance on the evidence led by defendant No. 8 to show that equity of redemption was sold.

(8) Reliance was also placed on some documents in which the disputed Bheni was described as of the appellant. Tnis does not show that equity of redemption was purchased. (His Lordship considered these documents and continued.)

(9) It was contended that it was for the plaintiff to prove not only a mortgage but a subsisting mortgage. It is true that by merely proving a fact that a property was subject to a mortgage many years ago, a plff. would not be entitled to succeed unless it was shown that the mortgage was a subsisting one. Plaintiff has to show prima facie that the suit was brought within the period of limitation, 'Prem Singh v. Mahomed Khurshid', AIR (14) 1927 Lah 574. The learned Advocate for the respondent relied on 'Wali Mahomed v. Mahomed Bakhsh', AIR (17) 1930 P C 91 in which it was held that once a mortgage was admitted onus was on the mortgagee to show that there was subsequent sale. Where mortgage is not admitted, but plaintiff proves that the property in suit was once mortgaged, he will have to give further evidence of a subsisting mortgage. When by the law of the land, no statutory period for redemption is prescribed, the question whether a mortgage is a subsisting one is to be decided on evidence direct and circumstantial led in the case. Where indentures are executed and registered, a defendant will always be able to produce the best evidence, viz., a conveyance of sale in his favour. If law of registration is not in force, it may be expected that some sort of conveyance to evidence sale of the equity of redemption would be passed. Plaintiff in such a case has merely to give negative evidence to show a subsisting mortgage. A mortgagor is entitled to redeem within the statutory period of limitation or when there is no such period prescribed, at any time. The Courts are inclined to presume a subsisting mortgage and to view the evidence in the light of the presumption made. If it were to be otherwise, it would be difficult, if not impossible, for a plaintiff to show a subsisting mortgage and mortgagees could defeat a mortgagor's suit for redemption on a plea of subsequent sale. Hence in appreciating evidence led on the question of a subsisting mortgage, it should be borne in mind that though the initial onus is on the plaintiff suing for redemption, the question of onus may become immaterial when evidence is led on both sides and one of the facts to be considered is absence of a conveyance evidencing the alleged subsequent sale. The appellant seems to have well appreciated this position in trial Court as he led evidence of the alleged subsequent sale considered above.

(10) I am, therefore, satisfied that the findings recorded by the lower Appellate Court are correct. The decree passed by the lower Appellate Court is, therefore, confirmed and the appeal is dismissed with cost. Hence the following order is made.

(11) ORDER.: Appeal is dismissed with costs.

R.G.D. *Appeal dismissed.*

A. I. R. 1952 Kutch 10 [C. N. 5.]

VAKIL, J. C.

Kunvarji Velji, Plaintiff-Appellant v. Umarshi Hansaraj, Defendant-Respondent.

Second Appeal No. 32 of 1950, D/- 8-10-1951.

(a) Civil P. C. (1908), O. 21, Rr. 92, 94, S. 65 — Execution sale — Removal of fixtures by judgment-debtor after attachment and before confirmation of sale and delivery of possession — Purchaser is entitled to price of fixtures. *(Paras 6 and 12)*

Anno: Civil P. C., O. 21, R. 92, N. 2; R. 94 N. 8; S 65, N 2

(b) Civil P. C. (1908), S. 65 — Law in Kutch — Execution sale — Property, when vests in auction purchaser. — Right of auction purchaser to mesne profits — Mode of ascertaining mesne profits — Kutch Civil P. C. (1894), Ss. 271, 316.

Under S. 65 of the Civil P. C., 1908, the property sold at a Court sale vests in the purchaser from the time of the sale and not from the time when the sale becomes absolute. All that the auction-sale-purchaser is, therefore, entitled to recover is the mesne profits from the date of the sale to the date of the delivery of possession. Under Section 316 of the old Code of 1882, the position was that the title to the property sold vested in the purchaser from the date of the sale certificate issued and not before. It was, therefore, held that an auction-purchaser's right to mesne profits or possession did not accrue until sale had been confirmed. The Civil Procedure Code in force in the former Kutch State, which was enacted in 1894 A.D., purports to have generally followed the scheme of the Code 1882. But no provision was made about vesting of property from the date of sale or from the date on which the sale certificate was issued. But S. 338 of the Code provided that matters for which no express provision was made in the Code should be decided according to customs, usages and equity. But it would not be equitable to apply S. 65 of Act V (5) of 1908. Though forms given are to be used for the purposes mentioned in the relevant sections of an Act, and as such cannot be used for interpreting any section of an Act, application of law on equitable grounds which results in creating a position inconsistent with the position contemplated by a form specifically prescribed is not warranted. Reading the Form No. 38 it would be more equitable to hold that according to the Kutch Code of Civil Procedure, the property vests from the date of the sale certificate which is the same as the date on which the sale is made absolute. The purchaser at a Court sale is therefore, entitled to mesne profits from the date on which sale was made absolute, to the date of delivery of possession.

In order to find out mesne profits, the Court has to find out profits which the judgment-debtor recovered or might have with ordinary diligence recovered. Profits can only be arrived at by deducting expenses including costs of manual labour. The Court would be therefore, right in arriving at net profits from the gross profits determined on the evidence led. Assessment of the mesne profits at a flat rate of 6 per cent interest on the price paid by the purchaser, for the property is wrong method. *(Paras 7, 10 and 11)*

Anno: Civil P. C. S. 65, N. 10, O. 21, R. 94, N. 3.

(c) Civil P. C. (1908), O. 21, R. 92 — Kutch — Right of Court-sale-purchaser to interest on deposit.

A Court-sale-purchaser, depositing sale price in Court has no cause of action to recover interest on the sale price deposited against the judgment-debtor whose property is sold on the ground that by preferring frivolous and vexatious applications, for setting aside the sale the date for confirmation of the sale was prolonged. If the applications are frivolous or vexatious or both, the Courts before whom such applications come for hearing, either before a trial Court or before an appellate Court, may summarily or expeditiously dispose them and may make an order under S. 35-A of the Code of Civil Procedure. If decisions of such matters are delayed, it does not give a Court-sale-purchaser a right to recover interest at 6 per cent or for that matter at any other rate of interest, from the judgment-debtor on the ground of illegal detention of purchase money. *(Para 8)*

Anno: Civil P. C., O. 21, R. 92, N. 2.

(d) T. P. Act (1882), S. 55 (6), (b) — Has no application to Court sales. *(Para 8)*

Anno: T. P. Act, S. 55, N. 1.

(e) T. P. (1882), S. 55 (6), (b) — Purchaser accepting delivery — S. 55 (6) (b) has no application. *(Para 8)*

Anno: T. P. Act S. 55, N 20.

(f) Kutch (Courts), Order (1948), S. 32 — Second appeal — Value of suit more than Koris 2,500/- — Decree for mesne profits against defendant to the extent of 2112 and odd Koris, confirmed in appeal — Second appeal by plaintiff — Defendant's cross-objection valued at 2,025/- — Koris held maintainable — Civil P. C. (1908), O. 41, R. 22 *(Para 9)*

(g) Civil P. C. (1908), S. 107, O. 41, R. 1 — Appreciation of evidence.

The general principle is well established that the view of the trial Judge as to credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court. *(Para 11)*

Anno: Civil P. C. S 107, N 14, O 41, R 1 N 13

K. N. Mankad, for Appellant; J. G Vaidya, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('02) 24 All 475: (1902 All W N 145) (Pr 7)
('11) 33 All 63: (7 Ind Cas 65) (Pr 7)

JUDGMENT.: Plaintiff appellant purchased at a Court sale defendant respondent's property consisting of a 'wadi' and a residential house for 13,201 and 32,501 Koris respectively. Defendant-respondent had applied for setting aside the sale. After the applications made by the defendant-respondent were decided, plaintiff-appellant got possession of the property. Plaintiff appellant then brought the suit under appeal to recover 2,681/- Koris, as interest for a period of 16½ months at 6 per cent on the sum of Koris 32,501/- being the sale price of the residential house; 4,525/- Koris as income of the wadi for a period of 16½ months and to recover 1,685/- Koris as price of the fixtures which the defendant respondent removed after the date of the sale. The cause of action for the first two claims stated was that due to defendant respondent's action in filing untenable proceedings for setting aside the sale, plaintiff-appellant could not get possession for a period of 16½ months since the date of the sale. The cause of action for the third claim, though not stated in so many words, was that defendant's act in removing fixtures amounted to larceny as the property was 'custodia

legis' and the plaintiff to whom property was sold became entitled to recover as damages price of the articles in respect of which larceny was committed.

(2) Defendant resisted the plaintiff's suit denying allegations made against him and contending that plaintiff was not entitled to recover interest and mesne profits claimed as his right to the wadi and to the house accrued on the day sale certificate was issued to him. He denied having received income from the wadi as alleged by the plaintiff. He further denied having removed fixtures.

(3) The trial Court held that plaintiff was not entitled to get interest on the sum of 32,501/- Koris. At the same time the trial Court awarded a sum of 825/- Koris as mesne profits of the residential house for a period of 16½ months; at the rate of 50/- Koris per month. As regards the second claim, the trial Court awarded a sum of 2,487-8 Koris to the plaintiff as mesne profits for 16½ months. As regards the third claim, the trial Court awarded a sum of 1,485/- Koris as price of fixtures removed by the defendant.

(4) Plaintiff and defendant both preferred separate appeals against the decree passed by the trial Court. The lower appellate Court dismissed plaintiff's appeal and partly allowed defendant's appeal by disallowing claim for fixtures and reducing mesne profits claimed to a sum of 1,200/- Koris. Plaintiff has, therefore, preferred this second appeal valued at 6,865/- Koris and defendant has preferred cross-objections valued at 2,025/ Koris. Thus the whole matter is before this Court in second appeal.

(5) It was urged on behalf of the appellant that the lower appellate Court erred in disbelieving witnesses on which the trial Court relied in awarding claim for fixtures and for mesne profits. It was further urged that even trial Court erred in allowing a claim for 2,487/- Koris only as net income out of gross income found by it, in view of the fact that defendant had led no evidence to show what expenses were incurred by him. It was further urged that under the provisions of Section 55 of the T. P. Act, plaintiff was entitled to recover interest by way of damages from the defendant on the sale price deposited by him. On behalf of the respondent, it was contended that according to the law in force in the former Kutch State, plaintiff became entitled to the property on the date sale certificate was granted and possession was delivered and hence plaintiff was not entitled to recover interest, nor mesne profits nor price of fixtures. On behalf of the appellant, it was contended that the cross-objections were not tenable as a second appeal did not lie.

(6) The respondent's contention goes at the root of the plaintiff's case and hence it may be considered first. The facts are that the sale was held on 15th day of the month of Ashwin St. 2002. It was confirmed on 6th day of Shrawan St. 2003, that is after an interval of 10 months. The possession of the wadi was delivered on the 14th day of the second half of the month of Magh St. 2003, that is 6½ months after the sale was confirmed and possession of the house was delivered a few days thereafter. It appears that sale certificate was granted some time after the sale was confirmed and before possession was delivered. Now the contention is that till plaintiff got sale certificate the property purchased by him at the Court sale did not vest in him and therefore he was not entitled to recover interest, mesne profits and price of fixtures from the respondent. It may be stated at this stage that this contention does not affect claim for interest and it also does not affect claim for the price of fixtures. Interest is claimed for detention of money from the date of sale till possession was delivered. A purchaser at a Court sale purchases the property as attached. As a result of attachment levied, the property attached passes into the custody of the Court. A purchaser at a Court sale is entitled to get the property in the same condition in which it was attached, and not in the condition in which the property is found to his detriment on the date a certificate of sale is issued or possession is delivered.

(7) Under Section 65 of the Civil Procedure Code (Act V of 1908), the property sold at a Court sale vests in the purchaser from the time of the sale and not from the time when the sale becomes absolute. An auction sale purchaser is, therefore, entitled to recover mesne profits from the date of the sale. Under Section 316 of the old Code of 1882, the position was that title to a property sold vested in the purchaser from the date of the sale certificate issued and not before. It was, therefore, held that an auction-purchaser's right to mesne profits or possession did not accrue until sale had been confirmed Vide 'Amir Kazim v. Darbari Mal, 24 All 475 and 'Shiam Lal v. Nathe Lal' 33 All 63. The Local Civil Procedure Code in force in the former Kutch State was enacted in 1894 A.D. and it purports to have generally followed the scheme of the Code of 1882. It provided that a sale would not be considered absolute till it was confirmed and on confirmation of the sale, a certificate in the prescribed form shall be issued to the purchaser. No provision was made about vesting of property from the date of sale or from the date on which sale certificate was issued. Both lower Courts, therefore, followed the provisions of Section 65 of Act V of 1908. The Kutch Civil Procedure Code was not intended to be exhaustive and Section 338 of the Code provided that matters for which no express provision was made in the Code should be decided according to customs, usages and equity. Both the lower Courts assumed that it would be equitable to apply Section 65 of Act V of 1908. In the Kutch Code no provision was made about vesting either in the Code as enacted or by a subsequent amendment despite the original provision in Code of 1882 and subsequent amendment in the Code of 1908. What both the lower Courts in effect held was that till 1908, law in Kutch was that property vested on the date of the sale certificate and after 1908 from the date of the sale. There is no warrant for such an interpretation and application of law on equitable grounds. Though forms given are to be used for the purposes mentioned in the relevant sections of an Act, and as such cannot be used for interpreting any section of an Act, application of law on equitable grounds which results in creating a position inconsistent with the position contemplated by a form specifically prescribed is not warranted. In Form No. 38 specifically prescribed by Section 271 of the Kutch Code, it was provided that:

> "Henceforth, by this sale, the purchaser has become owner of whatever right, title and interest, defendant might have in the property."

This term, "Henceforth" connotes that property vests from the date of the sale certificate. This is what would obviously be the case except when by express provision of law retrospective effect is given as was done by Section 65 of the Act of 1908. Hence, it would be more equitable to hold that according to the Kutch Code of Civil Procedure, the property vested from the date of the sale certificate which is the same as the date on which the sale was made absolute. Plaininff-appellant was, therefore, entitled to mesne profits from the date on which sale was made absolute.

(8) A Court sale unlike a private sale is carried out in accordance with the provisions of law.

Plaintiff-appellant deposited in Court 32,501/- Koris on the date of the sale as required by law. It is only after the applications under O. 21, R. 89 or O. 21, R. 90, if any filed, are disposed of that a Court-sale could be confirmed. In the Kutch Law of Limitation, there was no period of limitation prescribed for preferring applications for setting aside a Court-sale. A Court sale-purchaser, depositing sale price in Court has no cause of action to recover interest on the sale price deposited against the judgment-debtor whose property is sold on the ground that by preferring frivolous and vexatious applications, the date for confirmation of the sale was prolonged. If the applications are frivolous or vexatious or both, the Courts before whom such applications come for hearing, either before a trial Court or before an appellate Court, may summarily or expeditiously dispose them and may make an Order under S. 35A of the Code of Civil Procedure. If decisions of such matters are delayed, it does not give a Court sale-purchaser a right to recover interest at 6 per cent or for that matter at any other rate of interest, from the judgment-debtor on the ground of illegal detention of purchase money. The position in law being thus clear, the appellant's learned Advocate put his case on par with a private purchaser of property. Reliance was placed on Section 55, Sub-section 6 (b) of the T. P. Act, which provides that a purchaser who has not improperly declined to accept delivery of the property was entitled to a charge on the property was entitled to a charge on the property as against the seller to the extent of seller's interest in the property, for the amount of any purchase money property paid by the buyer and for interest on such amount. This sub-section has no application where delivery is accepted. It follows that the said provision of law can have no application to Court-sales. The appellant's claim of 2,681/- Koris for interest was apparently untenable.

(9) Both the lower Courts, however, thought that plaintiff was entitled to get mesne profits and awarded a sum of 825/- Koris as mesne profits at the rate of 50/- Koris per month. The respondent has, therefore, preferred cross-objections to the decree passed by the trial Court and confirmed by the lower appellate Court awarding 825/- Koris to the appellant. In accordance with the conclusion arrived at by me in para. 7 above, plaintiff may become entitled to get mesne profits for 6 months and not for 16½ months. But the appellant had sued for interest and not for mesne profits even in the alternative. It is, therefore, possible to contend that the lower Court erred in awarding mesne profits under O. 7, R. 7, C. P. C., as general or other relief when it was essentially different from the relief sought to recover interest and in the absence of specific case alleged and an issue raised to that effect, parties had led no evidence on that point. The respondent has preferred cross-objections valued at 2,025/- Koris (Rs. 675) of which this sum of 825/- Koris is included. The appellant's objection is that the respondent was not entitled to prefer a second appeal against the decree for 2,025/- Koris passed against him by the two lower Courts and hence he was not entitled to maintain cross-objections. It is quite elementary that cross-objections under O. 41, R. 22, C. P. C., could only be filed by a party entitled to appeal against the decree of the lower Court but who has not done so. Under Section 100 of the C. P. C., a second appeal would lie on any of the grounds mentioned in that Section. Section 32 of the Kutch (Courts) Order 1948 makes provision for appeals from appellate decrees. Plaintiff was awarded by the lower appellate Court a sum of Koris 825/- for mesne profits of the house and a sum of 1,287½ Koris for mesne profits of the wadi. To that extent the decree of the trial Court was confirmed. A suit for mesne profits is not a suit for land. Moreover the District Court had not reversed or varied the decree of the trial Court so far as the sum of 2,025/- Koris is concerned. But it is the value of the suit that is to be considered and not value of the appeal. The value of the suit being more than 2,500/- rupees, defendant was entitled to prefer this second appeal. It was not urged by the learned Advocate for the appellant that since the Kutch (Courts) Order, 1948 was passed, the Code of Civil Procedure, Act V of 1908 was made applicable and hence a second appeal would lie under Section 100 of the Code only. It was not so done as in that case appellant's appeal could only be heard on grounds mentioned in Section 100, C.P.C. Hence that question is left for future consideration when raised in an appropriate matter before me. The plaintiff's objection must, therefore, be repelled and it be held that the respondent was entitled to prefer cross-objections to the decree passed against him. It must also be held that the appellant was not entitled to get a sum of 825/- Koris for mesne profits. Result is that the appeal to get a sum of 1,856/- Koris more for interest stands dismissed and cross-objections to the extent 825/- Koris awarded for mesne profits must be allowed.

(10) Plaintiff appellant claimed a sum of 4,525/- Koris as income of the wadi for 16½ months. The trial Court awarded to the appellant a sum of 2,487/- Koris as a net income. The lower appellate Court reduced that sum to 1,200/- Koris. In view of my finding in para. 7 above, plaintiff appellant is entitled to mesne profits for 6½ months only. Appellant's further contention is that the trial Court erred in allowing only net income. The trial Court had to find out mesne profits. The lower Court had, therefore, to find out profits which the defendant recovered or might have with ordinary diligence recovered. Profits can only be arrived at by deducting expenses including costs of manual labour. The trial Court was, therefore, right in arriving at net profits from the gross profits determined on evidence led. It was contended that the defendant led no evidence to show the costs incurred. Consistently with his contention, he did not do so. That does not mean that in determining mesne profits the trial Court should not have regard to the expenses which might normally be incurred in raising crops in the wadi. Hence the appeal to the extent of 2,038/- Koris fails.

(11) The lower appellate Court assessed the mesne profits at a flat rate of 6 per cent interest on the price paid by the plaintiff, for the property. This was clearly wrong. The appellant's contention was that the lower Appellate Court erred in disbelieving the witnesses whom the trial Court had an opportunity to see and mark their demeanour. The general principle is well established that the view of the trial Judge as to credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court. The burden of proving actual profits was on the defendant. Both the lower Courts have not placed any reliance on the evidence led by the defendant. Hence the finding of the trial Court about mesne profits must be restored. The appellant is, therefore, entitled to 1,010/- Koris as mesne protfis. The appellant's appeal for 1,287½ Koris will, therefore, be dismissed and the respondent's cross-objections for 190/- Koris will be allowed.

(12) The last item to be considered is that fixtures alleged to have been removed by the defendant. The trial Court awarded a sum of 1,485/- Koris out of 1,685/- Koris claimed. It was not shown that the trial Court erred in allowing only

1,485/- Koris. Hence the appeal for 200/- Koris will be dismissed. The lower appellate Court disallowed the whole claim under this head. Here again the lower appellate Court disbelieved the witnesses whom the trial Court believed. The lower appellate Court was impressed with the fact that Pachan was sentenced. He was sentenced along with the defendant for the same act of setting fire to standing crop in the wadi. It follows that Pachan must have been employed by the defendant. Jagmaljee was disbelieved as he did not tell anybody about removal of articles. Naturally he would not say so as he had helped defendant in doing a thing which was wrong. The lower appellate Court observed that there was nothing to show that the articles were removed after sale. This was hardly necessary though alleged by the plaintiff. Plaintiff was entitled to the property with all the fixtures in it, on the date of the attachment because property was attached with all the fixtures in it and there is nothing to show that at the time of the settlement of sale-proclamation, some fixtures were excluded from salt. When defendant asked for delivery if possession, he had alleged that defendant had taken and removed some fixtures. A Panch Case, Ex. 7/c, was made at that time. Defendant stated that glass of a wall cupboard was broken. This fact was not believed by the trial Court. Defendant stated that he had removed door before the sale. There was a corrugated ironsheet. Defendant had admitted that he had removed it on the ground that it was a temporary structure only. Similarly wooden niches were taken away. I am satisfied that as property was sold defendant must have tried to remove and take away as many fixtures as possible and that the trial Court was right in relying on the evidence led. Hence the appeal for 1,485/- Koris should be allowed.

(13) Result is that the appeal shall be allowed to the extent of 1,485/- Koris and dismissed to the extent of 4,380 3/4th Koris. Cross-objections shall be allowed to the extent of 1,015/- Koris and dismissed to the extent of 1,010/- Koris. The decree of the lower appellate Court will, therefore, be modified by substituting a sum of 2,495/- Koris in place of 2,025½ Koris. As the appeal is substantially dismissed, the appellant shall pay respondent's costs and bear his own. As cross-objections are partly allowed and partly dismissed, there shall be no order as to costs. The order as to costs passed by the lower appellate Court shall remain unaltered. Hence the following order is made.

(14) ORDER.: The appeal is partially allowed and the decree passed by the lower appellate Court is varied by substituting a figure of 2,495/- Koris in place of 2,025½ Koris. The rest of the appeal is dismissed with costs. The appellant to pay respondents' costs and bear his own. The cross-objections are allowed to the extent of 1,015/- Koris and dismissed to the extent of 1,010/- Koris. The sum of 1,015/- Koris is deducted from the amount due to the appellant. There shall be no order as to the costs of cross-objections. The order as to costs passed by the lower appellate Court shall remain unaltered.

R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Kutch 13 *[C. N. 6.]*

VAKIL, J. C.

Thacker Vallabhji Bhanji, Defendant-Applicant, v. Bhatia Thacker Jivandas Murarji, Plaintiff-Opponent.

Civil Revision Application No. 100 of 1951, D/- 8-10-1951.

(*a*) *Transfer of Property Act (1882), Ss. 105, 106 — According to rent note, rent settled for one year — Rent to be paid from month to month as it fell due — Tenant to vacate, at any time when called upon to do so — Tenancy created held one at will and not for fixed period — No notice to quit is required — Even after expiry of 12 months, if tenant continues, tenancy still remains tenancy at will and does not become tenancy from month to month.* (*Para 2*)

Anno: T. P. Act, S. 105, N. 31 and 32, S. 106, N. 6.

(*b*) *Civil P. C. (1908), S. 115 — Contention that rent note on which the suit was filed was inadequately stamped cannot be entertained for first time in revision — It is not the matter of exercising jurisdiction not vested — Stamp Act (1899), S. 36.* (*Para 3*)

Anno: Civil P. C., S. 115, N. 2, 10. Stamp Act, S. 36, N. 7.

(*c*) *Houses and Rents — Kutch Rent Control Order — Suit for ejectment — It is for defendant tenant to contend and show before the Rent Controller that under the Order his lease was extended — Defendant cannot raise the contention for first time in revision. — Civil P. C. (1908), S. 115.* (*Para 4*)

Anno: Civil P. C. S. 115, N. 2.

Chhotalal B. Thacker, for Applicant; J. G. Vaidya, for Opponent.

ORDER.: The opponent sued the applicant in the Court of the Sub-Judge, Anjar to eject the latter from the plaint mentioned premises. The applicant resisted the suit on various grounds of which those material for the purpose of the present revision application are that the tenancy was not terminated by a statutory notice to quit, the rent note sued on was inadequately stamped and the suit was barred under the Kutch Rent Control Order in force in the former Kutch State.

(2) As regards the first contention, it is clear that the rent note sued on created a tenancy at will. No doubt in the rent note rent settled was for one year but it was to be paid from month to month as it became due. It, therefore, does not follow that the rent note was executed for a fixed period. On the contrary, it was provided that the tenant would vacate the premises at any time when called upon by the landlord to do so. It shows that by the terms of the rent-note a tenancy at will was created. As the tenancy created was tenancy-at-will, the tenant was not entitled to any statutory notice to quit. It was urged that the landlord accepted payment of rent even after the period of 12 months provided in the rent-note expired and hence there was a tenancy from month to month which could only be terminated by a notice to quit. Even if a rent-note was executed for a fixed period, it would not create a tenancy from month to month after termination of the period, if the tenant agreed to unconditionally vacate at any time during that period when called upon by the landlord to do so. Thus this contention is not tenable.

(3) As regards the contention that the rent-note was inadequately stamped, it is clear that this contention should have been raised in the trial Court before it was admitted in evidence. This is not a contention showing that the lower Court exercised jurisdiction not vested in it by law as the lower Court had jurisdiction to hold that the document was adequately stamped.

(4) Last contention is on the face of it untenable. There was no evidence led to show that a matter was pending before the Rent Controller. It was for the applicant to contend and show that under the Kutch Rent Control Order, the period of his lease was extended. He preferred not to lead any evidence in the trial Court.

(5) Result is that the present revisional application fails and it is dismissed with costs.

R.G.D. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 14 [C. N. 7.]

BAXI, J. C.

Govindji Dosa, Defendant No. 1, Applicant v. Kanji Mavji, Plaintiff and another, Defendant No. 2, Opposite Party.

Civil Revision Application No. 18 of 1951, D/- 19-7-1951.

(a) *Hindu Law — Partition — Purchase of undivided interest of coparcener.*

In Kutch, the decisions of the Bombay High Court are usually preferred where there is a conflict of opinion with other High Courts and it is desirable to state briefly the reasons when the Court differs from the Bombay view. According to the Bombay High Court the purchaser of the undivided interest of a coparcener should sue for general partition and suit for partial partition does not lie. (*Para 5*)

(b) *Civil P. C. (1908), O. 6, R. 2 — Objection at stage of arguments.*

Where the defendant does not take any objection against the frame of the suit in his written statement nor does he seek any issue thereon and gives no opportunity to the plaintiff during the trial either to amend his plaint or withdraw his suit with permission to bring another suit and the objection is sprung on him during arguments, he cannot be deprived of the results of his labour on an objection which takes him by surprise particularly when he has on his side a weighty opinion in the shape of the Calcutta and Allahabad High Court decisions. (*Para 5*)

Anno: C. P. C. O. 6, R. 2, N. 9

(c) *Partition Act (1893), S. 4 — Undertaking for buying — House occupied by strangers.*

The first condition for the application of Section 4 is that the applicant should give an unconditional undertaking to buy the share from which he cannot resile. Further the section can protect only those houses in which the family members dwell, but not the houses which have been mortgaged with possession to third parties and which are let to different persons by the mortgagee. (*Para 7*)

Anno: Partition Act S. 4, N. 1.

Jamiatrai G. Vaidya, for Applicant (Defendant No. 1); Premji R. Thacker, for Opposite Party. (Plaintiff).

ORDER.: The plaintiff claiming to be the adopted son of one Mavji Thakershi filed this suit in the Court of the Sub-judge, Mundra Taluka for partition and separate possession of ½ share in the house.

(2) The house was the undivided family property of the defendant No. 1 and his brother Lalji Dosa. Lalji's right, title and interest was ordered to be sold in execution of a decree against him. It was purchased by one Keshavji Vishanji. This Keshavji agreed to convey this interest to Mavji and assign the certificate of sale to him after it was issued by the Court. Accordingly, the certificate was assigned to Lalji on Jeth Vad 14 St. 1981. Lalji had married Mavji's niece. Therefore Mavji executed a writing in favour of Lalji Dosa Ex. 22/1 whereby he undertook that when he sold the interest assigned to him after getting the house divided or even earlier, he would set apart the balance of the sale proceeds after deducting his dues and they would be invested and interest paid to Lalji for maintenance of his family.

(3) After Mavji's death his son the present opponent No. 1 filed the present suit. The applicant defendant No. 1 is Lalji's brother. He mortgaged his share in the house by a chit-tham mortgage to the opponent No. 2 in St. 1980 and since then pays rent to him. He lives in Indore.

(4) The applicant's defences were based on various grounds. The following are, however, material to the present revision. The applicant contended that by the document Ex. 22/1 Mavji had retransferred to Lalji the interest which he (Mavji) had purchased from Keshavji Vishanji. Mavji's son the plaintiff applicant No. 1, had, therefore, no interest left which he could enforce. It was further urged that the present suit for partition of this specific property was incompetent. The plaintiff should have sued for general partition. Lastly it was urged that the opponent No. 1 can not get a decree for partition by virtue of the provisions of S. 4 of the Partition Act. The applicant had also questioned the opponent No. 1's adoption; but on this point the Courts below have given concurrent findings and the applicants must be concluded by them.

(4) The applicant's contention is that by the agreement Ex. 22/1 Mavji had actually transferred his interest in the house to Lalji. There is no substance in this argument. The document was passed without consideration and amounts only to a promise to pay maintenance to Lalji's family after the house was partitioned and sold by Mavji. There is not a word expressive of the transfer of any interest in the house itself to Lalji.

(5) The second ground of objection is that the plantiff who is the purchaser of the undivided interest of Lalji in the house should have sued for general partition. Reliance was placed on the applicant's behalf on Mulla Hindu Law (10th Edition) S. 261 (2). The learned author has noticed a divergence of opinion on this point between the Bombay and Madras High Courts on the one hand and the Calcutta and the Allahabad High Courts on the other. The latter Courts hold that a suit for partial partition lies whereas according to the Bombay High Court the purchaser of the undivided interest of a coparcener should sue for general partition. The Bombay view is in favour of the applicant but the learned Civil Judge adopted the Calcutta view. I may observe that in Kutch, the decisions of the Bombay High Court are usually preferred where there is a conflict of opinion with other High Courts and it is desirable to state briefly the reasons when the Court differs from that view. But the applicant cannot get the benefit of the Bombay view. He did not take any objection against the frame of the suit in his written statement nor did he seek any issue thereon. He gave no opportunity to the opponent No. 1 during the trial either to amend his plaint or withdraw his suit with permission to bring another suit. The opponent No. 1 was allowed to wade painfully through the suit, and the objection was sprung on him during arguments as the trial Court's judgment shows. He cannot be deprived of the results of his labour on an objection which takes him by surprise particularly when he has on his side a weighty opinion in the shape of the Calcutta and Allahabad High Court decisions.

(6) The last objection taken on behalf of the applicant was that the decree for partition was against the provisions of S. 4 of the Partition Act. This section lays down that where a share in a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share-

holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder.

(7) The first condition for the application of this section is that the applicant should give an unconditional undertaking to buy the share from which he cannot resile. This condition is absent in the present case. Moreover the house has long since ceased to be the family's dwelling house. The applicant left for Indore in St. 1980 (1924 A.D.) He mortgaged it with possession to another, and actually pays rent to the mortgagee for the portion which he occupies. There is another tenant also, who I am informed, pays rent to the mortgagee. A third person has thus actually been introduced into the house and the sanctity of the dwelling house occupied by the members themselves is destroyed. It is no longer a house in which the family or any member of the family dwells or might dwell in his capacity as such member. It is in the possession of a third party and a stranger has actually been introduced into it. The section can protect only those houses in which the family members dwell; but not the houses which have been mortgaged with possession to third parties and which are to let to different persons by the mortgagee.

(9) The revision must fail and is therefore ordered to be dismissed with costs.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 15 (1) *[C. N. 8.]*

BAXI, J. C.

Usufali Mahamadbhai, Plaintiff-Applicant v. Darji Alimamad, Defendant, Opponent.

Small Cause Revenue Application No. 4 of 1950, D/- 28-3-1951.

Houses and Rents — Kutch House Rent Control Order (2004 St) — Agreed rent in excess of standard rent — Suit for arrears of rent—Power of Court to give credit for excess rent already paid.

In a suit for arrears of rent the landlord cannot be awarded more than the standard rent even if the agreed rent is in excess of the standard rent payable under the law in Kutch. But there is no provision of the law which authorises the Court to compel the landlord to refund the rent paid in excess of the standard rent. Hence where the Court gives credit to the defendant for the amount paid in excess, in such suit especially when there is no counter-claim of the defendant, the order is without jurisdiction and must be set aside. (Para 3)

Jadavrai K. Dholakia, for Applicant; Krishndldl P. Kotwal, for Opponent.

ORDER.: The present revision arises out of a suit for recovery of arrears of rent of a room which the applicant filed against the opponent. The tenancy commenced from Posh Sud 1st 2003. The opponent had executed a rent note by which he agreed to pay Koris 25/- per month to the applicant. Six months' rent it is admitted had been duly paid. That is the rent was paid up to Ashad Sud 2 St. 2004. Thereafter the opponent used to make payments. He is a tailor and used to sew the applicant's clothes and the opponent's labour charges were credited towards the rent. The applicant maintained an account in which these payments have been credited. The applicant claimed that Rs. 164/- were due to him on this account. The opponent produced a counter-part of the account which the applicant gave him. There was a difference of Rs. 10/- in the two accounts and the learned Judge accepted the counter-part and held that Rs. 154/- were due under this account.

(2) He however reduced the applicant's claim to Rs. 33/10/-. This was because in Kutch a law for the control of house rents was enacted in Bhadarwa Sud 2 St. 2004. According to this law, the landlords were prohibited from charging rent in excess of the standard rent, which was the rent charged in St. 1999. Now the standard rent of the room let to the opponent would be 15/- Koris per month according to this rule as that was the rent which was being charged for it in St. 1999. The learned Judge, therefore, reduced the rent from Koris 25 to 15. He held that the applicant has received rent for the first 29 months at the rate of 25/- Koris and for the next 8 months at the rate of 24/- Koris recovering in all 10/- Koris per month in excess of the standard rent for the first 29 months and 9/- Koris for the next 8 months. He gave credit to the opponent for this excess rent received by the applicant in the account and held that only Rs. 33-10-0 remained due to the applicant for which amount he passed a decree. The applicant has applied in revision against this order.

(3) The only point argued in this revision was that though the rent received by the applicant exceeded the standard rent, the learned Judge had no jurisdiction to compel the applicant to refund it by crediting the excess in the account. The argument means that once the tenant pays the rent even if it is excess of the standard rent the Court has no power to compel the landlord to refund it. This argument appears to me to be quite sound. It is true that the landlord cannot be awarded more than the standard rent by the Court. But there is no provision of the law which authorises the Court to compel him to refund the rent if it is already paid to him. Besides before the opponent can be allowed to claim the refund, he should put in a counter-claim and pay proper court-fees thereon. The learned Judge's order must, therefore, be set aside.

(4) The next question is what order should be passed. The applicant has not stated actually for how many months the rent is due. He has, however, shown that Rs. 154/- are due as arrears of rent. The case will, therefore, be remanded to the learned Judge who will calculate the period for which the arrears are claimed and shall pass a decree for the plaintiff for rent for that period at the rate of 15/- Koris per month. The opponent shall pay the applicant's costs of this revision.

K.S. *Case remanded.*

A. I. R. (39) 1952 Kutch 15 (2) *[C. N. 9.]*

BAXI, J. C.

Mangharia Dada Bhachu, Accused-Applicant v. The State.

Criminal Revision Application No. 26 of 1951, D/- 20-7-1951.

Evidence Act (1872), Ss. 101 to 103 and 114 — Presumption and onus of proof — Influx from West Pakistan Act (1947), S. 5.

Where in a prosecution under S. 5, Influx from West Pakistan Act, the accused admits that his property had been taken over by the Government as evacuee property and the accused has not objected to such action of the Government till then it must be presumed that he has accepted the order of Government as correct and that he is an evacuee. The burden of rebutting the presumption by proving that he was in fact not an evacuee or that he had not migrated to Pakistan lies on the accused. (Para 4)

Anno: Evidence Act, Ss. 101 to 103, N. 4; S. 114, N. 33.

M. M. Mehta for Applicant; C. P. Pandya, for the State.

ORDER.: This application is against the applicant's conviction and sentence passed by the First Class Magistrate, Bhuj Taluka under Section 5 of the Influx from West Pakistan Act.

(2) The case for the prosecution was that the applicant left India for West Pakistan about 14 months before the filing of the information and he returned to Kutch without a permit.

(3) It is admitted by the applicant that some property belonging to his deceased father in which he has an interest as his heir was taken over by the Government as Evacuees Property in November, 1949. The applicant has raised no objection against the attachment till now. His defence was that he was in Jamsalaya in Saurashtra during all this time. The learned Magistrate argued that if the applicant was in fact in Jamsalaya as he alleges he woud surely have raised objections against the attachment of his share. The learned Magistrate, therefore, disbelieved the defence and held the applicant guilty under the Act.

(4) It was urged on the applicant's behalf that the learned Magistrate erred in presuming that the applicant was in West Pakistan merely on the strength of the attachment of his deceased father's property. He should have insisted on definite evidence of the applicant's departure for Pakistan or his return therefrom. I do not agree. If a man's property is taken under attachment and he does not protest against the order the presumption is that he has accepted its correctness. The applicant must, therefore, be presumed to have been an evacuee. It is open to him to rebut this presumption by showing that he was in fact not an evacuee nor had he migrated to Pakistan. But the burden of proving this is on him. The learned Magistrate has not accepted his defence that he was in Jamsalaya. The question whether he was in Jamsalaya or not is one of fact and the Magistrate's finding concludes the applicant.

(5) The applicant has thus failed to rebut the presumption arising out of the order of attachment and he must fail. This revision is accordingly ordered to be dismissed.

K.S. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 16 (1) *[C. N. 10.]*

BAXI, J. C.

Nathu Jasang, Accused-Applicant v. The Kutch Government.

Criminal Miscellaneous Case No. 11 of 1950, D/-12-3-1951.

Criminal P. C. (1898), S. 353 — Case posted for hearing on 28th — Magistrate examining certain prosecution witness on his request on 25th in absense of accused and relying on his testimony for conviction — Procedure held illegal. (Para 3)

Anno: Criminal P. C. S. 353, N. 4, Pt. 5.

Manharrai M. Mehta, for Applicant; C. P. Pandya, Public Prosecutor, for the Kutch Govt.

ORDER.: The applicant was tried by the Khadir Mahalkari under Sections 379-411, I.P.C., During the progress of the trial he adopted certain procedure which resulted in the present application for transfer of this case to another Court. This Court ordered stay of the trial, but before the order could be communicated to the Mahalkari, he had disposed of the case. It is now urged that this Court can in the exercise of its revisional jurisdiction quash all proceedings and should order the applicant to be acquitted.

(2) A copy of the application was sent to the Mahalkari for remarks. The application makes specific allegations of illegal procedure adopted by the Mahalkari. He has sent his explanation. He does not meet the main point of the complainant viz., adoption of the illegal procedure and writes that he has given his decision after perusal of the papers in good faith. His reply impliedy admits the varicus illegalities committed in the trial.

(3) The first complaint was that the prosecution cited a witness named Rabari Bhachu. This witness appeared before the Court and requested that he should be examined at once. He made this request on 24-10-1950. Now the case was posted for hearing on 28-10-1950 and the accused was informed of this date. But the Mahalkari examined this Bhachu on the next day in the absence of the accused. The proceeding of 24-10-1950 shows that the Mahalkari tried to secure the attendance of the accused by instructing the Jamadar to inform him of the proposed examination of this witness. The Jamadar informed him that the accused had gone to Waghad. Thereupon the Mahalkari decided to examine this witness in the accused's absence. The Mahalkari's proceeding was quite illegal and he could not hear the case in the absence of the accused. What is more the Mahalkari has relied upon the testimony of this witness in convicting the accused. This is quite illegal.

(4) The next point was that the Mahalkari did not frame a charge and refused to recall the prosecution witnesses for the accused's cross-examination. This too is quite illegal and vitiates the trial.

(5) The learned Public Prosecutor agreed that the procedure adopted was quite illegal.

(6) A question was raised that the present Mahalkari was not invested with powers of a Magistrate, and he had no jurisdiction to try the offence. The Public Prosecutor agreed that this was so.

(7) The result is that the trial is full of illegalities and the conviction must be set aside. I understand that the applicant has already undergone the sentence. There is, therefore, no point in ordering his re-trial. The conviction, is therefore, set aside and the applicant is ordered to be acquitted.

D.R.R. *Conviction set aside.*

A. I. R. (39) 1952 Kutch 16 (2) *[C. N. 11.]*

BAXI, J. C.

Shambhulal Bhaichand and others, Plaintiffs-Applicants v. Chunilal Ratanshi and others, Defendants-Opposite Party.

Civil Revision Application No. 89 of 1950, D/-28-2-1951.

Evidence Act (1872), S. 116 — Tenant accepting lease — He cannot deny landlord's title even if not let into possession.

A tenant who executes a lease but has not been let into possession by the lessor is estopped, from denying the lessor's title, except on proof of ignorance of the lessor's title or fraud, misrepresentation or any matter which renders the contract voidable. AIR (4) 1917 Mad 789 (2) FB, Rel. on.

Thus where 'A' executes a usufructuary mortgage in favour of 'B' and delivers possession to 'B' and accepts its lease from 'B', he is estopped under S. 116 from pleading his superior title on the ground that the mortgage not being registered, the mortgagee could not grant him any lease or that 'A' was not given possession of the leased property,

when 'B' sues for possession on the basis of the lease. AIR (24) 1937 Nag 265 and AIR (32) 1945 Mad 321, Disting. (*Paras 4, 7, 8*)

Anno: Evidence Act S. 116, N. 10.

Surji U. Bhansari, for Applicants; Nanalal V. Bhatt, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(15) 37 All 557: (AIR (2) 1915 PC 96) (Pr 5)

('17) 40 Mad 561: (AIR (4) 1917 Mad 789 (2) FB) (Pr 3)

('45) AIR (32) 1945 Mad 321: (ILR (1946) Mad 44) (Pr 8)

('37) AIR (24) 1937 Nag 265: (ILR (1937) Nag 346) (Pr 7)

ORDER.: The plaintiffs filed the suit in the Court of the Sub-judge, Rapar for possession of a certain dwelling house on the strength of a rent-note executed by the defendants after executing a document of vatantar (usufructuary) mortgage in the plaintiff No. 1's favour. The mortgage document was unregistered and is inadmissible to prove the mortgage. The suit however has been based on the rent-note.

(2) The Court of the first instance as well as the first appellate Court dismissed the suit. They held that though the defendant had accepted the position of a tenant by executing the rent-note, he was not let into possession by the plaintiffs and could show that they had no title to the property. S. 116 of the Indian Evidence Act did not estop him from denying their title. The present revision is against the decree of the lower appellate Court. The defendant died during the pendency of the suit and the opponents were impleaded as his legal representatives.

(3) It is urged on behalf of the plaintiffs that the execution of the rent-note created an absolute estoppel against the defendant, even though he was not let into possession by the plaintiff. Reliance is placed upon the Full Bench case of the Madras High Court 'Venkata Chetty v. Aiyanna Gounden', 40 Mad 561.

(4) This case lays down the principle that a tenant who executed a lease but had not been led into possession by the lessor was estopped from denying the lessor's title, except on proof of ignorance of the lessor's title or fraud misrepresentation or any matter which rendered the contract voidable.

(5) It cannot be urged in this case that the lease was executed under ignorance of defect of the plaintiffs' title. No fraud in the execution of the rent-note has been established. All that can be said for the defendant is that the plaintiffs did not let him in possession. The Madras Full Bench decision covers this point. In that case Phillip, J., thought that the words, "commencement of tenancy" occurring in S. 116 of the Indian Evidence Act need not necessarily be interpreted as applying to the time when the tenant was first let into possession. He thought that what was pertinent for consideration was not whether the tenant had been let into possession but whether a new tenancy had arisen. If it was proved that there was a new tenancy then the tenant was estopped from denying his landlord's title at the commencement of the tenancy whether he was let into possession by his landlord or not. The tenant took advantage of the supposed title of this landlord to obtain his lease and therefore as long as he wished to hold the property under the lease, he could not be heard to say that his landlord had no right to grant it. What he must do before he can deny his landlord's title is to deliver possession of the property to his landlord. He referred to the PC Case of 'Mt. Bilas Kunwar v. Desraj Ranjit Singh', 37 All 557, where their Lordships had observed that a tenant who had been let into possession could not deny his landlord's title however defetcive it might be so long as he had not openly restored possession by surrender to his landlord. The learned Judge explained that their Lordships did not appear to have placed any emphasis on the words, "let into possession" and the principle would apply equally whether the tenant was let into possession or was continued in possession.

(6) Now it cannot be disputed in the present case that a new tenancy was established by the rent-note. It is true that it was contemporaneous with the unregistered mortgage and may even be regarded as forming part of the mortgage transaction. But the creation of the mortgagee's title and delivery of possession to him are independent parts of that transaction. The unregistered mortgage may not create any title in the mortgagee; but if he is put into possession, he can exercise all the rights of a person in possession until a person with a superior title evicts him. The defendant accepted a derivative title from the plaintiffs by accepting the position of their lessees and he cannot assert his superior title until he surrendered his lease and gave back possession.

(7) The learned pleader for the opponents relied upon 'Rashid v. Hussein', AIR (24) 1937 Nag 265. In that case, the landlord had set up an oral tenancy following a contract of sale, by the tenant to the landlord. The tenant denied the tenancy and stated that the supposed contract was bogus and was not followed by any tenancy. The Court held that S. 116 could not prevent the defendant from denying the existence of tenancy. In the present case the execution of the lease is admitted. The eviction is sought to be resisted on the ground that as the plaintiffs had no title they could not validly create tenancy. This is a different question altogether. If the defendant had shown that the infructuousness of the mortgage on account of want of registration had the legal effect of preventing the lease from coming into existence he would have succeeded in his defence; but the tenancy can exist without the plaintiffs having a good title. This case therefore does not apply.

(8) The case of 'Mahomed Hussein v. Abdul Gafoor', AIR (32) 1945 Mad 321, was also referred to on behalf of the opponents. The High Court held in that case that if the lessee acquired an interest in the leased property after the lease, he could not be estopped from enforcing that title agains the lessor. S. 116 estopped a tenant from denying the landlord's title at the commencement of the lease; but it could not prevent him from asserting a title subsequent to the lease, nor did it prevent him from pleading that the title of the original lessor had since come to an end. This case obviously does not apply for it is nobody's case here that the defendant acquired a title subsequent to the lease or that the plaintiff's title had since come to an end. The defendants' case was that the plaintiffs had no title at the commencement of the lease and it continued to vest in him. The principle of the Madras Full Bench case, therefore, applies to the present case.

(9) I am unable to accept the learned District Judge's finding. The revision must be allowed. The decree of the lower appellate Court is set aside, and a decree as prayed by the plaintiffs shall be passed. The defendants shall pay the plaintiffs' costs throughout including the costs of this reversion.

D.R.R. *Revision allowed.*

A. I. R. (37) 1952 Kutch 18 *[C. N. 12.]*

VAKIL J.C.

Kanaiyalal Pranjivan, Appellant, v. Dhanji Gokalji and another Respondents.

Second Appeal No. 12 of 1951, D/- 18-12-1951.

(a) *Civil P.C. (1908), O. 41 R. 2 — Appellate Court's power to raise points 'suo motu'.*

O. 41, R. 2 enables an appellate Court to raise 'suo motu' points not raised in the memo of appeal and decide the appeal on these points, provided these points are apparent on the face of record. But pure questions of fact, or mixed questions of law and fact cannot be raised 'suo motu' if not raised in pleadings and consequently not made a subject matter of an issue in the trial Court. (*Para 3*)

Anno: C. P. C., O. 41 R. 2 N. 7 Pt. 1.

(b) *Hindu Law—Partition — Bombay and Madras Schools — Mortgagee of coparcenary property — Mortgagee entitled to possession — Right to sue for partition.*

According to Mitakshara law applied in Bombay and Madras where the undivided interest of a coparcener has validly passed to a stranger either by operation of law or by private contract, he is entitled to claim a partition as against other coparceners and to enforce it by a suit. This is on the principles that a coparcener can sell, mortgage or otherwise alienate for value his undivided share in coparcenary property but a stranger alienee of such a share, if he has not obtained possession, is not entitled to be put in joint possession, with other coparceners. A mortgagee entitled to possession under the deed of mortgage cannot be awarded joint possession with non-alienating coparceners, his obvious remedy would be to sue for partition. AIR (20) 1933 Bom 121, Rel. on. (*Para 4*)

(c) *Hindu Law — Schools of — Law applicable to Kutch.*

For the application of the principles of Hindu Law, Kutch is regarded as part of Bombay. (*Para 4*)

(d) *Transfer of Property Act (1882), S. 68(1)(d) — Mortgage of undivided share of coparcenary property — Right to recover mortgage money.*

The expression 'mortgagee being entitled to possession of the mortgage property' means not only that under the terms of the mortgage, the mortgagee is entitled to possession but he is also entitled to possession according to law. Therefore, a mortgagee of an undivided share of coparcenary property not being entitled under Hindu Law to joint possession, cannot recover mortgage money under S. 68(1)(d). (*Para 5*)

Anno: T.P. Act, S. 68 N. 5.

J. K. Dholakia, for Appellant; N. V. Bhatt, for Respondents.

Case referred to:

('33) AIR (20) 1933 Bom 121: (144 Ind Cas 456) (Pr 4)

JUDGMENT: This second appeal arises out of a suit brought by the appellant, as a mortgagee of one-third share in the plaint mentioned properties, for partition and separate possession of his one third share, against the respondents and three others in actual possession. The suit was resisted principally by the respondents on grounds which need not be stated for the disposal of this appeal. The suit was decreed by the Trial Court. On appeal, the District Judge raised 'suo motu' a point about tenability of the suit for partition brought by a mortgagee of an undivided share of coparcenary property. The District Judge answered that question in the negative and without going into the merits of the appeal, allowed it and dismissed the appellant's suit with costs throughout.

(2) Two points were urged by the learned Advocate for the appellant before me. Firstly it was urged that the lower Court erred in raising the point stated in the preceding para when it was not raised by respondents in their written statements in the trial Court nor in their memo of appeal to the District Court. Secondly, it was urged that the lower Court erred in holding that a mortgagee, like a purchaser, was not entitled to sue for partition and separate possession of the undivided share mortgaged with him.

(3) As regards the first point, Order 41 Rule 2 C. P. C. provides that the Appellate Court, in deciding the appeal, shall not be confined to the grounds set forth in the memo of appeal. This provision of law enables an appellate Court to raise 'suo motu' points not raised in the memo of appeal and decide the appeal on these points, provided these points are apparent on the face of record. For instance, an appellate Court can 'suo motu' raise and consider a point about limitation even though not raised before it or before the trial Court if the facts are clear from the record. Pure question of fact, or mixed questions of law and fact cannot be be raised 'suo motu' if not raised in pleadings and consequently not made a subject matter of an issue in the trial Court.

A question whether a mortgagee of the undivided interest of a coparcener in joint family property is entitled to partition and separate possession can only be raised on the assumption that the property had retained the character of coparcenary property on the date of the suit. The appellant had nowhere admitted in the plaint that he had taken mortgage of an undivided share of coparcenary property. The plaint having proceeded on the basis that the appellant's mortgagor and the respondents were tenants-in-common, the lower Court was not justified in assuming without any distinct pleading of the respondents to that effect that the property was coparcenary property and in raising the point on the decision of which the appeal turned.

(4) As regards the second point, the Mitakshara law applied in Bombay and Madras is that where the undivided interest of a coparcener has validly passed to a stranger either by operation of law or by private contract, he is entitled to claim a partition as against other coparceners and to enforce it by a suit. This is on the principle that a coparcener can sell, mortgage or otherwise alienate for value his undivided share in coparcenary property but a stranger alienee of such a share, if he had not obtained possession, is not entitled to be put in joint possession with other coparceners. For the application of the principles of Hindu Law, Kutch is regarded as part of Bombay and the principle of law stated above is applicable also to the State of Kutch.

The District Court thought the principle of law above stated was applicable only to a purchaser and not to a mortgagee. If a mortgagee,

entitled to possession under the deed of mortgage cannot be awarded joint possession with non-alienating coparceners, his obvious remedy would be to sue for partition. In Raghavachariar's work on Hindu Law at page 408, it is observed that

"this right is available even to a mortgagee of a coparcener's interest who has got a right to possession under the deed of mortgage."

The learned author has based this observation on 'MOTI MEGHAJI v. AMARCHAND', AIR (20) 1933 Bom 121. The District Judge refused to follow this ruling of the Bombay High Court observing that the said ruling was based on Section 263(1) of the work on Hindu Law by Mulla and that the attention of the learned Judges who decided the case was not invited to the expression 'mutatis mutandis' used in that sub-section. Though the Courts subordinate to this High Court are not bound to follow rulings of other High Courts, the District Judge would have been well advised in following this ruling of the Bombay High Court in the absence of any ruling on the subject of this High Court or of any other High Court. It was an error to think that the Bombay authority was based on S. 263(1) of Mulla's work on Hindu Law. In the Bombay case it was observed as under:

"Our attention has been drawn to two rulings in which lessees from coparceners were held competent to maintain suits for partition and possession and this supports the view that a mortgagee who is entitled to possession must be held competent to maintain a suit."

The District Judge then referred to the principle of law enunciated in S. 263(2) of the work on Hindu Law by Mulla and observed that a mortgagee was only entitled to a share in the coparcenary property if the coparceners partitioned the joint family property. That subsection provides that a mortgagee of a specific property has no right on that property if in a partition effected that property was allotted to other coparcener. That question did not arise in the present case.

(5) The District Judge felt embarrassed as there was no other decided case holding that a mortgagee of an undivided interest of a coparcener in joint family property was entitled to partition. He was not able to cite a single authority to the contrary. Reason is that very few cases in which a mortgagee has to sue for partition comes before the law Courts. A person may not enter into a mortgage transaction of this type unless he is sure to get possession. In the present case, the mortgage was 'Vatan dar' for 99 years. The mortgagee had to remain in possession and enjoy the usufruct in lieu of interest for 99 years. On termination of the period of 99 years, there was no obligation to pay the mortgage amount though the mortgage could be redeemed by the mortgagor. If such a mortgagee were not to get possession by partition when he cannot be allowed joint possession, he would be without a remedy.

The District Judge thought that his remedy would be to sue for mortgage amount under S. 68(D) of the Transfer of Property Act. The expression "mortgagee being entitled to possession of the mortgaged property" means not only that under the terms of the mortgage, the mortgagee is entitled to possession but he is also entitled to possession according to law. It is true that the mortgagor has to secure possession of the mortgage property to the mortgagee without disturbance by his co-sharer. If the mortagagee who has not obtained possession cannot be put in joint possession, no question of disturbance by a co-sharer of the mortgagor arises. This is the reason why a distinction is made between a stranger purchaser who had not obtained possession and one who has obtained possession. A stranger-purchaser who has not obtained possession cannot be put in joint possession. But if he has obtained possession, the non-alienating coparceners can be put in joint possession with him. It is thus evident that the mortgagee would not be entitled to recover mortgage money and he would be without a remedy, if he is not entitled to a remedy of partition.

((6) Result is that the decree of the District Court is set aside and the appeal is remanded to the District Court with a direction that it be readmitted in the Register of Civil Appeals, and disposed of according to law. As the appeal turned on a point raised by the District Court 'suo motu', there shall be no order as to the costs of this second appeal.

V.R.B. *Decree set aside.*

A. I. R. (39) 1952 Kutch 19 *[C. N. 13.]*

BAXI, J. C.

Sorthia Hadia Ruda Daya, Defendant-Applicant v. Karamshi Memraj, Plaintiff-Opponent.

Civil Revision Application No. 33 of 1951, D/- 23-7-1951.

Landlord and tenant — Suit for ejectment by tenant against his sub-tenant after expiry of subtenancy — Sub-tenant if can plead that he had taken fresh lease from landlord direct — Liability to restore possession — T. P. Act (1882), S. 108 (m) — Evidence Act (1872), S. 116.

In a suit for ejectment by a tenant against his sub-tenant on the ground of expiration of the subtenancy, the sub-tenant cannot plead that the plaintiff's title to the property had come to an end by a notice from the landlord and that he had obtained a fresh lease direct from the landlord. The defendant being the sub-tenant of the plaintiff, the landlord cannot terminate the sub-tenancy by a notice and therefore there being no threat of ouster from the landlord the defendant cannot set up the landlord's title in answer to the claim of the plaintiff to whom he is bound to restore possession under S. 108 (m) T. P. Act. AIR (13) 1926 Mad 187, AIR (38) 1951 Mad 284; AIR (26) 1939 All 670 and AIR (18) 1931 Lah 243, dist. (Para 6)

K. N. Mankad, for Applicant; P. P. Vaidya, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('39) AIR (26) 1939 All 670: (186 Ind Cas 274) (Pr 6)

('31) AIR (18) 1931 Lah 243: (133 Ind Cas 653) (Pr 6)

('26) AIR (13) 1926 Mad 187: (91 Ind Cas 1024) (Pr 6)

('51) AIR (38) 1951 Mad 284: (1950-2 Mad L Jour 605) (Pr 6)

ORDER.: This revision arises out of the plaintiff-opponent's suit for possession of a certain shop and furniture and for arrears of rent. The plaintiff is the tenant of the shop from the owner Champabai Devjji. The defendant was its sub-tenant under a rent-note executed by him in the plaintiff's

favour. On the expiry of the sub-tenancy the plaintiff served the defendant with a notice to quit. The defendant did not vacate the shop. The plaintiff has, therefore, filed the present suit.

(2) The trial Court as well as the learned District Judge in appeal gave a decree against the defendant who has now applied in revision.

(3) The defendant applicant's contention is that the original landlord's attorney Bhagwanlal had terminated the plaintiff's tenancy by a notice. Bhagwanlal had also given a notice to the defendant. The latter thereafter executed a rent-note directly in favour of the landlord and had ceased to be the plaintiff's sub-lessee. It is contended that the plaintiff's title to the shop came to an end by Bhagwanlal's notice and as the defendant had obtained a fresh lease from the landlord direct, he had ceased to be the plaintiff's sub-lessee and could not be ejected from the shop.

(4) Having taken the sub-lease from the plaintiff it was the defendant's duty under S. 108 (m) of the T. P. Act to restore possession to him on the expiration of the sub-lease. It has to be seen whether the landlord's notice to the plaintiff and the defendant and the attornment by the latter in favour of the landlord can have any effect on this obligation.

(5) Though the landlord had served a notice on the plaintiff, the question whether it terminated the plaintiff's tenancy cannot be decided as he has not been impleaded in this suit. Besides the defendant cannot thereby get a right to run to the landlord and obtain a fresh lease and thus defeat the plaintiff's right to recover possession from him. The defendant cannot set up the landlord's title without first restoring possession to the plaintiff.

(6) But cases have been cited before me where it has been decided that where the sub-tenant is ousted by the title paramount or where the holder of the paramount title has been armed with a legal process which cannot be legally resisted and threatens to put him out of possession, he can attorn to the true owner and set up the title of the true owner as an answer to the plaintiff's suit. The threat of ouster under the circumstances has been held to be equivalent to ouster and the tenant who attorns to the true owner under these circumstances without being actually dispossessed by the latter is treated as if he had been actually dispossessed. 'Alaga Pillai v. Ramaswami Thevan', AIR (13) 1926 Mad 187, 'Chokklingam Pillai v. Ganesha Shanmughasundaram', AIR (38) 1951 Mad 284. 'Ram Rekha Mal v. Munnalal', AIR (18) 1931 Lah 243 and 'Luckman Chaplain v. Pearylal', AIR (26) 1939 All 670. In this case, however, there was neither ouster of the defendant by the landlord nor even the colour of a threat of ouster. The defendant was the plaintiff's sub-tenant and the landlord could not terminate the sub-tenancy by notice. The landlord's notice to the plaintiff could not arm him with any legal process by which he could have evicted the defendant. There was, therefore, no threat of ouster, the defendant could not set up the landlord's title in answer to the plaintiff to whom he was bound to restore possession.

(7) The revision is, accordingly, dismissed with costs.

K.S. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 20 *[C. N. 14]*

VAKIL J.C.

Abdalla Fazal, Applicant v. Virji and others Opponents.

Civil Revn. Appln. No. 88 of 1951, D/- 26-12-1951.

(*a*) *Civil P.C. (1908), Ss. 47 and 115 — Excess of execution — Revision.*

Where the application was made by the opponents for restitution of money wrongly recovered by the applicant on the averment that he was awarded by the Judicial Commissioner's Court his costs of all the three Courts, and the Court ordered the applicant to refund to the opponents the excess amount realised in execution, the question raised is as to excess of execution and as such it is one relating to execution of the decree between parties to the suit under S. 47, Civil P. C. The applicant, aggrieved by the order, should prefer an appeal, and a revision petition to the Judicial Commissioner's Court is incompetent. (*Para 3*)

Anno: C. P. C., S. 47 N. 35, 84; S. 115 N. 8.

(*b*) *Civil P. C. (1908), S. 115 — Revision — Return for presentation to proper Court.*

An application for revision cannot be ordered to be returned for presentation to the proper Court as an appeal. An application for revision may be treated as a second appeal or vice versa by the High Court entertaining it for its disposal, as errors of procedure cannot be allowed to defeat the ends of justice. But an application for revision which is incompetent cannot be treated as an appeal which would not lie to the High Court, for making an order for its presentation to the proper Court. (*Para 4*)

Anno: C. P. C., S. 115 N. 18.

(*c*) *Civil P.C. (1908), S. 35 — Cost of successful party — Order of Court — Interpretation.*

The High Court allowed the review application and made the following order: "The decrees of the Courts below are set aside and opponents' suit is ordered to be dismissed with costs throughout. The opponents shall pay the applicant's costs of the revision." The executing Court interpreted the order of the High Court as awarding to the applicant only the costs incurred by him in the High Court.

Held that there was no intention on the part of the High Court to make any departure from the well recognised principle that a successful party is entitled to his costs throughout except when it is expressly otherwise provided. The last sentence was added out of superabundant caution. (*Para 5*)

Anno: C. P. C., S. 35 N. 7.

L. L. Thacker, for Applicant; P. P. Vaidya for Opponents Nos. 1/1, 1/2, and 2.

ORDER: This is an application for revision of an order dated 13-5-51 made by the Subordinate Judge, Mundra, in execution petition No. 28 of 1951.

(2) Opponents 1 and 2 sued opponent 3 and the applicant for possession of a 'vandah'. The trial Court and the District Court decreed the suit. The applicant filed Civil Revision Application No. 131 of 1950 against the decree passed by the trial Court and confirmed by the District Court. This Court allowed the application and made the following order:

> "The decrees of the Courts below are set aside and opponents' suit is ordered to be dismissed with costs throughout. The opponents shall pay the applicant's costs of the revision."

The applicant filed execution petition No. 24 of 1951 against opponents 1 and 2 (original plaintiffs) to recover his costs of three Courts. In execution of a warrant issued, the entire

amount claimed was realised from the opponents 1 and 2. The opponents then applied on 2-5-51 to the executing Court for an order for restitution of the amount recovered from them except a sum of Rs. 56/8, contending that the applicant was allowed costs incurred in this Court only and not in the two Courts below.

The executing Court interpreted the order of this Court set out above as awarding to the applicant only the costs incurred by him in this Court. It, therefore, ordered the applicant to refund to the opponents the remaining amount realised in execution. Aggrieved by above order made by the executing Court, the applicant has approached this Court for revision as stated in para one above.

(3) A preliminary objection as to maintainability of the present application for revision was raised by the learned Advocate for the opponents. The application dated 2-5-51 was made by the opponents for restitution of money wrongly recovered by the applicant on the averment that he was awarded by this Court his costs of all the three Courts. The question raised was as to excess of execution and as such it was one relating to execution of the decree between parties to the suit under S. 47 C.P.C. Determination of such a question is a 'decree' as defined by S. 2(2) of the Code. It follows that the applicant, aggrieved by the order, should have preferred an appeal to the District Court.

It was contended by the Learned Advocate for the applicant that execution having taken place, the executing Court could not have entertained such an application and the order made did not relate to execution of a decree. In executing a decree, it is possible that there might be excess or deficient execution. This may be due to fault of a decree-holder in not seeking relief adequately or due to fault of the Court in not properly verifying an application for execution or due to wrong construction of a decree. In cases not falling under Order 21, Rule 22 C. P. C., orders in execution are generally made 'ex parte'. In such cases, a judgment debtor who has submitted to a wrong order issued in execution, would be without a remedy if he is not allowed to make an application in execution proceeding for restitution of excess realised in execution. A question of this kind is all the same a question relating to execution notwithstanding the fact that execution is levied, decretal amount realised and even execution proceeding is terminated.

If the judgment-debtor had opportunity to appear and contest the claim made in execution, any question that he might subsequently raise as to excess of execution levied must be deemed to have been raised and decided against him on the application of the principle of constructive res judicata applied to execution proceeding and he would have no remedy either by such an application or by a separate suit or otherwise. If, however, he had no such opportunity he is entitled to make an application to the executing Court seeking restitution for excess of execution levied as the question relates to execution and a separate suit is barred. The applicant has thus misconceived his remedy in making an application to this Court when he ought to have appealed to the District Court.

(4) The Learned Advocate for the applicant submitted that in the event of the Court holding that the present application was not competent, it may be returned for presentation to the District Court. If it was an appeal filed in this Court, when as a matter of fact it ought to have been filed in the District Court, memo of appeal would have been returned to the appellant for presentation to the proper Court. But an application for revision cannot be ordered to be returned for presentation to the proper Court as an appeal. It was contended that the application be treated as a memo of appeal and an order for its return be made. An application for revision may be treated as a second appeal or vice versa by the High Court entertaining it for its disposal as errors of procedure cannot be allowed to defeat the ends of justice. But an application for revision which is incompetent cannot be treated as an appeal which would not lie to this Court for making an order for its presentation to the proper Court. The present application must therefore fail as the applicant was not entitled to prefer an appeal against the order made by the executing Court.

(5) In view of the conclusion arrived at by me in the preceding para it is not necessary to say anything on the merits of the application though I cannot help observing that the matter was so simple that with little clear thinking and reference to decided cases on the subject the executing Court would not have reached a conclusion which to say the least is mis-interpretation of the order of this Court, possibly occasioned by the last sentence added out of superabundant caution, to avoid the result. Apparently there was no intention to make any departure from the well-recognised principle that a successful party is entitled to his costs throughout except when it is expressly otherwise provided. Unforunately the applicant sought his remedy in this Court when he might have preferred an appeal to the District Court.

(6) Result is that the application is dismissed as incompetent. There will be no order as to costs of this application having regard to peculiar circumstances stated above.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 21 *[C. N. 15.]*

BAXI, J. C.

Meman Daud Haroon Ghos Mamad, Plaintiff- Applicant v. Devchand Damji, Defendant-Opponent.

Civil Revision Application No. 63 of 1951, D/- 20-7-1951.

(a) Civil P. C. (1908), S. 115 — Case decided.

An order refusing the plaintiff's application for issuing summons to certain witnesses is not a case decided and therefore revision cannot lie.

(Para 3)

Anno: C. P. C. S. 115, N 4, 5

(b) Civil P. C. (1908), O. 16, R. 1 — Refusal to issue summons.

If a party files a further list of witnesses and requests that summons should be issued to the witnesses named in the second list, the Court cannot refuse to issue the summons to these witnesses. All that it can do is to refuse to adjourn the case if these witnesses are not served. But the issue of summons to witnesses on the application of a party before he has closed his evidence is compulsory.

(Para 3)

Anno: C. P. C. O. 16, R. 1 N 5

M. M. Mehta, for Applicant, Devshanker P. Joshi, for Opponent.

ORDER.: This revision arises out of an order dated the 27th March, 1951 refusing the plaintiff's application for issuing summons to certain witnesses.

(2) After the suit was filed, issues were framed on 9-2-1951. The case was then adjourned to 21-2-1951 for filing lists of witnesses. The plaintiff, however, applied for a short adjournment and the case was accordingly adjourned to 26-2-1951 for filing the lists. On that date the plaintiff filed a list of his witnesses and requested the issue of summons on them. There is no dispute about them. On 3-3-1951, he produced a further list and applied that the summons be issued to witnesses named in the further list. On 27-3-1951, the learned Subjudge heard both the parties on this application and dismissed it. The plaintiff has applied to this Court for revision.

(3) The learned Sub-judge's order is not a case decided and therefore this revision cannot lie. But I would like to draw the attention of the learned Sub-judge to the provisions of Order 16, R. 1 C. P. Code. Under this rule the party has a right to apply for summons to witnesses at any time after the institution of the suit and it is not open to the Court to refuse to issue the summons. I am informed that the practice of this particular Court is to require the parties to file their lists of witnesses so that the witnesses may be summoned in time to enable them to attend the Court at the time of hearing. This is quite a desirable practice. But it does not mean that if a party files a further list of witnesses and requests that summons should be issued to the witnesses named in the second list, the Court can refuse to issue the summons to these witnesses. All that it can do is to refuse to adjourn the case if these witnesses are not served. But the issue of summons to witnesses on the application of a party before he has closed his evidence is compulsory. The learned Judge's order refusing to summon these witnesses is erroneous. The plaintiff will now be at liberty to make a fresh application if he is so advised and that application will be disposed of in the light of my observations in this judgment. With these remarks, this revision is dismissed. There will be no order for costs.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 22 *[C. N. 16.]*

VAKIL, J. C.

Jivraj Virjee, Plaintiff-Applicant v. Keshavji Lakhamshi, Defendant-Opponent.

Civil Revn. Appln. No. 68 of 1951, D/- 14-12-1951.

(*a*) *Evidence Act (1872), S. 57 — Existence of Custom.*

When a particular custom is of general prevalence and is commonly recognised, it is open to a Court to take judicial notice of it under S. 57. But the mere fact that existence of a custom of privacy in certain parts of Gujarat is judicially recognised by some decisions of Bombay High Court is not sufficient for taking judicial notice of its existence in Kutch. Plaintiff should lead evidence to show that right of privacy is generally prevalent and commonly recognised in Kutch. In that case it would be possible to take judicial notice of its existence in Beraja. (*Para 5*)

Anno: Evidence Act, S. 57 N. 1.

(*b*) *Easements Act (1882), S. 18 — Right of Privacy.*

Privacy can be claimed in respect of premises or those parts of premises which are secluded from observation. It follows that privacy cannot be claimed in respect of a garden, a courtyard or a Verandah not intended for being secluded from observation. A person cannot claim privacy in respect of an extensive vacant site which is used as an open air privy and bath. The object can be achieved by construction of structures to be used as a privy and a bath room. (*Para 7*)

Anno: Easements Act, S. 18 N. 2.

(*c*) *Civil P. C. (1908), S. 115 and O. 6, R. 17 — Amendment introducing new cause of action.*

An applicant cannot be allowed to urge a new cause of action in revision by an amendment of the plaint. (*Para 8*)

Anno: C. P. C., S. 115 N. 2, O. 6, R. 17 N. 12, 13.

R. R. Thacker, for Applicant; G. U. Bhanusali, for Opponent.

ORDER: This is an application for revision of the decree of the District Court, Kutch in Civil Appeal No. 169 of 1950, modifying the decree of the Court of Subordinate Judge, Mundra in Civil suit No. 9 of 1950.

(2) The applicant brought Civil suit No. 9 of 1950 to obtain a mandatory injunction for closure of four appertures opened by the opponent in hind wall of his house, over-looking applicant's extensive vacant site, called 'Varandah', alleging existence of a customary right of privacy and its infringement as the 'Verandah' was used by members of the applicant's family as open air privy and bath.

(3) The trial Court decreed the suit holding existence of customary right of privacy and its infringement by the opponent proved. The District Court on appeal held that existence of the right of privacy claimed was not proved. The District Court, however, granted a declaration to the applicant that he was entitled to close the appertures from his side. The District Court modified the decree of the trial Court by granting a declaration as aforesaid and making no order as to costs.

(4) The applicant has filed this application for restoration of the decree passed by the trial Court. The opponent has filed cognate revision application No. 71 of 1951 for setting aside the decree of the District Court granting declaration to the applicant and making no order as to costs.

(5) The main question to be considered in this Revision Application is whether the District Court erred in holding that the customary right of privacy claimed was not established. Both the lower Courts assumed existence of customary right of privacy in Kutch. No instance was cited in which customary right of privacy was judicially recognised. When a particular custom is of general prevalence and is commonly recognised, it is open to a Court to take judicial notice of it under S. 57 of the Indian Evidence Act. But the mere fact that existence of a custom of privacy in certain parts of Gujarat is judicially recognised by some decisions of Bombay High Court is not sufficient for taking judicial notice of its existence in Kutch. Plaintiff should have led evidence to show that right of privacy is generally prevalent and commonly recognised in Kutch. In that case it would have been possible to take

judicial notice of its existence in Beraja. As no such evidence was led, plaintiff had to show existence of customary right claimed in the particular village.

(6) The substance of oral evidence led by the plaintiff was that there existed some 'Verandahs' in this village used by their owners as open air privies and baths with blind hind walls of the neighbouring houses abutting on them. One of the witnesses examined admitted instances, though a few, of existence of appertures in hind walls over-looking such 'Varandahs'. It cannot therefore be said that the custom has been so well recognised that no one has dared to infringe it and hence there did not exist instances to prove that the custom was denied and upheld on a previous occasion. The evidence led was hardly sufficient to establish all the elements of custom.

(7) There is another aspect of the question which requires consideration. This aspect is whether the customary right claimed can be recognised. Privacy can be claimed in respect of premises or those parts of premises which are secluded from observation. It follows that privacy cannot be claimed in respect of a garden, a court-yard or a Verandah not intended for being secluded from observation. Applicant claims privacy in respect of an extensive vacant site which according to evidence is used as an open air privy and bath. As the user requires seclusion from observation, privacy is claimed. The object can be achieved by construction of structures to be used as a privy and a bath room. It would be unreasonable for an owner of a vacant site that he would use it for purposes stated above as such and expect neighbours to keep that side blind so that they might not get air and light from that direction.

The trial Court got over the apparent difficulty by stating that plaintiff had constructed compound wall six feet in height. When privacy was claimed and allowed in respect of a court-yard, it is found that the court-yard was secluded from observation. Such court-yards unlike 'varandah' in suit are appurtenent to residential buildings. In my opinion, it will be too oppressive to recognise such a custom even though the existence of right of privacy was generally established or was established to have existed in this particular village.

(8) The evidence which came on record in the trial Court showed that defendant's hind wall was originally a party wall. Defendant extended its height on the portion of his moiety by constructing a wall on his side in support and opened appertures in it. In the District Court, it was urged on behalf of the applicant that he was entitled to get the apertures opened in the extended joint wall removed. The District Court did not accept this contention as no such case was alleged in the plaint. On behalf of the applicant it was submitted that he be allowed to amend his plaint so as to urge that cause of action. This is a belated request which ought to have been made in the trial Court having regard to the fact that the applicant was aware of the wall being a party wall. Secondly, the Jalis do not exclusively exist in the extended joint wall. They exist in the new wall constructed by the opponent on his side. Hence the applicant cannot be allowed to urge a new cause of action in revision by an amendment of the plaint.

(9) Result is that the decree passed by the District Court so far as this application is concerned is confirmed and the application is dismissed with costs.

D.H. *Revision dismissed.*

A. I. R. (39) 1952 Kutch 23 *[C. N. 17.]*

VAKIL J. C.

Keshavji Lakhamshi, Defendant-Applicant v. Jivraj Veerji, Plaintiff-Opponent.

Civil Revn. Appln. No. 71 of 1951, D/- 14-12-1951.

(a) Civil P. C. (1908), O. 7 R. 7 — Grant of relief on cause of action different from one alleged in plaint.

The general principle is that a relief granted under this rule must be based on the same cause of action as the relief claimed in the suit. It may be possible to grant relief under this rule on a cause of action different from the one alleged in the plaint. Such a relief on a different cause of action can be granted on undisputed facts. *(Para 3)*

Anno: C. P. C., O. 7 R. 7 N. 1.

(b) Civil P. C. (1908), Ss. 35 and 115 — Order as to costs — Interference in revision.

Generally a Court of revision does not interfere with an order as to costs. But when reasons given by the lower Court for not awarding costs to a successful party are just the additional reasons why the successful party should get its costs from the defeated party, the Court will be justified in interfering. *(Para 4)*

Anno: C. P. C., S. 35 N. 31; S. 115 N. 20.

S. U. Bhanusali, for Applicant; R. R. Thacker, for Opponent.

ORDER: This application for revision of the decree of the District Court in Civil Appeal No. 169 of 1950 was made under the circumstances stated in paras. 2 to 4 of the judgment delivered in cognate Civil Revision Application No. 68 of 1951.*

(2) The District Court found that opponent had failed to show existence of customary right to privacy. Instead of dismissing the suit on this finding, the District Court granted a declaration to the opponent, though not sought in the plaint, as opponent was entitled to close the appertures from his side. The District Court further made no order as to costs of appeal and of the suit.

(3) The District Court relied on the provisions of O. 7, R. 7, Civil P. C. in granting this relief to the opponent. The general principle is that a relief granted under this rule must be based on the same cause of action as the relief claimed in the suit. Now the cause of action alleged for closure of the appertures was infringement of the right of privacy. The cause of action for blocking the jalis from the opponent's side was not only the fact that jalis were opened but the further fact that applicant prevented the opponent from blocking them from his side. Thus the cause of action for declaration granted was different from the cause of action alleged in the plaint. It may be possible to grant relief under this rule on a cause of action different from the one alleged in the plaint. Such a relief on a different cause of action can be granted on undisputed facts. The opponent having not alleged in the plaint that applicant obstructed him in blocking the

*See A. I. R. (39) 1952 Kutch 22.

jalis, there was no such undisputed fact. The District Court therefore erred in granting a declaration to the opponent.

(4) In para. 14 of its judgment the District Court gave reasons which would entitle the applicant to get costs of the suit, of appeal and of cross-objections filed by the opponent. Declaration was granted as a general relief and not as one claimed. It was based on a legal maxim that opponent was entitled to close appertures on his side to prevent acquisition of an easement right by the applicant on his property. Moreover the opponent had unnecessarily valued his plaint at Rs. 2000/- on the ground that value of his property was diminished. Result was that the applicant had to pay the same court-fees in appeal. The District Court remarked that such a suit was filed by the opponent instead of blocking the jalis on his side due to ignorance of law. It is therefore strange that the District Court thought it fit that the successful applicant should suffer for these reasons and he should be deprived of his costs. Generally a Court of revision does not interfere with an order as to costs. But when reasons given by the lower Court for not awarding costs to a successful party are just the additional reasons why the successful party should get its costs from the defeated party; this Court will be justified in interfering.

(5) Result is that the application is allowed, the decree passed by the District Court be modified by reversing the decree passed by the trial Court and dismissing the opponent's suit with costs throughout including the costs of cross-objections filed by the opponent. Opponent to pay the applicant's costs of this application and bear his own.

V.R.B. *Application allowed.*

A. I. R. (39) 1952 Kutch 24 *[C. N. 18.]*

VAKIL, J. C.

Madhavsangji Panchaji, Accused-Applicant v. State.

Criminal Revision Application No. 49 of 1951, D/- 28-12-1951.

(a) Criminal P. C. (1898), S. 439 — High Court's powers of revision — In revision the Judicial Commissioner's Court does not ordinarily interfere with the appreciation of evidence by the lower Courts particularly when there are concurrent findings recorded by the lower Courts. (Para 6)

Anno: Criminal P.C., S. 439, N. 15.

(b) Criminal P. C. (1898), Ss. 537 and 423 — Magistrate in holding re-trial acting upon evidence recorded in former trial — Irregularity or illegality — Consent of accused to procedure — Effect.

When a Magistrate, instead of holding a re-trial as directed in the manner provided by law substantially acts upon the evidence recorded in the former trial, he acts in contravention of the imperative provisions of law. The procedure adopted implies grave prejudice to an accused person which will none the less be so though the accused did not object to or even tacitly consented to the procedure being followed by the Magistrate: AIR (34) 1947 P. C. 67, Rel. on. (Para 9)

A Criminal Court cannot seek to validate an apparently allegal procedure to be adopted by taking consent of an accused person to it. (Para 8)

Anno: Criminal P.C., S. 537, N. 28, 30, 32.

(c) Criminal P.C. (1898), S. 439 — Revision — Re-trial — Trial defective — Serious charge against accused — Evidence supporting charge — Fit case where re-trial (in this case, second re-trial) should be ordered. (Para 12)

Anno: Criminal P. C., S. 439, N. 25a.

N. V. Bhatt on behalf of M. P. Thacker, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

Cases referred to:

('02) 25 Mad 61: (28 Ind App 257 PC) (Pr 9)
('47) AIR (34) 1947 PC 67: (48 Cri L J 533) (Pr 9)

ORDER.: This an application for revision of an order of conviction and sentence, for an offence punishable under Section 420, I.P.C., made by the Magistrate First Class, Abdassa, in Criminal Case No. 50 of 1950. The conviction and sentence were confirmed on appeal by the Sessions Judge, Kutch.

(2) The prosecution case against the applicant was that he borrowed a sum of Rs. 825/- from one Isarmal on security of a gold necklace which in fact was made of silver with gold gilted on it. When the case was first tried before the Magistrate First Class, some certified copies of depositions were allowed as part of the prosecution evidence. The Magistrate convicted and sentenced the applicant. On appeal, the Sessions Judge, Kutch set aside the order of conviction and sentence holding that certified copies were inadmissible in evidence and ordered a re-trial.

(3) When the case went back to the trying Magistrate the latter recorded in the proceeding dated 22-10-1950, as under:

> "This case is sent by the Sessions Court for re-trial. The case is therefore adjourned for the prosecution and the defence to state whether they wanted to put any further questions to the prosecution witnesses examined."

On 15-11-1950, the applicant filed the following statement in the Court in reply to the query of the trying Magistrate: "I do not want to put more questions to the prosecution witnesses as it is unnecessary to do so." The prosecution then produced some certified copies which were recorded and the defence examined some witnesses. The trying Magistrate, relying on the evidence recorded in the trial before a remand, except the certified copies held inadmissible by the Sessions Court, found the applicant guilty and convicted and sentenced him as stated above. The defence evidence was disbelieved.

(4) On appeal by the applicant, one of the points urged was that the trying Magistrate did not hold a re-trial as directed by the Sessions Court and relied on evidence recorded in the trial before remand. The Sessions Judge remarked that as the applicant agreed that evidence be not recorded de novo and as he further agreed that he had not to question further the prosecution witnesses already examined, no irregularity was committed and if any such irregularity was committed, the applicant was not prejudiced thereby. The Sessions Judge considered other contentions including those against conviction on merits and made an order confirming the conviction and sentence.

(5) In revision it was contended that the procedure adopted by the trying Magistrate on remand was illegal and hence the order of conviction and sentence be set aside. It was further contended that this was not a fit case for directing a second re-trial and therefore the applicant be acquitted. On merits, it was contended that the trying Magistrate and the Sessions Judge erred in relying on the prosecution evidence and on the alleged subsequent conduct of the applicant. Lastly, it was contended that the trying Magistrate was not empowered to take cognizance of the offence under Section 190, Criminal P. C., and hence the proceeding be quashed.

(6) The prosecution had led evidence to show that the necklace produced in Court was the one pledged by applicant as security for the loan. The prosecution also relied on the letter, admittedly in the hand of the applicant, in which he requested that no action be taken as his reputation was at stake and that he would settle the matter soon. It cannot therefore be said that there was no evidence to warrant conviction of the applicant. In revision this Court does not ordinarily interfere with the appreciation of evidence by the lower Courts particularly when there are concurrent findings recorded by the lower Courts.

(7) The important question of law to be considered is whether the trying Magistrate acted legally in adopting the procedure mentioned in para. 3 above when he was directed to hold a retrial. When a re-trial is ordered, a trial is to be held again in accordance with the procedure prescribed for a summons or a warrant case in Chapter XX or XXI of the Code as the case may be. As the trying Magistrate had to retry a warrant case, he had to follow the procedure prescribed in Chapter XXI of the Code by recording evidence of the complainant and his witnesses in the presence of the accused as provided in Section 252 and by further following the procedure prescribed by other sections of that Chapter. By calling upon the prosecution and the defence to state whether they wanted to put further questions to the prosecution witnesses examined at the time of the former trial and by treating that evidence as evidence in the new trial, the trying Magistrate innovated procedure not warranted by the provisions of the Code. It seems that the trying Magistrate had some hazy conception about the procedure to be adopted at the time of retrial. Under Section 350, an accused person may demand that witnesses or any of them be re-summoned and re-heard. Under Section 256, an accused person is entitled to recall prosecution witnesses for cross-examination. Though none of the two sections was applicable, the Magistrate thought that re-trial can be had by asking the prosecution and the defence whether any further questions were to be put to the witnesses examined and if they did not want to put further questions, by relying on the evidence as if it was evidence recorded in the case. The procedure adopted by the Magistrate was illegal.

(8) The Sessions Judge got over the difficulty by stating that the applicant agreed that evidence need not be recorded de novo and he further agreed that he had not to put further questions to prosecution witnesses examined. The statement made by the applicant is reproduced in para. 3 above. It is not correct to state that the applicant agreed that evidence need not be recorded de novo. It is true that when questioned he stated that he did not want to ask any question to the prosecution witnesses examined. But when re-trial was directed, there was no occasion to ask such a question to the accused. A Criminal Court cannot seek to validate an apparently illegal procedure to be adopted by taking consent of an accused person to it.

The Sessions Judge who directed re-trial was expected to better understand the order made by him. It is, therefore, surprising to see the Sessions Judge holding that no illegality was committed. It seems that according to the idea of the Sessions Judge, a retrial can be said to have been held when parties agree to treat evidence recorded at the time of the former trial as evidence in the new trial. The evidence must be recorded in every trial in the manner provided in Section 353. It does not matter how often the same offence is the subject of trial.

(9) In the alternative, the Sessions Judge held that the irregularity was cured under Section 537 of the Code. In KOTTAYA v. EMPEROR', AIR (34) 1947 P C 67, their Lordships observed that when a trial was conducted in a manner different from that prescribed by the Code as in 'SUBRAMANIA AYYAR v. EMPEROR', 25 Mad 61 P C, the trial was bad; and no question of curing an irregularity arose. When a Magistrate, instead of holding a re-trial as directed in the manner provided by law substantially acts upon the evidence recorded in the former trial, he acts in the contravention of the imperative provisions of law. The procedure adopted implies grave prejudice to an accused person which will none the less be so though the accused did not object to or even tacitly consented to the procedure being followed by the Magistrate.

(10) There was another aspect of the case which, the Sessions Judge did not consider. The evidence in the former trial could not have been treated as evidence in this case. There was no consent on the part of the accused to treat it as evidence in this case. In some old decided cases it has been held that if depositions in the former trial are read out in subsequent trial, it would be an irregularity which would not vitiate the trial if no prejudice was caused. But in this case neither the witnesses were recalled nor the evidence was read out to be treated as evidence in the new trial. Apart from the question of prejudice, if this evidence was ruled out, the conviction cannot be sustained on the remaining evidence.

(11) There is no substance in the contention that the Magistrate was not empowered to take cognizance under Section 190, Criminal P.C. The contention was not taken in the trial Court nor in the Court of appeal.

(12) Result is that the conviction and sentence must be set aside. The next question to be considered is whether the applicant should be ordered to be re-tried. It is true that the applicant has to face a trial once again. But the applicant has also his share of the blame. He ought not to have stated that he did not want to put further questions to the prosecution witnesses. He was represented by a lawyer who ought to have guided the Magistrate in following the correct procedure. It is a general rule that when a trial is defective a re-trial should be ordered. There is a serious charge against the applicant and there is evidence to support the charge. I, therefore, regard this as a fit case in which re-trial should be ordered.

(13) The applicant's conviction and the sentence passed on him by the Magistrate, First Class, Abdassa, and confirmed by the Sessions Judge, Kutch on appeal are set aside and it is directed that he be re-tried by the same Magistrate. Papers and proceedings be sent back to the Magistrate who is directed to try the applicant in accordance with the law in the light of observations made in this judgment about the procedure to be followed in re-trial.

V.B.B. *Re-trial ordered.*

A. I. R. (39) 1952 Kutch 25 *[C. N. 19.]*

VAKIL, J.C.

Chunilal Keshavji and others, Plaintiffs-Applicants v. Manodara Karamshi Jaga, Defendant-Opponent.

Civil Miscellaneous Application (for Review) No. 4 of 1951, D/- 3-12-1951.

(a) Civil P.C. (1908), S. 100, O. 47, R. 1 — Review of fact after decision in second appeal in Kutch — Kutch Courts Order (1948), S. 32.

Second appeals to the Judicial Commissioner's Court in Kutch Court are governed by S. 32 of the Kutch Courts Order, 1948, and not by Section 100 of C. P. C., AIR (38) 1951 Him-Pra 61, Foll. (Para 7)

In this view, in Kutch, discovery of new and important evidence on a question of fact is a good ground for review of the decree of the second appellate Court, the finding of fact of the first appellate Court not being final, and binding on the second appellate Court. (Paras 6, 7)

Anno: C. P. C., Ss. 100-101, N. 4; O. 47, R. 1, N. 19.

(b) *Civil P. C. (1908), O. 47, R. 1 — Discovery of new and important evidence.*

Where a new evidence proposed to be adduced is not likely to be practically conclusive and where despite the new evidence proposed to be adduced the judgment sought to be reviewed can be sustained, no case for grant of a review is made out. (Para 8)

Anno: C. P. C., O. 47, R. 1, N. 10.

J. G. Vaidya, for Applicants; M. M. Mehta, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('29) AIR (16) 1929 Bom 225: (118 Ind Cas 255) (Pr 6)

('51) AIR (38) 1951 Him-Pra 61 (Pr 6)

ORDER: This is an application for review of a judgment of this Court, dated 2-8-1951 in Civil Regular Second Appeal No. 16 of 1950, on the ground of discovery of new and important evidence which was not within the knowledge of the applicants at the time when the decree was made.

(2) The facts material for decision of this application are as follows:

(3) The applicants had filed a suit against one Manchhibai claiming to be reversionary heirs to the estate of her deceased husband, to restrain her from committing waste of the property in her possession as a widow. In this suit Manchhibai had filed a written statement saying that she had alienated mortgagee's rights in the suit property to the present opponent. It is not known as to what happened to that suit. The applicants then filed a suit for a declaration that alienation made by Manchhibai of the mortgagee's rights in the suit property was without legal necessity and hence it was not binding on them after the death of Manchhibai. To that suit both Manchhibai and the present opponent as her alienee were made parties. Manchhibai died during the pendency of the suit. Applicants therefore amended their plaint and sued to recover possession of the suit property from the opponent. The contention of the opponent was that the original mortgagors had redeemed Manchhibai and they then mortgaged the property with him for 3,300/- Kories. It is to be noted that when the suit was filed, the deed passed by the mortgagors in favour of the opponent was not registered. It was registered subsequently. The opponent denied that there was any alienation of mortgagee's rights by Manchhibai. The contention of the applicant was that the alleged transactions of mortgagors having redeemed Manchhibai and the latter having then mortgaged the property with the opponent were sham transactions and the transaction that really took place was alienation of mortgagee's rights.

(4) The trial Court and the appellate Court found for the applicants and decreed the suit. In second appeal this Court held that Manchhibai was redeemed and that there was no transfer of the mortgagee's rights by her in favour of the opponent. This Court therefore reversed the decree of the District Court and dismissed the applicants' suit.

(5) The applicants now say that there is a writing passed by the opponent in favour of Manchhibai on Ashad Vadi Amash of Samvat 2003 (July or August 1947) in which the former admitted having purchased mortgagee's rights from Manchhibai. It was stated that one Somchand, power-of-attorney holder of Manchhibai was sued by the applicant for getting possession of the account books of Manchhibai. In that suit Somchand gave the applicants four account books and further gave them a letter dated 22-4-1949 addressed to one Mr. Mulshankar pleader in whose custody the fifth book was lying for handing over that book to them. Recently applicants found it necessary to see the account book in connection with a suit filed against some persons and at that time they found out the said writing. It was stated that applicants were not aware of the existence of this writing which if admitted in evidence would conclusively show that there was alienation of mortgagee's rights.

(6) A preliminary objection was raised to the tenability of this application by the learned Advocate for the opponent. It was contended that no review of the judgment of this Court in Second Appeal was permissible on the ground of discovery of new and important evidence as to a question of fact and in support of this contention reliance was placed on the observations to that effect in Chitley and Rao's commentaries on Civil Procedure Code, Page 3548, 5th (1950) edition. The question was considered by Madgavkar, J., in 'HARI 'GANU BHANDIRGE v. HARI GANU SHINDE', AIR (16) 1929, Bom 225. His Lordship held that discovery of new and important evidence on a question of fact though a good ground for review of the decree of the first Appellate Court was not good ground for review of the decree of the second Appellate Court, the finding of fact of the lower Court being final and binding on the second appellate Court. The second appeals to this Court are governed by Section 32 of the Kutch Courts Order 1948, wherein it is provided that a second appeal shall lie to this Court from an appellate decree of the District Court on any of the grounds which would be a good ground of appeal if the decree had been passed in an original suit. It is for this reason that in second appeal filed by the opponent this Court was able to set aside the concurrent findings on a question of fact by the two lower Courts. The learned Advocate for the opponent contended that the section saved provision otherwise made by any law for the time being in force and on application of the Code of Civil Procedure, Act V of 1908, provisions of Section 32 of the Code were inapplicable.

(7) A similar question arose before the Judicial Commissioner, Himachal Pradesh in 'KEVALRAM v. BHAGWANDAS', AIR (38) 1951 Him-Pra 61. In this case the question was whether Section 115 of the Civil P.C., could be taken to have repealed Section 35 of the Himachal Pradesh Courts Order 1948. Section 35 of the Himachal Pradesh Courts Order 1948, is the same as Section 35 of the Kutch Courts Order 1948. In repelling the contention it was observed as under:

"the Code of Civil Procedure is a general enactment relating to the procedure of the Courts of

Civil Judicature extending to the whole of India except Part 'B' States and the Scheduled Districts, while the Himachal Pradesh (Courts) Order is a special provision relating to only a few of the matters covered by the Code of Civil Procedure and extending to only the State of Himachal Pradesh. That being so the rule that a general Act is to be construed as not repealing a particular one, that is one directed towards a special object or a special class of objects, is applicable.

Hence Section 115 of the Civil Procedure Code enforced in the State of Himachal Pradesh by S. 5, Merged State (Laws) Act 1949 cannot be taken to have repealed para. 35 of the Himachal Pradesh (Courts) Order (1948.")

I respectfully agree with these observations made by the learned Judge. I hold that second appeals to this Court are governed by Section 32 of the Kutch Courts Order 1948 and not by Section 100 of Civil P. C., (Act V (5) of 1908). The preliminary objection therefore fails.

(8) Now turning to the merits of the application, the first question to be considered is whether the case would turn on the new and important evidence discovered; if review is granted. It is proposed to lead evidence to show that even the opponent had admitted in that document that the mortgagee's rights were sold by Manchhibai to him. It is quite plain that the applicants were suing for possession on the allegation that the alienation made by the widow was without legal necessity. The opponent denied the alleged alienation. The applicant had therefore to show the alleged alienation. Admittedly there was no alienation by Manchhibai in favour of the opponent. It was recited in the plaint that an unregistered document was passed by Manchhibai in favour of the opponent. If such a document was passed it was not sufficient to convey title to the opponent as it was not registered in accordance with law. The title still remained with Manchhibai. There was thus no alienation. Thus it is clear that the evidence, if produced, would not have any effect on the judgment. Where new evidence proposed to be adduced is not likely to be practically conclusive and where despite the new evidence proposed to be adduced the judgment sought to be reviewed can be sustained, no case for grant of a review is made out. (After discussing the other objections, the judgment concluded:)

(9) Result is that the application fails and it is dismissed with costs.

V.B.B. *Application dismissed.*

A. I. R. (39) 1952 Kutch 27 *[C. N. 20]*

VAKIL J. C.

Velji Bharmal, Defendant-Applicant v. Samji Poonja and another, Plaintiffs-Opponents.

Civil Revn. Appln. No. 22 of 1951, D/- 26-11-1951.

(a) *Civil P. C. (1908), O. 8, R. 9 — Supplementary written statement — Delay.*

In deciding the question whether leave should be granted or not the courts take into consideration delay that has taken place in raising the contentions proposed to be raised by a supplementary written statement and the reason why those contentions were not raised before. A.I.R (5) 1918 Pat 230 and AIR (2) 1915 Lah 449 (1), Ref. to. (Para 6)

Anno.: C. P. C., O. 8, R. 9, N. 1, Pt. 3.

(b) *Civil P. C. (1908), S. 20 — Defendant living and working for gain in Bombay for 30 years — Defendant's residential house in Kutch and his wife staying in Kutch — Defendant occasionally visiting Kutch — Court in Kutch held had jurisdiction to entertain suit against defendant — (Obiter). A.I.R (28) 1941 Cal 670, Disting.* (Para 7)

Anno.: C. P. C., S. 20, N. 5.

(c) *Limitation Act (1908), S. 11 — Suit on foreign contract — Law of limitation applicable.*

Though the interpretation of contract must be governed by the law of the country where the contract was made, the mode of suing and the time within which the action must be brought must be governed by the law of the country where action is brought unless the rule of limitation of the former country applicable to the action had extinguished the contract and parties were domiciled in that country during the period prescribed by rule. (Para 8)

Anno.: Lim. Act, S 11, N 1, Pts 1 and 2.

(d) *Limitation Act (1908), S. 3 —Contract — Remedy barred by limitation — Contract is not extinguished.* (Para 8)

Anno.: Lim. Act, S. 3, N. 14, Pt. 1.

(e) *Contract Act (1872), S. 35 — Agreement to pay debt out of specified fund on account being made at specified time — Account not made — Suit to recover debt—Maintainability.*

Where the debt payable by the debtor is settled at a certain amount and he agrees to pay the amount out of a specified source when the amount would be made at a specified time, the agreement is not collateral to the contract to pay the amount, but merely provides a mode of performance and, therefore, a suit to recover the amount cannot be said to be not tenable because no account was made. (Para 9)

Anno.: Contract Act, S. 35, N. 1.

(f) *Evidence Act (1872), S. 114 — Debt of Rs. 1045 due in S. 1933 settled in S. 1989 for Rs. 400 — Suit to recover debt filed in S. 2001 — No presumption can be raised that debt was paid up.* (Para 10)

Anno.: Evidence Act, S 114, N 40.

K. K. Chhaya, for Applicant; J. G. Vaidya, for Nos. 1 and 2 for Opponents.

Cases referred to:

('41) AIR (28) 1941 Cal 670: (ILR (1941) 1 Cal 490) (Pr 7)

('15) AIR (2) 1915 Lah 449 (1) : (16 Cri L J 213) (Pr 6)

('18) AIR (5) 1918 Pat 230: (48 Ind Cas 746) (Pr 6)

ORDER: This is an application for revision of an order of the District Court, Kutch dated 15-3-51, in regular civil appeal No. 99 of 1950, confirming a decree dated 15-3-50 passed by the Subordinate Judge, Mundra in regular suit No. 179 of 'Samvat' 2001.

(2) Suit No. 179 of 2001 was brought by opponents to recover from the applicant a sum of Rs. 674 for principal and a sum of Rs. 400/- opponents to recover from the applicant a sum as interest, in all Rs. 1074/- on the basis of an agreement dated 'Samvat' 1989 'posh Vadi' 12, the corresponding date according to Gregorian Calendar being 23-1-1933. This document was essentially meant to be a partnership argeement between the parties. In Para. 2 of the agreement it was stated that a debt of Rs. 1045/- due to the plaintiff from the defendant was settled for Rs. 400/- and the said sum would be deducted from the amount due to the applicant on partnership account made at the end of the year 'Samvat' 1989. As the amount was not paid, plaintiff brought the suit alleging that though the cause of action arose in Bombay, the Court had jurisdiction to hear the suit as the defendant was a permanent resident of Kutch. The suit was instituted on the first day of 'Magsar Samvat' 2001.

(3) The suit was first decreed 'ex parte'. Defendant got the decree 'ex parte' set aside alleging that he became aware of the suit when his property was attached in execution proceeding. According to the procedure prevailing in Kutch State, defendant had to file his written statement along with his application to set aside the 'ex parte' decree. In the written statement filed by the defendant 4 years after the plaint was filed, the allegation made in the plaint that defendant was the permanent resident of Kutch was not specifically denied. Defendant contended that plaintiffs would be found indebted to him in the partnership business and hence the suit was not tenable. Defendant then applied on 27-1-1950 for permission to file a supplementary written statement. The trial Court granted permission despite the fact that the application was made after considerable period as only questions of law were raised by the proposed supplementary written statement. One of the contentions raised by the supplementary written statement was that defendant was not a permanent resident of Kutch and hence the Court had no jurisdiction to entertain the suit.

(4) The trial Court raised issues about jurisdiction, right of the plaintiff to sue on the basis of the agreement and about balance due to the defendant in the partnership business. The trial Court found all issues in favour of the plaintiff and decreed the suit. The appellate Court did not set out points for determination in appeal except an omnibus point whether the lower Court erred in decreeing the plaintiff's suit. However, it actually considered all the contentions raised by the defendant in his written statement and repelled them.

(5) In revision following contentions were urged before me by the learned Advocate for the applicant:

1. Both the lower Courts erred in holding that the trial Court had jurisdiction to entertain the suit;
2. the suit was time-barred as the debt was extinguished by operation of the period of limitation in Bombay;
3. the amount was to be paid from a particular fund or source and as account was not made, the suit was not tenable;
4. there was a presumption that the debt might have been paid as the suit was filed after such a length of time.

(6) As regards the first point it is obvious that it can be considered on facts found by the lower Court. The learned pleader for the opponent raised a preliminary contention that the trial Court erred in allowing applicant's application for filing a supplementary written statement. The trial Court thought that what was proposed to be urged by the supplementary written statement were only questions of law. The question of jurisdiction was a mixed question of law and fact. It appears from the recitals in Para. 2 of the plaint that the opponents had first sued on the original consideration in the 'khata' as the new contract was not performed by the applicant. That suit was defended by the applicant on the ground of 'novatio'. At that time, no contention about jurisdiction was raised. The opponents then filed the present suit in Samvat year 2001 (1945 A.D).

The written statement to the suit was filed in 'Samvat' year 2005. Yet in the written statement no contention about jurisdiction was raised though it was clearly stated in the plaint that though the cause of action arose in Bombay, the suit was brought in Kutch, as the applicant was a permanent resident of Kutch. The application for filing a supplementary written statement was filed on 27-1-50. The trial Court observed that a supplementary written statement in a suit filed in 1945 A.D. could not have been allowed in 1950 A. D. The trial Court, however, granted the application believing that the proposed supplementary written statement raised only question of law.

By the time, the trial Court considered the application, C. P. C. (Act V (5) of 1908) was applied to Kutch State. A supplementary written statement could be filed with the leave of the Court under O. 8, R. 9, C. P. C. In deciding the question whether leave should be granted or not the Courts take into consideration delay that has taken place in raising the contentions proposed to be raised by a supplementary written statement and the reason why those contentions were not raised before. In 'BISHANDAYAL SINGH v. M. T. JAISERE', AIR (5) 1918 Pat 230, delay of one year was considered inexcusable. In 'KADIR BAKHSH v. SUNDARLAL', AIR (2) 1915 Lah 449 (1), sufficient cause was not found and the application was rejected on the ground that piecemeal pleading should be avoided.

In the present case, applicant had submitted to the jurisdiction of the Court and contested the previous suit. He submitted to the jurisdiction of the Court and applied for setting aside the 'ex parte' decree and filed a written statement after 4 years. The trial Court therefore erred in allowing the application under O. 8, R. 9, C. P. C. at the stage at which it was made. The applicant was not entitled to file a supplementary written statement and to raise a contention about jurisdiction of the Court.

(7) In view of the conclusion arrived at by me in the preceding para, it is unnecessary to consider the question of jurisdiction. The applicant is residing in Bombay and is working for gain there for last 30 years. He has property including a residential house in Kutch. His wife stays in Kutch. He occasionally visits Kutch. Thus there was 'animus revertendi'. In 'BHAGAT SINGH v. DEWAN JAGBIR', AIR (28) 1941 Cal 670, it was held that 'animus revertendi' was not sufficient. In that case de-

fendant had an ancestral house at Wazirabad and he visited that place occasionally. But his property was let out to tenants. Evidence showed that the defendant had given up Wazirabad as his place of residence. Hence on the mere ground of 'animus revertendi' it could not be held that he had a place of residence at Wazirabad.

In the present case, defendant has his place of residence in Kutch. His wife stays in Kutch. These facts distinguish the case from the facts of the Calcutta case cited above. Moreover, in Kutch State, the fact that the defendant had property in Kutch was held sufficient to give a Court in Kutch State jurisdiction. This was the law prevailng in Kutch State. Of course in the plaint it was not stated that the Court got jurisdiction as defendant had property in Kutch State. But if defendant was allowed to file a supplementary written statement, plaintiff was entitled to urge by an amendment of the plaint that defendant had property in Kutch which gave jurisdiction to the Court when the suit was instituted. This Court cannot therefore accept the contention that when the suit was instituted the Court had no jurisdiction to entertain it.

(8) The second contention is that the agreement sued upon was entered into in Bombay. A suit based on the agreement if brought in Bombay would have been held barred by the law of limitation in force in Bombay. The debt was therefore extinguished and it could not be made a basis of a suit in Kutch where the period of limitation was 35 years. The rule applicable to the case of a contract made in Bombay and put in suit in a Court of a native State, as Kutch was then called, is that though the interpretation of contract must be governed by the law of the country where the contract was made, the mode of suing and the time within which the action must be brought must be governed by the law of the native State where action is brought unless the Bombay rule of limitation applicable to the action had extinguished the contract and parties were domiciled in Bombay during the period prescribed by the Bombay rule. A contract cannot be said to have been extinguished when only the remedy is barred by the operation of law of limitation and not the right. A person whose suit was dismissed in Bombay as time barred could sue in Kutch and could have obtained a decree owing to longer period of limitation applicable. This contention therefore fails.

(9) For understanding the third contention, it is necessary to refer to the agreement. It appears that the applicant was indebted to the opponents in the year 'samvat' 1983 (1927 A.D.) to the extent of Rs. 1045/-. In the month of 'Magsar', an agreement to do business in partnership was entered into between the parties. At that time, debt due from the applicant was reduced to Rs. 400/-. It was agreed as under:

> 'That debt is settled to-day at Rs. 400/- and I would give credit for the sum of Rs. 400/- out of my account made on the last day of the month of 'Ashvin Samvat' 1989.'

It appears clear that the applicant agreed to pay Rs. 400/- out of the amount found due to him when the partnership account would be made at the end of Hindu 'Samvat' year. Now the contention is that the sum of Rs. 400/- was to be paid from a specified source at the time when account was made and as account was not made, the suit was not tenable. The applicant urged a case of contingent contract mentioned in S. 35 of the Indian Contract Act. The statement in the agreement that the applicant would pay out of his account made on the last day of the year 'samvat' 1989 was not collateral to the contract. It only provided a mode of performance and was not collateral to the very obligation to perform the contract as that obligation was absolute and unconditional. Whether the account was made at the specified time or thereafter or not and whether any amount was found due to the applicant or not, the applicant was bound to pay the amount. Hence that contention fails.

(10) The last contention has no substance in it. A debt of Rs. 1045/- due in 'Samvat' 1933, had to be settled in 'Samvat' 1989 for Rs. 400/-. It cannot therefore be presumed under S. 114 of the Indian Evidence Act that the debt was paid up, as the opponents did not sue till 'Samvat' 2001. Having regard to the longer period of limitation in Kutch, no such presumption can be raised. It was contended that as opponents realised their dues from the amount due to the applicant from the partnership business, no suit was filed till 'samvat' 2001. The contention cannot be accepted in the absence of clear proof that partnership business resulted in profit and applicant was entitled to the amount due as his share of profit.

(11) Result is that decree of the appellate Court is confirmed and the application is dismissed with costs.

V.R.B. *Application dismissed.*

A. I. R. (39) 1952 Kutch 29 *[C. N. 21.]*

VAKIL J. C.

Naranji, Applicant v. Jivram Mandan and others, Opponents.

Civil Misc. (Supreme Court) Appln. No. 6 of 1951, D/- 28-11-1951.

(a) Constitution of India, Art. 133 (1) (a) — Subject-matter of dispute — Suit for recovery of money from partners of firm and also by sale of goods pledged — Applicant made defendant on allegation that in collusion with one of partners he took possession of goods — Applicant alleging that he was bona fide pledgee of goods including goods pledged to plaintiff — Suit decreed — Application under Art. 133 — What applicant alleged by way of defence to suit held could not be accepted as subject-matter of dispute. **(Para 6)**

Anno.: C. P. C., Appendix III, Constitution of India, Art. 133, N. 4.

(b) Constitution of India, Art. 133 (1) (a) and (b) — Need to satisfy requirement of Cl. (b) as alternative to restriction in Cl. (a).

A certificate can be claimed under any one or more of the three paras (a), (b) and (c) principally or in the alternative and it is not necessary to satisfy requirements of para (b) as an alternative to the restriction "the amount or value of the subject-matter still in dispute on appeal is and was not less than twenty thou-

sand rupees" in clause (a). AIR (38) 1951 Pat 177, Ref. to. (Para 7)

Anno.: C. P. C., Appendix III, Constitution of India, Art. 133, N. 1.

C. B. Thacker, for Applicant; K. N. Mankad, for No. 1, S. U. Bhanusali, for Nos. 2/2 and 2/3, for Opponents.

Cases referred to:

('30) 57 Ind App 56:(AIR (17) 1930 P C 44) (Pr 7)

('44) AIR (31) 1944 P C 65:(ILR (1944) Bom 745) (Pr 8)

('16) 39 Mad 843:(AIR (3) 1916 Mal 985) (Pr 7)

('51) AIR (38) 1951 Pat 177:(30 Pat 690) (Pr 7)

ORDER: This is an application by one of the judgment-debtors under Art. 133 (1) of the Constitution for leave to appeal to the Supreme Court.

(2) Opponent No. 1 brought suit No. 17 of 'Samvat' 2004 for recovery of Rs. 10300, costs and future interest from opponents 2/1, 2/2 and 2/3 as partners of the firm of Jayantilal Damjee and and also by sale of 500 bags of ground nut seeds alleging that opponent 2/1 as manager of the said firm of Jayantilal Damjee borrowed from him a sum of Rs. 10,000 on 'Asho vadi' 2nd, 'Samvat' 2004 (4-7-47) on security of 500 bags of ground nut seeds. The applicant was made a party-defendant to the suit on the allegation that he in collusion with the opponent 2/1 took possession of the pledged goods and brought into existence documents creating a pledge in his favour. The applicant did not submit opponent 1's pledge transaction and in the alternative contended that he was a 'bona fide' pledgee of 1675 bags of ground nut seeds, including 475 bags in suit, for Rs. 28000, without notice of the alleged prior pledge in favour of opponent 1. The trial Court held the pledge in favour of opponent 1 proved. It further held that the applicant was not a 'bona fide' pledgee for consideration without notice of the prior pledge in favour of opponent. It therefore decreed opponent 1's suit. The decree affected the applicant in so far as it directed realisation of the decretal amount by sale of 475 bags in his possession.

(3) The applicant preferred appeal No. 28 of 1950 against the decree passed by the trial Court. He valued his appeal at Rs. 7181/4 which was the price of 475 bags of ground nut seeds. It appears that out of 500 bags of ground nut seeds, 25 were stolen. This Court confirmed the decree of the trial Court and dismissed the appeal.

(4) The judgment of the trial Court and the judgment of this Court were delivered after the Constitution came into force. The application is therefore governed by Art. 133 of the Constitution. The applicant prayed for a certificate as under:

"To grant to your petitioner a certificate that the amount or value of the subject-matter of the suit in the first instance and of the matter in dispute on appeal to the Supreme Court is above Rs. 20,000/- and that the appeal herein involves a substantial question of law."

(5) The amount or value of the subject-matter of the dispute in the Court of the first instance was Rs. 10,300. In appeal the amount or value of the subject-matter of dispute was Rs. 7181/4. The amount or value of the subject-matter of dispute in the proposed appeal to the Supreme Court would be the same. Thus the requirements of Cl. (a) to Art. 133 (1) of the Constitution are not satisfied. The applicant thus failed to make out a claim to certificate prayed for.

(6) The applicant's contention is that the subject-matter of the dispute was not merely 475 bags of ground nut seeds pledged. His contention was that the subject-matter of dispute was the transaction of pledge with him of 1675 bags of ground nut seeds for Rs. 28,000. It is not possible to accept this contention. It cannot be accepted that what the applicant alleged by way of defence to the suit was the subject-matter of dispute. The subject-matter of dispute was the alleged pledge transaction in favour of opponent 1. The applicant was called upon to show that he was a 'bona fide' pledgee for value without notice of the prior pledge in favour of opponent 1 as in the alternative it was contended that he was entitled to a priority. But the subject-matter of dispute was the pledge of 475 bags only and not the alleged pledge of 1675 bags for Rs. 28000 in applicant's favour.

(7) The applicant then relied on Cl. (b) to Art. 133 (1) of the Constitution and contended that the judgment and decrees of the trial Court and of this Court involved directly or indirectly a claim or question respecting property of the amount or value exceeding Rs. 20,000/-. In para 4 above, the applicant's prayer for a certificate is set out. It was for the applicant to have prayed for a certificate under Cl. (b) to Art. 133 (1) of the Constitution. It is true that the provision corresponding to clause (b) to Art. 133 (1) in para 2 of S. 110, C. P. C. was held in 'CHAMPAMANI BIBI v. MAHOMED YUNUS', AIR (38) 1951 Pat 177, dependent on para one as an alternative to the second restriction in para one, and it can therefore be contended that in considering an application for grant of a certificate as prayed for, the question whether the judgment and decree involved directly or indirectly some claim or question respecting property of that amount or value has also to be considered. The reason for the view held by the Patna High Court was expressed as under:

"if therefore, this para is to be taken to be independent of the first, the result will be that an appeal will lie to the Supreme Court, subject of course to the provisions of third para of the Section, in every case where the value of the subject-matter in dispute on appeal is not less than Rs. 10.000/-, no matter what the value of the subject-matter of the suit was. In that case, not only the first condition in the first para would be rendered wholly nugatory but this para by itself would have to be treated as a superfluity."

In coming to the conclusion as stated above, the Patna High Court followed a previous ruling of the Madras High Court in 'SUBRAMMANIA AIYYAR v. SILLAMMA', 39 Mad 843 and observed that the reasoning in the said decision was approved by the Privy Council in MANGAMMA v. LAKSHAMAMMA', 57 Ind App 56 (PC). When Art. 133 was drafted, the judicial view stated above existed. Yet the second para was made alternative to the first para by giving them separate para numbers.

It follows that a certificate can now be claimed under any one or more of the three paras marked (a), (b) and (c) principally or in the alternative and it is not necessary to satisfy requirements of para (b) as an alternative in the restriction "the amount or value of the subject-matter still in dispute on appeal is and was not less than twenty thousand rupees" in Clause (a). It was therefore incumbent on the applicant to have prayed for a certificate under clause (b) to Art. 133 (1) in the alternative if it was held that he was not entitled to a certificate under clause (a) to Art. 133 (1). As the applicant has not done so he cannot be heard to say that in the alternative he is entitled to a certificate under clause (b) of Art. 133 (1).

(8) Now assuming that the applicant is entitled to claim a certificate under clause (b) of Art. 133 (1) of the Constitution though not specifically prayed for, the question to be considered is whether requirements of clause (b) are satisfied. That clause provides as under:

> "that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value.'

In some decided cases the expression 'some claim or question respecting property' has been interpreted to mean some claim or question to or respecting property additional to or other than the actual subject-matter in appeal. The question arose in 'SHEVANTIBAI v. JANARDAN', AIR (31) 1944 P C 65 but their Lordships did not express any opinion on it. If 475 bags which formed the subject-matter in appeal to this Court were excluded, the amount or value of the remaining 1225 bags would be less than Rs. 20,000. Assuming that claim or question was respecting 1675 bags, it cannot be held that the judgment involved directly or indirectly any such claim or question.

It is true that according to the applicant 1675 bags were pledged with him for Rs. 28000. What was decided by the judgments was that he was not entitled to have a priority over opponent 1's pledge for 475 bags. By the judgments applicant's claim to other bags cannot be said to have been decided as to create a bar or 'res judicata'. From the mere fact that the applicant advanced a claim for 1675 bags it cannot be held that the judgment involved a claim or question respecting all the said bags directly or indirectly. Hence, even if it be held that applicant can claim a certificate under clause (b) though not specifically prayed for, on merits he is not entitled to it. It is therefore unnecessary to consider the contention raised by the learned Advocate for opponents that under S. 110, C. P. C. applicant had to show as an alternative restriction the requirements mentioned in para 2 of that section over and above the requirement about the subject-matter of dispute in the Court of the first instance being not less than Rs. 20,000/-, in amount or value and as the subject-matter of dispute in the Court of the first instance was less than Rs. 20.000/- in amount or value, applicant was not entitled to a certificate.

(9) As the judgment of this Court is an affirming one, it is necessary to consider whether a substantial question of law is involved. As, however, the requirements of clauses (a) or (b) are not complied with it is not necessary to consider that question in this application. The question is considered in cognate miscellaneous application No. 5 of 1951 and the relevant portion of the judgment in that application may be taken as part of this judgment, if necessary.

(10) Result is that application fails and it is dismissed with costs.

V.R.B. *Application dismissed.*

A. I. R. (39) 1952 Kutch 31 [C. N. 22.]

VAKIL J. C.

Peraj Poonja, Applicant v. Bhansali Bhimji Kheraj and another, Opponents.

Civil Revn. Appln. No. 112 of 1951, D/- 10-11-1951.

(a) Civil P. C. (1908), O. 9, Rr. 3 and 8 — Application for adjournment refused — Procedure.

Where a pleader of a party who is not present applies for adjournment of the case it cannot be assumed that the pleader is not duly instructed and able to answer all questions relating to the suit. On rejection of an application for adjournment, proper course for the Court is to inquire of the pleader of the party on whose behalf the application for adjournment was filed whether he had instructions to proceed further with the suit unless the pleader reported that he was instructed only to apply for an adjournment. On dismissal of the application for adjournment, the Court errs in assuming that his pleader had no further instructions to proceed with the suit and in dismissing the suit. Hence it cannot be assumed for the application of O. 9, R. 8, C. P. C. that the plaintiff had not appeared. In this view, considered either under R 3, or under R. 8, the order of dismissal made by the Court is wrong. (Para 4)

Anno.: Civil P. C., O. 9, R. 3, N. 1; O. 9, R. 8 N. 1.

(b) Civil P. C. (1908), S. 115, O. 9, Rr. 3 and 8 — Kutch Province (Courts) Order (1948), S. 35 — Order of dismissal passed though there was no non-appearance — Revision.

Where R. 3 is inapplicable in that both the parties had appeared and R. 8 is inapplicable in that plaintiff had not failed to appear and a dismissal is made on erroneous application of R. 3 or R. 8, an application under R. 4 or R. 9 for setting aside dismissal order need not and cannot be made as such an application can only be allowed on showing sufficient cause for non-appearance. If an order of dismissal is erroneously made though there is no non-appearance, it is a fit case for revision of the order as the lower Court can be said to have acted with material irregularity in making the order. (Para 4)

Anno.: C. P. C., S 115, N 12; O 9, R 3, N 9.

(c) Kutch Province (Courts) Order (1948), S. 35 (1) (b) Proviso (1) — Applicability — Civil P. C. (1908), S. 115.

Where the lower Court can be said to have acted in the exercise of its jurisdiction with material irregularity, an application for revision of the order is not governed by any law of limitation. (*Para 5*)

Lavji Lakhamshi Thacker, for Applicant; Gopalji Umarshi, for Opponents.

ORDER: This is an application for revision of an order dated 17-4-51, made by the Sub-Judge, Nakhatrana by which he dismissed the applicant's suit under Order 9, Rule 3, C. P. C.

(2) The facts are few and simple. Applicant sued the opponent to recover possession of a portion of a field alleging encroachment on it by the latter. The opponent filed his written statement in the case. Issues were settled and the suit was fixed for hearing. From 17-3-51 to 17-4-51 applicant sought adjournments on the ground that he was ill at Bombay. On 17-4-51, an application for postponement was filed by the applicant's pleader. The lower Court rejected the application and dismissed the suit under Order 9, Rule 3, C. P. C. The applicant has therefore preferred the present application for revision of that order.

(3) It was contended on behalf of the applicant that after rejecting the application for adjournment, the lower Court should have allowed applicant's pleader to proceed with the suit instead of dismissing it under O. 9, R. 3, C. P. C. On behalf of the opponent it was contended that the dismissal in this case was under Order 9, Rule 8, C. P. C. and the present revision application was not competent as applicant had not applied for setting aside the order of dismissal for default. A question of limitation was also raised.

(4) An order of dismissal under O. 9, R. 3, C. P. C. can only be made if neither party appears when the suit is called on for hearing. An appearance of a party may be either personal or through his pleader unless it has been asked to appear in person. When a party is not asked to appear personally on any date fixed for hearing, appearance of its pleader is equivalent to appearance of it. The pleader must however be instructed and able to answer all material questions relating to the suit. Where a pleader of a party who is not present applies for adjournment of the case it cannot be assumed that the pleader is not duly instructed and able to answer all questions relating to the suit. On rejection of an application for adjournment, proper course for the Court was to inquire of the pleader of the party on whose behalf the application for adjournment was filed whether he had instructions to proceed further with the suit unless the pleader reported that he was instructed only to apply for an adjournment. On dismissal of the application for adjournment made on behalf of the plaintiff, the lower Court erred in assuming that his pleader had not further instructions to proceed with the suit and in dismissing the suit.

The learned Advocate for the opponent contended that the order made by the lower Court could be supported as one made under O. 9, R. 8, C. P. C. and as the applicant had not applied under Rule 9 of the order for setting aside the order for dismissal, this application for revision of the order was incompetent. For the reasons stated above, it cannot be assumed for the application of Order 9, Rule 8, C. P. C., that the plaintiff had not appeared. Hence, considered either under R. 3 or under R. 8, the order of dismissal made by the lower Court was wrong.

As regards competency of this revision application, it is true that an order rejecting an application under O. 9, R. 4 or R. 9 for setting aside a dismissal order is not open to revision under Section 115, C. P. C. A fortiori where no such application is made, the order of dismissal cannot be questioned in revision. But an application under O. 9, R. 4 or R. 9 is required to be made where neither party had appeared or plaintiff had not appeared and the suit was dismissed. Where Rule 3 is inapplicable in that both the parties had appeared and Rule 8 is inapplicable in that plaintiff had not failed to appear and a dismissal is made on erroneous application of Rule 3 or Rule 8, an application under R. 4 or R. 9 for setting aside dismissal order need not and cannot be made as such an application can only be allowed on showing sufficient cause for non-appearance. If an order of dismissal is erroneously made though there is no non-appearance, it is a fit case for revision of the order as the lower Court can be said to have acted with material irregularity in making the order.

(5) A question of limitation was urged under sub-section (2) of S. 35 of the Kutch Province (Courts) Order, 1948. This application was filed beyond a period of 90 days of limitation prescribed for making an application under Section 115, C. P. C., Proviso (1) to Clause (b) of sub-section (1) of Section 35 of the Kutch Province (Courts) Order, 1948, provides that an application for revision should be filed within 90 days. If the lower Court can be said to have acted in the exercise of its jurisdiction with material irregularity, this application is not governed by any law of limitation. It appears that the application could not be filed soon after the order was made as through mistaken advice an appeal against the order was made to the District Court.

(6) Result is that the application is allowed, Rule is made absolute, the order of dismissal is set aside and the lower Court is directed to readmit the suit at its original number in the Register of Civil suits and proceed to dispose it in accordance with law. There shall be no order as to the costs of the parties to this application.

V.B.B. *Application allowed.*

A. I. R. (39) 1952 Kutch 32 *[C. N. 23.]*

VAKIL, J. C.

Ravji Devshi, Defendant-Applicant v. Premji Hemraj, Plaintiff-Opponent.

Civil Revn Appln. No. 117 of 1951, D/- 15-11-1951.

(a) Civil P. C. (1908), O. 14, R. 2 and O. 15, R. 3 — Preliminary issue of fact.

Order 14, Rule 2 provides for disposal of a case or part thereof on issues of law only. An issue requiring evidence for its finding is not an issue of law and cannot be raised as a preliminary issue under this rule. Under Order 14 there is no power in the Court to frame something in the nature of a preliminary issue of fact; AIR (19) 1932 Bom 128, Rel. on. (*Para 5*)

Under Order 15, Rule 3, the Court may treat some of the issues framed as preliminary issues if no further evidence than the parties can at once produce is required for the decision of those issues and decision on those issues is sufficient for disposal of the suit. An action under Rule 3 of Order 15 cannot lie where further evidence than what the parties can at once furnish is necessary for the decision of the suit. (Para 5)

(*Desirability of pronouncing opinion on all important points involved in appealable cases, emphasised and attention of Subordinate Courts in Kutch pointedly drawn to this aspect*).

Anno: C. P. C., O. 14, R. 2 N. 2; O. 15, R. 3 N. 1.

(b) *Civil P. C. (1908), S. 115 — Kutch Province (Courts) Order (1948), S. 35 — 'Case decided' — Whether decisions of preliminary issues amount to a 'case decided' within the meaning of that expression used in Section 115 of the C. P. C. and Kutch Courts' Order 1948. AIR (19) 1932 Bom 81, Ref. (Quaere).* (Para 6)

Anno: C. P. C., S. 115 N. 4, 5.

(c) *Civil P. C. (1908), S. 115 — Interlocutory orders.*

In Kutch, it is inexpedient to exercise powers of interference in revision against interlocutory decision on an issue where there is remedy of appeal against the decree finally passed, even if it be held that in such matters powers in revision can properly be exercised: AIR (20) 1933 Rang 263, Ref. (Para 6)

It is true that where questions of jurisdiction, limitation and other issues of a like nature going at the root of the case involved are decided as preliminary issues in exceptional cases, powers in revision may be exercised to remedy injustice. But it will be not an exceptional case if on a finding on an issue recorded as contended for by the applicant the suit will result in dismissal. Exceptional cases are those which might cause irreparable loss or damage of some kind if revisional powers of interference are not exercised. (Para 6)

Anno: C. P. C., S. 115 N. 5.

Krishnalal P. Kotval, for Applicant; Padmakant P. Vaidya, for Opponent.

Cases referred to:

('32) AIR (19) 1932 Bom 128: (56 Bom 224) (Pr 5)
('32) AIR (19) 1932 Bom 81: (135 Ind Cas 815) (Pr 6)
('49) AIR (36) 1949 Kutch 5 (Pr 6)
('33) AIR (20) 1933 Rang 263: (146 Ind Cas 615) (Pr 6)

ORDER: This is an application for revision of an interim judgment dated 7-8-51 recorded by the Civil Judge (S. D.), Kutch by which three preliminary issues raised in suit No. 11 of 1951 were decided against the applicant.

(2) The opponent brought a suit against the applicant based on a Khata dated 7-11-25 executed by the latter in favour of the firm of Sha Jesang Malsee. The Khata was executed in Bombay and the applicant at the time of the commencement of the suit was residing in Bombay. It was alleged that applicant had property in Kutch, his wife was living in Kutch and he was recently residing in Bombay for business but he used to visit Kutch from time to time. It was alleged that opponent had obtained an assignment of the suit actionable claim in his favour from the original creditor.

(3) The suit was resisted by the applicant who contended that the Court had got no jurisdiction, to entertain the suit as 'defendant' was residing in Bombay for number of years last. He denied having resided in Kutch. It was also contended that there was no proper assignment in favour of the opponent by all persons having interest in the actionable claim. It was further contended that the suit was barred by limitation. There were other contentions raised which it is not necessary to mention for disposal of this application.

(4) On 3-7-1951, the lower Court raised eight issues and it was directed that issues relating to jurisdiction, limitation and proper assignment be fixed for hearing as preliminary issues. Evidence was led and these issues were found against the applicant. The applicant has therefore approached this Court for revision.

(5) Order 14, Rule 2, C. P. C. provides for disposal of a case or part thereof on issues of law only. An issue requiring evidence for its finding is not an issue of law and cannot be raised as a preliminary issue under this rule. Under Order 14, there is no power in the Court to frame something in the nature of a preliminary issue of fact — 'SOWKABAI v. TUKOJIRAO HOLKAR', AIR (19) 1932 Bom 128. Under Order 15, Rule 3, the Court may treat some of the issues framed as preliminary issues if no further evidence than the parties can at once produce is required for the decision of those issues and decision on those issues is sufficient for disposal of the suit. An action under Rule 3 of Order 15 could not have been taken as further evidence than what the parties can at once furnish was necessary for the decision of the suit. Moreover from very early time, desirability of pronouncing opinion on all the important points involved in appealable cases has been emphasised. The lower Court therefore erred in deciding the three issues as preliminary issues. As the issues are decided, nothing can be done in the matter of undoing what is done. But the attention of all Subordinate Courts is pointedly drawn to the fact that preliminary issues should not be raised and decided unless provisions of Order 14, R. 2 or Order 15, Rule 3 are applicable and in case the latter Rule applies, desirability of deciding such issues should be considered.

(6) As the issues are decided the question is whether the present revision application is competent and whether the Court will consider this a fit case for exercise of powers in revision. By deciding the three issues the lower Court has not exercised the jurisdiction not vested in it nor failed to exercise the jurisdiction vested. The lower Court was entitled to decide the question of jurisdiction — Limitation and the third issue about proper assignment. It is not necessary to decide the vexed question whether decision of preliminary issues amount to a 'case decided' within the meaning of that expression used in S. 115 of the C.P.C. and Kutch Courts' Order 1948, though there is a respectable authority holding that a finding on an interlocutory matter followed by an order is not a 'case decided' 'SENAJI v. PANNAJI', AIR (19) 1932 Bom 81.

There are interlocutory matters of different kinds and there are some which if decided one way as contended for the defendants in those cases dispose of the suit so far as that particular Court is concerned. For instance in 'MURARJI SOORJI v. JAYANT TRADING CORPORATION', A I R (36) 1949 Kutch 5, there was a decision on the question whether a plaint should be rejected for want of jurisdiction of the Court & it was held that the decision should be taken as a decision of the case. But revisional powers will not be exercised where there is another remedy open to the applicant. Accordingly it has been held that no revision will be entertained against interlocutory decision on each issue where there is remedy of appeal against a decree finally passed. It was observed by the Rangoon High Court that it was intolerable that where issues were decided separately, there should be what was really an interim appeal in the form of an application in revision to the High Court 'MAUNG PYU v. MA MI', AIR (20) 1933 Rang 263. It is true that where questions of jurisdiction, limitation and other issues of a like nature going at the root of the case involved are decided as preliminary issues, in exceptional cases, powers in revision may be exercised to remedy injustice. But it will be not an exceptional case if on a finding on an issue recorded as contended for by the applicant the suit will result in dismissal. Exceptional cases are those which might cause irreparable loss or damage of some kind if revisional powers of interference are not exercised. In this particular case if a decree is passed against the applicant on consideration of his other contentions, he can prefer an appeal and obtain a stay order. No irreparable loss is therefore likely to be caused to him as in the event of his succeeding, he will be compensated by costs. Moreover, it is evident that in revision conclusions on the question of fact by the lower Court have to be accepted. This might (not?) cause a prejudice to any of the parties as in appeal the findings on the questions of fact can also be attacked. There is a second appeal provided according to Kutch Courts Order 1948. Thus it is inexpedient to exercise powers of interference in revision even if it be held that in matters of this kind powers in revision can properly be exercised.

(7) In view of the conclusions arrived at by me as stated in the preceding para it is unnecessary to consider the contentions urged to show that the lower Court erred in deciding the three issues against the applicant. It will be undesirable to do so.

(8) Result is that the present application in revision fails and it is dismissed without any order as to costs.

V.B.B. *Application dismissed.*

A. I. R. 1952 Kutch 34

VAKIL, J. C.

Mahaprasad S. Joshipura, Plaintiff-Appellant v. Mistri Mavji Manji, Defendant-Respondent.

Misc. Civil Appeal No. 9 of 1951, D/- 9-1-1952.

(a) Civil P. C. (1908), S. 39 — Decree of Court outside Kutch could not be transferred to Court in Kutch before 1-8-49 under S. 39.

Unless the provisions of S. 39 governed the procedure of the Court transferring the decree for execution and of the Court to which execution of the decree was transferred, no transfer under that section can be made. (Para 3)

Hence, a decree of a Court in North Cachar Hills Assam could not be transferred to a Court in Kutch before 1-8-49, as the provisions of the Code are not made applicable to North Cachar Hills and the Code was not made applicable to Kutch State before 1-8-49: AIR (37) 1950 Kutch 11, Rel. on. (Para 3)

The fact that execution petition was made after 1-8-49 will not validate the transfer made before that date. (Para 3)

(b) Civil P. C. (1908), O. 21, R. 5 — Execution — Mode of transfer — Decree to be sent to Court of different district for execution — Failure to send decree through District Court — Effect.

'Obiter': In a case where the Court to which the decree is to be sent for execution is situate in a different district, the decree is to be sent to the District Court. Where in such a case a decree is sent direct to a Subordinate Court, execution of the decree by the Subordinate Court cannnot be strictly speaking legal. But where a transfer is made to a Subordinate Court which has not got pecuniary jurisdiction to execute the decree, the District Court which has got pecuniary jurisdiction to execute the decree cannot entertain a petition for execution of a decree as the decree is not transferred to it in accordance with the provisions of law. (Para 5)

Anno: C. P. C., O. 21, R. 5 N. 1.

P. P. Vaidya, for Appellant; J. K. Dholkia, for Respondent.

Case referred to:

('50) AIR (37) 1950 Kutch 11 (Pr 3)

JUDGMENT: This is an appeal against an order dated 23-4-51, made by the Civil Judge, (S. D.) Kutch in execution petition No. 73 of 1949.

(2) The facts are that one Mahaprasad S. Joshipura obtained a decree in 1940 A. D. against Mistri Kuverji Nanji and others in the Court of the Sub-Divisional Officer, North Cachar Hills (Assam) for Rs. 17274-9-0 and costs. The Court passing the decree transferred the decree for execution to "the Civil Court Anjar in the District of Kutch" on 22-7-48. On 9-10-49, Mahaprasad presented execution petition No. 73 of 1949 to the District Court, Kutch for realisation of the decretal amount from the legal representatives of Mistri Kuverji, since deceased, by attachment and sale of the judgment-debtor's property. The respondents resisted the execution petition contending that the lower Court had no jurisdiction to execute the decree, the legal representatives of Madhavjee were not brought on record and hence the Darkhast was not tenable and that the Darkhast was barred by limitation. The lower Court accepted the first mentioned contention and dismissed the execution petition.

(3) The decree sought to be executed was transferred under Section 39 of the Code of Civil Procedure (Act V (5) of 1908). Unless the provisions of Section 39, C. P. C. governed the procedure of the Court transferring the decree for execution and of the Court to which execution of the decree was transferred, no transfer under that section can be made. The

learned Advocate for the appellant was not able to show that the provisions of the Code were made applicable to North Cachar Hills. It appears from the A. I. R. Commentaries on the Code of Civil Procedure that in the list of scheduled Districts to which the provisions of the Code were extended, the District of Jalpaiguri excluding the North Cachar Hills was included. If this was so, the Court passing the decree was not entitled to transfer the decree under Section 39 of the Code. But assuming that the procedure of the Court passing the decree was regulated by the Code, it was further necessary to show that the procedure of the Court to which the decree was transferred for execution was regulated by the Code. It was not disputed that before 1-6-48, Kutch was an Indian State to which the Code was not applicable. The administration of Kutch State was taken over by the Central Government with effect from 1-6-48. But the existing laws and "Courts" of the Kutch State continued. It was therefore held by this Court in 'KHUSALCHAND DAMJI v. VISHANJI HANSRAJ', AIR (37) 1950 Kutch 11, that a decree of a Court outside Kutch could not have been transferred to a Court in Kutch before 1-8-1949 as the Code was made applicable to Kutch State on 1-8-49. It was contended that with effect from 1-6-48, Kutch State ceased to be an Indian State. Till the Government of India Act was amended and merger was brought about, the existence of Indian States as such continued. I therefore hold that under Section 39, C. P. C., the decree could not have been transferred for execution on 22-7-48. The fact that the execution petition was made after 1-8-49 will not validate the transfer made on 22-7-48.

(4) It was contended by the learned Advocate for the appellant that the transfer could be held to have been made under Section 45 of the Code to a Court established or continued by the authority of the Central Government acting under the Extra-Provincial Jurisdiction Act. The Courts in Kutch State were established under the Kutch Courts' Order 1948 on 28th December 1948. This was after the decree was transferred to Anjar Court. It was contended that the Central Government had continued the Courts of the State under the Kutch Administration Order 1948. The words "or continued" occurring in Section 45 of the Code were omitted by Indian Independence (Adaptation of Central Acts and Ordinances), Order, 1948.

(5) As I agree with the lower Court in holding that on 22-7-48, the decree could not have been transferred to a Court in Kutch State under Section 39 or even under Section 45 of the Code, it is not necessary to consider the question whether decree was properly transferred to Anjar Court and whether execution could have been sought in the District Court, on the basis of the transfer so made. Under Order 21, Rule 5, C. P. C. the decree was to be sent to the District Court. Where in such a case, a decree is sent direct to a Subordinate Court, execution of the decree by the Subordinate Court cannot be strictly speaking legal. But where a transfer is made to a subordinate Court which has not got pecuniary jurisdiction to execute the decree, the District Court which has got pecuniary jurisdiction to execute the decree cannot entertain a petition for execution of a decree as the decree is not transferred to it in accordance with the provisions of law.

(6) Result is that the order made by the lower Court is confirmed and the appeal is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. 1952 Kutch 35
VAKIL J. C.

Pashu Devshi, Plaintiff-Appellant v. Anandji Bhula, Defendant-Respondent.

First Appeal No. 5 of 1951, D/- 19-1-1952.

Civil P. C. (1908), S. 52 (2) — Enforcement of decree against legal representative personally — Cause of action specified in S. 52 (2) must be disclosed in application — Failure — Effect.

An execution petition for realisation of the decretal amount or part of it from the legal representative personally under sub-s. (2) of S. 52, Civil P. C., must disclose a cause of action, that is, must aver that no property of the deceased has remained in his possession and he has failed to duly apply property of the deceased which came into his possession. An execution petition, seeking to realise decretal amount by attachment and sale of property as of the deceased cannot be regarded as disclosing a cause of action for obtaining execution against the legal representative personally under sub-s. (2) of S. 52, Civil P. C. and it is not open to a judgment creditor filing such an execution petition to urge, on the legal representative successfully showing that the property attached is his self-acquisition, that though the property is his self-acquisition, it is nevertheless liable as he has not duly applied property of the deceased which came into his possession. **(Para 3)**

Anno: C. P. C., S. 52 N. 13.

P. P. Vaidya, on behalf of K. N. Mankad, for Appellant.

JUDGMENT: This is an appeal by the judgment-creditor against an order dated 21-7-1951, made by the District Judge, Kutch in execution petition No. 63 of 1949, raising attachment levied on properties marked lots Nos. 19 and 20.

(2) The appellant obtained a decree for payment of money in Regular Civil Suit No. 20 of Samvat 2001 against respondent, as legal representative of his father Bhula Arjan and others and in execution of the said decree, he got certain properties attached as of the ownership of Bhula. The respondent applied for raising the attachment levied on the grounds that lots Nos. 19 and 20 were his self-acquisition and other lots were not liable to be attached and sold for satisfaction of the decretal amount. The lower Court upheld the contention of the respondent that lots Nos. 19 and 20 were his self-acquisition and as such were not liable to be attached and sold. On behalf of the appellant, it was submitted in the lower Court that after the decree was passed, the respondent had borrowed money on the security of his father's property and therefore lots Nos. 19 and 20, though self-acquisition of the respondent, were liable to be attached and sold. This contention was repelled by the lower Court.

(3) Under sub-s. (2) of S. 52, Civil P. C., a decree for payment of money passed against a party as legal representative of a deceased person can be executed against him (judgment-debtor), to the extent of the property in respect of which he has failed to satisfy the Court, in

the same manner as if the decree had been passed against him personally, provided no property of the deceased remains in his possession and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession. An execution petition for realisation of the decretal amount or part of it from the legal representative personally under sub-s. (2) of S. 52, Civil P. C., must disclose a cause of action, that is, must aver that no property of the deceased has remained in his possession and he has failed to duly apply property of the deceased which came into his possession. An execution petition, seeking to realise decretal amount by attachment and sale of property as of the deceased cannot be regarded as disclosing cause of action for obtaining execution against the legal representatives personally under sub-s. (2) of S. 52, Civil P. C. and it is not open to a judgment-creditor filing such an execution petition to urge, on the legal representative successfully showing that the property attached is his self-acquisition, that though the property is his self-acquisition, it is nevertheless liable as he has not duly applied property of the deceased which came into his possession. The appellant was therefore not entitled to sustain the attachment as levied and therefore it is unnecessary to consider the merits of his contention.

It appears that the respondent had borrowed a sum of Rs. 3000/- on other properties of the deceased attached. The contention was based on this transaction. At the same time, the appellant does not admit genuineness of this transaction and has not only resisted a claim petition by the mortgagee but he has applied to this Court in revision for setting aside the order of the lower Court allowing the claim petition. Thus according to the appellant, the transaction was not a genuine one and hence there was no reason to urge that the property, or money obtained on the mortgage of the property of the deceased was not duly applied. The appellant should have fairly admitted that the property lots Nos. 19 and 20 were the self-acquisition of the respondent and on raising of attachment, he should have filed another execution petition for executing the decree personally against the respondent on averring facts disclosing a cause of action under S. 52 (2), Civil P. C.

(4) Result is that the appeal fails and is dismissed without any order as to costs as respondent has not appeared.

K.S. Appeal dismissed.

A. I. R. 1952 Kutch 36

VAKIL, J. C.

Vora Fidaali Gulamhusein and others, Plaintiffs-Applicants v. Vora Asgarali Isufali and others, Defendants-Opponents.

Civil Revn. Appln. No. 137 of 1951, D/- 19-1-1952.

(a) Civil P. C. (1908), S. 115 — Order for payment of deficit court-fee — Kutch (Courts) Order (1948), S. 35.

When a Court erroneously holds that a plaint is not properly valued for the purposes of court-fees and directs a plaintiff to pay deficit court-fees, it refuses to exercise the jurisdiction so vested in it to proceed further with the suit and an application for revision of such an order is competent both under S. 35 of the Kutch (Courts) Order 1948 as well as under S. 115 of the Civil Procedure Code. (Para 4)

Anno: C. P. C., S. 115 N. 27b.

(b) Court-fees Act (1870), S. 7 (IV) (b) and Sch. II, Art. 17(vi) — Suit for partition by Muhammadan co-heir.

As a co-tenant in exclusive possession of the property of co-ownership is in possession for and on behalf of all co-tenants, unless there are circumstances from which an ouster can be presumed, acts such as exclusive possession and enjoyment are quite constraint with the co-tenant holding the property as such. Muhammadan co-heirs succeeding to the property of their common relation are tenants-in-common in respect of the said property and apart from the question of actual joint possession, each of them is in constructive joint possession of it unless there is reason to hold that he is ousted from its possession and enjoyment. The plaintiffs therefore by praying for partition only seek change in the mode of possession and enjoyment of the property which was in their constructive joint possession and hence the relief of partition sought is incapable of being valued in money. For such a relief a fixed court-fee is payable under Article 17 (VI) of Schedule II. (Para 5)

Anno: Court-fees Act, S. 7(IV) (b) N. 2, 3, 7.

(c) Court-fees Act (1870), S. 7(IV) (b) and Schedule II, Article 17 (VI) — Claim to share in money value of property.

When partition of specific immovable property or specific movables is not to be effected but a share in the money value of movable or in price of immovable property not in existence is claimed, it cannot be said that the plaint cannot be valued for the purposes of court-fees. (Para 6)

Anno: Court-fees Act, S. 7(IV)(b) N. 1; Schedule II, Art. 17(VI) N. 1.

(d) Court-fees Act (1870), S. 7(IV) (f) — Suit for definite sum.

A relief for accounts has to be separately valued and ad-valorem court-fee is to be paid on the same. Under Section 7, Clause (iv) (f), a plaintiff is entitled to put any valuation and value relief for account accordingly.

When a definite sum is claimed, there is no question of taking accounts. Plaintiffs having valued the relief are bound to pay ad-valorem court-fees on the amount. (Para 8)

Anno: Court-fees Act, S. 7(IV)(f) N. 1.

P. P. Vaidya, for Applicants; K. J. Dholakia, for Opponents Nos. 1 and 2; K. K. Chhaya, the Govt. Pleader, for the State.

ORDER: This is an application for revision of an order made by the Additional District Judge, Kutch, in suit No. 78 of 1951 for payment of deficit court-fees on the plaint.

(2) The applicants brought suit No. 78 of 1951 for partition of three out of four immovable properties described in the schedule attached to the plaint and for recovery of Rs. 1333/5/4, for their one third share of the mortgage amount realised by the opponents, on redemption of property described at serial No. 3 of the said schedule. The applicants further sought to recover Rs. 600/- for their share in the rent of the property described at serial No. 2 of the schedule, Rs. 500/- as their share

in movables, and Rs. 2000/- as their share in business commodities. The plaint was not valued for the purposes of court-fees as fixed court-fee under Article 17 (VI) of the Court-fees Act was paid and it was valued at Rs. 12760/- for the purposes of Court's jurisdiction.

It was alleged in the plaint that applicants were entitled to one-third share in the suit property of ownership of their paternal grand father Alibhai Karimjee, including the mortgage amount realised on redemption and as they were in joint possession of one of three immovable properties sought to be partitioned, a fixed court-fee of Rs. 15/- was paid for partition and accounts.

(3) The Additional District Judge held that ad-valorem court-fees on Rs. 12760/- should have been paid and directed the applicants to pay deficit court-fees.

(4) When a Court erroneously holds that a plaint is not properly valued for the purposes of court-fees and directs a plaintiff to pay deficit court-fees, it refuses to exercise the jurisdiction so vested in it to proceed further with the suit and an application for revision of such an order is competent both under Section 35 of the Kutch Courts Order 1948 as well as under Section 115 of the Civil Procedure Code.

(5) The decision of the Additional District Judge was based on the ground that the applicants who claimed to have succeeded to the property of their grand-father were according to averments made in the plaint excluded from joint possession of the property. Muhammadan co-heirs succeeding to the property of their common relation are tenants-in-common in respect of the said property and apart from the question of actual joint possession, each of them is in constructive joint possession of it unless there is reason to hold that he is ousted from its possession and enjoyment. The fact that applicants were in joint possession of one of the items of the property is indicative of their constructive joint possession of all such items of the property. The applicants therefore by praying for partition only sought change in the mode of possession and enjoyment of the property which was in their constructive joint possession and hence the relief of partition sought was incapable of being valued in money. For such a relief a fixed court-fee is properly paid under Article 17(VI) of schedule II of the Court-fees Act.

The Additional District Judge, deciding the question about adequacy of court-fees from the averments made in the plaint was much impressed with the facts that except for one item of the property, the opponents were in actual possession of and enjoyment of other items and applicants were staying in Africa for number of years last. As a co-tenant in exclusive possession of the property of co-ownership is in possession for and on behalf of all co-tenants unless there are circumstances from which an ouster can be presumed, acts such as exclusive possession and enjoyment are quite consistent with the co-tenant holding the property as such. The Additional District Judge should have therefore accepted the court-fees paid on the plaint for the relief of partition for the purposes of admission.

(6) As regards the prayer to recover Rs. 1333/5/4, it is an admitted fact that the property ceased to exist as of the co-heirs since redemption. No doubt the mortgage amount of Rs. 4000/- would also be regarded as property but there is no such property ear-marked or included in accounts maintained. When partition of specific immovable property or specific movables is not to be effected but a share in the money value of movables or in price of immovable property not in existence is claimed, it cannot be said that the plaint cannot be valued for the purposes of court-fees. The applicant must therefore pay ad-valorem court-fees on Rs. 1333/5/4.

(7) The applicants further sue to recover Rs. 2000/- as their one-third share of the price of business goods presumably left by their grand father. Having claimed a specific sum they are bound to value it accordingly for the purposes of court-fees. It cannot be said that the business goods which no longer exists since last 25 years and more is in their joint constructive possession and there is only change to be made in its mode of possession. Hence for the reasons stated in the preceding para, applicants have to pay ad-valorem court-fees on Rs. 2000/- and on Rs. 500/- claimed for their one-third share in the price of the movables.

(8) The applicants have claimed a sum of Rs. 600/- for their one-third share of Rs. 1800/- realised as rent of one of items of the property from 1922 A .D. onwards. It was stated in the plaint that the suit was for partition and for accounts. When a definite sum is claimed, there is no question of taking accounts. A relief for accounts has to be separately valued and ad-valorem court-fee is to be paid on the same Under Section 7, Clause (iv) (f), a plaintiff is entitled to put any valuation and value relief for account accordingly. The applicants having valued the relief at Rs. 600/- are bound to pay ad-valorem court-fees on the amount.

(9) Result is that besides the fixed court-fees of Rs. 15/- paid, applicants must pay ad-valorem court-fees on Rs. 4433/5/4. The order made by the Additional District Judge is modified accordingly. No order as to costs of this application.

D.H. *Order accordingly.*

A. I. R. 1952 Kutch 37

VAKIL J. C.

Ramchandra Shivji and another, Plaintiffs-Applicants v. Soni Parshottam Gagu, Defendant-Opponent.

Civil Revn. Appln. No. 139 of 1951, D/- 15-1-1952.

(a) Civil P. C. (1908), O. 1 Rr. 3 and 10 — Partition suit — Necessary parties — Mortgagor is necessary party.

In a partition suit all persons having interest in the property sought to be partitioned must be made parties. The reason is that in their absence there cannot be a judicial declaration of their rights. Thus a mortgagor, who is owner of the property sought to be partitioned is a necessary party. (Para 3)

Anno: C. P. C., O. 1 R. 10 N. 16.

(b) Civil P. C. (1908), O. 1, Rr. 9, 10 and 13 — Non-joinder of necessary party — Failure to raise objection at proper time — Effect — Objection raised at stage of arguments — Duty of Court.

In a suit for partition and for removal of encroachment, the defendant who was only a mortgagee from a co-sharer did not raise any objec-

tion in his written statement that his mortgagor was a necessary party to the suit. The objection was raised for the first time at the stage of arguments. The Court without giving an opportunity to the plaintiff to implead the necessary party dismissed the suit.

Held that the defendant not having raised the objection as to non-joinder of a necessary party before the framing of issues should be deemed to have waived it and, therefore, it was not proper for the Court to allow the defendant to have raised that objection at the stage of arguments. Even if the Court considered that the suit was bad for non-joinder of a necessary party in whose absence no decree could be passed effectively, the Court should have given the plaintiff an opportunity to implead the necessary party. It should not have dismissed the suit straightway on the ground that if necessary parties are joined it may require it to hold a 'de novo' trial. **(Paras 4, 5)**

Anno: C. P. C., O. 1 R. 9 N. 2, 5; O. 1 R. 10 N. 10, 11 and 32; O. 1 R. 13 N. 2.

L. K. Jethi, for Applicants; P. P. Vaidya, for Opponent.

Cases referred to:

('34) AIR 1934 Lah 36 (1): (148 Ind Cas 329) (Pr 5)

('38) AIR 1938 Mad 982: (182 Ind Cas 141) (Pr 5)

ORDER: This is an application for revision of the decree of the Court of Additional Subordinate Judge, Bhuj in Regular Suit No. 218 of 1948, confirmed on appeal by the District Judge, Kutch in civil appeal No. 90 of 1950.

(2) Suit No. 218 of 1948 was brought by the applicants against the opponent, for partition and separate possession of their 1/4th share in a vacant piece of land called 'Agna' by removal of encroachment made by the opponent on it. The opponent denied the alleged encroachment and resisted the suit on various grounds which it is not necessary to state for the disposal of this application. The opponent was a mortgagee of a residential place to which the 'Agna' land was appurtenant. It was not contended by the opponent in his written statement that his mortgagors were necessary parties to the suit. Before the trial Court a contention was raised at the stage of arguments that the opponent's mortgagors were necessary parties to the suit. The trial Court without giving any opportunity to the applicants to join the opponent's mortgagors dismissed the suit as bad for want of necessary parties. On appeal, the District Judge, Kutch confirmed the decree of the trial Court.

(3) It is apparent that for removal of the alleged encroachment, the opponent's mortgagors were not necessary parties to the suit as the encroachment was alleged to have been made by the opponent. But the relief for removal of the alleged encroachment was an incidental one. The main relief sought was for partition of the 'Agna' land. In a partition suit all persons having interest in the property sought to be partitioned must be made parties. The reason is that in their absence there cannot be a judicial declaration of their rights. A mortgagor is an owner of the property which is subjected to a mortgage. Declaration of his rights and interest cannot be made and partition cannot be effected in his absence.

(4) Next question to be considered is whether the trial Court was right in dismissing the suit. It is provided in O. 1, R. 9, Civil P. C. that no suit shall be defeated by reason of mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The nature of interest possessed by a co-sharer who has mortgaged his share is such that no effective decree for partition can be passed in his absence. In such a case the proper course for the Court is to give an opportunity to the plaintiff to implead necessary parties and to refuse to pass a decree if he declines or does not agree to do so. So far as the opponent is concerned it is clear that he having not raised the contention of necessary parties to the suit before issues were framed had waived it. The trial Court therefore erred in allowing the opponent to raise that contention at the stage of arguments. If the trial Court felt on the contention made that the mortgagors of the opponent were necessary parties to the suit and in their absence no decree for partition could be effectively passed, it should have in all fairness to the applicants given them an opporutnity to join necessary parties. Of course this action might have the result of the trial being held de novo. But the opponent having not raised that contention in his written statement, it was not fair to raise that contention or allow it to be raised at the stage of arguments and at the same time not give the applicants an opportunity to join necessary parties. It appears from the averments in the plaint that the applicants were not aware that the opponent was a mere mortgagee. The opponent considered himself a virtual owner as a 'vatantar' mortgagee in this part of the country for a long period like 99 years would naturally consider himself. It is for this reason that contention was not taken till the stage of arguments.

(5) It was contended that in appeal the applicants did not offer to join the opponent's mortgagors as parties. It is true that it was not so done in the memo of appeal or at the stage of filing the appeal though it was done orally at the stage of arguments as noted by the District Judge. The District Judge held that plaintiffs were negligent in not taking steps for joining the necessary parties in the trial Court. It seems that the facts and the position in law stated in the preceding para were not placed before the District Judge. At the same time, the District Judge did refer to Order, 1, R. 13, Civil P. C. The District Judge observed that plaintiffs were negligent in not joining the necessary parties even at the stage of arguments. The opponent was disentitled to raise any contention and the trial Court was entitled to take action under O. 1, R. 10 (2), Civil P. C. even without an application by the applicants. The District Court thought that this was a case of gross negligence and relied on 'GHULAM SHROF v. LACHHMANDAS', AIR 1934 Lah 36 and 'VEDAKANU NADAR v. NANGUNERI TALUK', AIR 1938 Mad 982. In the Lahore case, appeal was dismissed as the Official assignee who was a party to the proceeding before the Insolvency Court was not a party respondent. In the Madras Case objection was raised and yet for 17 years parties were not impleaded. These are instances of gross negligence. Where defendant had not raised a contention of necessary parties and had waived his right to do so but the Court considered that certain persons are necessary parties in whose absence no decree

can be effectively passed, it should call upon the plaintiff to join those persons as parties to the suit and if the plaintiff refuses to do so, it may dismiss his suit. If it comes to the notice of the Court at a later stage that some persons are necessary parties to the suit, it should not dismiss the suit on the ground that if necessary parties are joined, it may require it to hold a de novo trial.

(6) It was contended on behalf of the opponent that as the suit was dismissed on technical ground except in so far as it relates to the prayer for removal of encroachment, it was open to the plaintiff to file a separate suit on impleading proper parties and the Court should not therefore interfere with in revision. There is no reason why there should be multiplication of suits when relief can be granted in this suit. It seems that the opponent does not wish to be deprived of the decree dismissing the suit so far as the relief for removal of encroachment is concerned. It was unnecessary to decide that contention as an issue in the case before a preliminary decree for partition was made. On the trial Court ascertaining the area of the 'Agna', the question whether there was an encroachment or not would have been found out on survey made on the spot.

(7) Result is that the decree of the lower Court dismissing the suit is set aside and the suit is remanded back to the trial Court with a direction that it be admitted in the register of suits in its original number necessary parties be brought on record as per order made on an application filed in this Court and the suit be disposed of in accordance with law. Costs of this Court and of the lower appellate Court to be costs in the cause.

K.S. Case remanded.

A. I. R. 1952 Kutch 39

VAKIL, J. C.

Pasoo Devshi, Plaintiff-Applicant v. Anandji Bhula and another, Opponents.

Civil Misc. Appln. No. 119 of 1951, D/- 29-1-1952.

Civil P. C. (1908), O. 21 Rr. 58, 60, 61, 62 and 66 — Attachment — Investigation of claim — Claim of mortgagee.

When a mortgage is a possessory one, attachment is to be raised to the extent or mortgagee's interest in the property and when a mortgage is a simple one, attachment may be continued subject to such mortgage. In the first mentioned case, the Court has not only to be satisfied about the mortgage but it has further to be satisfied about possession of the mortgagee on his own account. In the second mentioned case the Court has only to be satisfied about the mortgage. Though the question of fraudulent transfer cannot be considered, the question of possession of the claimant on his own account and not on account of the judgment-debtor as his benamidar or otherwise has to be considered. In the second mentioned case, the Court need not elaborately inquire into complicated questions about alleged fraudulent or benami nature of the transaction. If satisfied about the mortgage, the attachment may be continued subject to the mortgage. If the Court is not satisfied, it may refuse the application leaving the unsuccessful applicant to file a regular suit to establish the right which he claims in the property. In either case it would not be right to order, whether on investigation made or otherwise, that the sale be held with notice of the mortgage either by incorporating the incumbrance in the sale proclamation or by publishing the mortgages at the time of sale. (Para 4)

Anno: O. 21 R. 58 N. 20; O. 21 R. 62 N. 3.

P. P. Vaidya on behalf of K. N. Mankad, for Applicant; M. P. Thacker, for Opponent No. 2.

ORDER: The facts which gave rise to this application for revision of the order of the Additional District Judge, Kutch in Miscellaneous application No. 10 of 1950, briefly stated, are as follows:

(1a) In execution of a decree for payment of money obtained by the applicant against opponent 1 as legal representative of his father Bhula Arajan, two houses, a field and a vada were attached for sale. Opponent 2 preferred a claim to the two houses attached alleging that the said houses were mortgaged by Bhula with her for 19,900/- Kories in the year Samwat 1988 and were in her possession since the date of the mortgage. It was further alleged that opponent 1 effected a second mortgage on the said houses for Rs. 3000 in the year Samvat 2006. As regards the other property attached, it was alleged that the said property was subject to a simple mortgage of Rs. 1000/- effected by opponent 1 in Samvat 1996 in her favour. It was therefore prayed that the property subject to the mortgages as aforesaid be sold in execution.

(2) The applicant contended that the mortgages were sham and colourable transactions without consideration and denied the fact alleged that opponent 2 was in possession of the two houses attached. The lower Court held that the mortgage of Samvat 1988 was indisputable. As regards the mortgage of Samvat 2006, the lower Court held that evidence of consideration was sufficient for the summary inquiry and that the plea of fraudulent transfer could not be considered. As regards the simple mortgage of Samvat 1996, the lower Court held that there was no scope for making a full inquiry about the contention of fraud. In the result, the lower Court allowed the application and ordered that the aforesaid mortgage dues be declared at the time of Court auction.

(3) Treating the order made by the lower Court as one raising attachment, the applicant preferred the present application for setting aside the order of the lower Court and for dismissing the application to raise attachment.

(4) Now the claim preferred was that the property attached be sold subject to the three mortgages. In other words, the claim, preferred was that the two houses be released from attachment to the extent of mortgagee's interest therein and the other property be sold subject to the mortgage of Rs. 1000/-. This would be the only proper construction of the claim preferred having regard to the clear position in law that when a mortgage is a possessory one, attachment is to be raised to the extent of mortgagee's interest in the property and when a mortgage is a simple one, attachment may be continued subject to such mortgage. In the first mentioned case, the Court has not only to be satisfied about the mortgage but it has further to be satisfied about possession of the mortgagee on his own account. In the second mentioned case the Court has only to be satisfied about the mortgage. Though the question of fraudulent transfer cannot be considered, the question of possession of the claimant on his own account &

not on account of the judgment-debtor as his benamidar or otherwise has to be considered. In the second mentioned case, the Court need not elaborately inquire into complicated questions about alleged fraudulent or benami nature of the transaction. If satisfied about the mortgage, the attachment be continued subject to the mortgage. If the Court is not satisfied, it may refuse the application leaving the unsuccessful applicant to file a regular suit to establish the right which he claims in the property. In either case it would not be right to order, whether on investigation made or otherwise, that the sale be held with notice of the mortgage either by incorporating the incumbrance in the sale proclamation or by publishing the mortgages at the time of sale.

(5) The lower Court did not consider the questions of possession. As regards other property, the lower Court did not record a finding that it was satisfied that the property was subject to mortgage. It seems that the lower Court, after having made an elaborate inquiry in a matter to be summarily dealt with, did not keep in mind the distinction between an order under O. 21, R. 60, 61 or 62 and an order under O. 21, R. 66 and eventually made an order not contemplated by any of these rules.

(6) The learned advocate for the applicant submitted that it would serve his purpose if this Court held that the order was made under O. 21, R. 66. By the application a claim was preferred and the application was allowed. It was submitted that the opponent 2 did not pray for release of attachment on houses and continuance of attachment subject to mortgage on other property . As pointed out in para. 4 above, the relief sought must be construed accordingly. As, however, the lower Court did not decide the real questions arising in the case, it will be necessary to remand the application to it for disposal according to law. It rarely happens that a Court of revision remands such a matter to the lower Court. But, when the lower Court fails to consider and decide the real questions arising in the case, it acts in the exercise of jurisdiction with material irregularity. It will not be proper for this Court to give expression of opinion on the questions which the lower Court failed to decide.

(7) Result is that the order made by the lower Court is set aside and the application is remanded back to the lower Court for its readmission in the register of Miscellaneous applications and for its disposal in accordance with law in the light of observations made in this judgment. Costs in this Court to be costs in the applications.

V.B.B. Case remanded.

A. I. R. 1952 Kutch 40

VAKIL, J. C.

Thacker Shivji Kumverji, Defendant-Applicant v. Thacker Kalyanji Rattanshi, Plaintiff-Opponent.

Civil Revn. Appln. No. 78 of 1951, D/- 19-11-1951.

Civil P. C. (1908), S. 115 — Revision against order refusing review — Other remedy available.

Section 115 is not applicable to an order of the lower Court refusing to grant a review of its decision.

The powers of the Court under Section 115 cannot be exercised where an applicant has got an equaliy efficacious remedy (in this case, right of appeal) available. AIR 1943 Mad 377 (1) and AIR 1924 Bom 344, Rel. on. **(Para 3)**

Anno: C. P. C., S. 115 N. 8.

P. R. Thacker, for Applicant; U. K. Gor, for Opponent.

Cases referred to:

('24) AIR 1924 Bom 344: (80 Ind Cas 267) (Pr 3)

('43) AIR 1943 Mad 377 (1): (209 Ind Cas 160) (Pr 3)

ORDER: This is an application for revision of an order dated 28-3-51 by the District Judge, Kutch, in miscellaneous application No. 2 of 1951 for review of an order dismissing application No. 35 of 1950, for setting aside a decree passed ex parte in suit No. 89 of Samvat 2005.

(2) The facts are that the opponent sued the applicant to recover a sum of money and that suit was decreed ex parte against him. The applicant applied for setting aside the decree passed ex parte. That application was dismissed as barred by limitation. The applicant made an application to the lower Court for review of the order dismissing the application on the ground that Section 5 of the Limitation Act was made applicable to applications for setting aside ex parte decree by a rule made under the rule making power of this Court and the applicant was not aware of this fact when the application was dismissed. The review application was dismissed by the lower Court on the grounds that the Rule which was applied after the application for setting aside the ex parte decree was made had no retrospective operation and that over-looking of the provisions of law was not a ground for review of an order. The applicant has therefore approached this Court for revision of that order.

(3) The question is whether an order refusing to grant review can be revised under S. 115, Civil P. C. In 'PEDDIBOYIMA VISHWANATHAM v. SHRIMAT KILAMBI SHRINIVASA VENKATA VARADACHARYULU', AIR 1943 Mad 377 (1), the Madras High Court held that Section 115 was not applicable to an order of the lower Court refusing to grant a review of its decision. The reason stated was that the applicants could have appealed against the judgments. In the present application, it is an admitted fact that the applicant has preferred an appeal against the order dismissing the application to set aside the ex parte decree and the appeal is pending. In that appeal the same question is raised for consideration. The Bombay High Court in 'LAXMAN v. MURTI LAXMAN TELI', AIR 1924 Bom 344, came to the same conclusion. It was held that S. 115 of the Code did not apply to an order of a Court refusing to grant review of its decision. I respectfully agree with these decisions. The powers of the Court under Section 115, C. P. C. cannot be exercised where an applicant has got an equally efficacious remedy available. It is therefore not necessary to consider the application on merits.

(4) Result is that the application is dismissed with costs.

V.B.B. Application dismissed.

A. I. R. 1952 Kutch 41
VAKIL, J. C.

Jatubha Takhatsangji and others, Defendants-Applicants v. Chandansangji and others, Plaintiffs-Opponents.

Civil Revn. Appln. No. 26 of 1951, D/- 24-11-1951.

(a) Kutch Province (Courts) Order (1948), S. 35 (1)(a) — Application made by party aggrieved — Exercise of jurisdiction under Cl. (a) is not debarred.

It cannot be accepted that a Court of revision cannot exercise jurisdiction under Cl. (a) of sub-section (1) of Section 35 if an application was made to it by a party aggrieved. What is required is that before action is taken under Clause (b), the Court of the Judicial Commissioner should be of opinion that an important question of law or custom is involved and that such question required further consideration. This can ordinarily be done on an application made. It does not follow that when an application is made action could not be taken under Clause (a). **(Para 3)**

(b) Kutch Province (Courts) Order (1948), S. 35 — Misinterpretation of evidence is acting in the exercise of jurisdiction with material irregularity—(Obiter)—Civil P. C. (1908), S. 115. (Para 3)

Anno: C. P. C., S. 115 N. 12.

R. R. Thacker, for Applicants; K. K. Chhaya, for Opponents Nos. 1 and 3.

ORDER: This is an application for revision of a decree of the District Court, Kutch, dated 20-11-50 in Civil Appeal No. 459 of 1949 reversing a decree of the Sub-Judge, Mundra, dated 31-10-49, decreeing the applicants' Suit No. 61 of Samvat 2003.

(2) Suit No. 161 of Samvat 2003 was brought by the applicant to recover possession of a specified moiety of a vandi from the opponents on averments of title, possession and dispossession prior to the suit. The opponents demurred to the plaint mentioned averments and alleged title to the property in themselves. The trial Court decreed the suit holding applicants' title and possession proved. The District Court differed from the trial Court and found applicants' title and possession not proved. It accordingly dismissed the suit.

(3) In revision it was contended that the District Court erred in holding applicants' title and prior possession not proved. A preliminary objection was raised by the learned Advocate for the opponents that the present revision application under Clause (b) of sub-section (1) to Section 35 of the Kutch Province (Courts) Order (1948) was not competent. The provisions of Section 35 of the Order are drafted on the lines of the provisions of S. 115 of the C. P. C. with few but material variations. The learned Advocate for the applicants submitted that as the District Court had misinterpreted the evidence, there was a material irregularity and hence applicants were entitled to maintain the application for revision. It cannot be denied that misinterpretation of evidence is acting in the exercise of jurisdiction with material irregularity.

It was contended by the learned advocate for the opponents that Clause (a) of sub-section (1) to Section 35 of the Order was inapplicable as the Court had not acted in the matter 'suo motu but was moved by the applicants with an application. The Section first provides for power to call record of any case which has been decided by a Subordinate Court. In Cl. (a) provision is made for improper exercise of jurisdiction. It cannot be accepted that a Court of revision cannot exercise jurisdiction under Clause (a), if an application was made to it by a party aggrieved. What is required is that before action is taken under Clause (b), the Court of the Judicial Commissioner should be of opinion that an important question of law or custom is involved and that such question required further consideration. This can ordinarily be done on an application made. It does not follow that when an application is made action could not be taken under Clause (a).

(4) The applicants' case was that a moiety of the vandi on the eastern side originally belonged to one Varsang who mortgaged it in Samvat 1965 with one Meraj Jevat. Some of the heirs of Meraj alienated mortgage rights of Meraj in Samvat 1974 in favour of applicants' ancestors. As the alienation was not evidenced by a registered instrument, applicants obtained from the heirs of Meraj a registered document in Samvat 2002. It was alleged that the applicants and their predecessors-in-title were in possession of the moiety of the vandi since Samvat 1974.

(5) In support of their case set out in the preceding para, applicants relied on a registered mortgage deed of Samvat 1965, an unregistered deed of Samvat 1974 and registered deed of Samvat 2002. They also relied on oral evidence to show possession. Opponents produced their old documents of title and relied on a rent note of Samvat 1985 to show that Varsang had taken the disputed moiety on rent from them. The District Court held that the registered deed of Samvat 1965 did not convey any title to Meraj in the disputed moiety. The oral evidence led was not believed. As the trial Court had not relied on the documents produced by the opponents the District Court did not say anything about them.

(6) Now it is quite evident that the registered document of Samvat 2002, which alone could furnish evidence of applicants' title to the disputed moiety was executed by some of the heirs of Meraj as pointed out in the last para of the judgment of the District Court and hence applicants could not have based their suit on the said document to eject the opponents from the disputed moiety. It is therefore unnecessary to consider the contention that the District Court misinterpreted the document of Samvat 1965. Moreover, the District Court disbelieved the evidence led to show possession of the applicants and of their predecessors from Samvat 1974 and it cannot be urged from the fact that a document was executed in Samvat 1974 and there was misinterpretation of oral evidence if Meraj's vendor had a title which he could convey to him, applicants and his predecessors would have been found in possession from Samvat 1974.

(7) The application therefore fails and it is dismissed with costs.

V.B.B. Application dismissed.

A. I. R. 1952 Kutch 42

VAKIL J. C.

Soni Parshottam, Defendant-Appellant v. Mamibai Jagmal, Plaintiff-Respondent.

First Appeal No. 2 of 1951, D/- 20-3-1952.

(a) Civil P. C. (1908), O. 41, R. 27 (1) (b) — Substantial cause — Meaning of.

Though the expression 'substantial cause' is not to be understood to have been used only in the sense of a cause similar to a cause requiring a witness to be examined or a document to be produced for pronouncing a judgment, it is plain that the real criterion is whether the Court on examination of evidence as it stands requires additional evidence in view of some inherent lacuna or defect. The fact that the oral evidence was disbelieved by the lower Court does not show that there was inherent lacuna or defect. AIR 1949 Bom 266, Rel. on; AIR 1918 Oudh 406, Dissent. (Para 4)

Anno : C. P. C., O. 41, R. 27 N. 8 Pts. 1 to 3.

(b) Civil P. C. (1908), O. 41, R. 27 (1) (b) — Substantial cause — Respondent suing appellant for recovery of money—Appellant pleading repayment and producing receipt purporting to be under signature of respondent — At instance of respondent Court ordering that receipt be sent to expert for opinion — Order not implemented by respondent — In appeal appellant applying for forwarding receipt to expert for opinion and for examining him— Held there was no substantial cause to grant application. AIR 1931 P C 143, Foll. (Para 5)

Anno : C. P. C., O. 41, R. 27 N. 8 Pt. 22.

(c) Civil P. C. (1908), O. 41, R. 27 (1) (b) and O. 47, R. 1 — Party not availing of opportunity to lead evidence in trial Court — Evidence of conclusive nature — Fact no ground for leading additional evidence.

The fact that there is convincing or conclusive evidence to prove a case alleged by a party or to disprove a case alleged by his adversary, may be a ground of review if the requirements of O. 47, R. 1 are satisfied but it will not surely be a ground for leading additional evidence under O. 41, R. 27, when the party proposing to lead such evidence had every opportunity to do so in the trial Court but did not avail himself of it thinking that the evidence which he proposed to lead would be sufficient. (Para 6)

Anno : C. P. C., O. 41, R. 27 N. 8 Pt. 15; O. 47, R. 1 N. 16.

L. L. Thacker, for Appellant; K. N. Mankad, for Respondent.

Cases referred to :

('31) 33 Bom L R 1015: (AIR 1931 P C 143) (Pr 5)

('49) 51 Bom L R 245: (AIR 1949 Bom 266) (Pr 4)

('18) AIR 1918 Oudh 406: (48 Ind Cas 1007) (Pr 4)

ORDER : This is an application under O. 41, Rule 27, C. P. C. for permission to produce additional oral evidence in appeal. The few facts which need be stated are that the respondent sued the appellant for recovery of a sum of Rs. 6000/- on the basis of a 'khata'. The appellant contended repayment and produced a receipt purporting to be under the signature of the respondent in proof of the alleged repayment. The receipt was denied by the respondent. The respondent applied to the lower Court to obtain opinion of an expert on the hand-writing of the signature of the receipt on comparison of her admitted hand-writing. The lower Court granted the application. The respondent, however, took no steps to implement the said order made by the lower Court, by depositing costs required to be incurred. The appellant examined himself and a witness to prove execution of the receipt by the respondent. This evidence was disbelieved by the lower Court who decreed the respondent's suit.

(2) The appellant preferred Appeal No. 2 of 1951 against the decree passed by the lower Court on 5-2-1951. In the lower Court, appellant had produced two documents called a bond & a registered document purporting to have been executed by the respondent. The respondent admitted execution of the registered document but had denied execution of the bond. After filing the appeal, the appellant approached an expert for an opinion about the signature on the bond on comparison with the admitted signature on the registered document. After having filed this application for permission to produce additional evidence in appeal by forwarding the receipt to an expert for opinion and examining him after he has given his opinion.

(3) The grounds on which this Court should exercise the discretion vested in it under O. 41, Rule 27, C. P. C., as stated in application, are that as the respondent offered to send the receipt to the expert for opinion, the appellant could not do it; an opinion on a document execution of which was denied by the respondent was obtained by the appellant and that as the claim was a substantial one he should be allowed to lead additional evidence in the interest of justice.

(4) The application was supported under clause (b) of sub-rule (1) to Rule 27 of O. 41, C. P. C., which provides that when the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any substantial cause, a party to an appeal shall be entitled to produce additional evidence. It could not have been urged and in fact it was not urged that this Court required any witness to be examined to pronounce judgment. It is, therefore, necessary to consider whether this Court requires the witness to be examined for any substantial cause. Though the expression 'substantial cause' is not to be understood to have been used only in the sense of a cause similar to a cause requiring a witness to be examined or a document to be produced for pronouncing a judgment, it is plain that the real criterion is whether the Court on examination of evidence as it stands requires additional evidence in view of some inherent lacuna or defect.

In this case there was no lacuna or defect which can be regarded as inherent. The document called receipt which was denied by the appellant could be proved by oral evidence as was done by the appellant in the lower Court. The fact that the said oral evidence was disbelieved by the lower Court does not show that there was inherent lacuna or defect. An instance of inherent lacuna is furnished by 'VISHNU RAMKRISHNA v. NATHU VITHAL 51 Bom. L R 245, wherein a will propounded was required by law to be proved by examination of one attesting witness. The attesting

witness examined did not prove the will. The High Court required additional evidence for being satisfied on the question whether the document was the last will and testament of Gangabai.

The learned pleader for the appellant relied on 'MANGAL v. INDER KUVAR', AIR 1918 Oudh 406, and contended that where a trial Court disbelieved evidence as was done in the present case, it could be regarded as substantial cause. In the Oudh case, the plaintiff who had to prove a registered document thought that its execution would not be seriously challenged. As a matter of fact, it was seriously challenged. The Court regarded this circumstance as substantial cause. If this case purports to lay down a principle that whenever a plaintiff thinks that execution of a document will not be seriously challenged and for that matter does not lead sufficient evidence in proof of it, he can be allowed to lead additional evidence in appeal with due deference, it is not possible to accept it. In the Bombay case the decision was based on the ground that

> "It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of conscience would not permit such a thing to happen."

These observations cannot be made applicable to a case in which a party is supposed to judge the quantum of evidence required to be led to discharge onus or prove a document.

(5) Moreover, the appellant had ample opportunity to lead in the trial Court the evidence which he now proposed to do in this Court. The lower Court had made an order that the receipt be sent to an expert for opinion. This order, though not implemented by the respondent, could have been so done by the appellant, if he considered it necessary. It is true that the respondent did not implement the order. But that fact cannot be regarded as substantial cause. In 'PARSOTIM THACKUR v. LAL MOHAR', 33 Bom L R 1015 (PC), their Lordships dealing with a similar case observed as under:

> "In their Lordships' opinion, this additional evidence ought not to have been admitted. If the respondent desired to give evidence as to thumb impression, they had ample opportunity to do so in the trial Court."

The question whether the lower Court was right in disbelieving the evidence led by the appellant, having regard to the facts and circumstances of the case is still to be urged by the appellant and to be considered by this Court. It cannot therefore be said that there is inherent defect or lacuna. All that the appellant wants is that the said evidence be supplemented by opinion and evidence of an expert, so that the fact the lower Court has disbelieved the evidence could be counter-balanced. Surely, this cannot be regarded as substantial cause for which this Court finds it necessary or essential that additional evidence be led.

(6) Considerable reliance was placed on the fact that an expert had now opined on the similarity of hand-writing of the signatures on the registered documents and on the bond and it was contended that if additional evidence was allowed to be led it would show that the signature on the receipt was in the hand of the respondent. It was therefore urged that in the interest of justice, additional evidence be allowed to be led. Apart from the fact that opinion of an expert was privately obtained and also apart from the fact that much can be said for and against opinion of an expert, it is evident that opinion was as regards execution of the bond which was not the fact in issue. From the mere fact that respondent had not admitted execution of this bond it cannot be said that the opinion of the expert as regards the signature on the receipt would be the same, Moreover, the fact that there is convincing or conclusive evidence to prove a case alleged by a party or to disprove a case alleged by his adversary, may be a ground of review if the requirements of O. 47, R. 1 are satisfied but it will not surely be a ground for leading additional evidence under O. 41, R. 27, Civil P. C., when the party proposing to lead such evidence had every opportunity to do so in the trial Court but did not avail himself of it thinking that the evidence which he proposed to lead would be sufficient.

(7) Result is that the application fails and it is dismissed.

V.R.B. Application dismissed.

A. I. R. 1952 Kutch 43

VAKIL J. C.

Megji Lalji and others, Original Defendants-Appellants v. Gangabai Ratanshi, Original Plaintiff and another, Original Defendants-Respondents.

Civil Regular First Appeal No. 3 of 1951, D/-14-3-1952.

Kutch (Courts) Order (1948) — Rules under — Pleader's fees — Taxing of — General principle — Suit under O. 21 R. 63, Civil P. C. — Suit dismissed — Valuation of subject-matter for taxing Pleader's fees — (Civil P. C. (1908), O. 21 R. 63 — (Suits Valuation Act (1887), Ss. 8 and 11).

The general principle is that Pleader's fees are to be computed at the rates laid down on the amount or value of the subject-matter in dispute. Broadly stated, the amount or value of the subject-matter is the same as the amount or value of the subject-matter for the purposes of jurisdiction. (Para 2)

The plaintiff who was a mortgagee of the property attached brought a suit under O. 21, R. 63 claiming that the property was liable to be sold in execution subject to his mortgage charge. He paid a fixed court-fee and valued the suit for purposes of jurisdiction at Rs. 7400 which was the amount due on the mortgage. The suit being dismissed the question was whether the pleader's fees were to be taxed on Rs. 7400 or on Rs. 118/12 which was the decretal amount in respect of which the property was sought to be sold.

Held that as the decretal amount was much smaller than the value of the property and only part of the property sufficient for payment of the decretal amount could be sold according to law, the amount or value of the subject-matter in dispute was the decretal amount which was Rs.

118/12 for which the property was required to be sold and that amount would be the valuation for the purposes of pleader's fees. 35 Cal 202 (PC); AIR 1933 All 249 (FB) and AIR 1944 Nag 308, Rel. on. (Para 4)

Held further that the plaintiff was not precluded from urging that the proper valuation for the purposes of jurisdiction was Rs. 118/12 and not Rs. 7400, as there could be no estoppel on a question of law. AIR 1933 All 249, Rel. on. (Para 5)

Anno: C. P. C., O. 21 R. 63 N. 21 Pt. 1; S. V. Act, S. 8 N. 20 Pt. 2; S. 11 N. 6 Pt. 22.

R. R. Thacker, for Appellants; J. K. Dholakia, for Respondent No. 1.

Cases referred to:

('08) 35 Cal 202: (35 Ind App 22 PC) (Pr 4)
('33) AIR 1933 All 249: (55 All 315 FB) (Prs 4, 5)
('48) AIR 1948 Bom 8: (49 Bom L R 545) (Pr 5)
('44) AIR 1944 Nag 308: (ILR (1944) Nag 783) (Pr 4)

ORDER: By this application, the respondent against whom appeal was allowed with costs throughout, raised a question about Pleader's fees to be taxed in the bill of costs. The question arises this way. The respondent preferred a claim petition against the appellants, who in execution of their decree for payment of money obtained against one Govindjee had attached for sale certain property as of the full ownership of Govindjee. The claim preferred by the respondent was that the property was mortgaged with her for Rs. 3700 for principal and a sum of Rs. 3700/- was due for interest. On rejection of her claim petition, she brought the suit under appeal for a declaration that the property was liable to be sold subject to her mortgage charge as stated above. The suit was valued for the purposes of jurisdiction at Rs. 7400 as according to the respondent, that was the amount due on the alleged mortgage. The respondent succeeded in the trial Court but this Court allowed the appeal and dismissed the suit with costs throughout. As the Taxing Officer proposed to tax the pleader's fees on Rs. 7400, this application was made.

(2) Pleader's fees are to be taxed in accordance with the rules made by this Court under the Kutch Province (Courts) Order, 1948. The general principle is that Pleader's fees are to be computed at the rates laid down on the amount or value of the subject-matter in dispute. Broadly stated, the amount or value of the subject-matter is the same as the amount or value of the subject-matter for the purposes of jurisdiction. When fixed court-fees are paid as was done in the present case a plaintiff values his suit for the purposes of jurisdiction. The valuation is to be made on the basis of the subject-matter in dispute. It, therefore, 'prima facie' appears that amount or value of the subject-matter for the purposes of computing pleader's fees is Rs. 7400 /-.

(3) Now what was contended was that though the prayer was cast in the form of a declaration, the suit was in substance one contemplated by the provisions of O. 21, R. 63, Civil P. C. and that in such a suit, the amount or value of the subject-matter for the purposes of jurisdiction is the value of the property attached if that valuation is less than the decretal amount or the decretal amount if the value of the property is more than the decretal amount. In this case the decretal amount was only Rs. 118/12 and costs and the value of the property attached was more than Rs. 7400. On the other hand, the contention of the appellant was that adjudication was required to be made in respect of the alleged mortgage on which a sum of Rs. 7400/- was due and hence the amount or value of the subject-matter was Rs. 7400/-. In the alternative, it was contended that the respondent having valued the suit at Rs. 7400/- and thus having given jurisdiction to a superior Court was now precluded from urging that the proper valuation for the purposes of jurisdiction was Rs. 118/12.

(4) It is quite apparent that the respondent by her suit was not asking for adjudication of a disputed mortgage between herself and the judgment-debtor. She had therefore to establish the right which she claimed to the property in dispute against the appellant. The right which she claimed was that as she was a mortgagee, only the equity of redemption could be sold. The dispute was in respect of the property to the extent required to be sold for realisation of the decretal amount. The word "dispute" is a relative term and the extent of dispute was the extent of property required to be sold for satisfaction of decretal amount. It is thus obvious that the amount or value of the subject-matter in dispute in this case is the decretal amount for which property is required to be sold. This is so as the decretal amount is much smaller than the value of the property and only part of the property sufficient for payment of decretal amount can be sold according to law. If, however, in a given case, the value of the property is less than the decretal amount, the amount or value of the subject-matter in dispute would be the value of the whole property as according to law the whole property is required to be sold for payment of decretal amount. This is how valuation of the subject-matter in dispute is to be determined in suits falling under O. 21, R. 63, C. P. C., except in those cases where the dispute as to title arises between the claimant and the judgment-debtor. In that case valuation will be the valuation of the property irrespective of the decretal amount as the decision of such a suit will result in final determination of the question of title to the property between the rival claimants. The leading case on the subject is 'PHULKUMARI v. GHANSHYAM MISRA', 35 Cal 202. In that case it was observed as under:

> "The value of the action must mean value to the plaintiff. But the value of the property might quite well be Rs. 1000/-, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the property that this amount affects the value of the suit."

A Full Bench of the Allahabad High Court in 'MOOLCHAND MOTILAL v. RAMKISHEN', AIR 1933 All 249, held that when a claimant whose objection to an attachment in executing a decree against a judgment-debtor was dismissed, filed a declaratory suit that the property attached was his own and could not be attached, the valuation of the suit in cases when the value of the property was greater than the amount of the decree, was the amount of the decree. The Nagpur High Court in 'RADHABAI v. MADHORAO', AIR 1944 Nag 308, came to the same conclusion. It is thus evident that in the present case, valuation of the subject-matter in dispute for the purposes

of jurisdiction was Rs. 118/12 and that amount would be the valuation for the purposes of pleader's fees.

(5) It is true that plaintiff had valued her suit at Rs. 7400/- and the valuation so made gave jurisdiction to the District Court to try the suit. Where in a case governed by S. 8 of the Suits Valuation Act, a plaintiff, due to misapprehension of law, values the suit differently for the purposes of jurisdiction, he would not be precluded from urging what would be the correct valuation according to law. 'BANSILAL v. BHIKUBHAI', AIR 1948 Bom 8. Similarly, when a fixed court-fee is payable and a plaintiff due to misapprehension of law overvalues the suit as is done in the present case, he will not be precluded from urging that the proper valuation for the purposes of jurisdiction was much less. The reason is that there could be no estoppel on a question of law. 'MOOLCHAND v. RAMKISHEN', AIR 1933 All 249. But where a plaintiff deliberately undervalues or over-values a suit when no question of law is involved, he would be estopped from denying the correctness of the valuation made by him. In the present case, what was interpreted was the expression 'subject-matter in dispute' in a suit filed under O. 21, R. 63, Civil P. C. That was a question of law. Moreover, no question of jurisdiction has now to be considered. The respondent is therefore entitled to urge that the correct valuation according to law of the subject-matter in dispute is Rs. 118/12 only.

(6) Result is that the application is allowed and the Taxing Officer is directed to tax pleader's fees, on Rs. 118/12 as the subject-matter in dispute, in accordance with the rules made by this Court. No order as to costs of this application.

V.R.B. Application allowed.

A I. R. 1952 Kutch 45

VAKIL J. C.

Devji Vasta and others, Plaintiff-Applicants v. Dhanji Nanji, Defendant-Opponent.

Civil Review Appln. No. 5 of 1951, D/- 26-3-1952.

(a) Civil P. C. (1908), O. 47, R. 1 (1) — Error apparent on face of record — Judgment given on two grounds one of which was erroneous.

When a judgment is based on two grounds, each of which independently of the other is sufficient to sustain it, a review of the judgment cannot be granted even though it is shown that there was an error apparent on the face of the record in basing the judgment on one of the two grounds. (Para 4)

Anno: C. P. C., O. 47 R. 1 N. 15.

(b) Civil P. C. (1908), O. 47 R. 1 (1) — "Other sufficient reason" — Results of two revision applications inconsistent.

The fact that the result of a revision application was inconsistent with the result of the decision of another revision application decided earlier will not be a ground of "other sufficient cause" for review of the judgment in the later revision application. (Para 5)

Anno: C. P. C., O. 17 R. 1 N. 16.

K. N. Mankad, for Applicants.

ORDER: This is an application for review of the judgment of this Court in Civil Revision Application No. 163 of 1950, decided on 5-1-51.

(2) Civil Revision Application No. 163 of 1950 was brought by the applicants for setting aside a decree of the Court of the Sub-Judge, Mandvi in Suit No. 103 of 'Samvat' 2004 confirmed in Appeal No. 396 of 'Samvat' 2005.

(3) Suit No. 103 of 'Samvat' 2004 was brought by the opponent against Devji Vasta, the father of the applicants for recovery of 'Kories' 2000 alleged to have been given by the former to the latter as a loan. The applicants denied the alleged loan and contended that the sum of 2000 'Kories' was given to them in part payment of a loan of 11000 'Kories' given by Devjee to the opponent. The only question to be considered in this suit was whether the sum of 2000 'Kories' was given to Devjee as a loan or in part payment of the alleged debt due to Devjee from the opponent. This Court in dismissing the Revision Application observed that as there were concurrent findings on a question of fact by the two lower Courts, no interference in revision was called for. At the same time, it was observed that there was no evidence to support the applicants' case about appropriation of the sum of 2000 'Kories' towards the alleged debt due to Devjee from the opponent.

(4) The first contention urged on behalf of the applicants was that there was an error apparent on the face of the record as there was evidence of appropriation. In fact that was the case of the applicants in a suit filed by them against the opponent and evidence was led in the suit filed by the opponent to substantiate the defence. Though there was an error apparent on the face of the record, the judgment of this Court was not solely based on the ground shown to be erroneous. It was also based on the ground that there were concurrent findings of the two lower Courts and hence no interference in revision was called for. When a judgment is based on two grounds, each of which independently of the other is sufficient to sustain it, a review of the judgment cannot be granted even though it is shown that there was an error apparent on the face of the record in basing the judgment on one of the two grounds.

(5) It was then contended that there was sufficient reason for granting a review of the judgment. It was pointed out that the applicants had sued the opponent for recovery of 5440 'Kories' alleging a loan of 11000 'Kories' of which there was repayment of 7000 'Kories' inclusive of a sum of 2000 'Kories' which was made the subject-matter of the suit by the opponent 1. Though the two lower Courts dismissed the applicants' suit, this Court in Civil Revision Application No. 162 of 1950 decreed it. It was urged that this Court therefore accepted the applicants' case not only of the loan of 16000 'Kories' but also of the appropriation of 2000 'Kories' and hence it was incongruous for this Court to have confirmed the decree in opponent's suit. In Civil Revision application No. 162 of 1950, the judgment turned on a letter by the opponent which admitted the alleged loan. The question of appropriation did not arise and could not have arisen for consideration in that suit. Moreover, the two re-

vision applications were decided on different dates.

Though inconsistent findings in two cross suits, the subject-matter of which can fairly be said to be the same can be avoided by consolidation or by pronouncement of judgment in two suits on the same date, the fact that the result of Civil Revision Application No. 162 of 1950, decided later, was inconsistent with the result of the decision in Civil Revision Application No. 163 of 1950, will not be a ground of 'other sufficient reason' for review of the judgment in the last mentioned Civil Revision Application. The reason is that the judgment of this Court in Civil Revision Application No. 162 of 1950 cannot be questioned by the opponent and the contention now advanced by the applicants can similarly be urged by the opponent in respect of the judgment in Civil Revision Application No. 162 of 1950 in view of the decision in Civil Revision Application No. 163 of 1950 decided first.

(6) Result is that the application fails and it is dismissed.

V.R.B. Application dismissed.

A. I. R. 1952 Kutch 46

VAKIL, J. C.

Muljr Panachand, Applicant v. Dubasia Arjan Govind and others, Opponents.

Civil Revn. Appln. No. 90 of 1951, D/- 5-12-1951.

(a) Kutch Courts Order (1948), S. 35 — Revision under — Concurrent finding of fact by both lower Courts that a particular document was executed by a particular person based on evidence — No interference in revision — Civil P. C. (1908), S. 115. (Para 4)

Anno : C. P. C., S. 115 N. 2.

(b) Registration Act (1908), S. 17 — Sale of equity of redemption to mortgagee — Registration — Value of equity of redemption and not of whole property should be taken into account.

When a mortgagor sells his equity of redemption to his mortgagee, right, title and interest created in the mortgagee is of the equity of redemption and the value is value of the equity of redemption and not of the whole property. (Para 5)

A, a mortgagee, executed a mortgage of his mortgagee rights in favour of B for 425 Koris. Subsequently, A sold to B his mortgagee rights and the consideration for the sale was stated to be 330 Koris in addition to that due to B on the previous mortgage, viz. 425 Koris:

Held on a true construction of the document that it was a mere sale of the equity of redemption for 330 Koris and not 775 Koris and therefore it was not compulsorily registrable. AIR 1936 Bom 175, Rel. on; AIR 1950 Kutch 15, Explained; AIR 1928 Cal 107, Ref. (Para 5)

Anno: Registration Act, S. 17 N. 75.

(c) Kutch Courts Order (1948), S. 35(1)(a) — Exercise of jurisdiction with material irregularity — Civil P. C. (1908), S. 115.

If on true construction, a document does require registration but it is held that it does not require registration and the decision of the suit turns on the finding of that question one way or other, it is acting in the exercise of jurisdiction with material irregularity and to that extent an application for revision is competent under Section 35 (1)(a) of the Kutch Courts' Order, 1948. (Para 4)

Anno : C. P. C., S. 115 N. 12.

K. N. Mankad, for Applicant; G. U. Bhanusali, for Opponents.

Cases referred to :

('36) 38 Bom L R 205: (AIR 1936 Bom 175) (Pr 5)

('28) AIR 1928 Cal 107: (107 Ind Cas 474) (Pr 5)

('50) AIR 1950 Kutch 15 (Pr 5)

ORDER : This is an application for revision of a decree dated 16-3-51 of the District Court, Kutch, setting aside a decree dated 15-4-49 of the Court of the Subordinate Judge, Bhuj, in Suit No. 216 of Samvat 2002.

(2) Suit No. 216 of Samvat 2002 was brought by the applicant against the opponent for redemption of a mortgage of the year Samvat 1914 for 425 Kories effected by applicant's ancestor Devkaran Pitambar with opponent's ancestor Kunvarjee Kanjee. The opponent defended the suit contending that the equity of redemption in the suit property was sold to his predecessor-in-title in Samvat 1950 and hence the applicant was not entitled to sue.

(3) The trial Court decreed the suit holding that the document of Samvat 1950 required registration and as it was not registered it was not admissible in evidence. The District Court remanded the suit to the trial Court for recording a finding on the question whether the document of Samvat 1950 was proved. Both the trial Court and District Court found that the document of Samvat 1950 was proved. The District Court held that the document of Samvat 1950 did not require registration. The District Court therefore reversed the decree passed by the trial Court and dismissed the suit. Though unnecessary, the District Court expressed an opinion that if the document required registration, opponent was not entitled to rely on the doctrine of part performance.

(4) In revision it was contended that the District Court erred in holding that the document of Samvat 1950 was proved. There was evidence from which both the lower Courts found that the document was executed by the applicant's ancestors. These concurrent findings of fact cannot be challenged in revision. It was then contended that the District Court erred in holding that the document of Samvat 1950 did not require registration. The learned Advocate for the opponent contended that this question of law could not be raised in revision as an application for revision under Section 35 (1) (b) of the Kutch Courts Order, 1948 could not lie in case of an unclassed suit under the value of two hundred rupees. It was not disputed that if a document on its true construction purported or operated to create etc., any right, title or interest of the value of 500/- Koris or upwards, it required registration. Thus the question to be considered is not one of law but of proper construction of a document. It was contended on behalf of the applicant that mis-construction or mis-interpretation of a document was acting in the exercise of jurisdiction with a material irregularity. If on true construction, a document does require registration but it is held that it does not require registration and the decision of the suit turns on the finding of that question one way or other, it

is acting in the exercise of jurisdiction with material irregularity and to that extent an application for revision is competent under Section 35 (1) (a) of the Kutch Courts' Order, 1948.

(5) The material part of the document of Samvat 1950 can be rendered into English as under:

"From Devkaran Pitamber by his two sons Panachand and Ratansey Devkaran; this house is with us as per deed executed by Devkaran Jetha, Ubji, Bhima, Khima and Manjee Jetha. We mortgaged the said house with Dubasia Kanjee Kunvarjee in Samvat 1914 for 425 Koris and we had taken an advance of 330 Koris on this house in 1938 Jeth Sud 2nd. A document in respect of it was to be passed. To-day total amount of 755 Koris and expenses incurred on the house are due. This house is sold to you for the aforesaid Koris and expenses."

It is clear from the recitals of the document that the executants were mortgagees and they had mortgaged their mortgagees' right. By the document they were selling their mortgagees' rights which were mortgaged with the vendee for 425 Koris. Thus the document purported or operated to create rights, title and interest in the vendee of the mortgagees' rights value of which was 330 Kories and not 775 Kories as the vendee was also a mortgagee of mortgagee's rights. When a mortgagor sells his equity of redemption to his mortgagee, right, title and interest created in the mortgagee is of the equity of redemption and the value is value of the equity of redemption and not of the whole property.

In 'BARSIK NANDI v. GURUDAS PAL', AIR 1928 Cal 107, the mortgagor sold his equity of redemption to the mortgagee for the mortgage debt together with interest due thereon. The mortgage debt and interest exceeded Rs. 100/-. It was held that the document was compulsorily registrable. The decision proceeded on the view that the consideration of the deed was the mortgage debt and interest. In 'PITAMBAR v. RAJARAM', 38 Bom L R 205, A had mortgaged his property with D, predecessor in title of P for Rs. 250/-. He sold the property to P for Rs. 20/-. The document was construed as sale of equity of redemption for Rs. 20/- and as such it did not require registration. The view expressed by the Calcutta High Court that a conveyance of the equity of redemption which included a release of the mortgagors' liability under the mortgage required registration as the mortgage debt was of more than Rs. 100/- was not accepted. It was observed that a release of personal liability of the mortgagor could not be held to be an extinguishment of any interest in immovable property as it was merely an extinguishment of personal liability.'

The Bombay case was followed by this Court in 'JOSHI LAXMINARAYAN v. BHANSARI MULJI PRAGJI', AIR 1950 Kutch 15. The learned advocate for the applicant contended that the mortgage of Samvat 1914 was merged in the document of Samvat 1950. This Court in the case cited above observed that it was conceivable that a document of subsequent sale might recite the amount of the previous mortgage and might mention the return of mortgage document fully discharged as consideration with cash payment or it might recite that the transferee was not only paying the present consideration but was also foregoing his claim to recover mortgage debt in lieu of transfer. It was observed that if the document was in such form, its value would not be merely the present payment but also the mortgage amount. In this case there was no question of return of mortgage document fully discharged. It was mentioned that the transferee might take 775/- Kories and give back the property to the original mortgagor free from mortgage. No doubt it can be urged from the recitals of the document that the transferee was foregoing his claim to recover the mortgage debt in lieu of transfer. In the Bombay case Divatia, J. expressed a view that there was extinguishment of the mortgage debt. The Bombay view in Letters Patent Appeal was discussed in the judgment of this Court in 'JOSHI LAXMINARAYAN'S CASE'. The learned Judicial Commissioner was not inclined to accept the view that foregoing of the mortgage debt was only foregoing of mortgagor's personal liability as it was contrary to view expressed by him. The observations of the learned Judge in that case were mere obiter dicta. I respectfully agree with the view expressed in the judgment of the Bombay High Court, in the Letters Patent Appeal. I therefore hold that the document on its true construction was a mere sale of the equity of redemption for 330/- Kories and hence it was not compulsorily registrable.

(6) In view of the conclusions arrived at by me that the document of Samvat 1950 is not compulsorily registrable, it is not necessary to consider whether the decision arrived at by the District Court that if the document required registration, the doctrine of part performance was inapplicable and the document would not have been held admissible under the proviso to Section 49 of the Indian Registration Act to show part performance need not be considered. The application fails and it is dismissed with costs.

K.S. Application dismissed.

A. I. R. 1952 Kutch 47

VAKIL J. C.

Shantilal Jevatlal, Plaintiff-Applicant v. Pranlal Nanchand and others, Defendants-Opponents.

Civil Revision Appln. No. 154 of 1951, D/- 26-3-1952.

† (a) Civil Procedure Code (1908), O. 38, R. 5 (1) — Suit for dissolution of partnership and accounts — Attachment before judgment of partnership property.

Under O. 38, R. 5 a plaintiff can ask for attachment before judgment of the property of his defendant and not of the property of a partnership of which the defendant is a partner as the partnership property cannot be called 'his property' within the meaning of that expression used in cls. (a) and (b) of sub-r. (1) of the said rule. A 'fortiori' a plaintiff filing a suit for dissolution of partnership and accounts cannot ask for attachment before judgment of the partnership property which is the property in suit. (Para 3)

Anno: C. P. C., O. 38 R. 5 N. 2.

(b) Civil Procedure Code (1908), O. 38, R. 5 (1) and O. 39, R. 1 (a) — Allegations that property was in danger of being damaged, wasted or alienated by defendants — Allegations are not relevant for obtaining attachment

before judgment — They can be made basis of application under O. 39 R. 1. (Paras 2, 3)

Anno: C. P. C., O. 38 R. 5. N. 11; O. 39 R. 1 N. 6 Pt. 1.

M. M. Mehta, for Applicant; C. B. Thacker, for Opponent No. 1; S. U. Bhanushali, for Opponents 2 and 3.

ORDER: This is an application for revision of an order dated 20-12-51 made by the Additional District Judge, Kutch dismissing applicant's application in suit No. 94 of 1951, for attachment before judgment of property which on averments in the plaint was partnership property in suit.

(2) The allegations made in the application were that the said partnership property was in danger of being damaged, wasted or alienated by the defendants.

(3) Under the provisions of O. 38, R. 5, Civil P. C., a plaintiff can ask for attachment before judgment of the property of his defendant and not of the property of a partnership of which the defendant is a partner as the partnership property cannot be called 'his property' within the meaning of that expression used in clauses (a) and (b) of sub-rule (1) of the said rule. A 'fortiori', a plaintiff filing a suit for dissolution of partnership and accounts cannot ask for attachment before judgment of the partnership property which is the property in suit. For obtaining an attachment before judgment, it is necessary to aver that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property or is about to remove it from the local limits of the jurisdiction of the Court.

Allegations mentioned in para 2 above are not relevant for obtaining attachment before judgment though they could be made the basis of an application under O. 39, R. 1. The applicant had therefore clearly misconceived his remedy by filing this application. He had at the same time filed an application under O. 39, R. 1, Civil P. C. and it was pointed out in the judgment delivered in the 'Misc Civil Appeal No. 10 of 1951', that even a remedy by way of making an application under O. 39, R. 1 was misconceived in a partnership suit as the obvious remedy in such a suit for protection of partnership property during the pendency of suit was appointment of a Receiver.

(4) Result is that the application fails and it is dismissed with costs.

V.R.B. Application dismissed.

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Thacker Shivji Kumverji, Defendant-Applicant v. Bhatia Thacker Kalyanji Ratanshi, Plaintiff-Opponent.

Civil Misc. Appeal No. 6 of 1951, D/- 19-11-51.

(a) Limitation Act (1908), Art. 164 — Date of decree — Meaning.

The expression 'date of decree' means the date on which the judgment was pronounced, although in certain circumstances a defendant may be entitled under S. 12 of the Act to exclude the time intervening between delivery of judgment and the signature of the decree. AIR 1916 Pat 267; AIR 1936 Lah 976 and AIR 1924 Nag 271, Not foll. (Para 5)

Anno: Limitation Act, Art. 164 N. 5.

(b) Limitation Act (1908), S. 12 (2) and Art. 164 — Application to set aside 'ex parte' decree — Applicability.

The exclusion of time requisite allowed by S. 12 (2) cannot be had in computing the period of limitation prescribed for an application for setting aside an 'ex parte' decree. (Para 6)

Anno: Limitation Act, S. 12 N. 4; Art. 164 N. 9.

(c) Interpretation of Statutes — Amendment — Retrospective operation.

It is a principle well established that unless contrary is provided for, the law of limitation applicable to a suit etc., is the law in force at the date when such suit etc., is instituted and not an amending law which comes into operation during the pendency of the suit, etc. But when amending law is procedural, it takes effect immediately and applies to all pending proceedings. AIR 1929 Bom 262, Rel. on. (Para 7)

Anno: C. P. C., Preamble N. 3 Pts. 1 and 7.

P. R. Thacker, for Applicant; U. K. Gor, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) AIR 1951 All 122: (1950 All LJ 946 (FB)) (Pr 6)
('49) AIR 1949 Assam 23 (Pr 5)
('29) AIR 1929 Bom 262: (53 Bom 453) (Pr 7)
('40) AIR 1940 Bom 415: (192 Ind Cas 275) (Pr 5)
('30) AIR 1930 Cal 422: (57 Cal 148) (Pr 7)
('39) AIR 1939 Cal 711: (186 Ind Cas 58) (Pr 5)
('36) AIR 1936 Lah 976: (168 Ind Cas 897) (Pr 5)
('45) AIR 1945 Lah 229: (ILR (1945) Lah 504 FB) (Pr 5)
('24) AIR 1924 Nag 271: (20 Nag L R 131) (Pr 5)
('38) AIR 1938 Mad 688: (179 Ind Cas 16) (Pr 7)
('27) AIR 1927 Nag 1: (98 Ind Cas 1057 FB) (Pr 5)
('16) AIR 1916 Pat 267: (1 Pat L J 573 FB) (Pr 5)
('23) AIR 1923 Pat 129: (1 Pat 771) (Pr 5)
('39) AIR 1939 Pat 135: (180 Ind Cas 314) (Pr 5)
('39) AIR 1939 Pat 282: (18 Pat 355) (Pr 7)

JUDGMENT: This is an appeal against an order dated 8-2-1951 by the District Judge, Kutch, in miscellaneous civil application No. 35 of 1950 for setting aside a decree passed ex parte in suit No. 89 of 'Samvat' year 2005.

(2) The respondent sued the appellant on 2-11-1948 for recovering Rs. 46,538-10-3 on the basis of a 'khata' alleged to have been executed by the latter in favour of the former. The appellant who was duly served with summons in that suit applied through his pleader for postponements to file his written statements from time to time. The last application for postponement dated 24-1-49 was rejected by the lower Court. The suit then proceeded ex parte

but it was decreed till 12-12-1949. A decree was drawn up and signed by the District Judge on 20-12-1949.

(3) On 17-1-1950, the appellant filed miscellaneous application No. 35 of 1950 for setting aside the decree passed ex parte on allegation of sufficient cause for non-appearance. The respondent denied sufficient cause for non-appearance alleged and contended that the application was barred by limitation. The lower Court held that though there was sufficient cause for non-appearance, the application was barred by limitation. In the result the lower Court dismissed the application.

(4) The only question to be considered in this appeal is whether the application was barred by limitation. The respondent's learned Advocate supporting the order of the lower Court has challenged the finding recorded that the appellant had sufficient cause for non-appearance.

(5) It was not disputed that the Indian Limitation Act having been made applicable to the Kutch State by the Kutch (Application of Laws) Order, 1949, the application under appeal had to be preferred within 30 days from the date of the decree under Art. 164 of the Act. It is apparent that the application was preferred beyond a period of 30 days computed from 12-12-1949 on which the decree, ex parte was passed. The contention was that the expression 'Date of the decree' used in third column of Art. 164 meant date on which the decree was signed by the Judge of the lower Court and as the decree was signed on 20-12-1949 the application was preferred within time. The expression 'Date of decree' is used in some Articles of the Act commencing from Art. 151 and it means the date on which the judgment was pronounced, although in certain circumstances an appellant may be entitled under S. 12 of the Act to exclude the time intervening between delivery of judgment and the signature of the decree.

This view of the law is taken by other High Courts in India having regard to the imperative provisions of O. 20, R. 7 of the Civil P. C. I may only refer to the latest pronouncement by the Assam High Court in 'KANTIMAL v. MOHAN NATH', AIR 1949 Assam 23, under Art. 152 of the Act. The contrary view expressed in some decided cases 'RAM ASRAY SINGH v. SHEONANDAN SINGH', AIR 1916 Pat 267; 'KHAN CHAND v. GURDIT SINGH', AIR 1936 Lah 976; 'PANDU v. RAJESHWAR', AIR 1924 Nag 271, with due deference cannot be followed by this Court. The view in some of those cases has been reconsidered (view in 'KHAN CHAND v. GURDIT SINGH', AIR 1936 Lah 976 was overruled in 'RAHMAT v. ZILEDAR', AIR 1945 Lah 229 and the view in 'PANDU v. RAJESHWAR', AIR 1924 Nag 271 was explained in 'UMDA v. RUPCHAND', AIR 1927 Nag 1, also see 'SAGARMAL v. LACHMISARAN', AIR 1923 Pat 129, in which contrary view was expressed).

The cases relied on by the learned Advocate for the appellant (BALAPPA v. DYAMAPPA', AIR 1940 Bom 415; 'SARATCHANDRA v. S. RATI KANTA', AIR 1939 Cal 711; 'KAMESHWAR SINGH v. KUSHESWAR', AIR 1939 Pat 135, are reconcilable with the principle of law enunciated above. This contention therefore fails.

(6) Second contention was that exclusion of time intervening between the date on which judgment was pronounced and the date on which the decree was prepared and signed should be excluded and if that exclusion was made, the application was filed in time. Sub-section (2) of S. 12 of the Act provides for exclusion of time requisite for obtaining a copy of the decree in computing period of limitation for proceedings mentioned in it and the time requisite for obtaining a copy is under certain circumstances inclusive of the period intervening between the date on which judgment was pronounced and the date on which decree was actually signed.

But this exclusion can only be had in computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment specifically mentioned in sub-section (2) of S. 12 of the Act and not for an application for setting aside the decree passed 'ex parte' not so specifically mentioned. The exclusion of time requisite is allowed on the principle that the applicant or the appellant as the case may be has to obtain a copy of the decree or order though not necessarily for annexture with the memo of appeal or application ('KESHAR SUGAR WORKS v. R. C. SHARMA', AIR 1951 All 122 FB) and by not specifically including a proceeding for setting aside a decree passed 'ex parte' in S. 12 of the Act, it was intended that a defendant served with summons in a suit had not to obtain a copy of the decree passed 'ex parte' to enable him to apply for setting it aside.

Moreover, for obtaining exclusion of time under S. 12 of the Act it is necessary that an application for a copy be made and though it is a question not free from doubt that application for a copy should be made within the period prescribed for making an application or preferring an appeal, it follows from what is stated above that an application for a copy should be made at least before an appeal or an application as the case may be is filed. Hence, the contention for exclusion of time under S. 12 of the Act fails and it is not necessary to consider what time was requisite having regard to the fact that an application for a copy was not made in this case before the application for setting aside the decree passed ex parte was filed.

(7) Third contention was that though the provisions of S. 5 of the Act do not in terms apply to an application for setting aside a decree passed 'ex parte', the said provisions could be made applicable to such an application and in exercise of powers conferred under S. 125 of the Code of Civil Procedure, this High Court had by a notification No. 12124 dated 25-3-50 made a rule by which the provisions of S. 5 of the Act were made applicable to applications under O. 9, R. 13, Civil P. C. It was urged that this amendment in the procedural law made under the rule-making power of this High Court during the pendency of the proceeding was retrospectively applicable and hence delay of 5 days be condoned.

Reliance was placed on 'GIRDARILAL SON & Co. v. K. GOWDER', AIR 1938 Mad 688; JANAKINATH v. NIRODHARAN', AIR 1930 Cal 422 and 'BIRANCHI SINGH v. NANDKUMAR SINGH', AIR 1939 Pat 282. It is a

principle well established that unless contrary is provided for, the law of limitation applicable to a suit etc., is the law in force at the date when such suit etc., is instituted and not an amending law which comes into operation during the pendency of the suit etc. But when amending law is procedural, as in the present case what was amended was that S. 5 of the Limitation Act applied to applications under O. 9, R. 13 of the Code, it takes effect immediately and applies to all pending proceedings: 'PANDARINATH v. THAKOREDAS', A I R 1929 Bom 262. Hence the appellant could have claimed condonation of delay under Section 5 of the Act provided he moved the lower Court at the proper time with sufficient cause stated in that behalf. The appellant had not done so. It was urged that the appellant should now be allowed an opportunity to do so. This is a belated request which should have been made in the lower Court where the proceeding was pending for more than a year. Moreover, no sufficient cause could have been urged by the appellant for the delay as the applicant had armed himself with a medical certificate on 20-12-49 and he had since then sufficient time to apply for setting aside the decree passed ex parte. Hence this contention fails.

(8) As all the legal contentions raised by the appellant fail, it must be held that the lower Court was right in holding that the application was barred by limitation. It is therefore not necessary to consider at length the applicant's contention before the lower Court what he had sufficient cause. The lower Court has accepted this contention but the learned Advocate for the respondent has challenged that finding. In the lower Court an attempt was made on behalf of the appellant to show that he was ill from November 1948 to December 1949 and reliance was placed on medical evidence led. The lower Court relying on medical evidence found sufficient cause.

In this Court the medical evidence was challenged on the ground that the Doctor had no prescription, never prescribed any medicine, did not enter appellant's name in the register of patients and had till date not charged anything to the appellant. Reliance was also placed on the fact that in October 1949 the appellant had gone to Bombay to the Doctor's dispensary. It was pointed out that the respondent had filed an ejectment suit in Thana Court against the appellant just about this time and that suit was contested by the appellant.

It is unnecessary to enter into a detailed discussion of all these contentions. It appears from the application dated 24-1-49 filed on behalf of the applicant by his pleader that a written statement was prepared and sent to him at Ghatkopar for signature. It thus appears that the pleader engaged had instructions to prepare a written statement. The appellant who it is alleged was suffering from dysentery could have signed the written statement and forwarded it to his pleader at Bhuj. During this period, he had arranged to appear through a pleader and contested the respondent's suit for ejectment in Thana Court. He could have similarly arranged to sign the written statement and forwarded it to his pleader at Bhuj, at any time before the suit was decided after a lapse of 11 months. Though he was ill and bed-ridden, he could have arranged for filing of written statement. This could have led to framing of issues. The respondent had examined some witnesses in Bombay and if the appellant was ill at the time the suit came for hearing, he could have arranged to get himself examined on commission. Thus the illness of the appellant could not have come in the way of filing of a written statement and defending the suit as was being done in Thana Court.

But so far as this Court is concerned, the appellant did not bestir himself for a period of 11 months during which the suit proceeding 'ex-parte', was not decided. This shows that far from there being a sufficient cause the appellant was negligent. It was urged that the suit was for Rs. 45,000/- and it was in appellant's interest to defend it particularly when the question of jurisdiction was all important. It cannot be said why appellant did not care to do so, when between the same parties another suit for ejectment in Thana Court was pending and it was contested and defended. It is therefore difficult to hold that the appellant had established sufficient cause.

(9) Result is that the order made by the lower Court is confirmed and the appeal is dismissed with costs.

V.R.B. *Appeal dismissed.*

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VAKIL J. C.

Thacker Jeraj Keshavji, Plaintiff-Applicant **v.** Chavda Suleman Mod, Defendant-Opponent.

Civil Revn. Appln. No. 28 of 1951, D/- 15-11-1951.

(a) Evidence Act (1872), Ss. 101-103 — Negligence — Onus of proof — Bailment 'locatio rei.'

In the case of bailment of goods left with the bailee to be used by him on hire ('locatio rei') the standard of care required of the bailee is that of an average prudent man in respect of his own goods of the same kind and value in similar circumstances. Where negligence on the part of the bailee is alleged, the burden of proof lies on the bailee to show that such care as a man of ordinary prudence would have exercised was duly exercised by him. (Para 3)

Though the onus of proving negligence alleged is on the plaintiff, where a thing is solely under management or control of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things & using proper care, the accident itself affords prima facie evidence of negligence. (Para 3)

Anno: Evidence Act, Ss. 101-103 N. 18, 44.

(b) Civil P. C. (1908), S. 115 — Material irregularity — Placing of onus of proof wrongly.

Though mere placing of onus wrongly cannot be regarded as a material irregularity for interference in revision, where the effect of doing so was to require the plaintiff to prove specific acts of negligence alleged, the Judicial Commissioner's Court

will be justified in interfering in revision. (Para 4)

Anno: C. P. C., S. 115 N. 12.

P. P. Vaidya, for Applicant; M. H. Dholakia, for Opponent.

ORDER: This is an application for revision of the decree of the District Court Kutch in Regular Civil Appeal No. 446 of 1949 confirming the decree of the Subordinate Judge, Mandvi in regular civil suit No. 109 of 1949.

(2) The applicant sued the opponent to recover Rs. 1075/- as damages caused to a country craft, Rs. 74/7 as rent etc., due and costs of the suit on the allegations that due to negligence of the opponent, the country craft taken by him from the applicant on hire sunk, was carried away in tide and eventually broken into pieces. The opponent denied negligence and contended that despite best efforts made, the country craft was carried away by a strong current and it broke into pieces. The trial Court dismissed the suit for damages and the lower appellate Court confirmed it.

(3) The trial Court as well as the Appellate Court considered the main question of fact involved in the case by placing onus of proving negligence alleged on the applicant and the learned Advocate for the applicant has not raised before me any contention in respect of it. Now the bailment in this case was 'locatio rei' (Goods left with the bailee to be used by him on hire) and the standard of care required of the opponent was that of an average prudent man in respect of his own goods of the same kind and value in similar circumstances. The burden of proof lies on the bailee to show that such care as a man of ordinary prudence would have exercised was duly exercised by him. In cases of contracts of hire, if damage caused is such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then it would be for the hirer to prove that he had exercised such prudence. It is well established that though the onus of proving negligence alleged is on the plaintiff, where a thing is solely under management or control of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things and using proper care, the accident itself affords prima facie evidence of negligence.

(4) There being concurrent findings on the important question of fact by the two lower Courts, ordinarily this Court will not interfere in the exercise of its revisional powers as there is no question of exercising jurisdiction not vested or failure to exercise jurisdiction so vested or acting in the exercise of jurisdiction illegally. What can be urged is that the lower Courts wrongly placed onus of proof on the plaintiff. From the issue framed it appears that onus was not specifically placed on the plaintiff. In the usual course plaintiff opened the case and led evidence. But the two lower Courts decided the principal question of fact involved in the case on the assumption that the onus was on the plaintiff. Though mere placing of onus wrongly cannot be regarded as a material irregularity for interference in revision, where the effect of doing so was to require the plaintiff to prove specific acts of negligence alleged, this Court will be justified in interfering in revision.

(5) It will therefore be necessary to examine the evidence to see whether the conclusion arrived at by both the lower Courts is correct. (After discussing the evidence the judgment proceeded:) The two lower Courts were right in holding that the craft broke due to accident and there was no negligence on the part of the opponent.

(6) Result is that the decree dismissing the suit is confirmed, and the application is dismissed with costs.

V.B.B. *Application dismissed.*

A. I. R. 1952 Kutch 51

VAKIL J. C.

Sameja Abdulkarim Arab, Applicant v. The State of Kutch, Respondent.

Misc. Appln. No. 7 of 1951, D/- 9-11-51.

(a) Constitution of India, Art. 134(1)(c) — Substantial question of law.

A substantial question of law is an important or difficult question of law on which there may be divergence of judicial opinion not set at rest by a pronouncement of the highest Court. But mere existence of a substantial question of law is not sufficient under Article 134(1)(c). It must be shown that as the substantial question of law was not decided in the manner contended for by the applicant, injustice of serious and substantial character had occurred. Case law discussed. (Para 6)

Anno: C. P. C., Appendix III, Constitution of India, Art. 134 N. 1.

(b) Criminal P. C. (1898), S. 342(1) — Omission to point out specific points to accused — Effect.

Though under S. 342 the salient points appearing in evidence against an accused person must be pointed out to him, and he should be asked to render an explanation if so desired. Omission to do so would not necessarily vitiate the trial. AIR 1933 P C 124 and AIR 1946 Bom 465 (SB), Foll. (Para 8)

Anno: Cr. P. C., S. 342 N. 15 Pt. 1 N. 35 Pt. 3.

S. E. Oza, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) 5 Rang 53: (AIR 1927 PC 44: 28 Cri L J 259) (Pr 6)

('33) AIR 1933 PC 124: (34 Cri L J 322) (Pr 8)

('47) 49 Bom L R 508: (AIR 1947 PC 67: 48 Cri L J 533) (Pr 6)

('50) 52 Bom L R 512: (AIR 1950 F C 80: 51 Cri L J 1057) (Pr 5)

('50) AIR 1950 S C 169: (51 Cri L J 1270) (Pr 5)

('16) 38 All 42: (AIR 1915 All 462: 16 Cri L J 813) (Pr 4)

('25) 49 Bom 892: (AIR 1926 Bom 110: 27 Cri L J 305) (Pr 4)

('46) 48 Bom L R 382: (AIR 1946 Bom 465: 47 Cri L J 884 SB) (Pr 8)

('50) AIR 1950 Bom 380: (52 Cri L J 620) (Pr 5)
('51) AIR 1951 Kutch 30: (52 Cri L J 587) (Pr 5)
('07) 30 Mad 328: (5 Cri L J 341) (Pr 4)
('51) AIR 1951 Mad 721: (1952 Cri L J 95) (Pr 5)
('44) AIR 1944 Oudh 122: (45 Cri L J 538) (Pr 4)
('50) AIR 1950 Orissa 235: (1952 Cri L J 120) (Pr 5)
('51) AIR 1951 Pat 439 (2) (Pr 5)

ORDER: The applicant was tried by the Sessions Judge, Kutch, with aid of assessors for offences punishable under Ss. 409 and 477A, I. P. C. and was convicted and sentenced to rigorous imprisonment for 2½ years on each count and to pay a fine of Rs. 500/- for offence under S. 409, I. P. C. He was also similarly tried, convicted and sentenced for separate acts of embezzlement and falsification of accounts. The applicant preferred to this Court two appeals Nos. 27 & 28 against two orders of convictions and sentences. Both the appeals were dismissed except alteration in the sentence from 2½ to 1½ years in one of the two cases. The applicant has filed this application and application No. 8 of 1951 under Art. 134 (1) (c) of the Constitution of India to obtain certificate for preferring appeals to the Supreme Court.

(2) The applicant proposes to appeal to the Supreme Court on the following grounds:

(i) there was mis-joinder of charges under Ss. 409 and 477A which has vitiated the trials in the two cases;
(ii) there was no corroboration to the extra-judicial confessions;
(iii) the imperative provisions of S. 342, Criminal P. C., were not properly complied with; and
(iv) it was improper to rely on the so called admission of the Advocate who appeared for the applicant in appeals before this Court.

(3) To understand the first point urged it is necessary to state a few facts. The applicant was employed as a clerk in the Customs Department at Kandla between 19-5-48 to 15-3-50. It was alleged that the applicant as a public servant committed criminal breach of trust in respect of various items which he received in the course of his duty and fabricated accounts to conceal embezzlements of the said sums. Under sub-section (2) of S. 222, Criminal P. C., the applicant was charged in one case with criminal breach of trust in respect of a gross sum of Rs. 3335-4-0 committed between 19-5-48 to 31-3-49 and in another with criminal breach of trust in respect of a gross sum of Rs. 3250-9-0 committed between 1-4-49 to 15-3-50. To the charge of criminal breach of trust in the case was added a charge of falsification of accounts under S. 477A in respect of the identical items aggregating the two sums of Rs. 3335-4-0 and Rs. 3250-9-0.

In appeals before this Court, it was urged that there was mis-joinder of charges. This Court held that under S. 222 (2) of the Criminal P. C., the embezzlement of the lump sum was one offence and falsification of the entire account with a view to conceal that embezzlement constituted but one transaction for which the appellant could be legally charged and tried at one trial. The applicant proposes to urge before the Supreme Court that the view so held by this Court was erroneous and as there was mis-joinder of charges, the trial was vitiated. It was contended that the case involved substantial questions of law in which there was difference of judicial opinion and therefore, it should be certified as a fit case for appeal to the Supreme Court.

(4) A charge in such a case can be framed in different ways. In 'EMPEROR v. MANANT K. MEHTA', 49 Bom 892, Fawcett J. remarked that the Magistrate might have legally framed his charge so as to comprise only one offence of criminal breach of trust for the aggregate amount alleged to have been embezzled and one other offence for entire falsification of accounts in regard to that embezzlement. The charge in each of the two cases under consideration was framed following the remarks of Fawcett J., in the case quoted above. In the Bombay case, the charge framed was in respect of 3 separate acts of misappropriation and a general allegation was made of falsification of account books in furtherance of fraud.

It appears that the position was improved on what it existed in 'KASIVISWANATHAN v. EMPEROR', 30 Mad 328. The position was no better than combining a charge of falsification of accounts in respect of several items. In 'DEBIPRASAD v. EMPEROR', AIR 1944 Oudh 122, a charge first under S. 408 with having committed criminal breach of trust in respect of gross sum of rupees between two certain dates and a charge under S. 477A of having fraudulently made a series of entries relating to this defalcation in a large number of specified account books and papers belonging to his employers were combined.

It was held that there was no mis-joinder of charges. In 'EMPEROR v. KALKAPRASAD', 38 All 42, it was pointed out that the principle under S. 222(2), Criminal P. C., could not apply to S. 477A, I. P. C. This Court upheld the joinder of charges on the ground that falsification of accounts in respect of each sum was traceable directly to each item in respect of which embezzlement was made and embezzlement and falsification of accounts were alleged to have been made in the course of the same transaction. It is indeed a question of law whether under S. 235, Criminal P. C., read with S. 222(2), joinder of charges which was done in the present case could have been legally made. It also appears that decided cases are not uniform about the proper way of framing a charge in such a case having regard to the provisions of Ss. 222(2), 233, 234 and 235, Criminal P. C.

(5) Before the Constitution of India came into force, the Federal Court in dealing with appeals in criminal matters followed the principle laid down by the Privy Council in number of cases. Some of these cases and the principles enunciated in them are stated in the judgment of the Federal Court in 'KAPILDEVSINGH v. THE KING', 52 Bom L R 512. It appears from these cases that unless injustice of a serious and substantial character occurred, an error, a mistake, an improper admission of evidence or a mis-direction either in leaving a case to a Jury where there was no evidence or founded on incorrect construction of Penal Code was regarded insufficient.

After the Constitution came into force, the Supreme Court considered the question under Art. 136 of the Constitution. In 'PRITAM-SINGH v. THE STATE', AIR 1950 S C 169, it was held that generally speaking the Supreme Court will not grant leave to appeal in criminal cases unless it was shown that exceptional and special circumstances existed, that substantial and grave injustice had been done and that the case in question presented features of sufficient gravity to warrant a review of the decision appealed.

The Orissa High Court, in 'ARJUNA MISRA v. INDIAN UNION', AIR 1950 Orissa 235, granted a certificate of appeal to the Supreme Court under Art. 134 (1) (c) of the Constitution on the ground that there was disregard of the form of legal process in not examining the accused in respect of the property found in his possession. The Bombay High Court in 'W. H. KING v. EMPEROR', AIR 1950 Bom 380, did not grant certificate holding that a mere question of law would not be enough. It was observed that there must be at least a substantial question of law.

The Madras High Court in 'CHUNCHU NARAYAN v. KARAPATI KESAPPA', AIR 1951 Mad 721, did not grant a certificate though the case involved a question of law in which there was sharp divergence of opinion on the ground that it was not of such general or public importance. The Patna High Court in 'MOHITLAL v. STATE', AIR (38) 1951 Pat 439 (2) observed that for granting certificate, there must be something so irregular or outrageous as to shock the very basis of justice. It was held that even if there was an error of law or an error of procdure adoptetd, it was not sufficient. Lastly this Court in 'NANALAL v. GOVERNMENT OF KUTCH', AIR (38) 1951 Kutch 30, refused to grant a certificate as the question involved of was only a question of law and not of the substantial question of law.

(6) In the light of the case law reviewed in the preceding para, it is necessary to consider whether the present case can be certified as fit for appeal to the Supreme Court. This is a simple case of criminal breach of trust and falsification of accounts. There are no exceptional or special circumstances existing nor does the case present features of sufficient gravity to warrant a review of the decision. Only a question of law that there was a mis-joinder of charges is raised and it is urged that it is a substantial question of law. A substantial question of law is an important or difficult question of law on which there may be divergence of judicial opinion not set at rest by a pronouncement of the highest Court. But mere existence of a substantial question of law as defined above is not sufficient under Art. 134 (1) (c). It must be shown that as the substantial question of law was not decided in the manner contended for by the applicant, injustice of serious and substantial character had occurred. This could not have been urged by the applicant as the defence taken up by him in view of the prosecution evidence was that embezzlements were made and false entries in the accounts were written at the instance of superior officers who alone gained the benefit of the culpable acts.

Moreover, this Court had observed that it had not been shown that the appellant had been prejudiced in the case and it was certainly convenient for the prosecution and the appellant that there could be one trial instead of number of trials for mis-appropriation of each minor item and falsification of accounts in respect of it. The learned Advocate for the applicant contended that if it was held that there was mis-joinder of charges it was an illegality resulting in the trial being vitiated and it was not an irregularity covered by S. 537, Criminal P. C. In 'P. KOTAYYA v. EMPEROR', 49 Bom L R 508 P. C., their Lordships observed as under:

> ".....but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board, in 'ABDUL RAHMAN v. KING EMPEROR', 5 Rang 53, where failure to comply with S. 360 of the Code of Criminal Procedure was held to be cured by Ss. 535 and 537."

Thus the first and most important ground urged for obtaining a certificate fails.

(7) Second ground which the applicant proposes to urge is that extra judicial confessions were not corroborated by other independant evidence. The Public Prosecutor contends that evidence was led to show receipt of money by the applicant and of falsification of accounts by him in respect of money received by him. In the letters the applicant admitted this fact. Thus the conviction was not based solely on the letters. Hence this ground fails.

(8) The third ground on which the applicant proposes to appeal to the Supreme Court is that in one of the two cases the applicant was not examined with reference to the evidence of letters written by him. The Public Prosecutor pointed out that in that case the applicant himself had given explanation about the letters. It is true that under S. 342, Criminal P. C., the salient points appearing in evidence against an accused person must be pointed out to him, and he should be asked to render an explanation if so desired. Vide 'DWARKANATH v. EMPEROR', AIR 1933 P C 124. This case was referred to in 'HASHAMATULLA v. EMPEROR', 48 Bom L R 382, in which it was held that it did not follow that omission to question the accused person on specific points, even though it might be the duty of the Judge to do so would necessarily vitiate the trial.

(9) The last ground on which the applicant proposes to appeal to the Supreme Court is that the applicant's Advocate in appeal before this Court very frankly conceded that the applicant could not escape his liability for the various acts of criminal breach of trust. In other words, the Advocate conceded that the applicant had no case on merits. This Court did not solely rely on the so called admission by the Advocate for the appellant. In appeal, this Court observed as under:

> "I have examined the appellant's own plea in the Court which shows how completely jus-

tified the learned Advocate's attitude has been."

Hence this ground also fails.

(10) Thus the case cannot be certified as a fit one for appeal to the Supreme Court. The application, therefore, stands dismissed.

V.R.B. Application dismissed.

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VAKIL, J. C.

Parshottam Jethanand, Accused-Applicant v. The State.

Criminal Misc. Appln. (Leave to appeal) No. 5 of 1951, D/- 19-12-1951.

(a) Constitution of India, Art. 134(1)(c) — Certificate of fitness — Police officer making complaint to Magistrate in respect of non-cognizable offence — Criminal P. C. (1898), Sections 4 (1) (h) and 190 and Ss. 529 and 530.

Where a police officer who was investigating a complaint made by a person in respect of a cognizable offence made a complaint to the Magistrate in respect of a non-cognizable offence, the complaint is valid in view of the definition in Section 4(1)(h). It was open to the Magistrate to have asked the police officer to investigate the complaint. The proceeding of the Magistrate is not liable to be quashed because the police officer instead of resorting to S. 155 filed a complaint. Section 529 (e) and not Section 530 applies in such a case. The question is not of such public or private importance that a certificate of fitness can be issued. (Paras 4, 5, 9)

Anno: Cr. P. C., S. 4(1)(h) N. 2, 5, 13; Section 155 N. 2, 3, 4; S. 529 N. 2.

(b) Constitution of India, Art. 134(1)(c) — Certificate of fitness — Terror of criminal complaint — Penal Code (1860), S. 385.

Terror of a criminal complaint, whether true or false amounts to fear of injury and the guilt or innocence of the party threatened is immaterial. Where in the complaint it was stated that a person put another in fear that as his passport was false he would be prosecuted, the complaint discloses commission of an offence. The point is not of such a public or private importance that a certificate of fitness can be issued. (Paras 6, 9)

Anno: Penal Code, S. 385 N. 1.

(c) Constitution of India, Art. 134(1)(c) — Certificate of fitness — Sufficiency of evidence.

A question of sufficiency or credibility of evidence in proof of a particular fact is not a case of private importance specially when there are concurrent findings of fact and no certificate under Art. 134(1)(c) can be granted. (Para 7)

(d) Constitution of India, Art. 134(1)(c) — Certificate of fitness — Failure to supply copies under S. 162, proviso, Criminal P. C. — Criminal P. C. (1898), S. 162, Proviso.

Where the case in respect of which complaint was made was not investigated by the Police the accused is not entitled under the proviso to S. 162, Cr. P. C. to copies of Police statements recorded in the course of investigation of case started on the report of the accused. It is one thing to ask for statements under the proviso to S. 162, and another thing to request the Court for production of some documents or statements for contradiction of a witness. This is not a question of law and no certificate of fitness under Art. 134(1)(c) can be granted. (Para 8)

Anno: Criminal P. C., S. 162 N. 14, 20a.

S. B. Oza, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

Cases referred to:

(1900) 23 All 227: (28 Ind App 11 PC) (Pr 3)

('21) AIR 1921 PC 25: (63 Ind Cas 898 PC) (Pr 3)

('50) 52 Bom L R 534: (AIR 1950 Bom 380: 52 Cri L J 620) (Pr 3)

('51) AIR 1951 Mad 721: (1952 Cri L J 95) (Pr 3)

('51) AIR 1951 Pat 437: (52 Cri L J 701) (Pr 3)

ORDER: The applicant was tried and convicted by the Magistrate, First Class, Mandvi, for an offence under S. 384, I. P. C. The conviction and sentence, on appeal were confirmed by the Sessions Judge, Kutch and were further confirmed in revision by this Court. The present application is filed under Art. 134 (1) (c) of the Constitution for leave to appeal to the Supreme Court.

(2) The applicant proposes to appeal to the Supreme Court on the following grounds: (i) The Trying Magistrate was not entitled to take cognizance of the offence and under S. 530, Criminal P. C., his proceeding was void; (ii) The complaint did not disclose commission of any offence and hence the proceeding was liable to be quashed; (iii) The Sub-Inspector of Police instead of filing the complaint should have proceeded under S. 155, Criminal P. C., and his omission to do so has prejudiced the applicant; (iv) The conviction was based on tainted and discrepant evidence and hence it is liable to be set aside; (v) The trial Court should have furnished copies of the statements recorded under S. 162, Criminal P. C.

(3) Article 134 of the Constitution constitutes the Supreme Court as a Court of criminal appeals in limited class of cases specified herein. One of the classes specified is that a case is a fit one for appeal to the Supreme Court. The expression 'a case is a fit one for appeal to the Supreme Court' is also used in S. 109, Criminal P. C. This expression was interpreted to mean a case of great public or private importance, vide 'BANARASI PROSAD v. KASHI KRISHNA', 23 All 227 (P C) and 'RADHA KISHEN v. SWAMINATH IYER', AIR 1921 P C 25.

Following these cases, the Patna High Court in 'RAGHUBANS PRASAD v. LAXMAN GOPE', AIR 1951 Pat 437, refused to grant leave in a case in which a Magistrate took cognizance on a police report of a likelihood of a breach of peace. In 'EMPEROR v. W. H. KING', 52 Bom L R 534, the Bombay High Court refused to grant a certificate in a case which involved construction of Bombay Act LVII of 1947. The Madras High Court in 'CHUNCHU NARAYANA v. KESAPPA', AIR 1951 Mad 721, refused to grant certificate in a case which involved a question of law on which there was sharp divergence of opinion on the ground that it was

not of such general or public importance. Bearing in mind the principle of law and its application in cases stated above, I proceed to consider whether this is a fit case in which leave to appeal should be granted.

(4) As regards the first point, the contention is that the trying Magistrate was not specially empowered under S. 190 (1) (a) and (b), Criminal P. C. and hence his proceeding was vitiated. The Sessions Judge accepted the first part of the contention but relied on S. 529 for curing the irregularity. This Court on construction of the particular notification held that the trying Magistrate must be deemed to have been specially empowered. It was further held that the irregularity, if any, was cured under S. 529.

It was contended that the Magistrate not empowered by law had taken cognizance and hence under S. 530, his proceeding was void. The Magistrate had taken cognizance on a complaint and hence clause (e) to S. 529, Criminal P. C. applies. The Magistrate had not taken cognizance upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed. It is true that in this case, a Police Officer who was investigating a complaint made by the applicant in respect of a cognizable case had made the complaint in respect of a non-cognizable offence. In view of the definition of the term 'complaint' in S. 4 (1) (h), Criminal P. C., the Police Officer was entitled to make the complaint.

(5) It was then contended that the Police Officer should have obtained permission of the Magistrate under S. 155, Criminal P. C. for investigation of the non-cognizable case instead of filing the complaint. The Police Officer was not bound to do so. It was open to the Magistrate to have asked the Police Officer to investigate the complaint. The proceeding of the Magisrate is not liable to be quashed because the Police Officer instead of resorting to S. 155, filed a complaint.

(6) Next contention was that the complaint did not disclose commission of an offence. It was urged that in the complaint it was stated that the applicant put Ananda Ratna in fear that as his passport was false he would be prosecuted. It was contended that the mere fact that a person was told that as his passport was false he would be prosecuted did not amount to putting in fear of injury to him. Terror of a criminal complaint, whether true or false amounts to fear of injury and that the guilt or innocence of the party threatened is immaterial.

(7) It was then contended that conviction was based on tainted and discrepant evidence. The evidence was styled 'tainted' as the applicant had made a report against some of the witnesses in respect of passports. This does not make the evidence tainted. At the most it can be said that the witnesses had got a reason to depose against the applicant. This is a question about appreciation of evidence. The two Courts had accepted the evidence. This Court in revision would not reappreciate evidence. It was contended that in a fit case the 'highest Court' can re-appreciate evidence. A question of sufficiency or credibility of evidence in proof of a particular fact is not a case of private importance specially when there are concurrent findings of fact.

(8) Lastly it was contended that the trial Court should have furnished copies of Police statements to the applicant. It was conceded that the case in respect of which complaint was made was not investigated by the police & hence under the proviso to S. 162, Criminal P. C., applicant was not entitled to copies of Police statements recorded in the course of investigation of case started on the report of the applicant. It was contended that the Magistrate should have called for these statements. It is one thing to ask for statements under the proviso to S. 162 and another thing to request the Court for production of some documents or statements for contradiction of a witness. The point is dealt with in the judgment. This is not a question of law.

(9) None of the first three points is of such public or private importance that a certificate of fitness can be issued. Points Nos 4 and 5 have been considered in paras 7 and 8 above. I do not, therefore, regard this a fit case in which a Certificate of fitness can be issued. The application fails. It is dismissed.

D.H. Application dismissed.

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VAKIL J. C.

Sha Karamshi Vershi, Appellant v. Sha Ratanshi Nenshi and another, Respondents.

Second Appeal No. 9 of 1951, D/- 11-2-52.

(a) Civil P. C. (1908), O. 6, R. 2 — Inconsistent pleas.

Inconsistent pleas are not prohibited by the Code. It is for the party raising inconsistent pleas to see how they could be supported at the trial. If the pleas are absolutely inconsistent, they may prove mutually destructive. At any rate, in practice, the defence may be much weakened. (Para 7)

Anno : C. P. C., O. 6, R. 2 N. 5 Pt. 4.

(b) Transfer of Property Act (1882), S. 41 — Ostensible owner — Who is — On facts of case transferor held to be ostensible owner.

An ostensible owner is a person who has got indicia of ownership such as title, possession or entries in records made to show ownership. (Para 8)

Where on the death of their widowed mother the daughters succeeded to the property of their father and thereafter allowed 'A', a paternal agnate, who was treated as a member of the family, to take possession of the property, and allowed him to enter into an agreement of sale of a portion of the property and this they allowed him to do despite the fact that the eldest of them was living with him, others were not far away and they had relations to watch their interest:

Held that 'A' was the ostensible owner of the property by the implied consent of the daughters. (Para 8)

Anno : T. P. Act, S. 41 N. 8.

(c) Transfer of Property Act (1882), S. 41 — Ostensible owner — Consent — Inference from conduct subsequent to alienation.

The material date for considering whether a particular person is an ostensible owner is no doubt the date of alienation. But inferences showing consent of the real owner can be made from previous as well as from subsequent conduct. (Para 10)
Anno : T. P. Act, S. 41 N. 10.

(d) Transfer of Property Act (1882), S. 41 — Good faith — Daughters succeeding to their father's property — 'B', paternal agnate, allowed by daughters to deal with property as owner — 'C' purchasing property from 'B' — 'C' belonging to same caste to which father belonged and knowing latter's family — 'C' held did not act in good faith. (Para 11)
Anno : T. P. Act, S. 41 N. 22.

(e) Transfer of Property Act (1882), S. 41 — Transfer by ostensible owner — Implied consent of real owner — Applicability of principle of estoppel — Need for specific pleading—(Evidence Act (1872), S. 115) — (Civil P. C. (1908), S. 100).

Where a transfer of property is effected by an ostensible owner with the implied consent of the real owner, there is scope for the application of the principle of estoppel enunciated in S. 115 of the Evidence Act and it is not necessary to establish ostensible ownership and good faith of the transferee. But such a case must be pleaded and cannot be made out by a Court of appeal in the absence of a specific pleading to that effect. (Para 11)
Anno : T. P. Act, S. 41 N. 2; Evidence Act, S. 115 N. 49; C. P. C., S. 100 N. 55, Pt. 4.

R. R. Thacker, for Appellant; M. M. Mehta, for Respondent (No. 1).

JUDGMENT: This is a Second Appeal from the decree of the District Court, Kutch, in Civil Appeal No. 148 of 1949, reversing the decree of the Assistant District Court in Suit No. 50 of 'Samvat' 2002 and decreeing the plaintiff's suit with costs throughout.

(2) Plaintiff-respondent 1 brought Suit No. 50 of 'Samvat' 2002, to recover possession of the plaint mentioned lands hereinafter mentioned as 'said lands' from the appellant, on the allegations that the said lands of the ownership of Bhula Visar and inherited by his three daughters, hereinafter mentioned as the daughters, on his death and on the death of his widow, were purchased by him from them for consideration and that respondent 2, who had nothing to do with the said lands, unlawfully took their possession on death of the widow of Bhula and transferred their possession to the appellant.

(3) The appellant resisted the suit contending that on death of the widow of Bhula, respondent 2 succeeded to his property. In the alternative, it was contended that by implied consent of the daughters, respondent 2 was ostensible owner from whom he had purchased the said lands for consideration.

(4) The trial Court held that though the daughters were real owners of the property on the death of their mother, respondent 1 was entitled to succeed on the principle of ostensible ownership. The District Court held that respondent 2 was not an ostensible owner with the implied consent of the daughters and that appellant had not acted in good faith after taking reasonable care to ascertain that his transferor (respondent 2) had power to make the transfer. The District Court therefore reversed the decree of the trial Court dismissing the suit and decreed it. The appellant has preferred this second appeal under S. 32 of the Kutch Courts Order, 1948.

(5) Two points for determination which arise in this Second Appeal are whether respondent 2 was ostensible owner of the property in suit with the implied consent of the daughters and whether the appellant had acted in good faith after taking reasonable care to ascertain that his transferor had power to make the transfer.

(6) For determination of the aforesaid points, the undisputed facts and facts established in evidence are that Bhula Visar who owned the suit property and other property died in 'Samvat' 1970, survived by his widow Hirbai and his three daughters, Laxmi, Ratan and Dahi. Respondent 2, Ratansey Ladha is a son of the second cousin of Bhula. As he became an orphan during his childhood, he was brought up and was residing with Bhula and after his death with his widow Hirbai. After Bhula's death, respondent 2 was regarded a male member of the family of Bhula and as such he was managing the property of Bhula jointly with Hirbai till she died in the year 'Samvat' 1988. Before her death, Hirbai had mortgaged the suit lands and other property of her husband with one Kuverjee in 'Samvat' 1987 for 2501/- Kories.

When Hirbai died, Laxmi, her eldest daughter had become a widow and was residing with her. Dahibai was married in the same village Sherdi and was residing with her husband. Ratan had also married and she was residing with her husband at Devpar at a distance of 3 miles from Sherdi. In 'Samvat' 1989, respondent 2 who was living with Laxmibai effected a further mortgage on the property of Bhula for 1000/- 'Kories' in favour of one Kuverjee. In the same year he agreed to sell the suit lands to the appellant. In pursuance of the agreement, respondent 2 sold the suit lands to the appellant in 'Samvat' 1990 for 3601 'Kories' and passed a sale deed as owner. Since then respondent 2, who continued to live with Laxmibai, effected alienations of other property of Bhula.

In some of the deeds executed by respondent 2, attestations of one or more daughters were obtained. None of the daughters ever objected to the alienations of Bhula's property being effected by respondent 2. In 'Samvat' 2002, that is 12 years after alienation was made in favour of the appellant, the daughters sold the suit property to the plaintiff, respondent 1, their near relation on maternal side. Evidently the sale deed was passed to enable the plaintiff-respondent 1 to file the present suit for challenging the alienation made by respondent 2 in appellant's favour.

(7) The principal contention of the appellant in resisting the suit was that his transferor succeeded to the property of Bhula. This contention on the face of it was untenable and though a mild attempt was made in the trial Court to support it by alleging that according to the custom of the caste, a paternal agnate of a deceased succeeded him in preference to his daughter, it was not disputed before me

that according to law, daughters succeeded to his property. The District Court observed that in view of the principal contention of the appellant, there was no question of Respondent 2 being an ostensible owner. The District Court over-looked the fact that the contention under S. 41, T. P. Act was taken by the appellant in the alternative.

It is true that by these contentions inconsistent pleas were raised. But inconsistent pleas are not prohibited by the Code. It is for the party raising inconsistent pleas to see how they could be supported at the trial. If the pleas are absolutely inconsistent, they may prove mutually destructive. At any rate, in practice, the defence may be much weakened. In this case, the pleas were not absolutely inconsistent though advisability of raising the principal contention in the absence of very strong evidence to support it may well be doubted. It was not absolutely inconsistent for the appellant to say that according to the custom of the caste, Respondent 2 succeeded to the property of Bhula and in the alternative to say that he was ostensible owner by the consent of the daughters. The District Court thought that as Respondent 2 was the real owner from the point of view of the appellant, he could not be an ostensible owner. A person may be a real owner or he may be ostensible owner with the consent of the real owner. A purchaser from such an owner is entitled to support his title either way.

(8) From the way in which issue No. 2 was framed by the trial Court and from the discussion made on that issue in the judgment, it does not appear that the trial Court understood and appreciated the equitable doctrine of estoppel enunciated in S. 41 of the T. P. Act. To show that the daughters who were the real owners, by their implied consent, allowed Respondent 2 to hold out as an ostensible owner, the appellant relied on evidence summed up in Para 5 above. An ostensible owner is a person who has got indicia of ownership such as title, possession or entries in records made to show ownership. The appellant relied on the fact that Respondent 2 was in possession of the said lands. This fact could not have been denied as the appellant could not have got possession if it was not with Respondent 2. In the plaint it was alleged that Respondent 2 had been in unlawful possession after Hirbai died.

No attempt was made to support this averment as it was impossible to do so in view of the fact that Laxmibai was residing with Respondent 2. On the contrary, an attempt was made to show that Hirbai and Respondent 2 were in possession in the life time of the former and that Respondent 2's possession as an agent of Hirbai, continued in that capacity after her death. When Hirbai was in possession it is not correct to say that Respondent 2 was in possession. Respondent 2 who was treated as a male member of the family was helping Hirbai in cultivation of lands and management of the property. It cannot therefore be said that he was in possession of the property during Hirbai's life time.

After death of Hirbai, Respondent 2 redeemed the mortgage and sold the suit lands to Kuverjee. Before sale, an agreement of sale was entered into. It is not the case of the Respondent 1, that this transaction was entered into in secrecy. There is therefore reason to hold that the daughters knew about it. Thus the daughters allowed Respondent 2 to take possession of the property of Bhula after Hirbai died, allowed him to create a further mortgage as heir of Bhula and further allowed him to enter into an agreement of sale in respect of the suit property. This they allowed him to do despite the fact that eldest of them was living with Respondent 2, others were not far away and they had relations to watch their interest. The conclusion is therefore irresistible that Respondent 2 was the ostensible owner by their implied consent. The fact that the daughters did not raise their fingers against Respondent 2 in respect of the alienation in favour of the appellant for more than 12 years and that they have not yet objected to any subsequent alienation made by Respondent 2 lead to an irresistible conclusion that the Respondent 2 was the ostensible owner with the consent of the daughters.

(9) The District Court, however, came to a contrary conclusion and as the learned pleader for Respondent 1 has adopted the reasoning in judgment of the District Court in support of the decree made by it, I will proceed to consider some salient points made out in that judgment. The first point made out was that Respondent 2 was managing Bhula's property in the life time of Hirbai and that he was managing it in the same manner after Hirbai's death. It was therefore concluded that he had not taken possession of Bhula's property. Respondent 2 was only helping Hirbai in the management of the property. After Hirbai died, Respondent 2 proclaimed himself as heir to the property of Bhula as is evident from the recital in the mortgage of 'Samvat' 1989 and took possession of the property as stated in the preceding para.

Laxmibai in her evidence admitted that on death of her mother, Respondent 2 came into possession of her father's property. It was observed by the District Court that the daughters of Bhula would not know about the mortgage transaction of 'Samvat' 1989. Laxmibai avoided the question by stating that she did not know whether Ratansey (Respondent 2) had borrowed 1000/- 'Kories'. As stated in the preceding para, there is nothing to show that this transaction was kept secret. The fact that the alienation was not challenged by the daughters for a period of 12 years showed that they allowed Respondent 2 to effect the said transaction and intentionaly induced the appellant to purchase the said lands from him as an owner. Not only that but when a particular transferee wanted that the daughters should attest the transfer deed to show their consent, the daughters attested the deed. It is not the plaintiff's case that the daughters did all this in ignorance of their rights.

(10) It seems to have been realised that the subsequent conduct of the daughters was almost conclusive against them. But the District Court got over this evidence by stating that it was irrelevant for consideration of the question. In fact it was most relevant to show that they consented to Respondent 2 holding out as an ostensible owner. It is true that the material date for considering whether a particular person is an ostensible owner is the date of

alienation. But inferences showing consent can be made from previous as well as from subsequent conduct. The District Court therefore erred in not considering this important evidence from which consent could be inferred. Respondent 2 was thus an ostensible owner with the consent of the daughters and the appellant purchased the said lands from him for consideration. It is important to note that the consideration consisted of 3601 'Kories', of which there was the mortgage debt of 2501 'Kories' contracted by Hirbai and Respondent 2 had contracted debt of 1000 'Kories' presumably to defray expenses incurred for funeral rites of Hirbai.

(11) The second point for determination is whether appellant had acted in good faith after taking reasonable care to ascertain that his transferor had power to make the transfer. Exhibit 18 is the reply given by the appellant to the notice given to him by the Respondent 1 before institution of the suit. Exhibit 18 is vague and evasive. Exhibit 11 is the written statement of the appellant. It was not stated in Exhibit 11 that appellant had acted in good faith after taking reasonable care to ascertain that Respondent 2 had power to make the transfer. I do not propose to conclude the appellant because of this omission.

When issues were framed, the only thing known about this law of equitable estoppel was "the principle of ostensible ownership". The trial Court did not consider this question. The appellant in his evidence did not state that he acted in good faith. The appellant is the resident of the same village. He belongs to the same caste to which Bhula belonged. Appellant knew the family of Bhula. The appellant could not have therefore denied that the daughters succeeded to the property of Bhula. He alleged that Respondent 2 succeeded to the property in view of the custom of the caste. Apparently this was an after-thought as it was neither stated in Exhibit 18 (reply to the plaintiff's notice) nor in appellant's written statement. What appears to have happened is that the appellant purchased the property from Respondent 2 as the latter was allowed by the daughters to deal with the property of Bhula as an owner. The appellant cannot be held to have acted in good faith when he knew or was at least expected to know, as every Hindu is expected to know, that lineal descendants of a deceased including daughters, succeed to his property in preference to a paternal agnate.

Besides harping on the innovated version that according to the custom of the Caste, Respondent 2 succeeded to the property of Bhula, appellant had nothing to show that he took reasonable care to ascertain that the transferor had power according to law to make the transfer. He could not have done so as he purchased the said lands from Respondent 2 who was allowed by the daughters to alienate them as an owner.

Thus this appears to be a case in which being an ostensible owner by the consent of the daughters was not very material as transfer appears to have been effected with the implied consent of the daughters. If this was so, there was scope for the application of the principle of estoppel enunciated in S. 115 of the Indian Evidence Act and it would not have been necessary to establish ostensible ownership and good faith of the appellant. Such a case must be pleaded and cannot be made out by a Court of appeal in the absence of a specific pleading to that effect. The second point for determination must therefore be found in the negative.

(12) The respondent 1 was therefore entitled to succeed and the lower appellate Court was right in decreeing possession. However, the fact that the property was subject to two mortgages and was redeemed with the consideration of the sale in favour of the appellant, appears to have been lost sight of. As stated in Para 6 above, the first mortgage was effected by Hirbai and the daughters were bound by it. The second mortgage was effected to defray expenses of the funeral rites of Hirbai. The daughters would have taken the property subject to the debts. It is therefore equitable that before their transferee gets possession, appellant be paid the sum of 3501/- 'Kories'. The appellate Court awarded mesne profits to Respondent 1. As a conditional decree for possession is to be passed no question of mesne profits arises. As Respondent 1 has succeeded, he is entitled to his costs except for mesne profits claimed. Hence the following order is made.

(13) The decree passed by the lower Court is modified by deleting the relief for mesne profits, both past and future, and by providing that possession be handed over to the plaintiff on his depositing a sum of 3501/- 'Kories' for payment to defendant 1. Rest of the decree passed by the Lower Appellate Court is confirmed except that cost of mesne profits is not allowed and the appeal is dismissed. Appellant to pay Respondent 1's costs of this appeal.

V.R.B. Appeal dismissed.

A. I. R. 1952 Kutch 58

VAKIL J. C.

Sha Monshi Verjang having died his heirs Sha Dhanji and another, Defendants 1 & 3-Applicants v. Sha Jivraj Mandan having died his heirs Sha Newji Jivraj and another, Plaintiffs-Opponents.

Civil Revn. Appln. No. 115 of 1951, D/- 6-11-51.

(a) Civil P. C. (1908), S. 20 — Suit on contract (Khata) — Cause of action.

A Khata may contain a stipulation for payment at any place specifically or generally provided in it. But unless the creditor calls upon the debtor to make payments at a specified place, it cannot be said that the contract was to be performed at that place. If the debtor is so called upon, it is necessary to specifically make that averment in the plaint. (Para 4)

Anno: C. P. C., S. 20 N. 19.

(b) Civil P. C. (1908), S. 20 Expl. 1 — Several places of residence.

Where certain persons from Kutch went to Bombay a few years ago for business and had no residence of their own in Bombay, but had their places of residence in Kutch, their other members of the family living in those places:

Held that they had two places of residence and the Court in Kutch had jurisdiction to entertain suit against him. AIR 1949 Bom 304; AIR 1941 Cal 670, Rel. on. (Paras 4, 5)

Anno: C. P. C., S. 20 N. 5.

U. K. Gor, for Applicants; M. M. Mehta, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras.

(1900) 2 Bom LR 605 3
('49) AIR 1949 Bom 304: (51 Bom LR 485) 4
('41) AIR 1941 Cal 670: (ILR (1941) 1 Cal 490) 4
('50) AIR 1950 Kutch 66 4

ORDER: This is an application for revision of an order dated 4-7-1951 in Miscellaneous Appeal No. 4 of 1951 by the District Judge, Kutch, setting aside an order dated 20-7-1950 made by the Civil Judge (S.D.) Kutch in Suit No. 82 of 1950 under O. 7, R. 10, Civil P. C.

(2) The suit was instituted by the opponents against the applicants and against one Palaibai, mother of applicant 1, to recover a sum of Rs. 4000/- on the basis of a khata executed by the respective fathers of the applicants. In para. 6 of the plaint it was stated that the cause of action arose in Bombay and in Kutch. In para. 4 of the plaint it was stated that the original debtors and applicants were the permanent residents of Kutch. In para. 3 of the plaint it was stated that there was a stipulation in the Khata for payment in 'Desh Pardesh' which meant Bombay or Kutch. In the description of the parties it was stated that the applicants were for the present residing in Bombay for business though their place of residence was Bidada.

(3) The suit was resisted by the applicants on various grounds one of which was that the Court had no jurisdiction to entertain the suit as the cause of action arose in Bombay and applicants were actually and voluntarily residing in Bombay and were carrying on business there. There was no specific denial of the averment in the plaint that the applicants were the permanent residents of Bidada in Kutch State. In the trial Court, issues on all contentions raised were framed and evidence was led. The trial Court decided the question of jurisdiction and on finding that question against the opponents made the order stated in para. 1 above for return of the plaint for presentation to the proper Court.

The trial Court held that the particular stipulation in the Khata did not give a cause of action to the Kutch Court. It further held that as the applicants were actually and voluntarily residing in Bombay and carrying on business there, it had no jurisdiction to entertain the suit and the facts that the applicants had dwelling houses in Bidada, their family members were residing in those dwelling houses and they used to frequently go to Bidada were not material. Reliance was placed on a case reported in 'UGARCHAND v. SURAJMAL', 2 Bom LR 605.

The District Court was inclined to hold that the particular stipulation in the Khata would give cause of action to the Kutch Court, if there was a specific averment in the plaint. The District Court relied on the facts established and considered that from the time of the applicant No. 1's father, premises taken on rent in Bidada and the family of the applicant used to stay there. Applicant No. 1 who was 22 years of age on the date of his deposition before the trial Court was brought up at Bidada by his paternal aunt. His wife stays in that premises at Bidada. He has no place of residence in Bombay. He lives with his uncle. Applicant No. 2 had rented another premises of Nanja Raju at Bidada for the last 7 years. Thus applicant No. 2's wife and mother were residing in Bidada and he was lodging with a relative in Bombay to do business. From these facts the District Court held that applicants had got permanent residence in Bidada and hence the trial Court had jurisdiction to entertain the suit.

(4) The learned Advocate for the respondents did not contend before me that the particular stipulation in the Khata gave jurisdiction to the Court. As pointed out by the District Court, opponents had to aver in the plaint that they called upon the applicants to make payment at a particular place in Kutch. A Khata may contain a stipulation for payment at any place specifically or generally provided in it. But unless the creditor calls upon the debtor to make payments at a specified place, it cannot be said that the contract was to be performed at that place. If the debtor is so called upon, it is necessary to specifically make that averment in the plaint. As the opponents had not made any such averment it is not necessary to reconsider the decision of this Court in 'MANEK DEVJEE v. RATANBAI', AIR 1950 Kutch 66.

On behalf of the applicants it was contended that as they were residing in Bombay and were carrying on business there, the mere fact that they used to occasionally visit Kutch which was their native place would not give jurisdiction to the Kutch Court to entertain the suit. Though the applicants have no place of residence of their own in Bombay as they reside in Bombay with their relatives, they nevertheless actually and voluntarily reside in Bombay. Having regard to the age of the applicants it seems that they must have gone to Bombay since last 4 years for doing business. It cannot therefore be said that Bombay is their temporary residence only. Many persons from Kutch have gone to Bombay for business. It cannot be accepted that Bombay is a place of temporary residence of all of them. The clearest is the case of those who go to Bombay for a job for a few years and return back to Kutch. Provision for temporary residence in explanation I to Section 20 was made for such persons. Some go to Bombay and start business. They are in the stage of settling down. They have more than one place of residence at the same time, 'JUHARIMAL v. LILADHAR', AIR 1949 Bom 304, and Kutch will be their dwelling place if there is animus revertendi, 'BHAGAT SINGH v. JAGBIR SAWHNEY', AIR 1941 Cal 670. Some have actually settled down in Bombay for years. They visit Kutch on occasions. Though they might have necessary animus revertendi, Bombay will be regarded as their sole and permanent place of residence. Applicants' case falls under the second category mentioned above. Applicants have gone to Bombay a few years ago for business. The fact that they have no residence of their own in Bombay shows that they are in the stage of settling down. They have their places of residence in Kutch. Their other members of the family live in these places. Of course their visits to Kutch cannot be so frequent as would be the case of the people of Poona and Surat residing in Bombay as the distance is great and means of communication are not so up-to-date. But animus revertendi is there as in the event of failure in business or for any other cause they can go back to Kutch and live there.

(5) As the applicants had at the time of the commencement of the suit two places of residence, the trial Court had jurisdiction to entertain the suit. The order made by the District

Court is correct. It is a confirmed and the application is dismissed with costs.

V.B.B. Application dismissed.

A. I. R. 1952 Kutch 60

VAKIL J. C.

Ganatra Vishanji Kuverji, Accused-Applicant v. The State.

Criminal Revn. Appln. No. 5 of 1952, D/- 12-4-1952.

Criminal P. C. (1898), S. 345 (5A) — Composition in revision — Powers of High Court.

In granting permission for composition of an offence the Court has to exercise discretion vested in it judicially. The nature of the alleged offence, circumstances under which it is alleged to have been committed, relationship between the parties, possibility of parties living in peace and harmony if composition is allowed, stage at which composition is sought are some of the facts to be considered in deciding whether permission should be granted. (Para 3)

As a Court of revision, the High Court can, under Section 345 (5A), allow composition in a proper case. The High Court will exercise discretion not only on consideration of circumstances which the trial Court was bound to consider but it will further consider whether there is illegality or impropriety alleged and whether the parties had made attempt to compound while the matter was before the trial Court. AIR 1939 Cal 728 and AIR 1948 Pat 58, Rel. on. (Para 3)

Where the facts alleged against the applicant and held proved by the Court below were that he cheated the complainant to the extent of Rs. 120 by professing to sell him crude oil:

Held that though the nature of the offence was not a serious one, it was desirable in the interest of preserving business morality that no composition of such offences should be allowed. (Para 4)

Anno: Cr. P. C., S. 345 N. 16.

M. M. Mehta, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

Cases referred to:

('39) AIR 1939 Cal 728: (41 Cri LJ 125) 3
('48) AIR 1948 Pat 58: (48 Cri LJ 433) 3

ORDER: Heard the pleaders appearing on both sides. The applicant was convicted of an offence punishable under Section 420 by the Magistrate, First Class, Anjar and was sentenced to undergo rigorous imprisonment for four months. The order of conviction and sentence was confirmed on appeal by the Sessions Judge, Kutch. The applicant has therefore approached this Court for revision of the said Order of the trial Court confirmed by the Sessions Judge.

(2) By this application, the applicant and the original complainant requests the Court to sanction composition of the offence. The application is made under Section 345 (5A) of the Code of Criminal Procedure. The charge against the applicant was that he cheated the complainant by making a false representation that he would sell him Crude oil and thus induced him to part with a sum of Rs. 120. It is stated in the application that the applicant has returned the sum of Rs. 120 to the complainant and if the composition is allowed, parties would be able to live amicably in future.

(3) Unlike English Law, composition of certain offences specified in sub-s. (1) of Sec. 345, Criminal Procedure Code by the parties thereto is permissible. Further, composition of more serious offences specified in sub-section (1) of the said Section by the parties thereto is permissible with the permission of the Court before which prosecution of any such offence is pending. In granting permission, the Court has to exercise discretion vested in it judicially. The nature of the alleged offence, circumstances under which it is alleged to have been committed, relationship between the parties, possibility of parties living in peace and harmony if composition is allowed, stage at which composition is sought are some of the facts to be considered in deciding whether permission should be granted. When an accused person is convicted by the trial Court, composition of any of the offences mentioned in both the subsections can be allowed in appeal. On confirmation of an order of conviction and sentence by the appellate Court, an accused person can only move the High Court for exercise of the powers of revision as the Code does not provide a second appeal. The High Court admits an application for revision for considering legality or propriety of the order of conviction. The framers of the Code therefore did not consider it necessary to make any provision for composition at the revisional stage. This led to conflict of Judicial opinion on the question whether as a Court of revision, a High Court could allow composition. It was accepted by the legislature that in a proper case, the High Court might deem it fit to allow composition. It is quite evident that the High Court will exercise discretion not only on consideration of circumstances which the trial Court was bound to consider but it will further consider whether there is illegality or impropriety alleged and whether the parties had made attempt to compound while the matter was before the trial Court. In 'BABURALI v. KALA CHAND BEPARI', AIR 1939 Cal 728, the Calcutta High Court observed as under:

> "But ordinarily when the proceedings before the Courts below disclose no irregularity or impropriety, the exceptional power which has been conferred upon the High Court by subsection (5A) of Section 345 should not be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final orders in the case."

The Patna High Court in 'GURU NARAYAN DAS v. EMPEROR', AIR 1948 Pat 58, made similar observations. The present application must therefore be considered and disposed of on the principles of law stated above.

(4) The facts alleged against the applicant & held proved by the Courts below are that he cheated the complainant to the extent of Rs. 120 by professing to sell him crude oil. Though the nature of the offence is not a serious one, it is desirable in the interest of preserving business morality that no composition of such offences should be allowed. The complainant and the accused had no previous relations and

they belong to different villages. There is therefore no question of the parties living in peace and harmony if composition was allowed. The applicant admitted that he had received Rs. 120/- from the complainant but he denied having committed the offence. He stated that he received Rs. 120/- as a loan from the complainant. He defended himself in the trial Court. There was no attempt to compound in the trial Court. He preferred an appeal against the order of conviction. It is only when the application for revision was admitted that he approached the complainant and offered to pay him Rs. 120/- provided he agreed to compound. The complainant who set the criminal law in motion agreed for composition as his money was being paid back to him, thereby obviating the necessity of going to a Civil Court for its recovery. Thus, this is not a fit case in which composition would be allowed at the stage of revision.

It was urged that the receipt produced by the complainant showed that money was advanced as a loan. As the application is not heard, the question of legality or propriety of the conviction is not considered and the application is decided on the assumption that there might exist any impropriety as alleged in the memo. If the conviction is correct, to allow composition in such a case would be to encourage such undesirable elements in society. If the conviction is not correct, it will amount to abusing the process of the Court by which a person having a Civil remedy could screw out his dues.

(5) Result is that permission to compound is refused and the application is dismissed.

V.B.B. Application dismissed.

A. I. R. 1952 Kutch 61

VAKIL J. C.

Thacker Murarji Soorji, Appellant v. Shri Jayant Trading Corporation Ltd., Bombay and others, Respondents.

Civil Misc. Appeal No. 4 of 1951, D/- 19-4-52.

(a) Civil P. C. (1908), O. 20, R. 5 — Practice — Decision on one of questions sufficient to dispose of proceeding — Duty of trial Court to decide all questions.

A trial Court should ordinarily decide all questions arising in a suit or proceeding before it even though, in its view, decision of one of the questions would be sufficient to dispose of the suit or proceeding. This is necessary for obviating remand in the event of the appellate Court coming to a contrary conclusion on the question considered and decided. (Para 3)

Anno: C. P. C., O. 20, R. 5 N. 2.

(b) Civil P. C. (1908), O. 21, Rr. 66 and 90 — Notice under O. 21, R. 66 — Judgment-debtor not appearing — Upset price fixed in his absence — Judgment-debtor is estopped from urging that upset price was not correctly fixed.

When a judgment-debtor served with a notice under Order 21, Rule 66, does not appear in response to it, with the result that upset price is fixed in his absence with such material as the Court has before it, he will be precluded from urging that the upset price was not correctly fixed. What such a judgment-debtor is precluded is not from making an application under Order 21, Rule 90 but from urging that the upset price is not correctly fixed. AIR 1937 Pat 493, Rel. on; AIR 1930 Nag 191, Disting. (Para 5)

Anno: C. P. C., O. 21, R. 66 N. 16.

(c) Civil P. C. (1908), O. 21, R. 90, Proviso — Substantial injury — Allegation that grossly inadequate price realised at court-sale.

When an applicant alleges grossly inadequate price realised at the court-sale as the substantial injury but does not state in the application how the price was grossly inadequate and does not offer to lead evidence in support of that averment, he cannot be heard to say that he was not given an opportunity to substantiate his plea of substantial injury. (Para 6)

Anno:C. P. C., O. 21 R. 90 N. 39.

R. R. Thacker, for Appellant; S. U. Bhanushali, for Respondent (No. 1).

REFERENCES: Courtwar/Chronological/ Paras.

('30) AIR 1930 Nag 191: (124 Ind Cas 250) 5
('37) AIR 1937 Pat 493: (171 Ind Cas 73) 5

JUDGMENT: This is an appeal against an order dated 12-3-51 made by the Additional District Judge, Kutch in Miscellaneous Application No. 4 of 1951, refusing to set aside a sale held on 7-3-51.

(2) The facts are that respondent 1 obtained a decree for payment of money against the appellant, opponents 2 and another and in execution of the said decree, it got attached for sale certain property as of the joint ownership of the judgment-debtors. The property attached was sold in lots which were purchased by respondent 3 and six others separately. The appellant applied to the executing Court under Order 21, Rule 90, C. P. C. for setting aside of the sale held on the ground of material irregularity in publishing and conducting the sale resulting in substantial injury to him. The executing Court, without going into the question of alleged irregularities considered the question of substantial injury and held that no such injury was caused to the appellant. The application was therefore dismissed. Against the order dismissing the application, the appellant alone preferred this appeal against respondent 3 who was one of the purchasers of a house and a site sold in one lot.

(3) The executing Court did not consider the question of alleged material irregularities in publishing and conducting the sale observing that if no substantial injury was caused, it was unnecessary to consider that question. A trial Court should ordinarily decide all questions arising in a suit or proceeding before it even though, in its view, decision of one of the questions would be sufficient to dispose of the suit or proceeding. This is necessary for obviating remand in the event of the appellate Court coming to a contrary conclusion on the question considered and decided.

(4) The trial Court having held that no substantial injury was caused to the appellant, the question to be considered in this appeal is whether the said conclusion arrived at by the trial Court is correct. The substantial injury alleged was that the property was sold for a grossly inadequate price. This is one of the most usual forms of showing that the applicant judgment-debtor had sustained substantial injury.

Besides making a vague allegation in the application that the property was sold for grossly inadequate price, the averment was not substantiated by statement of facts. Though the property was sold in lots, the market value of such lot of the property according to the appellant and the price at which it was sold was not stated in the application. Nor was any evidence led at the trial to substantiate that averment.

(5) As stated above, though the property was sold in different lots, the appeal is restricted to one of the lots comprising a house and a site. It appears from the facts stated in the judgment of the trial Court that upset price of the property was fixed at Rs. 8700 and it was sold at Rs. 6683/-. I am told that the upset price of the house and the site were fixed at Rs. 1000 and Rs. 100 respectively and they were sold for Rs. 850 and Rs. 80 respectively. Prima facie, therefore, the property was not sold for grossly inadequate price. The upset price was fixed after service of notice under O. 21, R. 66 on the appellant for settlement of the terms of the sale proclamation. When a judgment-debtor served with a notice under O. 21, R. 66, does not appear in response to it, with the result that upset price is fixed in his absence with such material as the Court has before it, he will be precluded from urging that the upset price was not correctly fixed. In 'MADANLAL v. RIPUSUDAN PRASAD', AIR 1930 Nag 191, the Court of the Judicial Commissioner, Nagpur held that a judgment-debtor was not estopped from making an application under O. 21, Rule 90 for setting aside a sale simply because he did not appear in obedience to the notice served on him under Order 21, Rule 66, for settling the terms of sale proclamation. Making of application is one thing and proving particular averments made therein is another. What such a judgment-debtor is precluded is not from making an application under Order 21, R. 90 but from urging that the upset price is not correctly fixed. The principle of estoppel enunciated above was accepted in a Patna Case (TARNI PRASAD v. CHANDRESHWAR PRASAD', AIR 1937 Pat 493), but its application was restricted to objection on the ground of undervaluation as an irregularity in procedure. It was observed that still it was open to the judgment-debtor to plead that as a result of undervaluation the property had been sold for an inadequate price. With respects, it is difficult to follow the aforesaid observation. If undervaluation as an irregularity cannot be shown, it is difficult to see how it can be shown that the said irregularity was responsible for the property being sold for an inadequate price. Taking the upset price fixed as the correct valuation of the property it is apparent that the property was not sold for an inadequate price.

(6) Assuming that the appellant was entitled to show that the property was sold for an inadequate price despite the fact that he did not remain present and objected to the upset price fixed, it is apparent that the appellant had not laid any foundation for urging that case in his application. Property was sold in several lots to different persons and it was up to him to have stated in the application the correct market value in respect of each lot with a view to showing that the sale for that lot was for grossly inadequate price. Out of 7 lots sold, he has no grievance in appeal in respect of 6 lots purchased by six different persons. For the remaining lot in respect of which the present appeal is preferred, he did not state in his application that the valuation of that lot was so much. A mere vague allegation that the whole property was sold for grossly inadequate price was hardly sufficient. It was contended that the appellant was not allowed to lead evidence. The trial Court observed that it was requested on behalf of the appellant (appellant in this appeal) that the application be disposed of after taking evidence of irregularities. There was thus no offer made for leading evidence about the correct valuation of the property. When an applicant alleges grossly inadequate price realised at the Court sale as the substantial injury but does not state in the application how the price was grossly inadequate and does not offer to lead evidence in support of that averment, he cannot be heard to say that he was not given an opportunity to substantiate his plea of substantial injury.

(7) Result is that the order made by the trial Court is confirmed and the appeal is dismissed with costs.

V.B.B. Appeal dismissed.

A. I. R. 1952 Kutch 62

VAKIL J. C.

Talakchandji Chaturchandji, Appellant v. Pratapsangji Adabhai and others, Opposite Party.

Civil Revn. Appln. No. 72 of 1951, D/- 1-11-1951.

Debt Laws — Bombay Agricultural Debtor's Relief Act (28 of 1947), (as extended to Kutch) Ss. 4 and 46 — Applicability of O. 22, Rr. 3 and 4, Civil P. C. to proceedings under S. 4—Effect of omission of S. 46 — Applicability of Arts. 177, 181, Limitation Act.

The fact that Rule 13 of the Rules made under the Act was retained though S. 46 of the Act was deleted by the Central Government when extending the Act to the State of Kutch in exercise of the powers conferred by S. 2 of the Part C States (Laws) Act, 1950, shows that no essential change was made. So long as R. 13 stands, the procedure laid down in the Code, is, so far as may be, to be followed by the 'Court' in the proceeding before it. Hence the contention that as Sec. 46 of the Code is not made applicable, the provisions of the Code could not be made applicable, cannot be accepted. (Para 4)

It is true that a proceeding initiated on an application under S. 4 of the Act which is an original matter is contemplated by Section 141 of the Code. Hence, if a debtor or a creditor who has made an application under Section 4 of the Act, dies, his legal representatives could be brought on record. Similarly, if a debtor or a creditor against whom an application is made under S. 4 of the Act, dies, his legal representatives could also be brought on record by applying the procedure provided for suits in O. 22, for bringing legal representatives on record. But the provisions for abatement of a suit and an appeal in Rules 3, 4, were not intended to be made applicable and cannot

be so made applicable to applications under Section 4 of the Act. In other words, an application under Sec. 4 of the Act made by a creditor or a debtor does not abate if legal representatives of a debtor or a creditor, as the case may be, are not brought on record within the time prescribed by Art. 177 of the Limitation Act. (Paras 5, 6)

In any application under S. 4 of the Act, neither a creditor nor a debtor is bound to make an application for bringing on record legal representatives of his debtor or creditor. As an application under this Act terminates in an award unless allowed to be withdrawn, the 'Court' has to ascertain the names of legal representatives of a deceased debtor or creditor as the case may be and bring them on record, and hence there is no question of the applicability of Art. 177 or Art. 181, Limitation Act: AIR 1924 Lah 316, Disting. (Para 7)

J. K. Dholakia, for Appellant; C. S. Chhaya, for Opposite Party.

REFERENCES: Courtwar/ Chronological/ Paras.

('51) AIR 1951 SC 332: (1951 SCR 747) 4
('24) AIR 1924 Lah 316: (73 Ind Cas 387) 7

JUDGMENT: The appellant applied to the Court at Mundra under Section 4 of the Bombay Agricultural Debtors' Relief Act, 1947, for adjustment of his claims against his debtor Pratapsangji Adabhai. A notice under S. 14 of the Act was issued in that proceeding to the debtor. The notice was returned unserved with an endorsement that the said debtor died in the month of Falgun. The appellant applied on 7-3-51 to the Court for legal representatives of the deceased Pratapsangji being brought on record. The "Court" dismissed the application as it was not filed within the period of limitation prescribed. The application against the debtor was treated as having abated. The applicant has therefore approached this Court for revision of the said order.

(2) The Order impugned purports to have been made under O. 22, Rule 4, C. P. C. It seems to have been held that an application of this type must be made within 90 days from the date of the death of the party under Article 177 of the Indian Limitation Act. The application under Section 4 of the Act was filed on 31-1-50. Notice under Section 14 of the Act was not issued till 16-2-51. The applicant had stated that he learnt about the death of the debtor after Dewali and he was not aware of the fact that legal representatives of the debtor had to be brought on record. He therefore prayed, that delay, if any, be condoned. This aspect of the case does not seem to have been considered by the trial Court.

(3) First point urged before me in revision was that the provisions of the Civil Procedure Code (Act V of 1908) were made applicable to the applications under Section 4 of the Act by virtue of the provisions of S. 46 of the Act. The Bombay Act was extended to the State of Kutch, subject to certain modifications, by the Central Government in the exercise of powers conferred by Section 2 of the Part C States (Laws) Act, 1950. One of the modifications is that Section 46 of the Act shall be omitted. It was therefore argued that the provisions of Order 22, C. P. C. could not be applied to applications under the Act. It was contended on behalf of the opponent that Section 2 of the Part C States (Laws) Act, 1950, in so far as it empowered the Central Government to extend to any Part C States, any enactment which was in force in a Part A State at the date with such restrictions and modifications as it thinks fit, was ultra vires the Parliament and hence the Act must be held to have been extended without the particular modification. It was therefore argued that the provisions of O. 22, C. P. C. were applicable to applications under the Act.

(4) The questions whether S. 2 of the Part C States (Laws) Act, 1950, or any provisions thereof and in what particular or particulars or to what extent was ultra vires the Parliament came for consideration before the Supreme Court in 'Re Article 143, Constitution of India and Delhi Laws Act, 1912 etc.', AIR 1951 S C 332. Their Lordships Kania C. J. and Mahajan J. held that Section 2 of the Part C States (Laws) Act, 1950, were ultra vires the legislature to the extent power was given to the Executive to extend Acts other than Acts of the Central Legislature. Their Lordships Fazl Ali, Sastri, Das, Mukherjea and Bose, JJ. came to a contrary conclusion. Their Lordships Mukherjea and Bose, JJ. qualified their opinion by observing that the concluding portion of Section 2 enabling the Central Government to make any provision in any enactment so extended for repeal or amendment of any corresponding law etc., was ultra vires the Parliament. His Lordship Bose J. further qualified his opinion by observing that the power to restrict and modify in so far as it imported power to make essential changes was ultra vires the Parliament. The contention was that the particular modification resulted in making an essential change and hence to that extent S. 2 was ultra vires the Parliament. It is evident that the opinion expressed by his Lordship, Bose, J. is not the opinion of the majority of their Lordships. Moreover, by deleting S. 46 of the Act, no essential change was made. The Bombay Agricultural Debtors' Relief Act is a special Act intended for the relief of the agricultural debtors and as such it prescribes special procedure in Chapter II of the Act. After prescribing special procedure, it is provided in Section 46 of the Act that the provisions of the Code shall apply to proceedings under the chapter except as otherwise expressly provided. It does not seem clear why the Central Government should have thought it necessary to provide the particular modification. Besides the matters for which provision is made in the Act, there are number of other matters of procedure and for these matters, nothing could have been more appropriate than to adopt the procedure prescribed by the Code as far as it can be made applicable. Though as per particular modification, Section 46 of the Act was deleted, Rule 13 which provides that

> "in respect of any matter for which no provision is made in the Act or the rules, the procedure laid down in the Code, shall, so far as may be, be followed by the Court in the proceedings before it"

was not deleted. Rules made under the Act are part of the Act and are applicable along with the Act. It shows that by adopting particular modification, there was no intention to make any essential change. It will indeed be an interesting question to be considered when raised, whether, in view of the particular modification, Rule No. 13, could not be made ap-

plicable. But the fact that Rule No. 13 was retained though Section 46 of the Act was deleted shows that no essential change was made. So long as Rule No. 13 stands, the procedure laid down in the Code, is, so far as may be, to be followed by the 'Court' in the proceeding before it. Hence the contention that as S. 46 of the Code is not made applicable, the provisions of the Code could not be made applicable, cannot be accepted.

(5) It was then contended that by virtue of Section 46 of the Act or Rule 13, the provisions of Order 22 of the Code could not be made applicable to applications under Section 4 of the Act. It is true that the provisions of O. 22 of the Code, which are made applicable to suits and appeals do not in terms apply to what are called miscellaneous applications. Section 141 of the Code provides that the procedure prescribed in the Code in regard to suits shall be followed as far as it can be made applicable in proceedings in any Court of civil jurisdiction. The proceedings contemplated by the Section are proceedings in probate, guardianship and other original matters. It may therefore be accepted that a proceeding initiated on an application under S. 4 of the Act which is an original matter is contemplated by S. 141 of the Code. Hence, if a debtor or a creditor who has made an application under Section 4 of the Act, dies, his legal representatives could be brought on record. Similarly, if a debtor or a creditor against whom an application is made under Section 4 of the Act, dies, his legal representatives could also be brought on record by applying the procedure provided for suits in Order 22, for bringing legal representatives on record. But the question is whether provision for abatement of a suit and an appeal in Rules 3, 4, can be made applicable to applications under Section 4 of the Act. In other words whether an application under Section 4 of the Act made by a creditor or a debtor abates if legal representatives of a debtor or a creditor, as the case may be are not brought on record within the time prescribed by Art. 177 of the Indian Limitation Act.

(6) A suit is instituted by a plaintiff or by more than one plaintiffs to obtain relief or reliefs against a defendant or against more than one defendants. The relief sought is based on a cause of action alleged. Legal representatives are brought on record, if a sole plaintiff dies and the right to sue survives, or if one of the plaintiffs dies and the right to sue does not survive to the remaining plaintiffs alone. Similarly, legal representatives are brought on record, if a sole defendant dies and the right to sue survives or one of the defendants dies and the right to sue does not survive against the surviving defendants alone. The application under Section 4 of the Act can be made by a debtor or a creditor. From S. 15 of the Act it appears that it is obligatory on a creditor to make an application. The scheme of the Act is that an application in respect of all debts due from a person who is a 'debtor' shall be inquired into, accounts be taken, debts be scaled down and awards be made. Every application under the Act, unless allowed to be withdrawn must result in an award. In a debtor's application, names of all creditors are to be stated. In a creditor's application besides the names of his debtor, names of all creditors of the debtor are to be stated. Absence of a debtor or a creditor does not result in dismissal for default of proceeding ex parte. The 'debtor' has only a statutory cause of action even in respect of debts which have become subject-matter of original decisions. The 'creditor' has a liability to make an application. In case of an application for a probate, an executor named in a will has a right to make an application and he gets a cause of action on the date of the death of the testator. Thus there is nothing like a right to sue or a right to make an application arising out of certain facts and legal relations between the parties except that one party is a debtor, another is a creditor and there is debt due. So far as a creditor is concerned, an application has to be made as the law compels him to do so. Despite the fact that a debtor or a creditor dies, the debts have to be adjusted. For that purpose, on death of a debtor or a creditor, his legal representatives have to be brought on record. It will therefore be wrong to hold that an application under Sec. 4 of the Act abates. The law provides that a suit or an application must be instituted within the period prescribed by the Law of Limitation. The plaintiff may not desire to proceed with a suit against the legal representatives of a defendant. If no period of limitation for making an application for the legal representatives being brought on record is prescribed, the suit must be kept on file, ill plaintiff chooses to take it off the files. But an application under Section 4 of the Act cannot be taken off the file. It follows that an application under Section 4 of the Act was not intended to result in abatement. Having regard to the scheme, its provisions and its object, the conclusion is irresistible that the provisions of abatement of a suit or an appeal were not intended to be made applicable to applications under S. 4 of the Act and they cannot be so made applicable.

(7) It was further urged that in any case, Art. 177 of the Indian Limitation Act cannot be made applicable to applications under S. 4 of the Act, in which legal representatives are to be brought on record. It is true that a 'debtor' or a 'creditor' is not a plaintiff nor a defendant, nor an appellant nor a respondent, unless he becomes an appellant by preferring an appeal. It is further true that Rr. 3 and 4 of Order 22 of the Code provide for an application within the time limited by law. As these rules in terms provide for legal representatives of a plaintiff or a defendant to be brought on record, it can be said that Art. 177 applies. The argument is that as a 'debtor' or a 'creditor' is neither a plaintiff nor a defendant, Article 181 which is the residuary Article must apply. My attention was not invited to any decided case in which Art. 181 was made applicable to an application for bringing on record legal representatives of an applicant or an opponent. In 'WAHID BAKSH v. LALTA PARSHAD', AIR 1924 Lah 316, the Lahore High Court held that an application for bringing on record the legal representatives of a deceased person who was not a defendant or a respondent was governed by Art. 181, Indian Limitation Act. It therefore appears that where an application for bringing on record, legal representatives of a deceased person has to be made, Art. 181 of the Indian Limitation Act can more properly be applied to proceedings (except execution proceedings) which are not suits nor appeals. But in any application under Section 4 of the Act, neither a creditor nor a debtor is bound to make an application for bringing on record

legal representatives of his debtor or creditor. As an application under this Act terminates in an award unless allowed to be withdrawn, the 'Court' has to ascertain the names of legal representatives of a deceased debtor or creditor as the case may be and bring them on record. It is to be noted that the discretionary powers of dismissals for default or proceeding ex parte in the Civil Procedure Code are not to be found in the Bombay Agricultural Debtors' Relief Act. On the contrary it is provided under S. 36 that the Court shall proceed to hear the application ex parte. Thus if a debtor who has made an application is absent, the Court is to proceed with the hearing of the application ex parte. In order to hear the application ex parte, the Court shall have to inquire about the legal representatives of a deceased debtor or creditor who could be brought on record by application of the provisions of O 22, C. P. C.; neither a debtor nor a creditor is bound to make such an application and hence there is no question of the applicability of Art 177 or 181 of the Indian Limitation Act. If it were to be otherwise and if it were to be held that Art. 181 applies, as was held by the Lahore High Court in the case referred to above, a debtor would always wait for three years before he makes his application. A debtor might have a number of creditors whose names have to be mentioned in the application under S. 4 of the Act. If each of them were to die one after another, the proceeding would not be completed for number of years to come.

(8) Lastly, it is apparent that there was sufficient cause for excusing delay. The Bombay Agricultural Debtors' Relief Act was not a local law. After it was extended to the Kutch State, notice could not be issued for a period of 14 months. Pleaders are not allowed to appear except with permission in certain proceedings only. Hence apart from the discussion of legal points above and on the assumption that provisions of Order 22, R. 4, C. P. C. apply in toto including application of Art. 177 of the Indian Limitation Act, the trial Court should have found sufficient cause within the meaning of the expression used in S. 5 of the Indian Limitation Act and should have allowed the applicant to bring the legal representatives on record.

(9) Result is that the application should be allowed and the Order made by the trial Court should be set aside. The application is sent back to the lower Court with a direction that the legal representatives of the deceased debtor, be brought on record and the original application should be proceeded with further and it be disposed of in accordance with law.

(10) Costs to be cost in the proceedings.

V.B.B. Application allowed.

A. I. R. 1952 Kutch 66

VAKIL J. C.

Bhagwanji Jetha, Applicant v. Thacker Parshottam Lalji, Opponent.

Civil Revn. Appln. No. 4 of 1952, D/- 10-4-1952.

Transfer of Property Act (1882), S. 58 — Chitham mortgage — Personal liability.

Difference between 'Chitham' and a simple mortgage is that in 'Chitham', on failure to pay the mortgage amount on due date, the mortgagee becomes entitled to recover possession and to enjoy the usufruct, either in lieu of interest or otherwise as might have been agreed between the parties, till the mortgagor chooses to redeem. The nature of a mortgage by conditional sale and of an usufructuary mortgage negatives a covenant of personal liability. 'Chitham' is a kind of an anomalous mortgage. Such being its nature, the question to be decided must turn on the interpretation of its terms. The fact that there is provision in such a mortgage for payment of mortgage amount with interest is not conclusive as even in mortgage by conditional sale and usufructuary mortgages such a provision may be found. What is material is the provision made for recovery or otherwise in case of default. At the same time, the general nature of the mortgage and its incidents as understood in the country where it is prevalent can be taken into account in deciding the question. Where provision made for recovery or otherwise in case of default to pay within the stipulated time was to convert the 'Chitham' into 'vatantar' it means that the mortgagee was to remain in possession as a 'vatantar' mortgagee till redeemed by the mortgagor. Such a provision by implication negatives a personal liability. It cannot be construed to give an option to the mortgagee either to take 'vatantar' or to sue for recovery of money. AIR 1924 Nag 53; AIR 1939 All 260, Rel. on. (Paras 4, 6, 7)
Anno: T. P. Act, S. 58 N. 40.

D. P. Joshi, for Applicant; K. J. Dholakia, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras
('39) AIR 1939 All 260: (ILR (1939) All 313) 7
('24) AIR 1924 Nag 53: (70 Ind Cas 224) 7
('30) AIR 1930 Pat 152: (120 Ind Cas 308) 7

ORDER: This is an application for revision of an order dated 11-10-51 of the District Court, Kutch in Civil Appeal No. 67 of 1951, setting aside an order dated 5-3-51 of the Court of the Subordinate Judge, Mandvi in Regular Suit No. 210 of 1950.

(2) Suit No. 210 of 1950 was brought by the opponent to recover from the applicant personally a sum of Rs. 2546 on the basis of three unregistered mortgage bonds of Rs. 700, Kories 1200 and Rs. 1000 respectively. The applicant's defence was that by the terms of the bonds, he had not bound himself to pay the mortgage money and as the deeds were unregistered, opponent was without remedy. The trial Court considered this contention on a preliminary issue raised and held that applicant was personally liable for the amount due on the two bonds of Kories 1200 and Rs. 1000 but he was not so liable for the amount due on the bond of Rs. 700. The trial Court, therefore, made an interim order that opponent's suit on the basis of the bond of Rs. 700 was not tenable and directed the opponent to amend his plaint accordingly.

(3) The trial Court's order meant rejection or dismissal of a part of the claim. The order was not followed by a formal decree drawn up as the trial Court had called upon the opponent to amend his plaint. But as the order had the effect of an interim decree, the District Court,

Kutch entertained an appeal against that order. The District Court allowed the appeal and remanded the suit to the trial Court for disposal according to law.

(4) The only question to be considered in revision is whether by the terms of the bond of Rs. 700, the applicant had bound himself to repay the mortgage amount. The answer to this question must depend on the nature and terms of the bond. The nature of the mortgage was 'Chitham' a kind of mortgage prevalent in this part of the country. Difference between 'Chitham' and a simple mortgage is that in 'Chitham', on failure to pay the mortgage amount on due date, the mortgagee becomes entitled to recover possession and to enjoy the usufruct, either in lieu of interest or otherwise as might have been agreed between the parties, till the mortgagor chooses to redeem. By the terms of the bond, the mortgagor acknowledged a sum of Rs. 700 as due from him and agreed to repay the said sum with interest at 6 per cent. on or before the last day of the month of Posh, 1999. It was further agreed that if the mortgagor failed to do so, he would get the document registered before the period provided. It was further agreed that in case of failure to repay within the stipulated time, the 'debtor' would give the property to the 'creditor' in 'vatantar' and a registered deed of 'vatantar' would be passed in his favour.

(5) From the nature of the mortgage and its terms set out above, the trial Court held that applicant had not bound himself to pay the mortgage amount and that in case of default the creditor was to enjoy the property 'Vatantar.' The District Court held that though there might not be an express covenant to pay in a 'chitham' mortgage, it must be held to have been implied and that the said implied covenant was not negatived by the provision that in case of default, the mortgagee was to enjoy the property as 'Vatantar'. The District Court further held that opponent was entitled to recover the amount from the applicant on the ground that existing consideration failed.

(6) Section 58 of the T. P. Act defines six specified kinds of mortgages including an anomalous mortgage. A mortgage being a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, personal liability is implied in every mortgage as the loan prima facie involves such a liability despite the fact that security is given, unless negatived by the nature and terms of the mortgage. Out of the specified kinds of mortgages in S. 58 of the T. P. Act, the nature of a simple mortgage implies a covenant of personal liability if it is not express. But the nature of a mortgage by conditional sale and of an usufructuary mortgage negatives such a covenant, 'Chitham' is a kind of an anomalous mortgage. Such being its nature, the question to be decided must turn on the interpretation of its terms. The fact that there is provision in such a mortgage for payment of mortgage amount with interest is not conclusive as even in mortgage by conditional sale and usufructuary mortgages, such a provision may be found. What is material is the provision made for recovery or otherwise in case of default. At the same time, the general nature of the mortgage and its incidents as understood in the country where it is prevalent can be taken into account in deciding the question.

(7) In the mortgage under consideration, provision made for recovery or otherwise in case of default to pay within the stipulated time was to convert the 'chitham' into 'vatantar.' It means that the mortgagee was to remain in possession as a 'vatantar' mortgagee till redeemed by the mortgagor. Such a provision by implication negatives a personal liability. It can not be construed to give an option to the mortgagee either to take 'vatantar' or to sue for recovery of money. Mortgages in which there is provision for foreclosure in case of default to pay within a stipulated time are construed to negative personal liability, 'HARLALSA v. SHAIKH RAHIM', AIR 1924 Nag 53; 'BISHAN DATT SINGH v. MATHURA PRASAD', AIR 1939 All 260. A provision for the mortgagee to continue in possession in case the mortgagor made a default to pay within the stipulated time was held negativing personal liability, 'KAMAL NAYAN PRASAD v. RAM NAYAN PROSAD', AIR 1930 Pat 152. The reason is that an absolute covenant to be personally liable cannot be coupled with a further stipulation that if the mortgage amount was not paid, mortgagee would foreclose, take possession, continue in possession or take possession under a vatantar deed. It follows that a provision to get possession of the property mortgaged as a 'vatantar' mortgagee in case of default to pay within a stipulated time must be construed to negative personal liability. Besides the aforesaid interpretation of the terms, a nature of a 'chitham' is explained in 'Deshi' Shiresta 'Sangraha', a book making exposition of custom which was accepted as authoritative. According to this book, 'Chitham' is a mortgage by which interest in some specified property is transferred as security for loan. It contains a stipulation that if the mortgagor failed to pay within the time stipulated, the mortgagee was to take possession of the property and enjoy it till redemption. These being the incidents of 'chitham' as understood in this part of the country, it is evident that there was no personal liability to pay.

(8) The opponent did not allege and could not have alleged that the security had become insufficient or he was deprived of his security by or in consequence of any wrongful act of the mortgagor. Nor could he have alleged that he had become entitled to possession as the deed was not registered and consequently the immovable property comprised therein was not affected. Obviously the opponent had to sue for specific performance of the agreement to get a 'vatantar' deed and also to get possession or in the alternative to recover the amount due on the mortgage bond as damages. The opponent had not urged a case of failure of existing consideration and the District Court was not justified in making out that case for him.

(9) Result is that the application is allowed, decree passed by the District Court is set aside and a decree dismissing opponent's suit on the basis of the mortgage of Rs. 700 to recover the amount due on the foot of the said mortgage is made with proportionate costs in suit and full costs of appeal and revision.

D.H. Revision allowed.

A. I. R. 1952 Kutch 67
VAKIL J. C.

Jutha Premji, Applicant v. Faria Megji Uga and others, Opponents.

Civil Review Appln. No. 2 of 1952, D/- 30-4-1952.

(a) Civil P. C. (1908), O. 47, R. 1. — Discovery of new and important evidence — Copy of original produced — Evidence Act (1872), Ss. 90 and 65.

A Court granting review on the grounds of discovery of new and important evidence has to be satisfied that the said evidence would show the fact alleged but held not proved in the judgment under review. For that purpose the Court has to decide whether the evidence sought to be produced is 'prima facie' proved. On the allegation that the original is lost a copy could be made admissible provided it is shown that it is the true copy of the original. But there must be 'prima facie' proof of the original. If the original was a document thirty years old, presumption about its due execution could be made. But such presumption cannot be made when original is not produced and a copy is produced as secondary evidence. In such a case there is no 'prima facie' proof of the due execution of the original of which copy is sought to be produced. (Para 4)

Anno: C.P.C., O. 47 R. 1 N. 10; Evi. Act, S. 90 N. 7; S. 65 N. 1, 5.

(b) Civil P. C. (1908), O. 47, R. 1 — Discovery of new and important evidence — Nature of. (Evidence Act (1872), S. 18).

The new evidence sought to be adduced must be such as to show beyond doubt that the judgment would turn. A recital in the description of boundaries of a document of third parties has not got so much probative value, if held admissible in evidence. (Para 5)

Anno: C.P.C., O. 47, R. 1 N. 10; Evidence Act S. 18 N 3a.

P. P. Vaidya, for Applicant.

REFERENCES: Courtwar/Chronological/ Paras
('35) AIR 1935 PC 132: (57 All 494) 4
('45) 47 Bom LR 116: (AIR 1945 Bom 319) 4
('45) 47 Bom LR 962: (AIR 1946 Bom 193) 4
('41) AIR 1941 Pesh 89: (197 Ind Cas 633) 4

ORDER: This is an application for review of the judgment of this Court in Civil Miscellaneous Appeal No. 2 of 1950* on the ground of discovery of new and important evidence which, after exercise of due dilignece, could not be produced at the time the decree was passed.

(2) The facts are that Meghji Uga, opponent 1, sued the applicant and others for redemption. The applicant denied the alleged mortgage and contended that the suit property was first acquired by him as a mortgagee and then equity of redemption was purchased by him. At the trial reliance was placed on Ex. 21 to show the alleged sale effected in Samvat 1930. This document was inchoate bearing only a signature of some executant. Secondary evidence was led to show the contents of the document of Samvat 1930. Now, it is alleged that there is a partition memo of Samvat 1943, in which it is stated in one of the boundaries that "Bhai Premji has purchased himself the Bheni in which he lives and is his exclusive property". It is urged that this evidence coupled with other evidence would show that the equity of redemption was purchased by the applicant's father

(3) The document produced by the applicant is not the original but a copy. One Sunderjee filed an affidavit stating that the original document was in his father's account book and that the applicant had taken a copy from it, some thirty years back. It was further affirmed that the original could not be found. The applicant affirmed that the copy produced was in possession of Jadeja Hetubha as he and Hetubha had got some Giras lands jointly owned and that he was not aware of this document in possession of Jadeja Hetubha.

(4) A Court granting review on the grounds of discovery of new and important evidence has to be satisfied that the said evidence would show the fact alleged but held not proved in the judgment under review. For that purpose the Court has to decide whether the evidence sought to be produced is prima facie proved. What is produced and proved is a copy. On the allegation that the original is lost a copy could be made admissibe provided it is shown that it is the true copy of the original. But there must be prima facie proof of the original. As it is said that the original was a document thirty years old, presumption about its due execution could be made. The question is whether such presumption could be made when original is not produced and a copy is produced as secondary evidence.

It was held by some of the High Courts in India before the decision of the Judicial Committee in 'BASANT SINGH v. BRIJRAJ SARAN SINGH', AIR 1935 P C 132, that presumption of due execution of the original could be made in case of a document thirty years old even though a copy was produced. This view was however exploded after the pronouncement of the Judicial Committee in the aforesaid case. In this case before the Judicial Commitee, emphasis was laid on the word 'produced' in S. 90 & it was held that presumption could be made only in respect of the document produced. Accordingly, it was held that if the document produced was a copy admitted under S. 65 as secondary evidence, and it was produced from proper custody and was over thirty years old, then the signatures authenticating the copy might be presumed to be genuine but no such presumption could be made about due execution of the original not before the Court, 'VITHOBA v. SHRI-HARI', 47 Bom L R 116. 'PENDAPPA v. SHIVALINGAPPA', 47 Bom L R 962.

The learned pleader for the applicant relied on 'GURDIT SINGH v. SIRI RAM', AIR 1941 Pesh 89, but in that case no principle contrary to the one stated above was laid down. In the Peshawar case, the Privy Council case cited above was relied on. The Bombay cases have followed the Privy Council case in which it was laid down that the production of copy was not sufficient to justify principle of due execution of the original. It is thus clear that in this case there is no prima facie proof of the due execution of the original of which copy is sought to be produced.

(5) Now, a recital in the description of boundaries of a document of third parties, has not

*(See A.I.R. 1952 Kutch 8)

got so much probative value, if held admissible in evidence. The new evidence sought to be adduced must be such as to show beyond doubt that the judgment would turn.

(6) For the reasons stated above the application is summarily dismissed.

D. H. Application dismissed.

A. I. R. 1952 Kutch 68

VAKIL J. C.

Fakir Ismail Sumar and others, Accused-Applicants v. The State.

Criminal Revn. Appln. No. 7 of 1952, D/- 16-4-1952.

(a) Criminal P. C. (1898), S. 423 — "By a Court of competent jurisdiction — Retrial before same Magistrate.

The expression "Court of competent jurisdiction" does not exclude the Magistrate who originally tried the applicants, if he was otherwise competent to try them. (Para 3)

The question whether retrial before the same Magistrate or before another competent Magistrate be directed should be considered on merits and if it appeared expedient for the ends of justice that retrial before other competent Magistrate be held, the fact that if the case was sent to another Magistrate, it might be necessary to hold a de novo trial should not be considered conclusive for the decision of the question. The reason is that the question whether a retrial before the same Magistrate is expedient for the ends of justice or not is to be considered from the point of view of the accused person as well. (Para 4)

When a Magistrate had tried a case to judgment, it will be proper exercise of discretion by an appellate Court ordering retrial to direct that retrial be held before some other competent Magistrate. Case law Ref. (Para 5)

Anno: Cr. P. C., S. 423 N. 24.

(b) Criminal P. C. (1898), S. 439 — Revision of discretionary orders — High Court in exercise of its revisional powers under S. 439 will not lightly interfere with discretionary orders passed by appellate Court — High Court may interfere if it was shown that discretion was improperly exercised. (Para 4)

Anno: Cr. P. C., S. 439 N. 17.

(c) Criminal P. C. (1898), S. 423 — Whether Court of appeal can direct re-trial from stage at which defect in trial was found — Quaere. (Para 4)

Anno: Cri. P. C., S. 423 N. 23.

C. B. Thacker, for Applicants; C. P. Pandya, Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('25) AIR 1925 Bom 170: (26 Cri LJ 690) 4
('29) AIR 1929 Bom 309: (31 Cri LJ 309) 4
('26) AIR 1926 Cal 1173: (27 Cri LJ 1188) 4
('41) AIR 1941 Lah 367: (43 Cri LJ 71) 4
('37) AIR 1937 Pat 246: (38 Cri LJ 657) 4
('37) AIR 1937 Sind 33: (38 Cri LJ 382) 4
('41) AIR 1941 Sind 144: (42 Cri LJ 837) 4

ORDER: This is an application for revision of an order dated 11-2-52 made by the Additional Sessions Judge, Kutch in Criminal Appeal No. 72 of 1951, in so far as it directed retrial of the applicants before the same Magistrate from the stage the procedure adopted was held defective.

(2) The applicants were convicted and sentenced by the Magistrate First Class, Bhuj for an offence punishable under S. 420, I. P. C. On appeal, the Additional Sessions Judge, Kutch held that the trial was vitiated due to omission by the Magistrate to examine the applicants under S. 342, Criminal P. C., before they were called upon to enter on their defence. The Additional Sessions Judge, Kutch, set aside the order of conviction and sentence and directed retrial of the applicants before the same Magistrate from that stage. An application was made requesting the Additional Sessions Judge to direct retrial before some other competent Magistrate. The learned Additional Sessions Judge, Kutch did not accede to this request observing that it might involve a trial de novo.

(3) The order for retrial was made by the Additional Sessions Judge, under S. 423, Criminal P. C. Under that section, the learned Additional Sessions Judge was empowered to order retrial of the applicants by a Court of competent jurisdiction. The Magistrate who had tried the applicants was competent to retry the applicants. The expression "Court of competent jurisdiction" does not exclude the Magistrate who originally tried the applicants, if he was otherwise competent to try them. Thus under S. 423, Criminal P. C., the Additional Sessions Judge had discretion to direct retrial of the applicants before the said Magistrate or before any other Magistrate competent to try them.

(4) The learned Additional Sessions Judge, having made the order in the exercise of his discretion, this Court in the exercise of its revisional powers under S. 439, Criminal P. C., will not lightly interfere with such discretionary orders. This Court may interfere, if it is shown that discretion was improperly exercised. As stated in para 2 above, the learned Additional Sessions Judge was embarrassed by the fact that if the case was directed to be sent to another Magistrate, it might lead to a de novo trial. The learned Judge did not want a de novo trial to take place as it might result in setting at naught his order for retrial from a particular stage

The question whether under S. 423, Criminal P. C., a Court of appeal can direct retrial from the stage at which defect in the trial was found does not directly arise for consideration in this application. It is a question on which there is some difference of judicial opinion. In 'RAMCHANDRA PRASAD v. EMPEROR', AIR 1937 Pat 246, it was held by the Patna High Court that a partial retrial could not be directed by an appellate Court. The Chief Court of Sind in 'VIRUMAL SEOOMAL v. EMPEROR', AIR 1941 Sind 144, held that the words in S. 423 (1) (b) authorising a Court to order a retrial were sufficiently wide to authorise a retrial from the point at which the error in the trial had been committed provided that the accused was not otherwise prejudiced. In coming to that conclusion, the Sindh Court relied on 'EMPEROR v. NATHU KASTURCHAND', AIR 1925 Bom 170, in which the learned Chief Justice expressed an opinion that the Magistrate could have been directed to resume trial from the point where

he fell into error. Retrial was however not directed in that case. As the question does not directly arise in this case this Court is not called upon to decide it.

But the question whether retrial before the same Magistrate or before another competent Magistrate be directed should be considered on merits and if it appeared expedient for the ends of justice that retrial before other competent Magistrate be held, the fact that if the case was sent to another Magistrate, it might be necessary to hold a de novo trial should not be considered conclusive for the decision of the question. The reason is that the question whether a retrial before the same Magistrate is expedient for the ends of justice or not is to be considered from the point of view of the accused person as well. When a Magistrate has expressed an opinion on the credibility of the prosecution evidence, ordinarily, a Court of appeal ordering a retrial should direct retrial before another competent Magistrate. In 'BALI RAM v. SITARAM', AIR 1926 Cal 1173, the Calcutta High Court held as under:

> "Where accused have once been convicted and the conviction is upset by Superior Court & retrial ordered, unless it is impossible to get a Magistrate other than the one who had already convicted the accused or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the trial should not be held before the same Magistrate."

In 'EMPEROR v. LAKSHMAN RAMSHET', AIR 1929 Bom 309, Patkar J. observed as under:

> "The Magistrate in the present case has taken the whole evidence into consideration and expressed his opinion on the evidence and I agree that it would be fair to the accused in the circumstances of the present case to order a de novo trial. I agree, therefore, that the order just proposed by my learned brother Mirja J. who delivered the principal judgment in that case had directed retrial by Magistrate other than one who tried the case."

In 'GULABCHAND v. EMPEROR', AIR 1937 Sind 33, Davis J. C. who delivered the principal judgment in 'AIR 1941 Sind 144', (cited above) held as under:

> "When however the Magistrate originally trying the case had to proceed so far as to express his opinion as to the guilt of the accused, the case should not be sent for retrial to the same Magistrate but to some other Magistrate."

In 'CHUNI LAL LACHMAN DAS v. EMPEROR', AIR 1941 Lah 367, Skemp J. revising his previous decision held that apprehension of conviction was no ground of transfer of the case. In that case the facts were that order of retrial before the same Magistrate was not objected and an application of transfer under Section 526, Cr. P. C. was subsequently made. The case is therefore not an authority against the proposition that discretion could properly be exercised by sending the case for retrial before another competent Magistrate.

(5) Thus when a Magistrate had tried a case to judgment, it will be proper exercise of discretion by an appellate Court ordering retrial to direct that retrial be held before some other competent Magistrate. The question whether an order for retrial at the point where the Magistrate fell into error could be directed, when the case is sent to another competent Magistrate, having regard to the provisions of sub-section (3) of Section 350, Cr. P. C., might arise for consideration if the order made by the learned Judge to that effect is not disturbed. It is stated above that there is conflict of judicial opinion on the question whether a retrial could be directed before the same Magistrate at the point where the trying Magistrate fell into an error. As I hold that order directing retrial before the same Magistrate is improper and as I propose to direct that trial be held before another competent Magistrate it would be avoiding unnecessary complications if I directed that there should be a retrial de novo before the other competent Magistrate. I do not thereby set aside the order of the learned Judge for partial retrial on merits as I have stated that I am not called upon to decide that question. The order is made as incidental to the order that trial be held before another competent Magistrate.

(6) Result is that the rule is made absolute and the order made by the learned Additional Sessions Judge directing retrial before the same Magistrate is set aside. It is directed that retrial be held before the Additional Magistrate, First Class, Bhuj and that the retrial shall be full and not partial.

V.B.B. Rule made absolute.

A. I. R. 1952 Kutch 69

VAKIL J. C.

Asu Tala and another, Appellants v. Sha Kanji Monshi and others, Respondents.

First Appeal No. 1 of 1951, D/- 30-4-1952.

(a) Hindu Law — Partition — One of the coparceners separating — Presumption.

When one coparcener separates from the others, there is no presumption that the latter remain joint or united though it is open to the non-separating coparceners to remain joint and enjoy, as members of a joint family, the joint family property allotted to their share in partition. Instrument of partition effected may show whether the other members agreed to remain joint or reunited or separate. (Para 5)

(b) Hindu Law — Partition — Cesser in commensality.

Cesser in commensality is a fact to be considered in deciding the question whether there was severance of joint family status. But where cesser in commensality is preceded by a partition between the then existing coparceners, the question whether cesser in commensality was due to severance in joint family status or not is one of great importance. If from the partition deed it could be inferred that the other members did not intend to live as members of joint family, the subsequent cesser in commensality can reasonably be attributed to severance of joint family status and division inter se of the property allotted per stirpes in the first partition effected. (Para 6)

(c) Hindu Law — Partition — Shares defined — Effect.

When a partition is effected per stirpes, but shares of members of one branch in the

property allotted to that branch are defined and it is further stated that each may enjoy his own share of the property as he likes, an intention to remain joint on the part of the members of that branch is negatived. Once the shares are defined, there is severance of joint family status and unless the recitals of the partition deed or subsequent conduct show that despite defining of shares, the members continued to remain as members of a joint Hindu family such a result would follow. AIR 1936 PC 281, Rel. on. (Para 7)

(d) Hindu Law — Partition — Separation of branches — Presumption about members of the branch.

It is true that where there has been a separation between the members of a joint family, there is no presumption that there was a partition between one of the members and his descendants. But for the application of the principle stated above it is necessary that the said member was alive and was a party to the partition. AIR 1924 PC 126, Ref. (Para 7)

(e) Hindu Law — Partition — Inference of severance from facts.

The lower Court relied on the following facts for holding that there was severance of joint family status: (1) cesser in commensality admittedly from Smt. 1979, (2) each brother was earning his bread separately, (3) taking separate Lahnas from the caste, (4) separate occupation of the properties and disposal of some by one brother and some by the other alone and (5) payments of debts by each brother separately. This state of things followed a partition to which the brothers were parties and the extent of separate occupation of property indicated a partition by metes and bounds between the brothers.

Held that the lower Court was right in inferring a severance of joint family status and partition from the facts stated above. (Para 11)

(f) Hindu Law — Marriage — Presumption.

There is a presumption about a marriage in approved form. (Para 12)

(g) Hindu Law — Succession — Stridhan — Kutch State.

No doubt, sister's sons are now assigned a place in the list of Sapinda succession by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. But the said Act was not applicable to Kutch State where the general principles of Hindu Law were applied on the broad principles of equity, justice and good conscience. If a woman has got no heirs in her husband's family, the property of such a woman would go to her blood relations in preference to the crown. In default of husband's heirs, father and mother, nearest kinsmen and heirs of a woman married in an approved form dying childless are the heirs of her mother and father in the order of propinquity. In this order, daughter's sons of the father are entitled to succeed in preference to his brother. Thus when a Hindu woman, married in an approved form dies childless and there are no heirs in the husband's family, her sister's sons who are the daughter's sons of her father are entitled to succeed in preference to her paternal uncle who is her father's brother. If a woman is married in an unapproved form, her property goes to her mother, than to husband's heirs. The main distinction in the matter of succession between the case of a woman marrying in an approved form and in an unapproved form dying childless is that in the former case husband and his heirs succeed in preference to mother, father and their heirs. When there are no husband's heirs nor mother nor mother's heirs and the question is whether a paternal uncle or a sister's son is entitled to succeed both being Sapindas of the father, the question whether a woman is married in an approved form or unapproved form becomes immaterial. (Para 13)

K. N. Mankad, for Appellants; U. K. Gor, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('24) AIR 1924 PC 126: (5 Lah 92) 7
('36) 63 Ind App 436: (AIR 1936 PC 281) 7
('47) 49 Bom LR 130: (AIR 1946 PC 189) 13
('12) 36 Bom 339: (14 Ind Cas 438) 13
('21) 45 Bom 1106: (AIR 1921 Bom 138) 13
('48) 50 Bom LR 274 13
('14) 37 Mad 293: (AIR 1915 Mad 18) 13

JUDGMENT: This appeal arises out of a suit brought by the appellants to recover possession of a house, a field, price of movables and two gold ornaments from the respondents on the averments that the said house, field and movables constituted the joint family property of the appellants and of one Aju, since deceased and that they became solely entitled thereto by survivorship on death of the latter in St. 1993. In the alternative, appellants sought to recover possession of the house, field and price of movables as heirs to the property of Aju inherited by his daughter Devkabai, who died without leaving any lineal descendent. It was further alleged that one gold ornament belonged to Devkabai and the other belonged to Velabai, sister of appellant 1 and the appellants succeeded to the said ornaments on the deaths of Devkabai in St. 2004 and of Velabai in St. 2005.

(2) Respondent 1, who is the sister's husband and respondents 2 to 4 who are the sister's sons of Devkabai did not admit that Aju died as a member of a joint Hindu family consisting of himself and of the appellants and contended that the house, field and movables were the separate property of Aju. It was denied that the gold ornaments belonged to Devkabai and Velanbai. It was maintained that the said ornaments belonged to the respondents and that on death of Devkabai respondents 2 to 4 succeeded to the house, field and movables left by her.

(3) The trial Court dismissed the appellants' suit holding that the house, field and movables were the separate property of Aju and on the death of Devkabai appellants were not entitled to succeed her. It was further held that one of the ornaments did not belong to Velanbai. The trial Court held that the suit was false and vexatious and ordered the appellants to pay a sum of Rs. 200 as compensatory costs to the respondents.

(4) In appeal it was urged that the trial Court erred in holding that Aju did not die as a mem-

ber of the joint Hindu family of himself and the appellants. It was further urged that in the alternative appellants would be entitled to succeed to the property of Devkabai. In any case, it was urged that the trial Court erred in awarding special costs to the respondents.

(5) First question to be determined in appeal is whether Aju died as a member of the joint family of himself and of the appellants. Dharsey and Tala were two brothers. Tala died in the year St. 1969 survived by two sons Aju and Ashu and a daughter Velanbai. Appellants' case as alleged in the plaint was that in the year St. 1969, a partition of their joint family property was effected between Dharsey, Aju and Ashu. This fact was seriously denied by the respondents. But the lower Court has held it proved relying on a partition deed (Exhibit 1) produced by the appellants. The conclusion arrived at by the lower Court that the said partition was effected in St. 1969 was not seriously challenged before me in appeal. It seems to have been assumed in the plaint that when the partition was effected in Samvat 1969, Ashu and Aju remained joint.

There is no justification for such an assumption. When one coparcener separates from the others, there is no presumption that the latter remain joint or united; though it is open to the non-separating coparceners to remain joint and enjoy as members of a joint family, the joint family property allotted to their share in partition. Instrument of partition effected may show whether the other members agreed to remain joint or reunited or separate.

(6) The appellants led oral evidence to show that despite the partition effected in Samvat 1969, Ashu and Aju continued to remain joint till Aju died in Samvat 1993. It could not have been disputed that before his death, Aju was living separately from Ashu. It was, therefore, stated in para 3 of the plaint that some years after the partition of Samvat 1969, Aju began to live separately for the sake of convenience. Cesser in commensality is a fact to be considered in deciding the question whether there was severance of joint family status. But where cesser in commensality is preceded by a partition between the then existing coparceners, the question whether cesser in commensality was due to severance in joint family status or not is one of great importance. If from the partition deed it could be inferred that the other members did not intend to live as members of joint family, the subsequent cesser in commensality can reasonably be attributed to severance of joint family status and division inter se of the property allotted per stirpes in the first partition effected.

(7) Thus in the context of the aforesaid facts and statement of law, the recitals in the partition deed assume importance. Following are the salient recitals of the partition deed relevant for consideration of the question:

"In the hand of Shah Tala and Sha Dharsey Ladha of Nani Khakhar Kutch, we have today divided our ancestral and self acquired property. Out of them, Tala Ladha is not alive, therefore, 'his heirs Aju and Ashu Tala have each got equal shares in the property allotted to the share of Tala Ladha'..... Thus, the aforesaid property is allotted to the share of two brothers Tala and Dharsey Ladha. Henceforth each may enjoy his own share of the property as he likes."

The partition was effected between the two branches represented by Tala and Dharsey. But it was specifically stated that the two sons of Tala had each got half share in the property allotted to the share of Tala. When a partition is effected per stirpes, but shares of members of one branch in the property allotted to that branch are defined and it is further stated that each may enjoy his own share of the property as he likes, an intention to remain joint on the part of the members of that branch is negatived.

In 'PURNANANTHACHI v. GOPALASWAMI', 63 Ind App 436 (PC), the Judicial Committee held that there was no partition between other members as in the partition deed it was stated that the remaining members should live like an ordinary undivided family subject to survivorship. If it was intended that Ashu and Aju should remain joint, it would have been so stated in the partition deed. At any rate, it would not have been stated that Ashu and Aju were each entitled to a moiety of property allotted to the branch of Tala and that each was entitled to do whatever he liked with his share. Once, the shares are defined, there is severance of joint family status and unless the recitals of the partition deed or subsequent conduct show that despite defining of shares, the members continued to remain as members of a joint Hindu family such a result would follow. The learned pleader for the appellants laid emphasis on the fact that it was deceased Tala who was one of the parties to the partition and contended that there would be no presumption that there was partition inter se between the sons of Tala. The parties to the partition were Aju, Ashu and Dharsey. Tala was dead before partition.

It is true as held in 'HARI BAKSH v. BABU LAL', AIR 1924 PC 126, that where there has been a separation between the members of a joint family, there is no presumption that there was a partition between one of the members and his descendants. For the application of the principle stated above, it is necessary that the said member was alive and was a party to the partition. Tala's name was mentioned in the partition deed to show that actual partition by metes and bounds was effected between Dharsey and the branch of Tala leaving Aju and Ashu to follow suit, if they so thought fit, in view of the fact that their shares were defined and by providing that each was entitled to do what he liked with his share, each was made full owner of his share of the property.

(8) Thus the deed of partition on which appellants relied showed that there was severance of the joint family status. Oral evidence was led to show that after partition, the brothers continued to remain joint till Ashu died in Samvat 1993. It was admitted that at least from Samvat 1979, Aju began to live separately. In the plaint it was not stated that Aju began to live separately in Samvat 1979. What was stated was that he began to live separately some years after partition. Reason stated in the plaint for cesser in commensality was convenience. Ashu stated in his evidence that Aju's wife died in Samvat 1960 and hence they were living jointly. If despite this, Aju began to live separately it shows that he did so as there was severance of joint family status. Moreover, evidence shows that it was not a mere separate residence for convenience. Lots Nos. 1 and 3

out of the lots stated in the partition deed are a house and a Deli. They remained in possession of Aju till he died in Samvat 1993. In the mean time, in Samvat 1986, respondent 1's wife died and they all came to reside with Aju. They continued to reside in the property till Velanbai died in Samvat 2005.

The appellants explained that Devkabai who was a child widow and Velanbai who was also a widow were allowed to stay in the house and the Deli as they used to stay there during the life time of Aju. But the fact is that respondents were also staying in that house during the life time of Aju and they continued to do so after his death. If there was no severance of joint family status, respondents would not have been allowed to stay in the house and in the Deli. As against lots 1 and 2, appellants remained in exclusive possession of lots 9 and 11, a house and a chauk. It was admitted that 'Pat' allotted to the share of Tala was half in possession of the respondent and half in possession of the appellants. This seems to be lot No. 6. Lot No. 13 is compound. It was admitted that Aju sold compound twenty five years back and appellants recently sold the compound presumably of his share. Thus the possession of Aju and Ashu out of lots 1, 2, 6, 9, 11, 13 of item No. 1 allotted to the branch of Tala was as under: Aju: 1, 11, 6/1, 13/1 (sold)., Ashu: 1, 2, 6/2, 13/2 (sold).

Thus there was not only separate occupation of the joint family property but separate occupations showed a division effected. Besides the aforesaid item No. 1, there were eight vandas of which four were allotted to Tala's share. A field called Ravro was allotted to Tala's share. This field was sold by Aju 25 years back. Thus as against Vandas, Aju seems to have got the field which he sold. Besides these properties, there were debts but they could not be recovered and there was one field in possession of a mortgagee. It is thus clear that Aju was in separate occupation of property which would be allotted to his share and he had disposed of two out of those properties. The recitals in the documents of partition considered in para 6 above, cesser in commensality and separate ocupation of property under the circumstances stated above including the important circumstance about disposal of two of these properties, show that there was not only severance of joint family status but there was division of property between Ashu and Aju.

(9) Besides the property stated above, there was one field acquired by Tala. As it was his self-acquired property it was not included in the partition deed. This field called Vorai was in possession of Aju. The explanation given in the plaint was that as Devkabai had no means, she was given the field for maintenance. Plaint was silent about possession of Aju. It was stated in the evidence of plaintiff that land was given to Velanbai for maintenance. Plaintiff 2 made an improvement on the story stated by his father saying that he and Velanbai used to take crop of the field each alternate year. Purshottam (Plaintiff's witness No. 4) stated that Aju was in possession of the field during his life time. Thus Aju was in exclusive possession of this item of the joint family property. This fact indicates that there was not only severance of joint family status but there was partition by metes and bounds between the two brothers.

(10) In the absence of any joint family property yielding income, except the field in exclusive occupation of Aju, each brother had to work and eke out his existence. There is no clear evidence showing that both the brothers even brought their earnings in a common chest and disbursed expenses out of it. Appellant 1 pretended that he gave money to Aju from time to time. Aju had two daughters called Devkabai and Mulbai. Aju had got them married. Mulbai married in Samvat 1976. Appellant 1 stated that he and Aju jointly spent for the marriage. He further stated that he spent for the marriage of respondent 2. Hemraj (Plaintiff's witness No. 5) was examined to say that in Samvat 1993 he had effected repairs in the suit house and that the work was got done by Ashu and Velanbai. Appellants could have produced bills to show that Ashu had purchased articles required for effecting repairs. Kalubhai (plaintiff's witness No. 6) was examined to say that once he had done business in partnership with Ashu and Aju. He could not say whether Aju and Ashu had to divide their share of profit or loss.

Khimjee (Plaintiff's witness No. 7) grand-son of Dharsey was examined to say that Aju began to stay separately in Samvat 1979. The trial Court was not impressed with the evidence of this witnesss. Nanjee (Plaintiff's witness No. 8) is the son-in-law of appellant 1. He stated that he saw Ashu and Aju dining together. It was not surprising that as a son-in-law he might oblige appellant 1. The oral evidence considered above does not show existence of joint status particularly after Samvat 1979, so as to rebut the inferences to be made from the facts and circumstances stated in the preceding paras.

(11) The lower Court relied on the following facts for holding that there was severance of joint family status. These facts are (1) cesser in commensality admittedly from Samvat 1979, (2) each brother was earning his bread separately, (3) taking separate 'Lahnas' from the caste, (4) separate occupation of the properties and disposal of some by Aju and some by Ashu alone and (5) payments of debts by each brother separately. These state of things followed a partition to which Ashu and Aju were parties and the extent of separate occupation of property indicates a partition by metes and bounds between the brothers. The lower Court was right in not placing reliance on oral evidence led by the appellants and in inferring a severance of joint family status and partition from the facts stated above. I have no doubt that the evidence on which the appellants relied at the trial was unreliable and had to be led in view of the aforesaid broad facts clearly negativing continuance of joint family status between the two brothers. The lower Court was, therefore, right in finding the first point stated above in the negative.

(12) In the alternative, plaintiffs have claimed the house, the field, the movables and the gold ornament of Devkabai as her heirs. It is not disputed that on death of Aju, his daughter Devakabai would succeed to his property. When this alternative case was made in the plaint, it was not realised that failing lineal descendents, the property of Devkabai would go to her husband's heirs. It was, therefore, for the plaintiffs to state clearly in the plaint as to how they succeeded to the property of Devkabai.

It could have been alleged, if it was a fact that there were no heirs of the husband of Devkabai. This vagueness in the pleading led to subsequent complications. Appellant 1 stated in his evidence that the husband of Devkabai had no heirs. This was a signal to the defendants to go in search of some evidence to show that Devkabai's husband had got at least one heir. Defendants thought the ground under their feet was slipping away. So they found out some evidence to support a story that Devkabai was married in an unapproved form. Suffice it to say that this evidence was unreliable and was the result of an after thought. The question must be considered and decided on the finding that Devkabai had no heirs in her husband's family and her marriage was in an approved form.

The lower Court held from the way the appellants urged their alternative case in the plaint that Devkabai's marriage was in an unapproved form. But the fact that there is a presumption about a marriage in approved form was not taken into consideration. Moreover, the evidence to show that marriage was in an unapproved form was quite unreliable. It shou'd have been considered that when the appellants were in the witness box there was no suggestion made to them that bride's price was taken when marriage of Devkabai was performed. It was not put to appellant 1 that a certain person was the husband's heir of Devkabai. The lower Court remarked that this so called heir was making a statement against his interest. In fact, if he was the heir, he would take steps to get the property. But the witness wound up by saying that he did not want the property.

[18] It must therefore be held that Devkabai who was married in an approved form died childless and she had no heirs to her property in her husband's family. The appellants submitted that failing husband and heirs in the family of husband, the property of Devkabai would go to her blood relations. In Mulla's Hindu Law (Tenth Edition) the question of succession to stridhan when there is no issue is stated in S. 151 (iii) at page 145. It is stated that when a woman dies without leaving any issue, her stridhan of every description (except sulka) goes, if her marriage took place in an approved form, to her husband and failing him, to her heirs in her husband's family. It is pointed out that according to Mayukha, property of such a woman would go to her heirs in her husband's family ; but notwithstanding this dissimilarity between the language of Mitakshara and Mayukha, the heirs both under Mitakshara and Mayukha are the same. If a woman has got no heirs in her husband's family, the property of such a woman would go to her blood relations in preference to the crown. But if she was married in an unapproved form, it goes to her mother, then to her father and then to the father's heirs.

It seems to have been thought that appellants were the blood relations of Devkabai and hence they were entitled to succeed in preference to Respondents 2 to 4 who were her sister's sons. No doubt, sister's sons are now assigned a place in the list of Sapinda succession by the Hindu Law of Inheritance (Amendment) Act II [2] of 1929. But the said Act was not applicable to Kutch State where the general principles of Hindu Law were applied on the broad principles of equity, justice and good conscience. It is thus imperfect conception of Law that led to the plea of Devkabai having been married in an unapproved form being raised and being given great importance by the lower Court. As will be shown hereafter, the question whether Devkabai was married in an approved form or in an unapproved form was immaterial.

In *Kanakammal* v. *Ananthemathi*, 37 Mad. 293 and in *Ganpat* v. *Secretary of State*, 45 Bom. 1106, the principle laid down was that on failure of the husband's heirs, the property of such a woman goes to her blood relations in preference to the crown. Hence, in those cases, the questions as to who were her blood relations did not arise for consideration. Now it is apparent that Hindu Law makes separate provision for succession to the property of a woman as Sapinda succession-ship applies to the property of a male only. It is therefore, apparent, that the blood relations of a woman are her husband's or her father's blood relations.

In *Tukaram* v. *Narayan*, 36 Bom. 339, it was observed as under :

"If in the principal case of marriage, the wife's Sapindas are the same as husband's without distinction, the same must have been intended as between a daughter and her father also. If *Dwari* and *Kula* mean the identical terms for husband and wife, they must mean that also for father and daughter."

In *Pratap Bahadur* v. *Lachmidhar Prasad*, 49 Bom. L. R. 130 at p. 137 (P. C.), their Lordships of the Judicial Committee observed as under :

"Their Lordships agree with the opinion of Agarwala J. that it has generally been understood that Kamalakar's view relating to succession to stridhan, in default of husband, in the case of a woman married in the approved form, and in default of father in other cases, was that the heirs of husband or father succeeded in the order laid down in the Yagnavalkya's text relating to the succession to the property of a male."

In Mayne's Hindu Law, in S. 624, it is observed as under :

"On failure of her husband's heirs, her own blood relations are entitled to succeed; in other words her mother, her father and in their default, their nearest kinsmen and heirs in order, by rule of propinquity."

It is thus evident that in default of husband's heirs, father and mother, nearest kinsmen and heirs of a woman married in an approved form dying childless are the heirs of her mother and father in the order of propinquity. In this order, daughter's sons of the father are entitled to succeed in preference to his brother. Thus when a Hindu woman, married in an approved form dies

childless and there are no heirs in the husband's family, her sister's sons who are the daughter's sons of her father are entitled to succeed in preference to her paternal uncle who is her father's brother. If a woman is married in an unapproved form, her property goes to her mother, then to her father and then to the father's heirs and then to the husband's heirs.

The main distinction in the matter of succession between the case of a woman marrying in an approved form and in an unapproved form dying childless is that in the former case husband and his heirs succeed in preference to mother, father and their heirs. When there are no husband's heirs nor mother nor mother's heirs and the question is whether a paternal uncle or a sister's son is entitled to succeed, both being Sapindas of the father, the question whether a woman is married in an approved form or unapproved form becomes immaterial. When a woman has died childless and there is neither husband nor any heir in the family of husband, nor a brother, nor a mother nor a father, the succession to the property of such a woman and to the property of a maiden is the same viz. father's heirs in the order of propinquity. Hence in case of a maiden, it was held that her heirs, failing brother, mother and father, are her father's heirs vide *Meghjee* v. *Anant*, 50 Bom. L. R. 274.

The important fact to be noted is that when blood relations of a woman are to be considered, she could not be regarded as a proposita but her husband or her father are to be so regarded. In *Meghjee's case*, Lokur J. observed as under :

"Had Chaturba herself been regarded as the proposita, Hiralal (husband's brother) would have been her heirs, as her nephews (husband's nephews), though Sapindas, would be one degree more remote. But Himatlal (husband) was deemed to be the propositus, as Chaturba had merged in him, and so her heirs were held to be the heirs to her stridhan property. By parity of reasoning both Anta and Ananta must be held to have succeeded to Ahilya's stridhan as she was married in an approved form and they are both her father's heirs under Mayukha Law."

The conclusion is therefore clear that failing husband, heirs in husband's family, mother and father, the property of childless Devkabai would devolve on her father's heirs and according to both Mayukha and Mitakshara succession, respondents 2 to 4 who are daughter's sons are entitled to succeed in preference to appellant 1 who is the brother of Aju; and the question whether Devkabai was married in an approved form or unapproved form is immaterial.

[14] Result is that the appeal, in so far as it relates to the house, field, movables and one ornament of Devkabai fails. I agree with the lower Court in holding that there was no satisfactory evidence to show that the other ornament belonged to Velanbai. The appeal therefore fails entirely. The only question left for consideration is about the order as to costs made by the lower Courts under S. 35-A, Civil P. C., against the appellants. In para. 27 of their written statement, the respondents stated that the appellants unsuccessfully tried to get the complaint of theft filed by them stayed and therefore they filed the suit to shield the illegal act. It was not stated that the suit was false or vexatious to the knowledge of the appellants. Having regard to the important question of law considered so far as appellants' alternative case is concerned, it could not be said that the suit was vexatious. The lower Court seems to have been much impressed with the fact that appellants had taken forcible possession of the property on the death of Velanbai. That fact was hardly sufficient for a finding that the suit was false or vexatious to the knowledge of the appellants. Hence, that order must be set aside. The following order is therefore made.

[15] The decree passed by the lower Court except order as to special costs is confirmed and the appeal is dismissed with costs. The order of the lower Court for payment of Rs. 200 as compensatory costs under S. 35-A, Civil P. C. is set aside.

D.H. *Order accordingly.*

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VAKIL J. C.

Ramniklal Nanalal—Applicant v. *Shah Pranlal Nanchand—Non-Applicant.*

Criminal Misc. Appln. No. 7 of 1951, D/- 17-4-1952.

(a) Contempt of Courts Act (1926), S. 2 (1)—Application under—Who can make.

It is not necessary that the High Court be moved by the Public Prosecutor for taking action. Where the alleged contempt is constituted by an article regarding a pending criminal trial, the complainant in that case may move the Court. [Para 4]

Anno. C. C. Act, S. 2, N. 2.

† (b) Contempt of Courts Act (1926), S. 2 (1)—Contempt of Subordinate Court—Kutch Judicial Commissioner's Court—Jurisdiction of, to commit.

The Kutch Judicial Commissioner's Court which is established under the Kutch Province (Courts) Order, 1948, had no power, authority and jurisdiction to commit for contempt of Subordinate Courts till the Constitution of India came into effect. Under Art. 215 of the Constitution every High Court is a Court of record and has all the powers of such a Court including power to punish for contempt of itself. Under the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, Art. 215 is made applicable to the Courts of the Judicial Commissioner. Thus from 26-1-50 from which date the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, came into force, the Kutch Court as the Court of record possessed powers, authority and jurisdiction to commit for contempt of Subordinate Courts. [Para 4]

Anno. C. C. Act, S. 2, N. 1.

(c) Contempt of Courts Act (1926), S. 26—Repeal of Act by Act 32 of 1952—Effect of, on offence already committed—(General Clauses Act (1897), S. 6).

Though the Contempt of Courts Act, 1926, is repealed by the Contempt of Courts Act (XXXII [32] of 1950), the latter Act provides that S. 6, General Clauses Act, 1897 applied to the repeal of the old Act. Result is that for contempts committed prior to the commencement of new Act, action could be taken under the old Act. [Para 5a]

(d) Contempt of Courts Act (1926), S. 1—Contempt —What is — Publication of article tending to prejudice fair trial of pending case.

A filed a complaint against *B* for defamation by publishing an article alleging that *A* had pulled the braid of *B*'s wife in a public meeting. During the pendency of the case *B* published another article referring to that incident and suggesting that *A* was 'a goonda hired by congressmen to pull the braids of ladies'. On an application by *A* to commit *B* for contempt;

Held that such a publication was prejudicial as it tended to prejudice fair trial of the case by influencing the mind of the public and also of the Court against the applicant and hence constituted contempt of Court : A. I. R. 1952 Cal. 258; A I. R. 1929 All. 81; A. I. R 1945 Lah. 206 and A. I. R. 1941 Oudh 399, *Rel. on.* [Para 7]

Anno. C. C. Act, S 1. N. 3, Pt. 11.

(e) Contempt of Courts Act (1926), S. 1—Intention — Whether necessary ingredient of offence of contempt.

Intention is not the gist of the offence of contempt. What is to be seen is the effect of the offending publication. Absence of an intention may, however, be considered in deciding the final order. [Para 8]

Anno. C. C. Act, S. 1, N. 3.

(f) Contempt of Courts Act (1926), S. 2(3)—Applicability.

There is no bar to the taking cognizance of the contempt even though *prima facie* it may be actionable as a distinct offence under the Penal Code. Thus a libel punishable under the Penal Code can be dealt with, if it amounts to interference with justice, under the Act, *Case law referred.* [Para 9]

Anno. C. C. Act, S. 2, N. 6.

(g) Contempt of Courts Act (1926), S. 3—Contempt by newspaper—Sentence.

Though the punishment for contempt by newspapers, is more severe than punishment for contempt by an ordinary citizen, at the same time the fact that the contempt was not an intentional one has to be taken into consideration :

Held that as it was for the first time that a case of this type had come before the Court and it did not appear that an action for contempt was even taken by the Highest Court of the State before integration, it was not expedient to compel the non applicant to purge his contempt by payment of a fine or the undergoing of a sentence of imprisonment and the unqualified apology was accepted. [Para 11]

Anno. C. C. Act, S. 3, N. 1.

M. M. Mehta—for Applicant; D. P. Joshi— for Non-Applicant.

REFERENCES : Courtwar/Chronological/

	Paras
('45) A.I.R. 1945 P.C. 151 : (47 Cri. L. J. 1)	9
('29) A.I.R. 1929 All. 81 : (30 Cri. L. J. 217).	6
('35) A.I.R. 1935 All. 896 : (36 Cri. L. J. 967).	9
('38) A.I.R. 1938 All. 358 : (39 Cri. L. J. 677).	9
('52) A.I.R. 1952 Cal. 258 : (1952 Cri. L. J. 666).	6
('36) A.I.R. 1936 Lah. 917 : (38 Cri. L. J. 73)	9
('45) A.I.R. 1945 Lah. 206 : (47 Cri. L. J. 115).	6
('35) A.I.R. 1935 Nag. 46 : (156 Ind. Cas. 666).	5
('41) A.I.R. 1941 Oudh 399 : (42 Cri. L. J. 524).	6
('38) A.I.R. 1938 Pat. 142 : (34 Cri. L. J. 770).	9
('38) A.I.R. 1938 Pat. 204 : (12 Pat. 172).	9

Judgment.—This is an application for commitment of Shri Pranlal Nanchand Shah, Editor, Printer and Publisher of a local daily called 'Azad Kutch', for publication in the issue of his paper dated 18-12-1951, an article prejudicial to a criminal case pending in the Court of the Magistrate First Class, Bhuj and thus amounting to contempt of that Subordinate Court.

[2] The applicant alleged that Shri Pranlal, to be hereinafter referred to as 'non-applicant', had published in his paper dated 19-5-1951, the following matter defamatory of the applicant :

"A clerk named Ramnik of Congress leader Manharrai Mavjee Mehta, Hakla and Khengar came forward under the pretext of asking questions and . . . the man of the Congress leader Manharrai Mavjee showed temerity to pull braid of his wife (of Shri Pranlal)."

The applicant, therefore, filed a complaint against the non-applicant in the Court of the Magistrate First Class, Bhuj for an offence punishable under S. 500, Penal Code while that case was pending, the non-applicant published in the issue of his paper dated 18-12-1951, the following matter ;

"In the Capital, at the time of Municipal Election, had not Congressmen got braid of a woman pulled through their Gundas."

The applicant submitted that the writing published tended to obstruct or interfere with due course of Justice and thus amounted to contempt of that Subordinate Court.

[3] The non-applicant who was served with a notice to show cause filed a written statement raising the following contentions : (i) The applicant was not entitled to make this application. (ii) This Court has no authority to punish for contempt of a Subordinate Court. (iii) There was nothing in the writing which might interfere with or prejudice fair trial of the case. (iv) There was no intention to interfere with or prejudice fair trial of the case. At the end a reserved though unqualified apology was tendered to the Court.

[4] There is no substance in the first contention. The applicant as the complainant in the pending criminal case was vitally concerned in making this application. It is not necessary that this Court be moved by the Public Prosecutor for taking action in the matter. Any person concerned like the applicant can move this Court for commitment.

[5] The question about authority of this Court to commit for contempt of a Subordinate Court is important as this is the first case coming before this Court since the Court was established in the month of December 1948. The application was made under the Contempt of Courts Act (12 of 1926). Before the Act was passed, the High Courts in India exercised power to commit for contempt of Subordinate Courts, as Courts of record. The Act was passed to resolve doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of Court. Sub-section (1) of S. 2 provided that High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority in respect of contempts of Courts, subordinate to them as they had and exercise in respect of contempt of themselves. The Courts of Judicial Commissioners, existing at that time, being not High Courts established by Letters Patent had under the Act no power to commit for

contempt of subordinate Courts: *Hirabai Mt.* v. *Mangal Chand*, A. I. R. 1935 Nag. 46. This Court was established under the Kutch Province (Courts) Order 1948. That order was made under the Extra Provincial Jurisdiction Act, 1947. In the order it was not provided that the Court of Judicial Commissioner Kutch shall be a Court of record. In the Assam High Court Order, 1948, it was provided that the High Court for the Province of Assam shall be a Court of record. The position remained the same even after the Act was applied to the State of Kutch under the Kutch Application of Laws Order, 1949. The said Order, provided a rule of construction under which the expression 'High Court' meant the Court of Judicial Commissioner, Kutch. But the Act gave legislative recognition to exercise of power, authority and jurisdiction as existed and were exercised by High Courts. Thus this Court, from the date of its establishment had no power, authority and jurisdiction to commit for contempt of Subordinate Courts till the Constitution of India came into effect. Article 215 of the Constitution provides that every High Court shall be a Court of record and shall have all the powers of such a Court including power to punish for contempt of itself. Under the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, Art. 215 was made applicable to the Courts of the Judicial Commissioner. Thus from 26-1 50 from which date the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950 came into force, this Court as the Court of record possessed powers, authority and jurisdiction to commit for contempt of Subordinate Courts.

[5a] The learned-pleader for the non-applicant relied on the fact that the Act of 1926 was repealed by Act of 1952 (Contempt of Courts Act, XXXII [32] of 1952) and it was contended that no action for alleged contempt committed before the said Act came into force could be taken. Though by the new Act, the old Act was repealed, it was provided that S. 6, General Clauses Act (X [10] of 1897) applied to the repeal of the old Act. Result is that for contempts committed prior to the new Act coming into force, action could be taken under the old Act. Reliance was also placed on the fact that in the definitions in S. 2 of the new Act, it was specifically provided that High Court meant and included the Court of the Judicial Commissioner and it was contended that this Court had no such power, authority or jurisdiction before the new Act came into force. Though, according to Adaptation of Laws Order, High Courts in Sub-s. (1) of S. 2 of the old Act meant High Courts of Part A States, on application of Art. 215 to the Court of Judicial Commissioners, this Court became the Court of Record entitled to all powers of such a Court. This Court therefore had all the authority, power and jurisdiction conferred on High Courts of Part A States under Art. 215 of the Constitution. I therefore hold that from 26-1-50, this Court got authority, power and jurisdiction to commit for contempt of Subordinate Courts.

[6] It is evident from both the publications read together that reference to the incident of pulling braid in the second publication was the same mentioned in the first publication. It follows that the person meant as 'Goonda hired by Congressmen' was the same mentioned in the first publication as person who had temerity to put the braid. It is therefore clear that the Goonda referred to in the second publication was the applicant. These publications having been admittedly made, the question to be considered is whether the second publication tended to prejudice the fair trial of the case. The fact that the non-applicant was the author of the second publication and the fact that he was being prosecuted for the first publication establish other ingredients against him. Speeches or writings may tend to defeat ends of justice. One of the ways of doing it is to comment on pending proceedings, speeches, or writings misrepresenting the proceedings of a Court or prejudicing the public for or against a party are contempts. In *In the matter of Sudhir Chandra*, A. I. R. 1952 Cal 258, Harries C. J. defined contempt as under :

"It is extremely difficult to define the term 'contempt of the Court'. Generally, however, it may be said to be constituted by any conduct that leads to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice the parties litigating or their witnesses during litigation."

In *In re Ganesh Shankar*, A.I.R. 1929 ALL. 81, it was held that a prejudicial article was one which was calculated to influence the mind of not only the prosecution witnesses in the case but also of general public and was therefore prejudicial to the fair trial and which was written with the object of prejudicing the public against to the merits of the prosecution. Even abusing of parties to a pending case was held as tending to contempt: *Emperor* v. *Khushal Chand*, A. I. R. 1945 Lah. 206. In *Anis Ahmed Abbasi* v. *Hakim Oari*, A. I. R. 1941 Oudh 399, a complaint of defamation was filed against a person as the complainant was styled 'king of liars' in a publication made by the accused. During the pendency of the case the complainant made a publication that the article objected to was published on account of enmity implying that the fact stated in the article was not true. It was held that this would prejudice the public and the Court and thus constituted contempt though not of a serious kind.

[7] With respects, this Court accepts and follows the principle of law stated in the preceding para. It is evident that one of the facts to be considered by the Court trying the criminal case is whether the applicant had pulled or attempted to pull braid of the lady referred to in the article. What the non-applicant did was to affirm the correctness of the said fact which was *sub judice*. Such an affirmation tends to prejudice the public and the Court against the applicant. The

article was written with the object of prejudicing the general public against the applicant and as such it is bound to be prejudicial to the fair trial of the case. The public was asked to accept as true the fact that the applicant had pulled braid of the lady. There was further prejudice created by styling the applicant as a Goonda. It was stated that the applicant was a gconda mercenary employed by Congressman to do such a mean act. Such a publication must be held prejudicial in that it tended to prejudice fair trial of the case by influencing the mind of the public and also of the Court against the applicant. I therefore, find that publication objected to, interfered with or prejudicial to the fair trial of the case.

[8] It was contended that the non-applicant had no intention to commit contempt. Intention is not the gist of the offence of contempt. What is to be seen is the effect of the offending publication. It appears from the article read as a whole that the idea was to run down the political opponents in an election campaign. It is to be noted that in the entire article there is only one single sentence relating to the applicant. Even then the congressmen were the object of direct criticism. It may therefore be accepted that the non-applicant might not have any intention to commit contempt. This is a fact which may well be considered in deciding the final order to be made. But for deciding the principal question, the relevant thing to be considered is whether the objected publication tended to prejudice fair trial of the case.

[9] Next question to be considered is whether sub-s. (3) of S. 2 of the Act raises a bar to the taking cognizance of the offence by this Court. The question is considered on the assumption that "publication is *prima facie* defamatory." It was contended on behalf of the applicant that the said sub-section provided only for offence of contempt punishable under the Indian Penal Code and not for other offences punishable under the said Code. A libel punishable under the Indian Penal Code can be dealt with, if it amounts to interference with justice, under the Act. The contention that it cannot be so done is based on the view expressed by the Allahabad High Court in *Ziaul Hasan* v. *Aziz Ahmad*, A. I. R. 1935 ALL. 896. In a latter case, Allahabad High Court had expressed a contrary opinion: *Emperor* v. *Jagannath Prasad*, A.I.R. 1938 ALL. 359. The Patna and the Lahore High Courts held that the bar to sub-s (3) of S. 2 was meant for offences punishable as contempt under the Indian Penal Code: *Kaulashia* v. *Emperor*, A. I. R. 1933 Pat. 142, *Jnanendra Prasad* v. *Gopal Prasad*, A. I. R. 1933 Pat. 204 and *Bennett Coleman & Co. Ltd.* v. *G. S. Monga*, A. I. R. 1936 Lah. 917. The question arose before the Judicial Committee in *Nur Mohammed* v. *Emperor*. A. I. R. 1945 P. C. 151 but it was found unnecessary to decide it. Since then the old Act was repealed and in the new Act, the provisions of sub-s. (3) of S. 2 are reproduced. The legislature is presumed to be aware of the judicial interpretation placed on sub-s. (3) of S. 2 by the High Courts and of the fact that the Judicial Committee had expressed no opinion on the question. When the sub-section was reproduced in the new Act, it must be held that it was reproduced in the sense in which it was interpreted by the High Courts. It must therefore be held that there is no bar to the taking cognizance of the contempt even though *prima facie* it may be actionable as a distinct offence under the Indian Penal Code.

[10] Thus on consideration of facts and circumstances of the case and of law on the subject, I have no hesitation in coming to the conclusion that the impugned publication dated 18-12-51 tended to prejudice the fair trial of the case in respect of the first publication and that the non-applicant is guilty of contempt of a subordinate Court.

[11] Next question to be considered is the order to be made in the case. At the end of his written statement, the non-applicant has tendered a reserved but unqualified apology. Punishment for contempt by newspapers is more severe than punishment for contempt by an ordinary citizen. At the same time the fact that the contempt was not a serious one and the further fact that the contempt was not an intentional one have to be taken into consideration. This is for the first time that a case of this type has come before this Court and it does not appear that an action for contempt was ever taken by the highest Court of the State before integration. I do not therefore consider it expedient to compel the non-applicant to purge his contempt by payment of a fine or the undergoing of a sentence of imprisonment. At the same time, I may make it clear that this Court will not brook any contempt of the subordinate Courts and will exercise authority, power and jurisdiction for their protection in fit cases by imposing sentences of imprisonment or fine. I therefore accept the apology tendered but direct the non-applicant to pay costs of the applicant.

[12] The non-applicant is found guilty of contempt in respect of his publication dated 18-12-51. The apology tendered by him is accepted. No action is taken against him but he is directed to pay applicant's costs.

B/D.R.R. *Order accordingly.*

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VAKIL J. C.

Jakhu — Plaintiff-Applicant v. *Dhanji Pasu — Defendant-Opponent.*

Civil Revn. Appln. No. 133 of 1951, D/- 23-12-1951.

(a) Civil P. C. (1908), O. 7, R. 1 — Facts showing that Court has jurisdiction — Suit for money — Place of payment not alleged as giving cause of action — Plaintiff not entitled to plead it subsequently.

Where in a suit for recovery of money on the basis of a Khata, the plaintiff did not aver in the plaint that the cause of action arose in Kutch as money was to be paid in Kutch but merely alleged that he had served a notice of demand in Kutch which allegation he failed to prove, he is not entitled to urge that the cause of action arose in Kutch in the absence of specific averment to that effect in the plaint, the reason is that a case not specified in the plaint on the place of cause of action cannot be surmised at the time of arguments: A.I R. 1950 Kutch 66, *Rel. on.* [Para 6]

Anno. Civil P. C., O. 7, R. 1, N. 8.

(b) Civil P. C. (1908), S. 20—Suit for money—Fact that defendant has property within the jurisdiction of Court cannot give jurisdiction to Court : A.I.R. 1952 Kutch 27, *Disting.* [Para 7]

Anno. Civil P. C., S. 20, N. 2.

(c) Civil P. C. (1908), S. 20, Expl. 1 — Temporary and occasional residence.

Temporary residence is no residence for the purposes of S. 20 of the Code except that for a cause of action arising during the temporary residence, it is so regarded by virtue of explanation I to that section. It follows that a person actually and voluntarily residing in Bombay cannot be held to be actually and voluntarily residing in Kutch merely because he happens to visit Kutch on occasions and stays in his house for some time: Civil Revn. Appln. No. 6 of 2004 (Kutch), *Rel. on*; *Case law referred.* [Para 9]

Anno. Civil P. C., S. 20, N. 4, 5.

J. G. Vaidya —for Applicant; *M. H. Dholakia —for Opponent.*

REFERENCES : Courtwar/Chronological/ Paras.

('24) A.I.R. 1924 All. 669 : (79 Ind. Cas. 567). 10
('30) A I.R. 1930 Cal. 347 : (57 Cal. 65). 10
('41) A.I.R. 1941 Cal. 670 : (I.L.R. (1941) 1 Cal. 490). 10
('47) Civil Revn. Appln. No. 6 of 2004 (Kutch). 9
('49) A.I.R. 1949 Kutch 5. 9, 10
('50) A.I.R. 1950 Kutch 66. 6
('51) Civil Revn. Appln. No. 115 of 1951 : (A. I. R. 1952 Kutch 58). 9
('51) Civil Revn. Appln. No. 22 of 1951 : (A. I. R. 1952 Kutch 27). 7, 8, 9
('51) Cognate Civil Revn. Appln. No. 79 of 1951 (Kutch). 10
('33) A.I.R. 1933 Lah. 120 : (143 Ind. Cas. 357). 10

Order.—This is an application for revision of an appellate decree in Miscellaneous Appeal No. 6 of 1951, confirming an order for return of plaint in Suit No. 14 of 1951 for presentation to the proper Court made by the Subordinate Judge, Mundra.

[2] The applicant brought Suit No. 14 of 1951 to recover Rs. 2600 for principal and interest on the basis of a khata executed by the opponent in Bombay. In the plaint it was alleged that the cause of action arose in Kutch State by service of a notice on and by institution of a suit against defendant on 27-11-1949. It was further alleged that defendant was a resident of Kutch and had property in Kutch.

[3] Defendant stated that for last 40 years he was residing in Bombay where he was carrying on business. He denied having been served with a notice by the applicant. He further denied residing in Kutch. He admitted that he had a house in Kutch but he stated that he was not residing in it. Defendant, therefore, contended that the trial Court had no jurisdiction to entertain the suit. It is not necessary for the disposal of this application to state other contentions raised by the defendant.

[4] The Mundra Court tried the question of jurisdiction as a preliminary issue and held that it had no jurisdiction to hear the suit. It, therefore, ordered the plaint to be returned for presentation to the proper Court. The District Court on appeal confirmed the order of the trial Court. The applicant has, therefore, approached this Court in revision.

[5] It was contended before me that as money was to be paid in Kutch, the cause of action arose in Kutch and hence the trial Court had jurisdiction to hear the suit. It was further contended that defendant had two places of residence in Bombay and also in Kutch.

[6] As regards the first contention, it is evident that plaintiff had not averred in the plaint that the cause of action arose in Kutch as money was to be paid in Kutch. It was contended that a demand was made by notice in Kutch. Defendant had denied having been served with a notice. Plaintiff did not produce and prove the notice. Plaintiff had thus failed to show that money was demanded in Kutch. It does not appear how institution of a previous suit for a different claim would give a cause of action for institution of this suit in Kutch. Reliance was, however placed on the recitals in the khata that money was to be paid 'Desh Pardesh' and it was contended that as money was to be paid in Kutch, the trial Court had jurisdiction to entertain the suit. The obvious difficulty in the plaintiff's way was that he did not aver in the plaint that cause of action arose in Kutch as money was to be paid in Kutch. In *Manek Devjee* v. *Ratanbai Khetu*, A.I.R. 1950 Kutch 66, this Court observed that a case not specified in the plaint on the place of cause of action could not be surmised at the time of arguments. These observations apply to the facts of the present case. The applicant is, therefore, not entitled to urge that the cause of action arose in Kutch in the absence of specific averment to that effect in the plaint.

[7] Another contention urged was that the defendant had property in Kutch and hence that fact gave jurisdiction to the Court. In *Velji Bharmal* v. *Samji Punja*, Civil Revn. Appln. No. 22 of 1951, this Court observed that the fact that defendant had property in Kutch was held sufficient to give a Court of Kutch State jurisdiction. This observation was made in a case governed by the Civil Procedure Code of the Kutch State. The present case is governed by the Civil Procedure Code, Act V [5] of 1908 which was made applicable before the suit was filed. This contention therefore fails.

[8] Lastly it was urged that the trial Court had jurisdiction on the ground of residence of the defendant. It appears from the evidence led in the case that defendant was the original resident of Kutch. He is residing for number of years last in

Bombay where he carries on business. He has got a house in his native place Samagogha. He visits Samagogha on occasions and when he visits Samagogha, he stays in his house. From these facts it could not have been denied that at the time of the commencement of the suit defendant was actually and voluntarily residing in Bombay. It was contended that a person might have more than one place of residence in different places and that defendant had one place of residence in Bombay and another place of residence in Samagogha. Reliance was placed on the doctrine of *animus revertendi* and also on a decision of this Court in *Velji Bharmal* v. *Shamji Punja*, Civil Revn. Appln. No. 22 of 1951, in which the contention that the Court had no jurisdiction was not accepted.

[9] The question whether a person actually and voluntarily residing in Bombay or in any place outside Kutch can be said to be also actually and voluntarily residing in Kutch has arisen before this Court in some decided cases. In all such cases, the cause of action had arisen out of Kutch. The question of a permanent and a temporary residence could not arise in such cases. Reason is that in such cases, cause of action had not arisen during the temporary residence of the defendant in Kutch. In fact temporary residence is no residence for the purposes of S. 20 of the Code except that for a cause of action arising during the temporary residence, it is so regarded by virtue of explanation I to that section. It follows that a person actually and voluntarily residing in Bombay cannot be held to be actually and voluntarily residing in Kutch merely because he happens to visit Kutch on occasions and stays in his house for some time. It was so held by this Court in the earliest case on the subject decided vide *Hirachand* v. *Maneckjee*, Civil Revn. Appln. No. 6 of 2004 (Smt). In that case defendant who was actually and voluntarily residing outside Kutch had a residential house in Kutch which he seldom visited for specific purposes. The same question arose in *Murarjee* v. *Jayant Trading Corporation*, A. I. R. 1949 Kutch 5. In that case the facts were that defendants had their permanent residence in Kutch. They resided in Bombay for business purposes. They visited Kutch every year and resided for some time in their house there. It was held that defendants had two places of residence, one in Kutch and other in Bombay. The principle of law to be deduced from this case is that a person who is a resident of Kutch and who lives outside Kutch for business or service but returns back to Kutch every year and lives in his residential house for some time of the year, is actually and voluntarily residing both outside Kutch and in Kutch. The third case in which the question arose for consideration in *Dhanjee Monshi Verjang* v. *Jivraj*, Civil Revn. Appln. No. 115 of 1951. In that case the facts were that defendant who was the resident of Kutch had gone to Bombay for business 4 years before the suit. His family members used to reside in Kutch in his residential house. Defendant used to visit his family members from time to time. It was held that defendant had two places of residence in Kutch and in Bombay. The principle of law to be deduced from this case is that an original resident of Kutch residing out of Kutch for business or service but keeping his family members in his residential house in Kutch and visiting Kutch and living in his house with his family members from time to time is also actually and voluntarily residing in Kutch. Last case in which the question arose is *Velji Bharmal* v. *Shamji Punja*, Civil Revn. Appln. No. 22 of 1951. The facts found in that case were that defendant had a place of residence in Kutch. His wife used to reside in Kutch in that residential house. Defendant was living in Bombay doing business for last 30 years. Defendant used to visit and stay in his residential house from time to time. At first sight it may appear that the facts in this case are similar to the facts found in *Hirachand* v. *Maneckjee*. But the distinction is that the family members of the defendant were residing in Kutch in his residential house and that his visits to Kutch were not only on specified occasions. He visited Kutch to meet his family members and stayed with them. The doctrine of *animus revertendi* can properly be applied to such cases. The principle of law to be deduced is the same as stated while considering the case of *Dhanji Monshi Verjang* v. *Shah Jivraj*. The facts found in the present case attract applicability of the principle decided in *Hirachand* v. *Maneckjee*. Defendant cannot therefore be held to be actually and voluntarily residing in Kutch.

[10] In view of the conclusion arrived at in the preceding para, it is unnecessary to consider in detail the decided cases of other High Courts cited at the Bar. In the case of *Bhagat Singh* v. *Dewan Jagbir*, A. I. R. 1941 Cal. 670 in which the principle of *animus revertendi* was not accepted, it was found as a fact that defendant had given up Wazirabad as his place of residence and had no intention of returning. The other observations made in the case are quite consistent with the principal fact found as stated above. The question considered in *Municipal Board of Bareilly* v. *Hafiz Alabaksh* A. I. R. 1924 ALL. 669 is whether a person carrying on business is deemed to reside at the place or at the place where for rest or recreation or family ties, he occasionally returns to the family house. Hence the question considered in that case is an admitted fact in the present case that defendant actually and voluntarily resides in Bombay. In cognate Civil Revn. Appln. No. 79 of 1951 cases reported in *Sitanath Bhadra* v. *Jatindra Nath*, A. I. R. 1930 Cal. 347; *Nur Din* v. *Khair Din*, A. I. R. 1933 Lah. 120 and *Murarjee* v. *Jayant Trading Corporation*, A. I. R. 1949 Kutch 5 were cited. The Calcutta case was decided under explanation I to S. 20, Civil P. C. The Lahore case

was also similarly decided. Kutch case has already been considered above. Thus there is nothing in the cases decided by other High Court which would induce me to adopt a view different from what was taken by this Court in the decided cases discussed in para. 9 above.

[11] Result is that this revision application fails. It is therefore dismissed with costs.

B/K.S *Revision dismissed.*

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VAKIL J. C.

Jadavji Mansang — *Appellant* v. *Indarji Parshottam*—*Respondent.*

First Appeal No. 9 of 1951, D/- 26-4-1952.

Court-fees Act (1870), S. 13 – Applicability—Refund under inherent powers—(Civil Procedure Code (1908), S. 151, O. 41, R. 23.)

A suit was brought for dissolution of a partnership and for taking accounts. On 23-11-49, the District Court made a preliminary decree in that suit. That preliminary decree was confirmed by the Judicial Commissioner's Court on appeal. When the case went back to the trial Court, a question about liability for a silver bar was considered by it and decided. The trial Court made another preliminary decree incorporating therein the terms of the first preliminary decree together with its decision in respect of the silver bar. As defendant in that suit was made liable for the silver bar, he preferred an appeal. Plaintiff also preferred an appeal as defendant was not held liable to pay for the silver bar according to the current market rate. In both the appeals the following order was made by the Judicial Commissioner's Court:

"Result is that the preliminary decree dated 6-4-51 made by the Civil Judge (S. D.) is set aside as unnecessary in view of the preliminary decree dated 23-11-49 confirmed on appeal by this Court. The suit is sent back to the lower Court for proceeding further with it and for its disposal in accordance with law".

Held that no refund certificate could be issued under S. 13, Court-fees Act. Where a preliminary decree is erroneously made on decision of a point which cannot be regarded as a preliminary point, it cannot be said that the suit is disposed of on a preliminary point. Thus in the present case the suit was not disposed of on a preliminary point. Moreover, for application of S. 13, Court-fees Act, it is necessary that remand be made for a second decision by the lower Court. Disposal of a suit on a preliminary point is the first decision. Second decision contemplated is decision of the suit on remand on consideration of other points involved. Where there is no disposal of a suit on a preliminary point question of second decision does not arise. Reason is that there are other points to be considered but the court erroneously makes a preliminary decree on decision of a point.

Courts have got inherent powers to grant refund of court-fees apart from the provisions of Ss. 13, 14 and 15, Court-fees Act. The present appeals became infructuous as the Judicial Commissioners Court held that the second preliminary decree could not be made by the lower Court according to law. Appeals were preferred as the lower Court erroneously made a preliminary decree. When an appeal preferred against a preliminary decree became infructuous on the appellate Court holding that the lower Court erred in making a preliminary decree, a refund certificate could be issued. An appeal otherwise properly preferred is to be heard on merits. If however it could not be so done on the appellate Court holding that the preliminary decree was unnecessarily passed, appellants cannot be penalised to bear court-fees paid by each other. In one sense, the appellants could be said to have been compelled to prefer appeals and pay court-fees due to a mistaken order of the Court resulting in an unnecessary preliminary decree being drawn up. The appeals having become infructuous, a certificate for refund in the exercise of inherent powers must be issued in the interest of justice. *Case law discussed.* [Paras 5, 6, 7, 8]

Anno. Court-fees Act, S. 13 N. 2, 3, 4; C. P. C., S. 151 N. 4; O. 41 R. 23 N. 3.

L. L. Thacker—for Appellant; S. U. Bhanshali—for Respondent; K. K. Chhaya, Govt. Pleader — for State Gavernment.

REFERENCES : Courtwar/Chronological/ Paras.

('43) A.I.R. 1943 Bom. 50 : (I.L.R (1943) Bom. 25) 7, 8
('49) 51 Bom. L. R. 602 : (A.I.R. 1950 Bom. 4) 7
('34) A.I.R. 1934 Cal. 615 : (152 Ind. Cas 215) 8
('34) A.I.R 1934 Mad 566 : (57 Mad. 1028) 8
('42) A.I.R 1942 Mad. 316 : (202 Ind. Cas. 122) 8
('49) A.I.R. 1949 Mad. 895 : (1949-1 Mad. L. J. 179) 8
('33) A.I.R. 1933 Oudh 170 (1) : (7 Luck. 588) 7, 8

Order. — This is an application for refund of court-fees paid on the memo of Regular Civil First Appeal No. 9 of 1951.

[2] Regular Civil First Appeal Nos. 9 and 10 of 1951 were preferred against a preliminary decree dated 6-4-51 made by the Civil Judge (S.D.) Kutch, in Regular Suit No. 37 of Samvat 1997. In both the appeals the following order was made by this Court :

"Result is that the preliminary decree dated 6-4-1951 made by the civil Judge (S.D.) is set aside as unnecessary in view of the preliminary decree dated 23-11-1949 confirmed on appeal by this Court. The suit is sent back to the lower Court for proceeding further with it and for its disposal in accordance with law."

[3] Suit No. 37 of Samvat 1997 was brought for dissolution of a partnership and for taking accounts. On 23-11-1949, the District Court, Kutch, made a preliminary decree in that suit. That preliminary decree was confirmed by this Court on appeal. When the case went back to the trial Court, a question about liability for a silver bar was considered by it and decided. The trial Court made another preliminary decree incorporating therein the terms of the first preliminary decree together with its decision in respect of the silver bar. As defendant in that suit was made liable for the silver bar, he preferred Civil Appeal No. 10 of 1951. Plaintiff preferred Civil Appeal No. 9 of 1951 as defendant was not held liable to pay for the silver bar according to the current market rate. Plaintiff valued his appeal at Rs. 1977-12-5 and paid court-fees on the memo of appeal ad valorem on the said amount. Defendant valued his appeal at Rs. 1464-7-0 and accordingly paid court-fees on the memo of appeal.

[4] As both the appeals were disposed of in the manner stated in para 2 above, the appellants in those appeals have filed applications for refund of court-fees under S. 13, Court-fees Act and under the inherent powers of this Court. A notice of these applications was given to the State Government. The Government Pleader appearing for the State Government has opposed grant of refund certificate. It was submitted that S. 13, Court-fees Act did not apply to the facts of the case and that the Court had no inherent power to grant refund.

In the alternative, it was submitted that this was not a fit case for exercise of inherent powers.

[5] First question to be considered is whether the appellants are entitled to a certificate under S. 13 of the Court-fees Act. That section makes imperative provision for refund of court-fees paid on memo of an appeal if a suit under appeal is remanded on any of the grounds mentioned in O. 41, R. 23, Civil P. C., for a second decision by the lower Court. Order 41, R. 23, Civil P. C., provides for remand of a case by the Appellate Court when the trial Court has disposed of the case upon a preliminary point. A case can be said to have been disposed of on the decision of a preliminary point when it is disposed of on one of the points arising in it without necessity of deciding other points.

From the facts stated in paras 2 and 3 above, it is evident that the suit was not disposed of on a preliminary point. Where a preliminary decree can be made in a suit, the suit can be said to have been disposed of though a final decree is required to be made thereafter. But where a preliminary decree is erroneously made on decision of a point which cannot be regarded as a preliminary point, it cannot be said that the suit is disposed of on a preliminary point. Thus in the present case the suit was not disposed of on a preliminary point.

[6] Moreover, for application of S. 13, Court Fees Act, it is necessary that remand be made for a second decision by the lower Court. Disposal of a suit on a preliminary point is the first decision. Second decision contemplated is decision of the suit on remand on consideration of other points involved. Where there is no disposal of a suit on a preliminary point question of second decision does not arise. Reason is that there are other points to be considered but the Court erroneously makes a preliminary decree on decision of a point. Thus no refund certificate can be issued under S. 13, Court Fees Act.

[7] Next question to be considered is whether a certificate of refund can be issued in the exercise of the inherent powers of the Court under S. 151, C. P. C. The contention urged on behalf of the applicants is that they had to prefer appeals as a preliminary decree was drawn by the lower Court. These appeals were not decided by this Court on merits as in the opinion of this Court, the said preliminary decree drawn was entirely uncalled for. It was submitted that this was a mistake of the Court and justice required that they should not suffer for the mistake of the Court. The learned Government Pleader contended that apart from the provisions of Ss. 13, 14 and 15, Court Fees Act, the Court had no power to order refund of court-fees.

Courts have exercised inherent powers to secure ends of justice by remedying an injury. In *Vishnu Prasad* v. *Narandas*, 51 Bom. L. R. 602 instead of fixed court-fees, ad valorem court-fee was paid. It was held that the Court had inherent power under S. 151, Civil P. C., to order refund of court-fees paid in excess either by mistake, inadvertence or over-sight. In that case excess of court-fees was paid due to erroneous decision of the Court which was subsequently set aside. In *Ahmad Ebrahim* v. *Govt. of the Province of Bombay*, A. I. R. 1943 Bom. 50, a certificate of succesion for the property in United Kingdom was applied for and granted. As the certificate became infructuous, refund of court-fees was granted. In *Mahommad Sadiq Ali* v. *Ali Abbas*, A. I. R. 1933 Oudh 170 (1), appeal was found wholly unnecessary and a certificate for refund was granted. Thus the contention that Courts have not got inherent powers to grant refund of court-fees apart from the provisions of Ss. 13, 14 and 15, Court Fees Act, cannot be accepted.

[8] Next question for consideration is whether the present case should be regarded a proper one for exercise of inherent powers for grant of refund certificates prayed for by both the appellants. It was contended by the learned Government Pleader that the exercise of the inherent powers of the Court was restricted by decided cases to those cases in which excess of court-fees was paid due to mistake, inadvertence or over-sight and reliance was placed on the *Province of Madras* v. *Andemma*, A.I.R. 1949 Mad. 895. In that case, the Madras High Court held, following a previously decided case of that Court—that the Court could refund court-fees only—(1) where the Court Fees Act is applied; (2) where there was an excess payment by mistake or (3) where, on account of the mistake of a Court a party had been compelled to pay court-fees either wholly or in part. These principles were laid down in *Chidambaram Chettiar In re*, A. I. R. 1934 Mad. 566 wherein it was observed that outside these cases the Court had no authority to direct a refund.

One of the authorities cited when that case was heard is *Mahommad Sadiq Ali* v. *Ali Abbas* A.I.R. 1933 Oudh 170 (1). In the Oudh case fact was that the appeal was wholly unnecessary. The Madras High Court declined to follow *J. C. Galstaun* v. *Janki Nath*, A.I.R. 1934 Cal. 615 in which a certificate of refund was granted in an appeal held time barred on the ground that there was no want of bona fides on the part of the petitioner. It is true that this is not a case in which excess payment is made due to mistake, inadvertence or over-sight. In *In re: Narayana Reddiar*, A.I.R. 1942 Mad. 316 payment of court-fees was not due to mistake nor in obedience to a wrong order of the Court. It was held that refund could be granted. In *Ahmad Ebrahim* v. *Govt. of the Province of Bombay*, A.I.R. 1943 Bom. 50, excess of court-fees was not paid nor was payment made under a wrong order of the Court. Refund was ordered as the certificate became infructuous.

The present appeals became infructuous as this Court held that the second preliminary decree

could not be made by the lower Court according to law. Appeals were preferred as the lower Court erroneously made a preliminary decree. When an appeal preferred against a preliminary decree became infructuous on the appellate Court holding that the lower Court erred in making a preliminary decree, a refund certificate could be issued. An appeal otherwise properly preferred is to be heard on merits. If however it could not be so done on the appellate Court holding that the preliminary decree was unnecessarily passed, appellants cannot be penalised to bear court-fees paid by each other. It is true that the appellants should have guided the lower Court by submitting that on decision of the question of silver bar, a preliminary decree could not be passed particularly when they were represented by pleaders. But it is doubtful that the lower Court who had directed that a preliminary decree be drawn would have accepted any such submission made.

I hold on the authority of the Bombay case referred to above that the appeals having become infructuous, a certificate for refund in the exercise of inherent powers be issued in the interest of justice. In one sense, the appellants can be said to have been compelled to prefer appeals and pay court-fees due to a mistaken order of the Court resulting in an unnecessary preliminary decree being drawn up.

[9] Result is that both the applications are allowed and it is ordered that a certificate for refund of Rs. 125 being the court-fees paid on the memo of appeal No. 9 of 1951 be issued to the appellant. There shall be no order as to costs of the hearing of this application.

B/D.H. *Application allowed.*

A. I. R. 1952 Kutch 82

VAKIL J. C.

Purshottam Gagubhai—Appellant v. *Mamibai —Respondent.*

First Appeal No. 2 of 1951, D/- 27-6-1952.

Civil P. C. (1908), O. 41, R. 2—Ground not set forth in memorandum of appeal—Leave of Court when may be refused.

A ground not set forth in the memorandum of appeal cannot be allowed to be urged for the first time in appeal except when it is a question of law which can be considered on facts already on record. Where, however, a plaintiff could have sustained an alternative case to avoid consequences of such a question of law urged and his defendant, instead of urging such a ground, tacitly consents to the plaintiff sustaining an alternative case the defendant will not be allowed to raise such a ground for the first time in appeal. [Para 5]

(*Note.*—The Court further refused to consider *suo motu* the point raised on the facts of the case.)

Anno. C. P. C., O. 41 R. 2 N. 4.

L. L. Thacker — for Appellant; K. N. Mankad — for Respondent.

Order. — This is an application under O. 41, R. 2, Civil P. C for leave to urge a ground not set forth in the memorandum of appeal.

[2] The respondent sued the appellant for recovery of Rs. 6,555 on the allegation that she lent Rs. 6,000 to the latter at 6 per cent. interest on a hand note. The appellant denied having borrowed from the respondent Rs. 6,000 as alleged and contended that the hand note being inadmissible in evidence, respondent's suit was liable to be dismissed. The appellant further stated by way of what he termed as alternative contention that respondent had given him a sum of Rs. 6,000 for investment at 6 per cent. interest but as he could not find any person willing to borrow money, he returned that sum to her.

[3] On the pleadings set out in the preceding paragraph the trial Court framed five issues of which the first three are transcripted as follows:

1. Is it proved that defendant borrowed Rs. 6,000 from the plaintiff?
2. Is it proved that (the paper), dated 9-9-1948 was inadmissible in evidence?
3. Is it proved that defendant returned Rs. 6,000 to the plaintiff?

The trial Court found the three issues set out above as under: (1) No, but it is proved that Rs. 6,000 were given for getting interest realised; (2) Yes; (3) No. As a result of findings on the three issues, the trial Court decreed respondent's suit for Rs. 6,000 only.

[4] The respondent did not feel aggrieved by the decree of the trial Court. She did not, therefore, prefer an appeal against that part of her claim which was dismissed by the trial Court. The appellant preferred the present appeal against the decree of the trial Court. In support of the appeal several grounds were stated to show that the finding of the trial Court on Issue No. 3 was wrong. By this application filed after the appeal was opened and argued to some extent, the appellant submitted that he be allowed to urge a ground not set forth in the memorandum of appeal. The ground that he seeks to urge is that in view of the finding on Issue No. 1 in the negative, the trial Court should have dismissed the suit which could not have been considered and decreed on existence of specific legal relation different from that alleged in the plaint. It was submitted that this was a question of law on facts found and it was involved in the grounds set forth in the memo. of appeal. In the alternative, it was submitted that if leave as prayed was not granted, the Court be pleased to consider the said point. The application was opposed by the respondent.

[5] Order 41, R. 2, Civil P. C. provides that the appellant shall not, except by leave of the Court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. A ground not set forth in the memorandum of appeal may be called 'a new ground' for brevity. A new ground, not raised by way of attack or defence in the pleadings of the parties cannot be allowed to be urged for the first time in appeal except when it is a question of law which can be considered on facts already on record. Where, however, a plaintiff could have sustained

an alternative case to avoid consequences of such a question of law urged and his defendant, instead of urging such a ground, tacitly consents to the plaintiff sustaining an alternative case, he will not be allowed to raise such a ground for the first time in appeal.

[6] The appellant who denied having borrowed Rs. 6,000 from the respondent did not contend that in the event of the Court finding Issue No. 1 in the negative, plaintiff's suit was liable to be dismissed. What was contended was that the suit was liable to be dismissed as the document on which it was based was inadmissible in evidence. The respondent having sued alleging specific legal relation of a lender and borrower and the appellant having denied borrowing of money, there was no scope for urging an alternative line of defence in the manner done. The appellant who could not have denied having received Rs. 6,000 from the respondent meant to explain the circumstances under which he had received that sum from the latter. Unless the respondent made a case in the alternative that the sum of Rs. 6,000 was given to the appellant for investment, it was not necessary for the appellant to plead that he had returned the sum to the respondent. The appellant not only pleaded that he had returned that sum of Rs. 6,000 to the respondent but he also sought an issue in respect of it. The bulk of the evidence in the trial Court led on behalf of the appellant was in proof of that issue. It follows that even though the Court found that the sum of Rs. 6,000 was not lent to the appellant on interest, the appellant wanted to meet a case of Rs. 6,000 given to him for investment by contending that the said sum was given back to the respondent. The appellant thus consented to the respondent sustaining an alternative case of money given for investment. The case was fought on that basis in the trial Court. All the grounds set forth in the memorandum of appeal are meant for showing that finding on Issue No. 3 is not correct. Thus parties created a position under which the respondent was deemed to have urged an alternative case of money given for investment with the result that question of legal consequences on Issue No. 1 having found in the negative became immaterial. The trial Court, therefore, found no difficulty in finding Issue No. 1 in the manner done and no objection to Issue No. 1 so found was taken in the grounds set forth in the memorandum. The appellant cannot be allowed to raise that ground now even though urging of that ground only means urging of legal consequences on finding Issue No. 1 in the negative.

[7] In the alternative, it was submitted that the Court in deciding the appeal was not bound to confine itself to the grounds of objections set forth in the memorandum of appeal and the Court be pleased to consider this new ground having regard to the fact that only legal consequences of finding on issue in the negative are to be considered. Though such a question could be raised by the Court *suo motu*, it will not do so for the simple reason that apart from the question whether the respondent had sufficient opportunity of contesting the case on that ground, appellant interested in urging it had abandoned it by inviting the respondent to join issue on the question of return of the sum of Rs. 6,000 which could only have been done on the assumption of the respondent having an alternative case.

B/V.S.B. *Application rejected.*

A. I. R. 1952 Kutch 83

VAKIL J. C.

Harji Dhanji and others — Defendants — Appellants v. *Naran Devshi and others — Plaintiffs — Respondents.*

First Appeal No. 7 of 1950, D/- 25-7-1952.

Civil P. C. (1908), S. 92, O. 1, R. 8 (1) and O. 41, R. 2 — Suit under S. 92 — Contention as to want of permission under O. 1, R. 8 cannot be raised under O. 41, R. 2 — Contention as to want of consent of Advocate-General can be raised.

It cannot be accepted as a general proposition of law that all questions of law apparent on the face of the proceedings can be allowed to be raised for the first time in appeal, though not raised in the trial Court nor set forth in the memorandum of appeal. Thus, when objections as to defects in a suit not affecting Court's jurisdiction to entertain it, nor going at the root of the case, such as limitation, are sought to be raised for the first time in the appeal, they cannot be allowed to be so raised, though questions of law apparent on the face of the proceedings, if they cause surprise or prejudice to the opposite party. Want of permission under O. 1, R. 8 is not a defect in jurisdiction and, therefore, the contention that in a suit under S. 92 the respondents had not obtained permission to sue in a representative capacity cannot be allowed to be raised under O. 41, R. 2, particularly when a remand would be necessary if the contention were to be allowed. But the contention that no consent in writing of the Advocate General as required by S. 92 was obtained can be allowed to be raised. *Case law discussed.*

[Paras 1, 3, 4, 5 and 7]

Anno. C. P. C., S. 92, N. 23; O. 1, R. 8, N. 10, Pt. 5; O. 41, R. 2, N. 4, P. 8, N. 6, Pt. 5.

R. R. Thacker—for Appellants; S. U. Bhanshali—for Respondents.

REFERENCES: Courtwar/ Chronological/ Paras.

('42) A. I. R. 1942 All. 365 : (I. L. R. (1942) All. 708) 3
('36) A. I. R. 1936 Bom. 412 : (165 Ind. Cas. 1001) 3
('52) First Appeal No. 2 of 1951, D/- 27-6-1952 : (A. I. R. 1952 Kutch 82) 3
('21) A. I. R. 1921 Lah. 76 : (62 Ind. Cas. 888) 4
('33) A. I. R. 1933 Lah. 749 : (15 Lah. 129) 6
('27) A. I. R. 1927 Mad 645 : (101 Ind. Cas. 58) 4
('41) A. I. R. 1941 Mad. 129 : (1940-2 Mad. L. J. 520) 5
('31) A. I. R. 1931 Oudh. 375 : (136 Ind. Cas. 241) 4

Order. — This is an application, under O. 41, R. 2, Civil P. C. for leave to urge two grounds not set forth in the memorandum of appeal. The grounds sought to be urged are that (1) the Respondents had not obtained permission to sue in a representative capacity and (2) no consent in writing of the Advocate-General as required by S. 92, Civil P. C. (Act V [5] of 1908) was obtained.

[2] The suit under appeal was brought by the respondents in the year 1940, in the then Jadeja Court of the former Kutch State, to obtain reliefs provided in s. 92, Civil P. C. on averments of breach of a constructive trust of religious nature, on the part of the appellants, in the management of two temples of Swaminarayan Panth of the village Naranpar and their property. It was stated in para. 9 of the plaint that the suit was a representative one on behalf of the Satsangis of Naranpar village. Section 22, Kutch Civil P. C. containing provisions analogous to the provisions of O. 1, R. 8, Civil P. C. (Act v [5] of 1908), provided that notice be issued before permission was granted.

Accordingly, an application for issue of a notice was made and a notice was published in the Government Gazette. No express permission was granted but the suit proceeded on the footing of a representative suit by the respondents on behalf of the Satsangis of the village. No objection on the ground that permission was not granted to sue in a representative capacity or that the notice served was not in accordance with law was raised during the period of 12 years that the suit was pending in the trial Court. This appeal was filed 2½ years back. In the memorandum of appeal no such objection was raised.

[3] The appellants now propose to contend that as the Civil Procedure Code (Act v [5] of 1908) came into effect during the pendency of the suit and as it had retrospective effect, the suit was bad as consent was not obtained as required by that rule. Inconsistent as it appears, they further propose to contend that as no permission to sue in a representative capacity was obtained, the respondents were not entitled to maintain the suit. Both the contentions were not taken in the trial Court. In other words they are sought to be urged for the first time in appeal on the ground that they are questions of law apparent on the face of the proceedings. It cannot be accepted as a general proposition of law that all questions of law apparent on the face of the proceedings can be allowed to be raised for the first time in appeal, though not raised in the trial Court nor set forth in the memorandum of appeal.

The pleader for the appellants cited a ruling of the Bombay High Court reported in *Annappa Ramchandra* v. *Krishna Narayan Prasad*, A.I.R. 1936 BOM. 412, wherein the contention that consent of the Advocate-General was not obtained was allowed to be raised for the first time in the Court of Appeal. An objection as to want of consent of the Advocate General is one which goes to the jurisdiction of the Court to entertain the suit and it can be allowed to be raised for the first time in appeal, though not raised in the suit, as no question of waiver arises and even if the objection was raised in suit, the defect could not have been remedied. In the present case, the defect, if any, could have been remedied, if objection was taken in suit by obtaining the requisite permission.

Another case on which reliance was placed is reported in *Krishna Pratap Singh* v. *Sm. Prembada Kunwar*, A. I. R. 1942 ALL. 365, in which a new ground supporting alternative case was allowed to be raised for the first time in appeal. In that case, defence was that a gift was made under circumstances which rendered it valid. Even apart from these circumstances, under law, it was valid. The appellant was allowed to raise that question of law though not raised in written statement nor in the memo of appeal. No prejudice or surprise was caused to the opposite side in allowing this point to be raised for the first time in appeal.

When, however, a plaintiff could have sustained an alternative case to avoid consequences of a question of law to be urged and his defendant, instead of urging that the suit as based was not tenable, tacitly consents to the plaintiff sustaining an alternative case, he would not be allowed to contend for the first time in appeal that the suit as based was not tenable, *vide Parshottam Gagubhai* v. *Mamibai Jagmal*, First Appeal No. 2 of 1951, D/- 27-6-1952 (Kutch). Reason is that if the contention was raised in suit, plaint could have been suitably amended.

[4] From the discussion in the preceding para, it is evident that when objections as to defects in a suit not affecting Court's jurisdiction to entertain it nor going at the root of the case, such as limitation, are sought to be raised for the first time in the appeal, they cannot be allowed to be so raised, though questions of law apparent on the face of the proceedings, if they cause surprise or prejudice to the opposite party. The present case furnishes an instance illustrative of the principle of law stated above. The suit was pending for 12 years in the trial Court. If at any time during this period, the contention now sought to be urged was raised, the defect could have been remedied. Want of permission under O. 1, R. 8, Civil P. C., is not defect in jurisdiction. Hence, such a contention was not allowed to be raised for the first time in appeal in a case reported in *Pokhar Das* v. *Rijhu Ram*, A. I. R. 1921 Lah. 76.

Such a contention raised in the suit but not raised in first appeal, was not allowed to be raised in second appeal, *vide Kumarandy Kudumban* v. *Venkatasubramania Aiyar*, A. I. R. 1937 Mad. 645. It was observed that though questions of law involving jurisdiction or going to the root of the plaintiff's claim might be advanced in second appeal notwithstanding the omission to bring them forward before the lower Court or even trial Court, an objection relating to the non-representative nature of the suit was not a question of this character and the appellant must be deemed to have waived the right to advance this objection by failure to include it among the grounds of first appeal. The Oudh Chief Court in *Dilawar*

Husein v. *Subhan Khan*, A. I. R. 1931 oudh 375, did not allow similar contention to be raised on the ground that if specific objection on this score was taken, necessary permission could have been obtained and the fact that the suit was allowed to proceed justified the presumption that the defendants did not want to raise such a plea.

[5] An exception to the principle of law discussed above was sought to be engrafted in *Venkatachellam* v. *Suryanarayana Murty*, A. I. R. 1941 Mad. 129. In that case it was held that after all the long lapse of time and all the expense which must have been incurred, the High Court would naturally feel reluctant to allow the objection to be raised when it had never been taken before. In that case the objection was as to the place of suing. It was held that in view of the large stakes involved and the possibility of the case proceeding further, it was proper that objection should be dealt with on merits. It is not necessary to decide whether the exception to the general principle stated above be accepted as applicable to all such cases.

In the present case, if the contention is allowed to be raised and accepted, a remand would be necessary. It is true that no express permission was granted. The appellants want to contend that no implied permission could be inferred as no permission was sought. As stated above in para 9 of the plaint it was stated that it was a representative suit. Now, according to the Kutch Civil Procedure Code, notice of the suit was to be given before permission was granted. Hence, the application that was made was for publication of the notice. Whether under the circumstances, an implied permission can be inferred, cannot be held one way or another till the appellants are allowed to raise the question. But having regard to the peculiar facts, a remand would be necessary if the contention is allowed to be raised and accepted. The Madras case can, therefore, be distinguished on facts.

[6] The learned pleader for the appellants relied on a case reported in *Punjab Co-operative Bank Ltd., Lahore* v. *Hari Singh*, A.I.R. 1933 Lah. 749. In that case, permission was expressly sought and held to have been impliedly granted. But as no proper notice was given, the proceeding was held defective. The application made is to urge the ground that permission was not granted. It is not made to urge this ground.

[7] As regards the second ground it is quite apparent from what has been stated above that the appellants can be allowed to raise that contention. Permission is, therefore, granted to urge that ground and the appeal be fixed for hearing that ground. Permission is not granted to urge the question that no permission was obtained and hence the suit was defective.

B/V.R.B. *Order accordingly.*

A. I. R. 1952 Kutch 85

VAKIL J. C.

Barot Jetbai—Applicant v. *Barot Gova Natha—Opponent.*

Criminal Ref. No. 5 of 1951, D/- 3-5-1952.

† Criminal P. C. (1898), S. 488—Notice to opposite party—Necessity.

The ordinary rule of procedure is that no order should be made against a person on the application of another unless he has been given an opportunity of being heard in reply to the averments made against him except when it is expressly provided by law that an *ex parte* order could be made.

A case under S. 488 could not be decided without serving a notice of the application on the person from whom maintenance is sought. Not only that, but the law does not contemplate *ex parte* proceeding except in the particular class of cases mentioned in the proviso to sub-s. (6). Thus the intention of the legislature made quite clear that proceedings under the section shall not be heard *ex parte* except in the cases mentioned in the proviso. Hence, by implication it was provided that a notice of the application shall be issued to the person from whom maintenance is claimed. Sub-ss. (4) and (5) cannot be construed as leading to an inference that an order could be made without affording opportunity, to the person against whom application is made, of being heard.

[Paras 4, 5 and 6]

Anno. Cr. P. C., S. 488 N. 26.

D. C. Gor—for Opponent.

Order.—This is a reference made by the Sessions Judge, Kutch, under S. 438, Criminal P. C., recommending that the order, dated 10-9-51, made by the Magistrate, First Class, Mundra under S. 488, Criminal P. C. awarding maintenance at the rate of Rs. 30 per month to Bai Jetbai, wife of Barot Gova Natha from her husband with effect from 2-9-1951 be set aside as the Magistrate concerned had made the said order ex parte without giving notice of the application made by Jetbai to him.

[2] The facts are that on 2-9-1951, Jetbai made an application under S. 488, Criminal P. C., to the Magistrate, First Class, Mundra, alleging that her husband had ill-treated her, had driven her away and had neglected to maintain her, though he had sufficient means to do so. The Magistrate did not call upon the husband of the applicant to show cause why he should not be ordered to give maintenance to the applicant. The Magistrate recorded evidence ex parte, substance of which was that the husband had driven away his wife and he had means. On this evidence, the Magistrate made an order stated above. As the husband was not served with a notice and consequently the matter was not contentious, no judgment was recorded but in the order it was stated that though the husband had property, he neglected to maintain his wife.

[3] After making the order as aforesaid, the Magistrate thought that he had committed an error in not serving a notice of the application to the husband of the applicant. He, therefore, submitted a report to that effect to the Sessions Judge on 12-9-1951. Notices of this reference were given to the parties. The husband is represented by Mr. Dayaram. The wife has remained absent.

There is, therefore, none to support the order. I have, however, considered points which might have led the Magistrate to depart from the ordinary rule of procedure, that no order should be made against a person on the application of another unless he has been given an opportunity of being heard in reply to the averments made against him except when it is expressly provided by law that an ex parte order could be made.

Section 488 does not make any express provision for issue of a notice to the person against whom an order of maintenance is to be made. Sub-s. (4) of the section provides that a wife shall not be entitled to maintenance if she is living in adultery, or if without any sufficient reason she refused to live with her husband or if they are living separately by mutual consent. Sub-s. (5) provides that on proof of any of the three facts mentioned in the preceding sentence, the Magistrate shall cancel the order. The sub-section presupposes that an order is made without proof of any of three facts and hence it may lead to an inference that order could be made without giving notice of the application to the husband.

[4] It is quite evident that a Magistrate making an order under S. 488 has to be satisfied that a person having sufficient means was neglecting or refusing to maintain his wife. For being so satisfied evidence has to be led before him. He must be satisfied that the applicant was the wife of the person from whom maintenance is sought, the husband had means and that he was refusing or neglecting to maintain the wife. Subsection (6) of the Section provides that all evidence under this chapter shall be taken in the presence of the husband. The only case in which the Magistrate may hear and determine the case ex parte is when he is satisfied that the husband is wilfully avoiding service or wilfully neglects to attend the Court. It is thus evident that a case under S. 488 could not be decided without serving a notice of the application on the person from whom maintenance is sought. Not only that but the law does not contemplate ex parte proceeding except in the particular class of cases mentioned in the proviso to sub-s. (6). Thus the intention of the legislature was made quite clear that proceedings under this section shall not be heard ex parte except in the cases mentioned in the proviso. Hence, by implication it was provided that a notice of the application shall be issued to the person from whom maintenance is claimed.

[5] I will not (sic) consider sub-ss. (4) and (5) which might have led the Magistrate to think that an order could be made without affording opportunity to the person against whom application is made of being heard. It is entirely open to a person against whom an application under S. 488 is made to raise grounds mentioned in Sub-s. (4). But it is quite possible that a proceeding ex parte might have been taken under the circumstances mentioned in the proviso to Sub-s. (6). It is quite possible that when the order was made, none of the grounds mentioned in Sub-s. (4) might exist. For instance a wife may live in adultery after an order for maintenance is made in her favour. Further a husband might offer to maintain a wife on condition of her living with him.

A husband is entitled to co-habitation of his wife. In that case, refusal to co-habitate on the part of a wife is to be considered. It may happen that spouses might agree after the order is made to live separately. As a criminal Court is not entitled to create facilities for separation between spouses or fix alimony the order may be cancelled. It will thus be seen that grounds mentioned in Sub-s. (4) may exist when the application is heard and before an order is made or they or any of them may come into existence after an application is heard and an order is made.

[6] Thus there was no reason to come to a conclusion on a perusal of the plain language of the section that an order under it could be made without giving the person from whom maintenance was sought an opportunity of being heard. This is most elementary rule of procedure and was provided by implication in the section itself. It will lead to miscarriage of justice if such orders could be made on merely hearing the applicant and her witnesses. It is strange that the Magistrate, First Class, Mundra did not consider this aspect of the question. As an order is made without complying with the provisions of Sub-s. (6) and it has thereby occasioned failure of justice, the order has to be set aside as recommended by the Sessions Judge.

[7] Result is that the reference is accepted, the order made by the Magistrate, First Class, Mundra is set aside and the case is sent back to the Magistrate, First Class, Mundra with a direction that the person against whom the application is made be given notice of the application which shall be heard and disposed of in accordance with law.

B/D.H. *Reference accepted.*

A. I. R. 1952 Kutch 86

VAKIL J. C.

Bhatia Thacker Chatrabhuj Nenshi — Appellant v. *Talakshi Vershi and others — Respondents.*

First Appeal No. 2 of 1952, D/- 6-5-1952.

Civil P. C. (1908), O. 41 R. 5—Money decree—Substantial loss—Presumption.

The question whether an appellant in a particular appeal is likely to suffer substantial loss if the decree under appeal is executed during its pendency depends upon the nature of the decree. There is no rule of law that execution of a decree for payment of money should not be stayed and execution of any other kind of decree should be stayed. Whether execution should be stayed or not has to be decided on consideration of the question of substantial loss. In case of a decree for possession it may be presumed that substantial loss may be caused to the appellant in possession if he is evicted. If in case of a decree for payment of money, security is taken from a respondent for restitution,

it is apparent that no loss is likely to be caused to his appellant due to execution of the decree under appeal. Hence the contrary presumption may be made in case of a decree for payment of money. This presumption can be rebutted by showing that for executing of such a decree, it shall be necessary to attach and sell the property of the appellant and as it will not be possible to get back the property sold it would cause substantial loss to him if the decree is allowed to be executed. If on the other hand such an appellant has means and does not pay, the mere fact that his property may be sold in execution does not show that substantial loss is caused to him as he may bring upon himself the result by his own act. The question whether there is good ground for preferring an appeal which is likely to succeed may be considered in exercising discretion for stay of execution and the fact that an appeal is admitted is ordinarily sufficient for the exercise of discretion. But the question about exercise of discretion arises for consideration only after it is shown that substantial loss may accrue. When the appellant can pay the amount without any substantial inconvenience and it is possible to recover the amount from the respondent in the event of restitution, the presumption stands unrebutted and the appellate Court cannot order stay of execution merely because an appeal is preferred, has been admitted and the appellant thinks that it is likely to succeed. [Paras 4, 5]

Anno. C. P. C., O. 41 R. 5 N. 7.

J. K. Dholakia — for Appellant; M. M. Mehta — for Respondents 1 & 2; M. H. Dholakia — for Respondent 3.

Order. — This is an application made under O. 41, R. 5 for stay of execution of the decree under appeal on the ground that the appeal preferred is likely to succeed and the appellant would be put to loss if the decree under appeal is executed during the pendency of the appeal.

[2] The respondents oppose the application contending that the decree under appeal is a money decree and that no substantial loss is likely to be caused to the appellant.

[3] The application has been made without unreasonable delay and the appellant is prepared to furnish security for the due performance of the decree. The only thing to be considered is whether substantial loss is likely to result to the appellant due to execution of the decree under appeal.

[4] The question whether an appellant in a particular appeal is likely to suffer substantial loss if the decree under appeal is executed during its pendency depends upon the nature of the decree. A decree for Rs. 5385, costs and future interest was passed against the appellant. It was contended on behalf of the respondent that this being a decree for payment of money, its execution should not be stayed. There is no rule of law that execution of a decree for payment of money should not be stayed and execution of any other kind of decree should be stayed. Whether execution should be stayed or not has to be decided on consideration of the question of substantial loss. In case of a decree for possession, it may be presumed that substantial loss may be caused to the appellant in possession if he is evicted. This presumption like any other presumption can be rebutted. In case of a decree for payment of money, a contrary presumption may be made.

Order 41, R. 6 makes provision for taking security in case of execution of a decree under appeal. If in case of a decree for payment of money, security is taken from a respondent for restitution, it is apparent that no loss is likely to be caused to his appellant due to execution of the decree under appeal. Hence, the contrary presumption may be made in case of a decree for payment of money. This presumption can be rebutted by showing that for executing of such a decree, it shall be necessary to attach and sell the property of the appellant and as it will not be possible to get back the property sold, it would cause substantial loss to him if the decree is allowed to be executed. If, on the other hand, such an appellant has means and does not pay, the mere fact that his property may be sold in execution does not show that substantial loss is caused to him as he may bring upon himself the result by his own act.

[5] It is not alleged in the present case, that if execution is sought, the appellant would not be in a position to pay the amount and that it would be necessary to sell his property. Nor it is alleged that money paid by the appellant could not be recovered from the respondent even though security is taken. Thus the appellant has to pay the decretal amount even though he has preferred the appeal and he believes that his appeal is likely to succeed. The question whether there is good ground for preferring an appeal which is likely to succeed may be considered in exercising discretion for stay of execution and the fact that an appeal is admitted is ordinarily sufficient for the exercise of discretion. But the question about exercise of discretion arises for consideration only after it is shown that substantial loss may accrue. When the appellant can pay the amount without any substantial inconvenience and it is possible to recover the amount from the respondent in the event of restitution, presumption stands unrebutted and the appellate Court cannot order stay of execution merely because an appeal is preferred, has been admitted and the appellant thinks that it is likely to succeed.

[6] The application therefore fails and it is dismissed. The appellant may move the lower Court for security as provided in O. 41, R. 6, C. P. C. if so advised.

B/D.H. *Application dismissed.*

A. I. R. 1952 Kutch 87

VAKIL J. C.

Rajkuverbai — Debtor-Applicant v. *Dr. Karsondas Jeevandas—Creditor-Opponent.*

Civil Revn. Appln. No. 21 of 1952, D/- 8-5-1952.

Debt Laws—Bombay Agricultural Debtors Relief Act (XXVIII [28] of 1947)—Coming into force of, in Kutch State—Civil P. C. (1908), S. 100.

Where the question whether the applicant was not a debtor was decided by the lower Courts on consideration of the question whether the applicant was personally cultivating for two agricultural seasons immediately preceding the date of the coming into operation of Bombay Agricultural Debtors Relief Act, the applicant cannot be

allowed to dispute the question of fact found by the lower Courts. If, however, the finding on the question of fact was based on an erroneous assumption as to when the Act came into force in Kutch the finding was wrong. Though the Act was extended with effect from 31-7-1949 to the State of Kutch by the Kutch (Application of Laws) Order, 1949, it had to be re-extended under S. 2, Part C States Laws Act, because the Act was applied under the Kutch (Application of Laws) Order, 1949, without modifications and the application so made was meaningless. If an Act is applied without modifications so that it could not take effect, it cannot be said that it has not come into operation. Necessary modifications for giving effect may be made later on. But by modification No. 15, B. A. D. R. Act, as applied by the Kutch (Application of Laws) Order, 1949 was repealed with effect from 24-5-1950 and all pending applications had to be disposed of under the Act as applied with modifications. The Act therefore came into operation first on 31-7-1949. It was then repealed on 24-5-1950 on which day the Act with modifications came into operation. Therefore the only law in force was the B. A. D. R. Act 1947 applied with modification on 24-5-1950. This being the case, cultivation for two years is to be computed prior to 24-5-1950 and not prior to 31-7-1949. It was fallacious to think that as the applicant could not have shown that she was a debtor under the Act as applied on 31-7-1949, the opponent acquired a right to get relief from the ordinary Court under the repealed Act. The repeal of the Act with effect from 24-5-1950 had not affected acquisition of a right by the applicant which was affected by the application of the Act with modifications on the same day : A. I. R. 1951 S. C. 332, *Ref.*

[Paras 3, 5, 6, 7]

Anno. C. P. C., S. 100 N. 53.

C. B. Thacker — for Applicant; J. K. Dholkia — for Opponent.

REFERENCE : Para
('51) A. I. R. 1951 S C. 332 : (1951 S C R 747). 6

Order.—This is an application for revision of the decree of the District Court, Kutch, in Civil Appeal No. 140 of 1951, confirming an order dated 4-7-1951 made by the Subordinate Judge, Nakhatrana in Debt Adjustment application No. 834 of 1951.

[2] The facts are that the opponent sued the applicant for recovery of a sum of Rs. 2500 by sale of the mortgaged property. The said suit was transferred under the provisions of s. 19, B. A. D. R. Act to the 'Court' for adjustment of the debt. The 'Court' numbered the suit as application No. 834 of 1951. Sub-s. (4) of s. 19 of the Act provides that if the Court to which any suit is transferred decides the preliminary issue mentioned in cl. (a) of sub-s. 17 in the negative or that mentioned in cl. (b) of the said sub-section in the affirmative it shall retransfer the suit to the Court from which it had been transferred to itself. The 'Court' considered the first preliminary issue and held that as the applicant was not personally cultivating for cultivating seasons in the two years immediately preceding 1-8-1949 on which date the Act came into operation, she was not a debtor as defined by the Act. It was therefore ordered that the suit be retransferred to the Court from which it had been transferred to itself.

[3] The applicant preferred appeal No. 140 of 1951 against the order of the trial Court. The Additional District Judge who heard the appeal confirmed the order of the trial Court, on the same grounds. The applicant has therefore preferred the present application for revision as stated in para one above. The question for consideration in this application is whether the lower Courts were right in holding that the applicant was not a debtor. If this question is only a question of fact, the present application must be held untenable. But both the lower Courts decided the issue on consideration of the question whether the applicant was personally cultivating for two agricultural seasons *immediately preceding the date of the coming into operation of this Act.* The applicant does not dispute nor can she be allowed to dispute the question of fact found by the lower Courts.

What is urged is that the Act came into operation in 1950 and not in 1949 and hence the finding on a question of fact based on an erroneous assumption was wrong. It appears that this aspect of the question was placed before the lower appellate Court. The lower Appellate Court observed that the Act was extended to the State of Kutch on 31-7-1949 and that the Notification No. 53J dated 24-5-1950 was in the nature of an amending Act. As the lower Appellate Court took this view of the question, it was found unnecessary to consider it further.

[4] To appreciate the question of law that arises for consideration, it is necessary to state various steps of legislative actions taken. On complete merger of the Kutch State, laws both Central and Provincial were applied to it by the Kutch (Application of Laws) Order, 1949. One of the Provincial Acts applied was the B. A. D. R. Act of 1947. Thus the Act was extended to the State of Kutch from 31-7-1949. A notification was issued by the Chief Commissioner that applications under s. 4 of the Act be made till 31-1-1950. As the Act was applied without any modification, no application under s. 4 of the Act could have been made nor any such notification could have been issued. Yet applications were made and entertained. Then came the Part C States Laws Act, 1950 which received assent on 10-4-1950. Section 2 of the said Act gave power to the Central Government to extend enactments to certain Part C States.

Acting in the exercise of power under s. 2 of the said Act, the Central Government extended on 24-5-1950, the provisions of the B. A. D. R. Act 1947, to the State of Kutch subject to Central (sic) modifications. An important modification made was that for s. 4 (1), it was provided that any debtor or his creditor may make an application to the Court, before such date as the Chief Commissioner may by notification in the Official Gazette appoint for the adjustment of the debts of the debtor. Accordingly, the Chief Commissioner issued a notification that applications under s. 4 of the Act be made till 31-12-1950. In view of these facts the question for consideration is whether the date of the coming into operation of the Act

was 31-7-1949, or on 24-5-1950. The question is important as, if the Act came into operation on 31-7-1949, applicant was not, according to the facts found by the two lower Courts, personally cultivating land for cultivating seasons, in the two years immediately preceding that date. If the Act had come into operation on 24-5-1950, the applicant had done so.

[5] Now though the Act was extended with effect from 31-7-1949, to the State of Kutch by the (Kutch Application of Laws) Order, 1949, it had to be re-extended under S. 2, Part C States Laws Act. The reason why it had to be so done is obvious. The Act was applied under the Kutch (Application of Laws) Order, 1949, without modifications and the application so made was meaningless. Application under S. 4 of the Act, making of which was main purpose of the Act, could be made under S. 4 till 1-8-1947. It was so provided as applications under the old Act were already made except in the local areas where Boards were established on or after 1-2-1947. With S. 4, remaining unmodified, application of the Act to the State of Kutch was thus meaningless. As the laws were applied under the Extra-Provincial Jurisdiction Act, 1947, nothing could be done to cure the defect, till after the Constitution came into effect and Part C States Laws Act was passed. It cannot therefore be denied that the law was in operation on 31-7-1949, even though effect could not have been given to its most salient provisions.

It was urged on behalf of the applicant that an Act could not be said to be in operation, if it could not take effect. If an Act is applied without modifications so that it could not take effect, it cannot be said that it has not come into operation. Necessary modifications for giving effect may be made later on. But by modification No. 15, B. A. D. R. Act, as applied by the Kutch (Application of Laws) Order, 1949 was repealed with effect from 24-5-1950, and all pending applications had to be disposed of under the Act as applied with modifications. The Act therefore came into operation first on 31-7-1949. It was then repealed on 24-5-1950, on which day the Act with modifications came into operation. On the date the applicant made her application or the suit against her was transferred, the Act in force was the Act applied on 24-5-1950, with modifications.

Thus so far as the proceeding before the trial Court was concerned, the Act applicable was the Act that came into operation on 24-5-1950. The observations made by the Additional District Judge that the subsequent notification was only of an amending character were due to the fact that important provisions of the notification and other facts stated in this and the last but one para were not brought to his notice.

[6] The learned pleader for the opponent pointed out that the majority of their Lordships of the Supreme Court in *Re. Art. 143, Constitution of India and Delhi Laws Act* (1912) Etc., A. I. R. 1951 S. C. 332, held that the portion of S. 2, Part C States (Laws) Act, 1950, providing that

> "provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State"

was ultra vires and hence the notification to the extent it provided modification No. 15 was also ultra vires. It was therefore contended that the Act was (sic) applied by the Kutch (Application of Laws) Order, 1949 and the Act as extended under the Part C States (Laws) Act were in force and therefore the applicant had only to show that she was personally cultivating for 2 years prior to 31-7-1949. The anomalous position created by the decision of their Lordships was removed with the passing of the Part C States (Miscellaneous) Repealing Act, 1951, by which the law corresponding to the B. A. D. R. Act 1947, was repealed with effect from 24-5-1950. The corresponding Law was the B. A. D. R. Act applied by the Kutch (Application of Laws) Order, 1949. Thus the only law in force was the B. A. D. R. Act, 1947, applied with modification on 24-5-1950. This being the case, cultivation for two years is to be computed prior to 24-5-1950, and not prior to 31-7-1949.

[7] It was contended by the learned pleader for the Respondent that S. 3, Part C States (Miscellaneous Laws) Repealing Act, 1951, saved the right already accrued despite the repeal and on 24-5-1950, the opponent had acquired a right to recover from the applicant his dues by resorting to the process of an ordinary law Court as on that day the applicant was not a debtor and that the said right acquired could not be defeated by the repeal of the Act and application of the Act with modifications on 24-5-1950. It is fallacious to think that as the applicant could not have shown that she was a debtor under the Act as applied on 31-7-1949, the opponent acquired a right to get relief from the ordinary Court under the repealed Act. That right existed prior to the application of the Act on 31-7-1949. It would have been affected under the Act as applied on 31-7-1949, if the applicant was a debtor, that is, if she was cultivating for cultivating seasons in the two years immediately prior to 31-7-1949. The right came to be affected by the Act applied with modifications on 24-5-1950. Thus the repeal of the Act with effect from 24-5-1950, had not affected acquisition of a right by the applicant which was affected by the application of the Act with modifications on the same day.

[8] Result is that application is allowed, the order made by the lower Courts is set aside and the proceeding is remanded back to the trial Court for deciding the two preliminary issues except what is decided by this Judgment and for disposal of the proceeding in accordance with law.

Costs of the parties in this application and in appeal before the Court below to be cost in the cause.

B/D.H. *Application allowed.*

A. I. R. 1952 Kutch 90

VAKIL J. C.

Doongarshi Hansraj — Creditor-Applicant v. *Velbai w/o Passo Teju—Debtor-Opponent.*

Civil Revn. Appln. No. 40 of 1952, D/- 4-7-1952.

Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), S. 47 (2) — House of agriculturist mortgaged—Decree for sale made — House is "liable to attachment and sale" under Civil P. C. (1908), S. 60.

The expression "the property of the debtor, liable to attachment and sale under S. 60, Civil P. C." used in sub-s. (2) of S. 47, Bombay Agricultural Debtors Relief Act, 1947 means property of the debtor other than the property exempt from attachment and sale. The term 'sale' used in S. 60, Civil P. C. means sale which follows as a consequence of attachment levied. Where a house of an agriculturist is specifically mortgaged by him and a decree for sale of the mortgaged house is made, no attachment is required to be levied. Nor is sale in such a case directed of any property attached. Such a house is not exempt from 'attachment or sale', and is 'property liable to attachment and sale under S. 60, Civil P. C.' within the meaning of that expression used in sub-s. (2) of S. 47, Bombay Agricultural Debtors Relief Act, 1947: 4 Bom. 25, A. I. R. 1924 All. 328 (F. B.); A. I. R. 1927 Pat. 233 and A. I. R. 1947 Sind 32, *Rel. on.* [Para 4]

Anno. Civil P. C., S. 60, N. 3 and 10.

Dictum— "It is for the Legislature to consider whether S. 47 be so amended as to leave the question of adjudication to the option of a debtor, particularly in those cases in which action could be taken under S. 41 of the Act." [Para 6]

I. R. Antani — for Applicant; K. K. Chhaya — for Opponent.

REFERENCES : Courtwar / Chronological /	Paras
('24) A. I. R. 1924 All. 328 : (46 All. 489 F. B.)	5
('79-80) 4 Bom. 25.	5
('27) A. I. R. 1927 Pat. 233 : (6 Pat. 254).	5
('47) A. I. R. 1947 Sind 32 : (I. L. R. (1946) Kar. 311).	5

Judgment.— This is an application for revision of an order dated 26-3-1952, made in Debt Adjustment Application NO. 1304, by the Special Court at Mundra, established under the provisions of the Bombay Agricultural Debtors Relief Act, 1947, as extended with modifications to the State of Kutch.

[2] The facts are that the opponent, whose income was not sufficient to allow her debts, as adjusted by the Court, to be liquidated by annual instalments not exceeding twelve in number, was adjudicated an insolvent under S. 47 (1) of the Act and out of two sites, a house and a field owned by her, one field was reserved for her maintenance and one site only was ordered to be sold under sub-S. (2) of the said Section.

[3] The applicant felt aggrieved by the above order made by the Court, as the house and one site with a hut on it were not ordered to be sold as property not liable to attachment and sale under S. 60, Civil P. C. The contentions in support of the application were that the house was specifically mortgaged and a mortgage decree was passed in favour of the applicant and the site was not land immediately appurtenant to the house.

[4] Section 60, Civil P. C., declares what properties are liable to attachment and sale in execution of a decree and what properties are exempt from attachment or sale. It follows that the expression "the property of the debtor, liable to attachment and sale under S. 60, Civil P. C." used in sub-s. (2) of S. 47, Bombay Agricultural Debtors Relief Act, 1947 means property of the debtor other than the property exempt from attachment and sale. A house of an agriculturist, occupied by him, is exempt from attachment or sale. The term 'sale' used in S. 60, Civil P. C., means sale which follows as a consequence of attachment levied. Where no attachment is necessary, the question whether particular property is exempt from attachment or sale under S. 60, Civil P. C. does not arise. When a house of an agriculturist is specifically mortgaged by him and a decree for sale of the mortgaged house is made, no attachment is required to be levied. Nor is sale in such a case directed of any property attached. Such a house is not exempt from 'attachment or sale', and is 'property liable to attachment and sale under S. 60, Civil P. C.' within the meaning of that expression used in sub-s. (2) of S. 47, Bombay Agricultural Debtors Relief Act, 1947.

[5] As early as in 1879, the High Court of Bombay held in *Bhagvandas* v. *Hathibhai*, 4 BOM. 25 that the intention of S. 266 of Act X of 1877 was not to prohibit sale of property specifically mortgaged. In *Mubaraq Hussen* v. *Ahmed*, A. I. R. 1924 ALL. 328 (F. B.), it was held by the Allahabad High Court that a house specifically mortgaged, could be sold notwithstanding the proviso. In *Ganga Bisun* v. *Jagmohan Ram*, A. I. R. 1927 Pat. 233, the Patna High Court held that when a judgment-debtor had entered into an agreement to give his house in security for the amount of decree, he was estopped from pleading that the house was not saleable. The Sind High Court in *Shambhoo Khimjee* v. *Kaloch Roze*, A. I. R. 1947 sind 32 held that S. 60 (1) was not applicable to a mortgage decree and hence no question of exemption arose. Thus the conclusion that a house of an agriculturist occupied by him is not exempt from attachment or sale if it was specifically mortgaged and a mortgage decree for sale was passed is fortified by the views of other High Courts. The house of the opponent was thus her property which was not exempt from sale and was therefore property liable to attachment and sale under S. 60, Civil P. C. It is true that property of a debtor not required to be attached is not 'the property liable to attachment and sale under S. 60, Civil P. C.' What the Legislature obviously meant by using that expression in S. 47 (2) of the Act was that the property of a debtor exempt from attachment or sale should not be

sold. This is clear from the fact that S. 47 of the Act is included in chap. III of the Act, captioned 'Insolvency proceeding' and under S. 48, an order of adjudication made under S. 47 is given the effect of an order made under S. 27, Provincial Insolvency Act, 1920. The effect as stated in sub-s. (1) of S. 28, Provincial Insolvency Act, 1920 is that the property of an insolvent shall not include any property which is exempt by the Code of Civil Procedure. Thus the property not so exempt is the property which could be sold and the Legislature by using the expression 'property of the debtor liable to attachment and sale' in S. 47 of the Act meant all properties of a debtor except those in respect of which exemption could be claimed under S. 60 of the Code.

[6] It must therefore be held that the house of the opponent was not exempt and it could and should be ordered to be sold. It is not necessary to consider whether the order, in so far as it directs that one site with a hut on it was exempt, is correct, as it is admitted that if the house was ordered to be sold it was quite sufficient. It was complained on behalf of the opponent that though she did not desire to be adjudicated insolvent, she was so adjudicated as her income was not sufficient to allow her debts to be liquidated by annual instalments not exceeding twelve in number and her house, sale proceeds of which would be more than sufficient to pay her debt as adjusted, would be ordered to be sold, with the result that her position in this proceeding under the Act was no better than what it would have been if the decree was executed against her under ordinary law. It is for the Legislature to consider whether S. 47 be so amended as to leave the question of adjudication to the option of a debtor, particularly in those cases in which action could be taken under S. 41 of the Act.

[7] Result is that the application is allowed, the order made by the lower Court exempting the house from sale is set aside and it is directed that the house be also sold. Opponent to pay applicant's costs.

B/V.S.B. *Application allowed.*

A. I. R. 1952 Kutch 91

VAKIL J. C.

Bafan Juma—Accused-Applicant v. *State.*

Criminal Revn. Appln. No. 40 of 1951, D/- 26-9-1951.

(a) Criminal P. C. (1898), S. 439 — Revision against finding of fact.

Under S. 439, Criminal P. C., the High Court will not ordinarily interfere with sufficiency or otherwise of evidence on which conviction is based particularly when the trying Magistrate and the Sessions Judge have recorded concurrent findings on the only important question of fact in the case. [Para 3]

Anno. Cr. P. C., S. 439, N. 15.

(b) Constitution of India, Art. 7—Migration, meaning of—Evidence of.

Migration implies change of domicile and by Art. 7 of the Constitution it puts an end to the citizenship of India.

Where a person, domiciled in Kutch, went to Pakistan, visited Kutch on a temporary permit and went back to Pakistan :

Held, that this was sufficient evidence of migration: A. I. R. 1951 Kutch 38 and A. I. R. 1950 Nag. 161, *Ref.* [Para. 4]

(c) Influx from West Pakistan Control Act (1949), S. 4 — Section is not ultra vires and unconstitutional —Constitution of India, Arts. 13 and 19 : A. I. R. 1951 Kutch 38 and A. I. R. 1951 Nag. 43. *Rel. on.* [Para. 5]

M. M. Mehta — for Applicant; C. P. Pandya, Public Prosecutor—for The State.

REFERENCES: Courtwar/Chronological/ Paras

('51) A. I. R. 1951 Kutch 38 : (52 Cri. L. J. 585). 4
('50) A. I. R. 1950 Nag. 161 : (51 Cri. L. J. 817). 4
('51) A.I.R. 1951 Nag. 43 : (I.L.R. (1951) Nag. 552). 5

Order. — The applicant was convicted of an offence punishable under S. 5, Influx from West Pakistan (Control) Act (ACT XXIII of 1949), by the Magistrate F. C. Bhuj and was sentenced to undergo rigorous imprisonment for one month and to pay a fine RS. 50. The conviction and sentence were on appeal confirmed by the Sessions Judge, Kutch. The applicant has, therefore, approached this Court for revision of the order of conviction and sentence.

[2] The charge against the applicant was that on 9-2-1951, he entered Kutch from Pakistan without a permit. The prosecution led evidence in support of the charge and both the Courts below have accepted the evidence led. The applicant led defence evidence to show that he was residing in Jam-salaya. The Lower Courts did not place reliance on the defence evidence.

[3] The first point urged by the learned Advocate for the applicant was that the Lower Courts erred in holding that the applicant had entered Kutch from Pakistan. The prosecution had led evidence to show that the applicant had once come to Kutch from Pakistan on a temporary permit and had returned back. Under S. 439, Criminal P. C., this Court will not ordinarily interfere with sufficiency or otherwise of evidence on which conviction is based particularly when the trying Magistrate and the Sessions Judge have recorded concurrent findings on the only important question of fact in the case.

[4] Next point urged by the learned Advocate for the applicant was that the applicant was admittedly a resident of Kutch and unless the Prosecution proved that the domicile was changed, the provisions of the Act did not apply to the facts of the present case. This Court held in *Mandhara Jakab* v. *Kutch Government*, A. I. R 1951 KUTCH 38 that migration within the meaning of ART. 7 of the Constitution had no reference to domicile. It was urged that the word, "Migration" was not properly interpreted in that case and reliance was placed on *Habib Ahmed Rizvi* v. *The Crown*, A. I. R. 1950 NAG. 161. In the last mentioned case it was held that there was presumption in favour of continuance of an existing

domicile and it was not shown that domicile had changed. The question whether there was migration does not seem to have arisen in that case. Migration implies change of domicile and by Art. 7 of the Constitution it puts an end to the citizenship of India. The facts that the applicant went to Pakistan, visited Kutch on a temporary permit and returned back to Pakistan are evidence of migration.

[5] It was then urged that s. 4 of the Act was ultra vires of the Parliament as it offended the fundamental rights of freedom of movement granted under the Constitution. This Court in a case referred to in the preceding para has held to the contrary. The Nagpur High Court in *Atau Rehman* v. *The State of Madhya Pradesh*, A.I.R. 1951 Nag. 43 held that the provision of s. 7, Influx from Pakistan (Central) Act, could not be regarded as unconstitutional or having become void after inauguration of the Constitution.

[6] Result is that the applicant's conviction and sentence passed on him are confirmed and his application is dismissed. Applicant to surrender to his bail and serve out his sentence.

B/K.S. *Revision dismissed.*

A. I. R. 1952 Kutch 92

VAKIL J. C.

Chatrabhoj Keshavji and another— Plaintiffs — Appellants v. *Maharaj Ghanshyamlalji Ratanji—Defendant—Respondent.*

First Appeal No. 11 of 1951, D/-25-7-1952.

(a) Civil P. C. (1908), S. 92 and O. 1, R. 8 — Kutch Civil P. C., S. 22—Suit by certain members of religious sect in their individual capacity for reliefs provided in S. 92 — Maintainability — Procedure in S. 22, Kutch Civil P. C., must be followed.

A suit by two persons who claim to be the followers of a religious sect which is a fluctuating body incapable of ascertainment, and who claim to be beneficiaries of an alleged constructive trust created for public purposes of religious nature, for obtaining relief provided in S. 92, Civil P. C. was not maintainable under the Kutch Civil P. C., if the suit was brought in their individual capacity. In the absence of any provision in the Kutch Civil P. C. for obtaining the sanction of the Advocate General or any such or other officer, like the one contained in S. 92, Civil P. C. the suit must be brought in the representative capacity after following the procedure laid down in S. 22, Kutch Civil P. C. (Corresponding to O. 1, R. 8, Civil P. C.) 8 Cal. 32, *Ref.* [Para 5]

Anno. C. P. C., S. 92, N. 7, 8, 23; O. 1, R. 8, N. 10.

(b) Civil P. C. (1908), O. 1, R. 8—Suit in individual capacity—Power of appellate Court to give permission to sue in representative capacity.

If a representative suit is brought but for one reason or another, requisite permission is not obtained or granted, it can be granted by the appellate Court. Similarly, when a suit is brought by plaintiffs on the averment that they were appointed trustees of the community, permission could be granted to sue in a representative capacity. Reason is that the character of the suit is not changed. Where, however, plaintiffs sue in their individual capacity, such grant of permission would change the character of the suit. A Court of appeal will not grant such permission, result of which would be to change the character of the suit, particularly when the plaintiffs had opportunity in the trial Court to seek necessary permission and they did not avail of it. [Para 6]

Anno. C. P. C., O. 1, R. 8, N. 11, Pt. 2.

(c) Kutch (Province) Courts Order, 1948, Para. 42 (c) Order under, by J. C. — Order No. 1 of 1949, dated 3-1-1949 — Assessment of pleader's fees—Court has to assess pleader's fees on a flat basis according to its discretion except in certain specified cases — Court assessing pleader's fees on higher basis merely because suit lasted for six years in trial Court—Fees reduced from 400 to 200 Rs. [Para 9]

R. R. Thacker — for Appellants; S. U. Bhansali—for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('82) 8 Cal. 32 : (9 Cal. L. R. 433). 5

('47) A. I. R. 1947 Mad. 205: (1946-2 Mad. L. J. 462). 6

Judgment. — This appeal arises out of a suit brought by the appellants to obtain reliefs provided in S. 92, Civil P. C. (Act 5 of 1908), on averment that the respondent, religious head of of their Pranami Sect of Chakla Mandir, mismanaged the temple property and was about to alienate the same.

[2] The respondent disputed appellants' right to sue as followers of Pranami Sect of Chakla Mandir, maintained that the property in suit belonged to him as dedicated to him and contended that the suit was not tenable till the appellants sought and obtained permission under s. 22, Kutch Civil P. C.

[3] The trial Court found for the respondent, on the contentions raised by him and dismissed the suit. The appellants first applied for permission under O. 1, R. 8, Civil P. C. or in the alternative for adjournment of the appeal to enable them to get requisite consent of the Advocate General under s. 92, Civil P. C. They withdrew that application and applied for permission to withdraw the suit with liberty to file a fresh suit on the same cause of action. That application was dismissed. The appeal was then heard on merits.

[4] Out of three contentions on which the judgment of the trial Court turned, the contention which was the subject-matter of issue No. 4 in the trial Court was heard first. The issue raised in the trial Court was whether the suit was tenable without adopting the procedure mentioned in s. 22, Kutch Civil P. C. or without joining all persons who were the followers of the Sampradaya (Sect) as parties to the suit. In other words the contention was whether plaintiffs were entitled to maintain the present suit in their individual capacity in the manner done.

[5] The appellants were suing as beneficiaries of an alleged constructive trust created for public purposes of religious nature. They had thus the same interest which all the followers of the sect had in the alleged constructive trust. As such, the suit must be a representative one on behalf of the community of beneficiaries and not by the plaintiffs for their own interest. Such a suit ought to have been brought by the whole body of beneficiaries by joining all of them parties to the suit, if that was feasible and convenient, or by resorting

to the enabling provisions of S. 22, Kutch Civil P. C. The appellants seem to have thought that such a suit could be brought by them as two persons having interest in the trust but without obtaining the consent of the Advocate General as at the time the suit was instituted, the Kutch Civil Procedure Code was in force and that Code did not make provision for obtaining consent of any such or other officer. When a representative suit of the type under consideration does not fall within the purview of S. 92, Civil P. C. or where the procedural law in force does not make any such provision for instituting a suit on obtaining consent of an Advocate General or other officer empowered to give consent, the only course left is for the whole body of beneficiaries to bring the suit in their names or where that is not feasible, by any one or more of them in their representative capacity by complying with the provisions of the enabling procedural law on the subject. The appellants should have therefore joined all persons who were the followers of this sect as parties. The followers being a fluctuating body incapable of ascertainment, the appellants had to sue in their representative capacity. The suit brought by them in the manner done was not tenable. In *Jan Ali* v. *Ram Nath*, 8 Cal. 32, it was held that though the plaintiffs might possibly have obtained leave to sue under S. 30 of the Code (corresponding to O. 1, R. 8, Civil P. C.), on behalf of themselves and other persons attending the mosque, they not having obtained such leave, were not entitled to institute the suit for the purposes of obtaining the relief asked for. It is clear that the trial Court was right in accepting this contention raised by the respondent and in dismissing the suit.

[6] It was contended that the suit should not be allowed to be defeated by reason of a procedural defect and that permission be granted by this Court. Reliance was placed on *Mookka Pillai* v. *Valavanda Pillai*, A. I. R. 1947 Mad. 205, in which it was held that there was nothing which prevented a Court from permitting persons suing in their individual capacity to sue as representatives of a larger group even during the stage of appeal. There can be no doubt that in a fit case, an appellate Court can grant permission to sue in a representative capacity. If a representative suit is brought but for one reason or another, requisite permission is not obtained or granted, it can be granted by the appellate Court. Similarly when a suit is brought by plaintiffs on the averment that they were appointed trustees of the community as were the facts in the Madras case cited above, permission could be granted to sue in a representative capacity. Reason is that the character of the suit is not changed. Where, however, plaintiffs sue in their individual capacity, grant of permission would change the character of the suit. A Court of appeal will not grant such permission, result of which would be to change the character of the suit, particularly when the appellants had opportunity in the trial Court to seek necessary permission and they did not avail of it. In this case, the respondents had raised the particular contention on which the judgment of the trial Court turned. Not only he raised the contention but he requested the then trial Court to try that contention as a preliminary issue. The appellants objected to the trial Court doing so, stating that the suit was brought in accordance with the principles contained in S. 92, Civil P. C. and hence according to law it was not necessary to sue in a representative capacity. It was contended that at the stage of arguments, it was submitted on behalf of the appellants to the trial Court that an opportunity be given to the appellants to comply with the procedure mentioned in S. 22 of the Kutch Code if it was so thought fit. It was for the appellants, belated as they were, to have applied to the trial Court for permission unreservedly. They wanted to keep their cake and eat it. The obvious difficulty in their way was that the position, that they were followers of the sect and as such beneficiaries, was not admitted.

[7] The difficulty of considering such an application by the appellate Court is that first the parties must be heard on the finding recorded by the trial Court that appellants were not the followers of the sect. That finding having been recorded by the trial Court, the application cannot be considered unless it is set aside. Another difficulty of a more formidable character is that during the pendency of the suit, the Code of Civil Procedure (Act 5 of 1908) was applied to the State of Kutch. Apart from the question whether the application of the Code has effect on the suit in that requisite consent under S. 92 was not obtained, it is evident that the procedural law is retrospective and applies to pending proceedings without affecting substantive rights and permission is sought at a time when such a suit could only be brought under S. 92 by obtaining the requisite consent. Now permission can only be granted under O. 1, R. 8 and not under S. 22 of the Kutch Code. A suit under S. 92, Civil P. C., is also a representative suit. The question then will be whether it would be right and proper to grant permission under O. 1, R. 8, Civil P. C., when under S. 92 a representative suit could only be maintained on obtaining the requisite consent.

[8] For the reasons stated above, this case cannot be considered a fit one for grant of permission by the Court of appeal. The appellants stuck to their guns for a period of 6 years in the trial Court and they must take consequences of their act. Result is that the decree of the trial Court has to be confirmed on the finding that the appellants were not entitled to maintain the suit in the manner done. It is therefore unnecessary to hear the pleaders for the parties on other points arising in appeal.

[9] It was submitted that the trial Court erred in assessing pleader's fees at Rs. 400. It appears

that the then Judicial Commissioner issued Order No. 1 of 1949, dated 3-1-49, presumably under para. 42 (c), Kutch (Province) Courts Order, 1948 for assessment of pleader's fees. It was provided therein that in cases except those specifically stated the Court was to assess pleader's fees on a flat basis according to its discretion; but in doing so, the Court should take into consideration the nature of the suit and the fees charged by pleaders in ordinary cases. The facts taken into consideration by the trial Court were that the suit lasted for six years and hence the respondent must have been obliged to pay a big sum for pleader's fees. There was no statement made by the pleader for the respondent that he had charged so much for pleader's fees. Moreover, it is well known that the work of disposing contested suits was going very slowly in the former Kutch State in the absence of effective supervision. The trial Court thus did not follow the order referred to above. It was submitted on behalf of the respondent that this was a matter to be decided by the trial Court in the exercise of discretion. It seems to me that a fee of Rs. 200 would be adequate having regard to the nature of the case and having regard to the fees charged in ordinary cases.

[10] Result is that the decree of the trial Court dismissing the suit is confirmed and the appeal is dismissed with costs except a slight variation that instead of Rs. 400, pleader's fees are allowed at Rs. 200.

B/K.S. *Appeal dismissed.*

A. I. R. 1952 Kutch 94

VAKIL J. C.

Chatrabhuj Keshavji and another—Plaintiffs—Appellants v. *Ghanshyamlalji Ratanji — Defendant—Respondent.*

First Appeal No. 11 of 1951, D/-10-7-1952.

(a) Civil P. C. (1908), Ss. 92, 107, O. 1, R. 8 and O. 23, R. 1 (2)—Withdrawal in appeal— Formal defect —Sufficient grounds.

An appellate Court can allow withdrawal from a suit in view of the provisions of S. 107. If the conditions laid down in O. 23, R. 1 (2) are satisfied, permission can be granted irrespective of the fact that the suit was dismissed on merits also. No doubt the fact that a suit has failed on merits also, is to be taken into consideration in deciding the question whether the suit must fail by reason of some formal defect or whether there are sufficient grounds for allowing a plaintiff to institute a fresh suit on the same cause of action. In the absence of any specific provisions similar or analogous to the provisions contained in S. 92 of the Code in the Kutch Civil Procedure Code, a suit in which numerous persons had community of interest could not have been filed by two persons in their individual capacities. It could only be done by resorting to that part of the enabling procedural law which provides for a representative suit being filed. The question is one of the right to sue to obtain specific reliefs. As such, the question is one affecting the merits of the case and going at the root of the case. The question is not one of some formal defect. The fact that a suit must fail by reason of some formal defect is considered a sufficient ground. Other sufficient grounds, though not grounds in the nature of formal defects, must be analogous to them. If the appellants realised during the pendency of the suit that they must obtain permission to convert the suit into a representative suit, they could have very properly sought at that stage permission to withdraw from the suit in the trial Court though they could not have sought permission as the Civil P. C. was made applicable. Instead of doing so if they invited the trial Court not only to decide the question about their right to sue in their individual capacities but also to decide other questions about their being the followers of the Sect and about the debuttar character of the property in suit, and failed in all those contentions, it cannot be said that there are sufficient grounds, as on probable reversal of findings on two other questions of fact by the Judicial Commissioner's Court, the suit must fail on the ground of plaintiff's right to maintain the suit in the manner done: A. I. R. 1925 Cal. 711, *Rel. on.*

[Paras 7, 8, 9, 10, 11]

Anno. C. P. C., S. 92, N. 3; O. 23, R. 1, N. 11, 25, 26.

(b) Civil P. C. (1908), Ss. 92, 107, O. 23, R. 1 (2)— Withdrawal in appeal —Right to bring suit depending on consent to be given by statutory authority.

Under S. 92, it is for the Advocate General to decide whether he should grant permission and if yes, whether it should be granted to the appellants or to somebody else. The appellate Court cannot anticipate that the Advocate General will necessarily grant permission to the appellants having regard to the fact that the trial Court held that both the appellants were not entitled to sue as one did not belong to the Sect and the other had ceased to belong to it. Under O. 23, R. 1 (2) the Court can allow withdrawal from the suit with liberty to file a fresh suit in respect of the same subject-matter to those plaintiffs who have unquestionably the right to sue and not to those whose right to bring a fresh suit depends upon consent to be given by a statutory authority. [Para 12]

Anno. C. P. C., S. 92, N. 23; O. 23, R. 1, N. 2, 11, 27.

C. P. Thacker—for Appellants; S. U. Bhansali — for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('21) A I R 1921 Bom 278 : (45 Bom 206) 7
('25) A I R 1925 Cal 711 : (86 Ind Cas 1029) 9
('29) A I R 1929 Cal 88 : (55 Cal 1067) 7
('18) A I R 1918 Mad 1287 : (40 Mad 259 FB) 7

Order.— The appellants apply under O. 23, R. 1 (2), Civil P. C. for permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of the suit.

[2] The appellants brought the suit under appeal in the year 1945 A. D. in the then Varishta Court of the former Kutch State, to obtain reliefs provided in S. 92, Civil P. C. (Act 5 of 1908), on averment that the respondent, religious head of their Pranami Sect of Chakla Mandir, mismanaged the temple property and was about to alienate the same.

[3] The respondent disputed appellants' right to sue as followers of Pranami Sect of Chakla Mandir, maintained that the property in suit belonged to him as dedicated to him and contended that the suit was not tenable till the appellants sought and obtained permission under S. 22, Kutch Civil P. C.

[4] The trial Court found for the respondent on the contentions raised by him and dismissed the suit. In appeal, the appellant first applied for stay to enable them to obtain permission of the Advocate General or in the alternative for permission to sue in a representative capacity under O. 1, R. 8, Civil P. C. They withdrew that application

and have filed the present application to obtain the relief mentioned in para one above.

[5] To understand and appreciate averments made in the application, it is necessary to state some facts. The plaint was drafted and reliefs were sought on the basis of the provisions contained in S. 92, Civil P. C. As the said Code was not in force in Kutch State when the suit was filed and as the Kutch Code made no such corresponding provisions, a substantive right to institute the suit was understood to have existed, but the procedural part of the section of obtaining permission of the Advocate General was thought unnecessary as inapplicable. It was for this reason that suit was proceeded with despite the objections that permission to sue under S. 22 of the Kutch Code, containing provisions corresponding to the provisions contained in O. 1, R. 8, Civil P. C., should have been obtained and that the suit as brought was bad. The trial Court held that suit should have been brought in a representative capacity and as it was not done, it was bad.

[6] In Paras. 1 to 5 of their application, the appellants state the above mentioned facts and further state that as their suit had failed due to formal defect and as the Civil Procedure Code (Act 5 of 1908), came into force during the pendency of the suit and as the suit could not be held tenable unless permission was obtained under S. 92, Civil P. C., they should be permitted to withdraw from the suit with liberty to file a fresh suit in respect of the same subject-matter. The application is opposed by the respondent.

[7] First question to be considered is whether this Court as Court of appeal can permit withdrawal from the suit. Order 23, R. 1, Civil P. C. provides for withdrawal from the suit by the Court. As a trial Court can allow withdrawal from a suit, an appellate Court can allow withdrawal from a suit in view of the provisions of S. 107, Civil P. C. It was contended on behalf of the respondent that when a suit had been tried and dismissed on merits, the plaintiff should not be permitted to withdraw in appeal from the suit and reliance was placed on *Ram Saran* v. *Radha Raman*, A. I. R. 1929 Cal. 88. In that case, it was not held that the appellate Court had no power to do so. The question of jurisdiction of an appellate Court to allow withdrawal from a suit was considered in *Kamayya* v. *Pappaya*, A. I. R. 1918 Mad. 1287 (F. B.) and it was held that an appellate Court had power in a proper case to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. The Bombay High Court, following *Kammayya's case*, held in *Hassan (Sheikh)* v. *Mahommed Ali*, A. I. R. 1921 Bom. 278 that an appellate Court had such jurisdiction to grant permission. Following these cases, I hold that this Court, as a Court of appeal can grant permission to the appellants under O. 23, R. 1 (2), Civil P. C.

[8] Next question is whether permission should not be granted when a suit is tried and dismissed on merits also. It is clear that requisite permission can be granted if the Court is satisfied that the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing a plaintiff to institute a fresh suit for the same subject-matter. If these conditions are satisfied, permission can be granted irrespective of the fact that the suit was dismissed on merits also. No doubt the fact that a suit has failed on merits also is to be taken into consideration in deciding the question whether the suit must fail by reason of some formal defect or whether there are sufficient grounds for allowing a plaintiff to institute a fresh suit on the same cause of action. In the Calcutta case above referred to, the title of the plaintiff suing was not proved and hence the suit failed. Incidentally the Court held that the suit was bad for want of a necessary party and hence it must fail on that ground also. To grant permission to a plaintiff in such a case would be tantamount to giving him a fresh opportunity to establish his case. It cannot, therefore, be accepted as a general proposition of law that when a suit was tried and dismissed on merits also, the case is taken out of the purview of O. 23, R. 1 (2), Civil P. C.

[9] Next question is whether the suit must fail by reason of some formal defect. The suit has already failed and what is to be considered is whether it must fail in appeal by reason of some formal defect. It was urged that as appellants did not bring their suit as a representative suit, and as they were not able to do so now in view of the fact that such a suit would be governed by the provisions of S. 92 of the Code, their suit must fail by reason of that formal defect. The question is whether the defect can be regarded as mere formal one. It is evident that in the absence of any specific provisions similar or analogous to the provisions contained in S. 92 of the Code in the Kutch Civil Procedure Code, a suit in which numerous persons had community of interest could not have been filed by two persons in their individual capacities. The question, therefore, is one of the right to sue in the manner done to obtain specific reliefs. As such, the question is one affecting the merits of the case and going at the root of the case. The question is not one of some formal defect.

In *Nishi Kanta* v. *Umar Lal*, A. I. R. 1925 Cal. 711, a suit for declaration of a public path was instituted without taking steps under S. 91 or O. 1, R. 8, Civil P. C. It was held that the defect was not a formal one within the meaning of the rule. The appellants are, therefore, not entitled to get permission sought on the ground that their suit is likely to fail by reason of some formal defect. It is, therefore, unnecessary to consider whether the suit must fail by reason of some formal defect only. Nor is it possible to do so as the two other contentions raised by the Respondent and accepted by the trial Court are questions of fact and this Court cannot say anything on the merits of the

findings recorded on them by the trial Court without considering them in the light of arguments advanced.

[10] Next question is whether there are other sufficient grounds. The fact that a suit must fail by reason of some formal defect is considered a sufficient ground. Other sufficient grounds, though not grounds in the nature of formal defects, must be analogous to them. Now, the appellants had clear notice of the fact that their suit as instituted was bad. The Respondent had contended that permission under s. 22 of the Kutch Code should have been obtained. They however stuck to their guns. The Respondent requested the then trial Court to decide that particular contention as a preliminary issue. It seems that the then trial Court did not do so as the appellants must have objected to that request being granted.

The appellants explain that they did not take up the suggestion as they had instituted the suit in accordance with the principles enunciated in s. 92 of the Code. But the main principle enunciated in that Section is that a suit could be filed by two or more persons with the permission of the Advocate General. This provision was made so that trustees of public trusts might not be harassed by reckless suits filed against them. Where there is no provision for such permission being obtained but a suit contemplated by the provisions of that Section could be filed according to the then existing law, it follows that it could only be done by resorting to that part of the enabling procedural law which provides for a representative suit being filed. The appellants have to thank themselves if despite objections by the other side, they stuck to their guns. Where a plaintiff under the circumstances stated above sticks to his guns and invites the Court to decide the contention, he cannot be heard to say that he has now become wiser in appeal and therefore there is sufficient ground for withdrawal from the suit.

[11] It is true that the Code of Civil Procedure (Act 5 of 1908) came into force in this State during the pendency of the suit. It was urged that due to the fact that the Code was applied to the State when the suit was pending, no permission could have been sought to convert the suit into a representative suit and the suit was likely to fail due to application of the Code, which being procedural law had retrospective operation. No doubt, there being no vested right in the procedure, the Code applies retrospectively to all pending proceedings but not in such a way as to affect substantial or remedial vested rights. It can be urged that the appellants claiming to be the followers of the Sect had vested right to bring a suit of this type. But it is clear that the same vested right was to bring a representative suit. If such a suit is brought, it could not have been defeated by the application of the Code during the pendency of the Suit. The Code was applied many years after the suit was brought and even after the Code was applied, the appellants sought decision of the trial Court on the question whether they were not entitled to maintain the suit in their own rights.

If the applicants realised during the pendency of the suit that they must obtain permission to convert the suit into a representative suit, though at that stage when they could not have sought permission as the Code was made applicable, they could have very properly sought at that stage permission to withdraw from the suit in the trial Court. Instead of doing so, they invited the trial Court not only to decide the question about their right to sue in their individual capacities but also to decide other questions about their being the followers of the Sect and about the debuttar character of the property in suit. After they have failed in all those contentions, it cannot now be said that there are sufficient grounds as on probable reversal of findings of two other questions of fact by this Court, the suit must fail on the ground of plaintiffs' right to maintain the suit in the manner done.

[12] There is another weighty ground to be considered. It is conceded that the new suit to be instituted must comply with the provisions of s. 92, C. P. C. According to that Section new suit can be instituted by the Advocate General or by any two or more persons who obtained permission of the Advocate General and not necessarily by the appellants suing. It is for the Advocate General to decide whether he should grant permission and if yes, whether it should be granted to the appellants or to some body else. This Court cannot anticipate that the Advocate General will necessarily grant permission to the appellants having regard to the fact that the trial Court held that both the appellants were not entitled to sue as one did not belong to the Sect and the other had ceased to belong to it. Under O. 23, R. 1 (2) C. P. C., the Court can allow withdrawal from the suit with liberty to file a fresh suit in respect of the same subject-matter to those plaintiffs who have unquestionably the right to sue and not to those whose right to bring a fresh suit depends upon consent to be given by a statutory authority.

[13] Result is that the application for withdrawal cannot be granted. It is dismissed.

B/D.H. *Application dismissed.*

END

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MADHYA BHARAT HIGH COURT

1952

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Madhya Bharat High Court

A. I. R. (39) 1952 MADHYA BHARAT 1 (C. N. 1)

(GWALIOR BENCH)

(FULL BENCH)

SHINDE, DIXIT AND V. M. MEHTA, JJ.

Babu, son of Sirjeram, and another, Appellants v. State.

Criminal Special No. 6 of 1949, D/- 7-3-1951.

(a) Criminal P. C. (1898), S. 439 (3) — Revision by State — Sentence passed by Sessions Judge — Enhancement of.

Sub-s. (3) of S. 439, clearly precludes the High Court to pass a greater sentence than the Magistrate of the first class can pass only in a case when the sentence is passed by a Magistrate. But it makes no mention with regard to the sentence passed by a Sessions Judge. There is no reason therefore, to extend the scope of the sub-section to include the sentence passed by Sessions Judges, and the High Court can, in a revision filed by the State, can enhance the sentence passed by the Sessions Judge to life imprisonment, even though the latter is not competent to pass it. AIR (22) 1935 Oudh 239, AIR (22) 1935 All 989, Ref. (Para 2)

(b) United State of Gwalior, Indore and Malwa (Madhya Bharat) High Court of Judicature Act St. 2005, (8 of 1949), S. 25 — Criminal appeal under — Interference in — Practice of High Court.

The right of special appeal under Section 25 of the High Court Act was provided when the Judicial Committee was abolished. Hence the Madhya Bharat High Court, when exercising the powers under Section 25, can interfere with the decision of the lower Court only when substantial and grave injustice has been done. As a general rule, it cannot go into the question of evidence.

Held in the circumstances of the case that, as no question of substantial and grave injustice was involved in the case, no interference was called for in the concurrent finding of conviction of the lower Courts. (Para 4)

Day, for Appellants, Dy. Govt. Advocate, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) AIR (37) 1950 S C 169: (51 Cri L Jour 1270) (Pr 4)

('35) AIR (22) 1935 All 989: (37 Cri L Jour 49) (Pr 2)

('35) AIR (22) 1935 Oudh 239: (36 Cri L Jour 454) (Pr 2)

SHINDE, J.: This is a special appeal under Section 25 of the High Court of Judicature Act. Accused Babu and Uttamsingh were convicted under Sections 292 and 385 of the Gwalior Penal Code and sentenced each to 14 years' rigorous imprisonment and a fine of Re. 1/- and 4 years' rigorous imprisonment and a fine of Rs. 100/- respectively. Against that decision the accused filed an appeal for acquittal and the Government filed a revision for enhancement of sentence. A division bench of the High Court dismissing the appeal of the accused, accepted the revision of the Government and enhanced the sentence to life imprisonment and a fine of Re. 1/- each under Section 292 of the Gwalior Penal Code. Against that decision the accused have filed this appeal.

(2) The first contention raised by the learned counsel for the appellants is that the High Court erred in law in enhancing the sentence to life imprisonment which the Sessions Judge was not competent to pass. This argument is advanced on the analogy of Sub-section 3 of Section 439 of the Criminal Procedure Code. This Sub-section says that where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under Section 34 the Court shall not inflict a greater punishment for the offence which in the opinion of such Court the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class. This argument has no force. The Sub-section clearly precludes the High Court to pass a greater sentence than the Magistrate of the First Class can pass only in a case when the sentence is passed by a Magistrate. But it makes no mention with regard to the sentence passed by a Sessions Judge. There is no reason therefore, to extend the scope of this Sub-section to include the sentence passed by Sessions Judges. Nor has any authority been cited in support of such a proposition. On the contrary the learned Dy. Government Advocate cited two decisions 'Raja Ram v. Emperor', AIR (22) 1935 Oudh 239 and 'Emperor v. Ram Nath', AIR (22) 1935 All 989, to show that the sentence passed by the assistant Sessions Judge can be enhanced by the High Court and that this Sub-section is not attracted in a case where the sentence is not passed by a Magistrate. This contention, therefore, cannot be accepted.

(3) The second contention raised by the appellants is that the first information report was not legally proved. This contention also has no force. It is no doubt true that a copy of the first informa-

tion report was submitted in the Court. But it appears from the record that during the course of the trial original first information report was produced and the contents of the first information report were put to witness Krishna, P.W. 1, who admitted them. Hence this contention has no substance.

(4) The other contentions raised by the learned counsel for the appellants all relate to the appreciation of evidence. I am of opinion that as a general rule this Court cannot go into the question of evidence. The right of special appeal under Section 25 of the High Court Act was provided when the Judicial Committee was abolished. The fact that Section 25 was repealed when the new Constitution of India came into force and this High Court became amenable to the Supreme Court, leads to the same conclusion, namely that the right of special appeal was given in lieu of the right to appeal to the Judicial Committee. Hence this Court when exercising the powers under Section 25 of the High Court Act can interfere with the decision of the lower Court only when substantial and grave injustice has been done. In this connection the observations made by the Supreme Court in 'Pitam Singh v. State', AIR (37) 1950 S C 169, are particularly noteworthy. Their Lordships observed as follows:

"The obvious reply to all these arguments advanced by the learned counsel for the appellants, is that this Court is not an ordinary Court of criminal appeal and will not, generally speaking allow facts to be re-opened, especially when the two Courts agree in their conclusions in regard to them and when the conclusions of fact which are challenged are dependant on the credibility of witnesses who have been believed by the trial Court which had the advantage of seeing them and hearing their evidence. In the present case the story of the prosecution, which is neither incredible nor improbable, is supported by not less than five witnesses including the mother of the deceased, and their evidence in spite of its infirmities has impressed four assessors and the two Courts below, who, in appraising its reliability, have given due weight to certain features of the case which, according to them, negative the theory of conspiracy or concoction. In these circumstances, it will be opposed to all principles and precedents if we were to constitute ourselves into a third Court of fact and, after re-weighing the evidence come to a conclusion different from that arrived at by the trial Jduge and the High Court."

As no question of substantial and grave injustice is involved in this case, no interference is called for in the concurrent finding of conviction of the lower Courts. From the evidence of Nandkishore and Laxminarayan it is proved that the accused have produced Rs. 1,150/-, a gun and a ring. The deceased, when he was set upon, had a gun in his hand and a ring on his finger. Both the ring and the gun have been identified by his father P.W. 2 Lotaram and P.W. 3, Manju Lal, who was the Munim of the deceased. From the evidence of Nandkishore it is proved that on the information supplied by the accused the coat, which the deceased was wearing, was recovered. The coat also has been identified by P.W. 2 and P.W. 3. In these circumstances, there is no substance in this appeal and hence it must fail.

(5) The appeal is accordingly dismissed.

(6) MEHTA, J.: I agree.

(7) DIXIT, J.: I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 2 (C. N. 2)

(GWALIOR BENCH)

DIXIT, J.

Harbilas, Applicant v. The State.

Criminal Revision No. 76 of 1951, D/- 13-8-1951.

(a) *Criminal P. C. (1898), S. 499 — Surety Bond — Conditions in — Validity of.*

The surety bond executed by the surety did not mention the exact time and the place for the attendance of the accused. But the terms of the bond were "I shall produce the accused wherever and whenever called upon to do so by the Court or the police until the conclusion of the case."

Held that the surety undertook to produce the accused persons before the Sub-Divisional Magistrate whenever and wherever called upon to do so that he was asked to produce the accused in the very Court in which the surety gave the bond. It could not be maintained that the bond was invalid as the surety was asked to produce the accused persons at a place and time not stipulated in the bond. (Para 2)

Anno: Cr. P. C., S. 499, N. 2-a.

(b) *Criminal P. C. (1898), S. 514 (1) — Notice before forfeiting bond.*

Section 514 (1) does not require the Court to issue notice to show cause why the bond should not be forfeited. Again, the issue of notice to show cause why the penalty of the bond should not be realised is discretionary and not mandatory. It cannot, therefore, be maintained that an order of the forfeiture of the bond or the recovery of the penalty of the bond passed without giving notice to the surety is illegal.

Note: It was, however, held that the surety failed to produce the accused persons even after he had a notice and also failed to appear himself in the Court to explain his difficulty in not producing the accused person. The surety could not with any degree of force say that he was given no opportunity to show cause against the forfeiture of the bond or realisation of the penalty.) (Para 3)

Anno: Cr. P.C., S. 514, N. 8.

Anand, for Applicant; Shiv Dayal, Dy. Govt. Advocate, for the State.

ORDER.: This is an application in revision against the order of the District Magistrate of Morena, confirming an order of the Sub-Divisional Magistrate, Joura, directing the recovery of money forfeited by the petitioner who stood surety for the appearance of Jahar Singh and Punit Ram accused of the offence under Section 302, I.P.C.

(2) On behalf of the applicant Mr. Anand first contended that the surety bond executed by the applicant was not valid in that it did not mention the time and place for the attendance of the accused persons. There is no force in this contention. It is quite true that the surety bond executed by the applicant does not mention the exact time and the place for the attendance of the accused. But the terms of the bond are: "I shall produce the accused wherever and whenever called upon to do so by the Court or the police until the conclusion of the case." A reference to Form 25, Schedule 5, Criminal Procedure Code will show that in a bond for appearance, the surety can undertake to produce an accused person whenever and wherever called upon to do so instead of at a specific place and time. From the terms of the bond executed in the present case, it is very clear that the surety undertook to produce the accused persons before the Sub-Divisional Magistrate whenever and wherever called upon to do so. The applicant was asked to produce the accused in the very Court in which the surety gave the bond. It cannot, therefore, be maintained that the bond was

invalid as the applicant was asked to produce the accused persons at a place and time not stipulated in the bond.

(3) It was next urged that the Sub-Divisional Magistrate's order forfeiting the bond and directing the recovery of money forfeited, from the applicant, was illegal as no notice was given to the applicant to show cause against the forfeiture of the bond and the realisation of the penalty of the bond. I am unable to accept this contention as correct. Under S. 514 (1) of the Code a bond for appearance is forfeited whenever it is proved to the satisfaction of the Court that the accused has failed to appear and the notice that the Court may give to the person bound by the bond, is a notice to show cause why the penalty of the bond should not be paid by him. Section 514 (1) of the Code does not require the Court to issue notice to show cause why the bond should not be forfeited. Again, the issue of notice to show cause why the penalty of the bond should not be realised is discretionary and not mandatory. It cannot, therefore, be maintained with any degree of force that an order of the forfeiture of the bond or the recovery of the penalty of the bond passed without giving notice to the surety is illegal. It is no doubt, true that in order to avoid a failure of justice, a notice should ordinarily be given to the surety to show cause why the penalty of the bond should not be realised from him. The question, therefore, to be determined, is, whether if no notice was given to the applicant, any prejudice was caused to him on account of this irregularity. In the present case, the accused persons failed to appear before the Sub-Divisional Magistrate, on 5-12-1950. Thereupon, a notice was given to the applicant to produce them before the Sub-Divisional Magistrate on 14-2-1951. The notice issued to the applicant also stated that if he failed to produce the accused persons on 14-2-1951, the bond would be forfeited. This notice was served on the petitioner on 13-1-1951. On 14-2-1951, the accused persons were not produced before the Court by the petitioner. The applicant also did not appear in the Court on 14-2-1951 to explain his failure to produce the accused persons. The Sub-Divisional Magistrate, therefore, forfeited the bond on 14-2-1951 and directed that the penalty of the bond be realised from the petitioner. On 27-2-1951, the applicant presented an application stating that on 14-2-1951, the accused had gone to attend a wedding and for that reason he could not intimate to them the date of appearance in the Court and further, that as he himself had to attend a wedding on 14-2-1951, he could not appear in the Court to explain the non-appearance of the accused persons. In the above circumstance I find it difficult to accept the contention of the learned Counsel for the applicant that the petitioner was not given any opportunity to show cause why the bond should not be forfeited and why the penalty of the bond should not be realised. The petitioner was served with a notice to produce the accused persons nearly a month before the date on which the attendance of the accused was required. It was also indicated to him in the notice that in the event of the non-appearance of the accused persons, the bond would be forfeited. If, therefore, the applicant failed to produce the accused persons even after he had a notice and also failed to appear himself in the Court to explain his difficulty in not producing the accused person, the applicant cannot with any degree of force say that he was given no opportunity to show cause against the forfeiture of the bond or realisation of the penalty. The reasons subsequently stated by the petitioner for the non-appearance of the accused persons on 14-2-1951 and of his own failure to show cause on that day, are not in my opinion, sufficient. In the villages, marriages are not celebrated suddenly. If the accused and the surety had to attend a wedding on 14-2-1951, the applicant could have asked the Court at any time before 14-2-1951 to adjourn the case and to give him time to produce the accused persons. The absence of the accused persons on 14-2-1951 on the reason shown by the applicant himself was voluntary. It cannot be said that by their voluntary attendance at a marriage, the accused were prevented from appearing in the Court or that the petitioner was prevented for unavoidable cause to appear in the Court to show cause against the forfeiture of the bond on the recovery of the penalty thereof.

(4) Lastly, the counsel for the applicant made a plea for remitting a part of the penalty. I do not think the applicant is entitled to any consideration in the matter of the enforcement of the bond. If he had appeared on 14-2-1951 and asked the Court to give him further time to produce the accused persons, he would have been entitled to some consideration in the matter of the enforcement of the bond for the actual failure of the accused persons to appear on 14-2-1951.

(5) For the above reasons I am not inclined to interfere in the order of the District Magistrate. The result is that this petition is dismissed.

V.S.B. *Revision dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 3 (C. N. 3)

(GWALIOR BENCH)

DIXIT, J.

S. P. Bhargava and another, Applicants v. Rameshwar Shastri and another, Non-Applicants.

Civil Misc. Case No. 27 of 1951, D/- 14-9-1951.

(a) Companies Act (1913), Ss. 216, 221 — Application under S. 216 — Locus standi of creditor to challenge voluntary liquidation proceedings as being void.

Before exercising the powers under S. 216 the Court must be satisfied that the application for the exercise of any of the powers under S. 216 is by a person entitled to make the application. There is nothing in S. 216, Companies Act to suggest that the Court must accept the statement of the person applying under that section that he is the liquidator or a contributory or a creditor and that the Court is precluded from entering into an inquiry suo motu or at the instance of the persons opposing the application to determine whether the applicant has locus standi to make the application. The non-applicants are entitled to ask Court not to exercise the powers under S. 216 as the petitioners are not the liquidators in law inasmuch as the voluntary liquidation proceedings in which they were appointed were illegal and void.

A distinction ought to be drawn between a case where the person applying under S. 216 himself attacks the validity of liquidation proceedings and a case where the objection as to the validity of the proceedings is raised by the persons resisting the application. A petitioner under S. 216 praying that the Court should exercise the powers under that section for the assistance of the voluntary winding up, as also one under S. 221, Companies Act asking the Court to make an order for the continuance of the voluntary winding up subject to the supervision of the Court, must accept the fact that the voluntary winding up is valid. He cannot apply for orders under S. 216 to assist the winding up or for a supervision order under S. 221, and at the same time challenge the voluntary winding up proceedings as being void. The position of an opponent to such a petition is, however, different. His object is to secure the rejection of the petition and for that end, he is entitled to urge that the winding up proceedings in relation to which the Court has been moved to exercise the powers are void or for that reason, the petitioner is not entitled to apply. In

such cases the opponent's attack on the winding up is in the main with the object of showing that the conditions requisite for the exercise of the powers under S. 216 or 221, Companies Act, do not exist. A I R (23) 1936 Pat. 468, Disting.; A I R (37) 1950 E. P. 188, Rel. on. (*Para 3*)

Anno: Comp. Act S. 216 N. 1.

(b) *Companies Act (1913), Ss. 206, 207(1) and (2) — Non-compliance with — Effect on voluntary winding up.*

It is no doubt possible to take the view that the failure to conform to the provisions of S. 206, which only directs the advertisement of the resolution of winding up after its passing and which prescribes a penalty in the event of a default in complying with the provisions of the section, is only an irregularity and not an illegality which vitiates the resolution winding up the Company. But when the provisions of S. 207(1) and (2) also are not complied with, it cannot be argued that there is a valid "members' voluntary winding up". (*Para 6*)

(c) *Companies Act (1913), S. 216(2) — Attachment of property before passing of resolution for voluntary winding up — Attachment if can be set aside under S. 216.*

It is not open to the Court under S. 216 to set aside the order of attachment where the orders of attachment were made and put into force against the property of the Company before the passing of the special resolution for "voluntary winding up." The words "after the commencement of the winding up" in S. 216(2) do not refer to the time of making an application under S. 216 and qualify the orders of attachment, distress or execution. S. 216 itself presupposes that an application under that Section would be made after the commencement of the winding up and the words "after the commencement of the winding up" obviously refer to the time when any attachment, a distress or execution is put into force against the estate or effects of the company. Again, the power under S. 215, Companies Act can be exercised only if the Court is satisfied that the exercise of the powers would be just and beneficial not only to the petitioners but to all the parties. It would clearly be not a just exercise of powers when there are obvious irregularities in the procedure (such as non-compliance with Ss. 206, 207) as regards the winding up. (*Para 7*)

Anno: Com. Act, S. 216 N. 2.

Patankar, for Applicants — Bhagwan Das Gupta, for Non-Applicants.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) A I R (37) 1950 E P 188 (Pr 4)

('36) A I R (23) 1936 Pat 468: (162 Ind Cas 218) (Pr 4)

ORDER: This in an application under S. 216, Indian Companies Act, by S. P. Bhargava and S. R. Sen Gupta, who claim to have been appointed as liquidators in voluntary liquidation proceedings of a Company known as the Elite Medical Stores, Ltd., praying that the orders of attachment and sale of certain goods of the Company passed in two pending Civil Suits instituted against the Company by the non-applicants, be set aside and the liquidators be given possession of the property. The non-applicants oppose the petition on the grounds that the petitioners are not entitled to make the application as the voluntary winding up being not in conformity with the provisions of Ss. 206, 207, 209, 209A and 214, Companies Act, was irregular and void and that .as the orders of attachment were put into force before the commencement of the alleged winding up, they cannot be set aside under S. 216(2).

(2) Learned Counsel for the petitioners argues that an extraordinary general meeting of the Company held on 17th March 1950, a special resolution that the company be voluntarily wound up and the petitioners be appointed as liquidators, was passed; and that the liquidation was a member's liquidation because the special resolution itself stated that the Company was solvent and able to meet all its liabilities. It is conceded on behalf of the petitioners that a notice of the resolution was not published in the Official Gazette as required by S. 206 and that the provisions of S. 207, Companies Act were not complied with and no declaration of solvency was filed. But it is argued that these omissions are not fatal; they are mere irregularities and not illegalities which vitiate the resolution winding up the Company or the appointment of the petitioners as liquidators. It is further contended that the opponent-creditors have no locus standi to question the legality of the voluntary liquidation by the members and this Court cannot in these proceedings adjudge whether the voluntary winding up is valid. As to the objection of the opponents that the orders of attachment were made before the commencement of the alleged winding up, it is said on behalf of the petitioners that S. 216 (2), Companies Act does not prohibit the Court from setting aside such orders and that the words "after the commencement of the winding up" in S. 216(2) refer to the time of applying and not to the time when the order of attachment is made or put into force.

(3) Having heard the learned Counsel for the parties, I have come to the conclusion that this application must be refused. Under S. 216, Companies Act, the Court is empowered to exercise the powers mentioned in sub-sections (1) and (2) only if there is a petition before it by a person named in sub-section (1) namely by the liquidator or a contributory or a creditor. Before exercising the powers the Court must be satisfied that the application for the exercise of any of the powers under S. 216 is by a person entitled to make the application. There is nothing in S. 216, Companies Act to suggest that the Court must accept the statement of the person applying under that section that he is the liquidator or a contributory or a creditor and that the Court is precluded from entering into an inquiry suo motu or at the instance of the persons opposing the application to determine whether the applicant has locus standi to make the application. In my opinion, the non-applicants are entitled to ask this Court not to exercise the powers under S. 216 as the present petitioners are not the liquidators in law inasmuch as the voluntary liquidation proceedings in which they were appointed were illegal and void. I think a distinction ought to be drawn between a case where the persons applying under section 216 himself attacks the validity of liquidation proceedings and a case where the objection as to the validity of the proceedings is raised by the persons resisting the application. A petitioner under S. 216 praying that the Court should exercise the powers under that section for the assistance of the voluntary winding up, as also one under S. 221, Companies Act asking the Court to make an order for the continuance of the voluntary winding up subject to the supervision of the Court, must accept the fact that the voluntary winding up is valid. He cannot apply for orders under S. 216 to assist the winding up or for a supervision order under S. 221, and at the same time challenge the voluntary winding up proceedings as being void. The position of an opponent to such a petition is, however, different. His object is to secure the rejection of the petition and for that end, he is entitled to urge that the winding up proceedings in relation to which the Court has been moved to exercise the powers are void or for that reason, the

petitioner is not entitled to apply. In such cases the opponents' attack on the winding up is in the main with the object of showing that the conditions requisite for the exercise of the powers under S. 216 or 221, Companies Act, do not exist.

(4) It is on this ground that the decision reported in 'Kameshwar Singh v. Ambher State and Stone Co., Ltd.', A I R (23) 1936 Pat 468 is distinguishable. In that case two creditors of a Company in voluntary liquidation applied to the Court for the appointment of "an official liquidator with the voluntary liquidator and for restraining the voluntary liquidator from parting with the property of the company." An additional petition was also filed by them asking for a declaration that the voluntary liquidation was illegal and void. It was contended on behalf of the Company in that case that the petitioning creditors had no locus standi. The learned Judge first stated that he had some difficulty in understanding the exact nature of the petitioners' application. He held that the application could not be entertained under S. 215 (now section 216) Companies Act, or treated one for a supervision order. The learned Judge observed that the powers of the Court under S. 215 were strictly limited to assistance to the winding up and there was no power under the Companies Act for the creditors to come and say that the winding up resolution was bad and further that a creditor who challenges the voluntary winding up proceeding as void, cannot apply for a supervision order, which can be made only where there is a valid winding up. It will be observed that in the Patna case the powers under Ss. 216 and 221 could not have been exercised in favour of the petitioning creditors as they challenged the very fact, the existence of which was necessary for the exercise of the powers. The observations of the learned Judge that a creditor cannot come and say that the winding up proceedings are bad must be read with reference to the facts of that case and when so read the decision can be treated as holding only that a petitioner under S. 216, Companies Act has no locus standi to attack the validity of the voluntary liquidation. If the learned Judge intended to lay down as a general proposition that in proceedings initiated on an application under S. 216 of the Companies Act, the opponents to the applications have no locus standi to question the validity of the voluntary liquidation and the Court must also assume without any enquiry that the liquidation is valid, then I most respectfully disagree with the view. The question whether a creditor can attack voluntary liquidation proceedings also arose in a case before the East Punjab High Court 'John Vasica v. Janda Rubber Works Ltd.', A I R (37) 1950 E P 188. In that case the petitioner who was a creditor of the Company sought an order for a declaration that an order passed by the High Court under S. 221 directing the continuance of the voluntary liquidation subject to the supervision of the Court was without jurisdiction as the liquidation itself was illegal in so far as the provision of S. 207 were not complied with. On behalf of the Company, in that case, it was said relying on AIR (23) 1936 Pat 468 that it was not open to a creditor to question the legality of the voluntary liquidation of the members. The contention of the Company was not accepted. The learned Judge of the Punjab High Court observed that the Patna case did not help the Company and held that "if a voluntary winding up is bad in so far as it does not conform to the provisions of S. 207 then the appointment of a liquidator is bad and a fortiori the continuance of the voluntary liquidation". The Punjab case lends support to the view I have taken about the competency of a creditor to challenge in certain circumstances the voluntary liquidation proceedings as being void. I, therefore hold that the non-applicants in the present case are entitled to say that the petitioners are not competent to make the application because the voluntary liquidation in which they were appointed as liquidators, is void.

(5) Coming now to the question whether the petitioner's appointment as liquidators is regular and valid so as to entitle them to apply under S. 216; Companies Act, it is first necessary to examine certain sections of the Companies Act. Section 203 states that a Company may be wound up voluntarily in one of three ways. Of these, the second and third are as follows:

"(2) if the Company resolves by special resolution that the company be wound up voluntarily."

"(3) if the Company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up."

Then follow sections 204 to 207, of which sections 206 and 207 are important for our purposes. Section 206 says that the Company must advertise notices of the winding up resolution in the Gazette and in some newspaper circulating in the District where the registered office of the Company is situate, within ten days of the passing of the resolution. A default in advertising the resolution is punishable with fine. Section 207 divides voluntary winding up into two classes (1) a member's voluntary winding up and (2) the Creditor's voluntary winding up. To constitute a member's winding up the directors or a majority of them must before sending out notices of the meeting, make and deliver to the Registrar a statutory declaration that in their opinion the Company will be able to pay its debts in full within three years from the commencement of the winding up. If the declaration of solvency as required by sub-sections (1) and (2) of S. 207 is not made, then the winding up is "a creditor's voluntary winding up." S. 208 and Ss. 208 A to E make provision for the procedure to be followed in a "member's voluntary winding up." The procedure applicable in the case of a "Creditor's voluntary winding up" is given in S. 209 and Ss. 209 A to H.

(6) In the present case the Company by passing a special resolution stating that it was solvent and able to pay its debts in full, resolved to go into voluntary liquidation. The petitioners admit that the provisions of Ss. 206 and 207 (1) and (2) were not complied with, the resolution was not advertised in the Gazette and a declaration of solvency as required under S. 207 was not made. It is, however, contended that the omission to comply with these provisions is not fatal and further that as the company never intended to have a creditor's voluntary winding up and did not pass an extraordinary resolution to that effect that it could not by reason of its liabilities continue its business, it was not necessary to follow the provisions of Ss. 209 A to H. Applying the general rule that a Company cannot do that which is prohibited by the Act, but in cases where it is empowered to do a thing and it does it irregularly, then the irregularity can be cured., it is no doubt possible to take the view that the failure to conform to the provisions of S. 206, which only directs the advertisement of the resolution of winding up after its passing and which prescribes a penalty in the event of a default in complying with the provisions of the section, is only an irregularity and not an illegality which vitiates the resolution winding up the Company. But I do not think that it could be argued with any degree of force that even when the provisions of S. 207 (1) and (2) are not complied with, there is a valid "members' voluntary winding up". Under section 207 (1) and (2), a member's winding up can be constituted only when there is a declaration of solvency as laid down in the section. As no such declaration of

solvency was made, the winding up in which the applicants are said to have been appointed as liquidators cannot be regarded as a valid member's voluntary winding up. It follows that if the voluntary winding up is invalid as it does not conform to the provisions of S. 207, then the appointment of the petitioners as liquidators themselves is invalid, and they cannot be regarded as persons entitled to apply under S. 216, Companies Act. It is unnecessary for me to consider the question whether the winding up as a creditor's voluntary winding up is valid. For, firstly, the Company did not resolve to wind up by passing an extraordinary resolution to the effect that it could not by reason of its liabilities continue its business and secondly, it is not the case of the petitioners that there is a valid Creditors' voluntary winding up. In fact, during the course of his arguments, the learned Counsel for the petitioners maintained the position that the Company is solvent and it has no creditors and did not accept the position that there was a creditors' voluntary winding up. In these circumstances, it must be held that there was no valid members' voluntary liquidation and the appointment of the petitioners as liquidators in those proceedings is also not valid.

(7) Quite apart from the objection that the petitioners are not entitled to make the application under S. 216, Companies Act, it is impossible for me to set aside the orders of attachment in the present case for the simple reason that the orders of attachment were made and put into force against the property of the Company before the passing of the special resolution for "voluntary winding up". I am unable to accede to the submission of the learned Counsel for the applicant that the words "after the commencement of the winding up" in S. 216 (2) refer to the time of making an application under S. 216, and do not qualify the orders of attachment, distress or execution. In my judgment, S. 216 itself presupposes that an application under that section would be made after the commencement of the winding up and the words "after the commencement of the winding up" obviously refer to the time when any attachment, a distress or execution is put into force against, the estate or effects of the company. Again, the power under S. 216, Companies Act can be exercised only if the Court is satisfied that the exercise of the powers would be just and beneficial not only to the petitioners but to all the parties. It would clearly be not a just exercise of powers when there are obvious irregularties in the procedure as regards the winding up.

(8) For the above reasons, I reject the petition. In view of the difficult question involved in the petition which both sides were entitled to litigate, I direct that the parties shall bear their own costs of this petition.

V.B.B. *Petition dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 6 (C. N. 4)

(*GWALIOR BENCH*)

DIXIT J.

Kukaji, Appellant v. Misri Lal, Respondent.

Civil Revn. No. 137 of 1951, D/- 6-8-1951.

(a) T. P. Act (1882), S. 60 — Right of redemption — Extinguishment of, by agreement.

The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. The right of redemption can be extinguished by an act of the parties or by the decree of a Court. Where an agreement between two mortgagees of different portions of a house contemplates that if either party acquires the equity of redemption in respect of the entire house, he would retain the right in respect of the portion of the house mortgaged with himself and transfer to the other the right in respect of the portion of the property mortgaged with the other party, the agreement does not itself transfer any right to any party. It is merely an agreement to convey the equity of redemption in respect of the portions of the house from one party to the other. The equity of redemption cannot be held to be extinguished by a mere agreement to convey: A I R (37) 1950 F C 1, Rel. on.

Hence, the agreement does not constitute a bar to the suit for redemption by the mortgagee who has acquired the equity of redemption of the entire house against the other mortgagee. **(Para 4)**

Anno: T. P. Act S. 60 N. 22.

(b) Transfer of Property Act (1882), S. 63A — Mortgage before introduction of S. 63A — Improvements by mortgagee — Right to costs — Contract to the contrary.

Where the terms of the mortgage deed executed before the insertion of S. 63A or the coming into force of the Gwalior Transfer of Property Act, allowed the mortgagee to make improvements and repairs and to recover the costs from the mortgagor at the time of the redemption of the property, the question of the costs of improvements must be determined with reference to the terms of the mortgage-deed and to the principle of common justice that the mortgagee is entitled to recover from his mortgagor the reasonable and proper costs incurred in making lasting improvements. A I R (5) 1918 Bom 84: A I R (8) 1921 Bom. 250 Rel. on. **(Para 5)**

Anno: T. P. Act, S. 63A N. 1, 4.

Mungare, for Appellant — Murlidhar Maheshwari, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) A I R (37) 1950 F C 1: (1949 F C R 484) (Pr 4)

('19) 43 Bom 69: (A I R (5) 1918 Bom 84) (Pr 5)

('21) 45 Bom 1301: (A I R (8) 1921 Bom 250) (Pr 5)

JUDGMENT: This appeal arises out of a suit for redemption in respect of a portion of a house situated in Agar. The appeal is by the defendant mortgagee and it is directed against the decision of the District Judge, Shajapur, affirming the judgment and decree of the Sub-Judge, Agar, whereby the plaintiff-respondent's claim for redemption of the house was allowed.

(2) It was alleged by the plaintiff that on 'Jeth Sudi 11 Samvat 1976' one musammat Bhagi Bai mortgaged a portion of a house belonging to her with the plaintiff's father for Rs. 40/8/- and that on the same date Bhagi Bai mortgaged the remaining portion of the house for Rs. 60/8/- with the defendant Kukaji; that after the death of Mst. Bhagi Bai, her legal representative Nathu Lal sold on 10-8-39 by a registered deed the equity of redemption in respect of the portion mortgaged with Kukaji to the plaintiff for a consideration of Rs. 400/; and that after purchasing the equity of redemption the plaintiff asked Kukaji to accept the amount of the mortgage debt and release the property mortgaged with him by Bhagi Bai. But Kukaji declined to do so. The plaintiff, therefore, as the purchaser of the equity of redemption in respect of the portion of the house mortgaged by Bhagi Bai with Kukaji, brought the suit for redemption. The defendant Kukaji resisted the suit mainly on the ground that subsequent to the mortgages effected by Bhagi Bai, on Jeth Sudi 15 Samvat 1976 the plaintiff's father and he entered into a written agreement stipulating that in the event of the plaintiff's father purchasing the entire house from Bhagi Bai, the plaintiff's father would retain the

portion of the house mortgaged with him and would transfer to the defendant the portion of the house mortgaged with the defendant and further that if the defendant purchased the whole house from Bhagi Bai, he would similarly retain the portion of the house mortgaged with him and transfer to the plaintiff the portion of the house mortgaged with the plaintiff's father. The defendant, therefore, claimed that in accordance with this agreement, the plaintiff was not entitled to redeem the property mortgaged with the defendant. The defendant also pleaded that he was entitled to get from the plaintiff costs of the improvements effected to the property, if it is held that the plaintiff is entitled to redeem the property. The trial Court passed a decree for redemption in favour of the plaintiff. The trial Court disallowed the defendant's plea as regards the costs of improvements. Thereupon, the defendant Kukaji appealed to the Court of District Judge, Shajapur. When the appeal first came up for hearing before the learned District Judge, he came to the conclusion that an issue with regard to the costs of improvements should have been framed in the suit. He, therefore, framed the issue and directed the trial Court to record the evidence of the parties on the issue and return the evidence together with its findings thereon. After the receipt of the additional evidence, the learned District Judge proceeded to determine the appeal. He ultimately dismissed the appeal affirming the judgment and decree of the trial Court. On the question of the costs of improvements alleged to have been incurred by the defendant Kukaji, the learned District Judge held that under S. 63(A) of the T. P. Act, he was not entitled to get any such costs from the plaintiff but that he was at liberty to remove certain ceiling sheets. The learned District Judge also directed that the costs of the appeal before him should be borne by the parties themselves. The defendant Kukaji has now appealed to this Court against the decision of the District Judge Shajapur.

(3) When this appeal came up for hearing before my brother Mr. Justice Shinde, he raised the objection that as the valuation of the appeal was less than Rs. 500/- and the judgments of the Courts below were concurrent, this appeal was incompetent. Learned Counsel for the appellant, then, prayed for time to present an application for the conversion of the memo of appeal into a petition of revision. In my opinion, no application lies against the decision of the District Judge in this case. Learned Counsel for the appellant contends that the judgment and decree of the trial Court has been varied by the decision of the appellate Court inasmuch as the defendant Kukaji has been given the liberty of removing the ceiling sheets and the lower appellate Court has directed that the costs of the suit should be borne by the parties themselves. I am unable to accept this contention. Both the Courts below have disallowed the defendant the costs of improvements. I do not read the direction as regards costs in the decree of the first appellate Court as implying any change in the order of costs made by the trial Court. The direction with regard to the costs in the decree of the appellate Court refers only to the costs of the appeal and from the mere fact that costs of the appeal are disallowed to the parties, it cannot be maintained that the decree of the trial Court has been varied. The appeal is, therefore, clearly incompetent. But in view of the legal questions raised in this appeal, I grant the prayer of the defendant to treat this appeal as a revision petition, and dispose it of accordingly.

(4) Mr. Mungare, who appeared on behalf of the applicant Kukaji, first contended that as the lower Court has held that the plaintiff's father and the defendant Kukaji entered on Jeth Sudi 15 Samvat 1976 into an agreement, it should have further proceeded to enforce the agreement and held that in accordance with that agreement the plaintiff was not entitled to redeem the property. In my opinion, there is no substance in this contention. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. The right of redemption can be extinguished by an act of the parties or by the decree of a Court. It is not the case of the applicant that the right of redemption has been extinguished in this case by the decree of the Court. His contention is that the agreement entered into by him with the plaintiff's father prevents the plaintiff from exercising the right of redemption. Unless, therefore, on the construction of this agreement it is held that the equity of redemption is extinguished, the plaintiff's suit for redemption is not barred. The terms of the agreement entered into by the parties on Jeth Sudi 15 Samvat 1976 do not, in my opinion, extinguish the right to redemption in respect of any mortgage. From the wording of the agreement it is clear that it contemplates that if either party acquires the equity of redemption in respect of the entire house, he would retain the right in respect of the portion of the house mortgaged with himself and transfer to the other the right in respect of the portion of the property mortgaged with the other party. This agreement does not itself transfer any right to any party. It is merely an agreement to convey the equity of redemption in respect of the portions of the house from one party to the other. The question, therefore, of the extinction of the equity of redemption would have arisen only if the parties had done some thing in pursuance of the agreement to extinguish the equity of redemption in the portion of the house concerned. The equity of redemption cannot be held to be extinguished by a mere agreement to convey. In this connection I need only refer to the observations of the Federal Court in paragraphs 4, 12 and 14 of their decision reported in 'Subba Rao v. Matapalli Raju', A I R (37) 1950 F C 1 37. In my opinion, the learned District Judge was right in holding that the agreement pleaded by the applicant does not constitute a bar to the plaintiff's suit for redemption.

(5) It was next argued by the learned counsel for the applicant that the defendant is entitled to get from the plaintiff costs of improvements to the property. This contention is well-founded. The learned District Judge has disallowed the costs under S. 63A of the T. P. Act. But this section has, in my opinion, no applicability in the present case as the mortgage on the basis of which the plaintiff has sued was effected in Samvat 1976 that is, long before S. 63-A was inserted in 1929 in the T. P. Act or long before the Gwalior T. P. Act came into force. Again, the terms of the mortgage deed in the present suit allowed the mortgagee to make improvements and repairs and to recover the costs from the mortgagor at the time of the redemption of the property. The question, therefore, of the costs of improvements must be determined with reference to the terms of the mortgage-deed and to the principle of common justice that the mortgagee is entitled to recover from his mortgagor the reasonable and proper costs incurred in making lasting improvements. This principle was followed by the Bombay High Court in cases decided before S. 63-A was added to the T. P. Act. See 'Nijalingappa Nijappa v. Chanabasawa Satvirappa', 43 Bom 69; 'Dnyanu Laxman v. Fakira Ebram', 45 Bom 1301. In the present case both the Courts below have found that the costs of reasonable and lasting improvements effected by the applicant in the mortgaged property is Rs. 153/8/-. The plaintiff non-applicant led no evidence to show that the improvements were not reason-

able or lasting, or that the cost claimed by the applicant in respect of those improvements is high. In fact, he did not lodge any objection in the Court of the District Judge about the finding of the trial Court on the improvements effected and the cost thereof. In my judgment the defendant is entitled to recover on the redemption of the property Rs. 153/8/- from the plaintiff as costs of the improvements to the mortgaged property. The applicant will have no option of removing the ceiling sheets.

(6) For the above reasons, I would allow this revision petition and modify the judgment and decree of the Courts below with the direction that in addition to the amount found due on the mortgage by the lower Court, the plaintiff shall pay to the defendant Kukaji Rs. 153/8/- as costs of improvements before redeeming the property. Parties shall bear their own costs in this Court and the Court of the District Judge, Shajapur.

V.B.B. *Revision allowed.*

A. I. R. (39) 1952 MADHYA BHARAT 8 (C. N.5)

(GWALIOR BENCH)

SHINDE, J.

Ramswaroop Raghuwardayal and others, Applicants v. Mataprasad Prabhudayal, Opponent.

Civil Revision No. 115 of 1951, D/- 24-9-1951.

(a) Civil P. C. (1908), O. 17, R. 2 — Applicability — Hearing — Meaning of — Date fixed for disposal of interlocutory matter.

The word 'hearing' means the taking of evidence or the hearing of arguments or the consideration of questions relating to the hearing of suit which would enable the Judge to finally come to an adjudication upon it and not the consideration of merely interlocutory matters. AIR (11) 1924 P. C. 198 and AIR Commentary on Civil P. C. Relied on.

Where, therefore, no adjournment was sought nor was any evidence to be taken nor were any arguments to be heard nor any questions relating to the suit which would enable the Judge to finally come to an adjudication were to be considered and the only matter that could have been considered on the date was some interlocutory matter, in respect of the future conduct of the suit, the absence of the parties on that date would not be governed by Order 17, Rule 2. AIR (7) 1920 Pat 595 and AIR (23) 1936 Lah 280, Rel. on; AIR (6) 1919 Sind 89 Disting. *(Paras 3, 5)*

Anno: C. P. C., O. 17, R. 2, N. 6, Pt. 1, N. 1.

(b) Civil P. C. (1908), S. 115 — Scope — Revisional powers — When exercised.

It is not necessary to exercise the powers under Section 115, Civil P. C. in all cases. Revisional powers are intended to be exercised with a view to subserve and not to defeat the ends of justice. Where substantial justice has been rendered by the order of the lower Court the High Court will not interfere in revision notwithstanding the fact that the reasons for the order are not correct. The High Court will not take a technical view and unnecessarily interfere in every case whether the order is made irregularly or even improperly unless grave injustice or hardship would result from a failure to do so. Case law referred. *(Para 6)*

Anno: C. P. C., S. 115, N. 2 Pts. 3, 4.

Bhagwandas and Motilal Gupta, for Applicants; Kak, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('24) AIR (11) 1924 P C 198: (4 Pat 61) (Pr 3)

('47) AIR (34) 1947 All 343: (ILR (1947) All 389) (Pr 6)

('48) AIR (35) 1948 All 244: (ILR (1947) All 812 FB) (Pr 6)

('36) AIR (23) 1936 Lah 280: (161 Ind Cas 790) (Prs 3, 5)

('45) AIR (32) 1945 Lah 175: (222 Ind Cas 301) (Pr 6)

('20) AIR (7) 1920 Pat 595: (57 Ind Cas 748) (Prs 3, 5)

('38) AIR (25) 1938 Pat 447: (178 Ind Cas 41) (Pr 6)

('46) AIR (33) 1946 Pat 165: (222 Ind Cas 353) (Pr 6)

('19) AIR (6) 1919 Sind 89: (53 Ind Cas 560) (Pr 5)

('48) AIR (35) 1948 Sind 116: (ILR (1947) Kar 117) (Pr 6)

ORDER.: This is an application in revision by the defendant against the order of the District Judge, Gwalior, dated 20th April 1951, by which he set aside the order of dismissal for default dated 24-2-1951, and restored the suit. The facts of the case briefly are that Ramprasad and others filed a suit against Ram Swaroop and others for partition of joint family property. In that suit on 21-2-1951 the trial Court appointed Mr. Ramratan Gupta guardian-ad-litem for the minors and ordered that for the time being Rs. 500/- be paid to the guardian-ad-litem and that out of the sum Rs. 250/- be paid to the guardian immediately and the balance of Rs. 250/- be paid within a month. The Court also fixed 24-2-1951 for further proceedings. On 24-2-1951, Ramprasad and his Pleaders appeared in Court when the Court opened. As the Court was busy with a criminal case they went away. After some time the plaintiff went to the typist to get his application which he wanted to file in Court. In the meanwhile the case was called and dismissed for default. After the order of dismissal for default was passed the plaintiff came into the Court and having discovered that his suit has been dismissed for default presented an application for restoration. That application was allowed by the Court after giving opportunity to the opposite parties, who were present that day, to cross-examine and to adduce their evidence.

(2) The learned counsel for the appellant has raised the following contentions. (1) under Order 9, Rule 9, Sub-rule 2 notice should have been given to all the parties; as it was not done the order of the lower Court is wrong in law; (2) the lower Court has not found that the plaintiff was absent due to sufficient cause, (3) The costs awarded in the suit, whose valuation is 16 lacs, are absurdly disproportionate. The learned counsel for the opposite party has argued, inter alia that 24-2-1951 was not fixed by the lower Court for a hearing and hence the lower Court was wrong in dismissing the suit for default. The order of the lower Court, therefore, should be treated as an order passed under Section 151 of the Civil Procedure Code. I therefore, propose to deal with this point first.

(3) Chitaley in his commentary has stated that the word 'hearing' means the taking of evidence or the hearing of arguments or the consideration of questions relating to the hearing of suit which would enable the judge to finally come to an adjudication upon it and not the consideration of merely interlocutory matters. In 'Lachmi Narain v. Balmakund', AIR (11) 1924 P C 198, their Lordships observe as follows:

"In their (Judges of the High Court of Patna) view the 'hearing' mentioned in this rule only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit with perhaps one extension to the occasion when issues are to be settled; and was not meant to extend to occasions when interlocutory orders were being sought."

"Their Lordships' do not think it necessary to determine whether the word 'hearing' should or should not have this particular limitation; because they think that the decision can be supported on another ground etc....."

In this case which was the suit for partition a consent decree had been passed by the High Court. When the suit was remitted to the subordinate Judge for partition by metes and bounds the subordinate Judge fixed a date for hearing the parties and gave notice. On that date the plaintiff did not appear and hence the suit was dismissed for default. Their Lordships of the Privy Council although did not lay down the limitations of the word 'hearing' held that the case did not come under Order 17, Rule 2 and the order made by the Sub-Judge was without jurisdiction. In 'Manohar Dass v. Birandari Sheikhupurain', AIR (23) 1936 Lah 280, Agha Haidar, J., accepted the exposition of law laid down by their Lordships of the Patna High Court in the case of 'Balmukund v. Lachmi Narain', AIR (7) 1920 Pat 595. In this case 15 January 1935, was fixed for the submission of the Commissioner's report. On that date as the plaintiff was not present the suit was dismissed for default. It was held that the parties had nothing to do with the matter. The date on which the Court dismissed the plaintiff's suit was not a date of hearing and hence the order of the Subordinate Judge was without jurisdiction. If we turn to the wording of Order 17, Rule 2 we find that action for non-appearance can be taken only when hearing is adjourned and on the date fixed for hearing the parties or any of them are absent. Under Order 17, Rule 1, the Court has power to grant adjournment if sufficient cause is shown. Reading Rule 1 and Rule 2, together, therefore, it follows that if a party asks for adjournment and time is granted, then on the date of the adjourned hearing if any of the parties is absent action can be taken under Rule 2. But if the case is adjourned not at the instance of the party, Rule 2 will not apply.

(4) From the facts of the case given above it is clear that on 21-2-1951 no adjournment was asked for, by any party. Nor was the date 24-2-1951 fixed for doing anything. Rs. 250/- were ordered to be paid immediately to the guardian and Rs. 250/- were to be paid within a month. Therefore, on 24-2-1951 apparently there was nothing to be done in connection with the appointment of the guardian-ad-litem. The only object of adjourning the case to 24-2-1951 could have been to decide as to the future conduct of the suit. This is purely an interlocutory matter. Therefore, the case is not governed by Order 17, Rule 2. No adjournment had been sought, nor was there anything to be done on the appointed date and therefore, it cannot be said that 24-2-1951 was fixed for the hearing of the suit.

(5) The learned Counsel for the applicant referred me to 'Ghulam Hyder Khan v. Tekchand', AIR (6) 1919 Sind 89. In that case the plaintiff's Pleader had asked for adjournment to give whereabouts of defendant No. 4 and the case was fixed for hearing on 4-8-1916. On that date neither the plaintiff nor his Pleader appeared in Court. The Court thereupon dismissed the suit for default. This case is clearly distinguishable from the present case. The plaintiff had definitely asked for adjournment to give the address of the defendant and as on the appointed day the plaintiff did not appear the suit was dismissed for default. In these circumstances it was held that 4th of August was the date to which the hearing of the suit was adjourned and that the case fell under Order 17, Rule 2. This case, therefore, has no application to the present case. As already stated no adjournment was sought nor was any evidence to be taken nor were any arguments to be heard nor any questions relating to the suit which would enable the judge to finally come to an adjudication were to be considered. The only matter that could have been considered on that date was some interlocutory matter, in respect of the future conduct of the suit and hence absence of the parties on that date cannot be governed by Order 17, Rule 2. In my judgment 'Balmukund v. Lachmi Narain', AIR (7) 1920 Pat 595 and 'Manohar Das v. Birandari Sheikhupurain', AIR (23) 1936 Lah 280, are on all fours with this case. Consequently the order of the lower Court dated 24-2-1951 was passed without jurisdiction.

(6) The order of the lower Court having been passed without jurisdiction, it is not necessary to consider other points raised by the applicant. It may be necessary to issue notice to all the parties under Order 9, Rule 9 (2). The lower Court may also have made a mistake in not recording a clear finding as to whether there was sufficient cause for the non-appearance of the plaintiff and costs awarded may also not have been adequate. It is not necessary to exercise the powers under Section 115 of the Civil P. C. in all cases. Revisional powers are intended to be exercised with a view to subserve and not to defeat the ends of justice: Vide 'Ramzan Ali v. Mt. Satul Bibi', AIR (35) 1948 All 244. Where substantial justice has been rendered by the order of the lower Court the High Court will not interfere in revision notwithstanding the fact that the reasons for the order are not correct. (Vide 'Yaruddin Sheikh v. B. Das', AIR (33) 1946 Pat 165 and 'Hari Singh v. Narain Das', AIR (32) 1945 Lah 175. The High Court will not take a technical view and unnecessarily interfere in every case whether the order is made irregularly or even improperly unless grave injustice or hardship would result from a failure to do so. (Vide 'Vensimal Tarachand v. Karachi District Board', AIR (35) 1948 Sind 116. As a general rule when justice has been done between the parties the High Court will very rarely interfere with the orders of the lower Courts. Where the interference is likely to work not in the interest of justice but rather against it, the High Court will not interfere. Vide 'Chanderbhan Singh v. Lallu Singh', AIR (34) 1947 All 343 and 'Rameshwar Lal v. Ramcharan Parshad', AIR (25) 1938 Pat 447. To interfere in this case on the ground that no notice was given to all the defendants or that the lower Court did not specifically find that there was sufficient cause for the non-appearance of the plaintiff would work, not in the interest of justice but against it, consequently in my judgment, it is not a fit case wherein power under Section 115 Civil Procedure Code can be legitimately exercised.

(7) Accordingly I dismiss the revision and direct the parties to bear their own costs.

D.R.R. *Revision dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 9 (C. N. 6)

(GWALIOR BENCH)

CHATURVEDI J.

Jagannath, Appellant v. Takhat Singh and others, Respondents.

Civil Misc. Appeal No. 9/49, D/- 10-9-1951.

(a) Civil P. C. (1908), S. 11 — Execution proceedings — Constructive 'res judicata' — Objection of limitation under Art. 182 Lim. Act and S. 48, C.P.C. — When barred.

A judgment-debtor, even after notice, is not precluded from raising the objection of limitation under Art. 182 in subsequent execution proceedings unless there was an adjudication implied in an order which, taken with surrounding circumstances, should be taken to imply a conscious determination of the question raised or unless the decree-holder obtained some relief by way of part satisfaction of the decree. AIR (23) 1936 All 21 (F B) Foll.; Case law and AIR Commentary on Civil P. C., Referred.

Similarly as regards the 12 years rule (laid down in S. 48, Civil P. C. the judgment-debtor can raise the objection at any time till it is expressly adjudicated upon by the Court, and this particular objection cannot be hit by the principle of constructive res judicata. (Paras 6, 7)

Anno: C. P. C., S. 11 N. 23 Pt. 18.

(b) *Civil P. C. (1908) O. 21 R. 16 — Assignment by operation of law — Transfer inter vivos — Allotment of decree at oral family partition — Right of assignee to execute it.*

The words "operation of law" cannot apply to a case where a person has become the owner of a decree by some transaction 'inter vivos'. A I R (23) 1936 Mad 543, Rel. on.

If a decree obtained by one of the members of a Hindu family is allocated, at a family partition, to another coparcener, the person to whom it is allocated cannot be treated as an assignee of the decree by operation of law and he cannot by reason of such allocation alone, execute the decree unless he was so empowered by an instrument in writing. 16 Ind Cas 807 (Mad), Foll. (Paras 8, 9)

Anno: C. P. C., O. 21 R. 16 N. 4 Pt. 1.

(c) *Civil P. C. (1908), O. 21 R. 16 — Oral assignment of decree — Right of assignee to execute it.*

The assignee of a decree under an oral assignment has no 'locus standi' at all to apply for execution of a decree. 15 Bom 307, 13 Ind Cas 378 (Mad) and AIR (3) 1916 P C 147, Rel. on. (Para 10)

Anno: C. P. C., O. 21 R. 16 N. 4 Pt. 1.

(d) *Civil P. C. (1908), S. 11, O. 21 R. 16 — Oral assignment of decree — Application for execution by assignee — Principle of constructive res judicata — Applicability.*

Where an assignee of a decree under an oral assignment applies for its execution, the application for execution cannot be entertained and if entertained there would be lack of inherent jurisdiction and the proceedings being 'coram non judice' no amount of waiver on the part of the judgment-debtors could have validated the proceedings. Under these circumstances the principle of constructive res judicata cannot be made applicable. (Para 11)

Anno: C. P. C., S. 11 N. 23, O. 21 R. 16 N. 4.

(e) *Civil P. C. (1908), O. 21 R. 16 — Provisions are mandatory — Effect of non-compliance.*

The provisions of O. 21 R. 16 are of a mandatory character and giving of notice of the application to the transferor and the judgment-debtors in an indispensable condition of jurisdiction, and non-compliance with this renders all proceedings in execution void. 'Case law referred.' (Para 12)

Anno: C. P. C., O. 21 R. 16 N. 14 Pt. 1.

Motilal Gupta, for Appellant — Prithinath Bhargava, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('16) A I R (3) 1916 P C 147: (43 Cal 990) (Prs 10, 11)
('36) A I R (23) 1936 All 21: (58 All 313 F B) (Pr 6)
('37) A I R (24) 1937 All 446: (169 Ind Cas 997) (Pr 6)
('51) A I R (38) 1951 All 398 (Pr 6)
('91) 15 Bom 307 (Pr 10)
('10) 6 Ind Cas 262: (11 Cal L J 354) (Pr 12)
('27) A I R (14) 1927 Cal 781: (54 Cal 624) (Pr 12)
('38) A I R (25) 1938 Cal 734: (178 Ind Cas 257) (Pr 12)
('45) A I R (32) 1945 Cal 335: (49 Cal W N 260) (Pr 6)
('50) A I R (37) 1950 Cal 513: (54 Cal W N 900) (Pr 6)
('17) A I R (4) 1917 Lah 195: (39 Ind Cas 952) (Pr 12)
('21) 2 Lah 230: (A I R (8) 1921 Lah 143) (Pr 12)
('40) A I R (27) 1940 Lah 27: (186 Ind Cas 653) (Pr 6)
('40) A I R (27) 1940 Lah 161: (188 Ind Cas 207) (Pr 6)
('12) 13 Ind Cas 78: (1911-2 Mad W N 559) (Pr 10)
('12) 16 Ind Cas 807 (Mad) (Pr 8)
('36) A I R (23) 1936 Mad 543: (166 Ind Cas 922) (Pr 9)
('51) A I R (38) 1951 Nag 210: (1951 Nag L R 172) (Pr 6)
('21) A I R (8) 1921 Pat 76(2): (57 Ind Cas 250) (Pr 12)
('34) A I R (21) 1934 Pat 9: (149 Ind Cas 1003) (Pr 12)
('50) A I R (37) 1950 Pat 465: (29 Pat 732) (Pr 6)

JUDGMENT: The appellant Jagannath says that he is nephew of the original decree-holder Heeralal who obtained a decree No. 46 of 1986 dated 27-6-1930. This decree was against the property of the respondents and against whatever property the deceased Moujilal (father of respondents Takhat Singh and Kishen Singh) might have left. The first application for execution was filed by Heeralal himself on 23-8-1930 (Ex. File No. 75 of 1987). There was no service on the respondents and the application for execution was dismissed on 25-6-1931 on the ground that according to the decree-holder's Vakil the respondents were agriculturists and execution proceedings against agriculturists were stayed.

(2) The second application for execution was filed on 25-8-1935 (No. 125 of 1991) by Jagannath appellant who stated that the original decree-holder was dead and he was his nephew. Jagannath further stated that Shrichand is the son of the original decree-holder but he and Shrichand belonged to a joint family and that in partition of the family property this decree came to Jagannath's share. So Jagannath prayed that execution of the decree may be ordered. This execution application apparently was barred by time. But the Court issued notices to the respondents. Respondents Shyamlal and Takhat Singh were served but Kishen Singh could not be found. They did not appear. Then the decree was transferred to Paragana Kolaras on 30-8-1935.

(3) The third application (No. 1040 of 1995 was instituted on 12-6-1939. Notice on Kisten Singh was again not served. Execution was dismissed in default on 2-8-1939. This application was also time barred.

(4) The fourth application (No. 575 of 1998) was instituted on 31-1-1942. On 15-6-1942 warrants of attachment of cattle were issued. Notices on Kishen Singh and Takhat Singh were served. On Shyamlal the notice remained unserved. On 13-7-42 execution was dismissed in default.

(5) The fifth application for execution (No. 131 of 2000) was filed on 10-8-1943. The file was transferred to Suba Shivpuri for sale of Zamindari property (File No. 23 of 2002). Notices were served on respondents Takhat Singh and Shyamlal. The proceedings were going on in Subat Court Shivpuri when after the attachment of the property the respondents filed an application in Sub-Judge's Court Shivpuri on 7-6-1947 alleging that the execution is beyond limitation according to both the 3 years and the 12 years rule; and that Jagannath is not the legal representative of the original decree-holder as the latter's son Shrichand is alive. The learned Sub-Judge after recording the evidence overruled the objections. An appeal was taken to the Court of the District Judge who allowed the appeal, upheld the objections and dismissed the execution petition.

(6) Against this order, this appeal has been filed by Jagannath, and an important argument has been

advanced by his learned counsel, Mr. Motilal Gupta, to the effect that both the objections of the respondents ought to have been overruled on the principle of constructive 'res judicata' as the objections were filed nearly twelve years after Jagannath's first application for execution. He places reliance on 'Bishen Singh v. Jaishi Ram', A I R (27) 1940 Lah 161; 'Promotha Nath v. Habumia', A I R (32) 1945 Cal 335 and on Note 23 to S. 11 in Chitaley's commentary on the Code of Civil Procedure. Learned counsel for the respondents, Mr. P. N. Bhargava, on the other hand, has cited, Genda Lal v. Hazari Lal, AIR (23) 1936 All 21; 'Aley Rasul v. Balkishan', AIR (24) 1937 All 446, 'Ganga Ram Trust Society Lahore v. Sundar Lal', A I R (27) 1940 Lah 27, 'Sham Sundar Singh v. Dhirendra Nath', A I R (37) 1950 Pat 465; 'Karali Prasad Roy v. Probodh Chandra', A I R (37) 1950 Cal 513; 'Mannu Lal v. Hanuman Singh', A I R (38) 1951 All 398 and 'Jagadeo Nawasji v. Co-operative Society Mahalungi', No. 2, A I R (38) 1951 Nag 210 in support of the propositions (1) that a judgment-debtor even after notice, is not precluded from raising the point of limitation or other points in subsequent execution proceedings unless there was an adjudication implied in an order which taken with surrounding circumstances should be taken to imply a conscious determination of the question raised or unless the decree-holder obtained some relief by way of part satisfaction of the decree; (2) that a mere attachment of the property is not a fructification of the decree and (3) that there is no estoppel against the statute.

(7) I have considered the above rulings and I find that there is conflict of judicial opinion on the point of constructive res judicata. I would prefer the Allahabad view AIR (23) 1936 All 21 (FB) so far as the objection of limitation under Article 182 is concerned. As regards the 12 years rule (laid down in S. 48 of the Code of Civil Procedure) I am definite the judgment-debtor can raise this objection at any time till it is expressly adjudicated upon by the Court. If this point is not raised by the judgment-debtor after notice having been served in the 13th year after passing of the decree, it does not mean that the execution of the decree would continue for 50 or 100 years more at the sweet will of the decree-holder. I think that this particular objection cannot be hit by the principle of constructive res judicata, but as the judgments of the two Courts below on the question whether the judgment-debtors were agriculturists or not, are based not on evidence but on only superficial considerations I would like to send the case back for recording of the evidence and then for determining the question whether the judgment-debtors were agriculturists and whether the period during which execution proceedings against agriculturists were stayed should be excluded or not in this case.

(8) The more important question however in this case was whether the application for execution by the appellant Jagannath, as it was, could be allowed to proceed. In my opinion, the case had been dragging on for years in the execution Court with extreme carelessness and with reckless disregard of the provisions of the law. The proviso to R. 16 of O. 21 (S. 240 of the Gwalior Civil P. C.) may be referred here which lays down that

> "Where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution".

Mr. Motilal Gupta's contention that the decree was transferred by operation of law is fallacious. The decree was obtained by Heeralal in his personal capacity and there was no joint decree-holder. The legal representative of Heeralal is his adopted son Shrichand. According to his deposition recorded on 25-11-47 both he and Jagannath came in adoption from another family and remained joint till Samvat 1889. When there was a partition and the decree was allocated to the appellant Jagannath. This was all an oral transaction. The law is well settled that if a decree obtained by one of the members of a Hindu family is allocated, at a family partition, to another coparcener, the person to whom it is allocated cannot be treated as an assignee of the decree by operation of law and he cannot, by reason of such allocation alone, execute the decree unless he was so empowered by an instrument in writing. A Division Bench of the Madras High Court (Sundara Aiyar and Sadasiva Aiyar JJ.) further held in this case viz. 'Ramanathan Chettyar v. Ragavendra Rao', 16 Ind Cas 807 (Mad) that an oral transferee of a decree is not entitled to execute it and that under O. 21 R. 16 an assignee of a decree can apply to execute it only when the assignment is in writing and that an application of oral assignee cannot be said to be an application to take a step in aid of execution in accordance with law.

(9) In another case 'Periakhatha Nadar v. Mahalingam', A I R (23) 1936 Mad 543 a Division Bench held that the words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction 'inter vivos', and that the term applies to these cases where the decree has been transferred from one to another by way of succession or where there is bankruptcy or any similar event which has the effect in law of bringing about such a transfer. It was further held in this case that what is required by law is not particular form of writing but an assignment in substance which is in writing.

(10) The assignee of a decree under an oral assignment thus has no locus standi at all to apply for execution of a decree 'Parvathi v. Digambar', 15 Bom 307; 'Ramnathan Chettiar v. Sokkanatha', 13 Ind Cas 78; and 'Jatindra Nath v. Peyer Deye Debi', A I R (3) 1916 P C 147.

(11) It will thus be seen that the decree was dead in July 1933 and according to the dictum of their Lordships of the Privy Council in 'Jatindra Nath v. Peyer Deye Debi', AIR (3) 1916 P C 147 it was not in the appellant's power to make it alive. There could have been no execution of a decree that was not alive when the application was made. The application for execution could not have been entertained and if entertained there was lack of inherent jurisdiction and the proceedings being 'coram non judice' no amount of waiver on the part of the judgment-debtors could have validated the proceedings. It will be clear that under these circumstances the principle of constructive res judicata cannot be made applicable here.

(12) It is also important to note that in every application for execution appellant Jagannath continued to reiterate that the original decree-holder was dead and the decree came to his share in the partition. This was virtually an application for substitution of his name in place of the original decree-holder. The Court ought to have passed order recognising the assignment, if it was of opinion that the appellant was an assignee within the terms of R. 16 of O. 21. No such order was passed on any application, and no notice in writing of the applications was given to the transferor or the judgment-debtor. The provisions of O. 21 R. 16 are of a mandatory character and giving of notice of the applications to the transferor and the judgment-debtors in an indispensable condition of jurisdiction, and non-compliance with this renders all proceedings in execution void, 'Notan Das v. Lachhman Singh', 2 Lah 230; 'Sreenath Das v.

Achutananda Mahanti', 6 Ind Cas 262 (Cal), 'Uma Moyee Dasya v. Jatan Bewa', A I R (14) 1927 Cal 781; 'Partap Singh v. Gurditta Mal', A I R (4) 1917 Lah 195; 'Sarifa Khatun v. Asimannessa Bibi', A I R (25) 1938 Cal 734; Rameshwar Singh v. Harihar Jha', A I R (8) 1921 Pat 76(2) and 'Jamuna Das v. Baijnath Prasad', A I R (21) 1934 Pat 9.

(13) I would therefore hold that the application for execution of the decree by Jagannath could not be held to be competent and deserved to be dismissed.

(14) For these reasons, the appeal fails and is dismissed with costs.

D.R.R. *Appeal dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 12 (C. N. 7)

(GWALIOR BENCH)

DIXIT J.

Kunji Lal and others, Appellants v. Suba Lal, Respondent.

Appeal No. 53 of 1949, D/- 12-3-1951.

(a) Evidence Act (1872), Ss. 32 (5), (6), (7) and 50 — Relationship — Proof of, by evidence of general reputation.

The Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. It is necessary to put forward evidence of the kind described in S. 32, Cls. 5, 6 and 7 and S. 50 to prove the existence of relationship between persons deceased whenever the question is in issue. (*Para 3*)

The witnesses must be first asked by the parties producing them to state the source of their information about the relationship sought to be proved. It cannot be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility. A I R (24) 1937 P C 201, Foll. (*Para 3*)

Anno: Evidence Act, S. 32 N. 26.

(b) Hindu Law — Succession — Collateral heir — Proof — Evidence Act (1872), S. 32 (5).

Where the plaintiff claims as a collateral heir he is bound to allege and prove his title through the common ancestor in all its stages, and the most important stage is of course the common ancestor himself. (*Para 4*)

While no standard of special strictness is applicable to the proof of collateral relationship, the rule laid down in '6 Cal 626', should be followed with special strictness, where the evidence led by the party to establish the relationship is untrustworthy and insufficient. (*Para 4*)

Anno: Evi. Act, S. 32 N. 26.

Murlidhan Maheshwari, for Appellants — R. K. Dixit, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('37) A I R (24) 1937 P C 201: (31 Sind L R 575) (Pr 3)

('81) 6 Cal 626: (8 Cal L R 238) (Pr 4)

JUDGMENT: This is an appeal by the plaintiffs in the suit from the decision of the District Judge, Bhind reversing the judgment and decree of the trial Court and dismissing the plaintiff's claim for a declaration of their title to the rights of a mortgagee and for possession of the mortgaged property together with the mesne profits. The plaint stated that the land in suit was mortgaged by the owner one Har Prashad with Kishan one of the granduncles of the plaintiffs, that on his death the mortgaged property was in possession of Kishan's son Murli and that after Murli's death his widow Musammat Khemarni took possession of the land as a successor in title to the original mortgagee. It was further alleged by the plaintiffs that on the death of Musammat Khemarni, the plaintiffs applied to the revenue authorities for entering their names in the revenue papers as mortgagees in respect of the land as the nearest reversioners; but that the revenue authorities allowed the defendant's objection that they were entitled to succeed to the land on the basis of a will made by Mt. Khemarni in their favour. The plaintiffs claimed that Kishan had a brother Pratap and that the plaintiffs are the grandsons of Pratap. It was also alleged by the plaintiffs that Kishan Pratap & another person Asharam were the sons of one Lalju and that the plaintiffs are now the sole surviving collateral heirs of Kishan and are entitled to the property. The defendant admitted the fact that Murli was the son of Kishan and Mt. Khemarni was Murli's wife. They denied the alleged relationship between Kishan and the plaintiffs. The defendant claimed to be entitled to the property on the basis that he was the daughter's son of Mt. Khemarni, and that she was the full owner of the land in suit and that she made a valid disposition of the property in his favour.

(2) The trial Court decreed the plaintiff's claim. On appeal to the District Judge by the defendant, the plaintiffs' claim was dismissed on the sole ground that they failed to establish the alleged relationship between Kishan and them, and to show who the common ancestor was from whom they derived title. The learned District Judge did not think it necessary to express any view on the other issue in the suit. This appeal is directed against the decision of the District Judge, Bhind.

(3) After hearing the learned counsel for the parties, I think the judgment of the Courts below should be affirmed upon the single ground that the appellants have failed to show that they are the heirs of Kishan and to show who the common ancestor was through whom they claimed title to the property in question from Kishan. The evidence of the appellants on the point consists of the depositions of Mahadeo Prashad, the plaintiff and of the witnesses Baldeo, Mahendra Singh, Ochhelal and Chhabiram. The defendant respondent did not lead any evidence in rebuttal as he thought that the plaintiff's evidence was utterly insufficient to prove the alleged relationship between them and Kishan. No party has put forward evidence of the kind contemplated in Section 32, Cls. 5, 6 and 7, Evidence Act or S. 50 of the Act as to the existence of the alleged relationship between Kishan and the plaintiff's father, grandfather and grand-grandfather who are now deceased. As has been observed by the Privy Council in 'Lakshmi Reddi v. Venkata Reddy', A I R (24) 1937 P C 201, the Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. Their Lordships pointed out the necessity of putting forward evidence of the kind described in S. 32 Cls. 5, 6 and 7 and S. 50, Evidence Act to prove the existence of relationship between persons deceased whenever the question is in issue. The plff. Mahadeo Prashad and his witnesses in their evidence simply made ipse dixit statements as to the relationship between Kishan & the plaintiffs and as to the names of the plaintiffs' father and grandfather. To use the word of their Lordships of the Privy Council in 'A I R (24) 1937 P C 201, "These witnesses simply enunciated from the witness-box the proposition which they desired to prove". None of the witnesses made any statement showing that they had special means of knowledge about the relationship between the plaintiff and Kishan. The plaintiff Mahadeo Prashad said that his father was Jhandelal, that his grandfather's name was Pratap, and that his grandfather Pratap, Asharam and Kishan were three brothers. Mahadeo Prashad admits that he never saw Kishan, and that Kishan died long before the witness was

born. Mahadeo Prashad also did not say whether he saw his grand father Pratap. Nor did he say whether his father Jhandelal had made the statement that Pratap was his grandfather, that Kishan was a brother of Pratap and that both Kishan, Pratap and Asharam were real brothers. The plaintiffs' witness Baldeo said that Kishan had two brothers. He then proceeded to say that he did not remember the names of the brothers. Subsequently, the witness stated that Pratap was the brother of Kishan and the plaintiffs are the grandsons of Pratap. Baldeo admitted that he did not know the name of the Kishan's father. The witnesses Ochhe Lal and Mahendra Singh do not say anything about the relationship between Kishan and the plaintiffs. Their deposition is mostly with regard to the relationship of the defendant with Mt. Khemarni. Mahendrasingh, however, stated that Pratap was the grandfather of the plaintiff. He does not speak to having seen Pratap or Kishan. Bearing in mind the age of these witnesses it is clear that the statements which they have made about the relationship of the plaintiff's grandfather Pratap and Kishan are statements as to matters which could not be within their personal knowledge. The witnesses did not state the source of information and special knowledge about the relationship between the plaintiffs' grandfather and Kishan. These witnesses should have been first asked by the parties producing them to state the source of their information about the relationship sought to be proved. As observed by the Privy Council in the decision referred to above, "it cannot be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility". The plaintiffs' witnesses failed to show the basis on which they made the statements about the relationship between Kishan and the plaintiff's grandfather. That being so it cannot be held on such evidence that the appellants have succeeded in showing that they are the collateral heirs of Kishan.

(4) Again, there is no evidence to show who the common ancestor was from whom the plaintiffs claimed to derive title to the land in suit from Kishan. Both the lower Courts have held that it is not proved that Lalju was the common ancestor. The learned counsel for the appellant did not challenge this finding but he contended that it was not necessary to prove who the common ancestor was. I am unable to accept this contention. The general rule of Hindu Law is that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages, and the most important stage is of course the common ancestor himself. (See 'Kedarnath Doss v. Protab Chunder Doss', 6 Cal 626). As observed by the Calcutta High Court on 6 Cal 626,

> "though some persons may be said by the witnesses to be brothers, it is possible that they may in fact be cousins or related in some other degree or that their legitimacy may be doubtful or that they may have other brothers, who, if alive would take as heirs in priority to the plaintiffs."

The decision of the Calcutta High Court was cited before the Privy Council in AIR (24) 1937 PC 201, and their Lordships of the Privy Council expressed the opinion that while they were not prepared to hold that any standard of special strictness is applicable to the proof of collateral relationship in India, the rule laid down in '6 Cal 626', should be followed with special strictness, where the evidence led by the party to establish the relationship is untrustworthy and insufficient. Here, also the evidence falls short of a reasonable standard in accordance with the Evidence Act required to prove the relationship existing between the persons deceased. In these circumstances the learned District Judge was, in my opinion, right in dismissing the plaintiff-appellant's claim on the simple ground that they have not shown the alleged relationship between them and Kishan and have also not proved the common ancestor through whom they claimed the title to the property in question from Kishan.

(5) In the result, this appeal must be and is dismissed with costs.

V.B.B. *Appeal dismissed.*

A. I. R. (39) 1952 MADHYA BHARAT 13 (C. N. 8)

(GWALIOR BENCH)

DIXIT AND CHATURVEDI, JJ.

The State v. Brindawan, Respondent.

Criminal Appeal No. 30 of 1949, D/- 3-4-1951.

Criminal P.C. (1898), Ss. 492 and 417 — Appointment of Public Prosecutor under S. 492 (1) must be for specific area — Madhya Bharat Government Notfn. No. 200, Dated 26-2-1949 — Validity.

The words "in any local area" in S. 492 (1), Cr. P.C. qualify not only the words "for any specified class of cases" but also the preceding words "generally, or in any case." Under S. 492, it is incumbent on the Government to specify the local area within which the person appointed as Public Prosecutor is to exercise his powers. (Para 3)

Consequently, unless a person has been appointed under S. 492 as Public Prosecutor for a specific area, he can have no authority to present an appeal under S. 417 of the Code in a case arising from that area. (Para 4)

The Madhya Bharat Government Notification No. 200 dated 26-2-1949 which provides for the continuance as Public Prosecutors of all those persons who until that date were appearing in the High Court or in the Court of Sessions as prosecuting Inspectors or Public Prosecutors is not in accordance with S. 492 as it does not specify the area for which they are appointed and as such their appointments cannot be regarded as legally valid. To draw an inference of their appointment by implication in the local areas of the Courts to which they were appointed, is to ignore the express provisions of Ss. 417 and 492 which must be strictly construed in a case where the liberty of the subject is involved. A I R (1) 1914 Cal 560, Rel. on. (Paras 3, 5)

Anno: Cr. P.C., S. 417 N. 4; S. 492 N. 1.

Shiv Dayal, Deputy Government Advocate, for the State — Dey, for Respondent.

Case referred to:

('14) 41 Cal 425: (A I R (1) 1914 Cal 560: 15 Cr L J 46) (Pr 4)

DIXIT J.: This is an appeal against the decision of the Ses. J. of Gwalior acquitting the respondent Bindrawan of the charge preferred against him under S. 292, Gwalior Penal Code. A preliminary objection has been taken on behalf of the respondent that the appeal is not competent as Mr. Kaul who presented the appeal on behalf of the State was not a Public Prosecutor within the meaning of S. 417, Cr. P.C. and his appointment as a Public Prosecutor was not in accordance with the provisions of S. 492 of the Code.

(2) On 20-11-1948 the Indian Code of Criminal Procedure, 1898, was for the first time brought into force in Madhya Bharat with certain adaptations and modifications by the Madhya Bharat Criminal Procedure Adaptation Ordinance, No. 31 of Samvat 2005. On 26-2-1949 a notification was published in the Gazette with regard to the continuance as Public Prosecutors of all those persons who until that date were appearing in the High Court and in the Courts of Session as Pro-

secuting Inspectors or Public Prosecutors. The notification reads as follows:

"क्रमांक २०० इस कार्यालय के विज्ञप्ति क्रमांक १२१ दिनांक २ दिजम्बर सन १९४८ ई० को निरस्त करते हुए सर्वसाधारण की जानकारी तथा संबंधित न्यायालयों तथा पदाधिकारियों के पालन के लिए यह प्रकाशित किया जाता है कि अपराध विधि अनुकूलीकरण विशेषाज्ञा क्रमांक ३१, संवत २००५ वि० के अनुसार भारत डोमिनियन का जो अपराध विधि संग्रह विधान क्रमांक ५ सन १९९८ ई० अपनाया गया है उसकी धारा ४९२ द्वारा प्रदान की गई शक्ति को उपयोग में लाते हुए शासन ने आज्ञा प्रदान की है कि हाईकोर्ट व जिन सेशन्स न्यायालयों में अभी जो प्रासीक्यूटिंग इन्सपेक्टर्स अथवा पब्लिक प्रासीक्यूटर फौजदारी मुकदमों में पैरवी करते हैं वह अन्य आज्ञा होने तक उनमें पब्लिक प्रासीक्यूटर्स के तौर पर बदस्तूर कार्य करेंगे."

Until the date of the issue of this notification, Mr. Kaul used to appear in criminal cases heard by this Court at Gwalior in his capacity as Chief Prosecuting Inspector. The objection of the learned Counsel for the respondent is that under S. 417 an appeal from acquittal can be filed under the direction of the Government either by a person who has been appointed as a Public Prosectuor under S. 492 or by any person acting under the direction of a Public Prosecutor so appointed; that the notification purporting to appoint Mr. Kaul and other Prosecuting Inspectors as Public Prosecutors under S 492 was not a valid notification and that in filing the appeal Mr. Kaul did not act under the direction of any person who had been appointed Public Prosecutor under S. 492, and that, therefore the appeal was incompetent. It was contended that under S. 492 the appointment of any person as Public Prosecutor may be general or may be with reference to any case or any specified class of cases. But it must in any event be with reference to a local area within which the person so appointed is to exercise the powers of a Public Prosecutor, and that as the notification in question does not mention the local area or areas of the Public Prosecutors, the appointment of the persons referred to in the notification as Public Prosecutors is not valid in Law. On behalf of the State it was contended by the learned Deputy Government Advocate that the words 'in any local area' which occur in S. 492 only qualify the preceding words "for any specified class of cases" and that where the appointment of a person as Public Prosecutor is general without reference to any particular case or class of cases, it is not incumbent on the Govt. to define the local area within which the Public Prosecutor is to exercise his powers. The learned Deputy Govt. Advocate further said that the Govt. Notification No. 200 published in the Govt. Gazette of 6-2-1949 appointing the persons who were Prosecuting Inspectors & Public Prosecutors in the various Courts as Prosecuting Inspectors under S. 492, must be read as appointing them Public Prosecutors for the territorial limits of the Courts in which until the issue of the notification they were appearing as Prosecuting Inspectors or Public Prosecutors and as Mr. Kaul was the Chief Prosecuting Inspector for the High Court, it must be presumed that the local area for which he was appointed Public Prosecutor extended to the whole of Madhya Bharat over which this Court exercises jurisdiction. It was said Mr. Kaul's appointment as Public Prosecutor was in accordance with S. 492, Cr. P. C. & that he was, therefore, competent to file the appeal.

(3) In my opinion, the objection raised by the learned Counsel for the respondent, as to the competency of the appeal must be upheld. Sub-s. (1) of 492 of the Code is as follows:

> "The Govt. may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors."

It is clear from the wording of this Sub-section that the appointment of a Public Prosecutor must be with reference to both the cases & the local area within which the person is to exercise the powers of Public Prosecutor as regards the case or cases. The appointment may be in respect to particular case or in respect to a particular class of cases or in regard to cases generally. But it must in any event be with reference to a local area for exercising the powers of a Public Prosecutor. The words "in any local area", which occur in S. 492 qualify not only the words "for any specified class of cases" but also the preceding words "generally, or in any case." It must be noted that the word "generally" has been used to contradistinguish all cases from a particular case or a particular class of cases. If the words "in any local area", which are preceded by a comma are taken to qualify only the words "for any specificed class of cases" & if the word 'generally' is to be read independently of the words following it, the result would be to create a conflict between the jurisdiction of officers appointed as Public Prosecutors in regard to cases generally. A Public Prosecutor has specific powers under the Code & he cannot exercise these powers in regard to cases generally or in regard to a particular case or a class of cases unless the local area within which he is to exercise the powers is specified. In my view, under S. 492 of the Code it is incumbent on the Govt. to specify the local area within which the person appointed as Public Prosecutor is to exercise his powers. The notification, the validity of which has been challenged, does not at all mention the local areas in which the officers referred to in notification are to exercise the powers of a Public Prosecutor. In fact the wording of the notification is not at all clear. If it is to be understood as appointing the officers mentioned therein as Public Prosecutors in pending cases in which they were appearing before the issue of notification, then it cannot be said that Mr. Kaul was appointed a Public Prosecutor in this appeal which was not pending in this Court on the date of the issue of notification. This appeal was filed on 8-4-49, that is, nearly 1½ month after the notification in question was published. To read the notification as appointing the officers referred to therein as Public Prosecutors for the various Courts, & then to infer that they were appointed Public Prosecutors by implication in the local area of the Courts to which they were appointed, is to ignore the express provisions of Ss. 417 & 492 which must be strictly construed in a case of this description where the liberty of the subject is involved. In my opinion, the notification No. 200 published in the Gazette of 26-2-49 purporting to appoint certain officers including Mr. Kaul as Public Prosecutor is radically defective & not in accordance with S. 492 of the Code. The appointment of the officers mentioned therein as Public Prosecutors cannot, therefore, be regarded as legally valid.

(4) The view, that under S. 492 of the Code, the area for which persons have been appointed as Public Prosecutors must be specified has also been taken in 'Emperor v. Gaya Prosad', 41 Cal 425. In that case an appeal under S. 417 of the Code was presented by the Deputy Legal Remembrancer of Bengal professing to act on behalf of the Legal Remembrancer of Bengal. The appeal arose from

the Province of Bihar over which the Calcutta High Court then exercised appellate jurisdiction. The Legal Remembrancer of Bengal was appointed as Ex officio Public Prosecutor in all cases before the High Court on its appellate side except in a case coming from a Presidency or from other Magistrate in Calcutta. There was a separate Legal Remembrancer for the province of Bihar & Orissa. The Legal Remembrancer of Bengal had not been appointed Public Prosecutor generally for Bihar. In these circumstances the question that arose for determination before the learned Judges of the Calcutta High Court was whether the Legal Remembrancer, Bengal who had been appointed Public Prosecutor for Bengal only & not for Bihar could direct the filing of appeal under S. 417 of the Code on his behalf in a case arising out of an area for which he had not been appointed Public Prosecutor. Their Lordships of the Calcutta High Court held that the appeal before them was incompetent as it was not presented either by a person who had been appointed a Public Prosecutor in the area from which the appeal arose or under by a person acting under the direction of a Public Prosecutor so appointed. The learned Judges also refused to treat a letter written, by the Secretary to the Govt. of Bihar requesting the Legal Remembrancer of Bengal to file the appeal as one appointing the Legal Remembrancer of Bengal as Public Prosecutor of Bihar, on the principle that "where the liberty of State subjects is involved & an appeal is against an order of acquittal, the statute must be strictly sought to be preferred construed & full compliance with its provisions required." I think it follows from the decision of the Calcutta High Court with which I am in respectful agreement that unless a person has been appointed under S. 492 as Public Prosecutor for a specific area, he can have no authority to present an appeal under S. 417 of the Code in a case arising from that area.

(5) For the above reasons, I am of opinion that the notification published in the Gazette of 26-2-49 was not in accordance with law & Mr. Kaul's appointment was not in accordance with S. 492 of the Code & as Mr. Kaul was not a Public Prosecutor within the meaning of Ss. 417 & 492 of the Code, this appeal presented by him is incompetent. The appeal must, therefore, be dismissed on the ground.

(6) B. K. CHATURVEDI, J.: I agree.

K. S. *Appeal dismissed.*

(C.N. 9)

A. I. R. (39) 1952 MADHYA BHARAT 15

(GWALIOR BENCH)

SHINDE J.

Kanhaiyalal, Accused-Applicant v. Feliram, Complainant-Opponent.

Criminal Ref. No. 36 of 1950, D/- 22-1-1951.

Criminal P. C. (1898), S. 238 (2) — Applicability — Person charged with mischief if can be convicted of criminal trespass.

The general principle for the applicability of Sub-S. (2) of S. 238 is that the major offence and the minor offence must be cognate offences. Where two offences involve different elements and different questions of facts one offence cannot be said to be minor to the other. (*Para 4*)

The ingredients of mischief and criminal trespass are completely different from each other and hence if a person is charged with mischief he cannot be convicted for criminal trespass because the accused would be prejudiced in making his defence. (*Para 5*)

Anno : Cr. P. C., S. 238 N. 2.

Government Advocate, for the State; Inamdar, for Opponent.

Cases referred to :

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('45) A I R (32) 1945 All 81 : (46 Cri L Jour 750) (Pr 4)

('75) 23 W R Cr 59 (Pr 4)

('31) A I R (18) 1931 Cal 414 : (32 Cri L Jour 892) (Pr 4)

('25) 89 Ind Cas 449 : (A I R (13) 1926 Lah 132: 26 Cri L Jour 1361) (Pr 4)

ORDER : This reference raises a short question which may be stated as follows. Can a person against whom charge is framed under sections 426 and 379, I. P. C. be convicted under section 447, I. P. C.?

(2) Feliram filed a complaint against Kanhaiyalal stating that on 10-2-1949 the accused dismantled the hut of the complainant and took possession of the material and that he was laying a foundation of a new house. The learned sub-divisional Magistrate Pohari framed a charge under sections 426 and 379, I. P. C. He, however, acquitted him of both the offences under sections 426 and 379, I. P. C. and holding that his act amounts to trespass, convicted him under section 447, I. P. C. and sentenced him to a fine of Rs. 50/-. The accused filed a petition in revision before the Sessions Judge who has made this reference under section 438, Criminal Procedure Code.

(3) Mr. Inamdar, who appeared on behalf of the complainant, contended that the facts mentioned in the charge were that the accused dismantled the hut with intent to cause wrongful loss to the complainant and took possession of the material without obtaining complainant's permission. These facts also go to constitute an offence under section 441, I. P. C. hence under section 238, Criminal Procedure Code, conviction of the accused under section 441 cannot be said to be bad.

(4) Section 238 reads as follows :

(1) "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it etc".

Clause (1) of section 238 does not apply to this case. The only question for consideration is whether clause (2) is applicable or not. The general principle which is laid down in a number of cases is that the major offence and the minor offence must be cognate offences. In 'Makhhan v. Emperor', Malik J., observed as follows :

"The gravity of the offence must depend upon the severity of the punishment that can be inflicted but the major and the minor offences must be cognate offences which have the main ingredients in common, and man charged with one offence which is entirely of a different type from the offence which he is proved to have committed, cannot in the absence of proper charge be convicted of

that offence merely on the ground that the facts proved constitute a minor offence 'Vide Makkhan v. Emperor', A I R (32) 1945 All 81 at P. 85).

A person charged with dacoity or house breaking by night cannot be convicted of dishonestly receiving the stolen property because none of the particulars which go to make up the offence of dacoity or house breaking constitute by themselves the offence of receiving stolen property. (Vide 'Achpal v. Emperor', 89 Ind Cas 449). On the same principle a person charged with dacoity and riot cannot be convicted for house trespass, the latter offence not being the part of the former (Vide 'The Queen v. Salamut Ali', 23 W R Cr 59; 'Mehersheikh v. Emperor', A I R (18) 1931 Cal 414). From these decisions it is clear that where two offences involve different elements and different questions of facts one offence cannot be said to be minor to the other.

(5) The elements of mischief are that there should be destruction of some property and that the accused did it intending or knowing that he was likely to cause wrongful loss or damage to any person. The ingredients of the criminal trespass on the other hand are first entry upon the property in possession of another and second such an entry is done with intent either to commit an offence or to intimidate, insult or annoy the person in possession of the property. These ingredients, therefore, are completely different from each other and hence if a person is charged with mischief he cannot be convicted for criminal trespass because the accused would be prejudiced in making his defence. The arguments put forward by the learned counsel for the complainant therefore cannot be accepted.

(6) I, therefore, allow the reference and set aside the order of conviction and sentence passed by the trial Court. As the case appears to be of a civil nature it is not necessary to order a retrial. Fine, if paid, shall be refunded to the accused.

G.M.J. *Reference accepted.*

(C. N. 10)

A. I. R. (39) 1952 MADHYA BHARAT 16

(GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

Shriniwas Das, Appellant v. Jamanadas and others, Respondents.

Civil Misc. Appeal No. 8 of 2004, D/- 9-7-1951.

Transfer of Property Act (1882) Ss. 100, 21— Contingent charge — Validity.

Under Ss. 5, 21 and 100, T. P. Act, a present charge as security for discharging a contingent liability can be validly created. There is a difference between a present charge to discharge a contingent liability and the mere possibility of charge or a promise to create a charge in future. A charge to secure a liability which will arise only, if at all, in future is a present charge under S. 100, which is enforceable on the happening of the contingency. Thus a direction in a decree that the amount shall be realisable from a certain property if the mortgaged property was found insufficient to satisfy the debt, creates a valid contingent charge. A I R (5) 1918 Mad 674, A I R (24) 1937 Pesh 76, A I R (12) 1925 Pat. 288 and A I R (15) 1928 Pat 587, Relied on.; 14 Cal 687 and 3 All L Jour 221 held not correct. (*Para 3*)

Anno: T. P. Act, S. 100 N. 9 Pts. 1 to 4.

(Note: This case fully supports the submission in Point 6 of Note 9 on S. 100, in the A I R Commentary on T. P. Act (3rd (1950) Edn.-Ed.)

Bhagwandas Gupta, for Appellant; Bhagwandas Sharma, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('06) 3 All L Jour 221 : (1906 All W. N. 82) (Pr 3)

('87) 14 Cal 687 (Pr 3)

('18) A I R (5) 1918 Mad 674 : (39 Ind Cas 867) (Pr 3)

('25) A I R (12) 1925 Pat 288 : (78 Ind Cas 457) (Pr 3)

('28) A I R (15) 1928 Pat 587 : (7 Pat 584) (Pr 3)

('37) A I R (24) 1937 Pesh 76: (170 Ind Cas 136) (Pr 3)

DIXIT J. : This appeal arises out of execution proceedings of a mortgage decree held by Narayandas Jamanadas against the predecessor-in-interest of the present respondent, Mt. Rampyari. The decree was made by the Gwalior High Court on 28-7-39. After decreeing the plaintiff Narayandas Jamanadas's claim for Rs. 17000/- against the mortgaged property, it directed that if the proceeds of the sale of the mortgaged property were insufficient to satisfy the decree, the deficient amount shall be realisable from a house and a shop situated in Sarafa Lashkar. Subsequent to the sale of the mortgaged property the decree-holder on 22-10-1945 applied to the executing Court for the sale of the property situated in Sarafa Lashkar alleging that the decree had remained unsatisfied even after the sale of the mortgaged property. A proclamation for the sale of the property situated in Sarafa Lashkar was then issued by the Court executing the decree. The appellant, then, presented an application on 6th September, 1947, claiming that he was a bona fide purchaser of the property in Sarafa Lashkar and that it was not liable to be sold in execution of the respondent-decree-holder's decree against the respondent Mt. Pyaribai. The appellant further took the objection that the property could not be sold without prior attachment. The appellant had purchased the property from the judgment-debtor after the decree was passed by the Gwalior High Court. The Court executing the decree rejected the appellant's contention that no charge was created by the decree against the property situated in Sarafa Lashkar and held that for the sale of the property, prior attachment was not necesssary. This appeal is directed against the said order of the District Judge, Gwalior.

(2) Mr. Bhagwan Das Gupta, learned Counsel for the appellant contended that no charge had been created on the property in Sarafa Lashkar; that even if it were assumed that a charge was created, it could not be enforced against the appellant who is a purchaser of the property for consideration and without notice of the charge, that the decree was not in accordance with Order 34 of the Civil Procedure Code; and that as there was no charge on the

property it could not be sold without prior attachment.

(3) The learned Counsel for the appellant does not contest the position that if the decree created a charge on the property situated in Sarafa Lashkar then a prior attachment of the property is not necessary for its sale. The real question for determination in this appeal, therefore, is whether the decrees of the Gwalior High Court created a charge on the property in dispute. The argument of the learned Counsel for the appellant is that under the decree the charge on the property is only conditional and not a charge in law. I am unable to accede to this contention. It is clear from the wording of the decree that it creates a charge in present although the charge is to be operative in the event of the proceeds of the sale of the mortgaged property being insufficient to satisfy the decree. Under sections 5, 21 and 100 of the Transfer of Property Act, a present charge as security for discharging a contingent liability can be validly created. There is a difference between a present charge to discharge a contingent liability and the mere possibility of charge or a promise to create a charge in future. The view that a charge to secure a liability which will arise only, if at all in future is a present charge under section 100 of the Transfer of Property Act finds support in decisions of the Madras High Court reported in 'Imbichi v. Achampat Avukoya', AIR (5) 1918 Mad 674 and of the Patna High Court in 'Nandlal v. Dharamdeo Singh', AIR (12) 1925 Pat 288 and 'Murat Singh v. Pheku Singh', AIR (15) 1928 Pat 587. A similar view has also been held by the Judicial Commissioner's Court in 'Harnam Singh v. Mohd. Akbar Khan', AIR (24) 1937 Pesh 76. A contrary view that a charge as security for discharging a contingent liability is not valid has been held in 'Madho Misser v. Sidh Binayak Upadhya', 14 Cal 687. But I am of opinion that the view expressed in '14 Cal 687' is not correct. I adopt the observations made by Coutts-Trotter J., in 'AIR (5) 1918 Mad 674' with regard to '14 Cal 687' and a similar case of the Allahabad High Court reported in 'Harjas Rai v. Nawrang', 3 All L Jour 221. The learned Judge said :

"But if they are supposed to enunciate the proposition which is contended for here, and nothing short of that proposition will avail the respondent namely, wherever you have a charge to secure a liability which is not a liability existent 'in praesenti', but will arise, if at all in the future, that cannot be a present charge within the meaning of the Transfer of Property Act then I think this Court is bound to say that those decisions, if they mean that are bad law and should not be followed. The most forcible illustration, I think, is the one given by my learned brother of a Government servant who gives security by the deposit of a fidelity bond or other security for the faithful discharge of his duties. Is the charge bad, because he has not been dishonest at the time the deposit is made ? Another equally good illustration is the case of a man who, while his account is in credit at the Bank, deposits his title deeds to secure any future overdraft there may be. It is idle to contend that those are not perfectly good charges on the property over which they purport to operate, not withstanding the fact that the indebtedness in both cases is future and is contingent. As I say, if those cases in Calcutta and Allahabad are to be supposed to decide the proposition contended for, we decline to follow them."

On the construction of the decree I think it must be held that it creates a charge on the property situated in Sarafa Lashkar, though the charge can only be enforced on the happening of the contingency of the mortgaged property being insufficient to satisfy the decree.

(4) The other objections raised on behalf of the appellant cannot be considered in this appeal for the reason that they were not specifically raised before the lower Court and the learned District Judge has not given any decision on them in the order under appeal. The finding that the decree creates a charge on the property situated in Sarafa, does not preclude the appellant from taking the objection that the charge is not enforceable, against him as he is a bona fide transferee for value without notice of the charge or the objection that the sale proceeds of the mortgage property were sufficient to satisfy the decree and the contingency contemplated in the decree for enforcing the charge had not arisen. If and when such objections are specifically raised the executing Court would no doubt decide them according to law.

(5) For the above reason I would dismiss this appeal with costs.

(6) CHATURVEDI, J. : I agree.

D.R.R. *Appeal dismissed.*

[C. N. 11.]

A. I. R. (39) 1952 Madhya Bharat 17

(GWALIOR BENCH)

DIXIT J.

Narvirchand and others, Applicants v. The State.

Criminal Revn. No. 139 of 1951, D/- 5-11-51.

(a) Opium Act (1878), S. 9 (a) and (b) — Offences under, are separate and distinct — Transport of opium in motor car — Occupants of car when can be convicted under S. 9 (b).

The offence of transporting opium consists in moving opium from one place to another within the State in contravention of the Opium Rules. The possession of a person transporting opium may be temporary for the purpose of transport only. It is not necessarily the possession which constitutes an offence under S. 9 (a) of the Opium Act. A person possessing opium may carry it himself or entrust it to somebody else for carriage. If a person possesses opium and carries it himself, he is guilty of both the offences of possession and of transport though by virtue of Ss. 40 and 71 of the Indian Penal Code, he cannot be awarded separate sentences for the offences. If the person possessing opium does not carry it himself but entrust it to some other person for carriage in a car and that person carries the opium knowingly, then the driver of the car would be the person who transports the opium and person who directs him to do so would be the abettor of the offence of transporting. The occupants of such a car besides the driver can be said to have transported the opium only if it is shown that the opium in the car was in their possession so as to make them

liable for the offence of possession. For, then alone can it be said that by using a motor vehicle for their own transport with opium in their possession, they themselves transported it. (*Para 6*)

Anno: Opium Act, S. 9 N. 1, 5.

(b) *Opium Act (1878), S. 9 — Abetment of offence under S. 9 is offence under S. 109 Penal Code — Penal Code (1860) Ss. 40, 109.*

The Opium Act, 1878 does not contain any provision prescribing punishment for abetment of the offences under S. 9 of the Act. An abetment of the offence under S. 9 of the Opium Act is, however, an offence under S. 109 of the Penal Code read with S. 40 thereof and is chargeable and punishable thereunder. (*Para 7*)

Anno: Opium Act, S. 9 N. 13.

(c) *Criminal P. C. (1898) Ss. 237 and 238 — Abetment is not minor offence — Charge under S. 9 (b) Opium Act — Conviction for its abetment not permissible.*

An abetment of an offence is not a minor offence within S. 238 Criminal P. C. The ingredients that must be proved for the abetment of an offence are quite different from those required to establish the substantive offence. A charge for the substantive offence as such gives no intimation of a trial to be held for abetment. When a man is accused of a substantive offence he may not be conscious that he will have to meet an imputation of collateral circumstances constituting the substantive offence itself. A I R (14) 1927 All 35; 33 Mad 264, Ref.

Hence, where the accused is charged under S. 9 (b) Opium Act he cannot be convicted for its abetment. (*Para 7*)

Anno: Criminal P. C., S. 238 N. 2.

(d) *Criminal P. C. (1898) Ss. 190 (c) and 537 — Offence under Opium Act — Investigation and trial — No special procedure provided by Act — Investigation carried by police — Charge-sheet signed by Superintendent of Customs and Excise — Irregularity is curable — Opium Act (1878), Ss. 14 to 20.*

Sections 14 to 20 of the Opium Act make it clear that the offences under the Opium Act are to be investigated, inquired into and tried in accordance with the provisions of the Criminal P. C. The Opium Act does not lay down any scheme of procedure for the investigation and trial of offences under the Act. There is also no section in the Opium Act prohibiting a Magistrate from taking cognizance of any offence under the Act except on a charge-sheet presented by the police in accordance with the provisions of Criminal P. C. (*Para 9*)

Where on the basis of investigation carried out by the police themselves, a charge sheet signed by the Superintendent Customs and Excise was presented to the Additional District Magistrate who was competent to take cognizance under S. 190 (c), Criminal P. C.

Held that the irregularity in the presentation of the charge-sheet, if any, was curable under S. 537, Criminal P. C. and was one which did not vitiate the whole trial. (*Para 9*)

Anno: Criminal P. C., S. 537 N. 6, 7.

(e) *Opium Act (1878), S. 9 — Punishment, meaning of — Accused can be sentenced to rigorous imprisonment — General Clauses Act (1897), S. 3 (26).*

An accused convicted of an offence under S. 9 Opium Act can be awarded rigorous imprisonment. Under the General Clauses Act, the word "imprisonment" means imprisonment of either description as defined in the Penal Code. It cannot therefore, be maintained that the punishment of imprisonment prescribed for an offence under S. 9, Opium Act is only of simple imprisonment. (*Para 10*)

Anno: Opium Act, S. 9 N. 19.

Dey, for Applicants; Mungare, Government Advocate, for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) 49 All 120: (A I R (14) 1927 All 35: 27 Cr L J 1118) (Pr 7)
('10) 33 Mad 264: (11 Cr L J 49) (Pr 7)
('23) A I R (10) 1923 Mad 339: (24 Cr L J 335) (Pr 9)

ORDER: The six petitioners in this case have been convicted by the Additional District Magistrate Shivpuri under S. 9 (b) of the Indian Opium Act and sentenced to six months rigorous imprisonment each for the offence. An appeal preferred by the accused persons against their convictions and sentences was rejected by the Sessions Judge of Guna. They have now come up in revision to this Court.

(2) The prosecution case, briefly stated is that on the night of 27-4-1951, Mr. Ram Singh, the Collector and District Magistrate, Raj Garh noticed in Pachhar Hotel a motor car bearing Registration No. P.N.E. 3002 carrying a flag generally flown by Rulers of Indian States. The car had a break down and the petitioners Balaram, Minaram, Hira Singh and Jit Singh were repairing the car. Mr. Ramsingh, thinking that the car belonged to some Ruler of former Indian States made some inquiries about the persons travelling in the car. He was told by the applicant Narootam that Narvir Chand was the Raja of Jubbal and that he himself was his A.D.C. Mr. Ram Singh was however, not satisfied about the identity of Narvir Chand, but at the same time he offered his services to Narvir Chandra, asked him to accompany him to Biora and told him that he would make the necessary arrangements for the repairs of the car. Narvir Chand declined the offer. The conduct of Narvirchand and of the other petitioners, however, aroused suspicion in the mind of Mr. Ram Singh about Narvir Chand and his companions being "smugglers in opium". On 28-4-1951, Mr. Ram Singh sent a wireless message to the Superintendent of Police, Shivpuri to intercept the car of the petitioners and to search it. Accordingly, the police made arrangements for stopping the car of the petitioners and on receiving information that the car had a break down near Dahalda, the police proceeded to Dahalda. They found the car of the petitioners being pulled by a motor-truck. It was alleged by the prosecution that when the police expressed a desire to search the car, the petitioners Hira Singh and Jit Singh aimed their guns at the police party. The guns were, however, snatched by Sub Inspectors Lal Bahadur and Udaypal Singh. Thereupon, Narvir Chand aimed his pistol at the party. Head Constable Randhir Singh managed to snatch the pistol. The car and the petitioners were, then, taken to Shivpuri, where it was searched. The search revealed a box underneath the luggage carrier and in it was found 2 maunds, 29 seers and 3 chhataks of opium. The police, then, took up the investigation and found that the

petitioners were in possession of this opium and were transporting it in contravention of rules made under the Opium Act. On 21-5-51, the Superintendent Customs and Excise of District Shivpuri presented, in the Court of the Additional District Magistrate Shivpuri, a charge-sheet against the petitioners in respect of offences under section 9 (a) and (b) of the Opium Act.

(3) The learned Additional District Magistrate charged all the petitioners for being in possession of the opium and transporting it in contravention of sub-rule (a) and (b) of Rule 4 of the Opium Rules and thus committing an offence punishable under section 9 of the Opium Act. Balaram admitted that he was in possession of the opium and was transporting it in contravention of the Opium Rules. The other petitioners denied having any knowledge of the opium in the car. They stated in their defence that while they were going in their own car from Jhalwad to Delhi, they had a break down. Soon after Balaram arrived at the spot from Kota in a car bearing Registration No. P.N.E. 3002 Balaram was known to them and he gave them a lift. This defence was rejected by the trial Judge. He found all the petitioners guilty of the offence under section 9 (b) of the Opium Act, observing that the transportation of opium by the petitioners implied that they were in possession of the opium.

(4) When the revision petition was admitted by me on 19-8-51, I formed the view that if the conviction of the petitioners was correct, then the sentence of six months rigorous imprisonment imposed on each of the petitioners was, in the circumstances of the case, a light one. I, therefore, issued a notice to the petitioners to show cause why their sentences should not be enhanced.

(5) It is clearly proved by the evidence on the record that on the night of 27-4-1951, the petitioners along with the car bearing Registration No. P. N. E. 3002 were in Pachhar, that Mr. Ram Singh met the petitioners in Pachhar and when he became suspicious about the movements of the petitioners, he sent a wireless message to the Superintendent of Police, Shivpuri to stop the car and search it and that when the car was searched on 28-4-51 in Shivpuri, 2 maunds, 29 seers and 3 chhataks of opium was found in the car. Mr. Dey, learned counsel for the petitioners does not dispute these facts. He however, contends (1) that the applicants Narvir Chandra, Narootam, Jit Singh, Hira Lal and Mina Ram who were merely passengers in the car, cannot be said to have committed the offence of transporting opium as in the present case the act of transport could only be the act of the person driving the car, namely, Balaram; (2) that the Superintendent Customs and Excise had no power to put in a charge-sheet against the petitioners; (3) that the confessions of Mina Ram and Balaram having been recorded by the Second Class Magistrate, Shivpuri who was not empowered under S. 164, Criminal P. C., to record any confession, were inadmissible in evidence; (4) and finally that under S. 9 of the Opium Act, the Magistrate could have sentenced the petitioners only to simple imprisonment and not to rigorous imprisonment.

(6) Having heard the learned Counsel for the petitioners and the learned Government Advocate, I have come to the conclusion that the convictions of the petitioners Narvir Chand, Narottam, Jit Singh, Hira Singh and Minaram for the offence of transporting opium cannot be upheld. Section 9 of the Opium Act is as follows :

"Any person who, in contravention of this Act, or of rules made and notified under S. 5 or S. 8,

(a) possesses opium, or
(b) transports opium, or
(c) imports or exports opium, or
(d) sells opium, or
(e) omits to warehouse opium, or removes or does any act in respect of warehoused opium, and any person who otherwise contravenes any such rule, shall, on conviction before a Magistrate, be punished for each such offence with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees or with both."

It is clear from the wording of the section and in particular from the words "shall be punished for each such offence" that the possession, transport, import or export and selling of opium are all separate offences. For the offence of possession, it is necessary to prove both knowledge and control of opium. The offence of transporting opium consists in moving opium from one place to another within the State in contravention of the Opium Rules. The possession of a person transporting opium may be temporary for the purpose of transport only. It is not necessarily the possession which constitutes an offence under S. 9 (a) of the Opium Act. A person possessing opium may carry it himself or entrust it to somebody else for carriage. If a person possesses opium and carries it himself, he is guilty of both the offences of possession and of transport though by virtue of Ss. 40 and 71 of the Indian Penal Code, he cannot be awarded separate sentences for the offences. A strict construction of the definition of transport in the Opium Act as applied to Part B States would show that the offender is the person who removes opium from one place to another within the State. If the person possessing opium does not carry it himself but entrusts it to some other person for carriage in a car and that person carries the opium knowingly, then the driver of the car would be the person who transports the opium and person who directs him to do so would be the abettor of the offence of transporting. The occupants of such a car besides the driver can be said to have transported the opium only if it is shown that the opium in the car was in their possession so as to make them liable for the offence of possession. For, then alone can it be said that by using a motor vehicle for their own transport with opium in their possession, they themselves transported it.

(7) In the present case the prosecution evidence is that some where near Shamgarh two persons handed over bags containing opium to Narvir Chand, who then directed Balaram to keep the bags in the car; that all the petitioners had knowledge of the bags containing opium and that the car was being driven by Balaram. In his examination under S. 342, Balaram stated that he himself had purchased the opium and kept in the car without the knowledge of the other accused persons and that he drove the car. On his own statement Balaram is clearly guilty of the offence of transporting opium. In order to hold the other petitioners guilty of the offence of transporting

opium, the prosecution evidence must establish that the removal of opium from one place to another within the State was their own act by showing either that they caused the motor vehicle containing the opium to move or that if they did not by their act cause the vehicle to move, they were in such possession of the opium as amounted to an offence and thus by using the motor vehicle for their own transport with the opium, they transported the opium on their own. All the applicants were charged by the learned Magistrate with the offence of possession also. But he has not held that the petitioners committed the offence under S. 9 (a) of the Opium Act of possessing opium. At one or two places in his judgment, the learned Magistrate has, no doubt, observed that the petitioners were in possession of the opium. On a careful reading of the judgment of the learned Magistrate, it appears to me that the possession of opium by the petitioners which the Magistrate has found proved is the possession of a carrier. Nowhere in the judgment of the Magistrate is there any attempt to determine and find whether the possession of the petitioners was such as to hold them guilty of the offence under S. 9 (a) of the opium Act. To say, as the learned Magistrate did, that "transportation includes possession", is one thing. It is, however, quite, different to hold that the petitioners committed the offence of possessing opium and were guilty under S. 9 (a) of the Opium Act. If the learned Magistrate, by observing that the petitioners were in possession of the opium, meant to say that they were guilty of the offence under S. 9 (a), he should have proceeded to convict them under both S. 9 (a) and 9 (b) of the Opium Act and should have passed an appropriate sentence covering both the offences. What the trial Court did was to convict them under S. 9 (b) only and sentence them for that offence by observing that "the transportation included possession". In my opinion, the effect of this finding of the trial Court is that the petitioners who were charged with the offence of possession also were acquitted of the charge under S. 9 (a). There is no appeal before me on behalf of the State against the decision of the trial Court praying that the petitioners be convicted of the offence under S. 9 (a) also. I am, therefore, bound by the finding of the Magistrate that the petitioners did not commit the offence under S. 9 (a). From this finding it must, further, be held that the petitioners' possession of the opium was not such as to constitute an offence under S. 9 (a). It follows, therefore, that as the opium that was found in the car is not proved to have been in possession of the petitioners other than Balaram, it cannot be said with regard to them that by travelling in the car containing the opium, they themselves transported the opium. There is no evidence to show that the motor vehicle containing the opium was caused to move by any act or acts of these five petitioners. In these circumstances, it is difficult to hold that the petitioners Narvir Chand, Mina Ram, Jit Singh, Hira Singh and Narottam transported the opium and committed an offence under S. 9 (b) of the Opium Act. I have also considered the question whether these petitioners can be said to be guilty of abetting the offence of transporting opium. The Indian Opium Act, 1878 does not contain any provision prescribing punishment for abetment of the offences under S. 9 of the Act. An abetment of the offence under S. 9 of the Opium Act is, however, an offence under S. 109 of the Penal Code read with S. 40 thereof and is chargeable and punishable thereunder. By the second paragraph to S. 40, Indian Penal Code, the word "offence" in S. 109, I. P. C. denotes a thing punishable under the Penal Code and under any special or local law. There is no doubt that the Opium Act is Special Law and it seems clear that S. 109, I. P. C., can be applied to a thing punishable under the Opium Act. In my view however, the petitioners besides Balaram cannot be held guilty of the abetment of the offence of transporting opium because they were not charged with that offence. I am quite aware of the fact that there is a conflict of judicial opinion as to whether a person charged with a substantive offence can be convicted with the abetment of that offence when he was not charged with the latter offence. It seems to me that the decisions which hold that it is permissible to the Court to convict the accused of abetment when he was charged only with the substantive offence, proceed on the basis that abetment is a minor offence. I do not feel able to concur in this view. The ingredients that must be proved for the abetment of an offence are quite different from those required to establish the substantive offence. A charge for the substantive offence, as such gives no intimation of a trial to be held for abetment. When a man is accused of a substantive offence he may not be conscious that he will have to meet an imputation of collateral circumstances constituting the substantive offence itself. (See 'Mahabir Prasad v. Emperor', 49 All 120; 'Padmanaba Panji Kannaya v. Emperor', 33 Mad 264. Again, it is significant that sub-s. 2 (a) of S. 238, Criminal P. C., while it expressly makes mention of an attempt to commit an offence is silent as to abetment of an offence. The omission only shows that abetment of an offence is not a minor offence within the meaning of S. 238, Criminal P. C. Even if the view, that under Ss. 236 and 237 of the Criminal P. C., this Court can alter a conviction for a substantive offence into one for abetment, is accepted as correct. I do not think the principle can be applied to the present case. For, firstly, the circumstances constituting an abetment of the offence under S. 9 (b) have not been established with any clearness with respect to each of the petitioners other than Balaram and secondly, the trying Magistrate has not examined these accused persons on such collateral circumstances as can be said to appear in the evidence on the record. I do not think that S. 10 of the Opium Act can in any way help the prosecution for convicting the petitioners other than Bala Ram for abetment. Under this section an accused person cannot be called upon to account unless there is some prima facie evidence of the accused having committed an offence under the Opium Act. There is no such evidence of abetment on the part of the five petitioners of the offence under S. 9 (b).

(8) In the view I have taken of the matter, it is unnecessary to consider the objection of the learned Counsel for the petitioners that the confessions of Balaram and Mina Ram are inadmissible in evidence. Even if these statements are excluded from evidence, Balaram is clearly guilty of the offence of transporting opium on his own statement which he made

in the Court during the course of his examination under S. 342, Criminal P. C.

(9) I am unable to accept the contention of the learned Counsel for the petitioners that the trial was vitiated as the Superintendent Customs and Excise had no power to put in the charge-sheet against the petitioners. The argument is that the Opium Act contains a special procedure for the arrest, searches, seizure, and for the initiation of the proceedings of offences under the Act and that under S. 20 of the Act the police alone had the power to initiate proceedings on a proper charge-sheet for the trial of persons believed to be guilty of any offence under the Act. It seems to me clear from the provisions of Ss. 14 to 20 of the Opium Act, that the offences under the Opium Act are to be investigated inquired into and tried in accordance with the provisions of the Criminal P. C. The Opium Act does not lay down any scheme of procedure for the investigation and trial of offences under the Act. There is also no section in the Opium Act prohibiting a Magistrate from taking cognizance of any offence under the Act except on a charge-sheet presented by the police in accordance with the provisions of Criminal P. C. In the present case the entire investigation was carried out by the police themselves. On the basis of that investigation a charge-sheet signed by the Superintendent Customs and Excise was presented in the Court of Additional District Magistrate. In these circumstances I do not think it can be said that this irregularity in the presentation of the charge-sheet, which in my opinion, is curable under S. 537 of the Code, was one which vitiated the whole trial. Under S. 190 (c) Criminal P. C., the Magistrate was competent to take cognizance of the offence upon a charge-sheet presented by the Superintendent Customs and Excise. Learned counsel for the petitioners drew my attention to the decision reported in 'In re, Kuppusami', A I R (10) 1923 Mad 339. The Madras case dealt with a prosecution under the Madras Abkari Act which laid down an elaborate procedure for the investigation and trial for offences under that Act. The procedure has been examined in detail in that decision and it is clear that under the Madras Abkari Act, an accused person is placed in some respects in an advantageous position by the special procedure laid down in that Act regulating the course of investigation. It appears from that decision that the investigation in that case was carried on by the police instead of by the Abkari officers and a charge-sheet was submitted by the police. The learned Judges of the Madras High Court found that the investigation by the police and the submission of a charge-sheet by them instead of by the Abkari officers placed a considerable disability on the accused and deprived him of the right of special procedure regulating the course of investigation. The learned Judges of the Madras High Court, however, observed that if the question were merely of a charge of offence under a special Act made after an investigation carried on in the ordinary way and not differing in material particulars from the investigation after which offences under the Penal Code are charged, they would have held that a charge presented by the police instead of by the Abkari Officer as required by the Act to be one sufficient for taking cognizance of the offence by the Magistrate on that irregular charge-sheet. As I have said before, the Opium Act does not prescribe any special procedure for the investigation of the offenees under the Act. The investigation of an offence under the Opium Act by the police or by any officer of the Departments mentioned in S. 14 of the Opium Act, is required to be conducted in accordance with the provisions of the Criminal P. C. The Madras High Court decision is, therefore, not applicable to the present case.

(10) As to the contention of the learned counsel for the petitioners that for an offence under S. 9 of the Opium Act, rigorous imprisonment cannot be awarded to an accused person, it is sufficient to state that under the General Clauses Act, the word "imprisonment" means imprisonment of either description as defined in the Penal Code. It cannot, therefore, be maintained that the punishment of imprisonment prescribed for an offence under S. 9, is only of simple imprisonment.

(11) For the above reasons, I set aside the conviction and sentences imposed on Narvir Chandra, Narottam, Jitsingh, Hirasingh, Mina Ram. The conviction of Bala Ram under S. 9 (b) of the Opium Act is affirmed. The learned Magistrate has sentenced him to rigorous imprisonment for six months for the offence. Considering the circumstances of the case, I think a sentence of six months rigorous imprisonment awarded to Balaram is a light one for the offence of transporting opium in such a large quantity as was found in this case. I enhance his sentence to one year's rigorous imprisonment.

K.S. *Order accordingly.*

[C. N. 12.]

A. I. R. (39) 1952 Madhya Bharat 21

(GWALIOR BENCH)

KAUL, C. J. AND CHATURVEDI, J.

Murarilal and others, Appellants v. Municipal Committee Lashkar; Respondent.

Second Appeal No. 14 of 2004, D/- 27-9-1951.

Municipalities — Gwalior State Municipalities Act, (S. 1993), Sections 136, 128, 48 — Brick-Kiln for constructing one's own house — Permission — Notice under Section 128 — Suit for injunction against Municipality — Jurisdiction of Civil Court — Civil P. C. (1908), Section 9.

The plaintiffs wanted to construct a bungalow on their own land and for that purpose desired to set up a brick-kiln on it, and therefore applied to the Municipality for permission for having a brick-kiln there. The Municipality did not grant permission and served a notice upon the plaintiffs to fill up the pits dug out for a brick-kiln and also warned them that in case of default the municipality would itself arrange the pits to be filled up and recover the cost from the plaintiffs. The plaintiffs thereupon filed the suit asking for a declaration that the plaintiffs were empowered to have a brick-kiln on their own land and for a perpetual injunction restraining the municipality from interfering with the right of the plaintiffs for firing bricks in their own compound.

'Held' (1) that a brick-kiln for firing bricks for the purpose of constructing one's own house does not require either a license or permission from the Municipality under Section 136 or under any other provision.

(2) that a brick-kiln to attract the provisians of Section 136, must be a structure of a permanent nature and there must be regular user of it as a

brick-kiln. A temporary brick-kiln for firing bricks for the purpose of constructing one's own house does not come within the ambit of this section.

(3) that a notice under Section 128, must be confined to the removal of insanitary defects. A notice which complains of matters other than sanitation is not a good notice and a disobedience to it is not an offence. The order for filling up pits nearly four or five months before the commencement of the rainy season was absolutely unnecessary and arbitrary. The notice under Section 128 was clearly a pretext for preventing the brick-kiln and as such was unwarranted and unjustifiable.

(4) that the jurisdiction of the civil Court was not ousted in this case inasmuch as the orders of the Municipal Committee were not authorised by the Act.

(5) that the order of the Municipality was not within the scope either of its duty or of its powers under the Act. The suit was not "in respect of any act done or purporting to be done in its official capacity" and a two months notice was not necessary under S. 48.

(6) Further the suit was also hit by sub-clause 4 of Section 48. The suit in question was a suit instituted under Section 54 of the Specific Relief Act and two months notice was not required. The declaration required in this case was redundant and an injunction asked for could have been granted without any declaration. The plaintiffs' suit for injunction restraining the Municipality from interfering with their rights was, under the circumstance, fully justifiable. 'Case law Rel. on'.

(Paras 1, 4, 9, 12, 14, 17, 18, 20, 22, 23)

Anno: C. P. C., S. 9, N. 50.

Shiv Dayal, for Appellants. Vishnu Bahadur Singh, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronoiogically. List of foreign cases referred to comes after the Indian Cases.)

('27) 54 Ind App 338: (AIR (14) 1927 P C 176) (Pr 19)

('19) 41 All 162: (AIR (5) 1918 All 16) (Pr 23)

('22) 72 Ind Cas 356: 26 Cal W N 926: 49 Cal 1014: (A I R (9) 1922 Cal 194: 24 Cri L J 356) (Pr 8)

('40) AIR (27) 1940 Lah 377: (ILR 1940 Lah 707 FB) (Pr 16)

('41) AIR (28) 1941 Lah 200: (ILR 1941 Lah 278) (Pr 16)

('45) AIR (32) 1945 Lah 81: (ILR 1945 Lah 382 FB) (Pr 16)

('50) S A No. 82 of 1950 (MB) (Pr 18)

('07) 30 Mad 220: (5 Cri L J 189) (Pr 5)

('27) AIR (14) 1927 Mad 166: (50 Mad 239) (Pr 19)

(1838) 48 R R 88: (4 My & Cr 249) (Pr 15)

CHATURVEDI, J.: This is plaintiff's second appeal. The plaintiffs wanted to construct a bungalow in Morar on their own land and for that purpose desired to set up a brick-kiln on it, and therefore on 21-2-1942 applied to the Municipality for permission for having a brick-kiln there. The Municipality did not grant permission and served a notice upon the plaintiffs to fill up the pits dug out for a brick-kiln and also warned them that in case of default the Municipality would itself arrange the pits to be filled up and recover the cost from the plaintiffs. The plaintiffs thereupon filed this suit asking for a declaration that the plaintiff are empowered to have a brick-kiln on their own land and for a perpetual injunction restraining the Municipality from interfering with, the right of the plaintiffs for firing bricks in their own compound. The suit was decreed by the trial Court, but on 2-5-1947, the learned District Judge, in appeal, reversed the decree and dismissed the suit on the ground that the order of the Municipal Committee not giving permission for a brick-kiln was passed under Section 136 of the Gwalior Municipal Act and the plaintiffs could have gone in appeal to the I. G. of Municipalities against it. The learned District Judge further held that the Civil Court cannot interfere in such cases and an injunction could not have been granted.

(2) It is from this judgment that this second appeal has been filed by the plaintiffs, and Mr. Shiv Dayal, learned Counsel for the appellants, contends that such a case does not come within the purview of Section 136 of the Gwalior State Municipalities Act of Samvat 1993 which is applicable only to those brick-kilns which are used for the purposes of trade. The said Section runs as follows:

दफा १३६. जररसां और खतरनाक पेशे.

जररसां और खतरनाक पेशे का इन्तजाम.

दफा १३६ (१) म्यूनिसिपैलिटी के अन्दर हर एसी जगह का मालिक या का बिज जो कानून हाजा के शुरू निफाज के वक्त मुन्दर्जे जेल अगराज में से किसी के लिये इस्तेमाल की जाती हो यानी :

(क) चक्की पिघलाने के लिये;

(ख) हड्डियां या ओफल, फुजला, या खून को जोश देने के लिये;

(ग) साबुन बनाने या रोगन को जोश देने या चमडा रंगने के मकान की तरह;

(घ) चमडा रंगना या पकाना;

(च) इंटों के पजावे या बरतनों के पजावे या चूने की भट्टी की तरह;

(छ) किसी और ऐसे कारखाने या मुकाम कारोबार की तरह जिससे जररसां या मुजिर सेहत बू पैदा होती हो;

(ज) खुश्क घास, भूसा या छप्पर बनाने के फूस या लकडी या कोयला या और आतिशगीर चीज को तिजारत के अहाते या गोदाम की तरह;

(त) किसी भक से उड जानेवाले भादू या पेट्रोलियम या किसी आतिशगीर रोगन या रुह शराब के गोदाम की तरह.

उस बिला किसी मुआजवे के एक किताब में रजिस्ट्री करायेगा जो इस गरज से कमेटी में रखी जायेगी.

(२) इस कानून के शुरू हो जाने के बाद उन मकासिद में से किसी मकासिद के लिये कोई नई जगह बिला इजाजत तेहरीरी कमेटी व बिदून पावन्दी उन शरारत के जो कमेटी लगाना मुनासिब समझे, इस्तेमाल न की जायेगी.

मगर शर्त यह है कि ऐसे लायसेन्स के अता करने से इन्कार न किया जायेगा, इल्ला उस सूरत में कि कमेटी की दानिस्त में जिस काम का जारी या कायम करना मकसूद हो, वह उन शख्सों के लिये जररसां या खतरनाक हो, जो ऐने कुर्बा सवार में रहते हों या आमद रक्त रखते हों.

(3) This section is based on Section 135 of the Punjab Municipalities Act of 1891 (Act 20 of 1891) which corresponds with some alterations to Section 120 of the Punjab Municipalities Act of 1911 (No. III of 1911) which is as follows:

Dangerous or offensive trades:

121. (1) No place within a municipality shall be used for any of the following purposes: — Regulation of offensive and dangerous trades.

Melting tallow, dressing raw hides; boiling bones, offal or blood; as a soap-house, oil boiling house, dyeing-house or tannery; as a brick-field, brick-kiln, pottery or lime-kiln; as any other manufactory, engine-house, store-house or place of business from which offensive or unwholesome smells, gases, noises, or smoke arise; as a yard or depot for trade in slaked lime, hay, straw, thatching-grass wood, charcoal or coal, or other dangerously imflammable material; as a store house for any explosive, or for petroleum or any inflammable oil or spirit; except under license from the Committee which shall be renewable annually;

Provided that no such license shall be necessary in the case of any such premises which were used for any such purposes at the time that the Punjab Municipal Act, 1891, came into force, and were registered under that Act, and the case of brick-fields, which were used at the time that this Act came into force but the owner or occupier of the brickfields so excepted shall register the same in a book to be kept by the Committee for the purpose.

(2) The license shall not be withheld unless the Committee consider that the business which it is intended to establish or maintain would be the cause of annoyance, offence or danger to persons residing in, or frequenting, the immediate neighbourhood, or that the area should be for general reasons kept clear of the establishment of such business.

(3) The Committee may charge fees according to a scale to be approved by the Commissioner for such licenses, and may impose such conditions in respect thereof as it may think necessary. Among other conditions it may prescribe that any furnace used in connection with such trade shall, so far as practicable, consume its own smoke.

(4) The owner or occupier of any place registered under Sub-section (1) may apply to have that place licensed under this section. When any such place has been licensed, the registration of that place shall thereby be cancelled, and shall not be renewed.

(5) Whoever, without registration or without a license, uses any place for any such purpose as is specified in this section or in contravention of the condition of any such license, shall be punishable with fine which may extend to fifty rupees, and with a further fine not exceeding ten rupees for every day during which the offence is continued."

(4) A perusal of the Gwalior Section as well as the Punjab Section will lead to the conclusion that it is the trade that is to be regulated; and Section 136 requires licenses for trades specified; There are other provisions (e.g., Sections 142 and 156 in the Gwalior Municipal Act) which similarly empower Committee to regulate certain businesses by issue of certain licenses or by framing bye-laws. In municipal areas there will be very many places from which noxious smell or smoke arises. Such places do not require licenses unless they are places of business. Nuisances arising from places which are not places of business are to be dealt with under other provisions of the Act (viz., Sections 159 and 185) or under byelaws framed under Clauses (4) (8) (12) 13 and 21 of Section 156 of the Gwalior Municipal Act of Samvat 1993 or under Chap. 10 of the Indian Code of Criminal Procedure. From a perusal of the said Sections of the Gwalior Municipalities Act of Samvat 1993 I am quite clear in my mind that a brick-kiln for firing bricks for the purpose of constructing one's own house does not require either a license or permission from the Municipality under Section 136 or under any other provision, of the Gwalior Municipal Act. The reference to Section 136 by the respondent Municipality and by the learned District Judge seems to be erroneous and the said section does not at all apply here.

(5) I may usefully refer here to the facts in 'Emperor v. Mayandi Konan', 30 Mad 220, where Clause (n) of Section 188 of the Madras District Municipalities Act (No. IV of 1884) was construed by Mr. Justice Benson. The material portion of the section is as follows:

"Offensive and Dangerous Trades.

188. If Council so direct, certain trades shall not be exercised without license: (1) At any time, not being less than sixty days before the end of a financial year, the Municipal Council may notify by beat of drum and by notice in the District Gazette that, after the commencement of the following financial year, no place shall be used for any one or more of the purposes specified in the following Clauses (a) to (q), unless a license authorizing such use has been obtained from the Chairman;

(a) for depositing or washing soiled clothes or;
(b) for boiling paddy, camphor or oil; or
(c) for melting tallow or sulphur; or
(d) for storing, or otherwise dealing with manure, offal, blood, bones, rags, hides, fish horns or skins; or
(g) as a soap-house, dyeing-house, dyeing yard, oil-mill, oil-press, brick-kiln, pottery-kiln or lime-kiln; or
(n) for keeping together twenty or more sheep or goats or ten or more pigs or head or cattle etc."

(6) The accused were prosecuted for not obtaining licenses for keeping more than 10 head of cattle. The cattle admittedly were not kept for purposes of trade and it was proved that the usual number kept was less than 10, although such number was exceeded on a particular occasion. The Bench of Magistrates held that as the cattle was not kept for purposes of trade no offence was committed. Mr. Justice Benson observed:

"The words 'offensive and dangerous trades' are merely words of general description to facilitate reference, and cannot limit or control the plain words of the section which are "no place shall be used for any one or more of the purposes specified" in the section unless licensed. It is the place that must be licensed for one or more of the purposes specified."

(7) It was however added that there must be regular user of the place for keeping more than 10 head of the cattle and a mere temporary user for such purpose will not come within the purview of the section.

(8) In 'Superintendent and Remembrancer of 'Legal Affairs Bengal v. Troilokhya Nath', 72 Ind Cas 356: 26 Cal W N 926: 49 Cal 1014: AIR (9) 1922 Cal 194, the word 'Kiln' came up for construction. The material part of Section 261 of the Bengal Municipal Act (3 of 1884) applicable to that case was as follows:

"Within such local limits as may be fixed by the Commissioners at a meeting, no place shall be used without a license from the Commissioners, which shall be renewable annually for any of the following purposes, namely, as a tannery,

slaughter-house, or a kiln for making bricks, pottery, tiles or lime."

A Division Bench of the Calcutta High Court composed of Sir Lancelot Sanderson, C. J., and Mr. Justice Panton held that the words "Kiln" in the above sections refers to a structure which is of a permanent nature and does not include 'clamps' or panjas' for firing bricks.

(9) On the basis of these decisions it can be held that a "brick-kiln" to attract the provisions of Section 136, Gwalior Municipal Act, must be a structure of a permanent nature and there must be regular user of it as a brick-kiln. A temporary blick-kiln for firing bricks for the purpose of constructing one's own house does not come within the ambit of this section. If it had been intended to pronibit the temporary manufacture of bricks by any means in a municipal area it would have been sufficient for the Legislature to provide that no place shall be used without a permit or license from the Municipal Committee for the purpose of making and firing bricks. If temporary brick-kilns are regarded as nuisance it is open to the Legislature to amend the Act. But as the Act stands today there is no provision which, without unduly straining the meaning of the words, requires a house-owner to seek the permission of the Municipal Committee for a temporary kiln for firing bricks.

(10) Even the respondent Municipal Committee had to depend upon Section 128 for ordering the plaintiffs to fill up the pits dug out in their compound for making bricks. The said section is as follows:

"कमेटी को जायज है कि बजये इत्तलानामा किसी जमीन या इमारत के मकान या काबिज को यह हिदायत करे कि वह अपने मकान या जमीन के अन्दर के किसी ऐसे खाजगी कुए या तालाब या होज या तलेया, या नाली या पाखाना या नशेब या गडडे को पाक व साफ करे, या मरम्मत करे, या भर दे या ढाप दे या खुश्क करे जो कमेटी के नजदीक हमसायी के लिये मुजिर सहत हो या तकलीफ दह हो."

(11) The material part of the corresponding section of the Punjab Municipal Act of 1911 is in the following words:

"Section 126.': (1) The Committee may, by notice require the owner or occupier of any building or land to repair, or put in good order any drain, privy, latrine, urinal, cess-pool, or receptacle for any filth or refuse, or to close any drain, privy, latrine, urinal or cesspool belonging thereto, etc."

(12) A notice under Section 128 must be confined to the removal of insanitary defects. A notice which complains of matters other than sanitation is not a good notice and a disobedience to it is not an offence. Where a Committee objected to a cesspool because it was uncovered and passers by were likely to fall into it, it was held that action could not be taken under this section. In the case before us the question was whether the brick-kiln should be stopped or not. The question was not whether pits may be filled up or not. It was not rainy season but it was the last week of February 1942 and it is important to note that even then the concerned officer in the office of the I.G. of Municipalities wrote:

"Besides excavation of earth already done for preparation of bricks will lead to..... pools of stagnant water during rains. I cannot therefore agree with the members who have recommended the grant of permission to the applicant for carrying on an activity which is bound to be injurious to the health of the people in the vicinity.". (P. 7/2.)

(13) The order of the Inspector-General of Municipalities (Mr. D. L. B. Riley), dated 25-2-1942, is in the following words:

"Health Officer Lashkar Municipality is hereby ordered that under Section 204 Quanoon Municipality to take immediate action under Sections 128 136, 152 of Quanoon Municipality to get excavations on the land adjoining the premises of Mr. Kaul filled up, and to prevent the brick-kilns being set up." (P. 7/4.)

(14) It may be noted that the order for filling up pits nearly four or five months before the commencement of the rainy season was absolutely unnecessary and arbitrary. Much before that time the bricks would have been ready and some of the building would have been constructed. The notice under Section 128 was clearly a pretext for preventing the brick-kiln and as such was unwarranted and unjustifiable. If Sections 128 and 136 were not applicable, surely Section 152 (which deals with the disobedience of orders) could not be held applicable to the facts of the case. The plaintiff's suit for injunction restraining the Muicipality from interfering with their rights was, under the circumstance fully justifiable, and was rightly decreed by the trial Court.

(15) The judgment of the learned District Judge (the first appellate Court) is based upon a misconception of the meaning of Section 136 and also the powers of a Municipality. It has to be borne in mind that a Municipality or a Corporation is a creature of the statute. It is brought into existence by, or under the authority of an express legislative enactment to have control over municipal affairs within defined local limits and can exercise such powers of legislation or regulation as are entrusted to it by the Legislature. If the order or action of the Municipal Committee is in excess of the powers conferred on it by the statute or if it acts in contravention of the provisions of the statute, the subject has his ordinary remedy to seek relief in the Civil Courts, unless their cognisance is expressly or impliedly barred. In "Frewin v. Lewis' (1838) 48 R R 88 Lord Chancellor Cottenham observed:

"If under pretence of an authority which the law does give to corporations to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others they become like all other individuals, amenable to the jurisdiction of this Court by injunction."

(16) This dictum has been followed in Courts in India 'Municipal Committee, Montgomery v. Master Sant Singh', AIR (27) 1940 Lah 377; 'Administrator, Lahore Municipality v. Muniru-d-Din', AIR (28) 1941 Lah 200; 'Administrator City of Lahore v. Abdul Majid', AIR (32) 1945 Lah 81. The law on the subject is summed up by Kerr on Injunctions (P. 572 of Edn. 6) in the following manner:

"If under pretence of an authority which the law does give them to a certain extent, they exceed their authority, and assume to themselves a power which the law does not give them, the Court no longer considers them as acting under the authority of their Commission, but treats them as persons acting without legal authority."

(17) I am in respectful agreement with the principles enunciated above and would hold that the jurisdiction of the civil Court was not ousted in this case in as much as the orders of the Municipal Committee to the appellants were not authorised by the Gwalior Municipal Act of Samvat 1993. The judgment and decree of the learned District Judge cannot therefore be allowed to stand.

(18) Mr. Vishnu Bahadur Singh, learned counsel for the respondent, however, contends that be

that as it may, the suit ought to have been dismissed on the ground that two months prior to the institution of the suit a notice was not served on the Municipal Committee which is required under the provisions of Section 48 of the Act. An issue had been framed but the trial Court found this issue in favour of the plaintiffs. The District Judge dismissed the suit on other grounds and did not express any opinion on this point. The relevant portion of Sub-clause (1) of Section 48 of the Gwalior Municipal Act which closely follows Section 49 of the Punjab Municipal Act of 1911 reads as follows:

"No suit shall be instituted against a Committee or against any officer or a servant of a Committee, in respect of any act done or purporting to be done in its or his official capacity until the expiration of 2 months..... etc."

I have discussed the implication of this section in my judgment in an Indore case 'Fakira v. Municipal Committee Jawad, S. A. No. 82 of 1950 and have held that if the suit relates to an order passed by the Municipal Committee which is within the scope of its powers under the Act the suit will be deemed to be a suit "in respect of any act done or purporting to be done in its official capacity." If however, the order of the Municipality is not within the scope either of its duty or of its powers under the Act, as in this case, then it will not be "in respect of any act done or purporting to be done in its official capacity" and a two months notice will not be necessary under Section 48.

(19) Mr. Shiv Dayal relies on 'Arunachelam v. David', AIR (14) 1927 Mad 166, for the proposition that the words "in respect of any act purporting to be done" cover only a past act and do not include a future act; but in my opinion after the decision of their Lordships of the Privy Council in 'Bhagchand v. Secretary of State', 54 Ind App 338; AIR (14) 1927 P C 176, that case cannot be held to be good law.

(20) In the case before us, I find absolutely no difficulty as it is also hit by Sub-clause 4 of Section 48 which states:

(४) इस दफा की कोई इबारत एसे दावे से मुताल्लिक न होगी जो निस्वत हुक्म इम्तनाई दवामी, बगरज रोकने खिलाफवर्जी उस पाबन्दी के, जो मुद्दइ के हक में सरीहन या मानियन मौजूद हो, दायर किया जावे....

Rendered in English it will be as follows:

"Nothing in this section shall apply to any suit instituted for a perpetual injunction to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication."

(21) The corresponding portion of the proviso to Section 49 of the Punjab Municipal Act of 1911 is in the following words:

"Provided that nothing in this section shall apply to any suit instituted under Section 54 of the Specific Relief Act of 1877."

(22) The Gwalior State in Samvat 1993 had not enacted a Specific Relief Act. It came only in 1946 (Samvat 2002); and therefore the Gwalior Municipal Act did not refer to Section 54 of the Specific Relief Act but incorporated the provision of Section 54 Sp. R. A. in Sub-clause 4 of Section 48. The said Section 54 runs as follows:

"Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication."

It will be apparent that Sub-section 4 of Section 48 of Gwalior is exactly the same as the Proviso to Section 49 in the Punjab Act; and all that we have to see in such cases is whether a suit falls under Section 54 of the Specific Relief Act or not. If it is such a suit two months notice will not be necessary. There is no doubt that the suit in question is a suit instituted under Section 54 of the Specific Relief Act and two months notice was not required.

(23) Mr. Vishnu Bahadur Singh, however, contends that it was purely a declaratory suit. In my opinion the contention is not well-founded. The declaration required in this case was redundant and an injunction asked for could have been granted without any declaration. It is only in suits for declaration of the plaintiff's title to the land in dispute with a prayer for injunction that the difficulty arises of separating the principal relief from the ancillary relief. In all such cases the proper question to be determined is: whether the real substance of the suit is the title to the land? or, is it a suit for injunction? vide 'Municipal Board of Benaras v. Gajadhar', 41 All 162. But where title to the land is not in dispute, there is no difficulty in this respect. The respondent had admitted that the compound where brick-kiln was to be set up in this case belongs to the appellants; consequently any declaration was not needed and an injunction was the principal relief prayed for. In my opinion, this issue was therefore correctly determined by the trial Court.

(24) For reasons stated above, I would allow the the appeal with costs, set aside the decree and judgment of the first appellate Court and restore that of the trial Court.

(25) KAUL, C. J.: I agree.

D.H. *Appeal allowed.*

[C. N. 13.]

A. I. R. (39) 1952 Madhya Bharat 25

(GWALIOR BENCH)

DIXIT AND CHATURVEDI, JJ.

Narain Rao Jamdar, Appellant v. The State.

Criminal Confirmation No. 1 and Criminal Appeal No. 39 of 1951, D/- 23-7-1951.

(a) Penal Code (1860), Ss. 302, 304 — Applicability.

Where the handkerchief was stuffed into the mouth of the deceased in order to silence her and the female died due to suffocation before the offender could commence sexual intercourse, it cannot be said that the natural consequences of behaving in this way is definitely death. Though the conduct of the offender was most reprehensible and constituted a criminal offence, yet he cannot be saddled with the intention or knowledge necessary to constitute an offence under S. 302. The most that can be said then is that the offender must be presumed to have known that he was likely in so doing to cause her death. He is therefore guilty of culpable homicide not amounting to murder. The conviction under S. 302 and the death sentence should be set aside and a conviction should be recorded under S. 304 (Part 2). A I R (3) 1916 Mad 651, Rel. on.

(Paras 10, 18)

Anno: Penal Code, S. 302 N. 2; S. 304 N. 1, 6.

(b) Criminal P. C. (1898), S. 288 — Discretion under — Corroboration.

The power under S. 288 being one in derogation of the general principle that a Court can only act on the evidence given before it, the decision to let in the previous deposition of a witness under S. 288 should be arrived at

after careful consideration and only where there are sound and reasonable grounds for such a decision.

The evidence brought on record under S. 288 is good evidence and does not require corroboration from other sources. It is a substantive evidence and usable for all purposes; and if the Court finds that the evidence given before the Committing Court was true it can act upon it in preference to the one given before it. A I R (27) 1940 Nag 340; A I R (23) 1936 Lah 357; A I R (29) 1942 Lah 215; A I R (36) 1949 Nag 254, Rel. on. A. I. R. Commentary on Criminal P. C., Referred. (Para 12)

Anno: Criminal P. C., S. 288 N. 5, 7, 8.

Ramprakash Saxena, for Appellant — Shiv Dayal and Deputy Govt.-Advocate, for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) A I R (23) 1936 Lah 357: (37 Cr L J 567) (Pr 12)

('42) A I R (29) 1942 Lah 215: (43 Cr L J 828) (Pr 12)

('16) A I R (3) 1916 Mad 651: (1951 Mad W N 621: 30 Ind Cas 438: 16 Cr L J 614) (Pr 10)

('40) A I R (27) 1940 Nag 340: (42 Cr L J 17) (Pr 12)

('49) A I R (36) 1949 Nag 254: (50 Cr L J 597) (Pr 12)

CHATURVEDI J.: This case has come before this Court both on appeal by the accused and under section 374 of the Code of Criminal Procedure for confirmation of the capital sentence passed by the Additional Sessions Judge, Gwalior, on the accused for the offence of murder of one married young Kumhar (Potter) female (Mahila Dhanno) who was fifteen or sixteen years old.

(2) There is no eye-witness to the actual murder and the case depends entirely on circumstantial evidence. The case commenced in the following way.

(3) Babu, P. W. 1, brother of the deceased, lodged a report (Ex. P. 7) in police Station Madhogang, Lashkar at 11 p.m. on 4-2-1950 that his sister Dhanno had gone to sell cow-dung cakes at about twelve (noon) and had not yet returned home. Search amongst relations had proved to have been of no avail. It was added in the report that she had told her mother that she was going towards Jachakhana (Maternity Ward).

(4) On the next day, i.e., on 5-2-1950 the father of the accused, Yashwant Rao Jamdar P. W. 3 aged 55 years approached Thakur Puttusingh, the Superintendent of Police, and the latter sent for the City Kotwal P. W. 10 who on inquiry from Yaswant Rao recorded at 4 p.m. in the Roz Namcha A. M. a report No. 16 dated 5-2-1950 (Ex. P. 12), that the said Yaswant Rao stated that he had gone out of Lashkar and when he returned that day he saw some Kumhars roaming about his house. His son, Narain Rao (the accused) who was convicted in a theft case and was released from jail on 26-1-1950 was there; but he did not give any reply to his questions. It was added that the said Narayan Rao had however locked the stair-case leading to a room, and he was bent upon having a fight but would not open the doors.

(मारने मरने का तैयार है मगर ताला नहीं खोलता)

(5) The Kotwal then went to the house of Yashwant Rao, which was very near the Maternity Ward. In the meanwhile the accused absconded. The Kotwal and the Police with the father of the accused and other persons went inside the house. In the sleeping room of the accused, above his cot, there was a wooden plank fixed on which the basket was found and nearby in a corner were found the cow-dung cakes. Babu, (P. W. 1) identified these as belonging to the deceased. On the left side of the room was a stair-case which was locked. The lock was broken and the party went to the roof. On the left side was a sort of verandah with three doors which were closed. The doors were opened, and after entering a Kotha they found a very small room which was also closed. Opening it the dead body of Mahila Dhanno was found in it. The body was lying on its back. The mouth was stuffed with a handkerchief and on it was tied a langot; eyes were closed; private parts and breast were uncovered and there were many marks of abrasions on both sides of the breast. Dr. V. R. Sapkal (P. W. 2) who performed the autopsy on 6-2-1950 was of opinion that there were nearly ten abrasions on the right side of breast and a big abrasion with a diameter of 1¼" on the nipple left side. This was most probably due to human bite. No scratches or wounds could be detected near the private parts; hymen being old ruptured. The stomach and small intestines and oesophagus were inflamed; lungs, liver, spleen, kidneys being congested. The right side of the heart was full of blood and the left empty. According to him the cause of death was asphyxia and irritant poison. The viscera were sent for chemical examination; and opium was found in them. Examined as a witness Mr. Shankar Rao (P. W. 8), the Chief Chemist, deposed that he was unable to say whether the morphia which he found was the result of partaking of opium in the form in which it is usually taken or of partaking of some preparation containing morphia. He could not tell the quantity of opium taken or the time before death at which it could have been taken. The fatal dose being one grain of morphia or four grains of opium, it is difficult to say whether so much opium or morphia was in fact administered. The police failed to discover any morphia or opium in the house. It is possible that the fatal dose may not have been given but some preparation may have been given in order to break the resistance, if any. The slides containing vaginal discharge were negative for semen and no spermatozoa could be traced. The examination of the Lehenga (लेहंगा) and Dhoti (धोती) of the deceased also indicated the same result.

(6) From the above, it is evident that attempts were made to have sexual intercourse with the unfortunate female forcibly and the deceased continued to resist. Then, in order to silence her, a handkerchief was stuffed into the deceased's mouth and a langot was tied over it. It appears that the female died due to suffocation before the offender could commence sexual intercourse.

(7) Counsel for the appellant, Mr. Ramprakash Saxena, has however argued that as the heart was found full of blood, it should be taken that death could not have been due

to suffocation. It could have been due to opium alone and as there is no evidence that the appellant administered opium, his client should be acquitted.

(8) A perusal of the text books on medical Jurisprudence will show that there is no substance in the argument. Modi in his Medical Jurisprudence (Seventh Edition 1943) at page 175 dealing with "Internal appearance in suffocation" says:

> "The right side of the heart is often full of dark blood and the left empty. The brain is generally congested and so are the abdominal organs, especially the liver, spleen and the kidneys."

(9) Taylor in his Principles and Practice of Medical Jurisprudence, Vol. I (9th Edition 1934) at page 596 writes:

> "Watson observes that the engorged state of the right side of the heart and lungs is greatest when the act of suffocation has been slow and gradual, by the access of air to the lungs not having been completely prevented; when, on the other hand, death has taken place quickly or suddenly there is little or no unusual congestion of blood."

(10) It is clear that the internal appearance in this case could have been of suffocation. It is true that in poisoning by opium the post mortem appearances are typically those of asphyxia due to the paralysing action of opium on the respiratory centre in the meedulla. But it is to be borne in mind that if a fatal dose of opium had been given there would have been smell or odour of opium in the stomach contents; and, in the Post Mortem Report (Ex. P. 11) Dr. Sapkal had clearly mentioned that no particular smell could be detected in the contents of the stomach. Dr. Sapkal in his evidence also could not say anything whether death could have been caused by opium; and the Chief Chemist (Chemist in the Agriculture Research Laboratory) in answer to several questions, replied that he was not a medical man and so could not express any opinion on such points. On the slender data furnished by the testimony of these witness, it cannot be concluded that death of the female Dhanno could have been caused by opium poisoning. The Court has therefore to form its own opinion about the cause of the death after taking into consideration the circumstances in which the corpse was found. As mentioned above, a handkerchief was found stuffed in the mouth of the deceased and a langot was tied over it. In such cases death occurs on an average from 4 to 5 minutes after complete withdrawl of air from the lungs. The tongue of the deceased was also found pressed under the teeth and there were clear appearances of death by suffocation. It is true that ecchymosed spots were not visible any where; but they might have disappeared with putrefaction. According to Post Mortem Report rigor mortis was present and death had taken place within 24 to 48 hours before performing of the autopsy. Taylor in Vol. I page 595 also mentions that the appearance of ecchymosed spots are more strongly marked only if there has been rapid suffocation. In cases of slow and gradual suffocation the substance of the lungs is more congested with blood and then these patches or dots are merged in the general violet colour of the surface of the organs. It, therefore becomes clear that death was definitely due to suffocation and the interruption of breathing had been slow and gradual. From the signs of struggle and resistence in the body of the deceased neither accident nor suicide could be urged as affording a satisfactory explanation of their presence. From the absence of semen or spermatozoa on the clothes of the deceased one is led to the conclusion that the handkerchief was stuffed into the mouth of the deceased in order to silence her and the female died due to suffocation before the offender could commence sexual intercourse. Whosoever the offender is, he must be presumed to have known the natural consequences of his act; but it is difficult to say that the natural consequence of behaving in this way is definitely death. Though the conduct of the offender was most reprehensible and constituted a criminal offence, yet in my opinion he cannot be saddled with the intention or knowledge necessary to constitute an offence under S. 302, I. P. C. The handkerchief seems to have been stuffed in the mouth of the deceased in order to silence her and not with any idea of killing her. The most that can be said then is that the offender must be presumed to have known that he was likely in so doing to cause her death. He was therefore guilty of culpable homicide not amounting to murder. In this view, I am fortified by 'In re Sendoga Gounden', a decision of Ayling and Tyabji JJ., reported in 'AIR (3) 1916 Mad 651: 1915 M W N 621: 30 Ind Cas 438: 16 Cr L J 614'.

(11) I now proceed to discuss whether the accused Narayan Rao can be held responsible for this offence. Narayan Rao had disappeared from Lashkar in the afternoon on 5th Feb. 1950 as soon as his father P. W. 3 went to the police to lodge a report suspecting his compilcity in this murder. After due investigation a warrant was issued against him under sections 302 and 392, I. P C. but it seems the accused could not be arrested for about 3 months. It was the Dewas police that required him in connection with a theft case and got him arrested at Poona in May 1950. He was brought to Gwalior from Dewas and challaned under sections 302 and 392 but was committed under section 302 alone and, as stated above, sentenced to death.

(12) The defence of the accused has been from the beginning that he had left Lashkar on 28th Jan. 1950 and that he has no knowledge that any corpse or dead body was recovered from his house. In my opinion the learned Sessions Judge has rightly disbelieved the defence. In the presence of Ex. P. 12, i.e., the report recorded by the City Kotwal P. W. 10 at the instance of the father of the accused (P. W. 3), the statement of the accused, and, that of his defence witness Vittal Rao D. W. 1 cannot be relied on. The father Yashwant Rao (P. W. 3) supported the substance of the report which has been lodged in the police in the Committing Court. But he turned hostile in the Sessions Court and resiled from the previous statement recorded in the Court of the Committing Magistrate. The Sessions Judge then admitted his deposition before the Committing Magistrate as evidence at the trial under section 288 of the Code of Criminal Procedure. Counsel for the appellant contends that this course was open to objection, and refers to notes 5 and 7 of Chitaley's Commentary on this section in the 1948 edition. He also argues that such a statement should not

have been relied upon in the absence of corroboration. It is true that the power under this section, being one in derogation of the general principle that a Court can only act on the evidence given before it, the decision to let in the previous deposition of a witness under section 288 should be arrived at after careful consideration and only where there are sound and reasonable grounds for such a decision. In this case the Sessions Judge found that there were material changes in the version given by the witness P.W. 3 before it from the version given by him before the Committing Court. It was natural for a father in view of his affection for his son and his obvious desire to save him from the gallows to resile from the previous statement and then to depose that his son was not there on 5th Feb. 1950. Under these circumstances, in my opinion, the Sessions Judge was fully entitled to have recourse to the provisions of section 288 to bring on record the deposition of the witness in the Committing Court. The evidence so brought on record is good evidence and does not require corroboration from other sources. It is a substantive evidence and usable for all purposes; and if the Court finds that the evidence given before the Committing Court was true it can act upon it in preference to the one given before it. 'Parmanand Ganga Prasad v. Emperor', A I R (27) 1940 Nag 340; 'Narinjan Singh v. Emperor', A I R (23) 1936 Lah 357; 'Muhomed Surwar v. Emperor', A I R (29) 1942 Lah 215 and 'Hanuman Prasad v. Crown', A I R (36) 1949 Nag 254. I think that the Sessions Judge was fully justified in admitting the deposition of Yashwant Rao before the Committing Magistrate as evidence and in acting upon it.

(13) From this testimony it is proved beyond doubt that the room from which the dead body of Mahila Dhanno was recovered was exclusively in the possession of the accused and his father. The mother was away at Poona and the father on 4th was absent and the house was, at the time of Mahila Dhanno's death, in the exclusive possession of the accused. Not only the accused knew that the dead body was there, he also locked the staircase so as not to allow any body to go up through the staircase and recover the dead body. It was the duty of the accused to have explained how the dead body came in that portion of the house, which was in his exclusive possession.

(14) Then I would not rely on the evidence of those persons who gave information to the police that they saw Mahila Dhanno going to the house of the accused and subsequently resiled from those statements, but Sakharam P. W. 4 aged 19 or 20 years definitely states (and has stuck to that statement even in the sessions Court) that he is a friend of the accused and that the accused had invited him to come to his house on 4th Feb. in the afternoon for a chat with a girl friend. The witness then deposes that he could not go to his house as he was doing work at his shop but after finishing the work he went in the evening, and when he took tea with him he saw a girl therenear the window, but she was not his friend. According to the witness the accused told him that she is a kumhar girl and after enjoyment (i.e. sexual intercourse) he will let her go. The witness then after finishing his tea went to his house. Nowhere in the cross-examination of this witness, nor in the arguments before us, has the testimony of this witness been in any way, shaken and I am bound to take that testimony as weighing heavily against the accused. A question was put to the accused to give explanation as to why Sakharam should depose against him. No satisfactory reply was forthcoming. The testimony clearly proves that the deceased was seen with the accused on the evening of 4th Feb. 1950.

(15) It is then argued that there were other persons living in the house e.g. D. W. 1 Vithal Rao. I agree with the Sessions Judge that he is an unreliable witness. Any statement of a witness who comes to tell a naked lie that the accused was not present in the house on 5-2-1950 cannot be believed. The evidence of P. W. 3 the father of the accused is cogent and clear to prove that there were only two persons living in the house viz. the witness and his son, the accused.

(16) It is also strenuously urged that the house is in somewhat dilapidated condition and anybody can climb the roof and put the dead body there. First, it has to be borne in mind that the same thing can be said of most of the houses; thieves do climb the roof of many of the houses. Secondly, this circumstance could have been taken into consideration if other circumstances inculpatory of the accused had not been present in this case.

(17) Here, we have a man aged 18 years who was seen with a female in the evening of 4-2-1950 in his house and the accused had told Sakharam that she was a Kumhar female and after sexual intercourse she would be allowed to go. The accused was at that time alone in the house and in the exclusive possession of the house. The deceased a Kumhar lady disappeared that day. Her basket and cow-dung-cakes were found in the house of the accused next day and her dead body was recovered in that house of the accused in a condition which indicated that the lady died after a cloth had been stuffed into her mouth just before sexual intercourse could commence. The accused was suspected by the Kumhars and he had bolted the room and also locked the staircase and would not allow anybody to go in the rooms on the second storey where the corpse was lying. When the father returned home he asked the accused questions to which he did not reply. The accused did not allow even his father to proceed to the second storey. He said he was prepared for a fight but would not unlock the staircase. Disgusted with his son's attitude, the father had to approach the Police. If the accused had been innocent he would have remained there and would have expressed consternation at the recovery of a corpse and would do what he could to make amends. But then the accused absconded like a criminal. All these circumstances are certainly not compatible with his innocence; they are inconsistent with any other reasonable hypothesis than that of the guilt of the accused. I am therefore of the opinion that the accused was responsible for the death of Mst. Dhanno, but should be convicted under S. 304, I. P. C.

(18) In my judgment, therefore the appeal should be allowed in the sense that the conviction under S. 302, I. P. C. and the death sentence should be set aside and a conviction

should be recorded under S. 304 (Part 2) and he should be sentenced to seven years rigorous imprisonment.

(19) DIXIT J.: I agree. On the evidence on record the appellant Narayan Rao's conviction under S. 302, I. P. C. cannot be maintained. He is guilty of the offence of culpable homicide not amounting to murder and for this offence he should be sentenced under S. 304 Part 2, I P. C. to seven years Rigorous Imprisonment.

Conviction altered.

D.H.

[C. N. 14.]

A. I. R. (39) 1952 Madhya Bharat 29

(GWALIOR BENCH)

SHINDE J.

Municipal Committee Shivapuri, Applicant v. Parshadilal Chaturbhuj, Opponent.

Criminal Ref. No. 25 of 1950, D/- 29-1-1951.

† *Municipalities — Gwalior Municipal Act, S. 78 — Proceedings under, for realisation of tax — Criminal or Civil — Revision — Civil P. C. (1908), S. 115 — Cr. P. C. (1898), S. 435.*

A proceeding for realisation of taxes under S. 78, Gwalior Municipal Act is purely a Civil matter and though it is started before a Magistrate he does not exercise any criminal jurisdiction. Consequently, when the matter comes up in revision it should be entertained on the Civil side and not the Criminal side of the High Court. A. I. R. (37) 1950 Bom. 397 (FB). Rel. on. (Para 3)

Anno : Cr. P. C., S. 435, N. 7.

Sahasrabhudhe, for Applicant; Government Advocate Present, Mancharmal Jain, for Opponent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) A I R (15) 1928 Bom 376 : (29 Cri L Jour 1081) (Pr 3)

('39) A I R (26) 1939 Bom 477 : (I L R (1939) Bom 571) (Pr 3)

('50) A I R (37) 1950 Bom 397 : (I L R (1950) Bom 522 F B) (Pr 3)

ORDER : This is a reference under S. 438 of the Code of Criminal Procedure. The Municipal Committee of Shivapuri wrote to the Honorary Municipal Magistrate Shivapuri to realise Rs. 53/12/- due from Parshadilal under section 78 of the Gwalior Municipal Act. Parshadilal by an application dated 10-8-1949 objected to the dues stating that the liability has been wrongly fixed. The municipal magistrate directed the Municipality to produce evidence, in support of the dues. As the municipal committee failed to adduce the evidence the honorary municipal magistrate dismissed the claim of the municipality. The municipal committee Shivapuri preferred a revision against the order of the Municipal magistrate before the Sessions Judge, who has made this referrence for setting aside order of the lower Court.

(2) A preliminary objection has been raised on behalf of Parshadilal on the ground that the reference under section 438, Cri. P. C. cannot be entertained as the proceedings are of a civil nature. Mr. Sahastrabhudhe, who appears on behalf of the municipal committee Shivapuri, contends that as the order of the trial Court is passed by a magistrate it is revisable under section 435 of the Code of Criminal Procedure and hence the preliminary objection has no force.

(3) It is no doubt true that under section 435 of the Code of Criminal Procedure any proceedings before any inferior criminal Court is revisable by the High Court. But the question to consider in this case is whether realisation of a tax is a proceeding before a criminal Court. Section 78 of the Gwalior Municipal Act reads as follows :

"किसी मजिस्ट्रेट के रूबरू जिसको हुदूद म्युनिसिपलटी के अन्दर इख्तार समाअत हासिल हो मिन जानिब कमेटी या मिन जानिब किसी शख्स के जिसको इस बारे में कमेटी की जानिब से आम तौर से या खास तौर से इख्तियार दिया गया हो, दरख्वास्त गुजरने पर कोई बकाया टेक्स मय किसी के जो बतौर कोर्ट फीस या बतौर तलबाना का बिल अख्ज हो बाकी दार की किसी जायदाद मनकूला या गैर मनकूला की कुर्की व नीलाम से जो पैसे मजिस्ट्रेट की हुदूद अर्जी के अन्दर बाके हो, वसूल की जावेगी व कुर्की व नीलाम की कार्रवाही हस्ब अहकाम मजमूआ जाप्ता दीवानी अमल में लाई जावेगी."

Under this section, it is no doubt the municipal magistrate who is authorised to take action. But the action is that of realising a tax. Liability to a tax is a civil matter. The realisation of the tax is also to be carried out in accordance with the provisions of the Civil Procedure Code. Consequently although an action is taken under section 78 by the municipal magistrate, the nature of the proceedings is civil and not criminal. In the case of 'Ahmedabad City Municipality v. Vadilal' their lordships of the Bombay High Court observed as follows :

"We think, however, that this is a matter relating to a civil liability and the intention of the legislature was, under the old section 86, to give only one remedy by way of an appeal to the magistrate or Bench of magistrates." 'Vide A I R (15) 1928 Bom 376.

In 'Lokmanya Mills Ltd. Barsi v. Municipal Borough, Barsi', Beaumont C. J. with whom Wadia J. agreed made the following observations :

"The position is some what anomalous, because the question of liability to tax is a purely civil matter, and the magistrate hearing an appeal against a demand notice is a Criminal Court so that an appeal lies from him to the Sessions Court, and not to the District Court."

His Lordship further added:

"It certainly would seem anomalous that this Court should have jurisdiction to revise a civil order made by a District Judge and a criminal order made by a Sessions Judge, who of course, is the same individual, but should not have power to revise a civil order made by a Sessions Judge sitting under a statute temporarily as civil Court." 'Vide A I R (26) 1939 Bom 477'.

The question in the latter case for consideration was whether a revision under section 115, Civil Procedure Code, can be entertained in respect of an order made regarding a demand

notice. However it has clearly been laid down in both the cases cited above, that the proceedings with regard to demand notice are of civil nature. In 'Dimonte v. Bandra Borough Municipality', A I R (37) 1950 Bom 397 (FB) Chagla C. J. observed as follows :

"Now it cannot be disputed that the subject-matter of the decision of the magistrate is a purely civil matter. He is dealing with rates and taxes. He is not exercising any criminal jurisdiction, nor is he dealing with any criminal matter. Therefore, when the matter comes before us in revision, it is a matter which is civil in its nature; and we see no reason why such a matter should be entertained on the criminal side of the High Court and not on the Civil side."

I respectfully agree with the view taken by their Lordships of the Bombay High Court. The proceedings are no doubt undertaken by the municipal magistrate; but under section 78 of the Municipal Act the municipal magistrate does not exercise any criminal jurisdiction but deals with a purely civil matter. Hence the realisation of dues is not a proceeding before a criminal Court. The preliminary objection, therefore, must be upheld.

(4) In the view that I take the reference under section 438 does not lie.

(5) The reference is, accordingly, rejected.

K.S. *Reference rejected.*

[C. N. 15.]

A. I. R. (39) 1952 Madhya Bharat 30

(GWALIOR BENCH)

ABDUL HAKIM KHAN, J.

Batoolan w/o Jahoor Shah and another Applicants v. Zahoor Shah Roshan Shah, Opponent.

Civil Revn. No. 324 of 1949, D/- 21-8-1951.

(a) Muhammadan Law — Marriage — Option of puberty.

Where a Muhammadan minor girl has been contracted in marriage by the father or grand-father the contract is valid and binding, unless the minor on attaining puberty can establish that it is manifestly to the disadvantage of the minor and that the elders acted negligently or fraudulently. And where the contract of marriage is entered into for a minor by any guardian other than the father or grandfather, the minor possesses the right to repudiate the marriage on attaining puberty and this right is known as 'option of puberty.' (Para 5)

The knowledge of the law is not a condition precedent to the exercise of this right for in order to claim a benefit under the provision of the law, it is not a condition precedent that one should know that law personally. (Para 4)

(b) Muhammadan Law — Suit by husband for restitution of conjugal right — Plea if repudiation of marriage in defence if open.

It is the settled law that the girl can plead the repudiation of marriage in exercise of option of puberty in defence of her husband's suit against her for restitution of conjugal right and the Court may in that suit declare that the marriage has been annulled or repudiated. 19 Cal 79 Rel. on. (Para 7)

(c) Muhammadan Law — Marriage — Minor girl given away in marriage by unauthorised person — Validity of marriage.

A Muhammadan minor girl can be validly married by the father or grand-father or other guardians that have been enumerated in Muhammadan law. But, if the girl is given away in marriage by one who has no authority to do so, such a marriage through an unauthorised intermediary is to be regarded as void. Subsequent ratification may cure the defect. AIR (21) 1934 All 589, Rel. on. (Para 8)

Abdul Hafeez, for Applicants. Amanatullah Quaraishy, for Opponent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('34) AIR (21) 1934 All 589 : (35 Cr L J 1053) (Pr 8)
('92) 19 Cal 79 (Pr 7)

ORDER: The facts leading to this revision are that Zahoor Shah, the plaintiff brought this suit against Mt. Batoolan for the restitution of conjugal rights. He alleged that about 3 years ago, he was married to the defendant No. 1 (Mt. Batoolan), on a dower of Rs. 200/-, that for sometime, the said Batoolan lived with him and later on defendant No. 2, Masoom Shah took her away and now refuses to send her to him. Of the many pleas taken by defendant No. 1, one relates to the right of 'option of puberty', alleged to have been exercised by Mt. Batoolan, repudiating the marriage, and, it is the decision of the lower Courts on this point that has given rise to this revision.

(2) The trial Court in considering this plea has said that Mr. Batoolan is a girl of 16-17 years, who lives by making Pattals out of green leaves, she is unlettered and uneducated, she can only fix her thumb impression — how can such a person be conversant with the principles of Muhammadan law and not knowing them how can she be expected to have exercised the 'option of puberty.' The learned District Judge, without considering the plea in all its seriousness, merely added that 'option' should be exercised without unreasonable delay and that there should be confirmation of it by a decree of the Court and because both these facts do not exist in this case, the plea is not of any avail.

(3) Leaving aside the question what Muhammadan law is on the point, the learned trial Court in expressing the view, that because Mt. Batoolan did not know the principles of Muhammadan law, therefore, she cannot be assumed to have exercised the right under the law, has ignored the too well-known legal maxim : Ignorance of law is no excuse. Everyone is supposed to know law and if one cannot plead ignorance of law by way of excuse, it follows, as a necessary corollary to it that one cannot be deprived of a right that some law may confer on him merely on the ground that he did not know the law.

(4) Considering the point from the angle of Muhammadan law, I would refer to Hamilton's Hedaya, page 104, from which the following passage is quoted :

"The Imam (Imam Mohammad, the second' well-known disciple of Imam Aboo Hanifa) does not make knowledge of the right of option a condition, because that is an institute of the law, with which it is supposed that every person ought to be acquainted."

What from the view of the general legal maxim and what from the point of view of Muhammadan law, which is specific on the point — it is established beyond doubt that in order to claim some benefit under the provision of some law, it is not a condition precedent that one should know that law personally. I have no doubt that the judgment of the trial Court proceeds on a wrong basis.

(5) Let us now consider what is 'option of puberty.' In order to appreciate its significance, we may consider the lines on which the Moslem matrimonial law developed. The trend of Moslem jurisprudence has been to liberalize the law of marriage generally and in particular to give some

rights to women which they never enjoyed. The right known as 'Khyarul Baloogh' or 'option of puberty' is peculiar to Moslem legal conception. In Arabic, the women were treated as chattels and on the demise of their husbands, they were treated as property divisable among heirs. But Muhammadan law took a different view of the matter and redeemed the women from the thraldom of centuries. Marriage, among Muhammadans, is regarded essentially as a civil contract. In pursuance to this, it was laid down by Muhammadan jurists that where a minor had been contracted in marriage by the father or grand-father, the contract was valid and binding, unless the minor on attaining pubery could establish that it was manifestly to the disadvantage of the minor and that the elders acted negligently or fraudulently. And where the contract of marriage was entered into for a minor by any guardian other than the father or grandfather, the minor possessed the right to repudiate the marriage on attaining puberty and this right is known as 'option of puberty.' The right given to a minor to repudiate the contract of marriage on attaining puberty marks the liberalisation of law relating to matrimony. On one hand it encouraged the principle of mutual liking, which is regarded as a sure foundation of a happy married life, and, on the other it put a curb on the tendency prevalent in ancient society to perpetuate child-marriage, for fear of its repudiation by either party on attaining majority.

(6) There is evidence on record that defendant No. 1 (Mt. Batoolan) exercised her 'option of puberty', but the trial Court dismissed it as being of no consequence because she was illiterate and did not know Moslem law. But it has been said before that knowledge of the law is not a condition precedent to the exercise of the right she possessed.

(7) The learned District Judge has expressed the view that in order to be effective the repudiation should be confirmed by Court. There is some conflict as to whether a judicial order is necessary to effectuate cancellation. On one hand, "Fatawa-i-Alamgiri says that such an order is necessary. On the other hand "Radul Muhtar (a treatise on Muhammadan law) explains the position by saying that a judicial declaration is not needed for imparting validity to an act which the parties have power to do, but to provide judicial evidence in order to prevent further disputes." Anyway it may now be taken to be the settled law that the girl can plead the repudiation in defence of her husband's suit against her for restitution of conjugal right and the Court may in that suit declare that the marriage has been annulled or repudiated. 'Badal Aurat v. Queen Empress', 19 Cal 79. I am, therefore, of opinion that she can take the plea of repudiation in this case.

(8) Apart from the above considerations, a vital aspect of the matter has escaped the notice of the lower Courts and it must be considered also because it goes to the root of the question. Was Mt. Batoolon validly married? Her age at the time she gave her statement before the Court is 16-17 years. The plaint alleges that she was married 3 years before the commencement of these proceedings. Thus her age at the time of her marriage was 13-14 years, and, therefore she was undoubtedly a minor. Now a minor can be validly married by the father or grand-father or other guardians that have been enumerated in Muhammadan law. But it is alleged that defendant No. 2, Masoon Shah gave the minor girl in marriage to the plaintiff and Masoom Shah is neither the father, the grand-father, nor any of the guardians prescribed by Muhammadan law. He is a total stranger, who took pity on the girl and in the absence of the girl's parents brought her up. (See the statement of Mt. Batoolan on Index No. 8.) Now a contract of marriage according to Muhammadan law may be made either directly or through an agent, who can be appointed for that purpose by the parties to the marriage. The girl in this case was admittedly a minor and she was in consequence unable to appoint an agent. In this view of the matter, when Masoon Shah gave this girl away in marriage, he had no authority to do so and marriage through an unauthorised intermediary should be regarded as void. Subsequent ratification may cure the defect, but not only is there no evidence of it — the girl positively repudiates it. For these reasons I cannot regard this to be a valid marriage at all. See 'Shafiullah v. Emperor', A I R (21) 1934 All 589.

(9) In the view that I take of the matter, I hold that the marriage between the plaintiff and the defendant No. 1 (Mt. Batoolan) was not a valid one in the first instance, that even if it was valid, the girl having exercised her 'option of puberty' the suit for the restitution of conjugal right must fail. For either or both of the reasons, the plaintiff should be non-suited. Having regard to the peculiar circumstances of the case, I order that the parties shall bear their own costs throughout. Revision is allowed and the suit is dismissed.

V.S.B. *Revision allowed.*

[C. N. 16.]

A. I. R. (39) 1952 Madhya Bharat 31

(GWALIOR BENCH)

SHINDE AND DIXIT JJ.

Anand Bihari Mishra, Applicant v. Ram Sahay, Non-Applicant.

Misc. Appln. No. 3 of 1950, D/- 12-10-1951.

(a) (Madhya Bharat) Interim Legislative Assembly Act (XXIII (23) of 1949), Ss. 3, 4— Continuance of Act after Constitution

The Rulers, who were party to the Covenant, agreed by the Supplementary Covenant to adopt and enforce the Constitution of India in Madhya Bharat. The substitution has the effect that Para. (1) of Art. X of the old Covenant has never been in existence. As the legislature is to be subject to the provisions of the Covenant according to S. 3 of the Interim Legislative Assembly Act, S. 4 has become superfluous and inoperative. These provisions of Ss. 3 and 4 of the Interim Legislative Assembly Act, therefore, are not inconsistent with any provisions of the Constitution and offer no bar to the continuance of the Interim Legislative Assembly Act under Art. 372 of the Constitution. The Act was passed by a competent authority before the commencement of the Constitution and has not been previously repealed. Hence it continues in force even after the commencement of the Constitution. **(Para 6)**

(b) Constitution of India, Art. 385 — Election of new president — Necessity.

Under Art. 385 the old body is to continue to exercise the powers under the Constitution. The body functioning as the legislature includes even the speaker. Object of the article is to import into the Union the old legislative machinery in Part B States lock, stock and barrel. Besides the Interim Legislative Assembly Act has continued in force under Art. 372. Hence the President elected under the Interim Legislative Assembly Act also continues ipso facto. **(Para 6)**

(c) Constitution of India, Arts. 178, 385 — Applicability of the Art. 178.

Article 178 is attracted only when a legislative Assembly is constituted under the provisions of the Constitution. Article 385 purports to continue the old legislative body as a whole. Hence Art. 178 has no application in such a case. (Para 8)

(d) *Constitution (Removal of Difficulties) Order No. II — Coming into force of — General Clauses Act (1897), S. 5 (3).*

The Order came into force immediately on the expiration of 25th January 1950 and not after 10 a.m. on 26th January 1950 when the President took the oath. A I R (37) 1950 Cal 274, A I R (37) 1950 Pat 265, Ref. (Para 9)

Anno : G. C. Act, S. 5, N. 1.

(e) *Constitution of India, Art. 392 — Difficulty — Test to be applied.*

Article 392 gives power to the President to remove the difficulties. Naturally it is the President who has to decide whether there is a difficulty or not. Hence it is the subjective test and not the objective test that is to be applied. If the President is of the opinion that there was a difficulty, he certainly could issue an Order under Art. 392. (Para 11)

(f) *Constitution of India, Art. 392 — "Modification" — What constitutes.*

The word 'modify' conveys the sense of a partial change and not a complete change. Now although the Constitution (Removal of difficulties) Order No. II states that "for Art. 178 substitute the following", in actual fact the substituted form is only a modification of Art. 178. All that the Order does is to dispense with the first part and retain the latter. The adaptation of Art. 178 is only by a modification. (Para 12)

(g) *Constitution of India, Art. 392 — Power under — Extent of.*

It cannot be said that under Art. 392 power of adaptation is given only to remove difficulties in relation to the transition from the provisions of the Government of India Act 1935 to the provisions of the Constitution. The language clearly shows that the power is general. The mention of one particular instance in which it can be used does not circumscribe it. (Para 13)

(h) *Constitution of India, Art. 188 — Applicability.*

Article 188 is essentially meant to apply to legislatures constituted under the Constitution. It does not apply to old legislatures continued by virtue of Arts. 372 and 385. If the members of the speaker had taken oath in accordance with the provisions of Interim Legislative Assembly Act, they can validly continue to be members or speaker of the said Assembly even after the commencement of the Constitution. (Para 15)

(i) *Constitution of India, Arts. 188, 226 — Refusal to take oath — Information in the nature of quo warranto — Interim legislative Assembly Act (XXIII (23) of 1949), S. 11.*

If the oath under Art. 188 is not taken, a member does not cease to be a member. The penalty is prescribed in Art. 193. Under S. 11 of the Interim Legislative Assembly Act also the Government has been given a discretion to declare his seat vacant. But failure to make the oath does not ipso facto render his seat vacant. In these circumstances even if a member did not take the requisite oath an information would be futile in its results and hence no information in the nature of a quo warranto would lie. (Para 16)

(j) *Constitution of India, Art. 226 — Information in the nature of quo warranto — Office of speaker. (Per Shinde J.) Information in the nature of quo warranto can be issued in respect of the office of the speaker of Legislative Assembly as that office satisfies the requisite conditions.* (Para 20)

(k) *Constitution of India, Art. 392 (1) — "Whether by way of modification, addition or omission".*

(Per Dixit J.) The words "whether by way of modification, addition, or omission" in Art. 392 (2) are sufficiently comprehensive to include an adaptation by way of substitution. For, after all, substitution of one Article of the Constitution by another is in substance nothing but an omission of one Article and the addition in its place of another. (Para 33)

(l) *Constitution of India, Art. 392 (1) — Transition — Madhya Bharat State.*

(Per Dixit J.) During the period from 15-8-47 to 26-1-50, the transformation in the status of Madhya Bharat state, as of other former Indian States, from that of an Acceded State to the Dominion of India to a state specified in Part B of the First Schedule of the Constitution, the transition is from the provisions of the Government of India, Act, 1935 to the provisions of the Constitution, by virtue of the Instruments of Accession executed by the Rulers of the Indian States and subsequently by the Raj Pramukhs and subject to their terms, the Governor General of India, the Dominion Legislature, the Federal Court, and the other Dominion Authorities exercised in relation to the States and in respect of the matters mentioned in list I and List III of the Seventh Schedule of the Government of India, the functions that were vested in them by or under the Government of India Act, 1935. (Para 34)

(m) *Interpretation of Statutes — Constitution Statutes — Civil P. C. (1908) Pre.*

(Per Dixit J.) Where the words of an Article of the Constitution are plain, effect must be given to them. The Court would not be justified in depriving the words of their only proper meaning in order to give effect to some intention of the framers of the Constitution which they omitted to express. The Court is not entitled to read words into an article unless there is some clear reason for it in the Constitution itself. (Para 37)

Anno : C. P. C., Pre. N. 7.

(n) *Constitution of India, Art. 372 — Explanation III — Applicability — Explanation not applicable to Interim Legislative Assembly Act (XXIII (23) of 1949).* (Para 3)

(o) *Constitution of India, Art. 188 — "According to the form" — Meaning of.*

(Per Dixit J.) The expression "according to the form", does not mean "in the form", that is, a verbal and literal following of the form set out in the Third Schedule. It means the substantial following of the form. In other words, the Article means that the form set out in the Third Schedule or any form as near thereto as circumstances admit, shall be used in taking an oath or affirmation under the article (Para 41)

(p) *Constitution of India, Art. 212 — Jurisdiction of Court.*

(Per Dixit J.)— The validity of the proceedings of the Legislature can be called in question on a ground other than the ground of an irregularity of procedure. Thus, the proceedings would not be protected if they are held in defiance of the provisions of the Constitution or by exercising some powers which the Legislature under the Constitution does not possess. (Para 43)

(q) *Constitution of India, Art. 194 — Privileges of members — Extent of.*

(Per Dixit J.)— Under Art. 194, the powers, privileges, and immunities of State Legislatures and their members are not absolute. They are subject to the provisions of the Constitution and are modified by the fundamental principle that it is the Constitution which is Supreme and not the Legislature. It cannot, therefore, be inferred from the possession of certain powers and privileges by the House of Commons of the Parliament of the United Kingdom, that the like powers necessarily belong to the Legislatures under the Constitution. If a power or privilege claimed by the Legislature is clearly repugnant to the Constitution, then, notwithstanding the fact that it is one which the House of Commons enjoyed at the commencement of the Constitution, it must be denied to the Legislatures. (Para 43)

(r) *Constitution of India, Arts. 188, 212 — Failure to take oath — Jurisdiction of Court to interfere.*

(Per Dixit J.) : If the speaker has not taken an oath in conformity with Art. 188, it is for the Legislature to prevent him from taking his seat and performing the duties and exercising the powers of the Speaker and the High Court has no jurisdiction to interfere in this mater falling within the ambit of the internal affairs of the House. (Para 44)

(s) *Constitution of India, Arts. 212, 385 — Question regarding status of member — Jurisdiction of Court.*

(Per Dixit J.)— Under the Constitution, it is the duty of the High Court faithfully to expound and give effect to it according to its own terms. The question as to the legality of the continuance of a person in the office of speaker under Art. 385 is not one relating to the internal affairs of the Assembly. The question raised is one of declaring the status of a person on the interpretation of the Constitution and the High Court can declare whether under the Constitution a person has or has not the status of the Speaker of the Assembly. (Para 46)

(t) *Constitution of India, Art. 226 — Order restraining person acting in an office.*

(Per Dixit J)— Quite apart from the principles of English Law governing the issue of a writ of quo warranto, it is clear from the wide scope of Art. 226 that the High Court has the power to issue an order restraining any person acting in an office in which he is not entitled to act and also, if the case so requires declaring the office vacant, where the office said to be usurped, has been created by the Constitution itself with certain functions and duties attached to it. AIR (38) 1951 Madh B 121, FB. Rel. on. (Para 47)

***K. A. Chitale** Advocate General, for intervener the State of Madhya Bharat; Shiv Dayal, for Non-Applicant.*

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) AIR (37) 1950 Cal 274 : (51 Cri L J 1110 S B) (Prs 9, 39)
('51) AIR (38) 1951 Madh B 121 : (52 Cri L J 1305 F B) (Pr 47)
('50) AIR (37) 1950 Orissa 157 : (51 Cri L J 1189 F B) (Pr 39)
('50) AIR (37) 1950 Pat 265 : (51 Cr L J 1081) (Prs 9, 39)
('50) 5 D L R (Tr) 402 : (AIR (39) 1952 Tran-C 66) (Prs 14, 38)
(1916) 1 K B 595 : (85 L J K B 630) (Pr 47)
(1935) 1 K B 594 : (104 L J K B 244) (Pr 40)
(1851) 17 Q B 149 : (117 E R 1238) (Pr 47)
(1884) 12 Q B D 271 : (53 L J Q B 209) (Prs 40, 45)

SHINDE J.: The petitioner Shri Anand Bihari Mishra advocate and member of the Interim Legislative Assembly Madhya Bharat has filed this petition for the issue of an information in the nature of quo warranto against Shri Ramsahai to enquire by what authority he supported his claim to the office of a speaker of the Legislative Assembly of Madhya Bharat in order that the right to the office may be determined. The petitioner alleges that the body functioning immediately before the Constitution of India as the Legislative Assembly of Madhya Bharat was the Legislative Assembly constituted under the Interim Legislative Assembly Act No. 23 of 1949. Shri Ramsahai was holding the office of a president of that Assembly. On the commencement of the constitution on 26th January, 1950 Interim Legislative Assembly Act terminated and as Art. 385 of the Constitution of India does not make any provision for the President to continue as Art. 382 of the Constitution does, Shri Ram Sahai had no right to be the speaker of the Legislative Assembly of Madhya Bharat. Nevertheless the counter-petitioner had, since the commencement of the constitution, occupied and continues to occupy the speaker's chair. Shri Ram Sahai has also not made and subscribed the oath required by Art. 188 of the Constitution of India. This conduct of Shri Ram Sahai amounts to an illegal usurpation of a public office.

(2) In order to fully appreciate the force of Mr. Anand Bihari's arguments it is necessary to outline the history of the Madhya Bharat Legislature immediately before the advent of the Constitution.

(3) The Rulers of Gwalior, Indore and certain other States in Central India entered into a Covenant whereby they united their territories in one State with a common Executive Legislature and judiciary and named it "The United State of Gwalior, Indore and Malwa" (Madhya Bharat). By this Covenant which was entered into in 1948, the Rulers agreed to make over the administration of their States to the Rai Pramukh at the latest by the 1st of July 1948. Article X of the said Covenant provided for the formation of a Constituent Assembly to frame a constitution for Madhya Bharat. The said Article also provided for the constitution of an Interim Legislative Assembly which was to be dissolved automatically on the formation of the Constituent Assembly. In pursuance of this article first an Interim Legislative Assembly Ordinance and then the Interim

Legislative Assembly Act No. 23 of 1949 were enacted. Later on the original Covenant was modified by a supplementary Covenant and it was agreed that the Constitution of India adopted by the Constituent Assembly of India would be the Constitution for the United State of Madhya Bharat. Suitable consequential amendments in the original Covenant were also made by this supplementary Covenant.

(4) Mr. Anand Bihari contends that at mid-night on the 25th January, 1950 the Interim Legislative Assembly Act No. 23 of 1949 ceased to be operative and as Art. 385 does not make any provision for the speaker to continue as Art. 382 does, Mr. Ram Sahai, the President of the Interim Legislative Assembly, ceased to be the President of the New Legislature formed under the Constitution. He further contends that the President of India took the oath at about 10 a.m. and hence the Constitution (Removal of Difficulties) Order No. II issued on the 26th January 1950 could only be issued after 10 a.m. There was thus a vacuum left from the mid-night till 10 a.m. during which period original Art. 178 came into force. Hence the Madhya Bharat Legislature should have elected a speaker as enjoined by Art. 178.

(5) Article 372 lays down that:

"Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

Exception I defines the expression "law in force." It says:

"The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

It is clear that all the law in force in the territory of India immediately before the commencement of the Constitution is to continue in force until altered or repealed subject to the provision of the Constitution. For instance, if any provision of the law in force is inconsistent with any provision of Part III, it will be void under Art. 13 (1). Three inconsistencies have been pointed out in the Interim Legislative Act by the petitioner. One is that the Act lays down that it is to be subject to the provisions of the Covenant (Vide S. 3 of the Interim Legislative Assembly Act); the other is that the legislature is to consist of the Raj Pramukh and the Assembly (Vide S. 3 of the Interim Legislative Assembly Act); the third is that the Assembly is to be dissolved on the formation of the Constituent Assembly referred to in Para. 1 of the Art. X of the Covenant (Vide S. 4 of the Interim Legislative Assembly Act). It is true that the Interim Legislative Assembly is to be subject to the provisions of the Covenant. But that provision has not been shown to offend against any provision of the Constitution. Art. 238 (7) lays down:

"For every State there shall be a Legislature which shall consist of the Rajpramukh and;

(a) in the State of Mysore, two houses;
(b) in other States, one Houses."

Far from being inconsistent, it is actually in keeping with the provision of the Constitution. Section 4 of the Interim Legislative Assembly Act lays down the duration of the Legislature. Shri Anand Bihari is obviously unaware of the fact that this section is no longer in force. The original Covenant has been modified by a supplementary Covenant. Article 1 of this Supplementary Covenant is as follows:

"Article I. Notwithstanding anything contained in the original Covenant, the Constitution of India adopted by the Constituent Assembly of India shall be the Constitution for the United State of Madhya Bharat, and shall be enforced as such in accordance with the tenor of its provisions; and accordingly all references in the original Covenant to the Constitution framed thereunder shall be construed as references to the constitution of India."

Article II reads thus:

"Article II.

In Art. X of the original covenant:

(a) for paragraph (1), the following paragraph shall be substituted and shall be deemed always to have been substituted, namely:

"(1) There shall be a Legislature for the United State consisting of the Raj Pramukh and a Legislative Assembly", and

(b) in paragraph (3) for the words beginning with the words "Upon the formation" and ending with the words "assent of the Rajpramukh", the words "Until the commencement of the Constitution of India" shall be substituted, and the words "or as the case may be, the Constituent Assembly" shall be omitted"

Article III reads thus:

"Article III.

Schedule III to the original Covenant shall be omitted."

It is evident that the Rulers, who were party to the Covenant agreed by this Supplementary Covenant to adopt and enforce the Constitution of India in Madhya Bharat. Paragraph 1 article X of the Covenant now reads as follows:

"There shall be a Legislature for the United State consisting of the Raj Pramukh and a Legislative Assembly."

The supplementary Covenant also predicates that this paragraph shall be deemed always to have been substituted. This substitution has the effect that para. (1) of Article X of the old Covenant has never been in existence. As the legislature is to be subject to the provisions of the Covenant according to S. 3 of the Interim Legislative Assembly Act, S. 4 has become superfluous and inoperative. These provisions of Ss. 3 and 4 of the Interim Legislative Assembly Act, therefore, are not inconsistent with any provisions of the Constitution and offer no bar to the continuance of the Interim Legislative Assembly Act under Art. 372 of the Constitution. The Act was passed by a competent authority before the commencement of the Constitution and has not been previously repealed. Hence it continues in force even after the commencement of the Constitution.

(6) Having thus come to the conclusion that the Interim Legislative Assembly Act still continues in force, other contentions of Mr. Anand

Bihari are deprived of much of their force. I shall however, deal with them one by one. Art. 385 runs as follows:

> "Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

It lays down that until the House of the Legislature has been duly constituted and summoned to meet for the first session under the provisions of this constitution, the body or authority functioning immediately before the commencement of this constitution as the Legislature shall exercise the powers and perform the duties conferred by the Constitution on the House of the Legislature of the State. This article makes it abundantly clear that the body functioning as the Legislature is to exercise the power and perform duties conferred by the Constitution. This article does not contemplate creating a new body under the Constitution to function as the Legislature. It continues the old one; but it has been empowered to function as the legislature under the constitution until the legislature is duly constituted under the provisions of the constitution. The question of electing a speaker, therefore, does not arise at all. The old body is to continue to exercise the powers under the constitution. The wording of Art. 382 is different. It says the House or Houses of the Legislature shall exercise the powers. The House of the Legislature may or may not include a speaker. Besides as the Government of India Act of 1935 and the Indian Independence Act of 1947 by which these legislatures were constituted were repealed, it was necessary to provide for the continuance of the speaker in Part A States. Article 385 states that the body or authoriy functioning as the legislature is to exercise the powers under the constitution. The body functioning as the legislature includes, in my opinion even the speaker. Article 385 deals with different kinds of legislative bodies. It purports to deal with legislative bodies which may be elected, semi-elected or nominated. In such legislative bodies the speaker may be elected or nominated by a Ruler. Consequently the article contemplates continuing legislatures as they were constituted. Its object is to import into the Union the old legislative machinery in Part B States lock, stock and barrel. Besides the Interim Legislative Assembly Act has continued in force under art. 372 as already stated. Hence the President elected under the Act also continues ipso facto. This argument has, therefore, no force.

(7) I would like to clear one point before proceeding to consider other contentions urged by Mr. Anand Bihari. The petitioner argued that the legislature contemplated by Art. 385 is a new legislature and it is this new legislature that is empowered to exercise the powers under the constitution. This argument, in the face of the clear wording of article 385, is not tenable. The article does not create a new legislature. It gives power to the old legislature to exercise powers under the constitution. The opening words

> "until the House or Houses of the legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this constitution"

taken along with the words

> "the body or authority functioning immediately before the commencement of this constitution as the legislature of the corresponding Indian State"

make it amply clear that it is the old legislature that is continued. Besides if the article had contemplated constituting a new legislature under the constitution, it was unnecessary to state that it shall exercise the powers given by the constitution. On the contrary conferment of powers under the constitution denotes that it is the old legislature that is contemplated by article 385.

(8) The next contention put forward by Mr. Anand Bihari is that the Constitution (Removal of Difficulties) order No. II issued on the 26th January, 1950 came into force after 10 A. M. and thus left a vaccum from mid-night till 10 A. M.; as the constitution came into force at midnight, article 178 became operative; hence the Interim Legislative Assembly should have elected a speaker. This argument proceeds on the assumption that the Interim Legislative Assembly Act or S. 8 of the said Act, which provides for the election of a President, ceased to operate. As already pointed out the Interim Legislative Assembly Act continues in force even after the commencement of the constitution. Section 8 of the said Act also continues in force as it is not repugnant to any of the provisions of the Constitution. Article 178 is attracted only when a Legislative Assembly is constituted under the provisions of the constitution. Article 385 purports to continue the old legislative body as a whole. Hence article 178 has no application.

(9) The argument that the Constitution (Removal of Difficulties) Order No. II came into force after 10 A. M. is also fallacious. Article 380 provides that such person as the Constituent Assembly of the Dominion of India shall have elected in that behalf shall be the President of India until a president has been elected in accordance with the provisions contained in chapter 1 of Part V and has entered upon his office. This clearly lays down that a person elected by the Constituent Assembly of the Dominion of India is to be the President of India. The article prescribes no restrictions such as taking of oath as laid down in Art. 60 of the Constitution. The Constitution (Removal of Difficulties) Order No. I however lays down that the person elected shall, before entering upon his office, make and subscribe the oath prescribed in Art. 60. Consequently the President has to take the oath before entering upon his office. Article 367 however provides for the contingency. This article makes the General Clauses Act of 1897 applicable to the Constitution. Section 5 (3) of the General Clauses Act states that unless the contrary is expressed a central Act or Regulation shall be construed as coming into operation immediatedly on the expiration of the day preceding its commencement. This implies that the Constitution (Removal of Difficulties) Order No. II issued on the 26th January, 1950 came into force immediately on the expiration of the 25th. In this

view of the matter there is no vaccum left. The petitioner referred us to 'Sunil Kumar Bose v. The Cnief Secy. to the Govt. of West Bengal', AIR (37) 1950 Cal 274 and 'Brahmeshwar Prasad v. State of Bihar', AIR (37) 1950 Pat 265. In both the cases their Lordships of the Calcutta and Patna High Court were dealing with provisions of enactments, which were void because of their repugnancy to the constitution. They had held that as the president could make no valid order until after 10-15 A.M. on the 26th (when he took the oath), the subsequent order could not vivify the Act, which had become void simultaneously with the constitution coming into force. Both these decisions do not apply to the present case as none of the provisions of the Interim Legislative Assembly Act had become void because of repugnancy.

(10) The Constitution (Removal of Difficulties) Order No. II provides that for Art. 178 substitute:

"178. The speaker and the Deputy Speaker of the Legislative Assembly: So often as the office of the speaker or Deputy speaker of the Legislative Assembly of a State becomes vacant, the Assembly of a State becomes thereof to be its speaker or Deputy speaker, as the case may be."

This provision is to be construed to have come into force at midnight on the 25-1-1950 by virtue of S. 5 of the General Clauses Act. What this order in effect did is to delete the first portion of Art. 178 and to retain the last one. As that part of the article, which requires a Legislative Assembly to choose a speaker, is not in force from the midnight of the 25th, the argument of the petitioner falls to the ground. Election of a speaker is to be held only when there is a vacancy. Therefore even if it be conceded that article 178 is applicable to the Interim Legislative Assembly, election of a speaker is not necessary as the office has not fallen vacant.

(11) The petitioner also contends that the President had no power to issue the Constitution (Removal of Difficulties) Order No. II. He argues that in issuing the said order he has exceeded the power conferred by Art. 392 of the Constitution. His first objection is that there was no difficulty to remove and hence the Order should not have been issued. Article 392 runs thus:

"1. The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient".

The question is whether a subjective test or an objective test is to be applied to see whether there is a difficulty or not. Article 392 gives power to the President to remove the difficulties. Naturally it is the President who has to decide whether there is a difficulty or not. Hence it is the subjective test that is to be applied. If therefore the President was of the opinion that there was a difficulty, he certainly could issue an order under Art. 392. This objection, therefore, has no force.

(12) Another objection to the issue of the order is that the President substituted a new article for the original Art. 178 which he has no power to do under Art. 392. Mr. Anand Bihari argues that adaptations can be made only by modification, addition or omission; but not by substitution. The word modify conveys the sense of a partial change and not a complete change. Now although the Constitution (Removal of Difficulties) Order No. II states that for Art. 178 substitute the following, in actual fact the substituted form is only a modification of Art. 178. As already stated in the earlier part of this judgment, all that the order does is to dispense with the first part and retain the latter. The adaptation of Art. 178 is only by a modification. Consequently there is no room for this objection.

(13) The last objection to the issue of the Order is that under Art. 392 power of adaptation is given only to remove difficulties in relation to the transition from the provisions of the Government of India Act, 1935 to the provisions of this Constitution. Article 392 has already been reproduced. It says the president may, for the purpose of removing any difficulties 'particularly' in relation to the transition from the provisions of the Government of India Act 1935 to the provisions of this Constitution, by order direct etc. etc. This language clearly shows that the power is general. The mention of one particular instance in which it can be used does not circumscribe it. Hence this objection also cannot be accepted.

(14) The first contention, therefore, cannot be accepted. The Constitution has actually provided by Art. 372 for the continuance of all laws in force as long as they are not repugnant to any of the provisions of the Constitution. Consequently there is no doubt that the Interim Legislative Assembly Act of 1949 continued in force even after the commencement of the constitution. The Interim Legislative Assembly Act therefore continued even after the commencement of the constitution. Article 385 empowers the old legislatures to exercise powers under the Constitution. As Art. 385 intended to continue the entire legislative machinery, it was not necessary to elect a speaker on the commencement of the constitution. Besides Art. 178, by virtue of which election is claimed, being no longer in force since the inception of the constitution, election cannot be claimed under Art. 178. The objections to the issue of the Constitution (Removal of Difficulties) Order No. II are devoid of any force. In 'A. Nesamony v. T. M. Varghese', 1950 DLR (Tr) 402, Govinda Pillai J. observed as follows:

"After a careful consideration of the several provisions of the Constitution of India and the subsequent orders passed by the President by virtue of the powers vested to him under the provisions of the Constitution it does not apear to me that the absence of a provision in Art. 385, Constitution of India for the continuance of the speaker of the Legislative Assembly of Travancore-Cochin State would in any way affect his continuance as such. The provisions relating to the same in Arts. 379 and 382 were necessitated because of the repeal of the Acts of 1935 and 1947 referred to already."

The first contention, therefore, must be rejected.

(15) The second contention of the petitioner is that Shri Ram Sahai did not take the requisite oath and hence his occupation of the office is illegal. Article 188 lays down that every member of the Legislative Assembly shall be-

fore taking his seat make and subscribe before the Governor an oath or affirmation according to the form set out for the purpose in the Third Schedule. This article is essentially meant to apply to legislatures constituted under the Constitution. In my judgment it does not apply to old legislatures continued by virtue of Arts. 372 and 385. As already stated it was the old legislative machinery which was continued and was empowered to exercise powers under the Constitution. Besides under Art. 372 the Indian Legislative Assembly Act of 1949 continued in force. If the members or the speaker had taken oath in accordance with the provisions of that Act, they can validly continue to be members or speaker of the said Assembly even after the commencement of the Constitution. It may also be mentioned here that Shri Ram Sahai actually did take the oath. He took the oath in the form prescribed in the third schedule with the modification that instead of calling himself a member he called himself a speaker. There is no special form prescribed for a speaker in the Constitution. This contention, therefore, has no substance.

(16) Even if it be conceded that Shri Ram Sahai did not take the requisite oath, can a rule for information in the nature of quo warranto be issued? If the oath is not taken, a member does not cease to be a member. The penalty is prescribed in Art. 193. It states that a member, who, without complying with the requirements of Art. 188, sits or votes, shall be liable in respect of each day on which he so sits or votes to a penalty of Rs. 500/-. Section 11 of the Interim Legislative Assembly Act lays down that if a member fails to make the oath, the Government may by notification in the Gazette declare his seat vacant. Under the Interim Legislative Assembly Act the Government has been given a discretion to declare his seat vacant. But failure to make the oath does not ipso facto render his seat vacant. In these circumstances an information would be futile in its results and hence no information in the nature of a quo warranto would lie.

(17-20) The learned Advocate General opposes the petition on the ground that the office of the speaker is not an office under the Crown i.e. the Executive; hence no information in the nature of quo warranto would lie. An information in the nature of quo warranto will lie in respect of any particular office when that office satisfies the following conditions: (1) The office must have been created by charter from the Crown or by Statute. (2) The duties of the office must be of a public nature. (3) The office must be one the tenure of which is permanent' in the sense of not being terminable at pleasure. (4) The person proceeded against has been in actual possession and user of the particular office in question (Vide Halsbury's Laws of England, Vol. X 1909 Edn. pages 129 and 130 and 131). The office of the speaker has been created by statute. Article 178 of the Constitution and S. 6 of the Interim Legislative Assembly Act of Madhya Bharat provide for it. That the duties of the office of a speaker are of a public nature is not disputed by the Advocate General. The third and the fourth requisite conditions are also fulfilled in the present case. In these circumstances the objection of the Advocate General cannot be sustained.

(21) In the result I see no ground to confirm the rule. The rule is, therefore, discharged and the petition is dismissed with costs. Advocate's fee is assessed as Rs. 100/-.

(22) DIXIT J.: This is a petition under Art. 226 of the Constitution of India for the issue of a writ in the nature of quo warranto against the non-applicant Shri Ram Sahay to show cause as to by what authority, he is functioning as the Speaker of the Madhya Bharat Legislative Assembly and is exercising and performing the powers, duties and functions which may be performed or exercised by the Speaker under the Constitution, and for the issue of an injunction restraining the non-applicant from functioning as the Speaker and exercising and performing the powers, duties and functions of the Speaker. The petitioner is an Advocate of this Court and a member of the Madhya Bharat Legislative Assembly. He states in his application that just before the commencement of the Constitution he and the opponent Ram Sahay were members of the Legislative Assembly constituted under the Covenant entered into on 22-4-1948 by the Rulers of Gwalior, Indore and certain other States of Central India for the formation of the Madhya Bharat and that the non-applicant Ram Sahay was also the Speaker thereof; that this Assembly is, now under Parts VI and VII, the Constitution of India, the Madhya Bharat State Legislature and is empowered under Art. 385 of the Constitution to exercise the powers and perform the duties conferred by the provisions of the Constitution on the Legislature of the State; that under Art. 178, the State Legislature is required to choose a member of the Assembly to be the Speaker thereof and that every member of the Assembly has, before taking his seat, to take an oath or affirmation according to the provisions of Art. 188; but that after the commencement of the Constitution no such election of the Speaker has been held and that the opponent Ram Sahay has not taken an oath or affirmation in the prescribed form and has thus illegally usurped the office of the Speaker. The petitioner, further, states that he questioned the legality of the non-applicant's continuance as the Speaker by raising a point of Order in the Assembly, but that the objection was overruled by he non-applicant. He, further, says that he addressed letters to the Raj Pramukh, the Minister for Law and Justice and the opponent himself seeking redress before approaching this Court for a remedy under Art. 226.

(23) In his return to the rule nisi issued by this Court, Shri Ram Sahay does not say that after the coming into force of the Constitution, the Legislature elected him as its Speaker. He, however, opposes the petition on the grounds (1) that as he was the duly elected Speaker of the Assembly before the commencement of the Constitution he is entitled under the provisions of the Constitution to continue in the office and to exercise the powers and perform the duties of the Speaker; (2) that the matter of the election of a Speaker and of his continuance as the Speaker is one exclusively pertaining to the internal affairs of the Legislative Assembly and that this Court is precluded from enquiring whether the continuance of the non-applicant as the Speaker of the Assembly is legal; (3) and that as he holds no office under the Government or any office similar to what may be described as an office under the Crown, a writ in the nature of quo warranto cannot be issued against him and he

cannot be ousted in these proceedings from the office, which he is holding.

(24) Before stating the contentions of the parties, it seems to me necessary to narrate certain material facts and to refer to the provisions of the Constitutions, relevant to the matter before us. In April 1948, the Rulers of Gwalior, Indore and certain other States in Central India entered into a Covenant for the formation of the United State of Gwalior, Indore and Malwa (Madhya Bharat). The Covenant contained provisions for the Union and integration of the several States into one United State and made the present Ruler of Gwalior, the Raj Pramukh during his life time. Article VIII of the Covenant enjoined that the Raj Pramukh shall execute on behalf of the United State an Instrument of Accession in accordance with the provisions of Sec. 6 of the Government of India Act, 1935, and in place of the Instruments of Accession of several Covenanting States. Article X of the Covenant provided for the formation of a Constituent Assembly to frame a Constitution for the United State, and for the Constitution of an Interim Legislative Assembly to function until the formation of the Constituent Assembly. Clause III of the Article gave to the Raj Pramukh the power to make and promulgate Ordinances for the peace and good Government for the United State. This power was subject to certain conditions. The Instrument of accession was accordingly executed by the Raj Pramukh accepting the matters mentioned in List I and List III of the Seventh Schedule to the Government of India Act, 1935 as the matters with respect to which the Dominion Legislature had the power to make laws for the United State. An Interim Legislative Assembly in accordance with the provisions of Art. X of the Covenant was also constituted, and the petitioner and the opponent Shri Ram Sahay became the members of the Assembly. On 30-10-1948, the Raj Pramukh made and promulgated the Interim Legislative Assembly Ordinance (Ordinance No. 18 of 1948) containing provisions about the constitution of the Assembly, its dissolution, sessions, the election of the President, Deputy President and other connected matters. An election of the President was held under Sec. 8 of the Ordinance and the Assembly chose the non-applicant as its President. The provisions of this Ordinance were subsequently embodied in the form of an Act; namely, Interim Legislative Assembly Act (Act No. 23 of 1949) which replaced the Ordinance. Sometime towards the end of 1949, the Rulers of Gwalior, Indore and certain other States entered into a Supplementary Covenant modifying certain Articles of the original Covenant of 22-4-48. Article I of the Supplementary Covenant is in the following terms:

"Notwithstanding anything contained in the original Covenant, the Constitution of India adopted by the Constituent Assembly of India shall be the Constitution for the United State of Madhya Bharat, and shall be enforced as such in accordance with the tenor of its provisions; and accordingly all references in the original Covenant to the Constitution framed thereunder shall be construed as references to the Constitution of India."

(25) By Art. II of the Supplementary Covenant, for the provision in the original Covenant relating to the formation of a Constituent Assembly, the following paragraph was substituted with the direction that "it shall be deemed always to have been substituted". The substituted paragraph is as follows: "(1) There shall be a Legislature for the United State consisting of the Raj Pramukh and a Legislative Assembly."

(26) On 24-11-1949, the Raj Pramukh issued a proclamation accepting the Constitution framed by the Constituent Assembly of India as the Constitution for the State and enjoining its enforcement in the State. Thus, just before the commencement of the Constitution of India, the Interim Legislative Assembly was governed by the Interim Legislature Act (Act No. 23 of 49) and the counter petitioner Shri Ram Sahay was the duly elected Speaker of the Assembly under S. 8 of the Act.

(27) Coming now to the provisions of the Constitution of India, we find that Part VII of the Constitution contains special provisions governing the Constitution of the States specified in Part B of the First Schedule, as also the modifications subject to which the provisions of Part VI are applicable to Part B States. Article 168 of the Constitution as applied to Part B States says:

"For every State there shall be a Legislature which shall consist of the Raj Pramukh and (a) in the State of Mysore, two Houses; (b) in other States one House."

Article 178 provides that:

"Every Legislative Assembly of a State shall, as soon as may be, choose two members of the Assembly to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the Assembly shall choose another member to be Speaker or Deputy Speaker, as the case may be."

(28) Under Art. 188 every member of the Legislature of a Part B State must, before taking his seat make and subscribe before the Raj Pramukh or some person appointed in that behalf by him an oath or affirmation according to the form set out for the purpose in the Third Schedule. Clause 2 of Art. 189 declares that any proceedings in the Legislature of a State shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled so to do, sat or voted or otherwise took part in the proceedings. Article 193 prescribes the penalty for sitting and voting before making oath or affirmation under Art. 188. The next material and important Article is Article 385. It is as follows:

"Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of the Constitution, the body or authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

(29) On the 26th January, 1950, the Constitution (Removal of Difficulties) Order No. II was made by the President in exercise of the powers conferred on him by Clause I of Art. 392. By this Order, it was provided that until both Houses of Parliament and the State Legislatures have been duly constituted and summoned to meet for the first session under

the provisions of the Constitution, the Constitution of India shall have effect subject to the adaptations specified in Part I and Part II of the Schedule to the Order. One result of these adaptations is that during the transitional period indicated in the Order, Art. 168 in its applicability to the States specified in Part B of the First Schedule is made to read to this effect, namely,

"Subject to the provisions of Art. 385, there shall be for every State a Legislature which shall consist of the Raj Pramukh and (a) in the State of Mysore, two houses; (b) in other States, one House."

(30) A new Art. 172 (A) inserted in the constitution by the Order No. 2 makes the provisions of Arts. 169 to 172 inapplicable to the House or Houses of the Legislature of any State functioning under Art. 385. The Order also substituted for Art. 178 the following Article:

"So often as the Office of Speaker or Deputy Speaker of the Legislative Assembly of a State becomes vacant, the Assembly shall choose a member thereof to be its Speaker or Deputy Speaker, as the case may be."

Special provisions have also been inserted in the Constitution by the Order No. 11 rendering inapplicable certain Articles of which Art. 178 is one, to any Part B State which has no House of the Legislature.

(31) The petitioner presents before us his case in two aspects. First of all, it is said that the Constitution (Removal of Difficulties) Order No. II in so far as it makes adaptations in the Constitution as applied to the Part B States, is invalid for certain reasons, to which a reference will be made later on. The Petitioner, then, assumes the Madhya Bharat Legislative Assembly which was functioning immediately before the commencement of the Constitution and which has been empowered under Art. 385 to exercise the powers and perform the duties conferred by the provisions of the Constitution on the State Legislature, as the Legislature for the State of Madhya Bharat under Art. 168, and argues that as Art. 385, unlike the preceding Arts. 379 and 382, does not contain any provision for the continuance in the Office of Speaker of any person who was, immediately before the commencement of the Constitution, the Speaker of a Legislative Assembly in a Part B State, the election of the Speaker of the Legislature functioning under Art. 385 must be held in accordance with the provisions of Art. 178. The applicant also says in the alternative that even if it is assumed that the Constitution (Removal of Difficulties) Order No. II is valid, an election of the Speaker must be held under Art. 178 as adapted by the Order. It is argued that there being no provision in the Constitution for the continuance in the Office of Speaker of any person holding that Office immediately before the commencement of the Constitution in a Part B State, the Office must become vacant by the commencement of the Constitution itself. The second way in which the case is submitted before us is that as the non-applicant has not taken an oath or affirmation in the manner prescribed under Art. 188, he is not entitled to take his seat in the Assembly and that, therefore, he cannot continue as Speaker of the Assembly and exercise the powers and perform the duties of the Speaker.

(32) In these proceedings the State has been permitted by us to intervene. The learned Advocate General has, on behalf of the State, contrayerted all the points raised by the petitioner. His argument, which has been adopted by Mr. Shiv Dayal the learned counsel appearing on behalf of the non-applicant Shri Ram Sahay, may be concisely summarised thus: The contention of the petitioner that with respect to the former Indian States who had acceded to the Dominion of India in accordance with the provisions of the Government of India Act, 1935 as adapted after 15th August 1947 and who are now the States specified in Part B of the First Schedule of the Constitution of India, it could not be said that there was a transition from the provisions of the Government of India Act, 1935 to the provisions of the Constitution, is unwarranted and untenable. So also is the contention of the petitioner that for that reason the Constitution (Removal of Difficulties) Order No. II in so far as it adapts the provisions of the Constitution in their applicability to Part B States during the period of transition, is ultra vires. It is said that the Order is valid; it came into force by virtue of Sec. 5 (3) of the General Clauses Act, 1897 from the midnight of 25th January, 1950 and not, as the applicant says, from some time after the President took the oath on 26th January, 1950 at 10-15 a.m. and entered upon his office; and that, therefore, as directed by this Order, Art. 178 does not apply during the transitional period specified in that Order and the Assembly is not required to choose one member as its Speaker. It is, further argued that Art. 385 of the Constitution itself contemplates continuance of the "body or authority functioning immediately before the commencement of this Constitution as the Legislature of the State" without any alteration in its structure. The word 'body' in Art. 385 in relation to a State which has a House of Legislature functioning under Art. 385, includes the Officers of the State Legislature. The Office of Speaker in a House of the Legislature of any State specified in Part B functioning immediately before the commencement of the Constitution does not, therefore, fall vacant by the commencement of the Constitution itself and no election of Speaker is necessary under Art. 178 as adapted by the Constitution (Removal of Difficulties) Order No. II. The learned Advocate General, further contended that as the Interim Legislative Assembly Act of 1949 is a law which was enforced in Madhya Bharat immediately before the commencement of the Constitution, it still continues in force under Art. 372, and that Shri Ram Sahay who was duly elected under that Act as the Speaker of the Assembly must also continue in the Office on the coming into force of the Constitution of India, and that the absence of an express provision in Art. 385 for the continuance of the Speaker of a House of the Legislature of a Part B State does not in any way affect the continuance of the non-applicant in the office. As to the objection that the non-applicant had not taken an oath according to the form set out for the purpose in the Third Schedule, the reply of the learned Advocate General is that Shri Ram Sahay did take an oath before the Raj Pramukh on 26th January, 1950 describing himself as the Speaker of the Legislative Assembly and declaring that he would bear true faith and allegiance to the Constitution of India as by law established and he would faithfully discharge his duties as the Speaker. It is, however, argued that even if

Shri Ram Sahay has not taken an oath strictly conforming to the form set out in the Third Schedule, his failure to do so does not render his seat in the Assembly or the office of Speaker, which he is holding, vacant, and that in any case the question whether Shri Ram Sahay should be permitted to take his seat and exercise the powers and perform the duties of the Speaker as he has not taken the prescribed oath, was one exclusively pertaining to the internal affairs of the Legislative Assembly which cannot be enquired into by this Court. The learned Advocate General next contended that this application was not maintainable. No writ in the nature of quo warranto could be issued against the opponent, because as the Speaker of the Assembly, he does not hold "what can be described as an office under the Crown". The learned Advocate General also suggested that as under Art. 194 (3) the powers, privileges and immunities of a House of Legislature of a State are at present those of the House of Commons of the Parliament of the United Kingdom, the matter of the continuance or the election of Speaker is one exclusively of the rights and privileges of the Legislature and that, therefore, the jurisdiction of this Court to enquire into the matter is excluded.

(33) I now proceed to consider the several points raised by the petitioner. I must say that I feel I have had small success in following the arguments addressed to us by the applicant. The petitioner questioned the validity of the Constitution (Removal of Difficulties) Order No. II by first saying that under the Constitution, the President has no power at all to modify the provisions of the Constitution for the removal of difficulties. When his attention was drawn to the fact that the President derives this authority under the Constitution itself and that Art. 392 in express words gives him the power to remove difficulties by directing that the constitution shall, during such period as may be specified in the Order, have effect subject to such adaptations whether by way of modification, addition or omission as he may deem to be necessary or expedient, the petitioner challenged the validity of the Order on the ground that in respect of the former Indian States, there has been no transition from the provisions of the Government of India Act 1935 to the provisions of the Constitution and that there was no difficulty in holding an election of the Speaker under Art. 178 in a State specified in Part B of the First Schedule having a House of the Legislature. He also attacked the order on the ground that Art. 392 does not give to the President the power to adapt the Constitution by way of substitution, as has been done in the case of Art. 178, and that the Order does not specify the period during which the Constitution shall have effect in the modified form. The last objection may be disposed of by saying that the words "whether by way of modification, addition, or omission" in Art. 392 (1) are sufficiently comprehensive to include an adaptation by way of substitution. For, after all, substitution of one Article of the Constitution by another is in substance nothing but an omission of one Article and the addition in its place of another. The Order also specifies with reference to an event which is reasonably certain, namely, the summoning of the Parliament and the State Legislatures to meet for the first session after they are duly constituted under the Constitution, the time during which the Constitution is to be effective subject to certain adaptations.

(34) There is no substance in the other objections also as to the validity of the Order. From the material facts already narrated — facts which are now historical and indubitable — there can be no doubt that during the period from 15-8-47 to 26-1-50, the transformation in the status of this state, as of other former Indian States, from that of an Acceded State to the Dominion of India to a State specified in Part B of the First Schedule of the Constitution, the transition is from the provisions of the Government of India Act, 1935 to the provisions of the Constitution, by virtue of the Instruments of Accession executed by the Rulers of the Indian States and subsequently by the Raj Pramukhs and subject to their terms, the Governor General of India, the Dominion Legislature, the Federal Court, and the other Dominion Authorities exercised in relation to the States and in respect of the matters mentioned in List I and List III of the Schedule 7 of the Government of India Act, the functions that were vested in them by or under the Government of India Act, 1935. It is, no doubt, true that outside the limits of the Instruments of Accessions, the autonomy of the States was not affected in any way by the Government of India Act, 1935. But by their accession to the Dominion of India, the scope and character of their sovereignty was affected by the Government of India Act, 1935. It is not necessary to discuss here how the sovereignty of the States was affected by their accession to the Dominion of India. It is sufficient to say that their sovereignty was by their accession to the Dominion of India considerably impaired and wholly transformed, and they became subject to the provisions of the Government of India Act, 1935 to the extent specified in their Instruments of Accession. I can find no shadow of a justification for contending that in respect of the former Indian States which are now specified in Part B and C of the First Schedule of the Constitution, there has been no transition from the provisions of the Government of India Act, 1935 to the Provisions of Constitution and that, therefore, as regards these states, the Constitution (Removal of Difficulties) Order No. II should not be given effect to.

(35) Again, it appears to me from the language of Art. 392 that under that Article, the power of the President to make any adaptations in the Constitution is not limited to the removal of only those difficulties which may arise in relation to the transition from the provisions of Government of India Act, 1935 to the provisions of Constitution. It is wider. The word 'particularly' used in that Article does not limit or cut down the generality of the preceding words, namely, "for the purpose of removing any difficulties". The Constitution is "a contrivance of human wisdom to provide for human wants". As such, it is by no means infallible; for it is beyond the wit of man to devise anything that can be called perfect. Difficulties are, therefore, bound to arise especially in relation to the transition. As the nature of these difficulties, and of the provisions which should be made for meeting them could not have been clearly foreseen at the time of the framing of the Constitution, Art. 392 was included in the Constitution for

the purpose of facilitating the transition. In relation to the State Legislatures, with which we are concerned, difficulties arose because of the operation, after the commencement of the Constitution, of the various provisions dealing with the Legislatures, which have not yet come into being and because of the continuance by the Constitution of certain bodies to exercise the powers and perform the duties conferred by the provisions of the Constitution on the Legislatures until the limited period specified in Arts. 382 and 385. The measure of a difficulty contemplated by Art. 392 is not, as I conceive, whether it is practicable to do a thing required to be done under an article of the Constitution, to wit, whether it is practicable to hold election of the Speaker under Art. 178. It is, whether consistently with the transitional provisions contained in Part XXI of the Constitution it can be done. Judged by this test, the Constitution (Removal of Difficulties) Order No. II which secures harmony between certain Articles of the Constitution which are material here and the transitional provisions contained in Part XXI of the Constitution cannot on the ground urged by the applicant be held as invalid.

(36) Indeed, if the contention of the petitioner that the Order is invalid so far as Part B States are concerned, is accepted, the petitioner is out of Court. For, then there is no provision in the Constitution under which the petitioner can claim that the body, of which he is a member, is required to hold an election of Speaker. He cannot say that the election should be held under the original Art. 178. This Article is applicable only to a Legislature duly constituted under the provisions of the Constitution. That the body of which the petitioner is a member and which has been empowered under Art. 385 to exercise the powers and perform the duties conferred by the provisions of the Constitution, is not a Legislature duly constituted under Chapter III of Part VI as applied to this State, is clear enough. If it was one, there would be no need for the provision in Art. 385 that

> "It shall exercise the powers and perform the duties conferred by the provision of this Constitution on the House or Houses of the Legislature of the State so specified."

It is only with the aid of the Constitution (Removal of Difficulties) Order No. II, which inter alia modifies Art. 168 and suspends the operation of Arts. 169 to 172 that the petitioner can argue that when the modified Art. 168 says that subject to the provisions of Art. 385, there shall be for the State a Legislature, it means that during the limited period specified in the Constitution (Removal of Difficulties) Order No. II, the Legislature for the State shall be, in the manner indicated in Art. 385 and that the substituted Art. 178 applied to such a Legislature.

(37) The applicant felt himself constrained by force of logic to argue in the alternative that even assuming that the Constitution (Removal of Difficulties) Order No. II is valid, an election of Speaker is necessary under the substituted Art. 178 for the reason that there being no provision in the Constitution for the continuance of the Speakers in Part B States, the office which the non-applicant Shri Ram Sahay was holding fell vacant by the commencement of the Constitution. The applicant drew our attention to the difference between the wording of Art. 385 and that of 382, sub-clause 3 of which contains a provision for the continuance in office of the Speakers in Part A States. The point sought to be made was that the absence in Art. 385 of a provision similar to sub-clause 3 of Art. 382 shows that it was not the intention of the framers of the Constitution that any person holding office immediately before the commencement of the Constitution as a Speaker, in a State specified in Part B of the First Schedule, should continue in office even after the coming into force of the Constitution. This alternative argument does not appeal to me. I agree with the learned Advocate General that on a literal construction of the plain language of Art. 385, the Article contemplates that "the body or authority functioning immediately before the commencement of the Constitution as a Legislature of the State" should continue without any alteration in its structure. It is not disputed by the applicant that Art. 385 enables the body or authority functioning immediately before the commencement of the Constitution as a Legislature in a State to continue in existence after the commencement of the Constitution. If, therefore, in a State where such a body consists of a House of Legislature and the body continues under Art. 385 without any alteration in its structure, then, the Speaker of the Legislature who is a part of the structure must also continue. It is to be observed that Art. 385 does not deal merely with Houses of the Legislatures in certain Part B States. The words "body or authority functioning as the Legislature" in Art. 385 are intended to cover legislative machinery of every type functioning in Part B States before the Constitution came into force. Article 385 continues the existence of all these bodies or authorities without any distinction. If it was intended, to treat a body in the shape of a House of the Legislature differently or that such bodies should continue with certain alterations in their structure, the framers of the Constitution would have proceeded to insert express provisions to that effect in Art. 385 of the Constitution and indicate precisely the alterations. In my view, it is completely erroneous to apply the analogy of Sub-clause 3 of Art. 382 to the construction Art. 385. What is so often lost sight of, is the cardinal rule that in the construction of a statute, first the words employed should be considered and their ordinary grammatical meaning should be ascertained. It is only where the words are ambiguous that it is permissible to look at the scheme of the Act or the language used in other parts of the statute for gathering the intention. The same rule would apply in the construction of any Article of the Constitution and where the words of an Article are plain, effect must be given to them. The Court would not be justified in depriving the words of their only proper meaning in order to give effect to some intention of the framers of the Constitution which they omitted to express. We are not entitled to read words into an article unless there is some clear reason for it in the Constitution itself. No such case exists here. According to the language of Art. 385, the body or authority that is empowered to exercise the powers and perform the duties conferred by the provisions of the Constitution on the State Legislature, is the body or authority as constituted and composed of certain person or persons under a law of the State concerned and functioning under that law as the Legislature in that State im-

mediately before the commencement of the Constitution. I cannot imagine any language less suitable than that used in Art. 385 to say that where in a State such a body is in the form of a House or Houses of the Legislature, while the membership of the persons composing the body is to continue, the office of Speaker is excluded from the Constitution of the body and the incumbent will cease to hold the office on the commencement of the Constitution. I am not even sure that the absence in Art. 385 of a provision analogous to Sub-clause 3 of Art. 382 is unintentional. For, whereas the Government of India Act, 1935, under which the Legislatures in Part A States were constituted and the Speakers thereof were elected has been repealed by Art. 395 of the Constitution, the law under which the body or authority referred to in Art. 385 functioned in a Part B State, is continued in force by Art. 372 (1) of the Constitution. There was, therefore, no necessity to provide expressly in Art. 385 for the continuance of the Houses of the Legislature and the officers thereof in Part B States. In this State, the law under which the non-applicant was duly elected as the Speaker of the Madhya Bharat Legislative Assembly, is to be found in the Interim Legislative Assembly Act (Act XXIII (23) of 1949. By virtue of Art. 372 (1) and the Adaptation of Laws Order, 1950 made by the President under Subclause 2, the Act is still in force. The non-applicant who was elected as the Speaker in accordance with that law must, therefore, continue to function. The petitioner attempted to argue that the Interim Legislative Act has ceased to operate after the commencement of the Constitution, because sections 3 and 4 of the Act which speak of the Constitution of the Legislative Assembly subject to the provisions of the Covenant and its dissolution on the formation of the Constituent Assembly referred to in Para. I of Art. X of the Covenant, are repugnant to the provisions of the Constitution. The argument ignores altogether the fact that by the Supplementary Covenant, the provision contained in the original Covenant about the formation of a Constituent Assembly, has been deleted. There is, therefore, now no such repugnancy between the Interim Legislative Assembly Act and the Constitution. The petitioner, then, faintly suggested that the Act No. XXIII of 1949 is, under Art. 18 (1) void. The suggestion has only to be stated to be rejected. It was, then, said that as the Interim Legislative Assembly Act is a temporary law, it cannot be continued in force by virtue of Explanation III to Art. 372. I fail to see how Explanation III to Art. 372 is applicable to the Interim Legislative Assembly Act. The Act is not a temporary law. It does not fix a date for its expiration. After the deletion of the provision in the original Covenant about the formation of the Constituent Assembly, it cannot also be maintained that the Act would have expired on a date fixed by it if the Constitution had not come into force. Thus, there is no force in the objections of the petitioner that the Interim Legislative Act ceased to be operative from the commencement of the Constitution. In my judgment, both under Art. 385 and the Interim Legislative Assembly Act, the non-applicant Shri Ram Sahay is entitled to continue in the office of Speaker and that the contention of the petitioner, that by the commencement of the Constitution, a vacancy occurred in the office and that, therefore, an election of Speaker is necessary under Art. 178, must fail.

(38) A case similar to the present case came up for consideration before the Travancore-Cochin High Court in 'Nesamony v. T. M. Varghese, 1950 D L R (Tr) 402. In that case the continuance of a person in the office of Speaker of Travancore-Cochin Assembly was challenged by way of quo warranto proceedings on the same grounds, as were urged before us by the petitioner. The contentions were not accepted by Govinda Pillai, J., and the prayer for the issue of a writ in the nature of quo warranto was rejected. According to Govinda Pillai, J., the Constitution allowed the existing State Law to continue the Legislative Assembly of Travancore-Cochin State constituted and the Speaker elected as under that law would also continue to function and that the absence of a provision in Art. 385 for the continuance of the Speaker of the Legislative Assembly did not in any way affect his continuance as such. An appeal was filed against the decision of Govinda Pillai, J., to a Division Bench. In affirming the decision of Govinda Pillai J., the learned Chief Justice of Travancore-Cochin High Court said with reference to Art. 385 that:

> "The natural meaning that can be attributed to the clause in Art. 385 that this body shall exercise the powers and perform the duties conferred by the new Constitution would give a continuity of existence as a temporary measure to the Speaker as well." (See 1951 Dominion Law Reporter Travancore-Cochin, p. 347).

(39) At this stage, I may refer to the argument of the petitioner, which seeks to say that as the Constitution (Removal of Difficulties) Order No. II came into force some time after 10-15 a. m. on 26-1-1950 when the President was sworn as President and not at midnight of 25-1-1950, there was a vacancy in the office of Speaker and the election of Speaker must, therefore, be held. I must confess, I am utterly unable to follow the reasoning of this argument. The continuance of the non-applicant in the Office of Speaker is not the result of any adaptation made in Art. 385 by the Constitution (Removal of Difficulties) Order No. II. As I have already said, the continuance of Shri Ram Sahay as the Speaker of the Madhya Bharat Legislative Assembly follows from the language of Art. 385 itself, and further, that Art. 178 in its original form has no applicability to the Legislative Body of which the petitioner and the opponent are members. The question, therefore, as to the time of the commencement of the Order does not affect the continuance of the non-applicant Shri Ram Sahay in the office of Speaker. For, even if it be assumed that the Order came into force from the time alleged by the petitioner, it cannot be maintained that during the few hours that elapsed between the coming into force of the Constitution on the midnight of 25-1-50 and the time of taking of oath by the President, the Office of Speaker became vacant rendering a fresh election necessary. In this view of the matter, I do not think it necessary to express any opinion on the question whether the Constitution (Removal of Difficulties) Order No. II came into force some time after 10-15 a. m. on 26-1-50 or from the midnight of the 25-1-50. That point may have to be considered in a suitable case where the Court may be of the opinion that the question

of the time of the commencement of the Order is material. I would only say that as at present advised, there seems to be some force in the contention of the learned Advocate-General that by virtue of Art. 380 (1) of the Constitution and of S. 5 (3) read with S. 3 (12), General Clauses Act, the Constitution (Removal of Difficulties) Order No. II, even though it might have been actually made by the President after 10-15 a. m. on 26-1-50, would be deemed to have come into force for legal purposes from the midnight of 25-1-50. His criticism that in the decisions reported in A.I.R (37) 1950 Patna 265 and AIR (37) 1950 Cal. 274, which seems to support the contrary view, Art. 380 (1) has not been referred to at all and Ss. 3 (12) and 5 (3) of the General Clauses Act have not been fully considered, is justified. I would only add that the view taken by the Calcutta and Patna High Courts in the above cases has not been followed by Orissa High Court in Prahalad Jena v. State, A. I. R. (37) 1950 Orissa 157.

(40) I now pass to consider the contention of the petitioner that as the non-applicant Shri Ram Sahay has not taken an oath or affirmation in the manner prescribed under Art. 188, he is not entitled to take his seat in the Assembly and that, therefore, he cannot continue in the Office of Speaker. I am not sure how far the applicant desired to suggest that the opponent Shri Ram Sahay's seat and also his Office of the Speaker became vacant by the failure of the non-applicant to take the oath according to the form set out in the Third Schedule. The petitioner's grievance is not that Shri Ram Sahay did not take any oath at all but that the oath which he took on the 26-1-50 before the Raj Pramukh, was not in accordance with the prescribed form. In reply, the learned Advocate General contended that even if the non-applicant did not take an oath strictly conforming to the prescribed form, by that omission his seat in the Assembly or the Office of the Speaker did not become vacant, and further that the question, whether for this reason Shri Ram Sahay should be permitted to take his seat and exercise the powers and perform the duties of the Speaker being one exclusively pertaining to the internal affairs of the Assembly, cannot be enquired into by this Court. The learned Advocate-General also raised the larger question, which may be conveniently dealt here, whether in view of the provisions of Art. 194 (3) a Court of law has jurisdiction at all to determine the validity of the continuance of the non-applicant Shri Ram Sahay in the Office of Speaker on any of the grounds alleged by the petitioner. In support of his contention that the Court has no jurisdiction, the learned Advocate-General referred us to pages 172, 173 and 176 of the May's Parliamentary Practice 14th edition and to the Leading Cases of 'Bradlaugh v. Gossett', (1884) 12 Q.B.D. 271 and 'Rex v. Graham Campbell', (1935) 1 KB 594, on Parliamentary Privileges.

(41) I am unable to accede to the objection of the petitioner that in taking an oath before the Raj Pramukh on 26-1-50 in the form, he did, the opponent Shri Ram Sahay did not comply with the provisions of Art. 188. This Article requires every member of the Legislature to take an oath or affirmation according to the form set out for the purpose in the Third Schedule. It should be noted that the Article does not say that an oath or affirmation shall be taken in the form set out for the purpose in the Third Schedule. It uses the expression "according to the form." This expression does not mean "in the form", that is, a verbal and literal following of the form set out in the Third Schedule. It means the substantial following of the form. In other words, the Article means that the form set out in the Third Schedule or any form as near thereto as circumstances admit, shall be used in taking an oath or affirmation under the Article. In the present case both the petitioner and the opponent could not have clearly made an oath or affirmation in the form set out for the purpose in the Third Schedule, because they were neither elected nor nominated, after the Constitution came into force, as members of the Legislative Assembly under the Constitution. At the commencement of the Constitution, they happened to be members of a body referred to in Art. 385 and after the commencement of the Constitution, they were continued as members of the body by virtue of Art. 385. If, therefore, the petitioner is not inclined to dispute that an oath or affirmation made by a member of this body describing himself as a member of the body would be a substantial compliance of Art. 385, there is no reason to hold that the oath taken by the non-applicant Shri Ram Sahay describing himself as the Speaker of Madhya Bharat Legislative Assembly and thus impliedly as a member of that body, is not a substantial following of the form.

(42) The important question raised by the contentions of the parties is the extent to which Courts of Justice have jurisdiction to entertain matters which relate to the Legislative bodies under the Constitution, and the conduct of their affairs. Much as I desire to deal with the question fully, I think I should restrain myself from doing so, because we have not had the advantage of hearing full arguments on the point from the petitioner. I, therefore, propose to indicate here the broad principles on which the answer to the question must, in my view, depend. As the Legislature and its Speaker are entirely the creatures of the Constitution, it is necessary to turn to the Constitution itself in order to determine the question. Article 208 provides for the making, by a House of the Legislature, of rules for regulating, subject to the provisions of the Constitution, the procedure and the conduct of its business. Article 212 says that:

"1. The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.

2. No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

(43) Article 194 defines the powers, privileges and immunities of State Legislatures and their members. Sub-clause 3 of this Article stated that the powers, privileges and immunities of a house of the Legislature and of the members shall, until they are defined by the Legislature, be those of the House of Commons of the Parliament of the United Kingdom and of its members and Committees at the commencement of the Constitution. It will be observed from the wording of Art. 212 that the validity of the proceedings of the Legislature can be

called in question on a ground other than the ground of an irregularity of procedure. Thus, the proceedings would not be protected if they are held in defiance of the provisions of the Constitution or by exercising some powers which the Legislature under the Constitution does not possess. It is also necessary to note that under Art. 194, the powers, privileges, and immunities of State Legislatures and their members are not absolute. They are subject to the provisions of the Constitution and are modified by the fundamental principle that it is the Constitution which is Supreme and not the Legislature. It cannot, therefore, be inferred from the possession of certain powers and privileges by the House of Commons of the Parliament of the United Kingdom, that the like powers necessarily belong to the Legislatures under the Constitution. If a power or privileges claimed by the Legislature is clearly repugnant to the Constitution, then, notwithstanding the fact that it is one which the House of Commons enjoyed at the commencement of the Constitution, it must be denied to the Legislatures. It is unnecessary to enumerate here the powers, privileges and immunities of the House of Commons and to discuss which of these, the State Legislatures under our Constitution have. The existence of a power, privilege or immunity which is asserted must be determined with reference to each case in which it is in issue. The determination of a breach of recognised privilege is, however, a matter for the Legislature.

(44) In the present case, the claim made by Shri Ram Sahay, is that if he has not taken an oath in conformity with Art. 188, it is for the Legislature to prevent him from taking his seat and performing the duties and exercising the powers of the Speaker and that this Court has no jurisdiction to interfere in this matter falling within the ambit of the internal affairs of the House. I think the claim must be conceded both because it is recognised by the Constitution, and enjoyed by the House of Commons of the Parliament of the United Kingdom. It must be remembered that when the petitioner asks us to hold that the office of Speaker of the Assembly has fallen vacant and to restrain the opponent Shri Ram Sahay from discharging the functions and duties of the Speaker, the ground of attack is really this, that since the non-applicant is not entitled to take his seat as he has not taken an oath in compliance with the provisions of Art. 188, he is not, therefore, entitled to continue in the office of Speaker, Now, there is no Article in the Constitution providing that the seat of a member of a House of the Legislature shall become vacant if he fails to comply with the requirements of Art. 188. Article 190 specifies the circumstances in which the seat of a member becomes vacant. The failure to take an oath or affirmation under Art. 188 is not one of those circumstances. Sub-clause 4 of Art. 190, however, gives the power to the House to declare the seat of a member vacant, if for a period of sixty days the member without permission of the House absents from all meetings thereof. Under Art. 189(2) the proceedings in the Legislature are valid notwithstanding that it is discovered subsequently that some persons who were not entitled so to do, sat or voted or otherwise took part in the proceedings. A member who sits in the House before complying with the requirements of Article 188 is liable to a penalty under Art. [illegible] by judgment, by providing that the proceedings in the Legislature shall not be invalid if a member sits in the House without taking an oath or affirmation as required by Art. 188, by subjecting such a member to a penalty and by giving the House the power to declare the seat of a member vacant if he remains absent for a period of sixty days from the meetings of the House, the Constitution treats the matter of the failure to make an oath or affirmation as one relating to the internal affairs of the House and gives to the House itself adequate power to deal with such a member. It is open to the House to exclude a member who has not made an oath or affirmation under Art. 188 and to declare his seat vacant under Art. 190 (4). On the other hand if such a member persists in taking his seat, the House can initiate appropriate proceedings under Art. 193 against the member. As the sitting in the House of a member, who has not taken an oath or affirmation, does not render the proceedings in the Legislature invalid and as such a member is subject to a penalty, there can be no ground for a Court to make an order of restraint against the member only to prevent him from making himself liable to the punishment.

(45) That in the House of Commons of the Parliament of the United Kingdom, a matter such as this relates to the internal affairs of the House and the Court has no jurisdiction to interfere, is clear from the decision in 'Bradlaugh v. Gossett', (1884) 12 Q B D 271. In that case Bradlaugh asked the Speaker to call him to the table to take the oath but the Speaker declined on account of what had happened on a previous occasion. The House resolved on motion that the Sergent-at-Arms should exclude Bradlaugh from the House until he stopped attempting to take the oath in disregard of a resolution of the House and of the Parliamentary Oaths Act, 1866. Bradlaugh, thereupon, claimed an injunction from the Queen's Bench Division to restrain the Sergent-at-Arms (Gossett) from enforcing the order of the House and a declaration that the order was void. The Court took the view that it was a matter relating to the internal management of the procedure of the House, and one of its members and that in consequence, the Court had no power to interfere. Stephen, J., held that the House of Commons was not subject to the control of the Courts in its administration of that part of its statute law which had relation to its own proceedings. He also observed — the observation is very much in point in the present case—that if the Court had been moved to restrain Bradlaugh from taking his seat until he had taken the oath, it would certainly have refused to do so. It was also pointed out by the learned Judge that if the House had attempted by Resolutions or otherwise to protect Bradlaugh against an action from penalties, the Court would have disregarded such resolutions and determined the right of the parties according to its own interpretation of the Statute. I am, therefore, disposed to think that even if it be assumed in the present case that Shri Ram Sahay did not make an oath or affirmation under Art. 188, this Court cannot restrain him from taking his seat and from discharging the duties and functions of the Speaker.

(46) I do not, however, feel able to concur in the view that this Court cannot, on any ground, enquire into the legality of the continuance of the opponent Shri Ram Sahay in the office of Speaker. To the other grounds on

which the petitioner challenges the continuance of the opponent in the office of Speaker, the analogy of the British House of Commons being the sole Judge of determining the question whether any person who claims to be the Speaker, is so, cannot, in my opinion, even remotely be applied. It is obvious that the objections to the validity of any person holding the office of Speaker in the form in which they have been raised here, can never arise in England. If the jurisdiction of the English Courts to determine matters challenging the legality of any person in the office of Speaker of the House of Commons is excluded, it is because of the limits imposed by the law of their Constitution, on the various institutions of Government and thus upon the extent to which the Courts are required to control the Parliament which is supreme. To my mind, the objections raised by the petitioner as to the legality of the continuance of Shri Ram Sahay in the office of Speaker under Art. 385 of the Constitution is not one relating to the internal affairs of the Assembly. The question at issue was no doubt, raised by the petitioner in the Assembly by way of a point of order. But the determination of the matter by the House or the Speaker is not conclusive. The question raised is of declaring the stafus of a person on the interpretation of the Constitution. Under our Constitution, it is the duty of this Court faithfully to expound and give effect to it according to its own terms. The claim, therefore, that it is not the function of this Court to declare whether under the Constitution Shri Ram Sahay has or has not the status of the Speaker of the Madhya Bharat Legislative Assembly, being one opposed to the first principles of the Constitution, must be rejected.

(47) The last matter for consideration is the contention of the non-applicant that the relief sought should not be granted as he does not hold "what can be described as an office under the Crown". Quite apart from the principles of English Law governing the issue of a writ of quo warranto, it is clear from the wide scope of Art. 226 that this Court has the power to issue an order restraining any person acting in an office in which he is not entitled to act and also, if the case so requires declaring the office vacant, whereas in the present case the office said to be usurped, has been created by the Constitution itself with certain functions and duties attached to it. In this connection, it is sufficient to refer to the recent decision of a Bench of five Judges of this Court in 'Daya Bhai Patel v. Regional Transport Authority', A I R (38) 1951 Madh B 121, where the scope of the powers of this Court under Art. 226 has been fully explained. In England information in the nature of quo warranto was not restricted only to an improper assumption of an office under the Crown. It appears to me from the decision in 'R. v. Guardians of St. Martin', (1851) 17 Q B 149. and other cases that information in the nature of quo warranto lay in respect of an office not derived from the Crown but created by an Act of Parliament and that it lay in all cases where the office was of a public nature and substantive office. In the case of 'Rex v. Speyer', (1916) 1 K B 595, Lord Reading, C. J., pointed out that informations in the nature of quo warranto were used for the more easy trial of the rights of offices and franchises in Corporations and boroughs. The procedure of an information in the nature of a writ of quo warranto has now been abolished in England by S. 9(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938 and it is now provided that the High Court may grant an injunction restraining a person from acting in a public office to which he is not entitled. The principles which governed the former procedure, however, are still applied by the English Court in granting an injunction. In the view I have taken of the merits of the petition, I consider it unnecessary to express any opinion as to what is a public office and whether the office held by the opponent is a public office. On these matters, we have not heard full arguments from the parties. I must, therefore, reserve all these points for consideration if and when the question arises again, and where the Court may be of the opinion that it is necessary to issue a writ in the nature of quo warranto.

(48) On a consideration of the several questions argued before us and for the reasons stated above, I think this petition must be dismissed with costs.

(49) BY THE COURT: The rule is discharged and the petition is dismissed with costs. We fix Rs. 100/- as fees of the counsel for the opponent Shri Ram Sahai. In our opinion this petition does not involve any substantial question of law as to the interpretation of the Constitution. A certificate to file an appeal to the Supreme Court is, therefore refused.

D.H. ***Petition dismissed.***

A. I. R. (39) 1952 Madhya Bharat 45 *[C. N. 17]*

(INDORE BENCH)

MEHTA, J.

Chandulal Ganeshilalji, Applicant v. Baboolal Chimanlal, Opponent.

Small Cause Revn. No. 49 of 1949, D/- 13-11-50.

(a) *Stamp Act (1899), S. 2(22) — Indore Stamp Act (1907), S. 2(19) — Promissory note.*

An instrument executed by a debtor in favour of the creditor and containing an undertaking to pay a certain sum of money to the creditor found to have been due on account of certain transactions between them in a promissory note within S. 2(19) Indore Stamp Act. The question of negotiability does not arise under that definition.

(*Paras 10, 11, 12*)

Anno: Stamp Act, S. 2(22) N. 10.

(b) *Stamp Act (1899), S. 2(22) and 35 — Pro-note inadmissible for want of stamp — Suit on original cause of action.*

Where a cause of action for money is once complete in itself, whether for goods sold or money lent or for any other claim, and the debtor then gives a pro-note to the creditor for the payment of money at a future time, the creditor may, if the money is not paid on the maturity of pro-note, fall back on the original consideration.

Hence, where the promissory note is inadmissible in evidence for want of stamp the plaintiff can bring a suit on the original consideration.

(*Para 13*)

Anno: Stamp Act, S. 35 N. 12.

Roshanlal Khabya, for Applicant; V. R. Newaskar, for Opponent.

Case referred to:

('36) A I R (23) 1936 P C 171: (17 Lah 557)

(Prs 10, 11)

ORDER: This small cause revision is preferred by the applicant-plaintiff for recovery of Rs. 431-5-6. His suit was dismissed by the Judge Small

Cause Court on the ground that the suit was founded on a promissory note and as it was not stamped it was inadmissible in evidence.

(2) The short facts are that the defendant had dealings in silver with the plaintiff and on the foot of account Rs. 401/- were due from the defendant to the plaintiff on 3-11-1946. The same day the defendant executed a chithi in favour of the plaintiff for Rs. 401/-. As the defendant failed to pay, the plaintiff filed suit on the basis of chithi. According to the plaintiff the chithi is an agreement to pay.

(3) The defendant denied having any dealing in silver with plaintiff. He contended that the plaintiff got the chithi executed through fraud. He also contended that the chithi is inadmissible in evidence.

(4) The Judge Small Cause Court held that the plaintiff had practised no fraud in getting the chithi for Rs. 401/-, executed by defendant. However he held that the note in suit is a promissory note and as it is not stamped it is inadmissible in evidence and dismissed the plaintiff's suit.

(5) The main point for determination in this revision application is whether the chithi in suit is a pro-note or a mere agreement to pay.

(6) The question whether an instrument is a promissory note or not should be judged by the words used.

(7) A promissory note as defined by Indore Stamp Act of 1907 mean an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order, of a certain person or to the bearer of the instrument.

(8) It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available or upon any condition or contingency which may or may not be performed or happen. Hence judged in the light of this definition the document in suit amounts to a promissory note. The document in question contains an agreement for the payment of money. It amounts to an undertaking or promise. The undertaking is unconditional. The agreement is for payment of money and money only. The sum payable is certain. The instrument is signed by the maker of the instrument. The money is payable to or to the order of a certain person or to the bearer of the instrument.

(9) Mr. Khabya pleader for the applicant contended that in the document in suit, there are no words showing negotiability. As the instrument is not negotiable, it is taken out of the range of promissory note and it is merely an agreement.

(10) It has to be noted that the Indore Stamp Act was passed in 1907. It defines promissory note in S. 2(19). The Indore Negotiable Instruments Act was enacted in 1926. Therefore, a promissory note under the Indore Stamp Act does not mean a pro-note falling as defined in Negotiable Instruments Act. In view of the provisions of Indore Stamp Act, the question of negotiability does not arise. Here in this instrument certain person to whom the money is made payable is mentioned Bhai Chandulal Kanugo and it clearly states that Rs. 401/- are to be paid to Chandulal Kanugo. Here the definite person to whom the sum certain is to be paid is mentioned. This document before me contains an express promise to pay certain sum of money. In the Privy Council Case 'Mahomad Akbar v. Attarsing', A I R (23) 1936 P C 171, the document alleged to be promissory note contained the following words:

"This (one) receipt is hereby executed by H and A, resident of Hoti for Rs. 43,900, half of which amount comes to Rs. 21,950/- received from the firm of L, for and on behalf of M of Hoti. This amount to be payable after two years. Interests at the rate of Rs. 5-4-0 P. C. P. Y. to be charged, dated 1st April, 1917".

(11) The document, as it is worded, it is doubtful whether it can properly be styled as a promissory note since it does not contain an express undertaking to pay, but merely an undertaking which has to be inferred from the words used. In the document before me there are words indicating definite promise to pay. Hence the document in suit is a pro-note as defined by the Indore Stamp Act. Here there is no implied promise as in 'Mohammad Akbar's case' A I R (23) 1936 P C 171 but an express promise to pay जुमळे रुपिय ४०१ कुल आपको देवेंगे". The dominant object of the note is to embody such promise and not the acknowledgment.

(12) In the case before me an account is closed and a certain sum is found due by one party to another and if the amount is not paid immediately, it is often the practice for the debtor to give the creditor an instrument referring to the account and containing an undertaking to pay the sum found due with interest. Hence it is a promissory note pure and simple. Now the question arises whether the plaintiff should be allowed to fall back on original consideration in view of the fact that the pro-note in suit is inadmissible in evidence as it is not stamped.

(13) On the question it is well settled that where there is pre-existing debt or liability and a promissory note is passed in respect of it, the plaintiff can fall back on the original consideration. Where a cause of action for money is once complete in itself, whether for goods sold or money lent or for any other claim, and the debtor then gives a pro-note to the creditor for the payment of money at a future time, the creditor, may, if the money is not paid on the maturity of pro-note fall back on the original consideration.

(14) It was stated that the trial Court gave option to the plaintiff to amend the plaint but the plaintiff was in a confused state of mind because he did not know then that the Court is going to hold the document as a pro-note, hence he did not at that time amend the plaint. Now that the Court has held that the document is a pro-note, he should be allowed to amend his plaint so as to sue for original consideration.

(15) I, therefore allow the revision and set aside the decree of the lower Court and remand the case to the lower Court for being retired on merits. Costs in the cause.

K.S. *Case remanded.*

A.I.R. (39) 1952 Madhya Bharat 46 *[C. N. 18.]*

(GWALIOR BENCH)

CHATURVEDI, J.

Ram Ratan, Applicant v. Sughad Singh, Opposite Party.

Civil Revision No. 116 of 2005, D/- 2-5-1950.

Civil P.C. (1908), O. 17, Rr. 2 and 3 — Suit dismissed for default of appearance — Order whether made under R. 2 or R. 3.

The power conferred on the Court under O. 17, R. 3 is a very drastic power. It restricts very greatly the unsuccessful party's remedy for redress. It should be used only in exceptional cases. Where a default takes place both within the meaning of Rr. 2 and 3 and there is not enough material

on the record to entitle the Court to proceed to judgment, the Court should proceed under R. 2. To apply the procedure laid down in Rule 3 in a case there should be presence of both the elements viz., (1) the adjournment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of R. 3 'Chitaley's comm. on C.P.C., cited with approval, AIR (30) 1943 Sind 94; AIR (6) 1919 Lah 419; AIR (20) 1933 Cal 412, Rel. on. (Para 5)

The plaintiff's witnesses were summoned on several dates on which they appeared but their statements could not be recorded. On 23-5-1947, the Court ordered the plaintiff to pay the process fee and he fixed 28th June for examining the witnesses. On this date witnesses were not present as the process fee was not paid. The Court dismissed the suit for default.

'Held' that as there was clearly no material before the Court to enable it to pronounce a decision on the merits, the order of dismissal was one made under O. 17, R. 2 and, therefore, the application for the setting aside of this order and for restoration of the suit could be made under O. 9, R. 9. (Paras 2, 6)

Anno: C. P. C., O. 17, R. 3, N. 3.

Bajpai, for Applicant, Shivdayal Shrivastava, for Opposite Party.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('43) AIR (30) 1943 Bom 321: (ILR (1944) Bom 1 FB) (Pr 5)

('07) 34 Cal 235: (5 Cal L Jour 260) (Pr 5)

('33) AIR (20) 1933 Cal 412: (144 Ind Cas 462) (Pr 5)

('19) AIR (6) 1919 Lah 419: (47 Ind Cas 596) (Pr 5)

('43) AIR (30) 1943 Sind 94: (ILR (1942) Kar 547) (Pr 5)

ORDER: This is a revision petition filed by Ram Ratan defendant against the order of the District Judge, Bhind, who reversed the finding of the Subordinate Judge, Bhind and restored the plaintiff's suit.

(2) The material facts of the case leading to this revision are that in the plaintiff's suit issues were framed on 9-3-1946 and his witnesses were summoned on several dates on which they appeared but their statements could not be recorded due to several reasons. On 23-5-1947 the Subordinate Judge ordered the plaintiff to pay the process fee and he fixed 28th June for examining the witnesses. On this date witnesses were not present as the process fee was not paid. The Subordinate Judge dismissed the suit for default. Application for restoration was also dismissed by him, as he held that the plaintiff's illness was not proved and no sufficient reasons were given for not depositing process fee in time. In appeal the learned District Judge reversed the finding and ordered the restoration of the suit on payment of costs.

(3) On 13-2-1950 the question for determination before Shinde, J., was whether the order of the first Court dated 28th June 1947 was made under Section 159 of the Gwalior Civil Procedure Code or under section 160. These two sections of the Gwalior Civil Procedure Code correspond to Rules 2 and 3 respectively of Order 17 of Indian C.P.C. If the order was made under Rule 3 of Order 17, the order will be held to be on merits and the remedy was only by way of appeal; on the contrary, if the order was passed under Rule 2 an application to set aside the order of the dismissal is the proper remedy.

(4) I have heard the arguments on this question. It is true there has been conflict on the point and there has been divergence of judicial opinion, which has been noted in note No. 3 under Order 17, Rule 3 in Volume 2 of Chitaley's Commentary.

(5) It is difficult to attempt by refinement or subtlety to reconcile cases which are not capable of being reconciled. If one has to take the whole weight of the authorities the balance of authority is in favour of the view that the power conferred on the Court under Order 17, R. 3 is a very drastic power and it restricts very greatly the unsuccessful party's remedy for redress, and should be used only in exceptional cases. 'Tekchand Nenoo Mal v. Kalu Sing Manju Sing', AIR (30) 1943 Sind 94. Where a default takes place both within the meaning of Rr. 2 and 3 and there is not enough material on the record to entitle the Court to proceed to judgment, the Court should proceed under R. 2. 'Har Gopal v. Harish Chandar', AIR (6) 1919 Lah 419. To apply the procedure laid down in R. 3 in a case there should be presence of both' the elements, viz., (1) the adjournment must have been at the instance of a party and (2) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the applicaion of R. 3. 'Brojendra Nath v. Promotha Bhusan', AIR (20) 1933 Cal 412. The two rules are neither conflicting nor mutually exclusive. The relation between the two Rules, which correspond to Ss. 157 and 158 respectively, of the former Code, was explained in 'Mariannissa v. Ramkalpa Gorain', 34 Cal 235 and has been relied upon by the Full Bench of the Bombay High Court in 'Basalingappa Kushappa v. Shidramappa Irappa', AIR (30) 1943 Bom 321. According to these decisions:

> "Rule 3 contemplates a case in which the Court has materials before it to enable it to proceed to a decision of the suit. The mere fact of a party making default in the performance of what he was directed to do would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person, who made the default; the words 'notwithstanding such default' in R. 3 clearly imply that the Court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Order 17, R. 2, on the other hand, speaks of the disposal of the suit, and includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits. It is clear, however, that the contingency contemplated in R. 2 may happen in a case which falls within the letter of R. 3. It may well happen, for instance, that a plaintiff to whom time has been granted to produce evidence, not only fails to do so, but also fails to appear. In such a case if there are no materials on the record, the appropriate procedure to follow would be that laid down in R. 2, but if there are materials on the record, the Court ought to proceed under R. 3"

(6) In the case before me the witnesses not even of the plaintiff having been examined, there was clearly no material before the Court to enable it to pronounce a decision on the merits, and I am unable to see any difficulty in holding that the order of dismissal was that which could and should have been made under Order 17, R. 2. I am also of this opinion, after reading the decision of the learned Subordinate Judge, that the order was actually made under Order 17, R. 2, Civil P. C., I have no doubt, therefore, that the application for the setting aside of this order and for restoration of the suit could be made under Order 9, R. 9 Civil P. C.

(7) As regards the other points, i.e., whether there was sufficient reason to restore the suit, I can only state that the question being a question of fact it cannot be determined in revision. I have however, perused the evidence led by the plaintiff in this case about his illness and I think the testimony of Sughad Singh, Jahar Singh, and Bankelal is sufficient to establish that Sugad Singh suffered from scorching wind and remained ill for about a month. The learned Subordinate Judge does not seem to be correct in assessing this piece of evidence and I do not think any interference is called for by this Court in the conclusions arrived at by the learned District Judge. I therefore dismiss the revision with costs.

V.S.B. *Revision dismissed.*

A.I.R. (39) 1952 Madhya Bharat 48 *[C. N. 19.]*

(GWALIOR BENCH)

CHATURVEDI, J.

Municipal Committee, Lashkar, Applicant v. Shahabuddin, Non-Applicant.

Criminal Revision No. 132 of 1950, D/- 11-12-1950.

Gwalior Municipal Act (1993 Smt) Sections 153, 78 — Order passed on application for recovering cost of work from persons in default under S. 153 — Revision — Competency — Criminal P.C., (1898), S. 435.

An order passed by a Magistrate on an application for recovering the cost of the work from the person in default under Section 153 of the Gwalior Municipal Act or as an arrear of tax or of assessment under Section 78 cannot be revised by the High Court under S. 435, Criminal P.C. The order is an administrative order. The power which a Magistrate exercises under these sections is ordinarily of a ministerial nature and in certain cases he has also to deal with questions of civil liability. In neither case he exercises his power as an inferior Criminal Court. (*Paras 3, 22*)

As there is no provision in the Gwalior Municipal Act conferring revisional jurisdiction upon the High Court in matters of recovering costs for summary removal of encroachments no revision either on the Civil or Criminal side will be competent. Case law discussed. (*Para 20*)

Anno: Criminal P.C., S. 435, N. 8.

Vishnubahadur Singh, for Applicant. Swamisaran, for Non-Applicant.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) 145 Ind Cas 959: 34 Cri L Jour 1105: (AIR (20) 1933 All 281) (Pr 17)
('07) 6 Cri L Jour 425: (9 Bom L R 1347) (Pr 17)
('19) 43 Bom 864: (AIR (6) 1919 Bom 93: 20 Cri L Jour 702) (Prs 10, 13)
('39) 41 Bom L R 937: (AIR (26) 1939 Bom 477) (Pr 18)
('50) AIR (37) 1950 Bom 397: (ILR (1950) Bom 522 FB) (Pr 19)
('74) 21 WR 391 (2): (14 Beng L R 254) (Prs 5, 13)
('20) AIR (7) 1920 Cal 734 (2): (22 Cri L Jour 25) (Pr 7)
('25) AIR (12) 1925 Cal 934: (26 Cri L Jour 1246) (Pr 7)
('50) AIR (37) 1950 Cal 36: (51 Cri L Jour 346) (Pr 21)
('28) 29 Cri L Jour 389: 108 Ind Cas 414: (AIR (15) 1928 Mad 495) (Pr 9)
('41) AIR (28) 1941 Pat 543: (43 Cri L Jour 110) (Pr 8)
('27) AIR (14) 1927 Sind 23: (27 Cri L Jour 1127) (Pr 17)
12 R Q 67 (Pr 4)
15 R Q 317 (Pr 4)

ORDER.: The non-applicant had placed some building material (Malva) upon the ground level of a street and the Municipal Committee, Lashkar after issuing a notice to the non-applicant summarily removed the moveable encroachment. The Municipal Committee applied to the Magistrate for recovering expenses from the non-applicant. The Magistrate dismissed this application and a revision against this order was dismisesd by the learned District and Sessions Judge. The Municipal Committee has therefore come up in revision to this Court.

(2) Mr. Swamisaran, learned counsel for the non-applicant, has raised a preliminary objection contending that the order of the Magistrate is not liable to revision under section 435 of the Indian Criminal Procedure Code.

(3) I have no doubt that the power which the Magistrate exercises in respect of any prosecution, under section 159 or Chapter 9 of Gwalior Municipal Act, is a judicial power and any order made by him in these prosecutions will be the order of an inferior Criminal Court liable to revision by this Court. I am not sure however whether the same can be said of an order passed by him on an application for recovering the cost of the work from the person in default under section 153 of the Gwalior Municipal Act or as an arrear of tax or of asssessment under section 78. The power which a Magistrate exercises under these sections is ordinarily of a ministerial nature and in certain cases he has also to deal with questions of civil liability. In neither case he exercises his power as an inferior Criminal Court, and, therefore, in my opinion, his order cannot be revised by this Court under section 435 Criminal Procedure Code.

(4) In Section 80 of the Gwalior Municipal Act of Samvat 1993 procedure has been laid down for making references to the High Court in matters affecting taxes or principle of assessment. Then, Section 147 deals with criminal revisions. This Court, under this section can revise only those orders which are passed under section 109 or section 143. This case does not come under these sections or under section 159 or chapter 9 of the Gwalior Municipal Act. Therefore in my opinion the revision cannot be sustained. In 12 R Q 67 and in 15 R Q 317 this point does not seem to have been canvassed and under no provision of the Indian Criminal Procedure Code these cases could have been treated as criminal appeals. These two Gwalior rulings cited by Mr. Vishnubahadur Singh cannot therefore be treated as precedents for the point pressed before me.

(5) I have however gone through several rulings of the various High Courts of India on this point. But as the Gwalior Municipal Act differs in many respects from the Municipal Acts of other States in India, the rulings are not very helpful. I would therefore refer, with respect, to a very old ruling of 1874 reported in 'Baboo Chunder Narain Singh v. Brojo Bulub Govie', 21 W R 391 (2). The question in this case was whether the act of the Magistrate in removing an obstruction is in any way a judicial act. Chief Justice Couch referred to Clause (1 of Schedule K) of the Act 6 of 1868 which laid down that whoever builds any wall or erects or sets up any obstruction or encroachment in any public highway shall be liable to a fine not exceeding Rs. 50/-; and the Magistrate shall have power to remove any such obstruction or encroachment, and the expenses of such removal shall be paid by the person erecting the same, and shall be recoverable from him in the manner provided in section 83 of the Act.

(6) The learned Chief Justice then observed:

"If the whole of this clause is to be read as one single provision, and the power of the Magistrate to remove an obstruction only exists where the person building or setting up the obstruction has been convicted and punished by a fine, it might be said that the conviction of setting up the obstruction and imposition of the fine and the removal of the obstruction being one act, and the order by the Magistrate that it should be removed being part of the judicial proceeding for punishing the offender the whole was a judicial act; that the removing the obstruction could not be separated from the awarding of the punishment of the fine. But it appears to me that this would not be a reasonable construction of the clause; for, then, it would not provide for the cases where it may be necessary, for purposes of conservancy, that the obstruction should be removed, and yet no person can be discovered who could be punished for setting it up and made liable to pay a fine, or from whom even the expense of the removal could be recovered. This clause, although it contains two provisions one for the punishment of the author of the obstruction, and the other for the removal of the obstruction must be looked at as if it were in fact two clauses, one providing for the judicial act of determination who the offender is and punishing him, and the other for what may be done separately and without any offender being punished, namely the act of removing the obstruction, which may properly be called an executive or ministerial act."

The learned Chief Justice thereafter observed that these are two distinct acts and

"the circumstance that in this instance there has been the imposition of a fine upon the person who is said to have set up the obstruction does not make the act of the Magistrate which followed it, i.e., the act of removing the obstruction, in any way a judicial act."

(7) After this decision, in the Bengal Municipal Act of 1884 Section 205 laid down that any order made by the Magistrate under Sections 202, 203, 204, or 233 shall be deemed to be an order made by him in the discharge of his judicial duty. On the basis of Section 205 it had been held that an order made under Section 202 is a judicial proceeding and the High Court had power to revise the order of the Magistrate ('Alok Mohan Saha v. Narayanganj Municipality', AIR (7) 1920 Cal 734 (2) and 'Nabadweep Municipality v. Puranchand Mukherjee', AIR (12) 1925 Cal 934.)

(8) This view was followed by Dhavale, J., in 'Chairman Bihar Municipality v. Ramnandi Kuar', AIR (28) 1941 Pat 548, because Section 201, Bihar and Orissa Municipal Act, 1922 also provided that every order made by the Magistrate under section 198 shall be deemed to be an order made by him in the discharge of his judicial duty.

(9) In 'Rangesa Rao v. Swami Nath', 29 Cri L Jour 389:108 Ind Cas 414, Devadoss, J., held that when a Magistrate acting under Section 221, Madras Local Boards Act recovers a profession tax he acts in the capacity of a Magistrate and his orders are subject to the provision of sections 435 and 439, Criminal Procedure Code. The judgment is very short and no reasons are given and the ruling can be ignored.

(10) In 're Dinbai Jiji Bhai Khambatta', 43 Bom 864 the facts were that the committee, proceeded to construct the drain as required by their notice and demanded the cost from the applicant. The committee then applied to the Magistrate for recovery of the amount under section 161 (2) of the Bombay District Municipal Act 1901. The Magistrate directed the expenses to be recovered by distress. This order came for revision. A Division Bench of the High Court observed that the sub-section (2) consists of two parts. The first part relates to prosecution, to be instituted before the Magistrate and the second part provides for recovery of expenses incurred by the Committee. Any order passed on prosecutions is definitely revisable and the recovery of expenses was to be "by such Magistrate." Therefore the Divisional Bench of the Bombay High Court held that an order passed under the second section was also revisable. The words 'by such Magistrate' were emphasised in this judgment.

(11) It will be obvious that this Bombay ruling is not applicable in Gwalior. Section 159 of the Gwalior Municipal Act corresponds to sub-section 1 of section 173 of the Punjab Municipal Act which lays down that whoever places moveable encroachment upon any street without permission of the committee will be liable to punishment. In the Punjab Municipal Act of 1911 there is sub-section 2 in this section which empowers the committee to summarily remove the encroachment and recover the expenses incurred by the committee from the offender. Mr. Vishnubahadur Singh has not been able to show me any specific section in the Gwalior Municipal Act which corresponds to sub-section (2) of section 173 of the Punjab Municipal Act. This absence of any clause leads Mr. Vishnu Bahadur Singh to place reliance on the provisions of sections 153 and 78 of the Gwalior Municipal Act and on their combined effect to make up the deficiency in the Gwalior Municipal Act.

(12) Section 161 (2) of the Bombay District Municipal Act, 1901 may be quoted here in this connection:

"Any prosecution under this Act or under any by-law, thereunder, may be instituted before any Magistrate and every fine or penalty imposed under or by virtue of this Act or any by-law thereunder and also all compensation or other expenses for the recovery of which no special provision is otherwise made in this Act, may be recovered on application to such Magistrate by the distress and sale of any moveable property to the person from whom the money is claimable."

(13) In 're Dinbai Jiji Bhai Khambatta', (43 Bom 864) Heaton J. observed that this sub-section in general provides for (1) the arriving at a judicial decision and (2) to carry out ministerially of that decision. Shah J. observed that the power which a Magistrate exercises, under the latter part of the sub-section is ordinarily of a ministerial nature but in some cases it is also a judicial nature. It was on this view that the learned Judges held that the order of the Magistrate under this section is revisable though, with great respect, I think the observations of Sir Richard Couch C. J. in 21 W. R. 391 (2) were more appropriate and reasonable; but as there is no other sub-section in section 159 of the Gwalior Municipal Act the Bombay ruling or the Punjab rulings are not applicable to the present case.

(14) Sections 449 and 450 of the Calcutta Municipal Act (Bengal Act 3 of 1889) gave more powers to the Magistrate and made his order a judicial order. They laid down that the General Committee may apply to the Magistrate and such Magistrate may make an order directing that the work done be demolished or altered by the Chairman at the expense of the owner of the building; or make an order directing that the projection, fixture, additions, etc. be demolished or altered by the Chairman at the expense of the owner; provided that the Magistrate shall not make any such order without giving the owner or occupier full opportunity of adducing evidence and being heard in defence.

(15) It will be seen from the above provision that in the Bengal Municipal Act it is the Magistrate who passes the order after hearing the parties but in the Gwalior Municipal Act there is no such provision. In the case before me the Municipality has itself removed the encroachment and asked the Magistrate to realise the expenses which have been fixed by the Municipality from the owner. Mr. Vishnu Bahadur Singh has again and again stressed the point that the Municipality can pass an order under section 153 and the Magistrate can realise the dues or the expenses under S. 78 note 3. My difficulty is that S. 153 clearly and specifically mentions that an order under this section can be passed "if it is in accordance with the Act." I have not been shown any provision, rule or by-law framed under this Act, which makes it lawful for the Municipal Committee to remove the Malva as an encroachment and realise the expenses from the owner without prosecuting him under S. 159. The difference between prosecution for encroachment and merely recovering the expenses after removal of encroachment without prosecuting the owner can easily be seen. If the offender has been prosecuted under S. 159 he will be able to plead that no offence has been committed by him and the Magistrate in that case would be empowered to determine the question on merits. In the other case it is urged that the Magistrate is merely a ministerial officer and he should without any inquiry recover the amount fixed by some Overseer of the Municipality. The Committee or rather an officer of the Municipal Committee will always prefer the second course and would be reluctant to prosecute anybody under S. 159 and if the contention of the learned counsel for the Municipal Committee prevails the result will be that the alleged offender will have to pay the money demanded by the Municipality without having been formally declared as guilty of an offence under S. 159 I think this will be open to many objections and in this view the observations of the learned Magistrate and his reference to previous practice deserves serious consideration.

(16) There is also no section in the Gwalior Municipal Act which provides that any order made by the Magistrate under Ss. 153 and 78 will be deemed to be an order made by him in the discharge of his judicial duty. Therefore it is obvious that the Calcutta and Patna rulings referred to above cannot be made applicable to the facts of the present case. An act of removing the obstruction or an act of recovering the cost from the offender by a Magistrate will remain a ministerial act in Gwalior and no revision can lie to this Court against such orders.

(17) The ratio decidendi of 'In re Dalsukh Ram', 6 Cri L Jour 425; 'Karachi Municipality v. Jafferjee Tayabji', AIR (14) 1927 Sind 23 and of 'Municipal Board, Benaras v. Ram Sahia Gupta', 145 Ind Cas 959: 34 Cri L Jour 1105 will be a helpful guide in deciding such cases. These cases have held that a Magistrate hearing an appeal or dealing with a question of civil liability is not an inferior Criminal Court to which alone the revisional jurisdiction of the High Court applies under S. 435, Criminal Procedure Code.

(18) In the 'Lokmanya Mills Barsi v. The Municipal Borough of Barsi', 41 Bom L R 937: AIR (26) 1939 Bom 477 Beaumont C. J. held clearly that the question of liability of tax is purely a civil matter and when the Magistrate hears an appeal against a demand notice in a criminal Court and an appeal goes to the Sessions Court, the Sessions Judge in a case of this sort exercises the power of a civil Court and not of a criminal Court and therefore no revision application lies under the Criminal P. C. It was however held in this case that the High Court has power under S. 115 of the Civil P. C. to entertain an application for revision but such powers should be used sparingly and in proper cases.

(19) This view has recently been approved by a Full Bench of the Bombay High Court in 'D' Monte v. Bandra Borough Municipality', AIR (37) 1950 Bom 397 where it is laid down that the Criminal Court may be constituted as a Court designata and civil jurisdiction may be conferred upon the Court. If a Criminal Court exercises that jurisdiction, then it is not necessarily an inferior Criminal Court within the meaning of the Criminal Procedure Code; and if a right of revision is given from a decision of such a Court then that revisional application is civil in its character and not criminal. It was further made clear in this case that the High Court in such matters exercises a special jurisdiction which is conferred on it under S. 110 of the Bombay Municipal Boroughs Act of 1925 and this should be exercised on the civil side.

(20) It will thus be clear that if there is no provision in the Gwalior Municipal Act conferring revisional jurisdiction upon the High Court in matters of recovering costs for summary removal of encroachments no revision either on the civil or criminal (side?) will be competent.

(21) In a recent case 'Abdulla Haroon & Co. v. Calcutta Corporation', AIR (37) 1950 Cal 36, the question was whether an order passed by a Magistrate under S. 421 Calcutta Municipal Act for destroying at the cost of the owner food or drug which has become unwholesome or unfit for human consumption is a judicial order? R. P. Mookerjee J. after reviewing the entire case law came to the conclusion that the Magistrate in such case is bound to give notice before he arrives at a decision, and after hearing the parties he comes to a conclusion. Therefore, the order of the Magistrate is a judicial order. Das Gupta J. on the contrary came to the conclusion that it was entirely the Magistrate's discretion to hear any evidence or not. The Magistrate is just an alternative to the several Corporation officers or a Councillor or an elderman and the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order under S. 421(2). Therefore the learned Judge held that the Magistrate acting under S. 421(2) is an Executive Officer and not a Court, and his order for destruction of drugs is an administrative and not a judicial order and the High Court has no jurisdiction to revise the order passed by the Magistrate under S. 421. As both the learned Judges agreed in this case that the rule be discharged this case could not go to a third Judge for a final determination of the point canvassed in this case.

(22) It will neither be desirable nor justifiable to go through other rulings and to multiply authorities and apply stray observations in the decisions of various High Courts in India for interpreting an altogether different provision which is to be found in the Gwalior Municipal Act. On a perusal of the provisions contained in Ss. 153 and 78 and inter reting them together there is no escape from the conclusion that the order of the Magistrate is an administrative order.

(23) In the view I take the revision petition is not competent and I dismiss it.

Petition dismissed.

V.B.B.

[C. N. 20.]

A. I. R. (39) 1952 Madhya Bharat 51

(GWALIOR BENCH)

SHINDE AND DIXIT, JJ.

Jagannath, Applicant v. Mt. Puniya, Non-Applicant.

Civil Miscellaneous Petitions Nos 33 and 34 of 1951, D/- 18-9-1951.

Constitution of India Art. 227 — "Superintendence" — Meaning of — Powers of High Court — Error of law or fact — Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act (LXVI (66) of 1950) S. 147.

The word 'superintendence' in Article 227, includes administrative as well as judicial superintendence. In the exercise of its judicial functions, the Board of Revenue is a tribunal subject to the superintendence of the High Court under Article 227. Section 147 of the Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act cannot be construed so as to take away the power given to the High Court under Article 227. If Section 147 of the Act purports to take away the right of superintendence of the High Court under Article 227 of the Constitution, then clearly Section 147 of the Act is to that extent ultra vires the Constitution. The right given to the High Court under Article 227 cannot be taken away by the State Legislature.

The power of superintendence under Article 227 is not restricted to cases of non-exercise or illegal exercise of jurisdiction but extends also to cases where there has been an obvious miscarriage of justice because a Court or a tribunal has approached the matter entrusted to it in an arbitrary or despotic manner and against all rules of natural justice. But the power cannot be exercised to disturb a decision of a Court or a tribunal merely because it has misconceived a point of law or come to a wrong decision of the facts. 'Case law discussed.' (*Paras 3, 4, 5, 15*)

Karkare, for Petitioners.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('35) AIR (22) 1935 All 599: (57 All 977 FB) (Pr 3)
('51) AIR (38) 1951 All 514 (Pr 12)
('51) AIR (38) 1951 Assam 96: (ILR (1951) 3 Assam 147) (Pr 3)
('51) AIR (38) 1951 Assam 106: (52 Cri L J 966) (Prs 2, 3, 14)
('33) 57 Bom 93: (AIR (20) 1933 Bom 1:34 Cri L J 199 SB) (Pr 3)
('37) AIR (24) 1937 Bom 153: (38 Cri L J 606) (Pr 11)
('67) 7 W R 430 (Pr 7)
('07) 6 Cri L J 400: (6 Cal L J 705) (Pr 8)
('21) 48 Cal 522: (AIR (8) 1921 Cal 30:22 Cri L J 213 SB) (Pr 3)
('33) AIR (20) 1933 Cal 132: (34 Cri L J 299) (Prs 8, 9, 16)
('51) AIR (38) 1951 Cal 100 (Pr 3)
('51) AIR (38) 1951 Cal 138: (56 Cal W N 23) (Pr 3)
('51) AIR (38) 1951 Cal 193 (SB) (Prs 3, 9)
('33) AIR (20) 1933 Lah 259: (144 Ind Cas 515) (Pr 3)
('20) AIR (7) 1920 Mad 847: (20 Cri L J 755) (Pr 10)
('51) AIR (38) 1951 Nag 58: (52 Cri L J 1140) (Prs 3, 13)
('51) AIR (38) 1951 Nag 90: (1951 Nag L J 463) (Pr 3)
('19) AIR (6) 1919 Pat 573: (49 Ind Cas 389) (Pr 10)
('20) AIR (7) 1920 Pat 568: (56 Ind Cas 155) (Pr 10)
('28) AIR (15) 1928 Pat 111: (105 Ind Cas 131) (Pr 3)
('51) AIR (38) 1951 Sau 43 (Pr 2)

DIXIT, J.: These are two petitions under Article 227 of the Constitution of India for setting aside the orders of Board of Revenue. In Petition No. 33 of 51, the applicant asks us to revise the order of the Board of Revenue refusing to disturb, in the exercise of its revisional power, the decisions of the Commissioner and the Suba whereby the claim of the non-applicant Mt. Puniya, for her name being entered in the revenue papers as a Morusi tenant, was allowed. The petition No. 34 of 51 arises out of Settlement proceedings in which the Settlement Officer recognised the non-applicant Nanuram's possession of certain land and made an entry accordingly. An appeal against the order of the Settlement Officer was preferred by the applicant to the Commissioner. It was rejected. Thereupon, the petitioner appealed to the Bench Appeal Mal, Ujjain. The appeal was allowed and the petitioner's claim as regards possession was allowed. Subsequently, the non-applicant went up in revision to the Board of Revenue against the decision of the Bench Appeal Mal. The Board of Revenue allowed the revision petition and held that the appeal of the petitioner before the Commissioner was barred by time and that the appeal before the Bench Appeal Mal was incompetent. The petitioner Anand Rao now seeks the revision of this order of the Board of Revenue.

(2) Mr. Karkare who appeared on behalf of the petitioners argued that the Board of Revenue was a tribunal, subject to the superintendence of this Court under Article 227 of the Constitution of India; that under this Article this Court had the power to interfere judicially and even to correct errors of law and fact in the decisions of Courts and tribunals in the territories in relation to which this Court exercised jurisdiction. In support of his arguments Mr. Karkare relied on 'Bavalal Jadavji v. Jivanlal Gopalji', AIR (38) 1951 Sau 43 and 'Israil Khan v. State', AIR (38) 1951 Assam 106.

(3) In my opinion these petitions must be rejected. The decisions sought to be revised have been given by the Board of Revenue in the exercise of its judicial functions conferred on it by Sections 17 and 37 of the Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 (Act No. 66 of 1950). There can, therefore, be no doubt that in the exercise of its judicial functions, the Board is a tribunal subject to the superintendence of this Court under Article 227 of the Constitution of India. It is also true that there is ample authority to support the view that the power of superintendence includes not only superintendence on administrative points but superintendence on judicial side too. (See 'State of West Bengal v. Durga Devi', AIR (38) 1951 Cal 100 'Narendra Nath v. Binode Behari', AIR (38) 1951 Cal 138 and 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR (38) 1951 Cal 193; 'Sheoshankar v. State Govt. Madhya Pradesh', AIR (38) 1951 Nag 58 and 'Shridhar Atmaram v. Collector of Nagpur', AIR (38) 1951 Nag 90; 'Union of Workmen of R. S. N. & I. G. N. & Rly. Co. Ltd. v. River Steam Navigation Co. Ltd., AIR (38) 1951 Assam 96 and 'Israil Khan v. State', AIR (38) 1951 Assam 106). Article 227 of the Constitution is somewhat analogous to Section 107 of the Government of India Act 1915, which gave to the High Courts the power of Superintendence over all Courts for the time being subject to its appellate jurisdiction. In Pigot

v. Ali Mahomed', 48 Cal 522; 'Balkrishna Hari v. Emperor', 57 Bom 93; 'Ganesh Das Shankar Lal v. Asanand Radhsham', AIR (20) 1933 Lah 259 and 'Maharup Kuer v. Mahabir Singh', AIR (15) 1928 Pat 111, it was held that the power of superintendence under S. 107, Govt. of India Act 1915, included the power of judicial interference. The Allahabad High Court, however, took a contrary view in 'Mukund Lal v. Gaya Prasad', AIR (22) 1935 All 599. The Government of India Act 1935, however, restricted this superintendence to administrative matters only by an express provision to that effect in Section 224 (2). The absence in Article 227 of the Constitution of a provision similar to Sub-section 2 of Section 224, Government of India Act, 1935 and the insertion in Sub-section 2 of Article 227 of the words "without prejudice to the generality of the foregong provision", goes to confirm the views that the word 'superintendence' in Article 227 includes administrative as well as judicial superintendence.

(4) If as I think, the Board of Revenue is a tribunal subject to the superintendence of this Court under Article 227 of the Constitution and the power of superintendence of this Court extends to interference in judicial matters, then Section 147 of the Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act Samvat 2007 cannot be construed so as to take away the powers given to this Court under Art. 227. Section 147 says:

"Except as otherwise provided in this Act, no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which the Government are, or a Revenue Officer is, by this Act, empowered to determine, decide or dispose of."

(5) The Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act Samvat 2007 was passed after the Constitution came into force and if Section 147 of the Act purports to take away the right of superintendence of this Court under Article 227 of the Constitution, then clearly Section 147 of the Act is to that extent ultra vires the Constitution. The right given to this Court under Article 227 cannot be taken away by the State Legislature, and therefore it must be held that a power of superintendence exists in this Court in spite of Section 147 of the Act No. 66 of 1950.

(6) The question we have to decide is, what is the extent of judicial interference intended by Article 227, and whether it permits this Court to interfere in every case where it finds some error of law or fact in the proceedings of the lower Courts or tribunals.

(7) In 'Gopal Singh v. Court of Wards', 7 WR 430, one of the earliest case dealing with the power of superintendence conferred on the High Courts by Section 15 of the High Courts Act of 1861, Norman, J., pointed out that:

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court after hearing the parties comes to an erroneous decision either on law or fact in a matter within its jurisdiction, the Court having power of superintendence, never interferes. The only mode of questioning the propriety of such a decision is by appeal."

(8) In 'Kedarnath v. Kshetra Nath', 6 Cri L J 400 (Cal) Mitra, J., observed that the power of superintendence could only be exercised in cases of non-exercise or an illegal exercise of jurisdiction. Rankin, C. J., of the Calcutta High Court described in 'Manmatha Nath v. Emperor', AIR (20) 1933 Cal 132, the power of superintendence by saying that:

"The superintendence is not a legal fiction where-by a High Court Judge is vested with omnipotence but is a term having a legal force and signification. The general superintendence which this Court has over all jurisdiction subject to appeal is a duty to keep them within the bounds of their authority to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decision either in fact or law."

(9) The principles laid down by Rankin, C. J., in AIR (20) 1933 Cal 132, have been followed by a Special Bench of the Calcutta High Court in 'Dalmia Jain Airways, Ltd. v. Sukumar', AIR (38) 1951 Cal 193.

(10) The Madras High Court held in 'Ponnappa Iyengar v. Ramanuja', AIR (7) 1920 Mad 847, that it is only in very rare cases that the High Court would interfere under Section 107, Government of India Act 1915 and even when there was a question of jurisdiction. If there was no question of jurisdiction it would interfere only if very great miscarriage of justice would otherwise result. The Patna High Court by virtue of the powers conferred under Section 107 of the Government of India Act 1915, interfered in cases where there was a gross error apparent on the face of the record and there was a denial of justice. See 'Nilmani Nath v. Pratap Udai Nath', AIR (6) 1919 Pat 573; 'Brindaban Chander v. Gour Chandra', AIR (7) 1920 Pat 568.

(11) A Division Bench of the Bombay High Court held in 'Emperor v. Jamnadas Nathji', AIR (24) 1937 Bom 153, that:

"The powers of superintendence under Section 107 Government of India Act 1915 are not ordinarily meant to be exercised where no power of revision or interference exists and such power ought to be exercised only in rare cases where an obvious miscarriage of justice cannot be otherwise prevented."

(12) A reference may also be made to 'Harsaran Das v. Mukandilal', AIR (38) 1951 All 514, where Malik, C. J., forebore from expressing any concluded opinion on the question whether under Article 227 of the Constitution, the High Courts have not only administrative superintendence but also judicial superintendence, but was at the same time compelled to say that:

"The power given under Articles 226, 227 of the Constitution should be restricted to interference in cases of grave dereliction of duty for which no other remedy is available and which would have serious consequences if not remedied."

(13) In 'Sheoshanker v. State Govt. of Madhya Pradesh', AIR (38) 1951 Nag 58, Mangalmurti and Mudholkar JJ., observed that:

"Under Article 227 ordinarily it will be open to the High Court in the exercise of the power of superintendence, only to consider whether there is an error of jurisdiction in the decision of a Court or tribunal subject to its superintendence, whereas there is no limitation, under Article 226."

(14) An elaborate review of the cases on the subject is to be found in 'Ismail Khan v. The State', AIR (38) 1951 Assam 106, where it was held that:

"Since the jurisdiction of the High Court under Article 227 is extraordinary, it should not serve ordinarily as a substitute for revisional jurisdiction in cases where the revisional jurisdiction has been taken away from the High Court by a competent Legislature though even in such cases absence, excess or abuse of jurisdiction will, no doubt, justify interference. The High Court may also in such cases draw on its power of superintendence, to avoid or prevent obvious miscarriage of justice. It will not be justified in constituting itself a Court of appeal and substitute its own

views on findings of fact after minute scrutiny of the evidence, though the extraordinary jurisdiction may be utilised for correcting miscarriages of justice which have been occasioned by patent errors of law or procedure which cannot be corrected otherwise."

(15) In so far as it is necessary for me to express my own preference between these different views, I agree with the observations of Rankin, C. J., in AIR (20) 1933 Cal 132, which if I may respectively say so, appear to me to be more consonant with the character of the extraordinary power of superintendence than the views expressed in other cases. If I have correctly understood the opinion of Rankin, C. J., the power of superintendence is not restricted to cases of non-exercise or illegal exercise of jurisdiction but extends also to cases where there has been an obvious miscarriage of justice because a Court or a tribunal has approached the matter entrusted to it in an arbitrary or despotic manner and against all rules of natural justice. In saying so I do not pretend to lay down rigid principles for all cases and to define the circumstances or cases in which the extraordinary power under Article 227 should be exercised. I do not think it would be proper for any Judge to particularise the cases in which the power should be exercised and thus to restrict the wide generality of the language deliberately used in Article 227. I am, however, quite clear that the power cannot be exercised to disturb a decision of a Court or a tribunal merely because it has misconceived a point of law or come to a wrong decision of the facts.

(16) In the present case, it is not the case of the petitioner that the Board of Revenue in passing the orders, they did, exceeded or abused its jurisdiction. In Petn. No. 33 of 51, the petitioner challenges the correctness of the findings of fact arrived at by the Revenue Courts. In the other petition, the applicant's grievance is that the interpretation put by the Board of Revenue in a Departmental Order and Section 17 of the Settlement Manual, was wrong and that the Board of Revenue erred in not giving him the benefit of Sections 5 and 14 of the Limitation Act with respect to the appeal before the Commissioner. I fail to see how the decisions of the Board of Revenue in these two cases have resulted in a miscarriage of justice. Learned counsel for the petitioners said everything that could be said in favour of the petitioners. Nonetheless, I am not satisfied that there is any ground to entertain the applications. In my judgment, they must be dismissed.

(17) SHINDE, J.: I agree.

D.H. *Applications dismissed.*

[O. N. 21.]

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DIXIT, J.

Hari Narayan, Applicant v. Mt. Rani Devi, Non-applicant.

Criminal Revision No. 178 of 1949, D/- 5-12-1949.

(a) *Criminal P. C. (1898), S. 488 (3) — Maintenance order against husband — Execution of — Husband whether can show cause against execution.*

The words in Section 488 (3), "if any person so ordered fails without sufficient cause to comply with the order, etc." clearly indicate that when an execution of the order is applied for the husband or the father can show cause why the order would not be executed. The Magistrate must then consider judicially the sufficiency of the cause alleged by the husband or the father and make an order granting or refusing the execution of the maintenance order. The contention that the husband or the father cannot be permitted to show cause against the execution of the order, unless and until he gets the maintenance order cancelled under Sub-section (5) cannot be accepted; for such a construction would mean ignoring the words "failing without sufficient cause" which occur in Sub-section (3). (*Para 2*)

Anno: Criminal P. C., S. 488, N. 16.

(b) *Criminal P. C. (1898), S. 488 (5) — Cancellation of maintenance order — Retrospective effect of.*

Where an order for payment of maintenance which is cancelled under Sub-section (5) on proof that the wife, without sufficient reason refuses to live with her husband, is also incapable of execution on same ground under Sub-section (3) then the arrears of maintenance allowance due up to the date of the cancellation order cannot be recovered. It is clear that from the language used in Sub-sections (3) and (4) if sufficient cause for non-payment is shown and the Magistrate is satisfied that the wife, without sufficient reason refuses to live with her husband the order of maintenance cannot be enforced in the manner provided in Sub-section (3) and the wife is not entitled to receive the amount of maintenance allowance; and that must apply to arrears of maintenance due under an order. AIR (29) 1942 Bom 258, Rel. on; AIR (17) 1930 Lah 99; AIR (25) 1938 Cal 144, Not Appr. (*Para 3*)

Anno: Criminal P. C. S. 488, N. 24, Pt. 2.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('42) AIR (29) 1942 Bom 258: (43 Cri L J 826) (Pr 3)

('38) AIR (25) 1938 Cal 144: (39 Cr L J 357) (Pr 3)

('30) AIR (17) 1930 Lah 99: (30 Cri L J 719) (Pr 3)

ORDER.: This is an application in revision from an order of the Sessions Court Raj Garh refusing to make a reference to this Court for setting aside the order dated 22-6-49 of Sub-Divisional Magistrate, Panchhor in certain maintenance proceedings. On 20th June 1947, the applicant Hari Narayan was directed by the Sub-Divisional Magistrate, Sarangpur to pay maintenance to his children and wife Mt. Rani Devi. The order of maintenance passed by the Sub-Divisional Magistrate was affirmed by the Dewas (Junior) High Court with slight modification. The applicant did not pay the maintenance ordered for the period from 6-5-48 to 28-3-49 and on 31-3-49, Mt. Rani Devi applied to the Sub-Divisional Magistrate, Pachhor to enforce the order under S. 488 (3), Criminal Procedure Code. The applicant objected to the execution of the order on the ground that his wife Mt. Rani Devi, without sufficient cause refuses to live with him. The Sub-Divisional Magistrate took the view that it was not open to the applicant to raise such a contention when execution of the order is applied for and that if the applicant desired that the order should not be executed, he must first apply under Section 488 (5) and have the order against him set aside. The Magistrate, therefore, ordered the execution of the order. The Sessions Judge, Rajgarh to whom an application was made in revision agreed with the view taken by the Sub-Divisional Magistrate and further held that even if the order for maintenance is subsequently cancelled under Section 488 (5) the cancelling order would not have retrospective effect

so as to affect the arrears due up to the date of the order.

(2) The order of the Sub-Divisional Magistrate, Panchhor directing the execution of the maintenance order without considering the objections of the applicant is, in my opinion, clearly wrong. The words in Section 488 (3) 'if any person so ordered fails without sufficient cause to comply with the order, etc.' clearly indicate that when an execution of the order is applied for the husband or the father can show cause why the order should not be executed. The Magistrate must then consider judicially the sufficiency of the cause alleged by the counter-petitioner and make an order granting or refusing the execution of the maintenance order. The contention of the non-applicant that the applicant cannot be permitted to show cause against the execution of the order, unless and until he gets the maintenance order cancelled under Sub-section (5) cannot be accepted; for such a construction would mean ignoring the words "failing without sufficient cause" which occur in Sub-section (3) and also the Sub-section (4) which lays down that a wife is not entitled to receive an allowance, if, without any sufficient reason, she refuses to live with her husband. I, therefore, think the Sub-Divisional Magistrate should have considered the grounds alleged by the applicant against the execution of the order and having regard to all the circumstances then determined whether the order should be executed or not.

(3) As regards the question whether if the order of maintenance is cancelled under Section 488 (5) the cancellation order can affect the arrears due up to the date of the order, it seems to me from the language used in Sub-sections (3) and (4) that if sufficient cause for non-payment is shown and the Magistrate is satisfied that the wife, without sufficient reason refuses to live with her husband the order of maintenance cannot be enforced in the manner provided in Sub-section (3) and the wife is not entitled to receive the amount of maintenance allowance; and that must apply to arrears of maintenance due under an order. It is true that Sub-section (5) does not deal with the question of execution of the order for maintenance but provides for cancellation of the original order for payment of maintenance and the use of the word "cancel" does not necessarily import that the cancellation order has retrospective effect. But if an order for payment of maintenance which is cancelled under Sub-section (5) on proof that the wife, without sufficient reason refuses to live with her husband, is also incapable of execution on same ground under sub-section (3) it seems to me difficult to hold that the arrears of maintenance allowance due up to the date of the cancellation order can be recovered. I am fortified in the view I have taken, by a decision of a Division Bench of the Bombay High Court reported in 'Sangavva v. Gulappa'. AIR 1942 Bom 258. The learned counsel for the non-applicant has relied on 'Bhag Sultan v. Md. Akbar Khan', AIR (17) 1930 Lah 99, which was followed in 'Tari Bala v. Kibal Ram', AIR (25) 1938 Cal 144. In these cases it has been held that the cancelling order has no retrospective effect so as to disallow the prior allowed maintenance and that the maintenance order stands good until it is cancelled. The learned Single Judges of the Lahore and Calcutta High Courts have not given any reasons in support of their conclusions and with all due deference to them, I find myself unable to agree with their view that the order of cancellation takes effect from the date of the order and has no retrospective effect.

(4) For these reasons, I think, the Magistrate erred in summarily making an order for the payment of the arrears of maintenance allowance. The orders, therefore, of the Sessions Judge and the Magistrate directing the execution of the order are set aside and I direct the Sub-Divisional Magistrate that the application for execution and the counter-petition of the applicant be heard and disposed of by him in the light of the observations I have made.

V.S.B. *Revision allowed.*

[C. N. 22.]

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REGE, J.

Mohammad Amir Abbasi, Applicant v. Nasuruddin Ahmad and another, Opponents.

Criminal Misc. Case No. 87 of 1949, D/- 20-6-1949.

Criminal P. C. (1898), S. 491 — Custody of minor children — Paramount considerations — Guardians and Wards Act (1890), Ss. 7 and 9.

Where a minor is illegally or improperly detained, the High Court would interfere by way of Habeas Corpus but the interest of the minor is a paramount consideration and the High Court would not use the powers under S. 491, if the remedy under the Guardians and Wards Act is more suitable. It is a rule of prudence that where an inquiry is necessary to ascertain what would be beneficial in the interest of the minors the local forum will be best suited for making such inquiry. AIR (16) 1929 Mad 33 (F B) and AIR (17) 1930 All 260, Relied on. (Para 3)

In the circumstances of the case, an action under the Guardians and Wards Act was held more appropriate. (Para 3)

Anno: Criminal P. C., S. 491, N. 8, Pts. 8, 9, Guardians and Wards Act, S. 7 N. 2, S. 9 N. 1.

Mohammad Ahmed Khan, for Applicant; Abdul Karim, for Opponent No. 2.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('30) 52 All 491: (AIR (17) 1930 All 260: 31 Cri L J 719) (Pr 3)

('29) AIR (16) 1929 Mad 33: (31 Cri L J 985 FB) (Pr 3)

JUDGMENT: This is an application under Section 491 of the Criminal Procedure Code.

(2) The petitioner alleges that his son aged 9 & a daughter aged 7 years have been illegally detained by the opponents. A notice was served on the opponents and in reply opponent No. 2, Sultan Hamid Khan appeared through Pleader to show cause against the rule. His case is that the petitioner was married to Naiyar Jehan Begum but after her death on 16-12-1943 the petitioner did not take care of the children and that he had another wife from whom he had children as well; that after the death of the mother the children were looked after by the mother's mother who died on 6-3-1949. During her life-time she (the mother's mother), made a petition to the Administrator and Chief Minister, Jaora State in March 1948 in which she expressed her desire that after her death the children should be looked after by the Government of Jaora & their property should also be in trust with the State. The Chief Minister accepted the trust and ordered that the property should be taken over by the State and that:

"so long as the lady is alive the two children will remain with her and will be looked after by her. After her death the Government will have to

make some arrangement for looking after them and for that purpose the applicant lady has authorised the Government to make use of the minors' property."

These facts are not denied prima facie by the opponent's learned counsel in his application dated 20-6-1949, wherein a prayer is made for joining the Government as a party.

(3) The main question therefore is whether in the apparent circumstances of the case action under Section 491 of the Criminal Procedure Code would be proper. It may be conceded that where a minor is illegally & improperly detained this Court would interfere by way of Habeas Corpus but it has also to be borne in mind that the interest of the minors must be a paramount consideration and where a remedy under the Guardians and Wards Act is more suitable the High Court should not use these powers under Section 491 of the Code of Criminal Procedure. I am fortified in this view by the decisions reported in 'Sultan Singh v. Maya Ram', 52 All 491 and 'Moidin v. Kunha Devi', AIR (16) 1929 Mad 33. It would be a rule of procedure that where an inquiry is necessary to ascertain what would be beneficial in the interest of the minors the local forum will be best suited for making such inquiry; and in a case like the present one I consider that an inquiry is necessary and action under the Guardians and Wards Act will be more appropriate.

(4) I discharge the rule but since there is no appearance today on behalf of the opponents and the decision is not on merits I make no orders as to costs.

D.R.R. *Rule discharged.*

[C. N. 23.]

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MEHTA, J.

Ramkuwar Jainarayan, Appellant v. Pyarchand Meerchand, Respondent.

Second Appeal No. 197 of 1949, D/- 30-9-1949.

Evidence Act (1872), S. 34 — Rokad entries prepared every fortnight from Kachi Rokad entries regularly kept — Relevancy.

It is not necessary under S. 34 that the entries in the books should have been made from day to day or from hour to hour as the transactions take place. Accounts prepared from rough books or memoranda should be treated as original accounts and cannot be rejected on the ground that they were not entered regularly from day to day. (*Para 4*)

Rokad entries, therefore, cannot be rejected because they were made up every fortnight from Kachi Rokad regularly kept for fortnightly accounts. (*Para 4*)

Anno: Evidence Act S. 34, N. 2.

S. M. Samvatsar, for Appellant; R. L. Khabia, for Respondent.

JUDGMENT.: This is defendant's second Appeal and arises out of a suit filed by the plaintiff Pyarchand against the defendant, Ramkunwar for arrears of rent and ejectment.

(2) The plaintiff's case is that the defendant took from him on monthly rent of Rs. 13/- back portion of 2nd and 3rd storey of his house in Marothya Bazar. According to the plaintiff the defendant paid rent up to Fagan Sudi 10 S. Y. 2002 and later on for subsequent months the defendant did not pay rent and was in arrears for 10 months. According to plaintiff the defendant did not pay rent from Chait Sudi 10, S. Y. 2003 to Pose Sudi 10, S. Y. 2003. Hence the rent was in arrears amounting to Rs. 130/-. The plaintiff gave notice to the defendant to vacate the house but the defendant did not vacate it. Hence his suit for ejectment and arrears of rent.

(3) The defendant in his written statement admitted the tenancy but contended that he had paid the full amount of rent regularly up to Magsar Sudi, 10, S. Y. 2003. He also sent one month's rent by Money Order but the defendant refused to accept it. The defendant contended that he had deposited Rs. 52/- in Court as rent due and subsequent payments have been made in Court up to 20th July 1949. The trial Court found that the defendant had paid arrears of rent up to the filing of the suit. The defendant is protected by the Indore House Rent Control Order and therefore dismissed the plaintiff's suit for ejectment and arrears of rent. The plaintiff went up in appeal and the learned District Judge held that the defendant had failed to prove the alleged payment and therefore decreed the plaintiff's suit for ejectment and arrears of rent. The future rent at Rs. 13/- per mensem from Pose Sudi 10 S. Y. 2003 till the vacant possession is given was also decreed. The defendant has come up in second appeal.

(4) The only point for consideration in this appeal is whether the defendant has proved payments from Fagan Sudi 10 S. Y. 2002 to Magsar Sudi 10 S. Y. 2003. The burden of proving this issue is on the defendant and it is necessary to determine whether his state of accounts and other corroborative evidence prove that he had paid rent Rs. 130/- from Fagan Sudi 10 to Magsar Sudi 10. The defendant has produced his Rokad entries D/1 to D/9, showing the payment of rent of Rs. 13/- from Chet Sudi 10 to Magsar Sudi 10 S. Y. 2003. The rokad entries it is true are not written from day to day but they are entered from kachi Rokad regularly kept for fortnightly accounts. The entries do not bear dates but indicate the fortnight of the month during which the payment was made. The rokad is in the handwriting of Prahaladdas son of defendant Ramkuwar who deposes that he has written the entries from Exs. D/1 to D/9. He says that he keeps Kachhi Rokad from which the Pakki Rokad is written up in fortnight. Sometimes the entries are written even after a month. The learned District Judge has not relied on the Pakki Rokad entries because the Kachi Rokad has not been exhibited. It appears to me from the application, made by the defendant to the trial Court on 12-1-1948 that he had already filed the Kachi Rokad entries but as they were not properly exhibited he wanted to recall his son Prahaladas who has written them. The trial Court rejected the application saying that Pakki Rokad entries have been reproduced verbatim from Kachi Rokad and therefore it is not necessary to recall Prahaldass to prove them. Thus it appears that the defendant had not deliberately kept back the Kachi Rokad entries. He had filed them along with the written statement on 9-5-1947 and they are there on the record. These entries D/1 to D/9 have been proved and because the Rokad entries are made up every fortnight is no reason why they should not be relied upon. It is not necessary that the entries in the books should have been made from day to day or from hour to hour as the transactions take place. Accounts prepared from rough books or memoranda should be treated as original accounts and cannot be rejected on the ground that they were not entered regularly from day to day. All that Section 34 of the Evidence Act requires is that the entries in the accounts should be regularly kept in the course of business and the person making them

should have personal knowledge of the facts stated therein. Ramkunwar had deposed that whenever he paid rent his son was always present. Therefore, Prahaladas son of Ramkunwar had personal knowledge of the entries.

(5) The learned District Judge has also relied on the fact that the defendant has not produced the receipts of the payment of rent. It, however, appears that from the statement of Bakhtawarmai that he used to go to recover rent on behalf of his brother but he never used to pass receipt for the rent received. Bakhtawarmal further deposes that after taking the rent he used to write the payments in the defendant's account books. He never used to pass a separate receipt. Bakhtawarmal thus contradicts the plaintiff Pyarchand in this material particular. It is very significant to note that not a single question was asked to defendant Ramkunwar whether he used to obtain receipt from Bakhtawarmal in a book kept by him for this purpose. This is a very material omission and shows that no such book was kept by the defendant. Another point on which the learned District Judge has relied is that the defendant did not give any reply to the plaintiff's notice when the latter demanded arrears of rent prior to the filing of the suit. On this matter also no question was put to the defendant as to why he did not reply to the plaintiff's notice. The defendant was never asked to file reply given by him. The defendant has produced an acknowledgment showing that he did reply to the plaintiff's notice. The learned District Judge has relied on one letter Ex. P/1, dated the 1st April 1946, written by defendant Ramkunwar to the plaintiff in which the defendant complained that if no arrangement for supplying water free from pollution is made, he would not pay the rent. However, the defendant's explanation is that the plaintiff wanted the Municipality to give him water connection from Gambhir Water Works, therefore, he asked the defendant to write a letter of the kind Ex. P/1, so that he may get connection. The defendant states that he wrote this Chithi Ex. P/1, because the plaintiff falsely induced him to write it. This Chithi Ex. P/1 would not go to show that the defendant did not pay rent after he wrote this Chithi. This is a double-edged argument and it is just possible to infer that on the strength of this Chithi the plaintiff refused to give credit of rents paid by defendant subsequently.

(6) It appears to me having regard to the facts and circumstances of the case that the defendant who has been the plaintiff's tenant for the last ten years and has been paying rent regularly should invite trouble on himself by not paying rent from Fagan to Magsar, for a period of nine months. (sic.) The conduct of the defendant shows that he has paid rents even after the institution of the suit up to 20th July 1949.

(7) The plaintiff's accounts are thoroughly useless and unreliable. He has purposely failed to give credit of the rent paid from Fagan to Magsar Sudi 10 S. Y. 2003, paid by the defendant, so that the defendant cannot claim protection under the House Rent Control Order. Both the lower Courts have not relied on the plaintiff's Khata Ex. P/3. The Plaintiff's Khata Ex. P/3 is of S. Y. 2000 and he has not cared to change the Khata from year to year and no fresh Khata has been started for S. Y. 2001 and onwards. The entries in the Khata P/3 do not bear any date nor any month has been mentioned. It is thus an absolutely unreliable Khata.

(8) Having regard to all the aforesaid circumstances I am of opinion that the defendant has succeeded in proving that he paid the full amount of the rent regularly up to Magsar Sudi 10, S. Y. 2003. I, therefore, allow the appeal, set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the trial Court and dismiss the plaintiff's suit with costs throughout.

V.B.B. *Appeal allowed.*

[C. N. 24.]

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REGE, J.

Ramjilal, Appellant v. Ahmad Ali and another, Respondents.

Second Appeal No. 270 of 1948, D/- 18-10-1949.

(a) *Muhammadan Law — Will — Attestation.*

Under the Muhammadan Law no formalities are needed for a will and an unattested will can be admitted and proved. (Para 4)

(b) *T. P. Act (1882), S. 105 — Rent — Claim for enhanced rent.*

The tenancy connotes privity between the parties and unless there is an express agreement to pay enhanced rent or circumstances or conduct from which one could be inferred a claim for enhanced rent cannot stand. (Para 6)

Anno: Transfer of Property Act S. 105, N. 59, 64.

Narayanji Singhal, for Appellant; G. M. Chafekar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('40) AIR (27) 1940 Nag 140: (189 Ind Cas 895) (Pr 6)

('25) AIR (12) 1925 Oudh 189 (3): (28 Oudh Cas 77) (Pr 6)

('33) 145 Ind Cas 647: (AIR (20) 1933 Oudh 465) (Pr 6)

JUDGMENT.: The respondents instituted the suit out of which this appeal arises to obtain a decree for ejectment and arrears of rent against the present appellant. They alleged that the property vested in them under the will of one Rajab Ali. On the death of Rajab Ali notice was given to the appellant-defendant to vacate or pay rent at Rs. 7-8-0 in place of Rs. 2-8-0. The defendant denied the plaintiff's right to eviction or enhanced rent and finally on 31-12-1945, the final notice to vacate was given.

(2) The defendant contended that the plaintiffs were not the heirs of Rajab Ali; that the rent-note was inadmissible for want of registration and further set up his own occupation under an agreement by Rajab Ali to reconvey the property to him. It may be mentioned that Rajab Ali had purchased the property from the defendant and his brother on 21-6-1938 (Vide Ex. P/1).

(3) The claim was decreed by the trial Court for ejectment and arrears of rent at Rs. 2-8-0 per month. The defendant's appeal against the decree for ejectment was dismissed by the District Judge Jaora, and a cross-appeal by the plaintiff for arrears of rent at Rs. 7-8-0 was allowed. The defendant has come up in appeal.

(4) The questions raised in this appeal are:

1. Are plaintiffs entitled to bring the suit?
2. Is the rent-note admissible in evidence?
3. Had the plaintiffs a cause of action for ejectment?
4. Can arrears be granted at the enhanced rate claimed by the plaintiff?

The finding that the will set up by the plaintiff is proved has not been challenged in the memo of appeal but the learned Counsel for the appellant contended that there was no attestation proved. Under the Mohommadan Law, however, no formalities are needed and an unattested will can be admitted and proved. (See Mulla's Mahommadan Law page (sic.)).

(5) It is unnecessary to consider the question of the admissibility of the rent-note since the tenancy was expressly admitted by the defendant in the replies to the notices to vacate and the only dispute was then as to the quantum of rent. The defendant never challenged the validity of the notice and in view of this present contention that he was ever a tenant, the question does not arise at this stage. There was clearly cause for an action on the defendant's refusal to vacate.

(6) The only question is about the propriety of the decree for arrears. The tenancy connotes privity between the parties and unless there is an express agreement to pay enhanced rent or circumstances or conduct from which one could be inferred a claim for enhanced rent cannot stand. The learned Judge below has relied on a decision of the Nagpur High Court reported in 'Parekh Nandlal v. Anant Govind', AIR (27) 1940 Nag 140. A perusal of the judgment shows however that an agreement to pay enhanced rent was inferred in that case by the absence of protest against the landlord's demand. The correct principle has been enunciated in the decision reported in 'Mahomed Noor v. Ashiq Beg', 145 I C 647 (Oudh), which explains the observations in the earlier case in 'S. Burge v. Md. Inamullah Khan', AIR (12) 1925 Oudh 189 (3) and agreeing with this view I hold that the decree for enhanced rent cannot stand.

(7) I allow the appeal in part and setting aside the decree of the lower appellate Court restore that of the First Court. Fakhruddin was not a proper party to the suit and his name should be struck off. In view of the fact that the plaintiff partially succeeds and so does the defendant. I direct that parties should bear their own costs throughout.

V.B.B. *Appeal allowed.*

[C. N. 25]

A. I. R. (39) 1952 Madhya Bharat 57

(GWALIOR-BENCH)

(FULL BENCH)

KAUL C.J., SHINDE AND DIXIT JJ.

Ram Dubey, Applicant v. The Government of the State of Madhya Bharat and another, Opponents.

Civil Misc. Case No. 7 of 1951, D/- 6-12-1951.

(a) Constitution of India — Indian States, integration of — Covenant by Rulers — Madhya Bharat Covenant, Art. X (2) and Sch. IV — Election of members of Interim Legislative Assembly.

There is nothing either in the language of the main Article or in that of the Schedule to warrant a conclusion that the Rajpramukh could not accept for the Interim Legislative Assembly 40 members elected by the members of the Gwalior Legislative Assembly and 15 members elected by the members of the Indore Legislative Assembly unless such members were elected after the 11th of May 1948 when the Rajpramukh entered upon the functions of his office. All that the Rajpramukh had to see when he constituted the Interim Legislative Assembly was that the members of his Assembly fulfilled the qualifications mentioned in the schedule. Further after the Rajpramukh had entered upon the functions of his office he accepted the members elected by the Gwalior and the Indore Assemblies as members of the new Legislative Assembly and set upon what was done by the Gwalior and Indore Legislative Assemblies the seal of his approval. (Paras 13, 14)

(b) Constitution of India — Integration of Indian States — Covenant by Rulers — Madhya Bharat Covenant — Interpretation.

The Covenant is more akin to a treaty entered into by various States rather than a Statute passed by a Legislature, and accordingly it is only appropriate if the rules to be applied to its construction are those applicable to treaties rather than those applied to interpretation of Legislative enactments. Any attempt to apply all the technical rules ordinarily used for the interpretation of a Statute or to put a legalistic and narrow interpretation upon such a document would be improper and defeat the intention of the parties thereto and the purposes for which it was brought into existence. If the Rajpramukh has put upon the terms of the Covenant any interpretation and given effect to its provisions in a particular manner which has been accepted by all the States either expressly or by tacit consent in refraining from raising any objection to what was done by the Rajpramukh this in the absence of very strong reasons to the contrary, must be accepted as the proper interpretation of the meaning and the purposes of the Covenant. (Paras 15, 16)

(c) Constitution of India — Indian States, integration of — Covenant by Rulers — Madhya Bharat Covenant, Sch. IV (c) — Electoral College — Formation of.

The power of the Rajpramukh in forming the electoral college was unrestricted. All that was required was that he should do so in consultation with the Government of India. An electoral college is nothing more than a body of electors to choose one or more persons for a certain office or for an assembly. There is no invariable rule for constituting an electoral college. The electoral college which sent the 20 members consisted of two divisions — one the 'Prajamandal' and the other the Madhya Bharat Provincial Congress Committee'. — There is no warrant in the language of Sch. IV for the conclusion that an electoral college consisting of two divisions each of whom was to elect a certain number of members, could not be formed by the Rajpramukh. (Para 17)

(d) Constitution of India, Art. 385 — Test to be applied under.

(Per Kaul C. J.) : Article 385 requires the application of only a factual test. The constitutionality as a body of the Legislative Assembly which passed the Zamindari Abolition Act cannot be challenged as it fulfilled the factual test laid down by Art. 385. Accordingly even if it be assumed that some members of that body who were not entitled to sit, vote or otherwise take part in the proceedings of the Assembly did so, the validity of any enactment passed by it cannot be challenged in view of the provisions of S. 9 (2) of the Interim Legislative Assembly Act. (Para 21)

(e) Constitution of India — Indian States, integration of — Covenant by Rulers — Madhya Bharat Covenant, Art. X (2) — Failure to con-

stitute Interim Legislative Assembly before 1-8-1948.

The principle that time is of essence which is often discussed in Law Courts in cases arising out of breach of contracts cannot be applied to interpretation of Art. X of the Covenant. There is no provision in the Covenant as to the consequences which would follow on the inability of the Rajpramukh to constitute an Interim Legislative Assembly before the 1st of August 1948. The only purpose of fixing a date was to emphasise the need for expeditiousness in the constitution of the Interim Legislative Assembly. (Para 23)

(f) Constitution of India, Art. 31A proviso — 'Law' — Meaning of.

The word 'Law' as used in Article 31A means no more than a Bill passed by the Legislative Assembly of a State or in the case of a State having the Legislative Council a Bill passed by both Houses of Legislature of the State. Further when the Rajpramukh does not withhold his assent to a Bill and reserves the same for the consideration of the President, he must be deemed to have given his assent to that Bill, as an essential part of the Legislature of the State. It cannot therefore be said that inasmuch as the Bill for abolition of Zamindari in Madhya Bharat after it was passed by the Legislative Assembly did not receive the assent of the Rajpramukh as required under Art. 200 of the Constitution to make it a Law the provisions of the proviso were not complied with and what was reserved by the Rajpramukh for the assent of the President was a Bill passed by the State and therefore any such Legislation would not attract itself the provisions of Article 31A. Misc Petn. No. 29 of 1951 (Nag), Rel. on. (Paras 29, 30)

(g) Constitution of India, Part. III, Art. 31A — Natural rights — Rights recognized and rights conferred by Constitution — Madhya Bharat Zamindari Abolition Act — Applicability of Art. 31A.

It is too late in the day to base an argument in an Indian Court on the theory of the natural rights of man, particularly in relation to property. Whatever rights can now be claimed by any citizen in India must be on the basis of the Constitution. If relief is sought in respect of any infringement of an alleged right, the persons asking for such relief must base his claim on some provision of the Constitution either express or implied. The Fundamental Rights derive their sanctity not from anything which existed previously but from the Constitution and in this sense they are conferred by the Constitution. They are rightly called as "conferred" by the Constitution inasmuch as for enforcement of such rights new remedies are made available to the citizens of India. An application under Art. 226 of the Constitution challenging the constitutionality of the Madhya Bharat Zamindari Abolition Act is not a proceeding in relation to a right which has been merely recognised, but is in regard to a right which has been conferred by the Constitution. Article 31A therefore applies to such a case. AIR (37) 1950 SC 27, Foll.
(Paras 31, 32, 34, 71, 74, 75)

(h) Constitution of India, Art. 31 (4) — "Bill" — Meaning of.

The requirement of the clause is that a Bill must be pending on the date of the commencement of the Constitution and not that the Act ultimately passed must in every respect follow the Bill. It cannot be held that if a Bill as originally introduced in a Legislative Assembly, is during its passage through the house so materially altered as to become unrecognisable as the same Bill, the resulting Act can be impugned on this ground. Misc. Petn 29 of 1951 (Nag.) Rel. on. (Paras 35, 36)

(i) Constitution of India, Art. 31 — Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951) — Validity.

The Madhya Bharat Zamindari Abolition Act cannot be held to be confiscatory as not providing for compensation being given to Chakdars and Blockdars and as not providing for compensation for forest lands, pastures, stray trees and similar other items pertaining to Zamindari. AIR (38) 1951 All 674 (F B), Rel. on. (Paras 40, 42).

(j) Constitution of India, Art. 14 — Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951) not discriminatory.

The provisions relating to the award of rehabilitation grants though discriminatory are not void. The distinction between the bigger and the smaller Zamindars cannot be said to be arbitrary or capricious. A distinction based on the economic condition of the different classes cannot be said to be unreasonable. A I R (38) 1951 All 674 (F B), Rel. on; AIR (38) 1951 S C 318 Foll. (Paras 43, 44)

(k) Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951) S. 14 (5) — "Final and conclusive" — Meaning of — Constitution of India, Arts. 226, 227.

(Per Kaul C. J.): The phrase "final and conclusive" means nothing more than that it would not be open to challenge by an appeal or other proceeding. It should not be however interpreted to mean that the jurisdiction of the High Court under Art. 226 or 227 of the Constitution was thereby excluded. (Para 46)

(l) Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951) S. 15 — Validity — Constitution of India, Arts 226, 227.

(Per Kaul C. J.): In view of the words "anything contained in any Law for the time being in force" it is not possible to hold that the Section does not trench upon the jurisdiction conferred upon the High Court under Arts 226 and 227 of the Constitution. The Section in so far as it excludes the jurisdiction of the High Court exercisable under these two articles is 'ultra vires' of the powers of State Legislatures. (Para 47)

(m) Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951) S. 20 (5) — Validity — Constitution of India, Arts. 226, 227.

(Per Kaul C. J.): It was not intended by this provision of the Act to exclude the jurisdiction of the High Court under Arts. 226 and 227 of the Constitution. (Para 48)

(n) Madhya Bharat Zamindari Abolition Act (XIII (13) of 1951), Ss. 31, 32 — Validity — Constitution of India, Arts. 226, 227.

(Per Kaul C. J.): Sections 31 and 32 are not intended to exclude the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and are in view of entry No. 65 of the Seventh Schedule of the Constitution are 'intra vires' of the State Legislature. (Para 49)

† (o) Madhya Bharat Zamindari Abolition — Act (XIII (13) of 1951) — Validity.

(*Per Kaul C. J.*): *The act is a good and valid law except for Section 15.* (*Para 50*)

(p) *Constitution of India, Art. 31 (4) — Extent of protection.*

(*Per Dixit J.*): *It would appear from the words "Notwithstanding anything in this Constitution" which occur in clause 4 that it is not permissible to object to an Act on the ground that the compensation fixed or to be determined is no compensation in law as being contrary to other provision of the Constitution. The protection given by the clause 4 is not confined to one ground only, namely, the ground arising out of the provisions of clause 2 of Art. 31. A. I. R. (38) 1951 All 674 (F B) and Misc. Petn. 29 of 1951 (Nag), Rel. on; AIR (38) 1951 Pat 91 (S B) Dissented from.* (*Paras 77, 78*)

(q) *Constitution of India, Art. 31 — Public purpose — Purposes of the State.*

(*Per Dixit J.*) — *Purposes of the State or purposes of the Union are public purposes. Taking into consideration S. 3 of the Madhya Bharat Zamindari Abolition Act which vests proprietary rights in the State and other provisions of the Act, it cannot be seriously disputed that the Act is for the purposes of the State.* (*Para 82*)

(r) *Constitution of India, Arts. 208 (2), 212 (1) — Irregularity in passing a Bill — Effect.*

(*Per Dixit J.*) — *The form, content or subject-matter of a Bill at the time of its introduction into or of its consideration by the Assembly on the report of the Select Committee, is not a matter with which a Court of law is concerned. The question, whether the Assembly should have passed the Bill as reported by the Select Committee or recommitted it to the Select Committee or dropped the Bill, is a domestic matter relating to the procedure followed by the Assembly in the course of legislation. If there is any irregularity in the procedure followed by the Assembly in passing the Bill it does not make the culminating Act invalid or ultra vires.* (*Para 84*)

(s) *Constitution of India, Art. 188 — Madhya Bharat Legislative Assembly — Continuance after Constitution.*

The Madhya Bharat Legislative Assembly which passed the Madhya Bharat Zamindari Abolition Bill was a valid Legislative body under the Constitution, because the members of the body substantially complied with the requirements of Art. 188 about oath and it was presided over by a person who had taken an oath and who was entitled to continue in the office of Speaker of the Assembly after the coming into force of the Constitution. AIR (39) 1952 Madh B 31, Rel. on. (*Para 86*)

(t) *Constitution of India, Art. 385—Scope of.*

(*Per Dixit J.*) — *Article 385 does not protect from challenge the validity of the Constitution of a body which though functioning immediately before the commencement of the Constitution as the Legislature of the State was not legally entitled to do so under the law of the State.* (*Para 103*)

(u) *Interim Legislative Assembly Act (XXIII (23) of 1949) S. 9 (2) — Initial Constitution of Legislature questioned.*

(*Per Dixit J.*) *S. 9 (2) is not applicable where the initial Constitution of the Legislature itself is being questioned.* (*Para 103*)

B. Somayya and Anand Bihari Mishra, for Applicant; K. A. Chitale, Advocate General, for the Government.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(50) AIR (37) 1950 S C 27: (51 Cri L J 1383) (Prs 31,73)
('51) AIR (38) 1951 S C 318: (52 Cri L J 1361) (Pr 44)
('51) Petns. Nos. 382, 371 & 166 of 1951: (AIR (38) 1951 S C 458) (Pr 54)
('51) AIR (38) 1951 All 674: (1951 All L J 365 F B) (Prs 30, 42, 44, 78)
('51) Civil Misc Appln No. 3 of 1950 D/- 12-10-1951: (AIR (39) 1952 Madh B. 31) (Prs 24 86)
('51) Misc Petn. No. 29 of 1951 (Nag) (Prs 29, 78)
('51) AIR (38) 1951 Pat 91: (30 Pat 454 S B) (Pr 78)
(1610) 8 Co Rep 118 (Pr 69)
(1614) Hob 97 (Pr 69)

KAUL, C. J.: After the State Legislature had passed what is now Act No. 13 of 1951 (Madhya Bharat Zamindari Abolition Act) it was reserved by the Rajpramukh under Art. 31 (4) of the Constitution for the consideration of the President. It received the President's assent on the 5th June 1951. This, as its preamble states, is:

"An Act to provide for the public purposes of the improvement of agriculture and financial condition of the agriculturists by abolition and acquisition of the rights of proprietors in villages Muhals, chacks or blocks settled on Zamindari system which is only a system of keeping an intermediary between the States and the tenants injurious to the betterment of agriculture as well as the agriculturists in Madhya Bharat and for other matters connected therewith."

Section 3 of the said Act provides as follows:

"1. Save as otherwise provided in this Act and subject to the provisions of S. 8, on and from a date to be specified by a notification by the Government in this behalf (hereinafter referred to as the date of vesting) all proprietary rights in a village, Muhal, land Chak or block in Madhya Bharat vesting in the proprietor of such village, Muhal, land Chak or Block, as the case may be, or in a person having interest in such proprietary right through the proprietor shall pass from such proprietor or such other person, to and vest in the State free of all encumbrances.

2. After issue of a notification under sub-s. (1), no right shall be acquired in or over the land to which the said notification relates, except by succession or under a decree or order of a Court or under a grant of contract in writing made or entered into by or on behalf of the Govt. and no fresh clearings or cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Government in this behalf.

3. The Government may by notification published in the Government Gazette vary the date specified under sub-s. (1) at any time before such date."

(2) Shree Ram Dubey is a Zamindar in District Gird of Madhya Bharat. As his rights were

likely to be materially affected by any notification issued under S. 3 (2) and other provisions of the Act, he has made the present application under Art. 226 of the Constitution challenging the validity of this piece of Legislation. It is prayed that a writ in the nature of Mandamus or an order be issued to the Government of Madhya Bharat directing it to forbear "from issuing any notification under S. 3 of the said Act or from giving any effect in general to the said pretended Act". There is also a prayer for issue of an injunction restraining the Government of the State "from taking possession of the properties of the petitioner under the said Act". Though the relief para of the application contains a number of subparagraphs the above two prayers substantially cover all the reliefs that are asked for except the petitioner's claim for costs.

(3) Though the application made, mentioned more than a score of grounds on which the constitutionality of the Act was challenged, the petitioner's learned counsel Mr. Somayya confined himself only to 7 of them at the hearing. They are as follows:

"1. The said Act is beyond the Legislative competence of the State Legislature of Madhya Bharat.
2. The interference of the said Act is not for a public purpose.
3. The said Act does not specifically provide for any compensation to, inter alia, proprietors and Chakdars and Blockdars whose estates are to vest in the State as aforesaid.
4. The Bill passed which became the Act afterwards is not the Bill which was originally introduced in the so called Interim Legislative Assembly of Madhya Bharat.
5. The so called Interim Legislative Assembly of Madhya Bharat was not properly constituted under the Covenant. Therefore, the Bill "Zamindari Unmulan Bill" as introduced in the so called Interim Legislative Assembly of Madhya Bharat could not be considered and passed by the present Legislative Assembly of Madhya Bharat. It ought to have been freshly introduced.
6. The so called Legislative Assembly of Madhya Bharat is not a properly constituted Legislature of Madhya Bharat under the Constitution of India. It is presided over by a person.....who has not taken the oath of membership of the Legislative Assembly of Madhya Bharat under Art. 188 of the Constitution of India, and who is not entitled to continue as the speaker of the Assembly under the said Constitution. The members of the said Legislative Assembly, as well, have not taken the oath as required under the Constitution of India as applied to Part B States, under Part VII. Thus the so called Legislative Assembly of Madhya Bharat is not a competent authority to pass any Enactment which can have the force of law in Madhya Bharat, and therefore the said Act by the said Legislative Assembly of Madhya Bharat is void and inoperative.
7. The amendment of Constitution of India Act of 1951 is ultra vires the powers of the President and the Provisional Parliament under the Constitution. The people of India having delegated the power to amend the Constitution in the body designated in Art. 368, the President has no power to amend Art. 368 so as to authorise the Provisional Parliament to amend the Constitution. The words "for the purpose of removal of difficulty" in Art. 392 did not authorise the President to remove such difficulty as has been deliberately imposed by the Constitution."

(4) Shortly stated the points urged at the hearing were as follows:

(1) The Madhya Bharat Legislative Assembly as it existed before the Constitution of India came into force was not properly constituted.
(2) Even after the Constitution of India came into force the Madhya Bharat Legislature could not be said to be a legal and validly constituted body.
(3) The impugned Act is bad in as much as it did not receive the assent of the Rajpramukh.
(4) The Act is not saved by Art. 31(A) of the Constitution.
(5) The Act is confiscatory and discriminatory in character as it does not provide for any compensation for some items of property.
(6) That the Bill which later on became an Act was not the Bill that was originally introduced in the Assembly.

(5) For a proper appreciation of some of the points thus raised it is necessary to give a short account of the formation of the State of Madhya Bharat and the creation of the body which worked as the Legislative Assembly in this State.

(6) It is common knowledge that by the 15th of August 1947 all the Indian States barring the States of Hyderabad, Kashmere and Junagarh had acceded to the Dominion of India. The States which had acceded could be fitted into the Constitutional structure of India only after their consolidation into sizable administrative units and their democratization. As a part of this process, in April, 1948, the Rulers of Gwalior, Indore, and a number of other States in Central India entered into a Covenant for the establishment of a United State comprising the territories of their respective States with a common Executive, Legislature and Judiciary. This State when established was to be called the United State of Gwalior, Indore and Malwa (Madhya Bharat). The Executive authority of the United State of Madhya Bharat was to be exercised by the Rajpramukh either directly or through the officers subordinate to him. The then Ruler of Gwalior was to be the first Rajpramukh and he was to enter upon the duties of his office on the 11th day of May 1948. There was to be a Council of Ministers to aid and advice the Rajpramukh in the exercise of his functions. The Ruler of each covenanting State was, as soon as may be practicable, and in any event not later than the 1st of July 1948, to make over the administration of his State to the Rajpramukh. Thereupon all rights, authority and the jurisdiction belonging to the Ruler of which appertained or were incidental to the Government of the covenanting State became vested in the United State and shall thereafter be exercisable only as provided by the Covenant or by the Constitution to be framed thereunder. The Rajpramukh was under Art. 8 of the Covenant to execute as soon as practicable,

and in any event not later than the 15th of June 1948, on behalf of the United State of Madhya Bharat an Instrument of Accession in accordance with the provisions of S. 6 of the Government of India Act of 1935 and in place of the Instruments of Accession of the several covenanting States, and by such Instrument to accept as matters with respect to which the Dominion Legislature might make laws for the United State all the matters mentioned in List I and List III of the Seventh Schedule of the said Act except entries in List I relating to any tax or duty. The Covenant provided by Article X that the Rajpramukh shall not later than the 1st day of August 1948 constitute an Interim Legislative Assembly for the United State of Madhya Bharat which shall consist of 40 members elected by the Gwalior Legislative Assembly, 15 members elected by the members of Indore Legislative Assembly and 20 members elected by an electoral college to be constituted by the Rajpramukh in consultation with the Government of India to represent the covenanting States other than Gwalior and Indore. The election of these members was to be by proportional representation by means of the single transferable vote. The Rajpramukh was authorised to make rules for carrying into effect the foregoing provisions and securing the due constitution of the Interim Legislative Assembly. It was originally agreed that as soon as may be practicable there should be formed a Constituent Assembly to frame a Constitution for the United State. By an amendment of the Covenant however, it was stipulated that instead of a separate Constitution being framed for the United State, the Constitution of India adopted by the Constituent Assembly of India shall be the Constitution for the United State of Madhya Bharat and instead of the Constituent Assembly referred to in Art. 10 (i) of the Covenant it was provided that there shall be a Legislature for the United State, consisting of the Rajpramukh and a Legislative Assembly.

(7) This Covenant entered into among the Rulers of various States was concurred in by the Government of India which guaranteed all its provisions (See White Paper on Indian States issued by the Ministry of States at pages 252 to 262).

(8) In accordance with the terms of this Covenant the Rajpramukh entered upon the functions of his office on the 14th of May, 1948, and the Rulers of various States who were parties to the Covenant handed over the administration of their States by the 1st day of July, 1948. As required by Schedule IV of the Covenant which makes provision for the constitution of the Interim Legislative Assembly 40 members were elected by the Gwalior State Legislative Assembly, on the 8th May, 1948, and 15 members by the Indore Legislative Assembly. Of the remaining 20 members 14 were elected by the Prajamandal and 6 by the Madhya Bharat Provincial Congress Committee. This was done in consultation with the Government of India. On the 19th of October, 1948, the personnel and formation of the Interim Legislative Assembly were notified by the Rajpramukh.

(9) I will now turn to consider the various contentions raised by Mr. Somayya on behalf of the applicant against this background of facts.

(10) It was contended by the learned counsel for the petitioner: (1) That under Art. X Para. (2) it was the Rajpramukh who was to constitute an interim Legislative Assembly for the United State and he assumed the functions of his Office only on the 11th of May 1948, the election by the Legislative Assembly of 40 and 15 members respectively by the Legislative Assemblies of Gwalior and Indore of the 8th and the 9th of May 1948 was not in accordance with the provision of the Article and hence invalid. (2) That as provided by Sch. IV to the Covenant 20 members were to be elected by an electoral college to be constituted by the Rajpramukh in consultation with the Government of India to represent Covenanting States other than Gwalior and Indore. No such electoral college was constituted and thus the members who were said to represent Covenanting States other than Gwalior and Indore were not elected as required by the Covenant. (3) Under Art. X Paragraph (2) of the Covenant the Rajpramukh was required to constitute an Interim Legislative Assembly not later than the first day of August 1948. This was done (sic) and any Legislative Assembly constituted subsequently could not be in accordance with the terms of the Covenant and therefore not a validly constituted body; and (4) that after the 25th of January 1950 when the new Constitution came into force the members of the Madhya Bharat Legislative Assembly did not comply with the provisions of Art. 188 of the Constitution and that its Speaker Ram Sahay was not elected as its Speaker after the new Constitution came into force.

(11) I am clear that there is no substance in any of these objections. I will deal with each of them in the order in which they have been stated.

(12) 1. Shri Sommayya's objection, so far as I could follow him, was that so long as the Rajpramukh had not entered upon the functions of his Office it was not open to the Legislative Assemblies of Gwalior and Indore to elect 40 and 15 members respectively for the Interim Legislative Assembly. I find no warrant for any such conclusion in the language of Art. X (2). It says:

> "The Rajpramukh shall constitute not later than the first day of August 1948 an interim Legislative Assembly for the United State in the manner indicated in Sch. IV."

(13) Schedule IV makes provision for the Constitution of the Interim Legislative Assembly. It runs thus:

> "The Legislative Assembly shall consist of:
> (a) forty members elected by the members of the Gwalior Legislative Assembly;
> (b) fifteen members elected by the members of the Indore Legislative Assembly; and
> (c) 20 members elected by the electoral college to be constituted by the Rajpramukh in consultation with the Government of India to represent Covenanting States other than Gwalior and Indore."

I do not find anything either in the language of the main Article or in that of the Schedule to warrant a conclusion that the Rajpramukh could not accept for the Interim Legislative Assembly 40 members elected by the members of the Gwalior Legislative Assembly and 15 members elected by the members of the Indore

Legislative Assembly unless such members were elected after the 11th of May 1948, when the Rajpramukh entered upon the functions of his office. The Article requires the Rajpramukh to constitute an Interim Legislative Assembly and the Schedule gives the constitution of the Assembly to be constituted. There is not a word either in the Schedule or in the main Article to suggest that its members must be elected after the Rajpramukh had entered upon the functions of his Office. All that the Rajpramukh had to see when he constituted the Interim Legislative Assembly was that the members of his Assembly fulfilled the qualifications mentioned in the Schedule. There is nothing to show that the provisions of Para. (2) of Sch. IV were not followed in the election of these members of the Gwalior and the Indore Legislative Assemblies.

(14) Under Article X Paragraph (3) the Rajpramukh had the power to make and promulgate Ordinances for the good government of the United State. In exercise of these powers on the 30th of October 1948 the Rajpramukh by an Ordinance No. 18 of 1948 made provision for the working of the said Interim Legislative Assembly and for some other matters consequential and incidental to it. The Preamble of this Ordinance runs as follows:

"Whereas Article X of the Covenant of 22nd April, 1948, entered into by the Rulers of Gwalior, Indore and certain other States in Central India for the formation of the United State of Gwalior, Indore and Malwa (Madhya Bharat) which is hereinafter referred to as the 'Covenant' provides that until the formation of a Constituent Assembly for the United State of Gwalior, Indore and Malwa (Madhya Bharat) there shall be constituted for the said State an Interim Legislative Assembly in the manner specified in Sch. IV to the said Covenant;

And whereas in accordance with the aforesaid provisions the said Legislative Assembly has already been duly constituted."

This leaves no room for doubt that after the Rajpramukh had entered upon the functions of his office he accepted the members elected by the Gwalior and the Indore Assemblies as members of the new Legislative Assembly and set upon what was done on the 8th and the 9th of May 1948 by the Gwalior and Indore Legislative Assemblies the seal of his approval. This ratification, if such a term can appropriately be applied to what was done by him, is a complete answer to any such argument as was advanced by Mr. Somayya.

(15) I should before proceeding further like to say a few words as to the approach of the learned counsel to the matter before us. He attempted to interpret the Covenant as if it were a Statute passed by a Parliament. We should not forget the origin of this document, the circumstances in and the purposes for which it was brought into existence. The parties to it were Rulers of a number of Central India States who had absolute authority to enter into such a Covenant in regard to their respective States. They could, at the time of which we are speaking, by mutual consent and concurrence of the Government of India amend, alter or abrogate the Covenant. At the period of which we are speaking, it was for them to interpret the Covenant and to determine how it was to be given effect to. The Raj Pramukh was their mouthpiece and if he has put upon the terms of the Covenant any interpretation and given effect to its provisions in a particular manner which has been accepted by all of them either expressly or by tacit consent in refraining from raising any objection to what was done by the Raj Pramukh this in the absence of very strong reasons to the contrary, must be accepted as the proper interpretation of the meaning and the purposes of the Covenant. The Covenant before us is more akin to a treaty entered into by various States rather than a Statute passed by a Legislature and accordingly it is only appropriate if the rules to be applied to its construction are those applicable to treaties rather than those applied to interpretation of Legislative enactments. The method of interpretation appropriate to such a document is what Schwarzenberger calls 'Functional Interpretation' in his International Law (Second Edition, Volume I, pages 219-20). He refers there with approval to the observations made by the Permanent Courts of International Justice in the case of Chorzow Factory (1927) where the Court interpreting an Article of the Geneva Convention of 1922 observed:

"For the interpretation of Art. 23, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, 'but also and more especially of the function which, in the intention of the contracting parties, is to be attributed to this provision'."

(16) The main purpose of interpreting any such Covenant should be to put an interpretation which would give the fullest effect to the document.

"It must fulfill the functions which the parties had intended it to fulfill. An interpretation which would run counter to the establishment (sic) aims of the treaty (Covenant) is to be avoided."

Any attempt to apply all the technical rules ordinarily used for the interpretation of a Statute or to put a legalistic and narrow interpretation upon such a document would be improper and defeat the intention of the parties thereto and the purposes for which it was brought into existence. I am, however, as already stated earlier, of opinion that even if we put a literal interpretation on Article X there is nothing in it or Schedule IV which would support Mr. Somayya's contention.

(17) 2. The second point raised by Mr. Somayya was that according to Schedule IV, 20 members should have been elected by an electoral college to be constituted by the Rajpramukh in consultation with the Government of India to represent Covenanting States other than Gwalior and Indore. This it was contended was not done. We have before us an affidavit filed over the signature of an Under Secretary to the Madhya Bharat Government. Shri Shambhunath Chaturvedi, the relevant portion whereof reads as follows:

"The third groups consisted of 19 Covenanting States. The members to represent this group had to be elected by an electoral college constituted by the Rajpramukh in consultation with the Government of India. On explora-

tion of this field, the Rajpramukh was unable to discover any public bodies from which readily to constitute an electoral college. A workable formula was, therefore, evolved for setting up an ad loc electoral college in consultation with the Government of India. Public opinion was sounded by the Secretary to the State Ministry for that purpose. In accordance with the consensus of public opinion gathered from the Regional Council of the Central India States 'Peoples' Conference and other representatives, the Prajamandal Organisation was reported fairly to reflect the democratic trends and could serve as an electoral college. That body was, therefore, asked to elect 14 members who were thus elected. To afford representation to other sections of public opinion, if any, the Raj Pramukh was authorised to make nomination of 6 members in consultation with the Premier of Madhya Bharat. The Government of India, on the point being taken up with them by the Premier of Madhya Bharat, agreed that the 6 vacancies be filled by the nominees of the Madhya Bharat Provincial Congress Committee. (Vide D. O. Letter No. D. 14681-P. 48). The vacancies were thus filled. This scheme constituted in terms an ad-hoc electoral College as the only practical solution of political problem and the only working hypothesis. The representatives of the third group were, thus, validly elected by the 14th October, 1948 and on the 19th October, 1948 the personnel and the formation of the Interim Legislative Assembly were notified by the Rajpramukh."

It may be mentioned that the accuracy of this affidavit was challenged by a counter affidavit filed on behalf of the petitioner. I have however no hesitation in accepting Shri Shambhunath Chaturvedi's affidavit, the contents whereof are at least in part supported by a demi-official letter from Shri V. Shankar who was acting as Secretary to the Minister for States in 1948 and true copy whereof has been filed before us. The Rajpramukh was to constitute an electoral college in consultation with the Government of India to represent Covenanting States other than Gwalior and Indore. The power of the Raj Pramukh in forming the electoral college was unrestricted. All that was required was that he should do so in consultation with the Government of India. An electoral college is nothing more than a body of electors to choose one or more persons for a certain office or for an assembly. There is no invariable rule for constituting an electoral college. The extract from the affidavit of Shri Chaturvedi quoted above sets out the circumstances and the manner in which these 20 members to represent States other than Gwalior and Indore were chosen. 14 of them were elected by the 'Prajamandal' and 6 by the Madhya Bharat Provincial Congress Committee. In the absence of any fixed rule for constituting an electoral college it is difficult to see the point in Mr. Somayya's objection. The electoral college which sent, these 20 members consisted of two divisions — one the 'Prajamandal' and the other the Madhya Bharat Provincial Congress Committee.' — Possibly Mr .Somayya's objection was that all the members of the electoral college should have participated in electing each of the 20 members for the Interim Legislative Assembly who were to represent the group of States other than Gwalior and Indore. It is true that the words used in the Schedule IV (i) (c) are "an electoral college", but I can find nothing in these words which would make it incumbent upon the Rajpramukh to constitute a body of electors which may not consist of two divisions. All that was necessary was that these members should be elected. The body or bodies which were to elect them depended upon the choice of the Raj Pramukh which could be exercised only in consultation with the Government of India. I am unable to find any warrant in the language of Schedule IV for the conclusion that an electoral college consisting of two divisions each of whom was to elect a certain number of members, cou d not be formed by the Rajpramukh. To my mind only three things were essential: (1) That the electoral college should be constituted by the Raj Pramukh. (2) That he should do so in consultation with the Government of India; and (3) that the members should be chosen by election. If these three conditions were fulfilled and 20 members were elected for the Interim Legislative Assembly I am of opinion that the requirements of the Schedule should be deemed to have been substantially met with.

(18) It may also be a matter for consideration that the Covenant makes no provision for the consequences of the failure or inability of the Raj Pramukh to comply literally with any of its provisions.

(19) The object in view was to secure the representation of the group of smaller states. This it was indicated should be done by constituting an electoral college. It was further provided that the election by this college should be by proportionate representation by means of the single transferable vote. The power of Raj Pramukh to constitute an electoral college was left unfettered by any restrictions. If with a view to achieve the objects and purposes of the Covenant the Rajpramukh gave effect to any of its provisions in a manner which constituted substantial, though not literal compliance with the words used, but no objection is taken to such a course by the parties to the Covenant, it may, in these circumstances be legitimate to infer that what was done by the Raj Pramukh was within the scope of the general authority which the signatories to the Covenant must be deemed to have conferred upon him. The covenant was creating an Executive Head of a new State. He was entrusted with unfettered powers to issue Ordinances for the peace and good government of the new State which was brought into existence. We cannot in these circumstances impute to the signatories to the Covenant an intention to insist upon literal compliance with every provision contained therein by the Rajpramukh. An authority like the Rajpramukh could not in the discharge of the multifarious functions which his office naturally imposed upon him, be expected to sacrifice the objects and purposes of the Covenant by an attempt to comply literally with any supposed interpretation of a provision of the Covenant. Such, I am clear could not have been the intention of the signatories to the Covenant. They must be taken to be aware that in the task which they set to the Rajpramukh there might crop up many unforeseen contingencies. How was he to deal with a situation, like this? There was no provision in the Covenant for the Rajpramukh to consult the

signatories to the Covenant on such occasions. It would be wrong to suppose that he was merely their agent. To my mind it is not only a legitimate but in fact the only proper interpretation of such a Covenant to construe it as conferring upon the Rajpramukh authority to give effect to its provisions in the manner which in his opinion was best calculated to achieve its objects and purposes. So long as he did not disregard any positive direction laid down for his guidance, anything done by him could not be challenged on the ground of his failure to comply literally with the words of any provisions of the Covenant.

(20) It was the Government of India which had not only concurred in but guaranteed the provisions of the Covenant. There is no suggestion that whatever was done by the Rajpramukh in regard to the election of 20 members to secure the representation of the smaller group of States did not have the approval of the Government of India. Ever since its formation in 1948 the Interim Legislative Assembly thus constituted had been functioning as a Legislative Assembly of Madhya Bharat till the 25th of January 1950 when the Constitution of India came into force. The Constitution by providing in Art. 385 that the body or the authority functioning immediately before it came into force, as the Legislature of an Indian State shall exercise the powers and perform the duties conferred by the provisions of the Constitution on the house or houses of the Legislature of that State, indirectly set its seal of approval on the constitutional validity of the Interim Legislative Assembly constituted by the Rajpramukh in Madhya Bharat as a body. When I say so I do not imply that the validity of election of one or more members of this Assembly could not be challenged. But I am of opinion that it is not open to one to challenge the constitutionality of the Madhya Bharat Assembly as a body and to contend that any enactment passed by it was unconstitutional on the ground that it was not a validly constituted Assembly.

(21) Another argument advanced by the learned Advocate General in reply to Mr. Somayya's contention was that the impugned Act was passed in 1951 by a Legislative Assembly which derived its authority under Art. 385 of the Constitution. That Article provides that the body or authority functioning immediately before the commencement of the Constitution as the Legislature of an Indian State was to exercise the powers and perform the duties conferred by the provisions of the Constitution on the house or houses of the Legislature of that State. The Advocate General contended that under this provision the only test which could be applied in examining the constitutionality of the body which was functioning as the Legislature in Madhya Bharat when the Zamindari Abolition Act was passed must be a factual one. All that could be considered was whether this Assembly was immediately before the commencement of the Constitution, a body functioning as the Legislature in Madhya Bharat. The framers of the Constitution could not have been oblivious of the possibility of the constitutionality of any of the existing Legislatures in any of the Part B States being open to challenge on the 25th of January 1950. All they required of a body which was under Art. 385 to be invested with the authority of a House or Houses of the Legislature of the State was, that it should on the 25th of January 1950 be functioning as the Legislature in the Indian State concerned. The argument so advanced does not imply that the provisions of Art. 385 of the Constitution were a bar to the validity of election of any member of that Assembly being challenged as invalid. What he stressed however was that the constitutionality of the Legislative Assembly as a body could not in view of the provisions of Art. 385 be challenged. The argument is not without force. Art. 385 of the Constitution requires the application of only a factual test. It cannot be disputed, and in fact it was not disputed, that the Legislative Assembly which passed the Zamindari Abolition Act was on the 25th of January 1950 functioning as the Legislature in Madhya Bharat. Reference may in this connection be made to Section 9 (2) of the Interim Legislative Assembly Ordinance No. 18 of 1948 (Madhya Bharat) which provides that:

"The Assembly shall have power to act notwithstanding any vacancy in the membership thereof, and any proceeding in the Assembly shall be valid notwithstanding that it is discovered subsequently that some person who was not entitled to do so sat or voted or otherwise took part in the proceedings."

The same provision was re-enacted as S. 9 (2) of the Interim Legislative Assembly Act No. 23 of 1949 by which Ordinance No. 18 of 1949 was repealed. The constitutionality as a body of the Legislative Assembly which passed the Zamindari Abolition Act cannot be challenged as it fulfilled the factual test laid down by Art.385 of the Constitution. Accordingly even if it be assumed that some members of that body who were not entitled to sit, vote or otherwise take part in the proceedings of the Assembly did so, the validity of any enactment passed by it cannot be challenged in view of the provisions of Sec. 9(2) of the Interim Legislative Assembly Act. For the reasons above stated the point raised by Mr. Somayya must be rejected.

(22) The third point raised by Mr. Somayya was that:

"Under Article X Paragraph (2) of the Covenant the Rajpramukh was required to constitute an Interim Legislative Assembly not later than the first day of August 1948. This was not done and any Legislative Assembly constituted subsequently could not be in accordance with the terms of the Covenant and therefore not a validly constituted body."

(23) For obvious reasons the principle that 'time is of essence' which is often discussed in Law Courts in cases arising out of breach of contracts cannot be applied to interpretation of Article X of the Covenant. It is significant that there is no provision in the Covenant as to the consequences which would follow on the inability of the Rajpramukh to constitute an Interim Legislative Assembly before the 1st of August 1948. The circumstances which caused the delay have been stated in the affidavit filed by Shri Chaturvedi. If we accept Mr. Somayya's contention that time was of essence we would be creating an impossible position. The Rajpramukh either could not or did not constitute the Interim Legislative Assembly before the 1st day of August 1948. He constituted the Interim Legislative Assembly some time later. If it be held that he had no authority to do so,

we will find ourselves in a position that the entire fabric of the edifice conceived of by the Covenant would fall. There would be no Legislative Assembly and no authority to frame Laws for the newly created State. The fact that no provision is made in the Covenant for such a contingency is a strong ground for the inference that time was not intended to be 'of essence'. I am confirmed in this view by the circumstance that neither any of the signatories to the Covenant nor the Government of India who had concurred in the Covenant and guaranteed its provisions ever raised any objection to the constitution of the Interim Legislative Assembly at a period subsequent to that indicated in Article X (2) of the Covenant. The only purpose of fixing a date was in my opinion to emphasise the need for expeditiousness in the constitution of the Interim Legislative Assembly. I am unable to accept Mr. Somayya's argument which if given effect to would lead to an impossible position.

(24) The fourth point taken by Mr. Somayya is already covered by the decision of a Division Bench of this Court in 'Anand Bihari Mishra v. Ram Sahay,' Civil Misc. Appln No. 3 of 1950, which was decided on the 12th of October 1951. I do not think I can usefully add anything to what was said there on this point and accept the view of Law expressed in that decision.

(25) The impugned Act as we know from its preamble is an Act for acquisition of the rights of the proprietors in villages, Muhals, Chaks or blocks settled on Zamindari system in Madhya Bharat. In view of the recent amendment of the Constitution and addition of Art. 31A in Part III thereof it would ordinarily appear to be futile to challenge the validity of any such Act on the grounds mentioned in the application before us. Mr. Somayya was of course alive to this difficulty.

(26) Article 31A reads thus:

"Saving of Law providing for acquisition of Estate etc.

1. Notwithstanding anything in the foregoing provisions of this Part, no Law providing for the acquisition by the State of any Estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this Part:

   Provided that where such Law is a law made by the Legislature of the State, the provisions of this article shall not apply thereto unless such Law, having been reserved for the consideration of the President, has received his assent.

2. In this article:-

(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing Law relating to land tenures in force in that area, and shall also include any Jagir, Inam or Muafi or other similar grant;

(b) the expression 'rights' in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of the land revenue."

(27) Mr. Somayya contended that the present Legislation was not saved by Art. 31A. Under the proviso to Art. 31A (1) where any such Law as is referred to in Clause (1) of the Article is a Law made by the Legislature of a State the provisions of Art. 31A shall not apply to it unless such Law having been reserved for the consideration of the President has received his assent. He pointed out that in as much as the Bill for abolition of Zamindari in Madhya Bharat after it was passed by the Legislative Assembly did not receive the assent of the Rajpramukh as required under Art 200 of the Constitution to make it a Law the provisions of the proviso just referred to were not complied with. What was reserved by the Raj Pramukh for the assent of the President in the present case was a Bill passed by the State, Therefore any such Legislation would not attract itself the provisions of Art. 31A.

(28) Another argument advanced by Mr. Somayya was that Art. 31A barred a challenge to the validity of a Law providing for the acquisition of any estate which was based on the ground "that it was inconsistent with, or takes away or abridges any of the rights conferred" by any provisions of Part III of the Constitution. But a challenge based on other grounds was outside the scope of Art. 31A. According to him the rights of his client which are infringed by the present Act were not rights "conferred" by Part III of the Constitution. They were natural rights which were merely recognised by the Constitution. He sought to draw a distinction between the rights "conferred" and rights "recognised" by Part III of the Constitution.

(29) The first of his argument is the same which was advanced before a Bench of the Nagpur High Court in Misc. Petn. No. 29 of 1951 in connection with the corresponding Act passed by the Central Provinces and Berar Legislative Assembly for abolition of Zamindari in that State. This judgment has not yet been published in any of the legal journals but a copy of the same was made available to us by the Advocate General and we find from Paras. 24 to 26 of the judgment that the argument was rejected by that Court. Their Lordships observed at paragraph 26 of the Judgment:-

"The matter can also be put in a different way. After a Bill has been passed by the Legislative Assembly the Governor has three courses open to him — either give his assent to the Bill or to withhold his assent therefrom or reserve the Bill for the consideration of the President. A discretion is conferred upon him by the Constitution to follow one of these three courses (except in a case where, as here, another specific provision of the Constitution makes it obligatory upon him to pursue a particular course. What is important to note is that by following one of the three courses permitted to him by Art. 200 he exhausts his function and there is nothing more that he is expected to do, even though he is a part of the Legislature. It is not the Law that a Bill can never pass into an Act except with the assent of the Governor. It may further be added that when the Governor does not withhold his assent to a Bill and reserves the same for the consideration of the President, he must be deemed to have given his assent to that Bill, as an essential part of the Legislature of the State."

I respectfully agree with this view.

(30) It will further be noticed that Part VI of the Constitution makes provision for Legislative Procedure. Though it provides for reservation of a Bill, passed by the Legislative Assembly of a State by the Rajpramukh for the consideration of the President there is no provision made in that part for reservation of 'Law' for the President's consideration. Article 201 also speaks only of the assent of the Bill, reserved for his consideration or withholding of assent therefrom. There is no provision for reserving of 'the Law' for the assent of the President in any of the Articles in that Part. This inclines me to take the view that the word 'Law' as used in Art. 31A means more than a Bill passed by the Legislative Assembly of a State or in the case of a State having the Legislative Council a Bill passed by both Houses of Legislature of the State. An argument analogous to that advanced by Mr. Somayya was put forward before a Full Bench of Allahabad High Court in 'Raja Suryapal Singh v. The U. P. Government', A. I. R. (38) 1951 All 674 by Mr. P. R. Das and was not upheld (See Paragraph 24 of the judgment). For the reasons given above I am of opinion that the contention put forward by Mr. Somayya is without force.

(31) As regards the other argument advanced by Mr. Somayya concerning the inapplicability of Art. 31A to the present Act I may say at once, that it is too late in the day to base an argument in an Indian Court on the theory of the natural rights of man, particularly in relation to property. Without entering into any detailed discussion of this now trite proposition, I may say that the very concept of property pertains to a stage in the evolution of this history of man when he had passed beyond the "state of nature." I do not mean to suggest that the expression "natural right" has no meaning. It may well have a meaning in other contexts but has none in a discussion relating to the validity of a Legislative enactment which is challenged in an Indian Court of Law on the ground that it infringes a natural right. We are aware of the time and energy which have been spent in English and American Courts over discussion of arguments based on 'natural rights' and "natural justice". Recently however when a kindred question was raised in connection with the meaning of the words "procedure established by the law" in Art. 21 of the Constitution in our own Supreme Court in 'A. K. Gopalan v. State of Madras', AIR (37) 1950 S C 27, there was a consensus of opinion on the point. This may well be stated in the words of Mahajan J. that:

> "A Court cannot declare a Statute unconstitutional and void on the ground of unjust and oppressive provisions and because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited by or such rights are guaranteed by the Constitution."

(32) I will now consider whether the distinction sought to be drawn by the learned counsel between rights "conferred" by Part III (3) and rights that were only 'recognised' by that Part is sound. Article 31(1) lays down that no person shall be deprived of his property save by authority of Law. Can we say that this provision of the Constitution only recognises some right which existed previous to the commencement of the Constitution? In this connection it is well to remind ourselves that whatever rights can now be claimed by any citizen in India must be on the basis of the Constitution. If relief is sought in respect of any infringement of an alleged right, the persons asking for such relief must base his claim on some provision of the Constitution either express or implied. It is true that legal rights existed and were recognised even before the 26th of January 1950, and even that what are now called Fundamental Rights are some of those rights which were recognised by the Law Courts even before the commencement of the Constitution of India. There is however a real distinction between the rights as they existed previously and the Fundamental Rights as they are now called. The Fundamental Rights derive their sanctity not from anything which existed previously but from the Constitution and in this sense they are conferred by the Constitution. And I may add that they are rightly called as "conferred" by the constitution in as much as for enforcement of such rights new remedies are made available to the citizens of India.

(33) Entries 18 and 36 of List II (2) of the Seventh Schedule run as follows:

> "18. Land that is to say, rights in or over land, land tenure including the relation of landlord and tenant and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.
>
> 36. Acquisition or requisitioning of property except for the purposes of the Union, subject to the provisions of entry 42 of List III (3)."

(34) Entry 42 of List III (3) is as follows:

> "Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

(34a) Mr. Somayya's client may have had a right to hold his Zamindari property even before the commencement of the present Constitution. The Legislature of the State was however given the authority to acquire it subject to the provisions of Entry 42 of List III (3). Article 31 (2) however confers upon him a new right in as much as it provides that no Law for acquisition of immoveable property shall be valid unless it provides for compensation for such acquisition and either fixes the amount of compensation or specifies the principle on which and the manner in which the compensation is to be determined and given. In the absence of this provision Mr. Somayya could not challenge the validity of any enactment passed by the Madhya Bharat Legislature for acquisition of his client's Zamindari. Even if Mr. Somayya's contention about the distinction between a right "conferred" and a right "recognised" by the Constitution were sound which I do not concede the present application is not a proceeding in relation to a right which has been merely recognised, but is in regard to a right which has been conferred by the Constitution. The argument that Art. 31A does not apply to the present case must therefore fail.

(35) The learned Advocate General contended on behalf of the State that even apart from Art. 31A the impugned Act could not be successfully challenged as it was saved by Arti-

cle 31 (4) of the Constitution. That clause provides that:

> "If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the Law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of Cl. (2)."

It was argued that this was a Bill pending at the commencement of the Constitution in the Legislative Assembly of Madhya Bharat. After it was passed by the Legislative Assembly it was reserved by the Raj Pramukh for consideration of the President and receiving his assent. Accordingly 'notwithstanding anything in the Constitution' this Act cannot be challenged on the ground that it is of discriminatory or confiscatory character and does not provide for compensation or fails to specify the principles on which and the manner in which the compensation has to be determined. In reply to this Mr. Somayya argued that the Bill after it emerged from the Select Committee was so altered that it could not be called the same Bill as introduced. A similar argument was advanced in the Nagpur case to which reference has already been made and it was summarily rejected with the observation that:

> "We cannot accept the contention. In our judgment the requirement of the clause is that a Bill must be pending on the date of the commencement of the Constitution and not that the Act ultimately passed must be in every respect follow the Bill."

To me the argument seems to be wholly without substance and if I may say so without disrespect was rightly rejected.

(36) The Bill passed through the usual Legislative Procedure and any argument that the Act as passed by the Legislative Assembly and assented to by the President, could not be called to be the same Legislation as was envisaged by the original Bill must fail. There is no warrant for the proposition that if a Bill as originally introduced in a Legislative Assembly, is during its passage through the House, so materially altered as to become unrecognisable as the same Bill, the resulting Act can be impugned on this ground.

(37) Under Art. 208 of the Constitution a House of the Legislature of a State is empowered to make rules for regulating its procedure and the conduct of its business subject to the provisions of the Constitution. Article 212 provides that the validity of any proceeding in the Legislature of a State shall not be called in question on the ground of any alleged irregularity in the procedure. It would appear therefore that an objection like that raised by Mr. Somayya cannot be considered or enquired into by a Court of Law.

(38) It was next contended that the Act was bad in as much as it was confiscatory and discriminatory in character. This argument was obviously based on the provisions of Arts. 14 and 31 of the Constitution. For a full appreciation of this contention it is desirable to give a brief resume of the contents of the impugned Act. It consists of 8 Chapters and has 3 Schedules attached to it. Chapter I entitled "preliminaries" deals with the title, extent and commencement of the enactment and gives certain definitions. Chapter II relates to the vesting of proprietary rights in the State. The most important provision of this chapter is contained in S. 3 which has been reproduced at page 2 of this judgment. Chapter III (3): This chapter provides for assessment of compensation. Under S. 8 which forms part of this Chapter it is made obligatory upon the Government to pay compensation to every proprietor who is divested of his proprietary rights. The compensation is to be determined in accordance with the principles laid down in Sch. I annexed to the Act. Paragraph 4 of the Schedule provides that the compensation payable to the proprietor under S. 8 (1) shall be eight times the net income determined in accordance with the provisions contained in that Schedule. There is a proviso to this paragraph which runs as follows:

> "Provided that the Chakdar or blockdar who has completely fulfilled the conditions of his lease shall be entitled to the refund of the deposit money together with interest thereon deposited by him at the time of taking the lease."

Chapter IV is devoted to determination of debts secured on Zamindari rights. Chapter V deals with payment of compensation. Chapter VI relates to the management of tenure of lands after Zamindari rights have been acquired by the State. Chapter VII: Provisions relating to the rehabilitation grant form the subject-matter of this Chapter. In addition to compensation which the proprietors are to get such of them as pay annual land revenue not exceeding Rs. 3500/- are to be paid rehabilitation grants on a graduated scale. The scale on which rehabilitation grant is to be given is more favourable to smaller Zamindars than to those holding big Zamindaries. Chapter VIII deals with certain miscellaneous provisions. Schedule I as already stated gives the method of assessing compensation and its measure. Schedule II contains the rehabilitation grant Rules; and Schedule III mentions the points which were to be considered in determination of the amount of compensation with regard to wells.

(39) I will now deal with two contentions that were raised by the applicant's learned counsel. He contended that: (1) The Act was confiscatory in as much as it did not provide for any compensation being given to Chakdars and blockdars; and (2) that certain items of property were not evaluated in assessment of the compensation.

(40) The first of these arguments appears to be based on a misapprehension. As already stated under S. 8 a duty has been cast upon the Government to pay compensation to every proprietor who is divested of proprietary rights. "Proprietor" is defined in S. 2 (a) of the Act. It means in respect of a village, Muhal or land settled on Zamindari system, a person owing whether in trust or for his own benefit such village, Muhal or land and includes a Chakdar or Blockdar whose lease granted to him by the Government under any Act, Rules or Circular relating to the Chaks and blocks, includes also amongst other conditions, a condition that he shall acquire proprietary rights in respect of that Chak or block when the conditions of the lease are fulfilled. A

reference to S. 7 of the Act will also show that in the Chapter dealing with the assessment of compensation it is only Mustaja Supurdgidar, mortgagee and the ex-Zamindar whose rights to acquire Zamindari have ceased are not included within the term "Proprietor". Section 7 makes no reference to Chakdars or blockdars. A complete answer to this argument will be found in paragraph (4) of Sch. I which lays down that:

"The compensation payable to the proprietor under S. 8 (1) shall be eight times the net income determined in accordance with the provisions hereinafter contained:

Provided that the Chakdar or blockdar who has completely fulfilled the conditions of his lease shall be entitled to the refund of the deposit money together with interest thereon deposited by him at the time of taking the lease."

(41) The next ground for the objection that the Act is confiscatory was based on the absence of any provision therein under which compensation could be awarded for forest lands pastures, stray trees and similar other items pertaining to Zamindari. According to Para. (2) of Sch. I, the gross income of a village, Muhal, Chak or Block shall include the following: (a)..... (b)..... (c) The Sivai Jama income which shall be an amount equal to 1/5 of such total income during the five agricultural years from Samvat 2000 to 2004 as recorded in the Siyaha of the village, Muhal, Chak or block.

(42) There are two notes appended at the foot of this Paragraph. The first of which runs as follows:

"Only the income for those items will be taken which were included in the assessment at the time of the current settlement."

Sivai Jama as is well known is a term applied to income arising in a Zamindari from sources other than rent received by letting out agricultural land for cultivation. Thus it would appear that the income from sources to which reference was made by Mr. Somayya has not been ignored by the Act in assessment of compensation. The same contention was urged before a Full Bench of the Allahabad High Court in 'Suryapalsingh v. The U. P. Government', AIR (38) 1951 All 674, and was rejected. The learned Chief Justice observed in Para. 76 of the judgment:

"The argument rests on the assumption that the compensation is being paid on the basis of the income of the property, and that, therefore, no compensation is payable for non-income yielding property. We think this argument to be fallacious. In the first place compensation is based on the assets of the intermediary, those assets being measured by the value of the net income. Secondly, what is being acquired under the Act are the estates of the intermediaries, and each of such estates must be regarded as a whole. It would not in our opinion be correct to regard the acquisition of an estate as an aggregate of the acquisition of separate parts of or interest in the estate considered independently of each other."

I respectfully agree with the view expressed in this case. The usual method of evaluating Zamindari property when it is sold is to take the annual rental plus the Sivai Jama of the property in question and to calculate the price at a figure which is 20,25,30 times or any other similar multiple of the annual income thus ascertained minus the land revenue. I am clear that there is no substance in this contention.

(43) Another argument advanced by the learned counsel was that the Act is discriminatory in character and thus contravenes the provisions of Art. 14 of the Constitution. Reference was in this connection made to the method prescribed for calculation and award of the rehabilitation grant. The rehabilitation grant was it is contended a part of compensation and inasmuch as the Statute discriminates between bigger and smaller Zamindars in giving rehabilitation grants the provisions of the Act pertaining to the subject of compensation must be held to be void. In as much as I have taken the view that the impugned Act is saved by the provisions of Art. 31A it is unnecessary to go into this matter. Were it however necessary to do so I would hold that the provisions relating to the award of rehabilitation grants though discriminatory are not void.

(44) The argument advanced before us was also advanced in the case of 'Suryapalsingh v. The U. P. Government', AIR (38) 1951 All 674, and was rejected. It is clear from the decision of the Supreme Court in the 'State of Bombay v. F. N. Balsara', AIR (38) 1951 S C 318, that where different Laws are enacted for different classes of persons and the classification is not arbitrary or capricious but rests on some reasonable basis there is no room for application of Art. 14. Section 39 of the Bombay Prohibition Act of 1949 provided that the Provincial Government may, on such conditions as may be specified in the notification published in the Official Gazette, permit the use or consumption of foreign liquor on cargo boats, warships and troopships and in military and naval messes and canteens. It was contended that this exemption in favour of certain classes of persons being discriminatory was against the provisions of Art. 14 and hence the impugned Act was bad. In considering this argument Fazl Ali J. observed (See Paragraph 21 of the Judgment):

"The question is whether in relaxing the rule in favour of Warships, troopships and military and naval messes and canteens the Legislature has acted arbitrarily and capriciously or it has proceeded here also on the basis of reasonable classification."

The distinction between the bigger and the smaller Zamindars cannot be said to be arbitrary or capricious. A distinction based on the economic condition of the different classes cannot be said to be unreasonable.

(45) Before bringing this judgment to a close I should like to say a few words about a matter which attracted our attention during the course of argument. There are certain sections in the Act which bar the jurisdiction of Court and other authorities to interfere with the decisions taken by the persons appointed under the Act. The question arose whether any of those sections were in conflict with the provisions of Arts. 226 and 227 of the Constitution. Reference was made to Ss. 14 (5), 15, 20, 31 and 32 in this connection.

(46) Section 14 (5) runs thus:

"Except as provided in sub-ss. (1), (2), (3) and (4) the decision and the record made by

the Deputy Compensation Officer shall be final and conclusive in respect of the quantum of the compensation payable and other entries made in the statement of the Deputy Compensation Officer."

I am clear that the phrase "final and conclusive" means nothing more than it would not be open to challenge by an appeal or other proceeding. It should not be however interpreted to mean that the jurisdiction of the High Court under Art. 226 or 227 of the Constitution was thereby excluded. The ordinary rule of construction is that provisions in any enactment if it is possible to put upon them such a construction without doing violence to the language used should be so interpreted as not to make them inconsistent with other Statutes.

(47) Section 15 provides as follows:

"Except an authority before whom an appeal under this Chapter is pending against an order of the Compensation Officer, no Court or authority shall, notwithstanding anything contained in any Law for the time being in force, issue any injunction against any person in respect of any proceedings pending before the Compensation Officer under this Chapter which has the effect of staying the proceedings."

The principle of construction which I have applied to S. 14 (5) cannot however be applied to this section. In view of the words "anything contained in any Law for the time being in force" it is not possible to hold that the section does not trench upon the jurisdiction conferred upon the High Court under Arts. 226 and 227 of the Constitution. I hold therefore that the section in so far as it excludes the jurisdiction of the High Court exercisable under these two Articles is ultra vires of the powers of State Legislature.

(48) Section 20 (5) purports to exclude the jurisdiction of the Civil Courts. This section prescribes the procedure for preliminary proceedings for determination of debts, and lays down that if no objection is made under sub-s. (2) of the Section or if an objection is made and decided, the jurisdiction of the Claims Officer to proceed in accordance with the provisions of this Chapter shall not be questioned in any civil Court. Applying the principle of construction which I did on the interpretation of S. 14 (5) I hold that it was not intended by this provision of the Act to exclude the jurisdiction of the High Court under Arts. 226 and 227 of the Constitution.

(49) The same reasoning applies to Ss. 31 and 32. I hold that inasmuch as they are not intended to exclude the jurisdiction of the High Court under Arts. 226 and 227 of the Constitution they are in view of Entry No. 65 of the Seventh Schedule of the Constitution intra vires of the State Legislature.

(50) For the reasons given above I hold that the impugned Act is a good and valid Law except for S. 15 of the Act which in so far as it purports to exclude the jurisdiction of the High Court exercisable under Arts. 226 and 227 of the Constitution is ultra vires the powers of the State Legislature.

(51) The application shall stand dismissed.

(52) In view of the fact that the questions raised as to the proper constitution of the State Legislative were not altogether free from difficulty I make no order as to costs.

(53) DIXIT, J.: In this application under Art. 226 of the Constitution, the petitioner, who is the owner of certain Zamindari lands in Madhya Bharat challenges the constitutionality of the Madhya Bharat Zamindari Abolition Act, 1951 (Act XIII (13) of 1951) and prays for the issue of a direction or an order against the State of Madhya Bharat prohibiting them from giving effect to the said Act or proceeding in any manner under the Act. A number of similar applications by persons describing themselves as Zamindars, Chakdars, Malguzars and Blockdars have been filed in this Court challenging the same Act. In all these petitions, the objections raised to the validity of the Act are the same.

(54) Out of the several grounds taken in the petition, Mr. Somayya, the learned counsel for the petitioner has excluded the grounds relating to the validity of the Constitution (First Amendment) Act, 1951 which have now been concluded by the decision of the Supreme Court in the petition of 'Shankari Prasad Singh Deo v. Union of India', Petitions Nos. 382, 371 and 166 of 1951. He confined his arguments to the following grounds: (1) that the Madhya Bharat Zamindari Abolition Act is not protected by Art. 31A of the Constitution from being challenged on the ground that the Act violates the provisions of Arts. 14 and 31 (2) as these Articles merely recognise the Natural Rights of the petitioners and do not confer any new rights; (2) that the Act is discriminatory, expropriatory and does not give adequate compensation; that no compensation is given to Chakdars and Blockdars and for forests and grass lands and thus the Act infringes Arts. 14 and 31 (2) of the Constitution and is, therefore, 'ultra vires' and unconstitutional; (3) that the Madhya Bharat Zamindari Abolition Bill did not receive the assent of the Raj Pramukh and has therefore not passed into law; (4) that the Bill as passed by the State Legislature and assented to by the President was not identical with the Bill pending at the commencement of the Constitution, ,in that the Select Committee enlarged the scope of the Bill by extending it to chakdars and blockdars; (5) that the Madhya Bharat Legislative Assembly acted beyond its powers in adopting the Bill as altered by the Select Committee; (6) that the Assembly when it passed the Bill was not a valid Legislative Body under the Constitution for the reason firstly that the members of the body had not taken oath as required by Article 188 and secondly that it was presided over by a person who had not taken an oath under Article 188 and who was not entitled to continue in the office of Speaker of the Assembly after the coming into force of the Constitution; (7) that the Madhya Bharat Legislative Assembly which passed the Bill was not a properly constituted and a valid Legislative body under the Covenant entered into by the Rulers of Gwalior, Indore and other Central Indian States for the formation of Madhya Bharat.

(55) The title of the Act in question, namely, the Madhya Bharat Zamindari Abolition Act describes it as

"An Act to provide for the Public purposes of the improvement of agriculturists and financial condition of agriculturists by aboli-

tion and acquisition of the rights of proprietors in villages, muhals, chaks or blocks settled on Zamindari system, which is only a system of keeping an intermediary between the State and the tenants injurious to the betterment of agriculture as well as the agriculturists in Madhya Bharat and for other matters connected therewith."

(56) Section 1 of the Act provides that it shall extend to the whole of Madhya Bharat and directs that it shall come into force on and from such date as the Government may notify. The Bill as passed by the Legislature was reserved by the Raj Pramukh for the consideration of the President. It received the assent of the President on 5-6-51. Thereafter, a notification was issued bringing the Act into force from 25-6-51.

(57) Section 2 is the definition section and by section 2(a) it is provided that the term "proprietor" means:

"as respects a village, muhal or land settled on Zamindari system a person owning whether in trust or for his own benefit such village, muhal or land"

and includes:

"1. a Malguzar as defined in sub-clause (12) of section 2 of Qanoon Mal, Gwalior State, Samvat 1983; and

2. as respects a chak or block a chakdar or blockdar whose lease granted to him by the Government under any Act, Rules or Circular relating to chaks and blocks, includes also amongst other conditions, a condition that he shall acquire the proprietary rights in respect of that chak or block when the conditions of the lease are fulfilled;

3. the heirs and successor-in-interest of a proprietor."

(58) Chapter II (2) deals with the vesting of proprietary rights in the State and the consequences of the vesting.

(59) Chapter III provides for the assessment of compensation and the procedure for determination of the amount of compensation and also contains provisions for appeals, revisions, reviews against the decisions of officers determining compensation. A proprietor, on the acquisition of his proprietary rights by the State which term does not for the purposes of compensation include "mustajer, Supurdgidar, mortgagee and the ex-Zamindars whose rights to acquire Zamindari have ceased", becomes entitled to receive compensation eight times the net income determined in accordance with Schedule I to the Act.

(60) Chapter IV contains provisions for the determination of debts of the proprietors.

(61) Chapter V deals with the actual payment of compensation.

(62) Chapter VI provides for the management and tenure of land and includes incidental provisions dealing with the consequential changes of the vesting of proprietary rights in the State.

(63) Chapter VII contains provisions for the payment of rehabilitation grants on a graduated scale as laid down in Schedule II to every proprietor, other than a Supurgidar, Mustajar, Sabiq Zamindar and Tehekedar, "who has been divested of his proprietary rights under the Act and who earns his livelihood wholly or mainly from agriculture" and who pays Rs. 3,500/- or less as land revenue.

(64) Chapter VIII contains provisions for miscellaneous matters and empowers the Government to make rules for carrying out the purposes of the Act.

(65) Before dealing with the contentions of the petitioner, it is necessary to set out the provisions of Clause 1 of Art. 31A, inserted in Part III of the Constitution by the Constitution First Amendment Act, 1951.

1 "Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part."

"Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(66) It is obvious that the Madhya Bharat Zamindari Abolition Act is a law providing for the acquisition by the State of estate and of the rights therein as defined in clause 2 of Art. 31A. The Bill passed by the State Legislature having been reserved for the consideration of the President, received his assent. It follows, therefore, from the provisions of Art. 31A that the Act cannot be called in question and declared void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of Part III of the Constitution. Indeed, if I had not heard the plausible arguments of Mr. Somayya the learned counsel for the petitioner, I should have thought that the petition in so far as it attacked the validity of the Act on the ground that it offends against Arts. 14 and 31(2) was unarguable.

(67) The contention of the learned counsel for the petitioner is that the protection afforded by Art. 31A is strictly confined to one ground, namely, that "it is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of Part III, that the measure can be attacked on other grounds, that as any provision of Part III does not confer any right, the Act can be attacked on the ground that it is repugnant to that provision, that the right or personal liberty, of private property, and of equity before the law are the Natural Rights of Man, which the petitioner possessed even before the Constitution and possesses today independent of the Constitution, that as these Rights already existed, they cannot be said to have been conferred by Part III of the Constitution by their recognition and incorporation in that Part and that, therefore, if the Act infringes these Natural rights of the petitioner, it must be held to be void."

(68) In reply, the learned Advocate-General contended that the petitioner possesses no Natural Rights as such. The recognition by the Constitution of the rights of equality and property as fundamental rights is a conferment of the rights by the Constitution and that therefore, Art. 31A completely shuts out the petitioner from contending that the Act is void on the ground that it violates the provisions of Arts. 14 and 31(2).

(69) I am unable to accede to this contention of the learned counsel for the petitioner. Mr. Somayya did not point out how and when Natural Rights originated or were recognised or enforced before the Constitution came into force. He apparently relied on the old political doctrine of the Natural Rights of Man as primordial Rights inherent in their personality as individuals. I do not propose to enter into a discussion on the so called Fundamental Natural Rights of Man. But it seems to me necessary to state that the formulation of the Natural Rights of Man is an idea of no great antiquity. It is not more ancient than the eighteenth century. The writings of Locke, Hume, Voltaire, Rousseau, Payne, and Blackstone in that century contributed to the development of the concept of the Rights of Man. Locke justified the English Revolution of 1688 by it and The commentaries of Blackstone furnished the philosophical basis for the American Declaration of Independence. Political Thinkers have differed in their views as to the nature and concept of these Rights. According to Burke, there are no such things as Natural Rights, all rights are socially created; convention creates society, and the society thus created in its turn creates rights and it is free to limit and modify rights which it creates. Bentham dismissed Natural Rights of man as a fiction. Blackstone's view of the Natural Rights of Man as those "which need not the aid of human laws to be more effectually in every man than they are which no human Legislature has power to abridge or destroy", is, as pointed out by Professor Barker, an eminent English Political theorist in "Essays on Government" (published in 1945) contradicted not only by the general doctrine of sovereignty but also by the rules and practice of English law". With the exception of very old cases such as 'Bonham's case, (1610) 8 Co. Rep. 118 and Day v. Savidge' (1614) Hob 97' decided in the seventeenth century and noted in many books on Constitutional law, one can find no recent English case holding that an Act of Parliament against natural equity or reason is void.

(70) In our country, the ancient Ideal of Polity did not speak of the Rights of Man, but expatiated at length on the duties of Kings, as a guarantee of the Rights of their subjects. It was only during the last twenty five years preceding the present Constitution that the idea regarding the Fundamental Natural Rights of Man found consistent expression and finally culminated in the incorporation of some of the rights in the Constitution.

(71) The position today is that the rights of Liberty, Equality and of Property by their incorporation and recognition in Part III of the Constitution derive their validity from the Constitution. By giving validity to these Rights, the Constitution confers them on the citizens of the Republic. It is plain that the Natural Rights of Liberty, Property and of Equality before law is a meaningless phrase unless the Constitution which is the superior objective legal system, recognises the validity of the rights and provides for their maintenance and enforcement. The act of conferring a right is an act of authority and consists in the grant of recognition and validity by the authority to that right. It cannot, therefore, be maintained that Arts. 14 and 31(2) do not confer any rights on the citizens. They are not machinery provisions. They recognise the validity of the Right of Equality before the law, and of the Right to Property and thus confer the two rights on the citizens.

(72) The flaw in the argument of the learned counsel for the petitioner lies in its premise that the Right of Equality and of Property is a part of some sacred law which is superior to the Constitution and is binding on the Legislature; whereas the truth is that these rights got their validity from the Constitution itself.

(73) A somewhat similar argument was addressed before the Supreme Court in Gopalan's case, A I R (37) 1950 S. C. 27. The argument was rejected by the Supreme Court. Kania C. J., observed:

> "It is difficult upon any general principles to limit the omnipotence of the soverein Legislative power by judicial interposition, except in so far as the express words of a written Constitution give that authority . . . . . It is only in express constitutional provisions limiting legislative power and controlling the will of a majority by a permanent and paramount law settled by the deliberate wisdom of the Nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any Legislative enactment."

(74) His Lordship Mahajan J., was even more emphatic on the subpect. He said (Para 132).

> "It is quite obvious that the Court cannot declare a statute unconstitutional and void on the ground of unjust and oppressive provisions and because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited or such rights are guaranteed by the Constitution. It may also be observed that an Act cannot be declared void, because in the opinion of the Court it is opposed to the spirit supposed to pervade the Constitution but not so expressed in words. It is difficult on any general principles to limit the omnipotence of the sovereign Legislative power by judical interposition except in so far as the express words of a written Constitution give that authority."

(75) These observations, in my judgment, govern the present case and following them, any attack on the validity of the Madhya Bharat Zamindari Abolition Act as contrary to the Natural Rights of the petitioner cannot be entertained. As observed by the Supreme Court in the petitions upholding the validity of the Constitution (First Amendment) Act of 1951, Article 31A:

> "aims at saving laws providing for the compulsory acquisition by the State of a certain kind of property from the operation of Art. 13 read with other relevant articles in Part III."

Articles 14 and 31 (2) are, in my opinion, articles which confer rights on the citizens and by virtue of Art. 31A, it is not open to the petitioner to challenge the Act on the ground that it violates the provisions of Arts. 14 and 31 (2).

(76) If the view, which I have expressed, is not correct I am further of the opinion that the Act is protected under Art. 31 (4) from challenge on the ground that the compensation provided by the Act is inadequate or that it

gives no compensation for forest and grass-lands or that it discriminates against chakdars and blockdars by denying them any compensation. Clause 4 of Art. 31 says:

"If any Bill pending at the commencement of the Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2)."

(77) It is clear from this clause that if a Bill fulfils the two conditions laid down therein, then, the Act cannot be called in question on the ground that it contravenes the provisions of clause 2. That is to say, it cannot be challenged on the ground that it does not provide for compensation for the property taken possession of or acquired or that it does not fix the amount of compensation or specify the principles on which the compensation is to be determined. It would, again, appear from the words "Notwithstanding anything in this Constitution" which occur in clause 4 that it is also not permissible to object to the Act on the ground that the compensation fixed or to be determined is no compensation in law as being contrary to other provisions of the Constitution, it is invalid. For, to question, on the basis of any article of the Constitution, the validity of the compensation fixed or the principles on which it is to be determined, is to say that the compensation or the principles on which it is to be determined are not the compensation or the principles contemplated by the provisions of clause 2 and that, therefore, the Act contravenes the provisions of clause 2.

(78) A similar view has been taken by the Allahabad High Court in 'Suryapal Singh v. U P Government', AIR (38) 1951 All 674 FB & by the Nagpur High Court in Misc. Petn. No. 29 of 1951 and other petitions decided on 6. 4. 51. The Nagpur decision has not been reported so far, but a copy of the decision has been made available to us by the learned Advocate-General. The purpose, scope, the transitory nature of clause 4 of Art. 31 and the significance of the words "Notwithstanding anything in this Constitution" occurring therein, have been so fully dealt with in the aforesaid decisions of the Allahabad and Nagpur High Courts that I feel there is very little left to add to the reasons given therein to support the view that Art. 31 (4) bars any attack founded on the contravention of any article of the Constitution, if it is directed against the compensation fixed by the Act or the principles on which and the manner in which the compensation is to be determined. In 'Kameshwar Singh v. State of Bihar', AIR (38) 1951 Pat 91, the Patna High Court, however, held that the protection given by Clause 4 is strictly confined to one ground only, namely, the ground arising out of the provisions of clause 2 of Art. 31 and that the words "Notwithstanding anything in this Constitution" do not enlarge the effect of the operative portion of the clause. On a careful perusal of the opinions expressed by the learned Judges constituting the Full Bench of the Patna High Court I am disposed to say with all respect to the learned Judges, that in forming this view, they have not given due weight to the words "Notwithstanding anything in this Constitution". I agree with the observations of the learned Judges of the Nagpur High Court that the words "Notwithstanding anything in this Constitution" used in clause 4 are crucial and that the Patna High Court has not given full effect to the amplitude of these words.

(79) Leaving out of account for the moment the objection as to the alteration of the Madhya Bharat Zamindari Abolition Bill during its progress in the Legislature, the impugned Act is clearly one to which Art. 31 (4) applies. The Bill leading to the Act was pending at the commencement of the Constitution in the State Legislature. It was reserved for the consideration of the President after it had been passed by the Legislature. Thereafter, it received the assent of the President. The petitioner cannot, therefore, in my view, question the validity of the Act on the ground that the compensation provided by the Statute is inadequate or unjust compensation or that the principles laid down for determining the compensation are inequitable on the ground of inequality. In fact the arguments addressed to us by the learned counsel for the petitioner to show that this Act contravened the provisions of Clause 2 of Art. 31, were only in relation to the matter of compensation for chakdars, blockdars and for forests and pasture lands.

(80) It was said that land belonging to chakdars and blockdars is being acquired without compensation being paid for it; that the Act does not provide for any compensation for forests and pasture lands. There is no substance in this grievance. A chakdar or a blockdar is included in the definition of the word "proprietor" given in S. 2 (a) of the Act. He is also treated as a proprietor for the purposes of compensation. Under S. 8, every proprietor whose proprietary right is acquired is entitled to receive and to be paid eight times the net income determined in accordance with the provisions of Sch 1. The net income is arrived at after deducting certain items from the gross income. Section 2 of Schedule 1 makes a specific mention of the gross income of a chakdar or a blockdar. Thus, for the purposes of compensation a chakdar or a blockdar is placed on the same footing as other proprietors. Again, as I read the proviso to Section 4 of Schedule 1, it appears to me that in addition to compensation a chakdar or a blockdar is also entitled to receive back with interest the money deposited by him at the time of taking the lease enabling him to acquire proprietary rights on the fulfilment of its terms. There is, therefore, no force in the contention that the impugned Act discriminates against chakdars and blockdars by denying them compensation.

(81) As regards forests and grass-lands, it is not correct to say that they are being acquired without compensation being paid for them. Under Section 4 of Schedule 1 of the Act, compensation has been fixed eight times the net income. According to S. 3 of the Schedule, the net income is calculated by deducting certain items from the gross income of a village, muhal, a chak or a block as the case may be. The gross income is determined in the manner laid down in S. 3 of the Schedule and inter alia comprises of 1/5 of the total Sivai Jama

income of the village, muhal, chak or block for the five agricultural years from Samvat 2000 to 2004 as recorded in the Siyaba of the village, muhal, chak or block. The expression "Sivai Jama income" has not been defined in the Act. But under S. 2(o) of the impugned Act, it has the same meaning which is attached to it under the Qanoon Mal Gwalior State of Samvat 1983 and means income from various sources such as village forests, grass lands etc. It follows, therefore, that the income from pasture lands and forests is taken into account in determining the gross income which after the deduction of land revenue for the basic year and costs of management leads to the net income forming the basis of compensation. It cannot, therefore, be said that forests and grass lands are not being valued at all for the purposes of compensation.

(82) Learned counsel for the petitioner faintly raised the point that the impugned Act is not for a public purpose. He did not, however, press the contention in this Court but reserved his right to raise the point elsewhere if need be. It is, therefore, not necessary to enter into a discussion of the indeterminate concept of a public purpose which varies according to the practical needs and political philosophy of the time. It is sufficient to say that the Constitution itself contemplates acquisition of land for the purpose of the State as a public purpose and it empowers the State Legislature under item 36 of List II (2) to legislate with respect to "acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III (3)." Entry 42 of List III (3) is in the following terms, namely,:

"principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given".

The words "for other public purpose" which follow the preceding words "for the purposes of the Union or of a State " indicate that purposes of the State or purposes of the Union are public purposes. Taking into consideration S. 3 of the Act which vests proprietary rights in the State and other provisions of the Act, I do not think it can be seriously disputed that the impugned Act is for the purposes of the State. On this point, there is no conflict in the views expressed by the Patna High Court and the Nagpur High Court in their decisions referred to above. They have held that acquisition for the purposes of the State is acquisition for public purpose.

(83) The next point taken on behalf of the petitioner is that a law, such as is referred to in Cl. 2 of Art. 31, requires under the Constitution the assent of both the Raj Pramukh or the Governor, as the case may be, and of the President, and that as in the present case the Madhya Bharat Zamindari Abolition Bill received the assent only of the President, it is not a valid law. Learned Counsel for the petitioner drew our attention to the words "shall have effect" which occur in Cl. 3 of Art. 31 and argued that these words indicated that the law reserved for the consideration of the President must be one which having been passed by the Legislature has become effective by the assent thereto of the Raj Pramukh. This argument has, in my judgment, no weight. To my mind, the words "No such law..... shall have effect" far from making the assent of the Governor or Raj Pramukh essential to a Legislation of the type in question here, emphasise the fact that even if such legislation is assented to by the Raj Pramukh after it has been passed by the Legislature, it shall not become effectual unless it is reserved for the consideration of the President and has received his assent. In other words Cl. 3 of Art. 31 as it is worded makes the President's assent the sine qua non. The necessity for the use of the words "No such law.....shall have effect" in Cl. 3 of Art. 31 is obvious from the provisions of Art. 200. Under this Article when a Bill passed by the Legislature is presented to the Raj Pramukh, he has three options. He may assent to the Bill, or withhold assent therefrom, or reserve the Bill for the consideration of the President. There is nothing in Art. 200 to require the Raj Pramukh to assent to a Bill before reserving it for the consideration of the President. The article again does not make it obligatory for the Raj Pramukh to reserve the Bill for a law such as is referred to in Cl. 2 of Art. 31 for the consideration of the President. Where such a Bill is, however, reserved for the consideration of the President, as was done in the present case, the question of the assent of the Raj Pramukh to the Bill does not arise, and the Bill becomes law when President assents to it under Art. 201. But the Raj Pramukh may give his assent to such a Bill and not reserve it for the consideration of the President. In such a case Cl. 3 of Art. 31 prohibits the law assented to by the Raj Pramukh becoming effective — which otherwise would be until it has been reserved for the consideration of the President and has received his assent. The impugned Act cannot, therefore be held to be invalid by reason of the Raj Pramukh's failure to assent to the Madhya Bharat Zamindari Abolition Bill before reserving it for the consideration of the President.

(84) It was next urged by the learned counsel for the petitioner that the Act is invalid because the Madhya Bharat Zamindari Bill, as introduced in the Legislative Assembly, was not intended to apply to chakdars and blockdars, but that the Select Committee extended the scope of the Bill making it applicable to chakdars and blockdars. It was said that in as much as under the Madhya Bharat Legislative Assembly Rules (published in the Gazette dated 7-10-50) the scope of the Bill could be enlarged by the Assembly alone, it was not competent for the Assembly to pass the Bill as altered by the Select Committee. There is no force in this contention. Quite apart from the fact that the Madhya Bharat Zamindari Abolition Bill as introduced in the Assembly itself intended that it should apply to chakdars and blockdars, it appears to me that the form content or subject-matter of a Bill at the time of its introduction into or of its consideration by the Assembly on the report of the Select Committee, is not a matter with which a Court of law is concerned. The question, whether the Assembly should have passed the Bill as reported by the Select Committee or recommitted it to the Select Committee or dropped the Bill, is a domestic matter relating to the procedure followed by the Assembly in the course of legislation. It is a matter regulated

by the "Rules of Procedure and Conduct of Business in the Assembly as adapted by the Speaker under Art. 208 (2) of the Constitution" and as interpreted by him. In view of the provisions of Art. 212 (1) it is not a matter with which a Court can interfere, or indeed one on which it is entitled to express any opinion. If there was any irregularity in the procedure followed by the Assembly in passing the Bill it does not make the culminating Act invalid or ultra vires.

(85) A further point taken by the petitioner is that as the Madhya Bharat Zamindari Abolition Bill as passed by the Assembly was not the same as the one pending at the commencement of the Constitution, the President's assent to the altered Bill passed by the Legislature cannot exempt the law under Art. 31 (4) from being challenged on the ground that it contravenes the provisions of Cl. 2 of Art. 31. On the language of Art. 31 (4), I find it impossible to entertain the view that the protection afforded by Cl. 4 is not available unless the Bill as passed by the Legislature and assented to by the President is in every respect identical with the Bill pending at the commencement of the Constitution.

(86) The contention that the Madhya Bharat Legislative Assembly which passed the Bill was not a valid Legislative body under the Constitution, because the members of the body did not comply with the requirements of Art. 188 about oath and it was presided over by a person who had not taken an oath and was not entitled to continue in the office of Speaker of the Assembly after the coming into force of the Constitution, is concluded, so far as this Court is concerned, by the decision of a Division Bench of this Court in 'Anand Bihari v. Ram Sahay', Civil Misc. Appln. No. 3 of 1950, I was a party to that decision. In that case the validity of the continuance of Shri Ram Sahay as the Speaker of the Assembly after 26-1-50 was challenged on these very grounds. It was held that Shri Ram Sahay's continuance in the office of Speaker after 26-1-50 was valid. It was pointed out in that case that the members of the Assembly had substantially complied with Art. 188 by taking oath in the form they did. Learned counsel for the petitioner did not advance any arguments to persuade me to revise the opinion expressed in that case.

(87) The last contention of the learned counsel for the petitioner and one on which he laid considerable stress is that the Madhya Bharat Legislative Assembly which passed the impugned law was at its inception not a validly constituted body under the Covenant. In order to appreciate the arguments of the learned counsel for the petitioner and the learned Advocate General on this head it is necessary to refer to certain material provisions of the Covenant entered into by the Rulers of Gwalior, Indore and certain other States in Central India for the formation of the United States of Gwalior, Indore and Malwa (Madhya Bharat). The Covenant was signed by the Rulers of the Covenanting States on 28-5-48. Article III (a) of the Covenant made the present Ruler of Gwalior the Raj Pramukh of the United State during his life time and provided that he should enter upon the duties of his office on the 15th day of May 1948. Clause (1) (a) of Art. VI (b) of the Covenant laid down that when the Ruler of a covenanting State makes over the administration of his State to the Raj Pramukh, then all the rights, authority and jurisdiction belonging to the Ruler which appertain, or are incidental, to the Government of his State shall vest in the United State and shall thereafter be exercisable only as provided by the Covenant. The administration of the Gwalior and Indore States was made over to the Raj Pramukh on 16-6-48.

(88) By clause 2 of Article X (10) it was provided that:

"the Raj Pramukh shall constitute not later than the first day of August, 1948 an Interim Legislative Assembly for the United State in the manner indicated in Schedule IV (4)."

According to this Schedule the Legislative Assembly was to consist of:

"(a) forty members elected by the members of the Gwalior Legislative Assembly;
(b) fifteen members elected by the members of the Indore Legislative Assembly; and
(c) twenty members elected by an electoral college to be constituted by the Raj Pramukh in consultation with the Government of India to represent the Covenanting States other than Gwalior and Indore."

(89) Clause 2 of the Schedule stated that the election should be by proportional representation by means of single transferable vote.

(90) Clause 3 of the Schedule empowered the Raj Pramukh to make rules for carrying into effect the provisions of the Schedule and securing the due constitution of the Legislative Assembly.

(91) On 19-10-48 a body consisting of forty members elected on 8-5-48 by the Gwalior Legislative Assembly, fifteen members elected on 8-5-48 by the Indore Legislative Assembly, fourteen members elected by the Regional Council of the Central India States Peoples Conference, and six persons chosen by the Madhya Bharat Provincial Congress Committee was formed and notified by the Raj Pramukh as the Interim Assembly for Madhya Bharat.

(92) On 30-10-48, the Raj Pramukh made and promulgated the Interim Legislative Assembly Ordinance (Ordinance No. 18 of 1948) containing provisions about the constitution of the Assembly, its dissolution and other matters. This Ordinance was subsequently replaced by an Act (Act No. 33 of 1948) of the Assembly embodying the provisions of the replaced Ordinance.

(93) It is also relevant to note that the Covenant dated 28-5-48 contemplated under Cl. 1 of Art. X (10) the establishment of a Constituent Assembly for framing a Constitution for the State. This provision was subsequently deleted by a Supplementary Covenant entered into by the Rulers of covenanting States in 1948. Article II (2) of the Supplementary Covenant substituted for the provisions of the original Covenant relating to the formation of the Constituent Assembly, the following paragraph with the direction that "it shall be deemed always to have been substituted". The substituted paragraph is as follows: "(1) There shall be a Legislature for the United State consisting of the Raj Pramukh and a Legislative Assembly."

(94) Article 1 of the Supplementary Covenant enjoined that the Constitution of India adopted by the Constituent Assembly of India

shall be the constitution for the United State of Madhya Bharat.

(95) The Assembly which was formed and notified by the Raj Pramukh on 19-10-48 was functioning immediately before the commencement of the Constitution of India as the Legislature for the United State of Madhya Bharat and is the body which to-day, by virtue of Art. 385 of the Constitution, exercises the powers and performs the duties conferred by the provisions of the Constitution or the House of the Legislature of Madhya Bharat. It is this body which passed the law challenged by the petitioner.

(96) Learned counsel for the petitioner put his argument as to the validity of the Constitution of the Assembly on three grounds. Firstly, it is contended that the election on 8th and 9th May, of the prescribed number of members by the Legislative Assemblies of Gwalior and Indore was not valid inasmuch as it was not held after the Maharaja of Gwalior had entered upon the duties of the office of Raj Pramukh, and directed the Assemblies to elect their representatives to the Legislative Assembly of Madhya Bharat in accordance with rules framed by him. Secondly, that the Assembly was not constituted before 1-8-48, that is, before the date prescribed in Cl. 2 of Art. X (10) of the Covenant. Thirdly, the twenty members chosen to represent States other than Gwalior and Indore were not elected by an electoral college constituted for the purpose by the Raj Pramukh in consultation with the Government of India in accordance with Cl. (c) of Schedule IV (4) to the Covenant.

(97) In the return filed on behalf of the State the averment as to the constitution of the Assembly is as follows:

"It is denied that the Act is unconstitutional on the ground that the Legislative Assembly of the United State of Gwalior, Indore and Malwa (Madhya Bharat) was not validly constituted under the Covenant entered into between the Rulers of the integrating States. The Respondents humbly submit that the Legislative Assembly was validly constituted in accordance with the provisions of the Covenant, from amongst the then existing Legislatures of the Gwalior State, the Holkar State and an electoral college for securing popular representation from the remaining covenanting States, as ad hoc electoral college was constituted in accordance with a formula evolved with the object of securing a popular representation in the existing conditions and consented to by the Government of India."

(98) In the affidavit filed on behalf of the State, it is admitted that the election of representives from Gwalior and Indore States was held on 8th and 9th May respectively in accordance with rules framed for the purpose by the Speakers of these Assemblies after securing the approval before 11th May, 1948 of the Maharaja of Gwalior as the person who was to be the Raj Pramukh. It is also not disputed that of the twenty members representing States other than Gwalior and Indore, fourteen were elected by the Regional Council of the Central Indian States Peoples Conference and six were chosen by the Madhya Bharat Provincial Congress Committee and that the Assembly was fully constituted after 1st August, 1948. The learned Advocate General, however, argues that as the Covenant is a constitutional document creating a new State in place of the Several Covenanting States and providing for the peace, order and good Government of the new United State, it should be given a large and liberal construction so as to accomplish the objects for which the Covenant was entered into by the Rulers of the Covenanting States, that Cl. 2 of Art. X (10) which provided for the constitution of a Legislative Assembly before 1-8-1948 without declaring the consequences of the failure to constitute the Assembly by this date, should be construed as having a directory and not a mandatory effect, that the delay in constituting the Interim Legislative Assembly was caused by the practical difficulties in setting up an electoral college and the constitution of the Assembly is not vitiated by the alleged delayed action of the Rajpramukh; that as the Covenant did not exclude the possibility of the date of making over the administration of the Gwalior and Indore States to the Rajpramukh synchronising with the date of the assumption of the duties of the Raj Pramukh by the Maharaja of Gwalior, Cl. 3 of Sch. IV to the Covenant should be construed as empowering the person who was to be Rajpramukh to make rules for carrying into effect the provisions of the Schedule; and that in any event as the Rajpramukh ratified the election of the members by the Gwalior and Indore Assemblies by issuing a notification on 19-10-1948, that is, after he entered upon the duties of the office of Rajpramukh, the election of the members is not rendered invalid by the alleged irregularity. As to the members representing States other than Gwalior and Indore, it was submitted by the learned Advocate General that these members were, no doubt, to be elected by an electoral college constituted by the Rajpramukh in consultation with the Government of India, but on an exploration of the field, the Rajpramukh was unable to discover any public bodies from which an electoral college could be readily constituted. A workable formula was, therefore, evolved for setting up an ad hoc electoral college in consultation with the Government of India. In accordance with that formula, the Regional Council of the Central Indian States People's Conference was asked to elect and thus elected fourteen members. To afford representation to other sections of public opinion, the Rajpramukh was also authorised by the Government of India to ask the Madhya Bharat Provincial Congress Committee to elect six persons. According to the learned Advocate General, the scheme constituted in terms an ad hoc electoral college as the only practical solution of a political problem and the only workable hypothesis. It is, therefore, urged that the representatives of States other than Gwalior and Indore were validly elected.

(99) It was further said by the learned Advocate General that under Art. 385 of the Constitution, it is the body which was actually functioning before the commencement of the Constitution as the Legislature, irrespective of the fact whether it was, or was not, validly constituted, that is, competent to exercise after 26th January, 1950 the powers and duties conferred by the Constitution on the House of Legislature of Madhya Bharat and that an inquiry into the validity of the constitution of the Assembly is thus barred by Art. 385.

the present case, there is no contest between any of the parties to the Covenant regarding the manner in which these twenty persons were elected. On this question, there being complete harmony between the parties to the Covenant and the Government of India with whose concurrence and guarantee, the Covenant was entered into by the signatories, it must be held that in order to fulfil the function which the parties had intended, they agreed to so interpret clause 1, (c) and 2 of Schedule IV as to permit the election of the twenty members in the manner in which it was held. In other words on the principles of interpretation already indicated above such a practical construction put by the parties themselves must be regarded as authoritative of the scope and meaning of clause 1, (c) and of the applicability of clause 2 of Schedule IV. On this reasoning, I am inclined to think that the election of the twenty members chosen to represent States other than Gwalior and Indore was valid.

(103) Having reached this conclusion, it is not necessary for me to consider at length the contentions of the learned Advocate General resting on Art. 385 of the Constitution and section 9 (2) of the Interim Legislative Assembly Act. It is enough to say that I am unable to accept them. As I read Art. 385, it seems to me that the Article does not protect from challenge the validity of the Constitution of a body which though functioning immediately before the commencement of the Constitution as the Legislature of the State was not legally entitled to do so under the law of the State. As regards section 9 (2) of the Interim Legislative Assembly Act, I cannot see any justification for suggesting its applicability in the present case where the initial constitution of the Legislature itself is being questioned.

(104) Before concluding, it must be stated that we drew the attention of the learned Advocate General to sections 14 (5), 15, 20, 31 and 32 of the Madhya Bharat Zamindari Abolition Act excluding the jurisdiction of the Civil Courts to question the decisions of the various authorities under the Act, and asked him whether these sections as they are worded, affect the jurisdiction of this Court under Arts. 226 and 227 of the Constitution. The learned Advocate General stated that these sections do not take away the jurisdiction of this Court under Articles 226 and 227 in respect of proceedings under the impugned Act. In these circumstances I would only say that if these sections purport to take away the right of this Court under Articles 226 and 227 of the Constitution as regards proceedings under the Madhya Bharat Zamindari Abolition Act, then clearly, they are to that extent ultra vires the Constitution.

(105) For the reasons which I have given, I am satisfied that the applicant is not entitled to the relief claimed and his application should be dismissed. In view of the special circumstances of the case there should be no order as regards costs.

(106) SHINDE, J: I agree with judgment proposed by my learned brother Dixit J.

(107) BY THE COURT: The application is dismissed. No order as to costs.

Application dismissed.

D.H.

[C. N. 26.]

A. I. R. (39) 1952 Madhya Bharat 78

(INDORE BENCH)

REGE J.

Onkarlal and another, Applicants v. Mohonlal Siddulal and another, Opponents.

Small Cause Revn. No. 60 of 1949, D/- 24-10-1949.

Partnership Act (1932) S. 19 — Authority to acknowledge debts — Limitation Act, S. 19.

Where a firm is a running merchantile firm an acknowledgment of a khata by one partner would bind the other. (Para 2)

Anno: Partnership Act, S. 19 N. 9. Lim. Act, S. 19 N. 50.

S. L. Garga, for Applicants; Sambhudayal Sanghi, for Opponents.

Cases referred to.

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) AIR (15) 1928 All 387: (110 Ind Cas 561) (Pr 2)

('38) AIR (25) 1938 Mad 774: (I L R (1938) Mad 968) (Pr 2)

ORDER: This petition for revision arises out of a suit instituted by the opponents in the Court of Small Causes at Indore to recover Rs. 389-14-3 on the foot of a khata acknowledged by the defendants who the plaintiff allege were the owner of a firm named "Shivanarayan Ramnath" at Manpur in whose name the khata stands. It is common ground that defendant Onkarlal acknowledged khata in the year 1998 Samwat and Hanuman acknowledged khata for the other years. The suit was decreed and the defendants have come up in revision.

(2) Both the defendants tendered a common written statement in the suit. They stated that the acknowledgment by one of the defendants was not binding on the other and Onkarlal therefore would not be responsible in any case. The learned Small Cause Judge held that the firm was a joint family firm and, therefore, the acknowledgments were binding. It was half heartedly contended before me that the finding regarding the firm being a joint family firm was not correct, but the defendant Hanuman himself had admitted the jointness of the family and stated that there was no partition and the contention has, therefore, no force. It was then urged on the authority of cases reported in 'Gaya Prasad v. Babu Ram', A I R (15) 1928 All. 387 and Pangudaya Pillai v. Uthandiya Pillai', AIR (25) 1938 Mad 774, that the acknowledgment by Hanuman would not bind Onkarlal. In Allahabad case however it was a solitary transaction by two brothers of the Hindu family and different considerations would apply. In the Madras case the acknowledgment was made by a coparcener after partition when he had no authority to bind the other coparceners. The firm in the present case is a running merchantile firm and an acknowledgment by one partner would ordinarily bind the other. No circumstances have been shown to the contrary, but on the other hand the signatures of Hanuman after that of Onkarlal would indicate Hanuman's acquiescence and likewise continuance of the business of the firm under the management of Hanuman would bind Onkarlal. It was then contended that in

any case relief under the Money Lenders' Act should have been given to the defendants. One of the defendants is a recorded pattedar tenant and it may be assumed that the patta enures for the benefit of the joint family, but to attract the provisions of the Money Lender's Act it must be proved that the person claiming the benefit is an agriculturist. Hanuman has stated that he derives his income from agriculture, but this is belied by the fact that he has an interest in business too, and his contradictory statements in the plaint and in evidence makes him unworthy of belief. There is no evidence that either of the brothers is actually the tiller of the soil and the benefit of the Money Lender's Act cannot be claimed by them. The petition is dismissed with costs.

D.H. *Revision dismissed.*

A.I.R. (39) 1952 Madhya Bharat 79 *[C. N. 27.]*

MEHTA AND SANGHI JJ.

Zeta Narsingh and another, Appellants v. The State.

Criminal Appeal No. 45 of 1949, D/- 19-10-1949.

Criminal P.C. (1898), S. 162 — Police diary — Use of.

Under Section 162 the only way in which the Police diary can be used is to contradict a witness with his subsequent statement but the statement in the police diary cannot be used as substantive evidence. (*Para 6*)

Anno: Cr. P. C., S. 162 N. 10, 18.

P. R. Sherma, Public Prosecutor, for the State.

MEHTA, J: The accused Zeta S/o Narsingh and Rama S/o Bhalia were committed to the Court of the Sessions Judge Dhar on a charge under Section 396, I.P.C. The Sessions Judge found both the accused guilty under Sec. 394 and sentenced each of them to six years rigorous imprisonment.

(2) The short facts are that on the night intervening 11th and 12th March 1948, it is alleged that the accused Zeta, Rama and five or six other persons committed dacoity at the house of one Bholu son of Onkar at Chitkhalda, Pargana Nisarpur. One of the dacoits caused severe injury to Chhotu who was sleeping inside the house of Bholu as result of which Chhotu died in Nisarpur Hospital. Rama was arrested on 10-5-48 and Zeta was arrested on 7-5-1948.

(3) It may be mentioned that on previous night viz. 10-3-48 Bholu was sleeping alone in the front portion of his house. His son and daughter-in-law had gone out of the village to Balkeshwar. On the night of the 10th March, 48, the thieves broke into the back portion of the house and stole away some property. Bholu gave a report about this to the Police Head Constable Nisarpur at Chitkhalda. In the afternoon of 11th March some Bhils were suspected by Police at Chitkhalda. They were called by the Head Constable Raghunath Prasad. They were questioned and were allowed to go in the evening of the 11th March. When the dacoity took place between the night of 11th & 12th March 48, Bholu being nervous called Chotu to sleep at his house. They changed sleeping places. Bholu slept in the back portion of the house and Chotu slept in the front portion of the house. In the night of the 11th March the thieves came from the front portion of the house where Chotu was sleeping. Chotu was assaulted and he raised hue and cry. Bholu was aroused from sleep and Raghunath Prasad and some Police constables who heard the alarm, came at the spot. They chased the dacoits in different batches but did not succeed and came back. Then report Ext P/1 was made. It is dated 12-3-48. The report was dictated by Bholu and it was taken down by Raghunath Prasad. In the report it is mentioned that the thieves took away his battery worth Rs. 8/- of two cells and one white chadar, a Bandi and several other articles including one sword without scabbard (तलवार बगैर म्यान). Magan and Phunda came to know at Balkeshwar that their father was assaulted and they went to Nisarpur Dispensary on the 12th night. Chhotu succumbed to his injuries on the 12th March at the Nisarpur hospital. Chhotu's body was burried and when Chaturvedi, Police Inspector, reached Police Station on the evening of the 12th March, he got the burried body disintered on the 13th March, 1948, and the post mortem was held. On the 14th March, 1948, the District Inspector of Police came to Nisarpur and he took charge of the investigation.

(4) In this case there is absolutely no evidence regarding the identification of the dacoits. The only incriminating circumstance against the accused Zeta is the recovery of sword from the hut where Zeta was staying. The sword was stained with human blood. Zeta was staying in a separate hut in the village Kadmal which is 2½ miles from Chitkhalda. This discovery was made on 7-5-1948. The sword is Art A/2. In the first place I may mention that the mention about the sword without scabbard in the First Information Report is very suspicious. In my opinion the words " तलवार बगैर म्यान " appear to be interpolated and appear to be in the handwriting which is different from the handwriting in the body of Ext P/1. Out of the articles mentioned in the list Ext P/4 nothing was recovered. After more than two months viz. on 7-5-48 one sword was found in the hut of Weglya and this circumstance seems to corrobotate that there is an interpolation in the report Ext P/1. There is absolutely no evidence to show that the sword, Art. A-2 belonged to Zeta. Zeta has clearly stated that the sword belonged to Weglya and it was recovered from his hut. This fact is corroborated by D. W. Weglya. In his deposition he says that in his absence the Police seized this sword A/2 from his hut. Weglya has given the identification mark on the sword and says it belongs to him. D. W. Budhsingh also corroborates the statement of Weglya and says that the sword Art. A/2 belongs to Weglya and he also points out the identifying mark, on the sword and says that it belongs to Weglya. Therefore, the recovery of sword from the hut of Weglya does not help the prosecution in any way. Further it appears that on 12th March. 1948 additional statement of Bholu was recorded in the Police Diary giving further list of stolen articles. In that statement Bholu said that एक लुगडा लाल रंग का, धोता हरा किनार की, धोता लाल किनार का व धोता काला किनार का were also stolen. It is alleged that on 10-5-48 Mr. Shukla, District

Inspector of Police, went to Kadmal. There he asked Devki wife of Zeta to produce Dhoti, stolen in dacoity. Devki brought forward one Zanani Dhoti. This was identified by Phunda and her husband as belonging to Phunda. Devki wife of Zeta says that this article A belongs to her. This dhoti is an article which is of such a common use that there is no reason to disbelieve the statement of Devki that it belongs to her. Further it must be remembered that this dhoti Art. A was not formerly included in the list given by Bholu. Thus there is practically no evidence to implicate the accused Zeta in the commission of dacoity.

(5) As regards the accused Rama; he was living in a separate hut near the hut of Zeta at Kadmal. Rama was living with his wife Amnibai. The Police went to Amnibai and asked her to produce stolen articles. Amnibai produces article dhoti A/5 on 8-5-48. It was identified by Magan and Phunda. Amnibai says that Dhoti Article A/5 belongs to her. A dhoti with green border is also claimed by Magan as belonging to him. The accused Rama says that it belongs to him. Thus there is practically no evidence against the accused Rama to implicate him in such a serious crime of dacoity.

(6) In my opinion the prosecution has miserably failed. I may further note with regret that the Sessions Judge Dhar has made considerable use of the statement in the Police Diary. Under S. 162, Cri. P. C. the only way in which the Police diary can be used is to contradict a witness with his subsequent statement but the statement in the policy diary cannot be used as substantive evidence. I, therefore, hold that the prosecution has failed to bring home the guilt of the accused.

(7) I would, therefore, allow this appeal and set aside the order of conviction and sentence and direct that both the accused appellants be acquitted of the charge and should be set free.

(8) SANGHI, J.: I agree.

D.H. *Appeal allowed.*

A.I.R. (38) 1951 Madhya Bharat 80 [*O. N. 28.*]

(GWALIOR BENCH)

CHATURVEDI, J.

Jardan Singh, Applicant v. The State of Madhya Bharat, Opposite Party.

Criminal Misc. No. 34 of 1950, D/- 7-8-1950.

Criminal P. C. (1898), S. 491 — "Illegally or improperly detained."

Section 491 applies only to cases where persons are deprived of their personal liberty and confined to some custody. Where a person is ordered by the Government to proceed to any place in certain Districts and not to enter or remain in any other District and asked to report at least once a week to the officer in charge of Police Station in whose jurisdiction he resides, an application under S. 491 will not lie. (Para 4)

Anno: Cri P.C., S. 491, N. 7.

K. P. Dey and J. P. Gupta, for Applicant.

Government Advocate, for the State.

ORDER: Jardan Singh the applicant has made this application for the issue of a writ under Clause (1) of Art. 226 of the Constitution of India read with Sec. 491, Criminal P. C. alleging that the petitioner's father Gyan Singh and uncle Dwarka Singh have been served with orders from the Madhya Bharat Government that they should proceed to any place in the District of Jhabua, Dhar, Mandsaur, Ratlam and Ujjain and that they should not enter or remain in any other District of Madhya Bharat except with the previous permission in writing from the District Magistrate concerned. Further they have been also asked to report at least once a week to the officer in charge of Police Station in whose jurisdiction they reside permanently or temporarily.

(2) On 19th May 1950 Mr. Dey, learned counsel for the petitioner, desired that the application for issue of a writ under Art. 226 of the Constitution of India be postponed until the decision of the Full Bench of this Court at Indore and that application under Sec. 491 of the Criminal P. C. should be taken up immediately.

(3) Mr. Dey on that day was asked by me to show whether on the facts mentioned in the application a petition under Sec. 491 is competent. Mr. Dey wanted time to show some rulings on the point and time was given. Today, Mr. Jagannath Prasad Gupta has appeared on behalf of the petitioner and has argued that the word 'detention' as well as the word 'custody' are very wide and as Gyan Singh and Dwarka Singh have been asked to remain within 5 Districts of Madhya Bharat it should be taken that there is physical restraint and an infringement of their personal liberty. Hence, according to Mr. Gupta, an application under Sec. 491 lies.

(4) There is no doubt that the word 'detention' is susceptible of many shades of meaning. Section 491 of the Criminal P. C. however refers in sub-clause (b) to detention in public or private custody and in sub-clause (c) in jail. I am quite clear in my mind that to bring a case within the purview of Sec. 491, it must be established that there is detention either in jail or in public custody or in private custody. In my opinion the word 'custody' implies confinement or imprisonment with an idea to prevent escape and, every sort of physical restraint or restraint on movements will not come within the purview of Sec. 491. In my judgment, therefore Sec. 491 applies only to cases where persons are deprived of their personal liberty and confined to some custody.

(5) In the present case, the movements of the two persons have, of course, been restricted but they have not been confined to any custody. And I am not satisfied that the non-applicant in this case has the custody of the two persons mentioned above in any sense sufficient to entitle the petitioner to get a direction to the Chief Secretary that he should produce the body of the said two persons before this Court. I therefore do not see sufficient reason to issue a rule nisi against the non-applicant.

(6) I therefore reject the application under Sec. 491. Put up after a week for consideration of the application under Art. 226 of the Constitution of India.

D.H. *Application rejected.*

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(Indore)

FULL BENCH

KAUL C. J. AND

MEHTA AND CHATURVEDI, JJ.

State v. Kalu S/o Girdhari and another, Respondents.

Criminal Appeal No. 100 of 1949, D/- 22-1-51.

† (a) Criminal P. C. (1898), S. 423 — Appeal against conviction — While dismissing appeal, appellate Court cannot convict accused on charges of which he was acquitted by Sessions Judge, in absence of appeal against acquittal by Government.

Chaturvedi, J.: Clause (b) of S. 423 (1) does not apply to a case of acquittal, but applies only to a case of conviction and only Clause (a) applies to a case of acquittal. If the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they can be exercised only in an appeal against an acquittal under S. 423 (1) (a) and not on appeal against a conviction under S. 423 (1) (b).

Consequently in an appeal against conviction the appellate Court cannot, while dismissing the appeal and maintaining the conviction, convict the accused on the charge on which he was acquitted by the Sessions Judge. Government Appeal under S. 417, Criminal P. C. is necessary against the order of the Sessions Judge acquitting the accused of those charges. Case law reviewed. (Para 17)

Anno: Cr. P. C., S. 423 N. 15, 20.

† (b) Cr. P. C. (1898), Ss. 430, 417, 421, 423, 439 and 369 — Appeal against conviction dismissed — Government appeal against acquittal of other charges is not maintainable — Revision for enhancement of sentence is also not maintainable.

Per Chaturvedi J.: Where after an appeal under S. 423 (1) (b) by the accused against conviction has been dismissed by an appellate Bench of the High Court, if an appeal is filed against acquittal of accused of other charges by the Govt. under S. 417 such an appeal is not competent. The reason is that the decision of the Bench is final and if the appeal against acquittal is heard on merits, it might lead to a disturbance so far as the finality of the judgment is concerned. The difficulty arises from the difference in the period of limitation prescribed for filing appeals by the accused and by the State. In the case of the accused it is 30 days while the limitation for the State to appeal against acquittal is six months. It is possible that an appeal by an accused person may be heard and decided before the State has determined whether to prefer an appeal or not. Where there has been an acquittal on a graver charge, both State and accused have a right of appeal. If the appeal of accused person is heard and decided before the State appeals under S. 417, the decision is final under S. 430. Under the circumstances, the State appeal is barred and cannot be entertained. It is true that the State has a right of appeal under S. 417 and can wait for six months to file it but the State must also know that if the convict's appeal is dismissed in the meanwhile that decision being final and effective cannot be revised or reviewed and the State appeal will become infructuous. The only thing that can be done to avoid this anamoly is for the State to file appeal against acquittal before the decision of the Convict's appeal by the High Court, or before the appeal is heard; or, the Government-Advocate should move the High Court for adjournment of the Convict's appeal till the appeal against acquittal be preferred by the State. AIR 1932 Nag 73, Relied on; Majority view in AIR 1932 Nag 121 (FB), Dissented from. (Para 24)

Similarly after the appeal against the conviction has been heard and decided, there can be no application for enhancement of the sentence under S. 439 of the Code. In this respect there is no difference between filing of a memorandum of appeal under S. 417 and filing a revision petition for enhancement of sentence under S. 439. The question in each case is whether the decision of the Bench of the High Court while dismissing an appeal against conviction is final or not. By the word 'final' is understood that nothing more remains to be done by the Court pronouncing the judgment and the appeal is decided one way or the other in its entirety. If the High Court while dismissing the appeal of the accused suo moto issues a notice to the accused to show cause why his sentence should not be enhanced then the decision dismissing the appeal is not final so far as his sentence was concerned, though it is final so far as his conviction is concerned. AIR 1932 Nag 73, Dissented from. (Para 25)

If an appeal against conviction is dismissed then, unless there is anything contrary in the judgment itself, it should be taken that the appellate Court confirmed the conclusions of the trial Court on facts which constituted the offence, for which the accused was convicted, confirmed the conviction as well as the sentence, and also confifmed the conclusion of the trial Court that on those facts the offence fell within a particular section of the statute. Cri. Revn. No. 41 of 1950 (Indore), Relied on. (Para 28)

Section 421 is an exception to the general principles of Criminal law and Criminal Jurisprudence. It is obvious that an order can be passed under Section 421 without hearing the appellant. Where an order under Section 421 to the prejudice of an accused is made without affording him an opportunity of being heard (as for instance where a case was posted on a day anterior to that fixed in the notice to the accused), the High Court can vacate its summary order passed under Section 421 for rehearing the case, though it will not amount to reviewing a previous judgment. Even this will be possible only in the case of appeals presented under Section 419 and that too only at the instance of the accused-appellants. In no other case can an order passed under Section 421 be vacated or reviewed or revised. The order passed under Section 421 is definitely a judgment and cannot be altered. It is as final and effective as a decision made under Section 423(1) (b) after hearing the arguments of the appellant and Government Advocate. Case law reviewed. (Paras 33, 43)

Hence once an appeal preferred by the accused against his conviction of a minor offence is dismissed, either summarily or after hearing arguments, the High Court cannot alter or review the judgment and the Government Appeal against an order acquitting the accused of a

major offence will then become futile by reason of the previous judgment having become final and effective. (Para 46)

Anno: Cr. P. C., S. 417 N. 1; S. 369 N. 4, 5; S. 421 N. 1, 11; S. 423 N. 15, 20; S. 430 N. 1; S. 439 N. 32.

(c) Criminal P. C. (1898), Ss. 430, 417, 423, 369 — Appeal against conviction of minor charges dismissed by Division Bench — Remark in judgment that though appellate Court could alter acquittal of accused of major charges into conviction, without an appeal from acquittal, Court refused to alter acquittal — Subsequent appeal by Goverment against acquittal — Held that appeal was not maintainable, since the Division Bench had considered the case on merits and had refused to alter acquittal.

Accused was tried for offences under Sections 302, 394 and 397, Indian P. C. and was convicted for an offence under S. 304 (latter part). He was further convicted under Section 324, I. P. C. The sentences passed were to run consecutively. The accused appealed against the order passed by the Sessions Judge. This appeal was disposed of by a judgment of a Division Bench. The last paragraph of the judgment by which the appeal was dimissed read thus: "I would, therefore, maintain the convictions and dismiss the appeal. The learned Government Advocate made a strong plea for alteration of the conviction to one under S. 302 of the Penal Code. The Government has not filed an appeal from the acquittal under S. 302 although such an appeal would be within time, and in the circumstances, I would not think of altering the conviction though I agree, this Court has the power in a proper case to do so." Subsequent to the pronouncement of that judgment an appeal was preferred by the Government Advocate under Section 417:

'Held per Kaul, C. J. and Mehta, J': It was clear that in the view of the Division Bench the High Court could, in a proper case even though there was no appeal filed by the Government against an order of acquittal, alter a finding of the Sessions Judge that the accused was guilty of an offence under Section 304 only and hold him guilty of an offence under S. 302 though the Sessions Judge had acquitted him of that charge. In spite of expression of that opinion on the question of law, the Judges rejected the request made by the Government Advocate that the accused should be convicted under S. 302. The Judges must be taken to have applied their minds to the contention put forward by the Government Advocate and on a careful consideration of the matters raised before them, come to the conclusion that the acquittal of the accused for an offence under Section 302 by the Sessions Judge should, in the circumstances of the case before them, be maintained. The fact that the Government Advocate had not filed an appeal was not the reason of the refusal of the Judges to accept the contention put forward by the Government Advocate. This was only a circumstance to which they referred in arriving at a conclusion. From the fact that they expressly affirmed the power of the High Court to accede to such a request as was made by the Government Advocate in a proper case, it was clear that this matter whether the acquittal of the accused for the charge under Section 302 should be set aside, was considered and decided by the High Court. A decision having once been given by the High Court it was no longer open to challenge. The High Court had no power to alter that decision because subsequently an appeal under S. 417 had been preferred by the Government. A question already decided could not be reopened. (Para 50)

Anno: Cr. P. C., S. 369 N. 4, 5; S. 417 N. 1; S. 423 N. 15, 20; S. 430 N. 1.

Government Advocate, for the State; S. D. Sanghi, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) 50 All 722: (AIR 1928 PC 254: 29 Cri L J 828) (Prs 5, 12, 15)
('35) 62 Ind App 36: 57 All 156: (AIR 1935 PC 35: 153 Ind Cas 936: 36 Cri L J 482 (PC)) (Pr 10)
('35) AIR 1935 PC 89: (36 Cri L J 838) (Pr 11)
('39) 18 Pat 234: AIR 1939 PC 47: (40 Cri L J 364) (Pr 45)
('46) AIR 1946 PC 169: (47 Cri L J 933) (Pr 26)
('39) 1939 F L J 163: (AIR 1939 FC 43) (Pr 39)
('85) 7 All 672: (1885 All W N 177) (Pr 23)
('12) 34 All 115: (12 Cri L J 572) (Pr 4)
('18) AIR 1918 All 65: (20 Cri L J 22) (Pr 4)
('22) 44 All 332: (AIR 1922 All 487: 23 Cri L J 202) (Pr 15)
('22) 44 All 759: (AIR 1922 All 480: 23 Cri L J 505) (Pr 35)
('33) 55 All 834: (AIR 1933 All 565: 34 Cri L J 1064) (Pr 5)
('34) AIR 1934 All 988 (1): (36 Cri L J 300) (Pr 35)
('37) AIR 1937 All 240: (38 Cri L J 521) (Pr 5)
('44) AIR 1944 All 137: (46 Cri L J 38 FB) (Pr 9)
('49) 4 DLR (All-LB) 175: (AIR 1949 All 176: 50 Cri L J 228) (Pr 42)
('85) 10 Bom 176 (FB) (Pr 23)
('95) 19 Bom 732 (Pr 40)
('97) 23 Bom 50 (Pr 23)
('25) AIR 1925 Bom 268: (26 Cri L J 968) (Pr 26)
('26) AIR 1926 Bom 555: (27 Cri L J 1173) (Pr 44)
('30) AIR 1930 Bom 593 (2): (32 Cri L J 242) (Pr 44)
('34) AIR 1934 Bom 198: (35 Cri L J 1435) (Pr 26)
('38) AIR 1938 Bom 279: (39 Cri L J 578) (Pr 34)
('46) AIR 1946 Bom 276: (47 Cri L J 700 FB) (Pr 33)
('87) 14 Cal 42 (FB) (Pr 23)
('94) 21 Cal 92 (Pr 33)
('94) 21 Cal 121 (Pr 39)
('96) 23 Cal 975 (Pr 4)
('01) 28 Cal 652 (FB) (Pr 42)
('02) 29 Cal 726 (FB) (Pr 42)
('14) 41 Cal 350: (AIR 1914 Cal 456: 15 Cri L J 385) (Pr 4)
('19) 46 Cal 60: (AIR 1919 Cal 409: 20 Cri L J 265) (Pr 42)
('33) 60 Cal 179: (AIR 1932 Cal 723: 34 Cri L J 177) (Pr 5)
('33) AIR 1933 Cal 515: (34 Cri L J 812) (Pr 33)
('66) 5 W R Cr 61: (5 Beng L R Sup Vol 436 F B) (Pr 22)
('25) AIR 1925 Lah 355: (26 Cri L J 1169) (Pr 42)
('29) AIR 1929 Lah 797: (30 Cri L J 815) (Pr 44)

('42) ILR (1942) Lah 129: (AIR 1941 Lah 465: 43 Cri L J 235 FB) (Prs 5, 9)
('49) M L R (1949) Cri 258 (FB) (Pr 9)
('50) Cri. Revn. No. 41 of 1950 (Indore) (Pr 27)
('08) 31 Mad 543: (9 Cri L J 80) (Pr 39)
('11) 34 Mad 545: (11 Cri L J 534) (Pr 4)
('12) 35 Mad 243: (12 Cri L J 269) (Pr 4)
('14) 37 Mad 119: (AIR 1914 Mad 258: 15 Cri L J 180) (Prs 4, 13)
('23) 46 Mad 382: (AIR 1923 Mad 426: 24 Cri L J 439) (Prs 23, 35, 42)
('24) 47 Mad 428: (AIR 1924 Mad 640: 26 Cri L J 370) (Pr 42)
('93) 6 C P L R Cr 24 (Pr 37)
('09) 9 Cri L J 553: (5 Nag L R 76) (Pr 42)
('17) AIR 1917 Nag 203 (2): (18 Cri L J 993) (Pr 33)
('32) AIR 1932 Nag 73: (33 Cri L J 728) (Prs 24, 28, 29)
('32) AIR 1932 Nag 121: (33 Cri L J 849 FB) (Prs 19, 28, 45)
('24) AIR 1924 Oudh 425 (1): (25 Cri L J 1313) (Pr 35)
('25) AIR 1925 Oudh 290: (26 Cri L J 4) (Pr 33)
('34) 9 Luck 607: (AIR 1934 Oudh 200: 35 Cri L J 973) (Pr 5)
('40) 15 Luck 662: (AIR 1940 Oudh 369: 41 Cri L J 711) (Pr 35)
('17) AIR 1917 Pat 625: (18 Cri L J 982) (Pr 4)
('18) AIR 1918 Pat 257: (19 Cri L J 735) (Pr 4)
('20) AIR 1920 Pat 522: (21 Cri L J 139) (Pr 33)
('33) AIR 1933 Pat 38: (34 Cri L J 118) (Pr 33)
('33) AIR 1933 Pat 160: (34 Cri L J 1017) (Pr 33)
('35) AIR 1935 Pat 460: (37 Cri L J 93) (Pr 42)
('35) AIR 1935 Pat 32: (36 Cri L J 191) (Pr 33)
('42) 20 Pat 881: (AIR 1942 Pat 190: 43 Cri L J 493) (Pr 5)
('23) 1 Rang 436: (AIR 1924 Rang 93: 25 Cri L J 247) (Pr 4)
('26) 4 Rang 140: (AIR 1926 Rang 154: 27 Cri L J 1393) (Pr 4)
('06) 4 Cri L J 284: (1906 U B R Cr 49) (Pr 36)
('35) AIR 1935 Sind 84: 155 Ind Cas 736: (36 Cri L J 831 FB) (Prs 39, 41)
('38) AIR 1938 Sind 202: (40 Cri L J 937) (Pr 5)

CHATURVEDI, J.: This reference to the Full Bench arises from a Government appeal filed under Section 417 of the Criminal Procedure Code against an order of the Sessions Judge, Dhar, acquitting the respondents of the charges under Ss. 304, 392 and 302, Indian Penal Code. The respondents were convicted under Section 304, part 2 and an appeal filed by them against their conviction was dismissed by a Division Bench of this Court on 5-12-1949. Rege J. delivering the judgment of the Division Bench concluded his judgment in para 11 in the following words:

"I would, therefore, maintain the conviction and dismiss the appeal. The learned Government Advocate made a strong plea for alteration of the conviction to one under S. 302 of the Penal Code. The Government has not filed an appeal from the acquittal under Section 302 although such an appeal would be within time, and in the circumstances, I would not think of altering the conviction though I agree, this Court has the power in a proper case to do so."

(2) The Government Advocate then filed an appeal on 21-12-49 against the order of the Sessions Judge, Dhar, acquitting the respondents of the offences under Sections 394, 392 and 302 as stated above.

(3) An objection was raised by Mr. Sanghi, learned counsel for the respondents, that in view of the decision of the Division Bench dismissing the appeal of the respondents against their conviction, the Government appeal against the order of acquittal is not competent. Whether it is competent or not is a question referred to this Full Bench.

(4) Much argument has first been addressed to us on the question whether the Division Bench which heard the appeal against the conviction of the respondents was or was not empowered to alter the conviction of the respondents to one under S. 302, Indian Penal Code. If the Bench was so empowered, it has been argued, and the Bench did not consider it proper to alter the conviction from one under Section 304 to one under Section 302, the appeal against acquittal filed after the decision of the Division Bench should not be entertained. In other words, the first question for consideration is whether this Court sitting as an appellate Court, is empowered to convert the finding of an acquittal into one of conviction. A mass of case law has clustered round the question and, at present, it has given rise to considerable divergence of judicial opinion on the point. A number of cases were cited during the course of arguments but as this question is only of subsidiary importance in the case before us I shall avoid a detailed reference to all those cases. At one time, of course, there was a practical unanimity in the country on the interpretation of Section 423 (1) (b) (2), Criminal Procedure Code and the High Courts in India were agreed that the conviction under appeal could be so varied as to include an offence about which there was an acquittal 'QUEEN EMPRESS v. JABANULLA', 23 Cal 975; 'ROMESH CHANDRA v. EMPEROR', 41 Cal 350; 'DHANPAT SINGH v. EMPEROR', AIR 1917 Pat 625; 'MAHANGU SINGH v. EMPEROR', AIR 1918 Pat 257; 'ON SHWE v. EMPEROR'. 1 Rang 436; 'KAN THEIN v. EMPEROR', 4 Rang 140; 'APPANNA v. PETHANI MAHALAKSHMI', 34 Mad 545; 'GOLLA HANUMAPPA IN RE', 35 Mad 243; 'K. BALI REDDI v. EMPEROR', 37 Mad 119; 'SARADA v. EMPEROR', 34 All 115 and 'DULLI v. EMPEROR', AIR 1918 All 65.

(5) After the decision of their Lordships of the Privy Council in 'KISHAN SINGH v. EMPEROR', 50 All 722, another view emerged stating that the Privy Council had approved the statement of law that the only way in which a finding of acquittal can be altered or reversed is by a Government appeal: 'SARADA PRASAD v. EMPEROR', AIR 1937 All 240 and JADO RAHIM v. EMPEROR', AIR 1938 Sind 202. On the other hand, it was held in other cases that '50 All 722', did not interpret the powers of the appellate Court or the combined revisional and appellate powers of a High Court and it is limited to the revisional powers of the High Court, and it leaves the authority of old cases referred to above substantially unshaken: 'BARADA SINGH v. EMPEROR', ILR (1942) Lah 129; 'EMPEROR v. BARKA JETHA MAJHI', 20 Pat 881; 'HANUMAN v. EMPEROR', 60 Cal 179; 'LAKHAN SINGH v. EMPEROR', 9 Luck 607 and 'RAGHUNATH v. EMPEROR', 55 All 834.

(6) As the question is of interpretation of Section 423 which defines the powers of the appellate Court in disposing of appeals, it may

be convenient to quote the section itself which states that the appellate Court may:

"1. (a) in an appeal from an order of acquittal, 'reverse such order' and direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or 'find him guilty and pass sentence on him' according to law

(b) in an appeal from a conviction, (1) 'reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence or with or without altering the finding' reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but subject to the provisions of S. 106, sub-s. (3) not so as to enhance the same."

(7) The word 'alter' has been used above always in juxtaposition with 'reverse' to indicate that "reversal of a finding" is different from "alteration of a finding" which is definitely a weaker term. 'Reversal' connotes the complete annulment or revocation, or abrogation of a finding of a guilt or innocence (as the case may be) by the trial Court so as to convert a decision that a man is innocent into a finding of guilty or vice versa. It means turning into something completely opposite in character. "Alteration" is on the other hand a less radical expression meaning 'a change in form' without changing the underlying character of the thing to be changed. It envisages only such a change of form which does not altogether destroy the essence of the thing which is altered. It is significant to note that in an appeal against an order of acquittal in S. 423 (1) (a) the words are "reverse such order" and not 'reverse such finding' while in an appeal against conviction in Section 423 (1) (b) the words are:

"(1) 'reverse the finding and sentence' (2) alter the finding maintaining the sentence and (3) alter the nature of the sentence."

(8) It is obvious that there is not only the distinction between the words "'alter" and "reverse" but the distinction between "order" "finding" and "sentence" is also emphasised in Section 423 (1). A 'finding' includes both a 'finding' of law as well as a 'finding of fact'. A 'finding' therefore means and includes the conclusions of the Court on facts which constitute the offence, the conclusion of the Court that the accused is guilty and not innocent and then the conclusion that the offence falls within a particular section of the statute. If an appellate Court in an appeal from a conviction reverses the finding and sentence the accused will be acquitted or be ordered a trial or will be committed for trial. If an appellate Court alters the nature of sentence under Sec. 423(1)(b) (3) it cannot enhance the sentence so it must alter the nature of sentence either by reducing or maintaining it. If however the finding is altered under Section 423(1)(b) (2) the sentence must be maintained. It cannot be enhanced. Where an order of acquittal is to be converted into an order of conviction, it amounts to a reversal of the order. On the other hand, when the conviction under one section is altered to a conviction under some other section maintaining the sentence or reducing it, it amounts merely to an alteration of the finding and not to a reversal of the finding. The words 'alter the finding' in Section 423 (1) (b) (2) also do not give an unlimited power to the appellate Court to change the finding to any that it considers suitable to the purpose. They must be read as subject to the other general provisions in the Code with the result that the power of alteration must be related to Sections 236, 237 and 238 and can operate only within the limits prescribed by those sections.

(9) The Legislature has attached sanctity to an order of acquittal. The exact nature and importance of appeals against orders of acquittal, the previous law in India about such appeals, and the subsequent change in it in 1872 has been dealt with by me in 'MADHYA BHARAT GOVERNMENT v. SHRI DUBE', M L R (1949) Cri 258 (FB), at pages 269-270. The word 'alter' as used in the Codes of 1861 and 1872 could not possibly have included the power to convert a finding of acquittal into one of conviction. The Legislature also could not have intended to invest the appellate Courts (other than the High Court) with the power of converting a finding of acquittal into one of conviction. In my opinion, therefore, an order of acquittal cannot be set aside in any other manner except under Section 417 of the Code of Criminal Procedure. It cannot be set aside in an appeal filed by the accused against his conviction because to do so would amount to allowing an appeal which had not been filed or to an exercise of revisional powers contrary to Section 439 (4). For these reasons I respectfully agree with the minority opinion of Mulla and Hamilton, JJ. in 'ZAMIR QASIM v. EMPEROR', AIR 1944 All 137, and, with great respect, disagree with the majority opinion in this case and with the Full Bench decision in 'BAWA SINGH v. EMPEROR', AIR 1941 Lah 465. The majority opinion of the Full Bench of the Allahabad High Court held that an appellate Court is empowered under Section 423 (1) (b) (2) to alter a finding of acquittal into one of conviction, but it refrained from expressing any opinion on the question whether a High Court can, while substituting a finding of conviction for a finding of acquittal, enhance the sentence by exercising the power given by Section 439. The Punjab High Court expressed the view that it can do so. It was held in this case that:

"In its appellate jurisdiction the High Court can alter the finding to any that it considers suitable. As soon as it has done so, it can under the provisions of Section 439 (C 11), in its revisional jurisdiction, enhance the sentence to any sentence it considers suitable. Consequently it is open to a High Court in an appeal from a conviction by a convict who had been charged under Section 304, Part I to alter the conviction from one under S. 304 Part I to one under S. 302, I. P. C., and then in the exercise of the powers conferred by Section 439 (1) to enhance the sentence to one of death."

(10) With very great respect, I venture to express my dissent from the above proposition. It will not be a legitimate exercise of power for the High Court by combining the two powers in a same case to convert a finding of acquittal into a finding of conviction under Section 423 and then to enhance the sentence under Section 439 and thus achieve by combining the

two powers what it was prohibited to do so by exercising powers singly. The ruling of the Judicial Committee in 'CHUNBIDYA v. EMPEROR', 62 I A 36: 57 All 156: AIR 1935 P C 35: 153 I C 936, referred to by Dalip Singh, J. in the Lahore case is not very relevant in this connection. Chunvidya and others had appealed to the High Court against their conviction for the offence of murder and sentence of transportation for life. On appeal to the High Court, the High Court under Section 439 gave notice to the accused to show cause why the sentence should not be enhanced and then ordered the petitioners to be sentenced to death instead of transportation for life. It was urged before the Privy Council in an application for special leave to appeal against the sentence of death that in as much as the case came before the High Court on an appeal, and in as much as under the provisions as to an appeal the High Court dealing with appeals has no power to enhance the sentence, the High Court had no power to resort to its further powers of revision which give it power to enhance the sentence. Their Lordships of the Judicial Committee, holding that it was a fallacious argument, observed:

".....the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. Their Lordships are clearly of opinion that when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed and the High Court can then, though the record has only come to its knowledge in the appellate proceedings proceed to exercise its revision powers if it chooses to do so."

(11) From the above observations it will be quite clear that there was in that case no question of converting a finding of acquittal into one of conviction. It was a simple and straightforward case of dismissing the appeal and of enhancing sentence, a power specifically conferred by Section 439 (1), Criminal Procedure Code. Under Section 423 (1) (b), the High Court had as a Court of appeal dismissed the appeal and under Section 439 (1), as a Court of revision, it had enhanced the sentence. It had not converted an acquittal into a conviction on an appeal against the conviction. So what the Privy Council did approve was not the exercise by a High Court of its combined powers as a mixed Court of appeal and revision, but the exercise by the High Court of its powers in appeal and its powers in revision in succession. This view was also reiterated in 'EMPEROR v. DAHU RAUT', AIR 1935 P C 89, in which their Lordships observed:

"The powers conferred on the appellate Court under Section 423 appear to be as ample as the High Court would have on revision under Section 439, with the exception of the power to enhance the sentence, and if the appeal is before a High Court, and it is thought to be desirable, there is no reason why the accused should not be warned that at the hearing of the petition, he may be called on to show why the sentence should not be enhanced."

(12) I may also briefly refer to the observations of their Lordships of the Judicial Committee in 'KISHAN SINGH v. EMPEROR', 50 All 722 (P C), about the two cases (one of the Madras High Court and another of Allahabad High Court) referred to in their Lordships' decision.

(13) In 'RE BALI REDDI', 37 Mad 119, five accused were challenged with rioting, armed with deadly weapons, and with having murdered one person, offences punishable under Sections 148 and 302 of the Indian Penal Code. The Sessions Judge found that the accused not guilty of these offences, but guilty of offences under Sections 147 and 307 of the Indian Penal Code. The accused appealed against their conviction, and the Madras High Court, as a Court of appeal, gave them notice to show cause why they should not be convicted and be sentenced for the offence of murder. After hearing arguments the Madras High Court altered the finding to one of murder punishable under Section 302 and in lieu of the sentence imposed by the Sessions Judge the High Court sentenced each of the five accused to transportation for life. The view held by the High Court was that Section 423 gave powers to the High Court when hearing an appeal against a conviction to alter the finding and then as a Court of revision under S. 439 they are given power to enhance the sentence so as to make it appropriate to the altered finding. The High Court further observed:

"Sub-section (4) of Section 439, which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" is not, if rightly construed, inconsistent with this view. The prohibition in sub-section (4) refers to a case where the trial has ended in a complete acquittal, not to a case like the present, where the trial has ended in a conviction but where the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable as any other construction would be inconsistent with the power to "alter the finding" given to the Court as Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by Section 423 (1), Cl. (b), and the terms of a statute should not be so construed as to involve an inconsistency between its different parts. This view is borne out by the language of Section 423 (1), Cl. (a), which speaks of "an order of acquittal" in the sense of an order finding the accused not guilty on any of the charges framed against him, when contrasted with the language of Clause (b) which provides for the Appellate Court altering the finding where the accused has been convicted by the first Court on certain charges but not on other charges."

(14) Their Lordships' attention was drawn to the above observations of the Madras High Court and their Lordships' opinion thereon was expressed in the following words:

"It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if learned Judges of the High Court of Madras intended to hold that the prohibition in Section 439, sub-section 4, refers only to the case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted

of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. Words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the sub-section."

The correctness of the Madras decision was clearly doubted by their Lordships of the Privy Council in the above observations.

(15) In the second case 'EMPEROR v. SHEODARSHAN SINGH', 44 All 332, an accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the Sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly. On return of the notice, the High Court held that it had no power except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conivction. The learned Judges in giving judgment said as follows:

"Sheo Darshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. 'The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal."

The above extract was quoted in 'KISHAN SINGH v. EMPEROR', 50 All 722 (P C), and their Lordships observed:

"Their Lordships are of opinion that the above is a correct statement of law. It is indeed no more than a repetition of the provisions of the material sections of the Code of Criminal Procedure."

(16) From the above observations of their Lordships of the Judicial Committee on the Madras and the Allahabad cases, it is quite clear that their Lordships emphasised that where the Court below has either acquitted an accused expressly or by necessary implication, then, unless there is an appeal from acquittal, the finding of acquittal cannot be converted into that of conviction. These observations are general and are very important and cannot be sidetracked by stating that they refer only to a case in revision and should be deemed to be limited to the revisional jurisdiction of the High Court.

(17) Upon a careful examination of these authorities, I am of opinion that Clause (b) of Section 423 (1), Criminal Procedure Code does not apply to a case of acquittal, but applies only to a case of conviction and only Cl. (a) applies to a case of acquittal. If the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they can be exercised only in an appeal against an acquittal under Section 423 (1) (a) and not on appeal against a conviction under Section 423 (1) (b). The Division Bench of this Court in the case before us, therefore, was not empowered to alter the conviction of the respondents from one under Section 304 to that under Section 302, Indian Penal Code, and a Government Appeal under Section 417, Criminal Procedure Code was necessary against the order of the Sessions Judge acquitting the respondents of the charges under Sections 392, 394 and 302, Indian Penal Code.

(18) The question then arises, where an appeal by the accused against conviction has been dismissed by an appellate Bench of the High Court, and after the dismissal of the appeal filed under Section 423 (1) (b), if an appeal is filed by the Government under Section 417 of the Code of Criminal Procedure is such an appeal competent?

(19) It is contended by Mr. Sanghi, learned counsel for the respondents, that this Court has, in the circumstances, no legal power to interfere, as it cannot review or revise the judgment already delivered by a Division Bench of this Court on 5-12-49. Reliance is placed on the provisions of Section 430, Criminal Procedure Code which says that judgments and orders passed by an appellate Court upon appeal shall be final except in the cases provided for in Section 417 and Chapter 32. Section 417 allows an appeal against the order of acquittal and Chapter 32 permits interference, on revision by the High Court, with an appellate judgment of the lower Court. The proviso then means that judgment of the appellate Court can be varied by the High Court in the manner specified in Section 417 and Chapter 32. As Niyogi, A. J. C. observed in Full Bench case 'MOHAMMADI GUL ROHILLA v. EMPEROR', AIR 1932 Nag 121:

"Section 430 contemplates an order of an appellate Court subordinate to the High Court and the proviso does not affect a High Court's judgment, since there is no appeal under Section 417, against a judgment of a High Court. The High Court's judgment or order must therefore be regarded as final."

(20) Our attention is also drawn to the provisions of Section 369 which reads as follows:

"Save as otherwise provided by this Code or by any other law for the time being in force or in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct clerical error."

(21) The section has been subjected to the other provisions of the Criminal Procedure Code (e.g. 395, 484, Section 561 A etc.). Ordinarily when once a judgment has been signed it is final and there is no power left in the Court to re-open the case. The Court becomes functus officio and cannot rehear it.

(22) Even apart from these provisions it has been held from a very early time that the High Court has no power to review or revise an order passed in a criminal matter. In 'QUEEN v. GODAI RAOUT', 5 W R (Cr) 61, a Five Judges Full Bench of the Calcutta High Court, presided over by Sir Barnes Peacock C. J., after referring to S. 73, Regulation 9 of 1793, Regulation 14 of 1810 and Act 25 of 1861 came to the conclusion that the High Court cannot entertain, an application to review a judgment passed by it on appeal in a criminal case. The learned Chief Justice observed at page 63:

"The Code of Criminal Procedure does not contain any section expressly authorising a review of judgment in a criminal case after the judgment had been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorising a review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not

intend to confer in criminal cases a power similar to that which they had given in civil cases."

(23) The Code of Criminal Procedure has since then been amended a number of times and the Legislature has not chosen to give a power of review to any Court in a criminal case. This is also clear from the provisions of S. 369, as amended by S. 101 of Act XVIII (18) of 1923, which limits the powers of a Court to review its own orders except under certian circumstances. 'QUEEN EMPRESS v. DURGACHARAN', 7 All 672; 'In the matter of F. W. GIBBONS', 14 Cal 42; 'QUEEN EMPRESS v. C. P. Fox', 10 Bom 176 (FB); 'QUEEN EMPRESS v. GANESH RAMKRISHNA', 23 Bom 50 and 'KUNHAMMAD HAJI v. EMPEROR', 46 Mad 382, are authorities for the proposition that no Court has power to review its judgment pronounced in a criminal case.

(24) If the Division Bench's judgment is final and not open to review, it is argued, how the Government appeal under S. 417 can be entertained? If it is heard on merits, it might lead to a disturbance so far as the finality of the judgment is concerned. The difficulty arises from the difference in the period of limitation prescribed for filing appeals by the accused and by the State. In the case of the accused it is 30 days while the limitation for the State to appeal against acquittal is six months. It is possible that an appeal by an accused person may be heard and decided before the State has determined whether to prefer an appeal or not. Where there has been an acquittal on a graver charge, both State and accused have a right of appeal. If the appeal of accused person is heard and decided before the State appeals under S. 417, the decision is final under S. 430. Under the circumstances the State appeal is barred and cannot be entertained. This was the opinion of the Division Bench in 'EMPEROR v. MODKIA', AIR 1932 Nag 73.

(25) With this view I respectfully agree. But in this case it was also held that though there can be no appeal against the acquittal after the appeal against the conviction has been heard and decided, there can be an application for enhancement of the sentence under S. 439 of the Code. With great respect, it is difficult for me to accept this proposition as correct. I cannot see any difference between filing of a memorandum of appeal under S. 417 and filing a revision petition for enhancement of sentence under Section 439. The question in each case is whether the decision of the Bench of the High Court while dismissing an appeal against conviction is final or not. By the word 'final' I understand that nothing more remains to be done by the Court pronouncing the judgment and the appeal is decided one way or the other in its entirety. If the High Court while dismissing the appeal of the accused suo motu issues a notice to the accused to show cause why his sentence should not be enhanced then I would take it that the decision dismissing the appeal was not final so far as his sentence was concerned. It was of course final so far as his conviction was concerned. Appeal against conviction is always first heard and decided, and after the conviction is maintained the prisoner is called upon to show cause why his sentence should not be enhanced. It stands to reason that sentence cannot be enhanced if the appeal is to be allowed and the accused person is to be acquitted so it is only after the dismissal of the appeal against conviction that the question for enhancement of sentence can be considered. Whether the dismissal of the appeal against conviction has been recorded or is still in the mind of the Judge or the Judges composing the Bench is immaterial. The trend of the judgment or the record must show that the judgment is not final as regards the sentence.

(26) It was held in 'MANGAL NARAIN v. EMPEROR', AIR 1925 Bom 268, that it is not desirable, if the appeal against a conviction is admitted, to issue a notice at the same time under S. 439 to enhance the sentence. Crump J. observed that if it is issued before the appeal has been dismissed it may confound two things which should be kept separate, namely the question whether the conviction is right or not and the further question whether the sentence imposed is adequate or not. In 'PANDURANG v. EMPEROR', AIR 1934 Bom 198, Beaumont C. J. delivering the judgment of the Division Bench remarked on the above observations at page 199;

"It is to my mind a novelty to suggest that these two things are so divorced that they ought to be dealt with on separate occasion."

Fourteen years later in 'KUMAR SINGH CHHAJOR v. EMPEROR', AIR 1946 PC 169, Sir John Beaumont himself delivering the judgment of the Board observed at page 173:

"The passing of sentence in a criminal trial is a distinct step which follows conviction; it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt."

(27) These observations are important and should be taken into consideration while disposing of revision petition for enhancement of sentence. In 'STATE v. SHANKAR', Criminal Revision No. 41 of 1950, Indore, the question for determination before a Division Bench of this Court was: if an appeal against his conviction and the sentence passed upon him preferred by a convicted person is disposed of, is the High Court powerless to take action under S. 439 and enhance the sentence? My Lord the Chief Justice (Shinde J. concurring) observed:

"My answer to this query is that it must depend upon the order passed in appeal. The accused person may appeal either against conviction or against the sentence passed upon him or against both. If it is an appeal against his conviction alone and the question of sentence is not considered, it appears to me that there is nothing in the law which would preclude the High Court from subsequently enhancing the sentence passed by the lower Court in exercise of the power conferred upon it under S. 439 of the Criminal Procedure Code. On the other hand, if the question of sentence has been considered in disposing of the appeal and has once been determined, for obvious reasons no question of enhancing it subsequently can arise. We can consider a third contingency, viz., that though the appeal is preferred both against the appellant's conviction as well as the sentence passed upon him by the lower Court the High Court may dismiss the appeal as regards his conviction without finally giving a decision on the question of sentence. This may happen for instance if on perusal of the judgment at the time of admitting the appeal the High Court considers that the sentence passed should be enhanced and issues a notice to that effect but the appeal comes up for hearing before

the notice of enhancement of the sentence is served upon the convicted person. In such a case it will be that though the appeal as regards the conviction of the appellant is disposed of the question whether the sentence passed upon him should or should not be interfered with remains open. In a case like this there does not appear to be anything which would debar the High Court from enhancing the sentence when the appellant is given an opportunity to show cause against the notice issued to him."

(28) These observations have my respectful concurrence. I wish to add only this that if an appeal against conviction is dismissed, then, unless there is anything contrary in the judgment itself, I would take it that the appellate Court confirmed the conclusions of the trial Court on facts which constituted the offence, for which the accused was convicted confirmed the conviction as well as the sentence, and also confirmed the conclusion of the trial Court that on those facts the offence fell within a particular section of the statute. With this background I now pass on to consider the majority opinion of the Full Bench of the Nagpur Judicial Commissioner's Court in 'MOHAMMADI GUL ROHILLA v. EMPEROR', AIR 1932 Nag 121, which overruled 'EMPEROR v. MODKIA', AIR 1932 Nag 73, and held (Niyogi A. J. C. dissenting) that an appeal under S. 417 is competent although an appeal preferred by the accused against his conviction has already been heard and decided by the High Court. Mecnair J. C. gave the following reasons for his conclusion:

"The view that an appeal against the acquittal is competent after an appeal against the conviction is dismissed is supported by two considerations. In the first place, the appeal against the conviction may have been summarily dismissed and elementary principles of justice demand that the Local Government should not be precluded from appealing by an order passed behind its back. In the next place, had the conviction and acquittal dealt with two separate offences it seems clear that a judgment passed in appeal against the conviction would not prevent consideration of the appeal against the acquittal, and I think it impossible to interpret S. 430 as allowing such an appeal but allowing no appeal when the conviction is of a minor offence."

The learned Judicial Commissioner then added:

"I do not think any difficulty is involved in the fact that if the appeal against the acquittal succeeds, there will be two convictions: one for the minor offence and one for the major. A person who is guilty of the major offence is guilty of the minor offence. The substitution of punishment for the major offence for a less severe punishment for the minor offence does not involve variation of the conviction and sentence for the minor offence.

He further observed:

"An acquittal on the graver charge is not directly inconsistent with the conviction on the minor charge. Section 430 does not, in my opinion, make the findings on which the previous order was passed final."

(29) Subhedar A. J. C. who was a member of the Bench which decided 'EMPEROR v. MODKIA', AIR 1932 Nag 73, observed that it is against the fundamental principle of criminal jurisprudence to convict a person of two distinct offences on the same set of facts but agreed with the Judicial Commissioner that if the Government prefers an appeal against the acquittal for the major offence, after the appeal by the convict against his conviction for the minor offence is dismissed, it is open to the accused to question the propriety of his previous conviction and it is open to the appellate Court to give effect to the plea by dismissing the Government appeal and making suitable recommendation to the Local Government, if the Court came to the conclusion that, on the facts established, the convict was not guilty of any offence at all; or, in the alternative by accepting the Government appeal and substituting a conviction for the major offence.

(30) Niyogi, A. J. C. differed from this view and on the reasoning advanced in this case by him I entertain no doubt that his conclusion is well founded. He was of opinion that the High Court in such cases dealing with appeal against acquittal cannot exercise all the powers defined in Clause (a) of Section 423 (1). The learned Additional Judicial Commissioner was further of opinion that the previous judgment being final cannot be altered in subsequent appeal under Section 417 and Section 403, Criminal Procedure Code debars such a trial; and the very fact that the learned Judicial Commissioner found it necessary to invoke powers of the Government under Section 401 is an argument to prove the incompetence of the appellate Court to hear and determine the appeal. He added that any circumstance which takes away or restricts the power to enforce its orders must affect the competency of the Court. It must therefore follow that any appeal filed in such circumstances will turn out to be futile and the appeal itself will be incompetent. The Legislature could not have intended to give a right of appeal in case where the appellate Court which is supposed to hear the appeal is unable to exercise its powers vested in it by law and enforce its own orders, by reason of another judgment of the same Court having become final and effective.

(31) For reasons already stated above, I respectfully agree with this view. It is true that the State has a right of appeal under S. 417 and can wait for six months to file it but the State must also know that if the convict's appeal is dismissed in the meanwhile that decision being final and effective cannot be revised or reviewed and the State appeal will become infructuous. The only thing that can be done to avoid this anomaly is for the State to file appeal against acquittal before the decision of the Convict's appeal by the High Court, or before the appeal is heard; or, the Government Advocate should move the High Court for adjournment of the Convict's appeal till the appeal against acquittal be preferred by the State. As the appeals against acquittal are to be filed by the Government only in cases of grave miscarriage of justice, there would be no difficulty for the Government to adopt such a course, for as soon as the accused is acquitted by the trial Court of a major offence the prosecuting agency can take immediate necessary action for filing an appeal against acquittal and the Government can be informed in time beore the appeal against conviction comes up for regular hearing. In such appeals against conviction a notice is always given to the Government Advocate and I do not think the State can have any legitimate grievance

if an appeal cannot be filed before arguments are heard in accused's appeal against conviction.

(32) The real difficulty however arises when the appeal against conviction is dismissed, without issuing notice to the Government Advocate under Section 421 of the Criminal Procedure Code which runs as follows:

"1. On receiving the petition and copy under Section 419 or Section 420, the appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering it may dismiss the appeal summarily.

Provided no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

2. Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

(33) I have always been of the opinion that Sec. 421 is an exception to the general principles of Criminal law and Criminal Jurisprudence. It is obvious that an order can be passed under Section 421 without hearing the appellant. There appears to be some difference between an order passed under this section and that passed under Section 423 (1) (b). Whether there is any real difference between the two, and, whether an order passed under Section 421 can be set aside, are questions which necessitate careful study of the scope of the section, the provisions contained therein, and the case law bearing on them. Sec. 421 deals with appeals presented either under Section 419 or under Section 420. Section 419 provides that every criminal appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such petition shall be accompanied by a copy of the judgment of the trial Court. Section 420 deals with appeals of convict persons who are in Jail. They are to present their petitions for appeal to the Officer-in-charge of Jail, who is to forward such petitions to the proper appellate Court. The word 'Summarily' ordinarily means in an informal manner and without the delay of formal proceedings. The Judge is entitled to reject the appeal without any formality at all and without the formality of either a recorded judgment or reasons of any description: 'RAS BEHARI DAS v. BAL GOPAL SINGH', 21 Cal 92. The appellate Court is not bound even to call for the record and there is nothing to prevent even those appeals being rejected summarily wherein substantial points of law have been taken or where the judgment under consideration is a long and intricate one requiring careful consideration. A Court of criminal appeal when dismissing an appeal summarily is not bound to write a judgment as defined in Section 367. The High Courts have however advised, and, in some cases, ordered the lower appellate Courts to give, as concisely as possible, the main reasons of rejection of appeal summarily 'ABDUL LATIF v. AHMED', AIR 1933 Cal 515; 'JAGNARAIN DUBEY v. GHINHU DUBEY', AIR 1935 Pat 32; 'GANESH RAM v. GYANCHAND', AIR 1920 Pat 522; 'THAKURI v. EMPEROR', AIR 1933 Pat 160; 'BRIJ MOHAN LAL v. EMPEROR', AIR 1925 Oudh 290 and 'RAM RAO v. EMPEROR', AIR 1917 Nag 203 (2). But the discretion of an appellate Court remains unfettered in this respect and where the only order passed was 'rejected summarily' it has been held that it was a judgment. Then an order of a High Court in its criminal jurisdiction is ordinarily final and does not therefore require the statement of any reason 'KULDIP DAS v. EMPEROR', AIR 1933 Pat 38 and 'NAND LAL CHUNILAL v. EMPEROR', AIR 1946 Bom 276 (FB). In the Bombay case (NAND LAL CHUNILAL v. EMPEROR), the facts were that a reference was made by the Sessions Judge under S. 438 recommending that a particular order of Additional District Magistrate should be set aside and, thereon a Division Bench, without issuing notice passed an order, viz. "No order on this reference." The applicant at whose instance the Sessions Judge made the reference then came in revision to the High Court in the same matter. The question before the Full Bench (consisting of Divatia, Sen and Rajadhyaksha, JJ.) was; whether the order "No order on this reference" was a judgment within the meaning of Section 369. The Full Bench held that as there is no distinction between an order and a judgment of a High Court disposing of a proceeding before it, the said order was a 'judgment' under Section 369 and as such cannot be altered or reviewed. In the absence of anything to show that the order was passed on a preliminary ground without going into the merits of the point raised in the reference it must be presumed that the order was a final order and amounts to a judgment.

(34) The proviso to Section 421 of course lays down that no appeal under S. 421 shall be dismissed without giving to the appellant or his pleader an opportunity of being heard. But there is nothing in the section to indicate that the Legislature wanted that prisoners should also be afforded the same opportunity. In 'JALAM BHARAT SINGH v. EMPEROR', AIR 1938 Bom 279, Beaumont, C. J. was of opinion that the general rule that no person should be condemned unheard cannot apply to an appeal the right to which is the creation of the statute and so the appellate Court is entitled to dismiss the appeal summarily without hearing the accused, the prisoner having no right to insist on being heard. Justice Wassoodew agreed with this opinion and observed:

"The rule 'audi alteram partem' (hear the other side) cannot be extended without qualification to criminal appeals presented by the convict from jail under Section 420, Criminal Procedure Code. That rule is followed in criminal trials, it being incorporated in the statute itself as an indispensable requirement of justice. It is true that in judicial proceedings a party is ordinarily given an opportunity of hearing what is urged against him. But it is equally true that the right of appeal is essentially a statutory right and the provisions of the statute conferring that right, in so far as it lays down the procedure to be followed in the exercise of that right even in the matter of audience, have necessarily to be observed."

(35) The absence of any reason in the orders of summary dismissal which may be passed without going through the record and without hearing the appellant or his counsel is a factor which is likely to cause miscarriage of justice. It is likely that some important point of law which may have remained obscure in the trial Court's judgment but which may have importance in the case might be overlooked by the appellate Court whereas the appellant or his

vakil, if he appears, may be able to urge cogent and sufficient reasons which may induce the Court to issue notice under Section 422. The convict appellant is bound to suffer on account of this provision which deprives him of an opportunity to come or to send his vakil before the Court. In order to relax the rigour of law, High Courts have adopted some Rules in order that the convict appellant may be able to arrange for proper representation of his case before the Judge. In 'KUNHAMMAD HAJI v. EMPEROR', 46 Mad 382 at p. 400, Justice Devadoss has quoted Rule 50 of Criminal Rules of Practice which is as follows:

"No appeal shall be summarily rejected until seven days have elapsed after its receipt by the appellate Court. In forwarding such an appeal the Officer-in-charge of Jail shall invariably certify that the appellant has been informed that if he intends to appoint a pleader an appearance must be put in within seven days from the date on which the petition may reach the appellate Court."

So in Madras seven days time is allowed before a jail appeal is circulated to the Judges and a convict appellant has some opportunity of engaging counsel if he wishes to do so. In JODHA v. EMPEROR', 15 Luck 662:AIR 1940 Oudh 369, it has been mentioned that in former Oudh Chief Court jail appeals were not submitted to the Judges for disposal until 15 days had elapsed from their receipt in the office of the Court. This interval added to the time required for obtaining a copy of the judgment of the trial Court was considered sufficient to avoid hardship. In my opinion, such rules may be adopted in our High Court also. In Allahabad the dismissal of the jail appeal was deemed only to be a provisional dismissal and the fixing of the seal to the decision of the High Court was delayed till the period of limitation was over. "LACHHMAN CHAMAR v. EMPEROR', AIR 1934 All 988 (1). In 15 Luck 662: (AIR 1940 Oudh 369), the Oudh Chief Court observed that this practice which was then prevailing in that Court also had no justification in law, and, jail appeals as soon as a Judge or a Bench of Judges had decided them, and signed and dated their orders, were decided appeals. It was held that in such cases a subsequent appeal filed through a counsel could not be entertained. In 'KHAILI v. EMPEROR', 44 All 759; 'AIR 1922 All 480' and in 'RAM AUTAR v. EMPEROR', AIR 1924 Oudh 425 (1), a similar view had been held.

(36) These cases were decided on the assumption that orders rejecting appeals summarily under Section 421 are 'judgments' and cannot be altered. There are, however, some old cases which took a contrary view. In 1906 in 'EMPEROR v. NGA SEIN GYI', 4 Cri L J 284 (U B), a Judge on the Single Bench of the Court of Judicial Commissioner, Upper Burma, observed:

"The provisions of the Code relating to judgments in original proceedings are extended to proceedings in appeal by Section 424. On the analogy of the original proceedings it is reasonable to hold that an appeal is not heard till notice has been given to the respondent and he has had the opportunity of opposing the appeal and that a judgment is only required when an appeal is heard. It would follow I think that an order dismissing an appeal summarily is not a judgment."

(37) The head-note of 'EMPRESS v. PATI RAM', 6 C. P. L. R. Cr. 24, is as follows:

"An order of summary rejection of an appeal under the provisions of S. 421, Criminal Procedure Code does not amount to judgment and Section 424 has no application to such an order. A judgment under Section 424 of the Code implies a trial. The essential difference between the rejection of an appeal under Section 421 and its dismissal under Section 423 is that, in the latter case, the appeal is disposed of after trial, whereas in the former, the Court, by summarily rejecting it, refuses to try it at all."

(38) Both these decisions appear to have been influenced by principles of civil law and appear to have ignored the fact that S. 421 is an exception even to the general principles of criminal law and should be construed on that basis.

(39) The question then arises; what is a "judgment" in a criminal case? and, can an order rejecting an appeal summarily come within the purview of that term?

The word "judgment" has not been defined in the Indian Penal Code or the Indian Criminal Procedure Code. Attempts have however been made in several civil and criminal rulings to define it. In 'DAMU v. SHRIDHAR'. 21 Cal 121, it has been stated that a judgment means expression of opinion of the Judge in a trial after due consideration of the evidence. In 'SHAHU v. EMPEROR', AIR 1935 Sind 84, a passage from the Law Dictionary by Morley and Whitalay has been quoted to show that "judgment" means 'sentence or order of the Court in civil or criminal proceedings.' Whatever it may mean ordinarily, I am clear in my mind that the connotation of the term "judgment" in a civil case will differ from that in a criminal case. From a perusal of paragraphs 260 to 264 in Volume 9 of Halsbury's Laws of England (Hailsham Edition) it will be obvious that in England judgment is equivalent to a judgment of conviction or acquittal and is distinct from other orders in a criminal case. In 'EMPEROR v. MAHESHWARA KONDAYA', 31 Mad 543, it was observed that a judgment is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused and therefore it was held in that case that an order of discharge is not a judgment. In construing the words "judgment, decere, or final order" in Section 205 (1), Government of India Act of 1935 in 'DR. HORI RAM SINGH v. EMPEROR', 1939 F L J 153; (AIR 1939 F C 43), his Lordship Sir Sulaiman in his judgment reviewed the entire Indian and English case law bearing on the interpretation of the word "judgment" and after referring to Halsbury, Vol. 9, paras 260-264 and Sections 263, 264, 305, 309, 367, 370, 404, 415A and 423 of the Indian Criminal Procedure Code came to the conclusion that "judgment" in this Code means only a judgment of conviction or acquittal, and that neither under the English nor the Indian Law the term "judgment" in a criminal case includes an interlocutory order (at p. 163 of 1939 F L J 153 and at page 48 (1) of AIR 1939 F C 43.

(40) If an order of conviction is a judgment, there can be no doubt that an order, in an appeal, confirming an order of conviction must also be a judgment, and whether the order is passed summarily or after hearing the parties is not material. In this view of the matter an order passed under Section 421 is a "judgment" and according to Section 369 it cannot be altered except for correcting a clerical error. In 'QUEEN EMPRESS v.

BHIMAPPA', 19 Bom 732, this view had been adopted. In this case a Sessions Judge had dismissed an appeal summarily on the ground that it was barred by limitation. On a subsequent application by the accused, the Judge admitted the appeal & acquitted him. The High Court sent for the record in the exercise of its revisional jurisdiction and held that the order of acquittal was ultra vires under Section 430 of Act X of 1882 and the order dismissing the appeal as time barred was final and was not open to review. It was suggested in the arguments that the words "no sufficient ground for interfering" in Section 421 imply an order passed on the merits and the order passed by the Sessions Judge rejecting the appeal as time barred should be distinguished as a dismissal under Section 4 of the Limitation Act (Act 15 of 1877) and should not be taken to have been passed on merits and thus the previous order was open to review by the Sessions Judge. On this argument the Division Bench (Jardine and Ranade, JJ.) observed:

> "On this point we are aware of no reported authority; but after consideration, we decline to import into the Code a refinement which would seriously impair the finality of criminal judgments."

(41) In 'SHAHU v. EMPEROR', 155 Ind Cas 736: (AIR 1935 Sind 84), before a Full Bench of the Sind Judicial Commissioner's Court, the following questions of law came up for determination: (1) Whether an order under S. 421 dismissing an appeal filed under S. 419 is final? (2) Can it be vacated under S. 561A? Rupchand Bilaram, A. J. C. delivering the Full Bench judgment observed that S. 421 imposes two distinct conditions which must be fulfilled before a Court of competent jurisdiction summarily dismisses an appeal. The first condition is that the Court must apply its mind to the merits of the case and come to a conclution that the order appealed against is one which should not be disturbed. The Court cannot refuse to apply its mind to the merits of the case merely and solely because the appellant or his advocate has failed to appear. The second condition is, that where an appeal has been presented under Section 419 the Court is bound to afford to the appellant, or if he is represented, to his pleader, a reasonable opportunity of being heard. If both these conditions are fulfilled, then the order passed by a Bench is a perfectly valid order and the order cannot be reviewed. If either of the conditions mentioned above is not fulfilled the judgment given by the Court is 'prima facie' defective and may be reviewed 'ex debito justitiae.' Whether both or either of these conditions are fulfilled in any particular case or not, are questions of fact and their decision must depend upon the facts of the case. Generally speaking, there is a presumption in favour of the first condition having been complied with. An order under Section 421 cannot be vacated under Section 561A unless it is proved that either of the conditions precedent to the passing of the order as laid down by Section 421 has not been fulfilled. It is obvious that the burden of proving that either of the conditions has not been complied with lies heavily on the person challenging the finality of the order.

(42) In 'DWARKA NATH v. BENI MADHAB', 28 Cal 652 and 'MIR AHWAD HOSSEIN v. MD. ASKARI', 29 Cal 726, it was laid down that a District Magistrate who had ordered the dismissal of a criminal appeal, merely by reason of the non-appearance of the appellant, is competent to set aside such order and thereafter to hear and decide the appeal according to law. This view was also approved by Stanyon, A. J. C. 'RATANCHAND v. EMPEROR', 9 Cri L J 553 (Nag), when he remarked that the order of dismissal in default was one foreign to the exercise of criminal appellate jurisdiction and ultra vires. In 'KUNHAMMAD HAJI v. EMPEROR', 46 Mad 382: AIR 1923 Mad 426 (D B), Devadoss J. was of opinion that when an appeal is dismissed for default of appearance there is no decision on the merits and there is no proper disposal of it according to law and the Court may rehear it. The order of dismissal for default of appearance is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. In 'GULAB DAS v. EMPEROR', AIR 1935 Pat 460, Fazl Ali, J. also observed that where the appellants do not appear to support the appeal, the appellate Court should consider whether there is sufficient ground for interfering which would imply judicial consideration of the appeal on the merits. In 'RAJJAB ALI v. EMPEROR', 46 Cal 60, the summary dismissal for default of appearance was set aside and in 'MUHAMMAD SADIQ v. EMPEROR', AIR 1925 Lah 355, the order dismissing the appeal, without giving the appellant or his pleader a reasonable opportunity of being heard in support of the same, was held to have been made without jurisdiction. It was further added that in such cases the Court has inherent power to make an order that the appeal should be reheard after giving the appellant or his pleader a reasonable opportunity of being heard in support of the same. It is no use discussing here whether an order to the prejudice of an accused without affording him an opportunity of being heard is null and void 'ab initio', as being one passed without jurisdiction In re: 'TADI SOMU NAIDU', 47 Mad 428, or, is only voidable at the option of the appellant. In 'CHANDRIKA v. REX', 1949 D L R (All L B) 175: (AIR 1949 All 176), Seth, J. seems to have taken a reasonable view in explaining that in such cases it is preferable to found the jurisdiction of a High Court on the basis of inherent powers preserved to it under Section 561A rather than on the basis that the previous judgment is void 'ab initio.'

(43) A careful examination of the provisions of Section 421 and the weight of authority is sufficient to lead me to conclude that only in the above case (i.e. where an order to the prejudice of an accused is made without affording him an opportunity of being heard as for instance where a case was posted on a day anterior to that fixed in the notice to the accused) the High Court can vacate its summary order passed under S. 421 for re-hearing the case, though it will not amount to reviewing a previous judgment. Even this will be possible only in the case of appeals presented under S. 419 and that too only at the instance of the accused-appellants. In no other case can an order passed under S. 421 be vacated or reviewed or revised. The order passed under S. 421 is definitely a judgment and cannot be altered. It is as final and effective as a decision made under S. 423 (1) (b) after hearing the arguments of the appellant and the Government-Advocate.

(44) I am fortified further in this view by two rulings, one of the Punjab and another of the Bombay High Court. In 'EMPEROR v. DHANNALAL', AIR 1929 Lah 797 at p. 800, Addison J. observed (Coldstream J. concurring):

"There appears to be no distinction between dismissing a revision petition in 'limine' or after notice. The judgment is in either case an effective and final judgment of the Court. In this respect there is no difference between a revision petition and a memorandum of appeal."

In 'EMPEROR v. KOYA PERTAB', AIR 1930 Bom 593 (2) the appeal of an accused was summarily rejected under S. 421. While dismissing the appeal, the appellate Court directed that notice should be given to the accused to show cause why the sentence on him should not be enhanced. The accused argued that he had a right to avail of the provisions contained in S. 439 (6) and desired the appellate Court to go into the merits. Beaumount C. J. rejecting the contention observed:

"The point has already been dealt with by this Court in the case of 'EMPEROR v. JORABAI', AIR 1926 Bom 555, and the only distinction between that case and the present one is that that case had been heard on the merits and not summarily dismissed. But in my view that distinction is not one of principle."

Madgavkar J. agreed and added:

"As a party to the decision in 'EMPEROR v. JORABHAI', I would add that the reasoning there is as appropriate to criminal appeals dismissed summarily as to those dismissed after admission and I am unable therefore to accept the argument for the appellant, which seeks to distinguish the case on that ground."

(45) It is contended by the learned Government-Advocate that if this view is adopted it will put the State to a very great disadvantage. Murder cases may be imagined resulting in the conviction of the accused only for a minor offence like 323, 324 or 325 and the Government appeal under S. 417 against the order acquitting the accused for a major offence may become infructuous if the appeal against conviction for a minor offence is rejected summarily before the Government appeal is filed. This point of view finds reinforcement in the judgment of Macnair J. C. (at page 123, Col. 1 in 'MAHOMED GUL ROHILLA v. EMPEROR', AIR 1932 Nag 121 FB) where he pointed that "elementary principles of justice demand that the Local Government should not be precluded from appealing by an order passed behind its back". As stated in para. 28 above, this was one of the two main considerations which induced the learned Judicial Commissioner to take the view that an appeal against the acquittal is competent after an appeal against the conviction is dismissed. I have already explained above that the provision of summary dismissal contained in S. 421 is an exception to the general principles of criminal law; and even an important principle which governs the mode in which justice is administered in our Courts viz. 'No man should be condemned unheard' cannot be extended to jail appeals. The right of appeal is the creation of statute and the provisions of the statute governing the procedure in exercising that right have necessarily to be observed. In a criminal matter, then the question is not between party and party; and the principles of civil law relating to "setting aside of an ex parte decree" cannot be imported into the domain of Indian Criminal Procedure Code. It is then contended that in this view S. 421 might render the provisions of S. 417 nugatory. I do not think so. The right of appeal under S. 417 remains untouched; it affects only the period of six months given by Art. 157 of the Limitation Act for filing Government appeals, and demands from the executive Government extra care and alertness in preferring appeals against acquittal before a summary appeal against the conviction is dismissed. I am not impressed by the 'argumentum ab inconvenienti' that this may lead to serious consequences in important cases. As observed by the Privy Council at page 249 of 'PAKALA NARAYANASWAMI v. EMPEROR', 18 Pat 234: AIR 1939 PC 47, if the words of the statute are clear,

"it is inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interest of the prosecution or the accused."

If the section leads to inconvenience the remedy lies with the Legislature.

(46) For reasons stated above, I hold that once an appeal preferred by the accused against his conviction of a minor offence is dismissed, either summarily or after hearing arguments, the High Court cannot alter or review the judgment and the Government Appeal against an order of acquitting the accused of a major offence will then become futile by reason of the previous judgment having become final and effective.

(47) I am, therefore, of opinion that this appeal against the order of the Sessions Judge acquitting the respondents of an offence under S. 302 be dismissed, the judgment of a Division Bench of this Court of '5-12-1949' in Criminal Appeal No. '37 of 1949' having become final and effective.

(48) The appeal against the order of the Sessions Judge acquitting the respondents of offences under S. 392 and S. 394 is competent. Taking away of cattle by the accused from the jungle where they were grazing was a prelude to the quarrel which culminated in the death of the deceased. Though inter-connected as having supplied a motive, the incident is separate and the offence is separate; and, if the Government-Advocate thinks, as mentioned by him in para. 2 of his petition of appeal, that on the facts held proved the accused can be convicted at least under S. 379, he can press this point if despite the dismissal of appeal against acquittal under S. 302, he desires to do so.

(49) KAUL C. J.: By an order dated 27-7-1950 passed by a Division Bench of which I and Mr. Justice Mehta were members appeal No. 100 of 1949 preferred by the Government Advocate under S. 417, Criminal Procedure Code against the order dated 22-6-1949 passed by the Sessions Judge of Dhar acquitting the respondents of charges under Ss. 302, 394 and 397, I. P. C. was referred to a Full Bench.

(50) Kalu and Bhuwan were tried by the Sessions Judge of Dhar for offences under Ss. 302, 394 and 397. I. P. C. Kalu was convicted for an offence under S. 304 (latter part) for causing the death of one Onkar and sentenced to three years' rigorous imprisonment. He was further convicted under S. 324, I. P. C. for causing hurt to Bhagirath and sentenced to rigorous imprisonment for six months for that offence. The sentences passed were to run consecutively. Bhuwan was also convicted for an

offence under S. 304 (latter part), I. P. C. for causing the death of Onkar and sentenced to three years' rigorous imprisonment. They appealed against the order passed by the learned Sessions Judge. This appeal was disposed of by a judgment of Rege J. with which Amarnath Sehgal J. agreed on 5-12-1949. The last para. of the judgment of Rege J. by which the appeal was dismissed reads thus:

"I would therefore, maintain the convictions and dismiss the appeal. The learned Government-Advocate made a strong plea for alteration of the conviction to one under S. 302 of the Penal Code. The Government has not filed an appeal from the acquittal under S. 302 although such an appeal would be within time, and in the circumstances, I would not think of altering the conviction though I agree, this Court has the power in a proper case to do so."

Subsequent to the pronouncement of that judgment the present appeal was preferred by the Government-Advocate under S. 417, Criminal Procedure Code.

(51) A preliminary objection was raised by Mr. Sanghi learned counsel for the respondent to the hearing of this appeal. It was contended that in view of the decision of the Bench of the old Madhya Bharat High Court which was pronounced on 5-12-1949 the present appeal could not be entertained, or in any case, it was infructuous. At the hearing of the appeal it appeared to myself and Mehta J. that the case raised a point of law of general importance on which there should be an authoritative decision of the High Court. We accordingly referred the case to a Full Bench. On reading again the order of 5-12-1949 I am however of opinion that the general question, whether on an appeal against a conviction the High Court can alter a finding of acquittal into one of conviction under S. 423 (1) (b) of the Code of Criminal Procedure does not really arise in this case.

(52) It will be clear from what has been stated above that Kalu and Bhuwan, though the learned Sessions Judge did not expressly record an order of acquittal in respect of any charges for which the accused were tried, did acquit them of offences under Ss. 302, 394 and 397, I.P.C. At the hearing of the appeal before Rege and Sehgal JJ. as is clear from the last para of the judgment which I have reproduced above the Government-Advocate pressed for the alteration of the conviction recorded under S. 304, I. P. C. to one under S. 302, I. P. C. This contention was repelled with the following observation:

"The Government has not filed an appeal from the acquittal under S. 302 although such an appeal would be within time, and in the circumstances, I would not think of altering the conviction though I agree, this Court has the power in a proper case to do so."

(53-54) My reading of the observation thus made is that the Bench which disposed of the appeal considered the question, whether in the circumstances of that case, it should alter the finding arrived at by the learned Sessions Judge that Kalu and Bhuwan were guilty of offences under S. 304 (latter part) of the Indian Penal Code for having caused the death of Onkar and convict them (or either of them) of an offence under S. 302, I. P. C. a charge of which they were acquitted. It was contended by the learned Government-Advocate that the Bench which disposed of the appeal did not consider this matter. On the other hand it rejected the request made by him; to which reference is made in the paragraph of the judgment reproduced above, merely because the Government had not filed an appeal against the acquittal of the accused of the charge under S. 302, I. P. C. I am unable to accept this contention.

It is clear from what was said by Rege J. that in his view, a view with which Sehgal J. agreed, the High Court could, in a proper case even though there was no appeal filed by the Government against an order of acquittal, alter a finding of the learned Sessions Judge that the accused was guilty of an offence under S. 304 only and hold him guilty of an offence under S. 302, I. P. C. though the Sessions Judge had acquitted him of that charge. Inspite of expression of that opinion on the question of law, the learned Judges responsible for the decision of 5-12-1949 rejected the request made by the Government-Advocate that Kalu and Bhuwan should be convicted under S. 302, I. P. C. I am of opinion that the learned Judges must be taken to have applied their minds to the contention put forward by the Government-Advocate and on a careful consideration of the matters raised before them, come to the conclusion that the acquittal of Kalu and Bhuwan for an offence under S. 302, I. P. C. by the Sessions Judge should, in the circumstances of the case before them, be maintained. The fact that the Government-Advocate had not filed an appeal was not the reason of the refusal of the learned Judges to accept the contention put forward by the Government-Advocate. This was only a circumstance to which they referred in arriving at a conclusion. From the fact that they expressly affirmed the power of the High Court to accede to such a request as was made by the Government-Advocate in a proper case, I am clearly of opinion that this matter whether the acquittal of Kalu and Bhuwan for the charge under S. 302, I. P. C. should be set aside, was considered and decided by the High Court. A decision having once been given by the High Court it is no longer open to challenge. The High Court has no power to alter that decision because subsequently an appeal under S. 417 has been preferred by the Government. A question already decided cannot be reopened. It was not contended that an appeal is entertainable against the decision of a Bench in such a case, and obviously there is no power of review (Section 369, Criminal Procedure Code). This appeal by the Government-Advocate must therefore be held to be infructuous, and should be dismissed.

(55) As already stated, I refrain from expressing any opinion on the general question raised at the hearing.

(56) MEHTA J.: I agree.

R.G.D. Appeal dismissed.

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(GWALIOR BENCH)

CHATURVEDI, J.

Mule, Appellant v. Mt. Dropadi, Respondent.

Civil Misc. Appeal Case No. 44 of 1951, D/- 17-12-1951.

(a) Guardians and Wards Act (1890), S. 17 — Appointment of guardian — Matters to be taken into account.

Under S. 17 of the Guardians and Wards Act, the welfare of the infant is the prime consideration and in appointing a guardian for the minors, the main question is, who is most likely to contribute to their well-being and look after their health and comfort. (Para 3)

Anno: Guardians and Wards Act, S. 17 N. 1. and 10.

(b) Guardians and Wards Act (1890), S. 7(3) — Mother of minor who was natural as well as testamentary guardian living — Appointment of another person as guardian — Legality — Court has inherent power to recall its own order — Gwalior Qanoon Hifazat Zat Va Zayadad, S. 41(3) — Civil P. C. (1908), S. 151.

Where the mother who is the natural guardian of the minor boy, is living and taking care of the boy and she is also appointed as guardian under the will of her deceased husband, a Court acts without jurisdiction in appointing the uncle of the boy as guardian firstly because no guardian was needed for the protection of the person of the minor and secondly because such appointment in the presence of testamentary guardian could not be made either under Section 7(3) of the Guardians and Wards Act or under Section 41(3), Gwalior Qanoon Hifazat Zat Va Zayadad.

If even after an order for appointment has been made the Court is apprised that it has been made to assume jurisdiction by suppression or misrepresentation of facts in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction. AIR (2) 1915 Cal 49, Foll. (Paras 3, 4)

Anno:Guardians and Wards Act, S. 7 N. 6, 7.

Mungre, for Appellant; Bhagwanswaroop, for Respondent.

Case referred to:

('16) 26 Ind Cas 275: (AIR (2) 1915 Cal 49) (Pr 4)

JUDGMENT: I am asked in this appeal to consider the propriety of an order dated 28-9-1951 by which the learned District Judge has recalled an order previously made on 8-4-1950 in Civil Miscellaneous Proceedings No. 22 of 1950 for the appointment of the appellant as guardian of the person and property of the minor boy, Prabhu aged 4 or 5 years, son of Mt. Dropadi the respondent.

(2) The learned Judge has given several reasons for the removal of the guardian and Mr. Mungre contends that a guardian can be removed only on the grounds specified in S. 39 of the Guardians and Wards Act and not on any other grounds. Mr. Bhagwan Swaroop, on the other hand, contends that the application for removal of guardian was made at a time when the Qanoon Hifazat Zat Va Zayadad Gwalior State Samvat 1970 was in force; and the 11th Clause of Section 79 provided that the Court could remove the guardian for 'any sufficient reasons' किसी और काफी वजह से

(3) I would not go into all this detail. Under Section 17 of the Guardians and Wards Act, the welfare of the infant is the prime consideration and in appointing a guardian for the minors, the main question is, who is most likely to contribute to their well being and look after their health and comfort. In this case the mother of the minor boy was alive and she was looking to the comforts of the boy. The Court in appointing Mule as the guardian overlooked the fact that the mother was already there. It has been held several times that it is a mistake to assume that merely because an application is made, and the mother does not come forward, a guardian must be appointed. In all such cases the first thing to be done is to consider whether it is really necessary to appoint a guardian at all. In my opinion where no guardian was needed for the protection of the person of the minor, an order to appoint a guardian of the minor was without jurisdiction. Sub-clause 3 of Section 7 moreover lays down that where a guardian has been appointed by will, an order appointing another person to be guardian shall not be made until the powers of the guardian appointed by the will have ceased under the provisions of the Act. The respondent Mt. Dropadi, who is the natural guardian of the boy, was also appointed guardian under a will of her husband and in the presence of this will no other guardian could have been appointed either under sub-clause 3 of Section 41 of Gwalior Qanoon Hifazat Zat Va Zayadad or under sub-clause 3 of Section 7 of the Guardians and Wards Act. It will be manifest that the appointment of Mule as guardian of the boy was neither proper nor legal and as soon as facts came to the notice of the learned District Judge the previous order was set aside.

(4) The appellant Mule in his application had represented to the Court that he is an uncle of the boy and that Mt. Dropadi, the respondent was of bad character and was going to be remarried. Subsequently it came to the notice of the learned District Judge that both the allegations were without foundation and a Court is always competent to recall an order obtained from it by suppression or misrepresentation of facts. In 'RASHMONI DASI v. GUNADA SUNDARI DASI', 26 Ind Cas 275 (Cal), a Division Bench of the Calcutta High Court consisting of Asutosh Mookerjee and Beachecroft, JJ. after considering the whole case law laid down that the principle of Section 151, C. P. C. is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary civil Court. Therefore a Court which exercises powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interest of justice. If even after an order has been made the Court is apprised that it has been made to assume jurisdiction in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction.

(5) I respectfully concur with these views and in my opinion the learned Sessions Judge was fully justified in revoking his previous order.

(6) I would therefore dismiss the appeal with costs.

K.S. Appeal dismissed.

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(INDORE BENCH)

CHATURVEDI J.

Rupsingh Khushalsingh, Appellant v. Chironjilal Girdharilal, Respondent.

Second Appeal No. 210 of 1948, D/- 12-7-50.

(a) Civil P. C. (1908), S. 107, O. 13 R. 3 — Admissibility of evidence — Interference by appellate Court — Evidence Act (1872), S. 167.

A Court is to decide the preliminary question of admissibility of secondary evidence on consideration of the evidence and the surrounding circumstances. Where it so decides, the question decided is a question of fact, not of law; and it is proper to be decided by the Judge of the first instance, as it depends very much on his discretion and his conclusion should not be overruled except in very clear cases of miscarriage. 19 Cal 438 (P. C.) Ref. (Para 4)

Anno: C. P. C., S. 107 N. 13; O. 13 R. 3 N. 2. Evi. Act, S. 167 N. 1.

(b) Civil P. C. (1908), O. 13, R. 3 and O. 41, R. 1 — Objection as to mode of proof — When to be raised.

An objection to the improper mode of proof of a fact should be taken at the time when the fact is sought to be proved in an unauthorised manner, and if not taken at that time it cannot be taken subsequently. AIR (30) 1943 P C 83, Ref. (Para 4)

Anno: C. P. C., O. 13 R. 3 N. 2; O. 41 R. 1 N. 12.

(c) Civil P. C. (1908), O. 1 R. 10 — Suit by co-owners — Necessary parties.

One of several co-owners can maintain an action against a trespasser without joining the other co-owners as parties to the action. AIR (2) 1915 Mad 1214 and AIR (12) 1925 Sind 36 Rel. on. (Para 5)

Anno: C. P. C., O. 1 R. 10 N. 18 Pt. 5.

(d) Inam Rules (Jaora State), 1935 — Object of — Transfer of inam land prior to 1909 — Transfer declared valid by Court — Power to set aside.

There is nothing in the Inam Rules, 1935, to indicate that it was intended to cancel that portion of the Inam Rules of 1910 A. D. which validated those transfers of Inam Lands which had taken place prior to 1884 A. D. The object of the Inam Rules of 1935 was never to invalidate these transactions which had become final as far back as 1909 and reopen the disputes which had long been settled by judicial decisions. The said rules could not be deemed to have authorised the Thakur to set aside a decision of a Court of competent jurisdiction. If he passed any order purporting to do it under the Inam Rules of 1935, his order was ultra vires, null and void; and a void order is not binding on any party much less on a civil Court. (Para 8)

W. Y. Pandey, for Appellant; V. R. Newaskar, for Respondent.

Cases referred to:

('92) 19 Ind App 79: (19 Cal 438 PC) (Pr 4)
('43) AIR (30) 1943 P C 83: (ILR (1943) Kar PC 69) (Pr 4)
('16) 39 Mad 501: (AIR (2) 1915 Mad 1214) (Pr 5)
('25) AIR (12) 1925 Sind 36: (79 Ind Cas 59) (Pr 5)

JUDGMENT: This second appeal arises out of a suit filed by the plaintiff-respondent for declaration that he is the owner of a certain piece of land measuring 12 Bighas, in Thikana Sujaota in the former Jaora State and asking for an injunction restraining the defendant-appellant from interfering with the plaintiff's possession. The suit was decreed by the trial Court and the defendant's appeal was dismissed by the first appellate Court. It is not disputed that the suit relates to some land in Thikana Sujaota which was sold for Rs. 1101/- by Thakur Khushalsingh the father of the present appellant in the year 1881 A. D. to one Ramdayal, uncle of the present plaintiff-respondent. It further remains undisputed that the plaintiff remained in possession over this land since 1881 to the present day. The Thakur of the Thikana made various attempts to challenge the sale and also the possession. In 1909 a decision was given by the Kamdar of Jaora, in an appeal from a decision of the Tehsildar holding that the sale of 1881, was valid and Ramdayal had become owner of the property in dispute. This decision being inter partes is, in my op nion binding on the parties. In this appeal, it is not disputed that this decision was not a decision of a Court of competent jurisdiction. If it was a decision of a competent Court then it is clear that no rules subsequently made could have had the force of defeating the rights of the parties which had become final and had crystallised as far back as 1909 A. D. No rule, circular, regulation, or bye-laws are shown to me either of 1881, or made afterwards, which lay down that in 1881 it was invalid or illegal to transfer any portion of inam lands.

(2) The learned counsel for the appellant places reliance on Inam Rules promulgated in the year 1910. But even in these rules, an exception has been laid down which states that transfers of Inami lands made before the year 1884 will be deemed to have been valid.

(3) The letter from the Political Agent in Malwa, to the Chief Secretary Darbar Jaora, dated 12th February 1920, relied on by the learned counsel for the appellant has absolutely no bearing on the question before me. It is only an advice to the Darbar Jaora, for exercising sovereign powers. This letter cannot be taken to lay down a rule of law, asking the civil Courts not to entertain such suits. In fact the learned counsel for the appellant has failed to show to me any rule of the Jaora State, which prohibits civil Courts from taking cognisance of such cases. So far as this point is concerned I do not think there is any force in this appeal.

(4) The learned counsel for the appellant then argues that it was not proved that the original sale-deed of 1881 was lost and secondary evidence could not have been admitted till this fact was proved. I do not find any strength in this contention. A Court is to decide the preliminary question of admissibility of secondary evidence on consideration of the evidence and the surrounding circumstances. Where it so decides, the question decided is a question of fact — not of law; and the Privy Council has definitely laid down that it is proper to be decided by the Judge of the first instance, as it

depends very much on his discretion and his conclusion should not be overruled except in very clear cases of miscarriage. 'Srimati Rani Hurripria v. Rukmini Devi', 19 Ind App 79, (PC). In the case before me it is apparent that the document was produced in the Tehsil, and then lost before 1901 A. D. These facts are quite clear from the decision of the Kamdar and no further proof of it was needed. As regards the objection now taken that a copy of a copy was produced, it is sufficient to state that no objection was taken when this document was produced and admitted by the Court of the first instance. An objection to the improper mode of proof of a fact should be taken at the time when the fact is sought to be proved in an unauthorised manner, and if not taken at that time it cannot be taken subsequently. 'Gopal Das v. Sri Thakurji', AIR (30) 1943 P. C. 83.

(5) The third point urged by Mr. Pandey is about the misjoinder of parties. He contends that the members of the family of the plaintiff were not joined either as plaintiffs or defendants in the suit & as such the suit must fail. I think this matter is covered by 'Ahmad Sahib v. Magnesite Syndicate Ltd.', 39 Mad 501, and 'Mahomed Fariq v. Sidik', AIR (12) 1925 Sind 36, where it has been held that one of several co-owners can maintain an action against a trespasser without joining the other co-owners as parties to the action. It is not contended that in the absence of other members of the family an effective decree cannot be passed in this case.

(6) The last point developed by Mr. Pandey based upon the fact that the Thakur of Sujaota on 11th May 1942 gave a notice to the plaintiff calling upon him to show evidence of his title to the land in dispute and then on 25th July 1942, passed an order that the transfer of the disputed land in 1881 was bogus and fraudulent. He also passed an order for recovery of possession from the plaintiff asking the subtenants not to pay Toji to the plaintiff.

(7) Mr. Pandey contends that the Inam rules of 1935 authorised the Thakur to take this action. These rules provided an appeal to the Darbar against an order of the Thakur and the plaintiff ought to have preferred his appeal to the Darbar. Mr. Pandey contends that where an appeal is provided to the Darbar the Civil Courts could not have taken cognisance of the case.

(8) A perusal of the Inam Rules of 1935 inclines me to the view that Mr. Pandey's contention cannot be supported. There is nothing in these rules to indicate that it was intended to cancel that portion of the Inam rules of 1910 A. D. which validated those transfers of Inam lands which had taken place prior to 1884 A. D. The object of the Inam rules of 1935 was never to invalidate these transactions which had become final as far back as 1909 and reopen the disputes which had long been settled by judicial decisions. The said rules could not be deemed to have authorised the Thakur to set aside a decision of a Court of competent jurisdiction. If he passed any order purporting to do it under the Inam Rules of 1935, his order was ultra vires, null and void; and a void order is not binding on any party much less on a civil Court. I, therefore, hold that a civil Court was competent to take cognisance of the case. This disposes of all the arguments put forward by the learned counsel for the appellant. The appeal fails and I, therefore, dismiss it with costs.

K.S. *Appeal dismissed.*

A. I. R. 1952 Madhya Bharat 96

REGE J.

Prabhulal, Applicant v. Parwatibai, Opponent.

Criminal Ref No. 100 of 1949, D/- 17-10-1949.

Criminal P. C. (1898), S. 488 — Necessity to ascertain visible means and earning capacity of husband.

It is true that a person taking on the responsibility of marriage has to maintain his wife and mere minority or the fact that the husband does not work cannot come in the way of the maintenance of the wife, but it is in all cases necessary to ascertain the visible means and the earning capacity of the husband if he is compelled to work. *(Para 1)*

Anno: Cri. P. C., S. 488 N. 7.

Bhanudas Shaha, for Applicant; Deviprasad Bhargav, for Opponent.

ORDER: Mt. Parwatibai wife of Prabhulal instituted proceedings against her husband for maintenance under S. 488 of the Code of Criminal Procedure. The husband resisted the petition on the ground of infidelity of his wife. The learned Magistrate Bhanpura, allowed the application and directed that maintenance at Rs. 30/- per month should be given to Parwatibai. The opponent went up in revision to the learned Sessions Judge, Garoth who has reported the case with a recommendation that the order of the Magistrate should be set aside and the case remanded for further inquiry. The learned Magistrate found the allegation of infidelity improved and it cannot be said that the finding is without foundation. It is in evidence, however, that the petitioner Prabhulal is a minor and his means to pay the maintenance consist only of his interest in the joint family property. The learned Magistrate appears entirely to have ignored the meagre evidence tendered by the applicant Parwatibai regarding the means of the petitioner. The solitary witness on this point P. W. (9) Devilal states that the income of the property in the hands of the petitioner's father is about 800/- rupees per year. In cross-examination he reduces the figure to Rs. 250/- and it is further in evidence that the father has to maintain six persons in the family. It was necessary for the learned Magistrate before determining what maintenance should be allowed to have determined the actual means of the husband of Parwatibai and allocate proper part of it for maintenance. It is true that a person taking on the responsibility of marriage has to maintain his wife and mere minority or the fact that the husband does not work cannot come in the way of the maintenance of the wife, but it is in all cases necessary to ascertain the visible means and the earning capacity of the husband if he is compelled to work.

(2) I, therefore accept the reference and remand the case to the court of first instance to dispose of it after determining the means of the husband in the light of above observations.

G. M. J. *Reference accepted.*

A. I. R. 1952 Madhya Bharat 97

(FULL BENCH)

KAUL, C. J., DIXIT AND MEHTA, JJ.

Shankar Rao Ramaji and another, Petitioners v. State of Madhya Bharat.

Civil Misc. Petns. Nos. 92 and 93 of 1951, D/- 6-12-1951.

Constitution of India, Arts. 226, 329(b) — Rejection of nomination paper — High Court has no jurisdiction to interfere under Art. 226 — Word "election" in Art. 329(b) means the whole procedure of election, including filing of nomination paper—(Representation of the People Act (1951), Ss. 105, 100(1)(c)).

Where a statute creates a right and provides for the constitution of a Special Tribunal for determining questions as to that right and the special tribunal functions then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive (1859) 7 W R 464, Relied on.

The right of being nominated to stand as a candidate for election to the Parliament or to the State Legislatures is a right conferred by the Constitution, and subject to its provisions. The Constitution which creates this right, itself contains provisions for the setting up of a tribunal in Part XV of the Constitution, for trying cases for the infringement of the right and for the exclusion of the High Court's jurisdiction to deal under Art. 226 with such an infringement.

Article 329(b) of the Constitution prohibits an election being called in question except by an election petition, presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. The law contemplated by the clause is clearly the Representation of the People Act, 1951 enacted by the Parliament in the exercise of the power conferred under Art. 327. Part VI of this Act prescribes the procedure for the presentation of a petition challenging any election, for the constitution of a tribunal to try the petition and the procedure to be followed by the tribunal in the trial, and specifies the grounds on which the tribunal may declare the election to be wholly void, or declare the election of the returned candidate to be void. A remedy is, provided to a person whose nomination paper has been improperly rejected to have the election declared void by the special tribunal on the ground of the improper rejection of the nomination. The scheme of the Act is to set up a Special Tribunal for the trial of election disputes, confer a special jurisdiction upon that Tribunal and oust the jurisdiction of ordinary Civil Courts. It is quite true that Ss. 105 and 170, Representation of the People Act, 1951, or any other provision of that Act cannot by themselves in any way affect the jurisdiction of the High Court to issue writs under Art. 226 of the Constitution. But the jurisdiction of the High Court to enquire under Art. 226 into the validity of any election is taken away not by the Representation of the People Act but by Art. 329 itself. Article 329 means that notwithstanding anything contained in Arts. 225, 226, 227 and 228 and other articles of the Constitution, no election shall be called in question by invoking the powers of the High Court under those Articles. (Paras 25, 27)

The word "election" in Art. 329(b) is not restricted to the result of an election or to the actual counting of votes. The meaning of the term must be determined on a consideration of the whole procedure whereby a person is elected to the Parliament or to a State Legislature in accordance with the provisions of the Representation of the People Act, 1951. The election commences when a nomination paper of the person seeking election is presented to the Returning Officer and ends when the Returning Officer declares the result of the election. The act of the Returning Officer, therefore, in refusing to receive a nomination paper, or in accepting or rejecting a nomination paper, after scrutiny is clearly a matter which forms a part of the election. (Para 29)

The question, in such a case is not whether the Returning Officer has failed to exercise the jurisdiction vested in him by law or has erroneously exercised that jurisdiction. It is whether the High Court has the authority under Art. 226 to correct any action or decision of an erring Returning Officer who fails to carry out his statutory obligations, however, arbitrary and despotic the order or decision may be. As the Representation of the People Act, 1951, prescribes a procedure for the presentation of election petitions on the ground of improper rejection of nomination papers and their trial by a tribunal constituted thereunder Art. 329 (b) completely shuts out the petitioners from challenging before the High Court by way of a petition under Art. 226, the orders of the Returning Officers rejecting the nomination papers. (Paras 27, 31)

Had it not been for the opening words of Art. 329(b) excluding the jurisdiction of the High Court, the High Court could not have hesitated in exercising their powers under Article 226, against the improper rejection of nomination papers and in giving the appropriate relief, on the ground that the petitioner had his remedy under the Representation of People Act, 1951. It is no consolation and remedy to a person whose nomination paper has been improperly rejected to tell him that he must let the election go on and then have it set aside by an election petition and have a fresh election ordered. It is obvious that such a post-election remedy would be wholly inadequate in seeking the remedy under the Representation of the People Act. The person would necessarily be put to trouble and expense and if he succeeds he would be required to meet the prospect of a fresh election under altogether different conditions and with an array of fresh candidates. (Para 27)

Quaere: Whether a decision of the election tribunal or any proceedings of the tribunal can be challenged before the High Court by way of a petition under Art. 226 or 227. (Pr 33)

C L. Ojha, for Petitioner (Shankar Rao); Rege, for Petitioner (Uma Shankar); K. A. Chitale, Advocate General, for the State.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('41) AIR (28) 1941 FC 16: (1940 FCR 110) (Pr 30)
('51) AIR (38) 1951 SC 253: (1951 SCR 474) (Pr 27)
(1943) Canada L R (SC) 265 (Pr 33)
(1859) 7 W R 464: (28 L J C P 242) (Pr 25)

ORDER: We have before us two applications one (No 92 of 1951) and the other (No. 93 of 1951) arising out of proceedings relating to the forthcoming general elections. The first mentioned application is made by Shankar Rao Ramaji Masde who is a candidate for election to Madhya Bharat Legislative Assembly from Dapalpur Constituency. He alleges that he belongs to the Scheduled Caste and is a candidate for one out of the two seats which is reserved for the members of that caste. The other application is made by Shri U. M. Trivedi of Neemuch. He is a candidate for election to the House of People from Mandsaur Constituency in Mhadhya Bharat. Both the petitioners complained that their nomination papers which were duly filed have been wrongly rejected by the Returning Officers concerned. The learned counsel for Mr. Trivedi contended that in rejecting the nomination paper of his client the Returning Officer acted mala fide. The first of these applications was presented before a Division Bench yesterday. As for obvious reasons it was a matter which required speedy disposal Mr. Justice Mehta and Mr. Justice Dixit who composed the Bench directed it to be fixed for hearing to-day. Mr. Trivedi's application was presented only this afternoon. It was directed that as one of the questions which arose in both these applications was of general public importance, they should be heard by a Full Bench. This has been done accordingly.

(2) It was considered proper to issue notice of the first of these applications to the Advocate General as one of the questions which came up for consideration related to the interpretation of Article 329 of the Constitution.

(3) We entertained a doubt whether this Court has the jurisdiction to entertain these applications and grant the relief asked for in view of the provisions of Article 329 of the Constitution. We have heard the learned counsel for the applicants and the Advocate General and have come to the conclusion that as no election to either House of Parliament or to the House or either House of the Legislature of a State can be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any Law made by the appropriate Legislature, & Parliament has by enacting Representation of the People Act, 1951 made provision for dealing with all such matters this Court has no jurisdiction to entertain these applications.

(4) In our opinion the word 'election' as used in Article 329(b) of the Constitution of India should not be so interpreted as to confine it only to the result of an election but it covers the entire process whereof the declaration of a candidate as duly elected is the result.

(5) The applications are therefore rejected.

(6) We have dictated this short order in view of the desirability of giving a speedy decision in all such matters. We will give detailed reasons for the view taken by us later.

(7) DIXIT, J.: In these two applications under Article 226 of the Constitution, the petitioners who are candidates seeking elections from two different constituencies in Madhya Bharat to the House of People and the Madhya Bharat State Legislative Assembly, challenge the decisions of the Returning Officers in rejecting their nominations for elections.

(8) The petitioner in Miscellaneous case 92 of 51 is one Shankar Rao Masade. He states that as his name was omitted from the electoral roll, he made an application on 8-11-1951 in accordance with Rule (20), (2) of the Representation of the People (Preparation of Electoral Rolls), Rules, 1950 to the Election Commission for the inclusion of his name in the electoral roll for the constituency from which he sought election; that on 20-11-51 he presented to the Returning Officer for the Dapalpur Constituency of the Madhya Bharat Legislative Assembly, a nomination form for his election to fill one of the seats which is reserved for the Scheduled Castes that the nomination was in the prescribed form accompanied by a receipt of the Election Commission of his application for the registration of his name in the electoral roll, and was in order, but the Returning Officer refused to accept the nomination paper on the ground that the petitioner's name was not included in the electoral roll and returned it to the applicant, some two hours after its presentation with an endorsement thereon as to the date and time of the presentation. The petitioner prays that a direction in the nature of a writ of mandamus be issued to the Returning Officer to stay the proceedings in connection with the general election in the constituency and accept the nomination form of the petitioner.

(9) The applicant, in the other case Uma Shankar Trivedi sought election to the House of People from a constituency comprising of Mandsaur District and Jaora Tehsil of Ratlam District. His averment is that on 17-11-51 before the appointed date and time, he presented to the Returning Officer for the constituency two nomination papers for his election to the House of People from that constituency; that on 23-11-51, that is, on the date fixed for the scrutiny of the nomination papers, the Returning Officer departing from the procedure he followed in the case of nomination papers of other candidates, considered the petitioner's nomination forms together instead of separately and rejected both of them inter alia on the ground of misdescription of the constituency, saying that the constituency mentioned in the nomination papers is 'Mandsaur' whereas it should have been " 6 Mandsaur M. B.". The petitioner alleges that the Returning Officer acted mala fide in rejecting his nomination. He prays that the Returning Officer's orders accepting the nomination papers of all other candidates and rejecting his nomination papers be quashed and the petitioner be declared to be duly and validly nominated.

(10) The petition filed by Shankar Rao Masade was first put up for hearing before a Division Bench consisting of my brother Mehta and myself. As the petition raised an important question as to the jurisdiction of this Court to enquire into the correctness of the order passed by the Returning Officer and as to the

interpretation of Article 329 of the Constitution, we issued a notice to the Advocate General and directed that the papers be put up before my Lord the Chief Justice for the constitution of a Full Bench to hear the application. Accordingly, a Full Bench was constituted. While the hearing of this petition was on before before the Full Bench, Mr. Trivedi presented his application. It was also heard by the Full Bench as it raised the same preliminary question. At the conclusion of the arguments of the learned Counsel for the petitioners and of the learned Advocate General, the Court delivered a brief order expressing the opinion that Article 329 of the Constitution barred the jurisdiction of this Court to entertain the petitions and stating that detailed reasons for this conclusion would be given afterwards. Accordingly, I am now stating my reasons in this order.

(11) The main question that arises for determination is whether in view of the provisions of Article 329 of the Constitution, this Court has the jurisdiction to entertain any application under Art. 226 challenging the order of a Returning Officer rejecting the nomination of a person seeking election.

(12) In order to appreciate the precise question for determination and the contentions of the petitioners thereon, it seems to me necessary to refer to the relevant provisions of the Constitution and of the Representation of the People Act, 1951.

(13) Part XV of the Constitution contains provisions relating to elections. Article 327 gives to the Parliament the power to make provision by law with respect to all matters relating to, or in connection with elections to the Parliament or State Legislatures. Article 328 empowers State Legislatures to make provision by law with respect to all matter relating to, or in connection with elections to State Legislatures in so far as provision in that behalf is not made by Parliament and subject to the provisions of the Constitution. Article 329 which is very material to the question before us is as follows:

"Notwithstanding anything in this Constitution;

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Art. 327 or Art. 328, shall not be called in question in any Court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

(14) In July, 1951, Parliament enacted the Representation of the People Act, 1951 (Act No. XLIII of 51) to provide inter alia for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State and for the decision of doubts and disputes arising out of or in connection with such elections. Section 2 of this Act is the definition section. By S. 2 (d) it is provided that the term "election" means "an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir and includes a primary election".

(15) Section 17 requires that for the purpose of constituting the Legislative Assembly of a State under the Constitution, the Governor or the Raj Pramukh as the case may be of the State shall, by one or more notification, call upon all the Assembly Constituencies to elect members in accordance with the provisions of the Act and of the rules and orders made thereunder before the appointed date or dates. In exercise of the powers conferred by this section, the Raj Pramukh issued a notification (Notification No. 187 J. L. 226/51 published in the Extra-ordinary Gazette on 10-11-51) calling upon the Legislative Assembly constituencies in this State to elect members before 15-2-52.

(16) Section 30 of the Act provides that as soon as the notification calling upon a constituency to elect a member or members is issued under the Act, the appropriate authority, which in the present case is the Raj Pramukh, shall, notify in the Gazette, the last date for making nominations; the date for the scrutiny of nomination; the last date for the withdrawal of candidatures; and the date or dates on which a poll shall, if necessary, be taken. Accordingly, on 10-11-51, the Raj Pramukh issued a notification No. 188 VIII-J.L. 226/51 appointing,

(a) the 20th November, 51 as the last date for making nominations.

(b) 23-11-1951 as the date for scrutiny of nominations, and

(c) 26-11-51 as the last date for the withdrawal of candidatures.

(17) Sections 32 and 33 of the Act deal with the nomination of candidates for election, and presentation of nomination paper and requirements for a valid nomination.

(18) Under S. 35 of the Act, the Returning Officer, is required on receiving the nomination paper under S. 33 (1), to inform the person delivering the nomination paper of the date, time and place fixed for the scrutiny of nominations and to endorse on the nomination paper the date on which and the hour at which it was delivered to him.

(19) Section 36 of the Act lays down the procedure to be followed at the scrutiny of the nominations and gives to the Returning Officer the power to refuse any nomination on any of the grounds mentioned in that section. Sub-section 3 of this section prohibits the refusal of the nomination of any candidate on the ground of any irregularity in respect of any nomination paper if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed. Sub-section 4 prescribes that the Returning Officer shall not reject any nomination paper on the ground of any technical defect which is not of a substantial character.

(20) Sections 56 to 63 of the Act deal with the poll, manner of voting at elections and method of voting. Sections 64 to 67 deal with the counting of votes and declaration of results. Secs. 71 to 75 speak of the publication of the results of elections.

(21) Part VI of the Act contains provisions about disputes regarding elections. Briefly stated, the provisions are to the effect that an elec-

tion petition calling in question any election may be presented in the prescribed form on one or more of the grounds specified in S. 100 or 101 by any candidate or any elector, & the trial of the petition shall be by an Election Tribunal constituted in accordance with S. 86 of the Act. Clause (c) of sub-section 1 of S. 100 lays down that if the Tribunal is of opinion:

"that the result of the election has been materially affected by the improper acceptance or rejection of any nomination,"

the Tribunal shall declare the election to be wholly void.

(22) Section 105 says that every order of the Tribunal made under the Act shall be final and conclusive. Section 170 of the Act reads as follows:

"No Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election."

(23) Mr. Ojha, learned Counsel appearing for the petitioner Shankar Rao Masade contended that under Ss. 33 and 35 of the Representation of the People Act 1951, the Returning Officer was bound to receive the nomination paper of the petitioner delivered to him and to inform him the date, time and place fixed for the scrutiny of the nominations, and that he acted contrary to the provisions of these sections in returning it before the date fixed for the scrutiny of the nominations to the petitioner on the ground that his name was not included in the electoral roll for the constituency. Mr. Ojha further, said that Art. 329 of the Constitution did not bar him from seeking redress under Art. 226 from this Court, as in asking this Court to issue a direction in the nature of a writ of mandamus to the Returning Officer to receive the petitioner's nomination, he was not calling in question any election which is yet to be held. Mr. Rege's contention on behalf of the petitioner Uma Shankar Trivedi is that under S. 36 (3) of the Representation of the People Act, the Returning Officer should have considered separately the two nomination papers filed by the petitioner and that in rejecting these nomination papers jointly on the grounds, he did, the Returning Officer acted male fide and deliberately misinterpreted perfectly clear provision of law with the object of depriving the petitioner of his lawful right to be nominated to stand as a candidate in the election. Mr. Rege maintained that the right of being nominated as a candidate for election to the House of People is a right conferred by the Constitution and if that right is infringed, the petitioner is entitled to invoke the jurisdiction of this Court under Art. 226 to enforce that right. According to Mr. Rege, the word election in the expression "no election" as used in Art. 329 (b) means the actual act of choosing by the casting of votes of one or more persons from a number and that, therefore, Art. 329 does not take away from the petitioner the remedy provided by Art. 226 to enforce his right of being nominated as a candidate for election to fill a seat in the constituency.

(24) The learned Advocate-General argues that the term "election" as used in the beginning of Art. 329 (b) means the whole process whereby a candidate is returned and that as the Representation of the People Act, 1951, prescribes a procedure for the presentation of election petitions, and their trial by a tribunal constituted thereunder, Art. 329 (b) completely shuts out the petitioners from challenging before this Court by way of a petition under Art. 226, the orders of the Returning Officers rejecting their nomination papers. In the alternative, it was further said by the learned Advocate-General that even if this Court has jurisdiction to interfere in the orders of a Returning Officer passed in the course of election, a direction of the nature prayed for should not be issued by this Court as the petitioners have the alternative remedy under the Representation of the People Act, 1951, of attacking the orders of the Returning Officers by presenting election petitions to the Election Commission.

(25) On a careful consideration of Art. 329 of the Constitution, of the provisions of the Representation of the People Act, 1951, and the arguments of the learned Counsel I do not find myself able to hold that this Court can under Art. 226 entertain and decide on merits any petition against an order of a Returning Officer rejecting a nomination paper. That the right of being nominated to stand as a candidate for election to the Parliament or to the State Legislatures is a right conferred by the Constitution, and subject to its provisions, cannot, I think admit of doubt. But before it follows that Art 226 gives a remedy for the infringement of the right, we have to note whether the Constitution which creates this right, itself contains provisions for the setting up of a Tribunal for trying cases for the infringement of the right and for the exclusion of this Court's jurisdiction to deal under Art. 226 with such an infringement. If there are such provisions, then, clearly this Court can have no jurisdiction to entertain the present petitions. It is settled law that where a statute creates a right and provides for the constitution of a special Tribunal for determining questions as to that right and the special tribunal functions then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. As observed by Willes J., in 'WOLVERHAMPTON NEW WATER WORKS CO. v. HAWKESFOR', (1859) 7 W R 464 :

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely but provides no particular form of remedy, there the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by the statute which at the same time gives a special and particular remedy for enforcing it. The presented case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

(26) We have, therefore, to see whether the Constitution contemplates a special procedure and a remedy for giving effect to the petitioners' right to be nominated to stand as candidates in the elections.

(27) Now, leaving aside for the moment the question as to the meaning of the word "Election" in the expression "no election shall be called in question" it is clear that Art. 329 (b) of the Constitution prohibits an election being called in question except by an election petition, presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. The law contemplated by the Clause is clearly the Representation of the People Act 1951 enacted by the Parliament in the exercise of the power conferred under Art. 327. Part VI of this Act prescribes the procedure for the presentation of a petition challenging any election, for the constitution of a Tribunal to try the petition and the procedure to be followed by the Tribunal in the trial, and specifies the grounds on which the tribunal may declare the election to be wholly void, or declare the election of the returned candidate to be void. Under this part an election petition may be presented by any candidate or any elector on one or more of the grounds specified in Ss. 100 and 101 of the Act. One of the grounds stated in S. 100, (1), (c) on which the Tribunal is authorised to declare an election to be wholly void is that:

> "the result of the election has been materially affected by the improper acceptance or rejection of any nomination."

I do not read the words "the result of the election has been materially affected" as giving to the Tribunal on finding in the case of a petition presented by a person whose nomination paper has been improperly rejected, that it was so rejected the freedom to declare whether by this irregularity the result of the election has been materially affected. In such a case a Tribunal would appear to have no option but to hold that the result of the election has been materially affected and to declare the election to be wholly void.

The words "the result of the election has been materially affected" have been used, in my opinion, to cover the cases of those election petitions where the person whose nomination paper has been improperly rejected, is himself not the petitioner and is not aggrieved by the order of the returning officer rejecting his nomination paper or is not interested in having the election declared void so as to enable him to stand as a candidate in a fresh election. A remedy is, therefore, provided to a person whose nomination paper has been improperly rejected to have the election declared void by the special Tribunal on the ground of the improper rejection of the nomination. Sections 105 and 170 of the Act make the orders of the Tribunal and the Returning Officer final and not subject. The scheme of the Act is to set up a Special Tribunal for the trial of election disputes, confer a special jurisdiction upon that Tribunal and oust the jurisdiction of ordinary Civil Courts. It is quite true that Ss. 105 and 170 of the Representation of the People Act, 1951, or any other provision of that Act cannot by themselves in any way affect the jurisdiction of the High Court to issue writs under Art. 226 of the Constitution. But the jurisdiction of the High Court to enquire under Art. 226 into the validity of any election is taken away not by the Representation of the People Act but by Art. 329 itself. The opening words of this Article are "Notwithstanding anything in this Constitution". As was recently pointed out by the Supreme Court in the case of 'STATE OF SERAIKELLA v. UNION OF INDIA,' AIR (38) 1951 S C 253, the expression "Notwithstanding anything in this Constitution" overrides all provisions of the Constitution. The jurisdiction of the High Court is as defined in Arts. 225, 226, 227 and 228 of the Constitution. Article 329 means that notwithstanding anything contained in those articles and other articles of the Constitution, no election shall be called in question by invoking the powers of the High Court under those Articles. But for the opening words of the Art. 329, I would have had no hesitation in entertaining these petitions and in giving to the applicants substantially the relief they seek; it could not have been refused to the petitioners on the ground that they had a remedy under the Representation of the People Act, 1951. It is no consolation and remedy to a person whose nomination paper has been improperly rejected to tell him that he must let the election go on and then have it set aside by an election petition and have a fresh election ordered. It it obvious that such a post-election remedy would be wholly inadequate. In seeking the remedy under the Representation of the People Act, the person would necessarily be put to trouble and expense and if he succeeds he would be required to meet the prospect of a fresh election under altogether different conditions and with an array of fresh candidates.

(28) Learned counsel for the petitioners do not dispute that Art. 329 controls the operation of Art. 226 of the Constitution. Their main contention is that the word "election" should not be construed as including a stage at which a nomination paper is presented to the Returning Officer, under S. 33 of the Representation of the People Act, or the stage at which it is rejected or accepted after the scrutiny of nomination under S. 36 of the Act. The question for consideration, therefore, ultimately resolves itself into one of the meaning of the term "election" as used in Art. 329 (b) of the Constitution. Counsel for the petitioner Masade said that it meant the result of election. Mr. Rege for the petitioner Trivedi sought to restrict the meaning of the term of the actual act of the choosing of the candidates by the casting of ballots. I am not disposed to accept the construction put on the word by the learned counsel for the petitioners. The term "election" is not defined in the Constitution. The definition of the term given in the Representation of the People Act, 1951, is not very helpful in answering the question before us. In its ordinary or etymological meaning the term means some act of choosing specially by votes. To say that "No election shall be called into question" means that the result of no election shall be called in question, is to ignore the fact that when the validity of any election is challenged, the attack is not directed against the purely isolated fact of the result but it is directed against the whole procedure and process which led to that result. Again the definition suggested by Mr. Rege learned counsel for the petitioner Trivedi, does not take account of an uncontested

election where a person is declared as duly elected to fill a seat without a poll being taken.

(29) It is stated in Halsbury's "Law of England" Vol. 12 (Hailsham Edition) at pages, 232, 237 and 238 that

> "the first step towards an election of a member of the Parliament is the issue of a writ out of the Crown Office in Chancery .... it is a question of fact in each case when an election begins in such a way as to make a party concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of a writ nor the publication of the Notice of election can be looked to as fixing a date when an election begins from this point of view."

It seems to me that the meaning of the term "election" as used in Art. 329 (b) must, therefore, be determined on a consideration of the whole procedure whereby a person is elected to the Parliament or to a State Legislature in accordance with the provisions of the Representation of the People Act, 1951. The effect of these provisions is that the election is held in the case of a State Legislative Assembly in pursuance of the notification or notifications issued under S. 17 of the Act by Raj Pramukh or the Governor, as the case may be, for the constitution of the Assembly. After the issue of this notification, dates for the filing of nomination papers, for their scrutiny and for the withdrawal of candidatures are fixed under S. 30. Nomination papers of candidates for election are then presented to the Returning Officers; they are scrutinised and after scrutiny, a list of valid nominations is published in the prescribed manner. Thereafter, if the number of candidates duly nominated is more than the number of seats to be filled, a poll is taken, if the number of candidates is equal to the number of seats to be filled, the candidates are declared to be duly elected to fill those seats without a poll being taken; & if the number of candidates is less than the number of seats to be filled, the procedure laid down in S. 53(3) of the Act is followed. The next step when a poll is taken is the counting of votes and when the counting is completed, the Returning Officer declares the result of the election and makes a report of the result in the manner provided by the Act. Lastly, the results of the election are published in accordance with S. 74 of the Act. A close examination of these provisions leads me to the conclusion that from the point of view of the question before us, the election commences when a nomination paper of the person seeking election is presented to the Returning Officer and ends when the Returning Officer declares the result of the election. The act of the Returning Officer, therefore, in refusing to receive a nomination paper, or in accepting or rejecting a nomination paper after scrutiny is clearly a matter which forms a part of the election.

(30) During the course of his arguments Mr. Ojha drew our attention to the difference in the wording of Art. 329 (b) on the one hand and Arts. 327 and 323 on the other and sought to emphasise the point that inasmuch as in Arts. 327 and 328, the words "with respect to all matters relating to, or in connection with the election" have been used to enlarge the field of legislation of the Parliament and the State Legislatures, the word "election as used in these Articles and Art. 329(b) can only be taken as bearing the meaning contended by him. This argument cannot be accepted. I do not propose to enter into an examination of the meaning and scope of the word "election" as used in Arts. 327 and 328 or in item 72 of list I and in item 37 of list II of the seventh schedule. But it seems to me necessary to point out that the object of Arts 327 and 328 and the use of the words therein, namely, "with respect to all matters relating to, or in connection with the elections" is to enlarge the scope of the powers of Legislation of the Parliament and the State Legislatures beyond the limits expressed in Art. 246 of the Constitution which gives to the Parliament the power to make laws with respect to matters enumerated in list I and to the State Legislatures with respect to matters enumerated in List II. The necessity for the use of the words referred to above in Arts. 327 and 328 becomes obvious when one remembers the observations of Sulaiman J., in 'UNITED PROVINCES v. ATIQA BEGAM', AIR (28) 1941 F C 16, that the words "with respect to" as used in S. 100 of the Government of India Act, 1935 are not necessarily the exact equivalent of 'relating to' or 'connected with'. These words may not include a case where the subject of legislation is only remote related or very indirectly connected with the matters mentioned in the categories. An act may principally be with respect to some other subject and yet it may incidentally relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connection, would not be sufficient to answer the affirmative the question whether it is with respect to such subject. It is not enough that it should be in its working somehow overreach that subject. It has to be seen whether it appertains to such matters substantially and directly, and not only whether it should in actual operation affect any such matter in an indirect way". I do not think that the words "with respect to all matters relating to, or in connection with" used in Arts. 327 and 328 can be taken to have been used because the meaning of 'election' is restricted to the result of the election or to the actual casting of votes.

(31) In my view, the term "election" as used in Art. 329(b) seems to cover the whole procedure that takes place after the issue of a notification calling upon the constituencies concerned to elect members in accordance with the provisions of the Representation of the People Act, 1951, and whereby a person is returned whether or not it be found necessary to take a poll. It follows, therefore, that the refusal of a Returning Officer to receive a nomination paper, or to accept or reject a nomination paper after scrutiny is a matter in the course of an election and this Court has no jurisdiction to entertain the petitions challenging the acts done by the Returning Officers in the present two cases.

(32) Indeed, to hold otherwise is to ignore all the difficulties and anomalies arising out of a conflict of jurisdiction between the High Court & the Special Tribunals contemplated by the Constitution and the Representation of the People Act, 1951, to enquire into and determine election disputes. I find it difficult to believe that the farmers of the Constitution and the Parliament while contemplating that special tribunal should be seized of disputes regarding elections, intended that the High Court should also have concurrent jurisdiction

with the Tribunal. If they wanted not to bar the jurisdiction of the High Court and not to give exclusive jurisdiction to the Tribunals, nothing would have been easier than to give an expression to such an intention by express words in the Constitution. The inconvenience & difficulties that would result by giving this Court concurrent jurisdiction with the Tribunal can better be imagined than described. If the High Court was to have concurrent jurisdiction, one would have expected provisions in the Constitution and the Representation of the People Act, 1951, concerning these difficulties.

(33) It may be mentioned that the device of having election disputes determined by Special Tribunals to the exclusion of High Courts and other Civil Courts is not a new or special feature in our Country. It existed under the Government of India Act, 1915, and the subsequent Act of 1935. In many countries, the Courts decline to make an order in the nature of a writ of mandamus for the holding of a Parliamentary election or in relation to any dispute regarding the election on the ground that it would constitute an intrusion under the Constitution of the country upon the functions and privileges of the Legislature of that country. (See 'WILLIAM TEMPLE v. BULMER', (1943) Canada L R (S C) 265, in England, an election to the House of Commons can be challenged under the Parliamentary Elections Act, 1868, by presenting a petition to the King's Bench Division of the High Court of Justice. The trial of the petition is conducted by two Judges of the High Court. The determination of the Court is reported to the Speaker and is entered upon the journals of the House of Commons. This method has obviously been adopted to preserve the matter of election disputes as a privilege of the House and at the same time to avoid the adjudication of election petitions by a House susceptible to party passions. Into the reasons which impellel the framers of our Constitution and the Parliament to exclude the jurisdiction of Courts in relation to elections, it is purposeless to enter here. They have in their wisdom provided a special procedure and tribunals for the determination of election disputes. It is not the business of this Court to improve the provisions giving the special remedy but only to interpret and apply them. In making the above observations and in holding that this Court has no jurisdiction to entertain these petitions, I wish to guard myself against being understood as expressing any opinion on the question whether a decision of the election tribunal or any proceedings of the tribunal could be challenged before this Court by way of a petition under Art. 226 or 227. The question may have to be decided at the proper time when it comes before this Court, and I reserve my opinion thereon.

(34) There remains one contention advanced on behalf of the applicant Masade, which I must notice, before concluding this judgment. Learned Counsel appearing for Masade said that the refusal to receive the nomination paper of the petitioner was not a part of the election, as in doing so the Returning Officer failed to exercise the jurisdiction vested in him by S. 33 of the Representation of the People Act, 1951. According to the learned Counsel, the position would have been different if the Returning Officer had received the nomination paper and rejected it after scrutiny on the day fixed for it. It was, therefore, argued that this Court could direct the Returning Officer to exercise the jurisdiction conferred on him under S. 33. There is no substance in this contention. I have already pointed out that the refusal of a Returning Officer to receive a nomination paper is as much a part of election as its rejection after scrutiny. It makes no difference whether a nomination paper is refused by the Returning Officer or rejected by him after scrutiny. In either case, it is rejected. To my mind, the question, here, is not whether the Returning Officer has failed to exercise the jurisdiction vested in him by law or has erroneously exercised that jurisdiction. It is whether this Court has the authority under Art. 226 to correct any action or decision of an erring Returning Officer who fails to carry out his statutory obligations, however arbitrary and despotic the order or decision may be. As I have said before, the Constitution and the Representation of the People Act, 1951, provide a remedy against such actions and the decisions of the Returning Officers by way of an election petition after the election is over.

(35) For the above reasons, I am constrained to hold that our jurisdiction to entertain these petitions is excluded. I use the word "constrained" deliberately, because I appreciate the feelings and the disappointment of the petitioners in being required to wait until the elections are over for seeking redress of their grievances. But on a reasonable construction of Art. 329(b) and of the relevant provisions of the Representation of the People Act, to carry into effect the plain intention of the framers of the Constitution and of the Parliament, the conclusion cannot be any other than we have already reached.

(36) The petitions must, therefore, be dismissed. In view of the nature and importance of the points raised by the petitions, there should be, in my opinion, no order as to costs in these petitions.

(37) KAUL C. J.: I agree and have nothing to add.

(38) MEHTA J.: I entirely agree with my learned brother Dixit J.

R.G.D. *Petitions dismissed.*

A. I. R. 1952 Madhya Bharat 103

(INDORE BENCH)

REGE J.

State v. Hiralal Gangaram, Opponent.

Misc. Criminal Case No. 133 of 1949, D/- 7-10-1949.

Criminal P. C. (1898), Ss. 207, 213 — Comittal proceedings — Inordinate delay.

The trial or enquiry preliminary to commitment loses its importance by inordinate delay in the proceedings and a large number of adjournments by reason of want of time indicate inefficiency and want of control over the work. It ought not to be difficult for the Presiding Officer of the Court, to get through the work so that parties may not be put to unnecessary inconvenience and expenses and in criminal

cases in particular, the evidence being mostly oral and subject to loss of weight by lapse of time the Presiding Officer must be astute to see that the proceedings are finished without unreasonable delay. (Para 1)

Anno: Cr. P. C., S. 207 N. 1, S. 213, N. 18.

Public Prosecutor, for the State.

ORDER: The opponent was put up before the District and Sessions Judge, Mandsour on an accusation of murder under S. 292 of the Gwalior, Tajirat. The proceedings preliminary to commitment which commenced on 24-6-1948 were closed so far as the prosecution was concerned on 25-1-1949, after a number of unnecessary adjournments several of which were on the ground of want of time. I would observe that the trial or enquiry in a case of this kind looses its importance by inordiante delay in the proceedings and a large number of adjournments by reason of want of time indicate inefficiency and want of control over the work. It ought not to be difficult for the Presiding Officer of the Court, to fix work in such quantity as will reasonably enable him to get through it so that parties may not be put to unnecessary inconvenience and expense and in criminal cases in particular the evidence being mostly oral and subject to loss of weight by lapse of time, the Presiding Officer must be astute to see that the proceedings are finished without unreasonable delay.

(2) On 8-9-1948, all the evidence for the prosecution was over and at the instance of the prosecution the case was fixed for the production of the report of the Chemical Analyser on 13-9-48. Another adjournment was sought on that day and this was granted. On the same day, the accused was released on bail. The offence being one punishable with death or transportation for life reasons should have been given for the release; but none appear on the record. The case made no progress thereafter till 25-1-1949 when the accused was examined and called on to tender evidence on his behalf on 11-3-1949; and the case was again adjourned to 11-4-1949. The proceedings of that date are "File put up after holiday. Put up on 15-5-1949." The 15th was a holiday the file came up on the 16th of May and was ordered to be put up on 11-6-1949. The accused was absent on the 11th of June 1949 and the case was fixed for arguments on 20-6-1949. Eventually, the order of commitment was made on 27-6-1949. All this is deplorable.

(3) At the date of the offence, the village where the alleged offence took place was within the jurisdiction of Mandsour District. After the integration in the Madhya Bharat the village was put in the Rutlam District. On 28-3-1949 an order was published in the Gazette that cases pending in a Court the jurisdiction in which is transferred to another Court should be transferred to the latter Court. It is obvious that the Magistrate at Mandsour had jurisdiction to take cognisance of the offence since the village was then within his charge and the subsequent change could not oust his jurisdiction. The transfer of the village to the Rutlam District considered with Notification regarding the venue of the trial would however invest the Sessions Court at Rutlam with the power to try the case & it would be proper to hold that the case was at the time of the commitment pending in the Mandsour Sessions Division. Consequently it must be transferred for trial to the Sessions Judge Rutlam.

(4) I order accordingly.

G.M.J. *Order accordingly.*

A. I. R. 1952 Madhya Bharat 104

(INDORE BENCH)

SANGHI J.

Radhakishan and another, Appellants v. Keshrimal Hiralal, Respondent.

Second Appeal No. 227 of 1949 D/- 21-11-1949.

Civil P.C. (1908), S. 47 and O. 23 R. 3 — Compromise decree — Execution — Decree held inexecutable.

A compromise decree passed in a suit for ejectment of a tenant provided that the tenant should give vacant possession of the house by 31-8-1947 i.e. with one month and two days of the decree and if he did not do so he would be liable to pay from that date Rs. 50/- per month as damages (mesne-profits).

Held on construction of the decree that the tenant was to have a month's time in which to make his mind whether to quit or stay on the premises at the enhanced rent which was disguised in the name of damages. The decree was therefore inexecutable by way of ejectment. (Para 2)

Anno: C.P.C, S. 47 N. 33 pt. 14; O. 23 R. 3 N. 27.

Nevaskar, for Appellants; N. P. Gupta and M. N. Gupta, for Respondent.

Case referred to.

('07) 31 Bom 15: (8 Bom L R 813) (Pr 2)

JUDGMENT: The appellant is the landlord & the respondent is his tenant. The appellant instituted a suit to eject the respondent from the house occupied by him and his subtenants. The rent was Rs. 15 per month. The suit was compromised and a decree in terms of the compromise was passed. It was provided by the compromise that the tenant-respondent should give vacant possession of the house by 31 August, 1947, and, if he did not he would be liable to pay from that date (आगे) Rs. 50/- per month as damages (mesne profits). This was on 29th July, 1947. On 3rd September, 1947, appellant made an application for the execution of the decree. The relief sought was possession of the house. The learned Munsiff held that under the compromise the appellant was not entitled to enforce delivery of possession, he could only claim the mesne profits. On appeal the District Judge was of the same opinion. Hence this second appeal.

(2) The learned counsel for the appellant submitted that the decree of a Court should not be so construed as to render it inexecutable. The decree is in terms of the compromise and it is the compromise which has to be interpreted not the decree. There is the Rent Control Order in force in the city of Indore, since 1943, and tenants cannot be ejected unless they are not ready and willing to pay the rent. This plea had been taken by the respondent. The question is whether the compromise should be understood as giving the option to the tenant to quit the house or remain therein paying a rent

of Rs. 50/- instead of the original rent of Rs 15/- or that the house was to be vacated by 31st August 1947, and that the Rs. 50/- per month was to be the measure of the mesne profits for the time that might elapse before possession was actually obtained. The compromise is entered into on 29th July 1947 and the tenant is to quit by 31st August, 1947 that is, within one month and two days and if he unlawfully remains after this date he is to pay Rs. 50/- as damages for the period of unlawful occupation. I am of the opinion that what was meant was that the tenant was to have a month's time in which to make up his mind whether to quit or stay on the premises at the enhanced rate of rent. The significant word in the agreement is the word indefinite 'आगे' that is 'thereafter.' If the period in between the date fixed and the date of obtaining actual possession was meant, it would have been so stated. The learned counsel for the appellant submitted that the compromise were construed against him, he would for all time be debarred from ejecting the respondent. I do not think so. The respondent continues under the agreement, to be appellant's tenant from 1st September, 1947 at a monthly rent of Rs. 50/- per month. The use of word नुकसानी (damages or mesne profits) is merely a disguise to hide the fact of enhanced rent. I am of the opinion that in the decree is embodied the agreement of the parties and it is inexecutable. The agreement is but an instance of the frantic efforts made by landlords to evade the operation of a severe law. The contract gains no strength by being embodied in a decree: 'Krishnabai v. Hari', 31 Bom. 15.

(3) The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1952 Madhya Bharat 105

(INDORE BENCH)

SHINDE AND DIXIT JJ.

Mrs. Lilawati Mutatkar, Petitioner v. State of Madhya Bharat.

Civil Misc. Appln. No. 94 of 1951, D/- 5-2-1952.

† (a) *Constitution of India, Art. 226, Art. 310, Art 311 and Art. 309 Proviso — Civil Service (Punishment and Appeal) Rules, 1950, R. 8 — Civil Servant — Dismissal of — Mandamus to compel reinstatement does not lie.*

It is clear from Art. 310 that persons employed in the service of the State, are engaged on the express statutory condition that they hold their employment at the pleasure of the President or the Governor or the Raj Pramukh, as the case may be, and that they can be dismissed, removed, or reduced in rank at the pleasure of these authorities subject to the limitation imposed by Art. 311. It must be noted that Art. 311 does not in any way, alter or affect the principle embodied in Art. 310 that a Government servant holds office during the pleasure of the President or the Governor or the Raj Pramukh as the case may be. It only imposes certain statutory obligations before dismissal or removal or reduction in rank is effected. It is the breach of these statutory obligations that affords a cause of action to a person adversely affected to complain that his employment has been wrongly terminated. If in the termination of his employment, there is no contravention of Art. 311, the High Court would have no jurisdiction to quash the order terminating the services. (Para 6)

The (Madhya Bharat) Civil Service (Punishment and Appeal) Rules, 1950, which prescribe the conditions of the service, that is to say, the circumstances and the manner in which the employment of a Civil Servant can be terminated though framed by the Raj Pramukh under the power conferred by the proviso to Art. 309 of the Constitution, do not in any way abridge or control the power of the President or the Governor or Raj Pramukh to dismiss at pleasure a Civil Servant. These rules are merely administrative rules for the guidance of officers of the Government in the imposition of penalties and in the conduct of departmental inquiries against Government servants. The dismissal, removal or reduction in rank of a Civil servant in violation of the Rules would not by itself entitle him to come to the High Court but would leave him to appeal to the administrative authorities. It is only a breach of Art. 311 that furnishes to a Civil Servant adversely affected to come to the High Court or to approach a Civil Court for redress. (Para 6)

As there is no statutory obligation on the State to retain the petitioner in the service, an order in the nature of a mandamus cannot clearly be issued to the State to reinstate him. A mandamus cannot be issued to compel an appointment in the office held at pleasure. (1892) 2 Q. B. 21, Rel. on. (Para 7)

Even if it is assumed that in the termination of the petitioner's services, Art. 311(2) of the Constitution had not been complied with, on that ground alone the High Court would not be justified in giving to the applicant the remedy by a mandamus. For, a mandamus is not granted unless it clearly appears that it will be effectual. If the State had sufficient cause to remove the petitioner from service, it would, undoubtedly, remove him again after complying with the provisions of Art. 311(2), if the Court orders the State by mandamus to reinstate him in the office and thus the State would render the order in the nature of a mandamus inoperative. The petitioner cannot clearly be granted a mandamus to set aside the order of the Government terminating his services though the order may be illegal. A mandamus does not lie for declaring that an act of a person or an authority is illegal and ultra vires. It only lies to compel public officials or bodies to carry out their statutory duties. (Para 7)

Anno: C. P. C., App. III, Constitution of India, Art. 226 N. 7, 11.

† (b) *Constitution of India, Art. 226, Art. 310, Art 311 — Certiorari, writ of — Dismissal of Civil Servant — Act is purely administrative — Certiorari cannot be issued to correct dismissal order — Petitioner whether entitled to any other relief — (Madhya Bharat) Civil Service (Punishment and Appeal) Rules, 1950, R. 8.*

It is evident on the language of Arts. 310 and 311 of the Constitution that an order of dis-

missal, removal or reduction of a Civil servant is an administrative order. There is nothing in the language of these articles to suggest that in making such an order the competent authority is obliged to act judicially. These articles recognise the principle that a Civil Servant holds his employment at the pleasure of the President, Governor, or the Raj Pramukh, as the case may be, and they may put an end to the employment at any time for any reason stated or unstated, if in their opinion the continued employment of the Civil servant is detrimental to the interests of the State and the service. It is, no doubt, true that Art. 311(2) prohibits the dismissal removal or reduction of a Civil servant until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But this provision of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" cannot be treated as a condition imposing a quasi-judicial duty on the competent authority in passing an order of dismissal, removal or reduction of a Civil Servant. (Para 16)

Nor does the fact that R. 8 of the Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950 contemplates an inquiry into such of the allegations as are not admitted by the Civil servant and entitles him to cross-examine witnesses, and to lead his own evidence, import an obligation of acting quasi-judicially in the making of an order for the dismissal, removal, or reduction of the Civil servant. (Para 18)

Apart from the fact that the enquiry into allegations denied by the civil servant is optional with the authority, Rule 8 does not cast on the authority the duty to call evidence before the inquiry and justify the charges against the Civil Servant and prove them. The rule simply gives an opportunity to the civil servant to state his objections and call such evidence as he might be advised. (Para 18)

All service under the State being public service and for the public benefit, in making a decision, about the removal, dismissal, or reduction of a Civil Servant the authority must obviously be guided by its own views as to what is expedient in the interests of the State and the Service. The authority can base its opinion on whatever material it may think fit. This cannot be affected by the fact that the authority decides to hold an inquiry. The object of such an inquiry can only be to clear matters upon which the authority may like to be better informed. The inquiry cannot bind the discretion of the authority as to the material on which it may take action although it may have some bearing on the question of bona fides. (Para 19)

It is entirely erroneous to say that an order is quasi-judicial because it can be reviewed or is appealable. An administrative order can be subject to review or appeal by the appropriate administrative authority in much the same way as a judicial order, is by judicial authorities. It is impossible to suggest that the nature of an order which is purely administrative and of the proceedings leading to it, is entirely changed when it comes up before the reviewing or the appellate authority. (Para 11)

In this view, an order terminating the services of a Civil Servant, cannot be quashed on certiorari. No other form of remedy under Art. 226 can be granted for the purpose of reviewing or avoiding the order of termination of his services. A mere declaratory relief that the removal of the applicant from service was illegal cannot be given under Art. 226. (Para 22)

Ordinarily the power under Art. 226 should not be exercised by the High Court if the petitioner has other convenient or adequate remedy. The burden lies on the applicant to show that he has no other specific and adequate legal remedy. (Paras 27 and 28)

The question whether the applicant has been given a reasonable opportunity of showing cause as required by Art. 311(2) is a question of fact or a question of law arising out of interpretation of facts proved. As the applicant's right to come to the High Court depends on certain facts which have to be proved the remedy under Art. 226 of the Constitution, would be inappropriate. For the High Court cannot clearly enter into an investigation of the facts on which the petitioner bases his claim. They can conveniently be proved by the petitioner in a regular suit in a civil Court having the jurisdiction. In certiorari proceedings, the Court only considers the question whether the order which is challenged is on the face of it and on the material as it appears on the record returned and brought into the Court, was made by the authority acting within its jurisdiction. If, therefore, there is a dispute as to the facts constituting the material on the record, it cannot be said that the error, if any, in the order appears on the record. (Para 29)

Anno: C. P. C., App. III; Constitution of India, Art. 226 N. 7, 8, 13.

Homi Daji, for Applicant; K. A. Chitale, Advocate-General, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) AIR (35) 1948 P C 121: (1948 F C R 44) (Prs 17, 18)
('45) AIR (32) 1945 F C 47: (1945 F C R 103) (Prs 16, 18)
('50) AIR (37) 1950 S C 222: (1950 S C R 621) (Prs 8, 10, 11, 18, 23)
('51) Cases Nos. 300 to 304 of 1951: (AIR (39) 1952 S C 12) (Pr 26)
('50) AIR (37) 1950 Bom 363: (52 Cri L J 120 (F B)) (Pr 23)
('51) AIR (38) 1951 Bom 440: (53 Bom L R 621) (Pr 25)
('50) AIR (37) 1950 Madh B 46 (Pr 24)
('51) AIR (38) 1951 Madh B 121: (52 Cri L J 1305) (Pr 24)
('51) Civil Misc Case No. 22 of 1951: (M L R (1952) Civil 42) (Pr 23)
('51) AIR (38) 1951 Nag 138 (Pr 25)
(1947) 1 All E R 851: (1947 L J R 1285) (Pr 18)
(1947) 2 All E R 289: (1947 L J R 1440) (Pr 8)
(1924) 1 K B 171: (93 L J K B 390) (Pr 9)
(1928) 1 K B 411: (97 L J K B 222) (Pr 11)
(1892) 2 Q B 21: (61 L J M C 151) (Pr 7)

DIXIT J.: In this application under Art. 226 of the Constitution of India, for the issue of a writ in the nature of certiorari and also for a

writ in the nature of mandamus, the petitioner Mrs. Lilawati Mutatkar states that from 18-5-49 until 5-8-50, she was employed as a stenographer in the Health Ministry of the Madhya Bharat State and was working as a stenographer to the Deputy Secretary, Police; that on 5-8-50 she was suddenly suspended pending a departmental inquiry into her conduct and that on 6-11-50 she was served with a notice intimating to her the result of the inquiry & asking her to state within four days whether she accepted or denied the accuracy of the allegation against her, namely that she had contravened rule 21 (1) of the Government Servant's Conduct Rules by associating herself with persons engaged in subversive activities; that on 13-11-50 she made a representation to the Deputy Secretary Police Department denying the allegations and requesting him to furnish her with the details of the charges against her, but no such details were given to her and that on 18-11-50 the Chief Secretary of the Madhya Bharat Government sent her a memo terminating her services "on account of her undesirable antecedents and association with persons engaged in subversive activities". The petitioner proceeds to say that subsequently on 4-12-50 she applied for a review of the order terminating her services; the review petition was rejected and she was informed that as her case was covered by proviso (3) to R. 8 of the Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950, there had been no irregularity of procedure in her case. The applicant, then, says that on 6-2-51 she appealed to the Chief Minister against the order of the Chief Secretary terminating her services and that while this appeal was pending, she was informed that there was a typing error in the letter dated 20-1-50 of the Under-Secretary Appointment Department communicating to her the rejection of the review petition on the ground that her case was covered by proviso (3) to R. 8 of the Madhya Bharat Civil Services Rules, 1950 and that in fact her case was covered by proviso (c) to R. 8. The petitioner's complaint is that the inquiry following her suspension was held in her absence; that at no time was she informed of the concrete charges against her and the evidence on which they were being put forward, and that she was never told that the termination of her services was the punishment proposed against her and further that she was never given a reasonable opportunity of showing cause why the punishment of termination of her services should not be imposed.

(2) The petitioner seeks an order in the nature of a certiorari to quash the decision of the Chief Secretary terminating her services and to declare the termination of her services as "improper, illegal and inoperative and void". An order in the nature of a mandamus is also asked for directing the State to set aside the order of the termination of the applicant's services and to reinstate her in her former post or to provide her with a post of like standing, status and remuneration and to reimburse the petitioner in full for the loss of pay occasioned by her wrongful dismissal from service.

(3) In the affidavit in reply filed on behalf of the State, the petition is being opposed inter alia on the grounds, firstly, that a writ of certiorari to quash the order of the Govt. terminating the petitioner's services cannot be issued as it is a purely administrative order; secondly, that the remedy by the issue of a writ of mandamus is not competent as final orders have already been passed by the Government against the petitioner; thirdly, that the petitioner has efficacious remedy by way of a suit; fourthly, that for the alleged wrongful termination of her services, the petitioner cannot invoke the aid of Art. 226 for a relief of damages or for a declaration that the order terminating her services is void and lastly that the petitioner's complaint that she was not aware of the charges against her is not true; that she was

> "duly appraised of the main allegation against her and to the extent to which the disclosure of the material on the record against her could be made consistently with the interest of the security of the State,"

and that the order passed against the petitioner was not mala fide. In presenting this affidavit before us, the learned Advocate General stated that in the event of this Court finding it necessary to enter into an examination of the facts and the details of the procedure adopted by the Government in making the order of the termination of the petitioner's services, Government should be given leave to file a further affidavit of the Officer who actually conducted the inquiry against the petitioner. It was said that this affidavit could not be filed immediately as the Officer concerned was on training outside the Madhya Bharat State. The submission of Mr. Daji, the learned Counsel appearing on behalf of the petitioner, is that in the termination of the petitioner's services, the provisions of R. 8 of the Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950 and of Art. 311 (2) of the Constitution had not been complied with and consequently the order terminating the petitioner's services is wrongful, illegal and ultra vires the State Government. Mr. Daji pointed out that under the aforesaid R. 8, no order of dismissal, removal or reduction in rank can be passed on a member of the service other than an order based on facts found proved by a criminal Court, unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. This rule further provides that:

> "The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires and if the authority so directs an inquiry shall be conducted as to such of these allegations as are not admitted and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a reasonably sufficient record of evidence and a statement of the findings and the grounds thereof."

(4) It was said that it is only when as a result of the findings of such a departmental in-

quiry, a definite conclusion is reached as to the charges and the actual punishment is provisionally decided upon, and then as required by R. 8 (4) of the Civil Services (Punishment and Appeal) Rules and Art. 311 (2) of the Constitution, the Government servant is given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, that an order of dismissal or removal or reduction in rank can be passed. The substantial matter of complaint against the order dated 18-11-50 of the Chief Secretary terminating the petitioner's services is that in conducting the inquiry which led to that order and in making the order, the Deputy Secretary and the Chief Secretary did not regard themselves, as it was said, they should have done, as persons exercising quasi-judicial functions and they did not communicate to the petitioner the material suspected to be against her and did not give her a real and effective opportunity of disproving allegations made against her, or of showing cause why the punishment of terminating her services should not be imposed. Learned Counsel for the petitioner stated that the departmental inquiry was held in the absence of the petitioner, and argued that it was not sufficient compliance of the provisions of Art. 311 (2) and R. 8 of the Civil Service Rules to tell the petitioner that the ex parte inquiry showed that she had contravened R. 21 of the Government Servant Conduct Rules associating herself with persons engaged in subversive activities and that consequently she was liable to have her services terminated, and then asking her to state within four days whether she accepted or denied the accuracy of these allegations. It was further contended that after the commencement of an inquiry under R. 8 (1), the Raj Pramukh could not direct under proviso (c) to this clause, that in the interest of the security of the State, it was not expedient to give to the petitioner a reasonable opportunity of showing cause or of defending herself and that in any case the communication to the petitioner while the appeal was pending before the Chief Minister that her case was covered by proviso (c) to R. 8 (1) of the Civil Services Rules was an after-thought, intended to cover the defects in the inquiry and only indicated that the order of the termination of the petitioner's services was mala fide.

(5) I need not set out the arguments of the learned Advocate General. In saying this, I do not mean any disrespect to him. It will be sufficient to state that during the course of his arguments, the learned Advocate General forcibly elaborated the objections raised in the affidavit filed on behalf of the State. I have derived considerable assistance from his arguments in formulating my reasons for the conclusion that I have reached that this petition must be rejected. What I propose to state presently is, substantially what the learned Advocate General addressed to us. There are, as it appears to me, a variety of grounds on which this application should be rejected. In order to determine whether the applicant is entitled to the reliefs which she specifically seeks, namely, an order in the nature of a mandamus and an order in the nature of a certiorari, it is first necessary to see whether there is a legal obligation on the State to continue to employ the applicant, and also to consider whether the order dated 18-11-50 of the Chief Secretary terminating the petitioner's services is a quasi-judicial or an administrative act. It is well settled that a writ of mandamus is issued

> "to direct any person, corporation or inferior Court of jurisdiction requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

Under Art. 226 of the Constitution, a writ in the nature of mandamus can also be issued in appropriate cases to any Government. But the applicant for an order in the nature of a mandamus must show that the Government or the public authority or official is under an absolute and not a discretionary duty to perform certain functions which it has omitted to do and that the applicant has a demonstrable interest in the performance of that duty. See Halsbury's Laws of England, Volume IX (Hailsham edition), Arts. 1269-1279-1303). It is also equally well-established that a writ of certiorari is issued against inferior Courts or persons or authorities who are required by law to act judicially or quasi-judicially and only in those cases where they act in excess of their jurisdiction. A writ in the nature of certiorari is not issued to correct an administrative act.

(6) Now as regards the tenure of office of persons serving the Union or a State, Art. 310 of the Constitution says that except as expressly provided by the Constitution, every person who is a member of the Civil Service of the Union and every person who is a member of the Civil Service of a state holds office during the pleasure of the President or of the Governor or the Rajpramukh as the case may be. Art. 311 prescribes the conditions which must be fulfilled before a person who is a member of the Civil Service is removed or dismissed or reduced in rank. It provides (1) that a member of the Civil Service shall not be dismissed or removed by an authority subordinate to that which he was appointed and (2) that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The proviso to Cl. 2 of Art. 311 lays down three circumstances under which a member of a civil service can be removed without being given an opportunity to show cause against the action proposed to be taken in regard to him. It is thus clear that persons employed, as the petitioner was in the service of the State, are engaged on the express statutory condition that they hold their employment at the pleasure of the President or the Governor or the Raj Pramukh, as the case may be, and that they can be dismissed, removed, or reduced in rank at the pleasure of these authorities subject to the limitation imposed by Art. 311. It must be noted that Art. 311 does not, in any way, alter or affect the principle embodied in Art. 310 that a Government servant holds office during the pleasure of the President or the Governor or the Raj Pramukh as the case may be. It only imposes certain statutory obligations before dismissal or removal or reduction in rank is effected. It is the breach of these statutory obligations that affords a cause of action to a person adversely affected to complain that his employment has been wrongly terminated.

The extent of the rights of a Government servant in the matter of tenure of his office must be gathered only from a reading of Articles 310 and 311 of the Constitution. He can-

not have any rights apart from these provisions in the Constitution. During the course of his arguments, learned Counsel for the petitioner seemed to suggest that the petitioner has a cause of action as her services were not terminated as provided by the Civil Service Rules, 1950 and in accordance with the procedure laid down in Rule 8. Having regard to this argument, I think it is only right to state that these Rules which prescribe the conditions of the service, that is to say, the circumstances and the manner in which the employment of a Civil Servant can be terminated, though framed by the Raj Pramukh under the power conferred by the proviso to Art. 309 of the Constitution, do not in any way abridge or control the power of the President or the Governor or the Raj Pramukh to dismiss at pleasure a Civil Servant. These Rules are, as Art. 309 itself indicates, subject to the provisions of the Constitution. The subjection of these rules to the provisions of the Constitution and the opening words of Art. 310 (1) "except as expressly provided by this Constitution" leave no doubt that the Civil Services (Punishment and Appeal) Rules, 1950, cannot be regarded as clogs on the right of the President or the Governor or the Raj Pramukh to dismiss a Civil Servant at will after fulfilling the requirements of Art. 311. These rules are merely administrative rules for the guidance of officers of the Govt. in the imposition of penalties and i the conduct of departmental inquiries against Government servants. The dismissal, removal or reduction in rank of a Civil Servant in violation of the Rules would not by itself entitle him to come to this Court but would leave him to appeal to the administrative authorities. It is only a breach of Art. 311 that furnishes to a civil servant adversely affected to come to this Court or to approach a civil Court for redress.

It must not be taken that I am in any way laying down, that in removing, dismissing, or reducing in rank a civil servant, the procedure prescribed by R. 8 of the Civil Service Rules, 1950 need not be followed or that a reasonable opportunity of showing cause against action proposed to be taken in regard to a Civil Servant means an inquiry much more elaborate than that contemplated under the said rule. The question, whether an aggrieved civil servant has in fact been given a reasonable opportunity or not, as required by Art. 311(2) of the Constitution, is a question of fact to be determined in each case on its facts and circumstances. The point I wish to emphasise is that a civil servant holds his appointment at the pleasure of the President or the Governor or the Raj Pramukh, as the case may be, and if in the termination of his employment, there is no contravention of Art. 311, this Court would have no jurisdiction to quash the order terminating the services.

(7) It follows, therefore, that as the petitioner in the present case, held her employment at the pleasure of the Raj Pramukh, there is no statutory obligation on the State to retain her in the service. That being so, an order in the nature of a mandamus cannot clearly be issued to the State to reinstate the applicant in her former post or to provide her with a post of like standing and status. It has been held in 'REG. v. BODMIN CORPORATION', (1892) 2 Q B 21, that a mandamus will not be issued to compel an appointment in the office held at pleasure. Even if it is assumed that in the termination of the petitioner's services, Art. 311(2) of the Constitution, had not been complied with, on that ground alone this Court would not be justified in giving to the applicant the remedy by a mandamus. For, a mandamus is not granted unless it clearly appears that it will be effectual. If the State had sufficient cause to remove the petitioner from service, it would, undoubtedly, remove her again after complying with the provisions of Art. 311(2), if this Court orders the State by mandamus to reinstate her in the office and thus the State would render the order in the nature of a mandamus inoperative. The petitioner cannot clearly be granted a mandamus to set aside the order of the Government terminating her services though the order may be illegal. A mandamus does not lie for declaring that an act of a person or an authority is illegal and ultra vires. It only lies to compel public officials or bodies to carry out their statutory duties. Accordingly, I think the relief of an order in the nature of mandamus cannot be granted to the applicant.

(8) Turning next to the relief of an order in the nature of certiorari and to the question whether the order of the Government terminating the applicant's services is a quasi-judicial or an administrative order, that relief, in my view, cannot be made available to the applicant as in my view, the order made against her is an administrative order. The contention of Mr. Daji on this head is that as the order of the Government terminating the employment of a civil servant is an order affecting her rights, there is a presumption that the Government must in making that order act quasi-judicially. It is also argued that inasmuch as no order of dismissal, removal, or reduction in rank can be passed on a member of the service unless a quasi-judicial inquiry as contemplated by R. 8(1) is held and unless as required by Art. 311 (2) a reasonable opportunity is given to the Government servant of showing cause against the action proposed to be taken in regard to him, it follows that there is a statutory obligation on the authority concerned to act in a quasi-judicial manner in making an order for the removal, dismissal or reduction in rank of a member of the service and that if an order is passed in violation of R. 8(1) and Art. 311(2) then the order being ultra vires and illegal can be a subject of proceedings by way of certiorari. In support of this submission, learned Counsel for the petitioner relied on 'PROVINCE OF BOMBAY v. KHUSHAL DAS ADVANI', AIR (37) 1950 S C 222 and 'FRANKLIN v. MINISTER OF TOWN AND COUNTY PLANNING', (1947) 2 All E R 289.

(9) I do not think that the applicant can draw much help to support her petition from these cases. In addition to these cases relied on by the applicant, there are also a number of Indian and English authorities dealing with the question of a quasi-judicial order and an administrative order in relation to such matters as requisitioning of property, grant and cancellation of permits and licences, closing orders, clearance orders and other orders of that kind. But in my opinion, these cases are only illustrative of the general principle stated by Lord Justice Atkin (as he then was) in 'REX v. THE ELECTRICITY COMMISSIONERS, LONDON ELECTRICITY JOINT COMMITTEE', (1924) 1 K B 171, that

> "the operation of the writs has extended to control the proceedings of bodies which do not

claim to be, and would not be recognised as Courts of Justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

(10) It seems to me that the question whether an order made by an authority is a quasi-judicial or an administrative order is not a general or abstract question of principle. It has to be determined on a construction of the relevant provisions of the particular statutes under which the order in question is made by the authority concerned. Some of the tests to find out whether an authority making an order under an Act, acts in quasi-judicial or in an administrative capacity have been indicated in the decision of the Supreme Court in 'PROVINCE OF BOMBAY v. KHUSHAL DAS ADVANI', AIR (37) 1950 S C 222. In that case, Kania, C. J., in Para. 7 of his judgment rejected as unsound the proposition that whenever there is a determination of a fact which affects the rights of parties, the decision is quasi-judicial. He observed:

"Every decision of the executive generally is a decision of fact and in most cases affects the rights of some one or the other. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari.....it seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed."

(11) In 'ADVANI'S CASE', (AIR (37) 1950 S C 222), Das J. emphasised that it is the duty to act judicially which distinguishes a quasi-judicial act from an administrative act, and in support he referred to the observations of Lord Hewart C. J., in R v. LEGISLATIVE COMMITTEE OF THE CHURCH ASSEMBLY', (1928) 1 K B 411 that

"In order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

(11 a) Das J., then analysed with reference to the decided cases the circumstances under which a statutory body can be said to be under a duty to act judicially and laid down the following principles.

"(i) That if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

(12) He pointed out that the two kinds of facts, namely, quasi-judicial and administrative acts have many common features, by saying that:

"A person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power. He has to consider facts and circumstances and to weigh pros and cons in his mind before he makes up his mind to exercise his power just as a person exercising a judicial or quasi-judicial function has to do. Both have to act in good faith. A good and valid administrative or executive act binds the subject and affects his rights or imposes liability on him just as effectively as a quasi-judicial act does. The exercise of an administrative or executive act may well be and is frequently made dependent by the Legislature upon a condition of contingency which may involve a question of fact, but the question of fulfilment of which, may, nevertheless, be left to subjective opinion or satisfaction of the executive authority."

(13) It was then stressed by Das, J., that a mere provision for an inquiry as a preliminary step in coming to a decision will not necessarily make the decision a quasi-judicial act, for the purpose of inquiry may only be to enable the deciding authority to make up its mind to do what may be a purely administrative act.

(14) In this connection, it is instructive and helpful to refer to the opinion expressed by the Committee on Ministers' Powers (Appointed in England in 1929 under the Chairmanship of the Earl of Donoughmore) on the distinction between administrative and judicial decisions. The Committee observed at p. 81 of the Report (Cmd 4060 of 1932) as follows:

"Decisions which are purely administrative stand on a wholly different footing from quasi-judicial as well as from judicial decisions and must be distinguished accordingly. Indeed, the very word "decision" has a different meaning in the one sphere of activity and the other. When a person resolves to act in a particular way, the mental step may be described as a decision. Again when a Judge determines an issue of fact upon conflicting evidence, or a question of law upon forensic argument, he gives a "decision". But the two mental acts differ. In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submission and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion."

(15) It would seem, accordingly that a quasi-judicial decision is nothing but an administrative decision, some stage or some element of which possesses judicial characteristics. Whether the decision is quasi-judicial or administrative, it is one taken by the competent authority in the exercise of its discretion. But the feature which separates a quasi-judicial act from an administrative act is, the mode or manner in which the opinion on the basis of which the act is done by the authority in the exercise of its discretion, is formed. The decision of the authority is quasi-judicial if in reaching that decision the authority is required first to ascertain certain facts by means of evidence and is then free to take such action as it may think fit on the facts so ascertained. In such a case, the authority must consider the representations of the parties and give them an opportunity to adduce and examine the evidence. On the other hand, the decision would be purely administrative if in taking the decision the authority has the freedom to base its opinion on whatever material it thinks fit, whether obtained in the ordinary course of its executive functions or derived from the evidence at an inquiry, if there is any. The answer, therefore, to the question whether an authority in the discharge of its statutory duties acts in an administrative or quasi-judicial capacity must necessarily depend on the particular provisions of the statute in their application to the particular subject-matter.

(16) Applying these principles here, it is evident on the language of Arts. 310 and 311 of the Constitution that an order of dismissal, removal or reduction of a Civil Servant is an administrative order. There is nothing in the language of these articles to suggest that in making such an order the competent authority is obliged to act judicially. As I have already pointed out, these articles recognise the principle that a Civil Servant holds his employment at the pleasure of the President, Governor, or the Raj Pramukh, as the case may be, and they may put an end to the employment at any time for any reason stated or unstated, if in their opinion, the continued employment of the Civil servant is detrimental to the interests of the State and the service. It is, no doubt, true that Art. 311 (2) prohibits the dismissal, removal or reduction of a Civil servant until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But this provision of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" cannot be treated as a condition imposing a quasi-judicial duty on the competent authority in passing an order of dismissal, removal or reduction of a Civil servant. Articles 310 and 311 of the Constitution reproduce in substance the provisions of S. 240 of the Government of India Act, 1935. Sub-section 3 of S. 240 embodied the same provisions which are today contained in Art. 311 (2). In 'SECY. OF STATE v. I. M. LALL', AIR (32) 1945 F C 47, the Federal Court explained that the real point of sub-section 3 of S. 240 of the Government of India Act, 1935 was:

> "that the person who is to be dismissed or removed or reduced must know that, that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed."

(17) This case went up to the Privy Council 'HIGH COMMR. FOR INDIA v. I. M. LALL', AIR (35) 1948 PC 121 and while approving the view of the majority of the Federal Court, their Lordships of the Privy Council observed that:

> "No action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the Civil servant the opportunity for which sub-section (3) makes provisions."

(18) It follows from the decisions of the Federal Court and the Privy Council in the case of 'I. M. LALL', (AIR (32) 1945 F C 47 and AIR (35) 1948 PC 121), that the provision of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" in Art. 311 (2) does not imply that a Civil servant can be dismissed, removed or reduced only if certain facts are found against him by a process analogous to judicial process. It does not make the charges against a Civil servant and the material in support of it a matter of issue between the Civil servant affected and the competent authority. The fact that R. 8 of the Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950 contemplates an inquiry into such of the allegations as are not admitted by the Civil servant and entitles him to cross-examine witnesses, and to lead his own evidence, does not, in my opinion, import an obligation of acting quasi-judicially in the making of an order for the dismissal, removal, or reduction of the Civil servant.

Quite apart from the fact that the inquiry into such of the allegations as are denied by the Civil servant is optional with the authority, it is obvious from the wording of R. 8 that the scope of the inquiry is very limited. The Rule does not cast on the authority the duty to call evidence before the inquiry and justify the charges against the Civil servant and prove them. The rule simply gives an opportunity to the Civil servant to state his objections and call such evidence as he might be advised. It seems clear that the purpose of having an inquiry and of giving an opportunity to a Civil servant to call evidence is further to inform the mind of the authority and not to consider any issue between the authority and the Civil servant.

In this connection, it is pertinent to refer to the observations of Lord Greene M. R. in 'ROBINSON v. MINISTER OF TOWN & COUNTY PLANNING', ((1947) 1 All E R 851, quoted with approval by Das J., in 'PROVINCE OF BOMBAY v. KHUSHALDAS', AIR (37) 1950 S C 222 to emphasise the point that the holding of an inquiry as a preliminary step in coming to a decision, does not necessarily make the decision a quasi-judicial act. Lord Greene said:

> "To say that, in coming to his decision, he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles, but this is quite a different

thing from saying that any such principles are applicable to the doing of the executive act itself, i.e., the making of the order. The enquiry is only a step in the process which leads to the result, and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the Courts by reference to the evidence or lack of evidence at the inquiry which is here relied on."

(19) It seems to me that all service under the State being public service and for the public benefit, in making a decision about the removal, dismissal, or reduction of a Civil servant the authority must obviously be guided by its own views as to what is expedient in the interests of the State and the Service. The authority can base its opinion on whatever material it may think fit. This cannot be affected by the fact that the authority decides to hold an inquiry. The object of such an inquiry can only be to clear matters upon which the authority may like to be better informed. The inquiry cannot bind the discretion of the authority as to the material on which it may take action, although it may have some bearing on the question of bona fides.

(20) That the decision of the authority to dismiss, remove or reduce a Civil servant is purely administrative and that the authority cannot be compelled to reveal matters of fact and opinion, and the use it has made of them in coming to the decision, is confirmed by Cls. (b) and (c) of the Proviso to Art. 311 (2) and clause 3 of Art. 311. Under clause (b) a Civil servant is not entitled to a reasonable opportunity of showing cause against the action proposed to be taken in regard to him if the authority empowered to dismiss or remove or reduce him, is satisfied that for some reason to be recorded it is not reasonably practicable to give to that person such an opportunity. Clause 3 of Art. 311 makes final the decision of the authority on the question whether it is reasonably practicable to give to the Civil servant such an opportunity. Again, a Civil servant is not entitled to such an opportunity under Clause (c) of the Proviso to Art. 311 (2) if the President, Governor or Raj Pramukh, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to give to that person such an opportunity. These provisos appear to me to be the strongest possible indications that the act of the competent authority in making an order of removal, dismissal or reduction of a Civil servant is purely an administrative act—an act of policy, expediency, conscience and judgment.

(21) Learned Counsel for the petitioner suggested that the order in question is a quasi-judicial order as under Rules 10 and 11 of the Civil Services Rules, it is open to review and appeal. I am not quite sure how far Counsel for the applicant desired to lay emphasis on the words "review" and "appeal". But I think it is entirely erroneous to say that an order is quasi-judicial because it can be reviewed or is appealable. An administrative order can be subject to review or appeal by the appropriate administrative authority in much the same way as a judicial order is, by judicial authorities. It seems to me quite impossible to suggest that the nature of an order which is purely administrative and of the proceedings leading to it, is entirely changed when it comes up before the reviewing or the appellate authority. The functions and powers of the reviewing or the appellate authority can at the most be only those which the authority, passing the order sought to be reviewed or appealed from, would have itself exercised. The reviewing or the appellate authority would generally be guided by principles which should in its opinion have governed the proceedings under review or appeal It cannot, therefore, be maintained with any degree of force that if an order is open to review or appeal, the proceedings in review or appeal become quasi-judicial proceedings and that, therefore, the order is a quasi-judicial order.

(22) For the above reasons I am disposed to think that the order dated 18-11-50 of the Chief Secretary terminating the petitioner's services is an administrative and not a quasi-judicial order. That being the position, the order cannot be quashed on certiorari. It is to be observed that the petitioner has asked that she be granted "such further and other relief as the nature of the petition may require." If it be right to say that the order in question cannot be dealt with by an order of mandamus and cannot be touched by an order of certiorari, I fail to see what other form of remedy under Article 226 could be granted to the petitioner for the purpose of reviewing or avoiding the order of termination of her services. A mere declaratory relief that the removal of the applicant from service was illegal cannot be given under Article 226.

(23) Counsel for the applicant then contended that although an order of certiorari could not be issued to correct an administrative order, yet the High Court could under the wide powers conferred by Article 226 issue an order for quashing or reviewing an administrative order in order to safeguard the rights of a citizen. The contention is to a certain extent supported by the decision of the Bombay High Court in 'JESHING BHAI v. EMPEROR', AIR (37) 1950 Bom 363 (F B) where it was held that High Court has under Article 226 the jurisdiction to issue an order against even an executive officer who had issued an administrative order in order to safeguard the fundamental rights of a citizen although a writ of certiorari cannot be granted to correct such an administrative order. The learned Judges of the Bombay High Court were, however, careful to add that the Court will of its own motion put limitations upon its own powers under Article 226 (1) and that it will not exercise this power

> "in a matter which it cannot deal with judicially, nor would it take notice of anything which it cannot take notice of judicially, nor would it interfere with the action of an executive officer unless it is satisfied that the executive officer is under an obligation to do something or forbear from doing something"

There are also observations in the judgment of Kaul C. J. in 'VALLABHDAS v REGIONAL TRANSPORT AUTHORITY INDORE Civil Misc. Case No. 22 of 1951 (Indore Bench) which seem to support the contention that under Article 226, the High Court can interfere with administrative or executive acts if they are proved to have caused injustice to the rights of a citizen. It must be remembered that these observations were made by the learned Chief

Justice while considering the question whether the grant of a permit by the Regional Transport Authority under the Motor Vehicles Act for plying a bus is an administrative or quasi-judicial act. The learned Chief Justice held following 'PROVINCE OF BOMBAY v. KRUSHAL DAS', AIR (37) 1950 SC 222, that the Motor Vehicles Act requires a judicial approach in making a decision about the grant of a permit. In my opinion, these decisions cannot be regarded as laying down any such proposition that whenever a purely administrative order interferes with the rights of a citizen, the High Court should in every case make an appropriate order under Art. 226 to redress the wrong and injustice done to the citizen.

(24) The powers of the High Court under Art. 226 are, no doubt, wide. But that does not mean that the High Courts have unlimited powers to do anything by their writs, orders or directions. I had occasion to consider the scope of Art. 226 in 'HARENDRANATH v. STATE OF M. B.' AIR (37) 1950 M B 46, which was subsequently affirmed in 'DAYA BHAI v. REGIONAL TRANSPORT AUTHORITY', AIR (38) 1951 M B 121. As I pointed out in those cases, the object of Art. 226, in giving to the High Court the discretionary jurisdiction to issue certain directions or writs or orders, is to secure the protection of the rights of the public and to ampliate justice and redress grievances in any matter which the ordinary course of law is too defective to reach. I further stated that in the exercise of its supervisory or corrective jurisdiction, the High Court will have to evolve limitations upon its powers under Art. 226 and indicated that the Court would be loath to make an order in the nature of mandamus or certiorari where there is an alternative remedy which is equally appropriate, efficacious and convenient unless there has been a denial of natural justice.

(25) The same opinion has been expressed by the Bombay High Court in 'ABDUL MAZID HAZI MOHAMMAD v. P. R. NAIK', AIR 1951 Bom 440 and by the Nagpur High Court in 'AHMAD HOSSAIN v. STATE OF MADHYA PRADESH', AIR (38) 1951 Nag 138.

(26) Recently in cases Nos. 300 to 304 of 1951, 25th October, 1951 'STATE OF ORISSA v. MADAN GOPAL RUNGATA' AIR (39) 1952 S C 12, the Supreme Court considered the power conferred on a High Court under Article 226(1) with reference to the question whether directions in the nature of interim relief only could be granted under Art. 226, where the Court expressly stated that it refrained from determining the rights of the parties on which a writ of mandamus or directions of a like nature could be issued. Their Lordships of the Supreme Court after stressing the point that the existence of the right is the foundation of the exercise of the jurisdiction under Art. 226 (1) observed that

> "An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party in final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such a suit, issue directions in the nature of temporary injunction, under Art. 226 of the Constitution."

(27) The observation of the Supreme Court which is material here is that

> "if the Court was of opinion that there was no other convenient or adequate remedy open to the petitioner, it might have proceeded to investigate the case on its merits."

It clearly shows that ordinarily the power under Art. 226 should not be exercised by the High Court if the petitioner has other convenient or adequate remedy.

(28) The burden lies on the applicant to show that she has no other specific and adequate legal remedy. It is not disputed on behalf of the petitioner that she has an alternative remedy of instituting a suit against the State challenging the validity of the order by which her services were terminated and for a declaration that her removal from the service was void and inoperative. But she has failed to state in her petition or place before us the special circumstances which would operate against her in a suit in obtaining the relief which she seeks by this petition. It is not her case that as a result of the termination of her services she is in immediate danger of being without any means of subsistence. Nor does she state that if the order terminating her services is not set aside immediately she would irretrievably lose all chances of promotion in the service, which are imminent. There is thus nothing to show that the question of the determination of the validity of the applicant's removal from the service is a matter one of urgency and that, therefore, the ordinary process of law would not be equally adequate or effective in safeguarding the rights of the petitioner.

(29) There is also a further difficulty in this particular case in the applicant's way. The difficulty is, that the allegations of the applicant that she was not made aware of the charges against her, that the enquiry against her was held ex parte and that she was never given a reasonable opportunity of showing cause against the action taken against her, are denied on behalf of the State. As I have said before, the petitioner's right to come to this Court depends on the question whether there has been a contravention of Art. 311(2). The question whether the applicant has been given a reasonable opportunity of showing cause as required by this Article is a question of fact or a question of law arising out of interpretation of facts proved. If, therefore, the applicant's right to come to this Court depends on certain facts which have to be proved the remedy under Art. 226 of the Constitution would in my opinion be inappropriate. For, this Court cannot clearly enter into an investigation of the facts on which the petitioner bases her claim. They can conveniently be proved by the petitioner in a regular suit

in a civil Court having the jurisdiction. In certiorari proceedings, the Court only considers the question whether the order which is challenged is on the face of it and on the material as it appears on the record returned and brought into the Court, was made by the authority acting within its jurisdiction. If, therefore, there is a dispute as to the facts constituting the material on the record, it cannot be said that the error, if any, in the order appears on the record. Again, as stated in Halsbury's Laws of England (Hailsham edition) Volume IX p. 791 para 1342 "A mandamus which is peremptory in the first instance is not an appropriate procedure where questions of fact remain in issue."

(30) Having regard to the above view I have taken it becomes unnecessary and indeed it would not be proper to consider the question whether the petitioner has or has not been given a reasonable opportunity of showing cause within the meaning of Art. 311 (2) or whether the clause was validly made inapplicable to her case, and the questions of fact relative thereto.

(31) For the above reasons, I cannot find any ground on which an order of certiorari or mandamus could be made in this case. The petitioner's application must, therefore, be refused. In my opinion, considering the questions raised in this petition, there should be no order as regards the costs of this petition.

(32) SHINDE, J.: I agree.

V. B. B. *Application dismissed.*

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(INDORE BENCH)

KAUL C. J. AND CHATURVEDI, J.

State v. Motilal Kaluram, Respondent.

Criminal Appeal No. 10 of 1951, D/- 8-11-1951.

(a) Public Safety — United State of Gwalior, Indore and Malwa (Madhya Bharat) Maintenance of Public Order Act (VII (7) of 1949), Ss. 4 and 3 (1) — Order of detention under S. 3 (1) — Omission to mention period — Effect — Presumption as to non-satisfaction.

An order made under S. 3 is not bad because it does not state the period for which it is to remain in force. From the language of S. 4 it is clear that in the absence of mention by the authority making the order of the period for which the order is to remain in force, it must remain in force for three months unless revoked earlier. The only effect of expressing the duration of the order in the particular form chosen by the Legislature in the Statute is to give the authority concerned a discretion to make an order which may remain in force for less than three months. (Para 4)

(Section 4 compared with various sections of the Penal Code (1860) providing punishments and S. 144, Criminal P. C. (1898).)

In this view of the matter, the omission by the authority making the order to mention the period for which it is to be in force does not lead to an inference that the authority did not properly apply his mind to all the relevant points which he ought to have considered at the time of making the order and so the order is bad in law. Want of 'bona fides' cannot be presumed and if an order, which on the face of it is a good and valid order, is passed, the burden of proving that it was not made 'bona fide' must rest on the party challenging the same. (Para 8)

† * (b) Public Safety — United State of Gwalior, Indore and Malwa (Madhya Bharat) Maintenance of Public Order Act (VII (7) of 1949), Ss. 3, 5 and 11 — Validity — Constitution of India, Art. 19 (1) (d) and (e) and (5).

The powers conferred upon the Government under S. 3 are as wide as conceivable. It authorises the Government not only to interfere with the personal liberty of an individual but makes legal an interference by the Government with practically every sphere of activity of the citizen as a preventive measure if it is satisfied that he is likely to do any act prejudicial to public safety or maintenance of public order. (Para 14)

The unreasonableness of the restrictions imposed by the statute does not result merely from the unusually wide character of the restrictions that may be imposed upon the rights of the citizens but also flows from the manner in which the power conferred may be exercised. Under S. 11 the Government is empowered to delegate the powers or duty which is conferred or imposed on the Government, to any officer or authority, without any safeguards. The unreasonableness of restrictions further becomes evident from the fact that except in the case of an order of detention (see S. 5) the person against whom any other of the various orders which it is permissible to make under S. 3 (1) is passed the person affected thereby is not given any right of representation. The authority making the order may have acted on wrong information or under a mistaken belief as to the existence of a set of circumstances which really do not exist, yet the person against whom an order is made, if it is an order other than one for his detention, is without a remedy. (Paras 18, 19)

The cumulative effect, therefore, of Ss. 3, 5 and 11 is to impose restrictions on the Fundamental Rights conferred by Art. 19 (1) (d) and (e), Constitution of India which cannot be called reasonable. The restrictions which it is permissible to impose under those sections must, therefore, be held to be 'ultra vires' of the powers of the State Legislature. (Para 19)

K. A. Chitale, Advocate-General, for The State; G. L. Oza, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) Petn No 149 of 1950 (SC) (Pr 3)
('50) Petn No 167 of 1950 (S C) (Pr 3)
('51) AIR (38) 1951 SC 270: (52 Cri LJ 904) (Prs 3, 4)
('51) AIR (38) 1951 All 357: (52 Cri LJ 115) (Pr 3)
('07) 34 Cal 897: (6 Cri L J 194 F B) (Pr 6)
('20) AIR (7) 1920 Mad 847: (20 Cri L J 755) (Pr 7)

KAUL C. J.: This is an appeal preferred by the State against an order passed by the Magistrate, First Class, Jhabua acquitting the respondent Motilal Bhandari who was tried for

contravention of an order passed by the District Magistrate, Jhabua, under S. 3(1) (b) of the Maintenance of Public Order Act (Madhya Bharat) No. 7 of 1949, which is an offence punishable under Sub-s. (7) of S. 3 of the same Act.

(2) The material facts are as follows: On 8-4-1950, the District Magistrate of Jhabua, passed the following order against the respondent, Motilal Bhandari:

चूंकि मुझे पुष्टि हुई है कि मोतीलाल वल्द कालूजी भंडारी सा० मेघनगर जिला झावुआ शराब बंदी आन्दोलन के संबंध में ऐसे कृत्य करने से रोकने के लिये जिनसे शान्ती भंग होने की आशंका है यह जरूरी है अत: मै सूबा एन्ड डिस्ट्रिक्ट मजिस्ट्रेट जिला झावुआ मध्यभारत धारा ३ उपधारा १। ब। ग्वालियर इन्दौर तथा मालवा राज्य (मध्यभारत) सार्वजनिक व्यवस्था बनाये रखने का विधान नंबर ७ सं० २००५ के अंतर्गत यह आज्ञा देता हूं कि:—

इस आज्ञा के मिलने क २४ घन्टे के अंदर उक्त मोतीलाल जिले झावुआ कि हद के बाहर निकल जावे व बिना पहले से मुझ से लिखित आज्ञा लिये प्रवेश न करें।

The order was served upon the present respondent on 9-4-1950. In contravention of the terms of the said order Motilal Bhandari entered Meghnagar on 8-6-1950. He was accordingly prosecuted for the said contravention. A number of points were raised before the learned Magistrate on behalf of the accused. The validity of the Madhya Bharat Maintenance of Public Order Act was also challenged before him. It was further contended that the order passed was ineffective and unenforceable because it did not specify the period for which the respondent was externed. The last mentioned contention found favour with the learned Magistrate and accordingly he acquitted the accused without expressing any opinion on the other points that were raised. Dissatisfied with this decision the State has preferred the present appeal.

(3) It was contended by the learned Advocate-General, who appeared on behalf of the State that the view of law taken by the learned Magistrate in the Court below though it finds support in the decision of Bhargava J. in 'M. M. BASHIR v. STATE', AIR (38) 1951 All 357, is erroneous. He argued that the matter was concluded by the observations of Patanjali Sastri J. in 'RAM SINGH v. THE STATE OF DELHI', AIR (38) 1951 S C 270. Reference was made to the following observations which are found at p. 274 of the report:

> "It is also argued that the orders of detention were bad because they did not specify the period during which the petitioners were to be under detention. This point is now concluded against the petitioners by the decision of this Court in 'UJAGAR SINGH v. THE STATE OF PUNJAB', Petn. No. 149 of 1950 and 'JAGJIT SINGH v. THE STATE OF PUNJAB', Petn. No. 167 of 1950, where it was pointed out that as S. 12 of the Act itself prescribed a maximum period of one year for detention thereunder, such orders could not be said to be of indefinite duration and unlawful on that ground."

Section 4 of our Act No. 7 of 1949, reads as follows:

> "An order made under S. 3, shall be in force for a period not exceeding three months unless earlier revoked by the authority making the order:
>
> "Provided that any such revocation shall not prevent the making under S. 3 of a fresh order to the same effect as the order revoked."

(4) The observations relied on by the Advocate-General were made in a case which arose under the Preventive Detention Act, which was a temporary Act while the present appeal arises in a case under a perpetual statute and so I am unable to hold that the question raised before us is concluded by the observations made in the case of 'RAM SINGH v. STATE OF DELHI', AIR (38) 1951 S C 270. All the same having regard to the language of S. 4 of our Act, I am of opinion, that in the absence of mention by the authority making the order of the period for which the order is to remain in force, it must remain in force for three months unless revoked earlier. It is not necessary to draw any inference as to the intention of the authority making the order about the period of its duration from the language of the order made. By virtue of S. 4, an order made is to remain in force for a period not exceeding three months unless the authority making the same revokes it earlier. The only effect of expressing the duration of the order in the particular form chosen by the Legislature in the Statute under consideration is to give the authority concerned a discretion to make an order which may remain in force for less than three months. In the absence of a specific mention of a shorter period, however, any order passed under S. 3, must ordinarily remain in force for three months. There can be no analogy between the sections of the Indian Penal Code which provide punishments for various offences and S. 4 of the Madhya Bharat Act 7 of 1949. In the Penal Code usually a maximum period is prescribed for every offence (Ss. 397 & 398 are exceptions to this general rule) and a duty is cast upon the Court to determine what is the right measure of punishment in a particular case before it. In a case under the Penal Code, if the period of punishment is not mentioned in the judgment, it will be left for the reader to guess (or infer) the punishment that the Magistrate intended the convicted person to suffer. The use of the expression 'may extend' in the various sections of the Penal Code casts a duty upon the Court to determine the extent of the punishment in each particular case. The scheme of our Act 7 of 1949, as well as the language of S. 4 of the Act are altogether different. This is obvious if we read the opening clause of S. 3(1) and S. 4 together. The former provides that if satisfied with respect to certain matters the Government of the State may make an order to the effect specified in subsequent clauses of S. 3(1). Then follows S. 4, which as already stated provides that an order under S. 3(1) shall be in force for a period not exceeding three months unless revoked earlier etc. etc. This is not a case in which the Statute provides the maximum period for which the order made may remain in force and casts upon the authority making the order a duty to determine in each case the period for which the order is to remain in force. On the other hand it prescribes a period for which every order made under S. 3 is to remain in

force, but leaves it to the authority concerned to limit it to a shorter period if deemed proper. Accordingly if the authority making the order does not limit the duration of the order to a shorter period it must remain in force for three months unless revoked earlier.

(5) The difference between the two forms of expressions, that used in the Penal Code and that in Madhya Bharat Act 7 of 1949, S. 4, conveys an altogether different intention in each case. If at all there may be some analogy between S. 4 of our Act and Cl. (6) of S. 144 of the Code of Criminal Procedure which reads:

"No order under this section shall remain in force for more than two months from the making thereof".

(6) It is true that the language in S. 144 (6), Criminal P. C. is not exactly the same as that of S. 4 of Madhya Bharat Act, 7 of 1949 but the Madhya Bharat Act, S. 4, has a closer analogy to this provision of the law than to the sections of the Indian Penal Code which prescribe punishments for various offences under the said Code. It was observed by Mookerjee J. in 'RAM NATH v. EMPEROR', 34 Cal 897 (F B) that:

"It is an elementary principle of construction that where a judicial order is to be interpreted such construction must, if possible, be adopted as would make the order one in accordance with law and not an order such as the Court making it had no power to pass. If no time is specified the reasonable presumption is that the Court intended to pass an order which it was competent to pass and which would operate for two months and not to pass an order which would be beyond its statutory powers and consequently void."

(7) These observations were relied on by a Bench of Madras High Court in 'R. PONNAPPA AIYANGAR v. VANAMMALAI RAMANUJAR JEER', AIR (7) 1920 Mad 847, which held that where an order under S. 144, specified no time during which it is to be in force the reasonable presumption is that the order is to operate for 2 months and not for an indefinite time. For the reasons given above I disagree with the view taken by the trial Court and hold that the order in question cannot be said to be bad because it does not state the period for which it was to remain in force and is thus of indefinite duration.

(8) It was further contended that the omission of the authority making the order to mention the period for which it was to be in force leads to an inference that the District Magistrate did not properly apply his mind to all the relevant points which he ought to have considered at the time of making the order and so the order was bad in law. It may be conceded that if a person against whom an order under S. 3 is made can establish that the order was made without the authority making the same applying its mind to the material before it or without considering the nature of the order which is to be made the order cannot be held a valid order. The reason for this view is obvious. There would in such a case be no 'bona fide' satisfaction of the authority concerned as to the necessity of making the order. The words: "The Government if satisfied.....that.....it is necessary so to do, may make an order". imply not only that the satisfaction should be only for the necessity of making some order but the authority concerned should further be satisfied as to the necessity of making the particular order which it passes. In this view of the matter if I were satisfied that the District Magistrate did not consider the period for which the order was to be in force I would be inclined to hold that one of the prerequisites of a good and valid order under S. 3(1) did not subsist. But if an order, which on the face of it is a good and valid order, is passed the burden of proving that it was not made 'bona fide' must rest on the party challenging the same. Want of bona fides cannot be assumed and in the view which I have taken of Section 4, omission by the authority concerned to mention any period of duration of the order necessarily implies that it shall be in force for three months unless revoked earlier. I hold accordingly that the validity of the order cannot be challenged on this ground.

(9) Mr. Ojha learned counsel for the respondent however challenged the validity of the Act. He contended that its provisions impose restrictions upon the rights of the citizens: (i) to move freely throughout the territory of India, (ii) to reside and settle in any part of India, which were not reasonable. He argued that these were the two Fundamental Rights enjoyed by every citizen of Indian Republic under Article 19 of the Constitution and these rights cannot be restricted or abridged except as specified in Clause (5) of that Article.

(10) Maintenance of Public Order Act No. 7 of 1949 was enacted to

"provide for preventive detention, imposition of collective fines, control of meetings and processions and precensorship, control and regulation of the publication of any matter in the territories of the United State of Gwalior, Indore and Malwa (Madhya Bharat)."

Section 3 of this Act runs as follows:

1. The Government, if satisfied with respect to any particular person that with a view to preventing him from doing any act prejudicial to the public safety or maintenance of public order it is necessary so to do, may make an order—

(a) directing that he be detained;

(b) directing that, except in so far as the may be permitted by the provisions of the order or by such authority or persons as may be specified therein, he shall not remain in any such area or place in the United State as may be specified in the order;

(c) requiring him to reside or remain in such place or within such area in the United State as may be specified in the order and if he is not already there, to proceed to that place or area within such time as may be specified in the order;

(d) requiring him to notify his movements or to report himself or both — to notify his movements and report himself in such manner, at such times and to such authority or person as may be specified in the order;

(e) imposing upon him such restrictions as may be specified in the order in respect of his employment or business, in respect

of his association or communication with other persons and in respect of his activities in relation to the dissemination of news or propagation of opinions;

(f) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order;

(g) otherwise regulating his conduct in any such particular manner as may be specified in the order;

2. A District Magistrate may exercise the powers conferred by clause (a) of Sub-section (1) and an order so made by him shall be valid for a period not exceeding one month.

3. An order made under Sub-section (1) may require the person in respect of whom it is made to enter into a bond, with or without sureties, for the due performance of, or as alternative to the enforcement of, such restrictions or conditions made in the order as may be specified in the order.

4. If any person is in any area or place in contravention of an order made under the provisions of this Section, or fails to leave any area or place in accordance with the requirements of such an order, then without prejudice to the provisions of Sub-section (6) he may be removed from such area or place by any Police Officer or by any other officer acting on behalf of the Government.

5. So long as there is in force in respect of any person such an order as aforesaid directing that he be detained he shall be liable to be removed to and detained in such place and under such conditions including conditions as to maintenance of discipline and the punishment of offences and breaches of discipline, as the Government may from time to time by general or special order specify.

6. If there is reason to believe that a person, in respect of whom such an order as aforesaid has been made directing that he be detained, has absconded or is concealing himself so that the order cannot be executed, the authority ordering the detention may:

(a) make a report in writing of the fact to the Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of the Code of Criminal Procedure relating to declaration, attachment and return, etc., of the property of the absconder shall apply in respect of the said person and his property, as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the official Gazette, direct the said person to appear before such officer, at such place and within such period as may be specified in the order, and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year, or with fine or with both.

7. If any person contravenes any order made under this section other than an order of the nature referred to in clause (b) of Sub-section (6), he shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both, and if such person has entered into a bond in pursuance of the provisions of Sub-section (3) his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

(11) Section 4 of the Act has already been reproduced earlier.

(12) Then we have Section 5 which is as under:

"Where an order is made in respect of any person under clause (a) of Sub-section (1) of Section 3 as soon as may be after the order is made, the authority making the order shall communicate to the person affected thereby so far as such communication can be made without disclosing facts which the said authority considers it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order and such person may at any time thereafter make a representation in writing to such authority against the order and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practical opportunity of doing so. Such a representation, if made, shall be fully considered by the authority who had passed the order and the result of the reconsideration shall be duly communicated to the person concerned."

(13) Under Section 11:

"The Government may by order direct that any power or duty which is conferred or imposed on the Government not being the power of imposing collective fines under Section 6, shall, in such circumstances and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority specifically mentioned in that direction."

(14) An examination of these sections would show at a glance that they constitute material restrictions and abridgement of the two of the rights conferred by Art. 19(1) of the Constitution to which reference was made in Mr. Ojha's argument. Under Section 3, the Government is empowered to make an order not only for preventive detention or for externment of a person from an area or place specified in the order but may further make an order requiring a person to reside or remain in a place or within an area that may be specified in the order and if he is not already there, to proceed to that area or place. Under that section an order can also be made requiring a person to notify his movements and to report himself in such a manner and at such times and to such authority or person as may

be specified in the order. It can also pass an order imposing upon a person restrictions in respect of his employment or business, as also in respect of his association or communication with other persons and in respect of his activities in relation to the dissemination of news or propagation of opinions. An order prohibiting or restricting the possession or use by a person of any such article or articles as may be specified in the order can also be made, and under Clause (g) of Sub-section (1) of the section the Government can pass an order regulating the conduct of the person in any manner otherwise than is covered by the other clauses of that Sub-section. It will be readily conceded that the powers conferred upon the Government under this section are as wide as conceivable. It authorises the Government not only to interfere with the personal liberty of an individual but makes legal an interference by the Government with practically every sphere of activity of the citizen as a preventive measure if it is satisfied that he is likely to do any act prejudicial to public safety or maintenance of public order.

(15) We have to consider whether these can be called reasonable restrictions on the exercise of the rights conferred by Article 19 (1) (d), (e) and (f). I may mention that Mr. Ojha in his argument referred to only sub-clauses (d) and (e) of Article 19 (1) but a consideration of Section 3 (1) (g) of Madhya Bharat Act 7 of 1949 would show that even the conduct of a person in respect of acquiring, holding and disposing of property may also be regulated in the manner specified in an order passed by the Government under the said Law. Under Section 3, the Government is not only empowered to pass any order of the nature contemplated by the various clauses of sub-section (1) of that section but to ensure that the order shall be obeyed by the person against whom it is passed, it may require him to enter into a bond with or without sureties for due performance of, or as alternative to the enforcement of the restrictions or conditions specified in the order. In case there is reason to believe that a person in respect of whom an order of detention under Section 3 has been passed has absconded or has concealed himself so that the order cannot be executed the Government or the authority concerned may direct the party affected by an order notified in the official Gazette, to appear at such place and within such period as may be specified in the order. Failure to comply with the order published in the Gazette is made an offence punishable with imprisonment for a term which may extend to one year or with fine or with both. Even if an order other than one for detention of a person is passed under Section 3 the contravention of any such order is also an offence punishable with imprisonment for a term which may extend to one year or with fine or with both. The foregoing brief analysis of the section would give some idea of the far-reaching character of this Law.

(16) The reasonableness of any restrictions imposed should amongst other things, be determined with reference to the relation which they bear to the interest sought to be protected. Section 3 is concerned with preventing acts prejudicial to the public safety or to the maintenance of public order. Are the extremely wide powers conferred by the Legislature upon the Government commensurate with the requirements of the interests sought to be protected thereby? As already pointed out the powers given by Section 3, confer not only the authority to make a person reside in a specified area or to extern a person from a particular area or place—they include the power to control almost any activity of the individual in any sphere of life whatsoever. The section authorises even the passing of an order prohibiting the person against whom the order is made, the use of any article that may be mentioned in the order.

(17) The far-reaching and almost unlimited character of the restrictions that may be imposed on the individual under the powers conferred by Section 3 will be seen in clear relief if we take a concrete instance. Suppose the majority of the residents of a village consists of Brahmins and Kshtriyas who object to the wearing of 'Janeoo' by Pasis or Chamars. Some members of any of the two last mentioned classes insist upon wearing the sacred thread. The Government, the District Magistrate or the authority to whom the power to act under S. 3 has been delegated is of opinion that the wearing of the sacred thread by a Chamar or a Pasi of that village is likely to result in a breach of peace. The authority concerned may in these circumstances make an order under Section 3 against the Pasi or the Chamar who insists on wearing a 'Janeoo' directing him to confine himself to his house for a period of three months if he wears the sacred thread; or an order may be passed that he when appearing in public must cover his body with cloth in such a manner that the 'Janeoo' round his neck is not visible or the authority concerned may even make an order that he should leave the village for three months. All such orders would be well covered by the language of Section 3. It is thus clear that the restrictions which can be imposed on the right to reside and settle in any part of India and the right to move freely throughout the territory of India are heavily restricted by the provisions of this section.

(18) The manner in and the means by which obedience to the order passed under Section 3 may be enforced are drastic and of a character so as to make the restrictions imposed on the rights conferred by Article 19 (1) (d) and (e) unreasonable. A person against whom an order under Section 3 (1) is made may, as already pointed out, be required to execute a bond with or without sureties for due performance of the instructions or the conditions specified in the order. In case of a person against whom a detention order is passed if there is reason to believe that such a person has absconded or is concealing himself so that the order cannot be executed he may not only be treated as an absconder and steps taken against him under Sections 87 and 88 of the Code of Criminal Procedure but he may further, by an order notified in the official gazette, be directed to appear at a specified place within a specified time. In case he fails to do so, and is unable to satisfy the officer concerned that it was impossible for him to comply with this order and further that he had within the specified time informed the officer concerned of the reasons which rendered compliance of the order impossible,

he is guilty of an offence and makes himself liable to punishment for a term which may extend to one year or with fine or with both. Under S. 3(7), if a person against whom action is taken under S. 3 (1), contravenes any other order (an order other than the one for detention) made under S. 3 (1) he can similarly be punished with imprisonment for one year or with fine or with both. Thus it will be seen that with a view to prevent persons from doing any act prejudicial to public safety or maintenance of public order S. 3 imposes not only extraordinarily wide and heavy restrictions on the rights conferred upon the citizens by Art. 19 (1) (d) and (e), but the disobedience of any such order is made a penal offence punishable with a sentence of one year or with fine or with both.

The unreasonableness of the restrictions imposed by the statute under consideration does not result merely from unusually wide character of the restrictions that may be imposed upon the rights of the citizens but also flows from the manner in which the power conferred may be exercised. Under S. 11, the Government is empowered to delegate the powers or duty which is conferred or imposed on the Government, 'to any officer or authority'. This it will be seen is in marked contrast with the analogous provisions of the Preventive Detention Act No. 4 of 1950, (an Act passed by the Parliament) where the power to make an order of detention is granted either to the Central Government or to the State Government or to the District Magistrate or to an Additional District Magistrate specially empowered in this behalf, the Commissioners of Police of Bombay, Madras, Calcutta or Hyderabad or to Collectors in Hyderabad in certain specified circumstances; while under our Act, there are no such safeguards and the powers may be delegated to a Naib Tehsildar or to a Sub-Inspector of Police or may be even to a Head Constable. From the onerous character of the restrictions imposed, the penalties attached to the disobedience of any order passed under this law and in the absence of any safeguard against the delegation of the powers to the Subordinate Officials, however so low in rank, I am clear that the restrictions which the law permits to be imposed cannot be called reasonable.

(19) This is not all. The unreasonableness of restrictions becomes evident when we find that except in the case of an order of detention (see S. 5) the person against whom any other of the various orders which it is permissible to make under S. 3 (1) is passed, the person affected thereby is not given any right of representation. The authority making the order may have acted on wrong information or under a mistaken belief as to the existence of a set of circumstances which really do not exist, yet the person against whom an order is made, if it is an order other than one for his detention, is without a remedy. There cannot be a slightest doubt that such restrictions as are permitted to be imposed on two of the Fundamental Rights of the citizen under the impugned statute cannot be said to be reasonable restrictions as contemplated by Art. 19 (5) of the Constitution. The result, therefore, is that the provisions of Ss. 3 and 11 read with S. 5 of the Act, render the Fundamental Rights conferred by Art. 19 (1) (d) and (e) of the Constitution practically valueless. The provisions of S. 3 are of such a far-reaching character that they may restrict & abridge even Fundamental Rights other than those to which reference has just been made, but in the view that I take of the matter it is unnecessary to go into that question. I hold accordingly that the cumulative effect of Sections 3, 5 and 11 of Act 7 of 1949, is to impose restrictions on the Fundamental Rights conferred by Art. 19 (1) (d) and (e) which cannot be called reasonable. The restrictions which it is permissible to impose under those sections must, therefore, be held to be 'ultra vires' of the powers of the State Legislature.

(20) The result, therefore, is that the order passed by the District Magistrate of Jhabua against Motilal Bhandari must be held to be an order which was illegal and his acquittal by the trial Court must, therefore, be upheld.

(21) The appeal preferred by the State is accordingly dismissed.

(22) CHATURVEDI, J.: I agree.

G.M.J. Appeal dismissed.

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(GWALIOR BENCH)

CHATURVEDI, J.

Shamlal and others, Appellants v. Mahipat Singh, Respondent.

Second Appeal No. 97 of 1950, D/- 4-1-1952.

Limitation Act (1908), Art. 182 (7) — Instalment decree — Decree-holder entitled to recover entire amount on default of any one instalment — No instalment paid — Remedy to enforce default clause becoming barred — Effect of, on decree-holder's right to revover unpaid instalment.

Where an instalment decree provides that in case of any default the entire sum could be recovered at once and no instalment is paid, the decree-holder applying for execution of such a decree can rely on the decree as a whole, for the purpose of limitation, even though his application for the enforcement of the default clause may be barred. His claim to the instalments which are not time-barred under Art. 182 (7) is not barred on account of his failure to waive his right to claim the entire decretal amount on the first default. AIR 1942 Oudh 219, Rel. on. (Para 4)

Unless the decree leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due. 16 All 371, Ref. (Para 5)

The main question to be considered in such cases is whether the default clause in the decree is expressed in a mandatory or in a mere declaratory form i.e., whether the decree makes it obliga-

tory on the decree-holder to execute it for the entire balance if a default occurs, or it merely gives him a choice and says either that "the entire balance shall become due" or that "the decree-holder shall have the power to execute the decree for the whole amount." In the first case the decree-holder has no choice and time runs from the date of default; but in the second case the decree-holder is given an option to demand immediate payment of the whole amount, and the decree-holder is at liberty to take advantage of the option but if he does not take advantage of this option the provision for payment by instalments is not affected. AIR 1931 Bom 263, Dist. Case Law Ref. (Para 7)

Anno: Limitation Act, Art. 182, N. 136.

Sahastrabudhe, for Appellants; Har Krishan Dixit, for Respondent.

Cases referred to:

('32) 59 I A 376:7 Luck 442: (AIR 1932 P C 207) (Pr 6)
('94) 16 All 371: (1894 All W N 115) (Pr 5)
('35) 56 All 921: (AIR 1934 All 534) (Pr 6)
('31) AIR 1931 Bom 263: (132 Ind Cas 437) (Pr 9)
('36) 60 Bom 62: (AIR 1936 Bom 17) (Pr 6)
('36) AIR 1936 Bom 268:38 Bom L R 492: (163 I C 937) (Pr 6)
('46) 50 Cal WN 735: 81 Cal LJ 324: 226 Ind Cas 343: (AIR 1946 Cal 500 F B) (Pr 6)
('36) 11 Luck 276: (AIR 1935 Oudh 465 F B) (Pr 5)
('42) 17 Luck 449: (AIR 1942 Oudh 219) (Pr 4)
('39) AIR 1939 Sind 49: (ILR 1940 Kar 385) (Pr 6)

JUDGMENT.: This is an execution appeal from an order passed in first appeal by the learned District Judge, Bhind on 16th September 1948, allowing the appeal and the objections of the judgment-debtor and dismissing the decree-holder's application for execution as time-barred.

(2) The decree was passed in 1927 and in course of execution in 1937 a compromise was arrived at and on the basis of this compromise an order was passed by the Court on 27-7-1937 providing for payment of Rs. 200/- by the judgment-debtor within a period of 10 years by annual instalment of Rs. 20/- out of which Rs. 10/- were to be paid on 15th January and Rs. 10/- on 15th of May every year. It was further provided that in case of any default the entire sum could be recovered at once. It is admitted that the judgment-debtor did not pay any instalment and the decree-holder never made an application for execution before 1947. On 24-12-1947, the decree-holder for the first time applied for the execution of the decree for instalments. He mentioned in his application that he wants to get from the judgment-debtor seven instalments of Rs. 10/- each which have fallen due on (1) 15th May 1944, (2) 15th January 1945, (3) 15th May 1945, (4) 15th January 1946, (5) 15th May 1946, (6) 15th January 1947 and (7) on 15th May 1947. The decree-holder further alleged in the application that as a tenant of the judgment-debtor the previous instalments he had adjusted towards the rent which he was liable to pay to his landlord the judgment-debtor. The judgment-debtor objected to the execution of the decree and one of his objections was that the execution is time-barred. He also stated that he had filed a suit for arrears of rent against the decree-holder and the story of adjustment of the previous instalments towards rent is without foundation.

(3) Apart from other considerations, the main question in this appeal is: can the decree-holder sleep over some of the instalments and apply for the remaining when they will be due specially when a default has taken place and when the decree-holder did not choose to enforce the default clause? In other words, the question is: when a single instalment is not paid did the default clause come into operation and did the decree cease to be an instalment decree and did it become, from the day of default, a decree for the payment of the whole decretal amount? or, could it retain, at the sweet will of the decree-holder, the nature of an instalment decree?

(4) It is well settled now that where an instalment decree provides that in case of any default the entire sum could be recovered at once and no instalment is paid the decree-holder applying for execution of such a decree can rely on the decree as a whole, for the purpose of limitation, even though his application for the enforcement of the default clause may be barred. His claim to the instalments which are not time-barred is not barred on account of his failure to waive his right to claim the entire decretal amount on the first default. 'PEOPLES BANK OF NORTHERN INDIA v. AIJAZ ALI', 17 Luck 449.

(5) It was observed in 'AJODHIA PRASAD v. BANSILAL', 11 Luck 276 by a Full Bench of the Oudh Chief Court:

> "If the decree-holders do not choose to enforce within limitation the provision which was inserted for their benefit, they may be debarred from enforcing it afterwards, but they ought not to be prevented from recovering the future instalments, the claim in respect of which is made within time. If the subsidiary right of enforcing the default clause has become barred by time, it does not follow that the primary right relating to payments by instalments is also barred."

It therefore becomes clear that unless the decree leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second, or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due 'SHANKAR PRASAD v. JALPA PRASAD', 16 All 371.

(6) There is of course authority to the contrary also where it has been held that when, under an instalment decree with a default clause instalments have not been paid and the default clause can be brought into operation the decree ceases to be an instalment decree and becomes from the date of default a decree for the payment of a lump sum and time runs from that default; and in order that the decree may retain for the benefit of the decree-holder the nature of an instalment decree, the decree-holder must show unequivocally that he so intended, (vide cases referred to in the judgment of Broomfield J. in 'BOMATU BHADU v. GOVARDHANDAS', AIR 1936 Bom 268: 38Bom LR 492: 163 IC 937. But in view of the judgment of the Privy Council in 'LASA DIN v. GULAB KUNWAR', 59 Ind App

376: 7 Luck 442: (AIR 1932 PC 207, these cases cannot be regarded as good law. Their Lordships of the Privy Council in this case held that as the default clause in the mortgage deed was a clause in favour of the mortgagee which he might or might not enforce, so he was not bound to enforce it, and that time ran not from the date on which the default clause might have been brought into operation, but from the date when the mortgage expired and the principal sum became due. This principle has been applied to default clauses in decrees where the decretal sum is payable in instalments by the Bombay High Court in 'VEHERBHAI VALLAVBHAI v. JAVER SOMA', 60 Bom 62: AIR 1936 Bom 17, by the Allahabad High Court in 'RAM PRASAD RAM v. JADUNANDAN UPADHIA', 56 All 921: AIR 1934 All 534; by the Sindh Judicial Commissioner's Court in 'LEKH RAJ SIRUMAL v. KHUB CHAND', AIR 1939 Sind 49 and by a Full Bench of the Calcutta High Court in 'RANGALAL AGARWALLA v. SHYAMLAL TAMULI' 50 Cal W N 735: 81 Cal L J 325: 226 Ind Cas 343: AIR 1946 Cal 500.

(7) The main question to be considered in such cases is whether the default clause in the decree is expressed in a mandatory or in a mere declaratory form i.e., whether the decree makes it obligatory on the decree-holder to execute it for the entire balance if a default occurs, or it merely gives him a choice and says either that "the entire balance shall become due", or that "the decree-holder shall have the power to execute the decree for the whole amount." In the first case the decree-holder has no choice and time runs from the date of default; but in the second case the decree-holder is given an option to demand immediate payment of the whole amount, and the decree-holder is at liberty to take advantage of the option, but if he does not take advantage of this option the provision for payment by instalments is not affected. The present case comes under the second class and I am clear in my mind that it was open to the decree-holder to execute the decree for instalments. The application being one for the recovery of certain instalments, it is an application to enforce payments which the decree directed to be made at certain dates. Consequently Art. 182(7) applies here and in my judgment the application was within time.

(8) If the decree retained the nature of an instalment decree, the decree-holder could forgo certain instalments and apply for the remaining ones, in which case he would have, in respect of each instalment, three years time from the date it became due, under Art. 182(7), Limitation Act.

(9) Mr. Ramkrishna Dixit places reliance on 'PANDURANG VISVANATH v. MAHADEO VISHWESHWAR', AIR 1931 Bom 263 but that case is distinguishable as the decree-holder in that case had on the first default taken out execution for the whole amount and had exercised his option. Subsequently he attempted to execute the decree for instalments. It was held that once he had exercised his option for the whole amount he could not be allowed to execute the decree for instalments. This circumstance does not exist in the case before me, and, I am of opinion that a decree-holder cannot be deemed to have abandoned his rights under the order for instalments and elected to rely on the default clause unless there is clear proof of his having done so.

(10) In this view of the matter, I allow the appeal with costs, set aside the order of the lower appellate Court and hold that the application for execution was within time. I remand the case back to the learned District Judge for disposing of appeal on other points.

K.S. Appeal allowed.

A. I. R. 1952 Madhya Bharat 121
(INDORE BENCH)
KAUL C. J. AND MEHTA J.

Chhotelal Banshidhar, Appellant v. Abdullabhai Abdul Gafoor, Respondent.

Second Appeal No. 394 of 1949, D/- 17-1-1952.

Houses and Rents — Madhya Bharat Sthan Niyantran Vidhan (15 of 1950), S. 4 — Tenancy by contract — Determination of — Notice to quit is essential — Provisions of Vidhan do not repeal or abrogate provisions of Transfer of Property Act — Transfer of Property Act (1882), Ss. 106, 111.

Before the landlord can seek protection of the provisions of S. 4 of the Stan Niyantran Vidhan, he must prove that he had determined the tenancy by a valid notice to quit. In the state of law as modified by the terms of the Sthan Niyantran Vidhan it becomes necessary for a landlord seeking to evict his tenant to prove not only that the tenant is liable to ejectment under the general law or under the contract of tenancy, but also that the tenant cannot claim protection from ejectment by reason of the provisions of the Sthan Niyantran Vidhan. It is true that by merely proving a valid notice to quit, a landlord cannot get a decree for ejectment and possession. He has to prove one of the grounds mentioned in S. 4 of the Sthan Niyantrana Vidhan.

However where the tenancy is not a statutory one but by a contract and by the terms of the contract notice to quit is required in order to terminate the tenancy, the tenancy cannot be determined except by a valid notice to quit. In such a case provisions of the T. P. Act are neither repealed nor abrogated by the Sthan Niyantran Vidhan. Consequently before a landlord can sue for eviction of a tenant he must have terminated the tenancy i.e. either by effluxion of time or by determination of the lease providing for a forfeiture or by a notice to quit in accordance with law. Section 4 of the Sthan Niyantran Vidhan in no way interferes with those provisions.

(Paras 5, 6, 11)

Anno: T. P. Act, S. 111 N. 23a.

V. R. Newaskar, for Appellant; S. D. Sanghi, for Respondent.

MEHTA, J.: In this appeal the plaintiff Chhotelal son of Bansidhar had sued the defendant Abdullabhai for ejectment on the ground that the defendant had been in arrears in the payment of rent and that the plaintiff wanted the shop for his own use and he, therefore, gave notice to the defendant to vacate. The defendant raised various contentions and the trial Court held that the notice to quit is not valid and therefore dismissed the plaintiff's suit. In appeal the District Judge confirmed the judgment and decree of the trial Court and dismissed the appeal.

(2) At the time this appeal was heard the Sthan Niyantran Vidhan had come into force.

Mr. Niwaskar contended that under S. 12 of the Sthan Niyantran Vidhan retrospective effect can be given to all pending matters and therefore he contended that the plaintiff wanted to base his ground of eviction under S. 4 of the Sthan Niyantran Vidhan. He contended on behalf of the plaintiff-appellant that the grounds for ejectment are that the house in suit is dilapidated and needs construction and substantial repairs which cannot be made without the defendant's eviction from the house; that the house in question is required by the owner for residence and there is meagre accommodation for the plaintiff's family; that the defendant-respondent has caused substantial damage to the premises so as to diminish its value; that the defendant is occupying premises of his own and hence he is not entitled to remain in the premises any longer.

(3) Mr. S. D. Sanghi learned pleader for the respondent urged that the remand will not serve any useful purpose as both the trial Court and the lower appellate Court have held that notice to quit has been held to be invalid. Hence the question arises whether a landlord can file a suit for ejectment of a tenant without giving notice to quit in case the tenant contravenes any of the clauses of S. 4 of the Sthan Niyantran Vidhan of Samvat 2006 and therefore the matter was referred to a Division Bench to consider whether in view of the provisions of the Sthan Niyantran Vidhan of Samvat 2006, a valid notice to terminate the tenancy is or is not necessary.

(4) Mr. Newaskar contended that having regard to the preamble of the Sthan Niyantran Vidhan, it appears that the Act has codified the law with regard to letting of premises on rent, requisition of dwelling houses, control of rent paid in respect thereof and restricting the eviction of tenant therefrom. He contended that the grounds of ejectment, mentioned in S. 4 are exhaustive and therefore a notice to quit is not necessary. He contended that the Sthan Niyantran Vidhan has superseded and repealed the previous law on the subject. On the other hand it is argued by Mr. Sanghi that the Sthan Niyantran Vidhan does not abrogate the provisions of T. P. Act. Under the provisions of the T. P. Act under Sections 106 and 111 the legal relation between the landlord and the tenant cannot be determined except by notice to quit in case of monthly tenancy and in case of fixed tenancy until the expiration of the fixed period by efflux of time.

(5) Having regard to the facts of this particular case it is quite clear that this is a case of monthly tenancy and according to the provisions of S. 106 of the Transfer of Property Act in this case the plaintiff-landlord had given a notice to the defendant-tenant to quit but this was held to be invalid by both the Courts below. In this case the contract of lease distinctly stipulated that in case the landlord wanted to eject the tenant from the premises, he must give one month's notice expiring with the period of tenancy. The determination of the lease by such notice must have become complete by the expiration of a valid notice to quit before the institution of the suit. Here, before the landlord can seek protection of the provisions of S. 4 of the Sthan Niyantran Vidhan of S. Y. 2006, he must prove that he had determined the tenancy by a valid notice to quit and then only the provisions of S. 4 of the Sthan Niyantran Vidhan will come into play. It appears to me that in the state of law as modified by the terms of the Sthan Niyantran Vidhan it becomes necessary for a landlord seeking to evict his tenant, to prove not only that the tenant is liable to ejectment under the general law or under the contract of tenancy, but also that the tenant cannot claim protection from ejectment by reason of the provisions of the Sthan Niyantran Vidhan. It is true that by merely proving by valid notice to quit, a landlord cannot get a decree for ejectment and possession. He has, therefore, to prove one of the grounds mentioned in S. 4 of the Sthan Niyantran Vidhan. However the relation of landlord and tenant in view of the contract of tenancy cannot be determined except by a valid notice to quit.

(6) Hence notice to quit & other grounds of objection have got to be proved. I am clearly of opinion that in the particular circumstances of this appeal the provisions of Sthan Niyantran Vidhan have not abrogated or repealed the provisions of the T. P. Act with regard to the ejectment of a tenant by first giving him notice to quit. In the absence of notice to quit the contractual tenancy cannot be determined. In my opinion before a landlord can sue for eviction of a tenant he must terminate the tenancy i.e. either by effluxion of time or by determination of a lease providing for a forfeiture or by a notice to quit in accordance with law. Section 4 of the Sthan Niyantran Vidhan in no way interferes with those provisions. Unless and until a tenancy or a lease is determined, a landlord is not entitled to obtain from a Court an order for eviction or possession. Here both the Courts have held that the notice to quit is bad.

(7) Hence my answer to the reference is that under the peculiar facts of this case the landlord cannot evict the tenant before determination of the tenancy by giving a valid notice.

(8) KAUL, C. J.: I have had the advantage of reading the judgment written by Mehta J. and agree with the conclusion arrived at by him. I will content myself with making a few observations of my own.

(9) It was contended by Mr. Newaskar that the provisions of Act 15 of 1950 (स्थान नियंत्रण विधान) had created a statutory tenancy and that the provisions of S. 106 of the T. P. Act were abrogated and accordingly could not be applied.

(10) With regard to the first of these contentions I am clear that Act 15 of 1950 did not create any statutory tenancy. The tenancy in the present case was admittedly created by a private contract. All that Act 15 of 1950 has done with regard to a lease like the present, is that it regulates by law the relations between the landlord and the tenant with respect to certain matters arising under the lease. For instance the rent that may be recoverable by the landlord in respect of the premises and ejectment of the tenant by the landlord only on specified grounds are matters to be regulated by law. This cannot be said to be the creation of a statutory tenancy.

It was contended by Mr. Newaskar that the "स्थान नियंत्रण विधान" is an amending and a consolidating Act and its provisions must be taken to contain the whole law on the subject with which it deals. This may be conceded. It may further be conceded that as stated in the preamble of the said Act, ejectment of the tenants is one of the subjects dealt with by the statute. The question however is does the statute lay down the whole law pertaining to ejectment of tenants. I am clear that the answer to this query must be in the negative.

Section 4 is one of the provisions which purports to deal with the question of ejectment of tenant in one of its aspects. That section however lays down only the grounds on which a suit for ejectment may be brought against a tenant. This as already observed is only one aspect of the problem with which a suit for ejectment of a tenant is concerned. There is no section in this law which lays down the defences that may be open to a defendant in a suit for ejectment brought under the Act. It was contended that any defences that may be raised in such a suit must necessarily flow from the grounds on which a suit for ejectment may be brought and must therefore be held to be implied in S. 4 of the Act. It was further contended that no grounds other than those which are employed in S. 4 were open to a tenant against whom a suit for ejectment was brought after Act 15 of 1950 came into force.

I am unable to accept this contention. A lease is a legal concept with which we are all familiar. It is one of the modes of transfer of property recognised by our law. Once a valid lease is created it gives rise to various rights and obligations as between the lessor and the lessee. The right to eject the tenant from the demised premises is only one of them. Whenever it is attempted to enforce any of the rights arising under the lease, defences that may be taken to such a suit may arise out of the various aspects of the legal concept of the lease. They need not necessarily arise out of or be confined to the grounds on which a suit for enforcement of the right to eject may be brought. This does not require much argument. The pleas of limitation and jurisdiction for instance have nothing to do with the grounds of ejectment mentioned in S. 4. It cannot however be disputed that such pleas can be raised in a suit for ejectment.

(11) The provisions of the "स्थान नियंत्रण विधान" must be given effect to so far as they go. There is however nothing in the Act to suggest that it repeals the whole of the chapter pertaining to leases contained in the T. P. Act. It is well in this connection to bear in mind the following observations of Maxwell in his Interpretation of Statutes (See page 173 Ninth Edition):

"But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

(12) It was not disputed before us that if the provisions relating to notice by a landlord desirous of ejecting his tenant contained in the T. P. Act be applicable to the present case the appeal cannot succeed. There is a finding by the lower appellate Court that the notice issued by the landlord-appellant in this case to the tenant was bad and the suit for ejectment must therefore fail. There is nothing in Act 15 of 1950 which would induce me to hold that the provisions of the T. P. Act pertaining to notice to quit to be given by a landlord to his tenant, have abrogated by any of the provisions of स्थान नियंत्रण विधान there is accordingly no point in sending the case back to the lower Court for further inquiry. The disposal of this appeal shall however not preclude the appellant from raising any points which could be raised in this appeal in any suit which he may now bring for ejectment of his tenant.

(13) The appeal is accordingly dismissed with costs.

(14) BY THE COURT: In the view of the law taken by the Bench the appeal is dismissed with costs.

R.G.D. Appeal dismissed.

A. I. R. 1952 Madhya Bharat 123
(INDORE BENCH)
MEHTA, J.

Martandrao Tatyaji, Applicant v. Tarabai, Opponent.

Civil Revn. No. 183 of 1950, D/- 5-12-1951.

Court-fees Act (1870), S. 7 (v) (e) — Suit against licensee for possession.

Where in a suit for possession of a house the plaintiff claims that the defendant in possession is his licensee, the court-fee is payable under S. 7(v)(e) according to the market value of the house: 'AIR 1947 Bom 482 and AIR 1949 Cal 621, Foll.; AIR 1927 Pat 140, Dissent. (Para 3)

Anno: Court-Fees Act, S. 7(V) N. 1.

W. Y. Pande, for Applicant; N. A. Phadke, for Opponent.

Cases referred to:

('47) AIR 1947 Bom 482: (49 Bom L R 552) (Pr 3)
('49) AIR 1949 Cal 621 (Pr 3)
('27) AIR 1927 Pat 140: (5 Pat 631) (Pr 3)

ORDER: The only point involved in this revision application is one about the court-fees. The Civil Judge, City Indore, decided the preliminary point with regard to court-fees and held that the court-fees should be paid according to Section 4, Clause (V) (f) i. e., where the subject-matter is a house or garden, the market value of the house or garden.

(2) Shortly stated the facts are that the plaintiff Martandrao sued his wife Tarabai for declaration and possession of a portion of a house, No. 77, Ada Bazar, Indore City. The plaintiff alleged that he had allowed his wife to reside in the upper portion of the Ada Bazar house and he was not on good terms with her. The plaintiff had gone to Niphad in Nasik District and he had married second wife and he has got two sons and a daughter. He wants to return to Indore and he wants the entire house for his own use and hence this suit for declaration and possession. The plaintiff paid only court-fees of Rs. 37-8-0 being yearly rent of the portion in occupation of the defendant. The trial Court held that the plaintiff has to pay court-fees on the market value of the portion in possession of the defendant according to S. 7, Cl. (V) (f), Court-fees Act.

(3) Mr. Pande for the applicant contended that the court-fee should be paid not on the market value of the house but on the rental value of the house in possession of the defendant. In my opinion there is absolutely no substance in this revision application. The question is whether in a suit for possession of a house where the plaintiff claims that the defendant in possession is his licensee, the court-fee is payable according to the market value of the

house. The Division Bench of the Bombay High Court decided (Vide 'RATILAL v. CHANDULAL', AIR 1947 Bom 482), that where in a suit for possession of a house the plaintiff claims that the defendant in possession is his licensee the court-fee is payable under Sec. 7 (v) (e) according to the market value of the house. The ruling in 'BARKATUNNISA BEGUM MT. v. MT. KANIZA FATMA', AIR 1927 Pat 140 was particularly dissented from. The Patna High Court held that where the subject-matter of the suit is a right to eject the defendant the value of that right is the value at which the defendant's right to remain in the house under the license of the plaintiff may be valued. I prefer to follow the Bombay view and I also do not understand how the right of a licensee to remain in a house is to be valued. The distinction made between an ordinary suit in ejectment based on title and a suit in ejectment based on licence for the purposes of Section 7 (v), Court-fees Act, is really a distinction of substance. The same point is discussed in 'SATISH KUMAR v. SAILABASINI DEVI', AIR 1949 Cal 621, where it is held that where a person claims possession of certain premises from a licensee whose licence has been revoked the suit is clearly for recovery of possession and the valuation for purposes of court-fee is governed by Section 7 (V). The plaintiff is (not?) entitled to put his own valuation on the suit.

(4) For the reasons aforesaid I reject the revision application with costs. Pleaders' fee Rs. 15/-.

G.M.J. Revision application dismissed.

A. I. R. 1952 Madhya Bharat 124

(GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

State v. Kehari Singh, Respondent.

Criminal Appeal No. 51 of 1951, D/- 5-3-1952.

Penal Code (1860), S. 318 — Intention of concealing birth of child.

When the birth of the child was known to most of the villagers in the village no inference can be drawn that the disposing of the dead body of the child was with the intention of concealing the birth of a child within the meaning of the expression in S. 318. (Para 6)

Anno: Penal Code, S. 318, N. 1.

Mungre, Government Advocate, for the State; Krishan Bahadur, for Respondent.

CHATURVEDI J.: This is an appeal filed by the State under S. 417, Criminal P. C., against an order passed by the Sessions Judge Gwalior on 4-12-50 in Criminal Case No. 20 of 1950 acquitting the respondent Kehari Singh of an offence under S. 318, Indian Penal Code.

(2) The prosecution story was that Mst. Konsa, a Rajput widow, aged 24 years, was pregnant, & on 5th January 1950 gave birth to an illegitimate child who was soon throttled and Mst. Konsa's uncle Kehari Singh took the dead body of the child and threw it in a well in village Semari, P. S. Ghatigaon, District Gird. Mst. Konsa was committed to Sessions for standing her trial for offences under Ss. 302 and 318, Indian Penal Code, Kehari Singh was committed for standing his trial for offences under Ss. 302/109 and 318, Indian Penal Code. Both were acquitted by the learned Sessions Judge Gwalior and the State has filed this appeal only against the acquittal of Kehari Singh respondent and the prayer is that 'the accused be convicted under S. 318, Indian Penal Code. It will be seen that this appeal relates only to the offence of secretly disposing of the dead body of the child. No appeal has been preferred against the order of acquittal for the offence either of murder or of abetment of murder.

(3) The dead body of the child was seen floating in a well on 12-1-1950 and a report was sent to the police by Parmal Singh P.W. 10, who was Naib Tehsildar of the Village at that time, through Choukidar Khemoo P.W. 1. The report mentioned only this fact that a child is lying dead in a well out-side the 'Abadi'. It was subsequently found by the police that it was the child of Mst. Konsa who had given birth a week before. It appears from the evidence that many villagers knew that Mst. Konsa was pregnant, and if the statement of Lali, P.W. 9 is to be believed the birth of Mst. Konsa's child was known to many persons. The birth had taken place at Lali's own house and she had told everything to Jhandu Prasad P.W. 6, Ratan P.W. 4, Sita Ram P.W. 11 and also to the villagers. There is thus no doubt, and, it is proved by the prosecution evidence itself that the pregnancy of Mst. Konsa and thereafter the birth of the child was known to all and sundry. It was not a secret thing.

(4) The respondent Kehari Singh in his examination under S. 342 admitted that Konsa is his niece and is a widow and had given birth to a child who had died immediately afterwards. He took the dead body and threw it in a well near the village; for, the custom in that village is that the dead body of a child is thrown either in a well or in a river.

(5) There is no evidence on behalf of the prosecution about the custom of disposing of dead bodies of the children that is prevalent in this particular village. But the main question in this case is: whether the secret disposing of the dead body of this child was with the intention of concealing, or of endeavouring to conceal, the birth of this child? It is important to note that it is the act of secretly disposing of the dead body with the intention of concealment of the birth of the child (and not with the intention of concealing the death of the child) that is made punishable under S. 318, Indian Penal Code.

(6) When the birth of the child was known to most of the villagers in the village no inference can be drawn that the disposing of the dead body of this child was with the intention of concealing the birth of a child within the meaning of the expression in S. 318, Indian Penal Code. In this view of the matter the appeal cannot succeed and we dismiss it. We direct that the respondent who has been arrested and is in Jail be released forthwith.

(7) DIXIT, J.: I agree with my learned brother that the evidence on record does not lead to the inference that the disposal of the dead body of the child in this case was with intention of concealing the birth of the child. The appeal must, therefore, be dismissed.

V.R.B. Appeal dismissed.

A. I. R. 1952 Madhya Bharat 125
(GWALIOR BENCH)

DIXIT, J.

Mansoor Shah, Applicant v. Maya Shankar and another, Non-Applicants.

Criminal Revision No. 106 of 1951, D/- 24-1-1952.

(a) Criminal P. C. (1898), S. 253 (1) and (2) — Difference between two sub-sections.

There is a difference between a discharge of an accused under Sub-section (1) and a discharge under Sub-section (2). While under the first sub-section, the discharge is on the ground that no case has been made out, under the second sub-section, the discharge is on the ground that the charge against the accused is groundless. To say that no case is made out, is not the same thing as saying that the charge is groundless. The first sub-section obviously contemplates the taking of all the evidence referred to in Section 252. Sub-section 2 deals with cases in which the complaint appears to be so groundless 'ab initio' or after some witnesses of the complainant have been examined that the examination of all or any of the remaining witnesses for the prosecution cannot materially help the case of the complainant. AIR 1928 Mad 129 (1), Ref. (Para 2)

Anno: Criminal P. C., S. 253, N. 6.

(b) Criminal P. C. (1898), Ss. 252 (1) and (2) and 253 (1) and (2) — Discharge without examining witnesses.

When a Magistrate has taken under Section 252 (1) all the evidence produced by the complainant in support of the prosecution and then he has also issued summonses under S. 252 (2) to witnesses to give evidence for the prosecution, he cannot discharge the accused persons without examining the witnesses so summoned unless he comes to a conclusion about the evidence which is to be given by those witnesses and finds that even if that evidence is recorded, the charge would be groundless. (Para 2)

Anno: Criminal P. C., S. 253, N. 5.

Mungre, for Applicant; Katare, for Non-Applicants.

Case referred to:

('28) AIR 1928 Mad 129 (1): (28 Cri L J 995) (Pr 2)

ORDER: This is a petition to revise an order of the City Magistrate Lashkar discharging the non-applicant accused persons. The applicant is prosecuting the accused for an offence under S. 500, I. P. C., alleging that the non-applicants Maya Shankar and Jhanman Lal, the Editor and the Printer respectively of 'Dainik Madhya Bharat Samachar' printed and published in an issue of the paper dated 10-3-50, a news item to the effect that it was learnt that a prominent Jhagirdar of Madhya Bharat who owned a Jagir in Hyderabad and who was a member of the Muslim League was involved in the conspiracy for the abscondance of Liak Ali and that this Jagirdar was seen in Hyderabad a few days back and had also met the wife of Liak Ali. The complainant alleged that the imputation in the news item obviously referred to him and that by that imputation, his reputation had been harmed.

On 15-11-50, Virendra Singh, the last witness whom the complainant wished to examine on his behalf and who had been summoned by the Court, did not appear in spite of the service of the summons on him. The learned Magistrate without taking any steps to secure the attendance of this witness, passed an order discharging the accused persons on the evidence of the witnesses till then examined for the prosecution. The complainant then applied to the learned Sessions Judge Gwalior for a revision of the order of the City Magistrate. Before the learned Sessions Judge, it was urged that the order of discharge passed by the Magistrate without examining Virendra Singh was not legal.

The learned Sessions Judge admitted the force of the contention that the Magistrate should have taken steps to procure the attendance of Virendra Singh for giving evidence. But he came to the conclusion that under S. 253 (2), the Magistrate was empowered to dischare the accused at any stage of the case without examining the complainant's witnesses. He also observed that the learned City Magistrate should have, in the order of discharge, fully discussed the evidence led by the complainant and the reasons for discharging the accused persons. In the end, the learned Sessions Judge saw no ground for disagreeing with the decision of the City Magistrate.

(2) In this revision petition, the main contention advanced on behalf of the petitioner is that the City Magistrate was not competent to discharge the accused persons without recording the evidence of prosecution witness Virendra Singh who had been summoned to give evidence but who had failed to obey the summons. In my opinion, this contention must be accepted. It is not disputed on behalf of the non-applicants that Virendra Singh was summoned by the Court and that he failed to appear in the Court to give evidence. It is also not contested that the complainant had not made a declaration that he did not wish to examine this witness.

I do not agree with the learned Sessions Judge that the order of discharge passed by the trial Court was under S. 253 (2) of the Criminal P. C. Sub-section (1) of this section authorises the Magistrate to discharge an accused person, if upon taking all the evidence referred to in S. 252, and making such examination of the accused person as he may think it necessary, the Magistrate comes to the concusion that no case against the accused has been made out. Sub-section (2) of S. 253, empowers the Magistrate to discharge an accused person before all the witnesses are examined if for reasons to be recorded by him, he considers the charge to be groundless.

Now there is difference between a discharge of an accused under sub-section (1) and a discharge under sub-section (2). While under the first sub-section, the discharge is on the ground that no case has been made out, under the second sub-section, the discharge is on the ground that the charge against the accused is groundless. To say that no case is made out, is not the same thing as saying that the charge is groundless. The first sub-section obviously contemplates the taking of all the evidence

referred to in S. 252. Sub-section 2 deals with cases in which the complaint appears to be so groundless 'ab initio' or after some witnesses of the complainant have been examined that the examination of all or any of the remaining witnesses for the prosecution cannot materially help the case of the complainant. See 'MOHOMMED SHERIFF v. ABDUL KARIM', AIR 1928 Mad 129 (1).

In the present case both the Courts below overlooked the difference between the two sub-sections of section 253. The order of the Magistrate discharging the non-applicants is obviously not under the second part of S. 253. He discharged the non-applicants on the ground that the complainant had failed to prove that he was a member of the Muslim League or that he had met Liak Ali's wife or that he was the only Jagirdar of the Madhya Bharat owning Jagirdari land in Hyderabad. The learned City Magistrate does not say that even if these facts are held to be established by the evidence already recorded by him or by the evidence of Virendra Singh to be recorded, the charge made by the complainant against the accused would be groundless.

In fact, in the present case, the Magistrate recorded the evidence of witnesses produced by the complainant and also issued a summons to Virendra Singh for giving evidence on behalf of the prosecution. It is not, as if, the Magistrate thought it unnecessary to record the evidence of any of these witnesses after ascertaining from the complainant the nature of the evidence that they were going to give. In my opinion, when a Magistrate has taken under S. 252 (1) all the evidence produced by the complainant in support of the prosecution and then he has also issued summonses under S. 252 (2) to witnesses to give evidence for the prosecution, he cannot discharge the accused persons without examining the witnesses so summoned unless he comes to a conclusion about the evidence which is to be given by those witnesses and finds that even if that evidence is recorded, the charge would be groundless. The order of the discharge of the City Magistrate cannot, therefore, be supported by sub-section (2) of S. 253. The order of discharge passed by him is clearly one under sub-section (1). But it is not legal as it was passed without taking all the evidence contemplated under S. 262.

(3) I, therefore, set aside the order of discharge passed by the City Magistrate Lashkar and direct him to record the evidence of the complainant's witness Virendra Singh and decide the case on the full evidence tendered by the complainant.

V.R.B. Order set aside.

A. I. R. 1952 Madhya Bharat 126
(INDORE BENCH)
MEHTA J.

State of M. B. v. Gopal Govind Sinnarkar.

Criminal Reference No. 94 of 1951, D/- 28-11-1951.

Madhya Bharat Essential Supplies (Temporary Powers) Act (3 of 1948), Ss. 4, 5—Government empowering Director of Food to make regulations in respect of matters referred in S. 4 — Deputy Director cannot make regulation — S. 18, Madhya Bharat General Clauses Act does not apply — Regulation made under Cl. (12) of the Madhya Bharat Rationing Order 1949, by the Deputy Director is therefore ultra vires and conviction cannot be based on it. (Madhya Bharat General Clauses Act, S. 18) — (Madhya Bharat Rationing Order (1949), Cl. 12) (Madhya Bharat Rationing Regulations (1949)).

Where the Government has empowered the Director of Food under S. 4 of the M. B. Essential Supplies (Temporary Powers) Act, to make regulations under S. 4, the Director of Food has no jurisdiction to delegate the powers to the Deputy, unless he is expressly authorised to do so. When the Government says that it delegates the powers to the Director of Food, it excludes the possibility of further delegation of the power by the person so empowered. Hence it is not competent for him to delegate powers to the Deputy Director, of making regulations under Cl. (12) of the Madhya Bharat Rationing Order, 1949. Section 18 of the Madhya Bharat General Clauses Act does not apply to such a case. This is not merely a ministerial act but involves personal discretion and as such the power to make regulations which is vested by the Govt. in the Director of Food cannot be delegated to the Deputy Director. M. B. Rationing Regulation, 1949, made by Deputy Director of Food under Cl. (12) of M. B. Rationing Order, 1949, is therefore ultra vires and conviction cannot be based on it. AIR 1949 All 32 and AIR 1951 SC 332, Rel. on. (Paras 4, 4a, 5)

The Advocate General, for the State.

Cases referred to:

('51) 1951 S C J 527: (AIR 1951 S C 332) (Pr 4)

('49) AIR 1949 All 32: (50 Cri L J 101) (Pr 4)

ORDER: This is a reference made by the Municipal Magistrate First Class Indore City under the Codes of Civil and Criminal Procedure (Amendment) Act No. XXIV of 1951. Section 432 (as amended) of the Code of Criminal Procedure says that where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision, contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court. The Municipal Magistrate is of opinion that the Deputy Director of Food has no power or jurisdiction under S. 5 of the Madhya Bharat Essential Supplies (Temporary Powers) Act No. 3 of 1948 to make regulations about the Madhya Bharat Rationing Order and therefore the Madhya Bharat Rationing Regulations of 1949 is ultra vires and no conviction can be based on that.

(2) It appears that the Madhya Bharat Government by a Notification No. 2 dated the 4th February, 1949 notified for general information that the Madhya Bharat Government has directed that the power of the Government to

make orders under S. 4 of the Madhya Bharat Essential Supplies (Temporary Powers) Act, Samvat 2005, in respect of control over Food shall be exercisable by the Director of Food and in pursuance of this the Director of Food under S. 5 of the Madhya Bharat Essential Supplies (Temporary Powers) Act, Samvat 2005, is given powers to make regulations in respect of matters referred by S. 4: Vide Madhya Bharat Gazette dated the 20th August 1949 page 286. Under Clause 12 of the aforesaid Madhya Bharat Rationing Order, 1949 the Director of Food, or any officer or authority empowered in this behalf by him, may in respect of any area or areas make regulations. Under Clause (12) the Director of Food has delegated his power to the Deputy Director of Food: vide Office of the Director of Food, Notification No. 27, dated the 13th July 1949, where it is stated that the officer empowered to make regulations under clause 12 of the said Order shall be a Deputy Director of Food (Rationing), Madhya Bharat.

(3) The question is whether the Director of Food has got jurisdiction or authority to delegate powers of making regulations to the Deputy Director.

(4) In my opinion such a delegation is not proper. The Government having empowered the Director of Food under S. 4 of the Essential Supplies Act, Samvat 2005 to make regulations under S. 4, the Director of Food had no jurisdiction to delegate the powers to the Deputy. The Government having indicated that the Director of Food shall alone make such regulations, he alone can pass regulations and he cannot himself delegate any portion of his powers to any other official unless he is expressly authorised to do so. When the Government says that it delegates the powers to the Director of Food, it excludes the possibility of further delegation of the power by the person so empowered. Hence it was not competent for him to delegate powers to the Deputy Director of making regulations under cl. (12) of the Madhya Bharat Rationing Order, 1949.

(4a) The learned Advocate General contended that under S. 18 of the Madhya Bharat General Clauses Act, Samvat 2007 the law relating to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior. In my opinion S. 18 of the General Clauses Act does not apply to the facts of this particular case. This was not merely a ministerial act but it involved personal discretion and as such the power to make regulations which is vested by the Government in the Director of Food cannot be delegated to the Deputy Director. The same view is taken in' KUNNI LAL v. REX', AIR 1949 All 32. In this particular case the District Magistrate had delegated certain powers to be exercised by the Deputy Town Rationing Officer and the Deputy Town Rationing Officer framed rules and orders, it was held by the Allahabad High Court that the rules and orders were ultra vires and no conviction can be based upon any contravention thereof. With regard to the delegation of powers we have got an authoritative pronouncement by the Supreme Court reported in 'THE CONSTITUTION OF INDIA AND DELHI LAWS ACT (1912) ETC', 'IN RE', 1951 S C J 527, about the validity of certain provisions of the Delhi Laws Act, 1912. There Mahajan J. observed that the nature of the duty discharged by the Legislature is such that it is implicit within it that it should be discharged by the person entrusted with it and by no others. In order words, the nature of the public duty itself demands it and the principles of legislation require it. The correct position on the other hand is that unless expressly or impliedly authorized, such delegation is not permissible.

(5) Here the Government has specified that the Director of Food shall make regulations under Clause (12) of the Rationing Order and therefore the Director of Food has no authority to further delegate powers to the Deputy Director. The power of making regulations under the Rationing Order is not a mere ministerial act and therefore the provision of S. 18 of the Madhya Bharat General Clauses Act would not apply.

(6) I, therefore, accept the reference made by the Municipal Magistrate First Class Indore City and hold that the Madhya Bharat Rationing Regulation, 1949 is ultra vires and no conviction can be based for contravention thereof.

R.G.D. Reference accepted.

A. I. R. 1952 Madhya Bharat 127

(INDORE BENCH)

MEHTA J.

Jagjiwanpershad, Appellant v. Bhurapershad and others, Respondents.

Civil Misc. Appeal No. 15 of 1951, D/- 12-12-1951.

Guardians and Wards Act (1890), S. 25 — Application for custody of minor wife — Power of Court to decide question of factum of marriage and minority.

Where a person claims the custody of his minor wife and on behalf of the girl it is contended that she is not a minor and not the lawfully married wife of the applicant there is nothing to prevent the Court under certain circumstances to decide the question of the factum of marriage without deciding its validity. Without giving any opportunity to the applicant to prove the factum of marriage the Court cannot shut out the inquiry as to factum of marriage by saying that it has no power to go into the question of marriage. The Court should also inquire whether the wife is or is not minor because if she is not a minor then the Court has no jurisdiction under the Guardians and Wards Act and the proper remedy for the applicant would have been to institute a suit for restitution of conjugal rights. 3 All 403, Disting. (Para 2)

Anno: Guardians and Wards Act, S. 25 N. 9.

M. A. Khan, for Appellant; N. Karanjkar, for Respondents.

Case referred to:

('81) 3 All 403 (Pr 2)

JUDGMENT: One Jagjiwanpershad made an application to the District Judge Indore under S. 25 of the Guardians and Wards Act for the custody of his minor wife. The plaintiff's allegations are that minor Ramkuwar is his lawfully married wife. He states that defendants Nos. 1 and 2 who are the father and

mother of the minor are detaining the minor and they come in the way and do not give the custody of the minor wife to him. The applicant fears that if the custody of the minor is not given to him she would be given in Natra elsewhere. The non-applicants Nos. 1 and 2 who are the father and mother of the minor Ramkuwar contended that Ramkuwar is aged above 18 years and she is not a minor. They also contended that minor is not the lawfully married wife of the applicant Jagjiwanpershad. They contended that the applicant stated that he belongs to the same sub-caste as that of the non-applicants and by falsely stating his caste he wanted to marry the minor. But the non-applicants came to know about it and the marriage was not brought about.

(2) The learned District Judge without making any inquiry rejected the plaintiff's application on the ground that the Court could not inquire into the question of the validity of marriage. The lower Court relied on a case reported in 'BALMAKUND v. JANKI', 3 All 403. In a judgment of four lines the Judge of the Allahabad High Court held that where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act No. IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court. That Allahabad case was decided on the provisions of Act No. IX of 1861. The present application is made under the Guardians and Wards Act No. VIII of 1890. In my opinion, complicated question relating to marriage may not be tried by the District Judge under the Guardians and Wards Act but there is nothing to prevent the Court under certain circumstances to decide the question of the factum of marriage without deciding its validity. At least a 'prima facie' inquiry should have been made whether the applicant proves the factum of marriage. But without giving any opportunity to the applicant to prove the factum of marriage the Court cannot shut out the inquiry by saying that it has no power to go into the question of marriage. The Court should have also inquired whether Ramkuwar is or is not a minor because if she is not a minor then the Court had no jurisdiction under the Guardians and Wards Act and the proper remedy for the applicant would have been to institute a suit for restitution of conjugal rights. The welfare of the minor and her wishes are to be ascertained. However it appears that the lower Court is so obsessed by the judgment in '3 All 403' that it refused to make even a 'prima facie' inquiry into the factum of marriage and also to determine the question whether Ramkuwar is a minor or major. Under these circumstances I remand the case to the lower Court with a direction to dispose of the application of the plaintiff on merits and according to law. Costs cost in the cause.

G.M.J. Case remanded.

A. I. R. 1952 Madhya Bharat 128

INDORE BENCH

KAUL C. J. AND MEHTA J.

K. N. Bhatia Ghisalal, Applicant v. The Regional Transport Authority and others, Opponents.

Civil Misc. Cases Nos. 23, 24, 26 and 28 of 1951, D/- 17-12-1951.

(a) Motor Vehicles Act (1939) (as extended to Madhya Bharat), S. 58 — Permit granted for one year — Permit cannot in view of Section 58, remain in force for 3 years. Civil Misc. Case No. 22 of 1951 (MB), Foll. (Para 8)

Anno : Motor Vehicles Act, S. 58 N. 1.

(b) Constitution of India, Art. 226 — Order passed by Appellate authority appointed by Madhya Bharat State Government under R. 80, Madhya Bharat Motor Vehicles Rules, 1949 — High Court can interfere with the order. Civil Misc. Case No. 22 of 1951 (M B), Foll. — Motor Vehicles Act (1939), S. 68 — Rules under — Motor Vehicles Rules (M B), R. 80. (Para 6)

Anno : C. P. C., Appendix II; Constitution of India, Art. 226 N. 7.

(c) Motor Vehicles Act (1939), S. 68 — Rules under — (M B) Motor Vehicles Rules, 1949, R. 80 — Constitution of appellate authority — Person having financial interest in transport undertaking is disqualified from being a member of Appellate authority. Civil Misc. Case No. 22 of 1951 (M B), Foll. (Para 8)

(d) Constitution of India, Art. 226 —Administrative orders — Interference by High Court — Permit granted to applicant under Motor Vehicles Act, cancelled on appeal without notice to applicant — Fit case for interference by High Court — Motor Vehicles Act (1939), S. 64.

Though the Court may not control all administrative and executive acts they can and in order to see that no injustice is done by authorities that are invested by Legislative enactments with large Statutory powers affecting the rights of private citizens, should insist — if such insistence is necessary to achieve the object and purpose of the Statute — that in passing even administrative orders the well-recognised principle of approach are not ignored. (1880) 24 QBD 712 and 1915 A C 120, Rel. on. (Para 17)

Where a permit granted to the applicant under the Motor Vehicles Act is cancelled on an appeal without any notice to the applicant, the cancellation is improper and it is eminently a fit case in which the High Court ought to interfere to set right the wrong. (Para 18)

Anno : Motor Vehicles Act, S. 64 N. 1; C. P. C., Appendix III; Constitution of India, Art. 226 N. 4, 7 and 13.

In No. 23/51 S. M. Samvatsar, for Applicant; K. A. Chitale, Advocate-General, for Opponents.

In No. 24/51 S. M. Samvatsar, for Applicant; V. R. Newaskar (for No. 4) and K. A. Chitale, Advocate-General, for (Nos. 1, 2, 3 and 5), for Opponents.

In No. 26/51 S. M. Samvatsar, for Applicant; H. Sanghi and S. M. Kutumbale (for No. 4) and K. A. Chitale, Advocate-General, (for Nos. 1, 2, 3 and 5), for Opponents.

In No. 28/51 S. M. Samvatsar and R. G. Waghmare, for Applicant; K. A. Chitale, Advocate-General, (for Nos. 1, 2, 3, 4 and 5) and V. R. Newaskar (for No. 6), for Opponents.

Cases referred to :

('51) Civil Misc. Case No. 22 of 1951 (M B) (Pr 8)

(1915) A C 120: (84 L J K B 72) (Pr 17)

(1880) 24 Q B D 712: (59 L J Q B 250) (Pr 17)

KAUL C. J.: These are four applications made under Art. 226 of the Constitution praying for issue of certiorari or mandamus or other appropriate orders or directions to obtain redress for the injury caused to the interests of the applicant in each case by certain orders of the Appellate Authority appointed under R. 80 of the Motor Vehicles Rules, 1949. As all these applications have many features in common and raised the same questions it will be convenient to dispose of them by one common order.

(2) The four applications arise on these facts:

Civil Misc. Application 23 of 1951.

(3) By local Act No. 62 of Samvat 2006 the Motor Vehicles Act of 1939 (India) was with certain adaptations brought into force into Madhya Bharat in June 1949. As required by the Act the Government constituted for the United State a Transport Authority and two Regional Transport Authorities. One of these was the Regional Transport Authority for the Southern Region and the other for the Northern Region; the former will for the sake of convenience be referred to as the Regional Transport Authority. A firm doing business under the Firm name K. N. Bhatia was granted a permit by the Regional Transport Authority for plying a Stage carrier on hire between Indore and Dhar. This was permit No. 343/50 dated the 13th August 1950. It was to remain in force upto the 31st of July i.e., for one year. One Shafi Ahamad who was also an applicant for a permit to ply a stage carrier on hire on the same section as K. N. Bhatia and whose application had been rejected by the Regional Transport Authority filed an appeal against the order rejecting his application and granting a permit to K. N. Bhatia, to the Appellate Authority appointed under R. 80 of the Motor Vehicles Rules. The appeal preferred by Shafi Ahamad was heard and disposed of by a Board consisting of the Chairman Shree C. L. Gupta and two members Mr. V. V. Sarvate and the Dy. Inspector General of Police, Gwalior. They allowed Shafi Ahamad's appeal on the 7th of December 1950. By their order they cancelled the permit granted to K. N. Bhatia and

> "remanded the case to the R. T. A. S. R. (Regional Transport Authority Southern Region) which has directed to follow the procedure laid down under S. 57 of the Motor Vehicles Act and dispose of the case according to merits and law."

(4) K. N. Bhatia preferred an appeal against the said order to the Government of Madhya Bharat which was held incompetent and rejected. Hence this application under Art. 226.

(5) Two main contentions were put forward on behalf of the applicant:

1. That in view of the provisions of S. 58 of the Motor Vehicles Act, the permit granted to him must, in spite of the fact that it was according to its terms to be valid only upto the 31st of July 1951 remain in force for three years, and
2. That the Appellate Authority which heard the appeal filed by Shaikh Ahamad was not properly constituted and accordingly any order passed by it could not have any binding force.

(1) The Regional Transport Authority, Southern Range (2) United State Transport Authority (3) The Secretary and Chief Executive Officer, Regional Transport Authority, Southern Range and (4) The Appellate Authority, Gwalior were impleaded as opposite parties.

(6) In his reply to the points raised on behalf of the applicant, the Advocate-General who appeared for the opposite parties denied that the Appellate Authority was improperly constituted. He further contended that the grant of a permit by the Regional Transport Authority and its cancellation by the Appellate Authority were administrative, as distinct from the judicial acts, with which the High Court could not interfere.

(7) Another point raised on behalf of the opposite parties was that inasmuch as the period for which the permit was granted to the applicant expired on the 31st of July 1951, his application was infructuous and no relief could be granted to him.

(8) For the reasons given in detail in my order in 'BABULAL VALLABHDAS v. REGIONAL TRANSPORT AUTHORITY', Civil Misc. Case No. 22 of 1951, I have held that a permit granted for one year could not in view of the provisions of S. 58 of the Motor Vehicles Act, remain in force for three years. I rejected the contention advanced by the Advocate-General that the High Court could not interfere with an order passed by the Appellate Authority appointed by the State Government under R. 80 of the Motor Vehicles Rules, and further held in that case that Shree C. L. Gupta, Chairman of the Appellate Authority, was inasmuch as he had a financial interest in a transport undertaking (as Chairman of Madhya Bharat Roadways), disqualified from being a member of the Appellate Authority and accordingly the constitution of the Appellate Authority was invalid. But as the period of the permit granted to K. N. Bhatia had expired when his application came to be heard no relief could be granted to him.

(9) His application is accordingly dismissed.

(10) I make no order as to costs as his permit was in force on the 19th of July 1951 when he presented his application.

Civil Misc. Application No. 24 of 1951:

(11) In this case as in the previous application Messrs. Sind Transport Company were granted a permit by the Regional Transport Authority, Southern Range, to ply on hire a stage carriage on Indore Dharampuri Road via Dhamnod. This was permit No. 342/50 dated the 3rd of August 1950. It was to remain in force till the 31st of July 1951. One Fazil Khan who had also applied for a permit to ply a stage carriage on hire on the same Indore Dharampuri section and whose application had been rejected by the Regional Transport Authority filed an appeal which was disposed of by a Board consisting of Shri C. L. Gupta, Chairman and two members, the Deputy Inspector General of Police, Northern Range and Shri V. V. Sarvate. Fazil Khan's appeal was allowed and the permit granted to the present applicant was cancelled. Hence the present application.

(12) (1) The Regional Transport Authority, Southern Region (2) United State Transport Authority (M. B. Gwalior) (3) Secretary and

Chief Executive Officer, Regional Transport Authority Southern Region, Indore (4) Fazil Khan and (5) The Appellate Authority, Gwalior, were impleaded as opposite parties to the aplication.

(13) The same contentions which were urged on behalf of K. N. Bhatia in case No. 23 of 1951 were raised in this case on behalf of the present applicant.

(14) A further point was raised in this case in addition to those urged in applications Nos. 22 and 23 of 1951. It was contended that the appeal preferred by Fazil Khan was heard by the Appellate Authority without any notice to the present applicant and the order cancelling his permit was passed behind his back.

(15) The observations made by me in dealing with the points which are common to this application and applications Nos. 22 and 23 apply to the present case also and this application also must stand dismissed for the same reasons for which the applications Nos. 22 and 23 were dismissed. I should however like to say a few words with regard to the fresh point raised in this application.

(16) It was strenuously argued by Mr. Samvatsar that the present applicants who were to be vitally affected by any order that might be passed in connection with Fazil Khan's appeal had no notice of the date of hearing. He was thus allowed no opportunity to have his say in the matter and an order which cancelled his permit and granted a permit to a rival applicant behind his back could not bind him. In reply to this argument the learned Advocate-General as also the counsel for Fazil Khan referred to S. 64 of the Act under which the appeal was preferred. They invited our attention to the last part of the section which says that the Appellate Authority shall give the appellant and the Authority which passed an order appealed against an opportunity of being heard. They sought to draw an inference from the language of the section that an Appellate Authority could decide an appeal without giving any notice of the hearing to a person whom any order passed by them might vitally affect. The learned counsel strenously argued that the grant of a permit under the provisions of the Act as well as the decision of an appeal against an order granting the permit to one applicant and rejecting the application made by rival claimants for permits were purely administrative acts in which this Court could not interfere. It was further argued on the basis of the wording of S. 64, that legislature never intended that any party except the appellant under that section or the authority against whose order an appeal was preferred should be heard by the Appellate Authority. I am satisfied that this is not the correct view of the Law.

(17) It is true that S. 64 does not require the Appellate Authority to give notice of the appeal or an opportunity of being heard to any person who may adversely be affected by their order. I may, however, here refer to the observations made by the House of Lords in 'HOPKINS v. SMETHWICK LOCAL BOARD OF HEALTH', (1880) 24 Q B D 712, that it was the duty even of administrative authorities "to listen fairly to both sides" when they have anything to decide. To similar effect are the observations of Lord Haldane in 'LOCAL GOVERNMENT BOARD v. ARLIDGE', (1915) A C 120 at p. 132, His Lordship observed:

> "My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made."

Though the Court may not control all administrative and executive acts they can and in order to see that no injustice is done by authorities that are invested by Legislative enactments with large statutory powers affecting the rights of private citizens, should insist—if such insistence is necessary to achieve the object and purpose of the Statute—that in passing even administraive orders the well recognised principle of approach are not ignored.

(18) In the case before us a permit was granted to the present applicant. This was cancelled on an appeal preferred by Fazil Khan without any notice to the applicant and without affording him an opportunity of being heard. I am clear that this was improper and the present is eminently a fit case in which the High Court ought to interfere to set right the wrong. But inasmuch as with the expiry of the applicant's permit no relief can be granted to him the application is dismissed.

(19) No order as to costs is made for the same reasons as in Civil Misc. Case No. 22 of 1951.

Civil Misc. Case No. 26 of 1951:

(20) In this case the applicant Laxminarayan was granted a permit by the Regional Transport Authority to ply a stage carriage on hire on the Indore Chambal Railway Station. This was permit No. 305/1951 dated the 3rd January 1951. This permit is to remain in force till the 30th of September 1954. One Kazi Mohammad Amin had also made application for a permit for the same route. That was rejected. Accordingly Kazi Mohammad Amin preferred an appeal which was disposed of by the Regional Transport Authority appointed by the Madhya Bharat Government under R. 80 of Madhya Bharat Motor Vehicles Rules. The appeal was allowed and the permit granted to the present applicant was cancelled; instead a permit was granted to Kazi Mohammad Amin. Hence the present application.

(21) (1) The Regional Transport Authority, Southern Region, Indore (2) United State Transport Authority, Madhya Bharat, Gwalior (3) Secretary and Chief Executive Officer, Regional Transport Authority, Southern Range, Indore (4) Kazi Mohammad Amin and (5) The Appellate Authority, Gwalior were impleaded as opposite parties to this application.

(22) As in other cases it was contended on behalf of the present applicant that the Appellate Authority was not properly constituted and hence any order passed by it could have no binding force.

(23) Another point raised was that the order purporting to have been passed by the Appellate Authority was signed only by two persons, Shri C. L. Gupta, the Chairman and Shri V. V. Sarvate one of the members of the Board. Though the appeal was heard by these

two and the Deputy Inspector General of Police the last named member did not sign the orders.

(24) I have for the reasons given in Civil Misc. Case No. 22 of 1951, upheld the contention challenging the constitution of the Appellate Authority appointed by the Madhya Bharat Government under R. 80 of the Motor Vehicles Rules. Any order passed by it must therefore be held to be a nullity. In this view of the matter it is unnecessary to consider the question whether the omission by one of the members of the Appellate Authority to sign the order makes it invalid.

(25) The application is therefore allowed. The permit granted to the present applicant must accordingly be held to be still in force. A direction shall issue to Madhya Bharat Government to appoint a properly constituted Appellate Authority as contemplated by R. 80 of the Motor Vehicles Rules, 1949. It will be open to Kazi Mohammad Amin to seek redress against the rejection of his application by the Regional Transport Authority before that body.

(26) As the Government of Madhya Bharat whose error is responsible for what has happened is not a party to this application we make no order as to costs.

Civil Misc. Case No. 28 of 1951:

(27) In this case Harichand was granted a permit by the Regional Transport Authority, Southern Range, to ply a stage carriage on hire on Indore—Mahidpur Road via Tarana. The permit granted to him was No. 377/50 dated the 20th of December 1950. It was granted for one year and was to remain in force till the 19th of December 1951. The application made by Shaikh Mohammad for a permit to ply a stage carriage on hire on the same section was rejected. He preferred an appeal which was heard by a Board consisting of Shri C. L. Gupta, the Deputy Inspector General of Police, Northern Range and Shri V. V. Sarvate. The appeal was allowed and the permit granted to Harichand was cancelled. Harichand has accordingly preferred the present application.

(28) (1) The State of Madhya Bharat, through Chief Secretary Madhya Bharat, (2) United State Transport Authority, Madhya Bharat, (3) Appellate Authority, United State Transport Authority, (4) Regional Transport Authority, Southern Range, (5) The Secretary and Chief Executive Officer of the Regional Transport Authority and (6) Shaikh Ahamad, have been impleaded as opposite parties in the present application.

(29) It was contended on behalf of the applicant that inasmuch as the Appellate Authority which disposed of Shaik Ahamad's appeal was not legally constituted the order cancelling the petitioner's permit passed by it could have no binding force.

(30) For the reasons given by me upholding a similar contention in Civil Misc. Case No. 22 of 1951, I am of opinion that this application should be allowed.

(31) The permit granted to the applicant by the Regional Transport Authority inasmuch as it has not been cancelled by a duly constituted Appellate Authority must be held to be still in force.

(32) The application is allowed. A direction shall issue to opposite party No. 1 to constitute an appropriate Appellate Authority as contemplated under R. 80 of the Motor Vehicles Rules, 1949. It will be open to Shaikh Ahamad to seek any remedy that may be open to him under the provisions of the Motor Vehicles Act before such Authority.

(33) As the application has been allowed I direct that opposite party No. 1 shall pay the applicant Rs. 100/- by way of costs.

(34) The orders passed by us in these cases shall not affect any remedy with regard to an injury that may have been caused to any party by an order passed by the improperly constituted Appellate Authority. We express no opinion whether any remedy is open to such party or not. We only wish to guard against our order in the present bunch of cases being interpreted as dealing with that matter.

(35) A copy of the order in Civil Misc. Case No. 22 of 1951 (Babulal Vallabhdas v. The Regional Transport Authority and others) shall be attached to and form part of this order.

(36) MEHTA J.: I entirely agree with my Lord the Chief Justice and have nothing to add.

V.B.B Order accordingly.

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(GWALIOR BENCH)

DIXIT J.

Gunni, Applicant v. Babu Lal, Non-applicant.

Criminal Revn. No. 175 of 1951, D/- 14-3-52.

(a) Criminal P. C. (1898), S. 488 (1) — Just ground — Cruelty on part of husband — Necessity to establish.

A wife seeking maintenance under Section 488 has to prove neglect or refusal on the part of her husband to maintain her and her child who is unable to maintain herself and she is not required to establish cruelty on the part of her husband, although cruelty may be proved as a just ground for the wife's refusal to stay with her husband. (Para 3)

Anno : Cr. P. C., S. 488 N. 11 Pt. 1 N. 21 Pt. 8.

(b) Criminal P. C. (1898), S. 488 (3) (as amended by Criminal Procedure (Amendment) Act, 1949) — Just ground — Husband contracting second marriage or taking mistress before amendment.

There is nothing in the Criminal Procedure (Amendment Act) 1949 to show that it would not be a just ground for the wife's refusal to live with her husband if the husband has contracted marriage with another wife or taken a mistress before the amendment made in S. 488. (Para 4)

Anno : Cr. P. C., S. 488 N. 21.

(c) Criminal P. C. (1898), S. 488 (1) and (3) — Just ground — Husband's second marriage or concubinage — Material point of time.

It is clear from the sub-clauses (1) and (3) of S. 488 that in considering whether the husband's second marriage or his concubinage is a just ground for the wife's refusal to live with him, the material point of time is the time of the refusal of the wife to live with her husband & not the time

of contracting a second marriage or taking a mistress. (Para 4)

Anno : Cr. P. C., S. 488 N. 21..

Shiv Dayal, for Applicant; Tribhuwan Nath for non-applicant.

REFERENCES: Courtwar/ Chronological/ Paras.

(1895) A C 425: (64 LJPC 167) (Pr 4)

ORDER : This is a petition arising out of an application for maintenance by a wife against her husband. The applicant stated in her petition under Section 488, Cr. P. C. that she was married to the opponent Babu Lal in Samvat 1993; that three years after her marriage the non-applicant Babu Lal contracted a second marriage with one Mt. Pancho and that after his second marriage Babu Lal at the instigation of Mt. Pancho began to illtreat her; that when in Samvat 2005 a son was born to the petitioner from Babu Lal, the illtreatment increased and her husband frequently beat her and starved her and her child of the necessary clothing and food. The petitioner further stated that on 26-5-50 Babu Lal told her to remain at the service and attendance of his second wife and not to accept any food or clothing from her parents and then subsequently beat her with shoes and drove her out of the house.

Babu Lal admitted that the applicant was his wife and that he begot a child from her in Samvat 2005. He also admitted that he had contracted a second marriage with Mt. Pancho. But he denied the allegation that he was illtreating the petitioner or that he had asked her to leave his house.

(2) The Sub-Divisional Magistrate Kolaras before whom the applicant presented her petition found that the non-applicant Babu Lal might have given a beating to the applicant on one or two occasions and might have displeased her, but that this sort of conduct on the part of a husband was not unusual in "this Country or society." The learned Magistrate further held that the applicant had failed to prove that Babu Lal beat her on the night of 26-5-50 and drove her out of the house. The Magistrate was inclined to think that Mt. Gunni herself left the counter-petitioner's house on 9-7-50. He gave no finding as to whether after this date, Babu Lal neglected or refused to maintain her.

The Magistrate however observed that the petitioner used to live with her husband and child in a separate house and that while she was living with him Babu Lal provided her with adequate food and clothing. On these findings the learned Magistrate refused to pass an order directing the counter-petitioner to pay his wife & the child of 2½ years of age any amount by way of maintenance. The petitioner then applied to the Sessions Judge of Guna for a revision of the order of the Magistrate. The learned Sessions Judge agreed with the findings of the Magistrate and rejected the revision petition. The applicant has now come up in revision to this Court.

(3) After hearing the learned counsel for the parties, I have formed the opinion that the order of the Magistrate dismissing the applicant's petition for maintenance, cannot be sustained. Both the learned Sessions Judge and the Magistrate appear to have ignored altogether the fact that a wife seeking maintenance under S. 488 has to prove neglect or refusal on the part of her husband to maintain her and her child who is unable to maintain herself & that she is not required to establish cruelty on the part of her husband, although cruelty may be proved as a just ground for the wife's refusal to stay with her husband. The Courts below also lost sight of the amendment effected in 1949 to sub-clause 3 of S. 488, Cr. P. C. by the Criminal Procedure (Amendment) Act, 1949. By this amendment it is now provided that

> " if a husband has contracted marriage with another wife or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

In the present case the marriage of the petitioner with the non-applicant Babu Lal is admitted. Babu Lal also admits his second marriage with Mt. Pancho. He also admits that he has a son aged about 2½ years from the applicant. Before me it is also not denied on behalf of the counter-Petitioner Babu Lal that the applicant Mt. Gunni ceased to live with her husband a few days prior to the filing of the application under S. 488 before the sub-Divisional Magistrate Kolaras and has been since then living along with her son at her parents' residence and that after the applicant's leaving her husband's residence, the husband has not maintained her and the child. Babu Lal has said in his statement that the applicant is not entitled to any maintenance if she lives separate from him. Babu Lal's father also says in his evidence that if the applicant is willing to live in his house, as other members of the family do, then he and his son are prepared to maintain her and the child.

(4) The question, therefore, that arises for determination on these facts is whether in view of the amendment made in S. 488(3) the petitioner is entitled to any maintenance allowance for herself and for her child on the sole fact of her husband's second marriage, without proving cruelty on her husband's part as a ground for refusal to live with him. Learned ccunsel for the petitioner argues that under the amended Clause 3 of S. 488 the fact that the counter-petitioner has married a second wife is in itself a just ground for the applicant's refusal to live with her husband Babu Lal and that, therefore, on the admitted facts of the present case she is entitled to claim maintenance from her husband for herself and for her child. On behalf of the non-applicant, it is contended that the amendment would apply only to those cases where the husband has after the amendment contracted marriage with another wife, or taken a mistress.

I am unable to accept the contention advanced on behalf of the non-applicant. There is nothing in the Criminal Procedure (Amendment) Act, 1949 to show that it would not be a just ground for the wife's refusal to live with her husband if the husband has contracted marriage with another wife or taken a mistress before the amendment made in S. 488. Before the amendment, the fact of the husband's marrying a second wife or keeping a mistress was not by some High Courts considered a just ground for the first wife's refusal to live with him, although it was taken into account in considering whether the husband's offer to maintain his first wife was really 'bona fide' or not.

The amendment is clearly intended to put an end to an unsatisfactory state of law, utterly inconsistent with the progressive ideas of the status and emancipation of women, in which women were subjected to a mental cruelty of living with a husband who had taken a second

wife or a mistress on the pain of being deprived of any maintenance if they chose to live separately from such a husband. In my view to hold that the amendment is intended to afford a just ground for the wife's refusal to live with her husband only in those cases where he has after the amendment, taken a second wife or a mistress is to defeat in a large measure the very object of the amendment.

It is also clear from sub-cls. (1) and (3) of S. 488, Criminal P. C., that in considering whether the husband's second marriage or his concubinage is a just ground for the wife's refusal to live with him, the material point of time is the time of the refusal of the wife to live with her husband and not the time of contracting a second marriage or taking a mistress. I do not think it can be argued with any degree of force that as the non-applicant married a second wife long before the amendment, he had, therefore, acquired a vested right of taking advantage of the provisions of S, 488 (3) as they stood before the amendment and that the fact of his second marriage cannot afford a just ground for the applicant's refusal to live with him.

Mt. Gunni applied before the Sub-Divisional Magistrate on 31-5-1950 that is nearly one year after the amendment in S. 488 (3). She had not applied for any maintenance before the Criminal Procedure (Amendment) Act, 1949 came into force. If she had, then the opponent could have availed himself of the advantage given to him by sub-cl. 3 of S. 488 as it was before the amendment. But in my opinion the opportunity of availing himself of a statutory advantage cannot be treated as an acquired right. It is stated in Halsbury's Laws of England, Volume 31, p. 517, that:

> "A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued."

In 'ABHOTT v. THE MINISTER FOR LANDS', (1895) AC 425, it is observed:

> "The mere right (assuming to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be deemed a right accrued within the meaning of the enactment."

(5) I am therefore, inclined to think that in the present case the petitioner is entitled to urge her husband's second marriage as a just ground for her refusal to live with him. It seems to me that the petitioner has established satisfactorily her claim to maintenance for herself and her child. The petitioner claims a monthly allowance of Rs. 100/-. The amount claimed by the petitioner appears to me proper. It is in evidence and the learned Magistrate has also found that the income of the family of which the opponent Babu Lal is a member is about Rs. 2000/- p.m. That being so, I am of the opinion that a maintenance of Rs. 100/- per month to the petitioner would be a reasonable maintenance allowance for herself and for her child. I, therefore, direct the counter-petitioner Babu Lal to pay monthly allowance at this rate to the petitioner with effect from the date of the order of the Sub-Divisional Magistrate that is, 8-1-1951.

V.R.B. Order accordingly.

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(INDORE BENCH)

KAUL C. J. AND MEHTA J.

Babulal Tendwa and others, Applicants v. State.

Criminal Misc. Appln. No. 139 of 1951, D/- 10-1-1952.

(a) Constitution of India, Art. 134 — Irregularity in choosing assessors — Grant of certificate — (Criminal P. C. (1898), S. 284).

Where no prejudice is caused to the accused any irregularity in choosing the assessors cannot be a ground which would justify the High Court in granting a certificate of fitness under Art. 134. (Para 18)

Anno: C. P. C., Appendix III; Constitution of India, Art. 134 N. 1; Cr. P. C., S. 284 N. 9.

(b) Penal Code (1860), Ss. 149 and 302 — Some members of unlawful assembly running away after inflicting one or two injuries on deceased — Responsibility of such members for death.

Where the persons participating in an assault upon the deceased are members of one unlawful assembly, the mere fact that some of the members of that assembly run away after inflicting one or two injuries each upon the deceased cannot absolve them of the responsibility for the death even though it was not the direct result of the injuries inflicted by any one of them but was the cumulative result of the injuries inflicted by them and other members of the same unlawful assembly. It is impossible to dissociate the act done by one member of an unlawful assembly from the acts of other members of the same assembly if all those acts form part of the same transaction. (Para 21)

Anno: Penal Code, S. 149 N. 8, S. 302 N. 24.

L. S. Shukla, for Applicants; P. R. Sharma, Government Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('50) AIR 1950 SC 169: (51 Cri LJ 1270) 17

KAUL, C. J.: This is an application under Article 134 of the Constitution praying for a certificate "that the case is a fit one for appeal to the Supreme Court."

(2) The material facts are as follows: On the 20th August 1950, there was riot in one of the local cloth Mills in Indore. As a result of certain incidents which followed this riot one Deputy Superintendent of Police, Joshi and a Police Constable Kesrisaran lost their lives and several other Police men sustained injuries. Three cases were started by the Police in connection with this riot and the incidents which followed:

(1) A riot case relating to the riot which took place on the Mill premises.

(2) A case relating to the incident which resulted in the loss of life of Deputy Superintendent of Police Joshi on the public road at a short distance from the Mill gate; and

(3) A case relating to the murder of Constable Kesrisaran which took place at a spot some distance remote from where Deputy Superintendent Joshi was assaulted.

(3) 14 persons were sent up for trial in connection with the case relating to the incident which resulted in the loss of life of Deputy Superintendent of Police Joshi. Of these 5 were

convicted by the Sessions Judge, Indore and the rest acquitted. 2 of these 5 namely Babulal Tendwa and Madanlal were convicted under Section 302/149, I.P.C., and also under Section 148, I.P.C. Each of them was sentenced to death for the first mentioned offence and to three years' rigorous imprisonment under Section 148, I.P.C. The remaining three were acquitted of offences under Section 302/149, I.P.C., and 148, I.P.C., but were convicted under Section 326/149, I.P.C., and sentenced to ten years' rigorous imprisonment each.

(4) Three appeals were preferred against the order passed by the learned Sessions Judge:

(1) Criminal Appeal No. 84 of 1951 by Babulal Tendwa and Madanlal against their conviction for offences under section 302/149, I.P.C., and under Section 148, I.P.C.

(2) Criminal Appeal No. 88 of 1951 by Lalta Prasad, Honsla Prasad and Bapu Talwala against their conviction under Section 326/149, I.P.C.;

(3) Criminal Appeal No. 108 of 1951 was preferred by the State against Lalta Prasad, Honsla Prasad and Babu Talwala in respect of their acquittal under Section 302/149, I.P.C.

(5) Criminal Appeal No. 84 of 1951 preferred by Babulal Tendwa and Madanlal was dismissed and the reference made by the Sessions Judge for confirmation of the death sentence passed upon them was accepted. Criminal Appeal No. 88 of 1951 preferred by Lalta Prasad, Honsla Prasad and Babu Talwala was also dismissed. Criminal Appeal No. 108 of 1951 preferred on behalf of the State was accepted. The acquittal of the three appellants Lalta Prasad, Honsla Prasad and Babu Talwala by the Sessions Judge under Section 302/149, I.P.C., was set aside and instead of Section 326/149, I.P.C., they were convicted under Section 302/149, I.P.C., and sentenced each to transportation for life.

(6) Mr. Shukla one of the counsel who appeared for all these five persons, both in the Court of Sessions as well as in the High Court, has made the present application under Article 134 of the Constitution praying for a certificate that the case is a fit one for appeal to the Supreme Court. Even if we disregard the appeal preferred on behalf of the State (Criminal Appeal No. 108 of 1951) we have two separate appeals Nos. 84 and 88 of 1951, the former on behalf of Babulal Tendwa and Madanlal and the latter on behalf of the three remaining convicted persons. Curiously enough however Mr. Shukla has treated both of them as one and made a common application on behalf of the 5 convicted persons praying for a certificate under Article 134 (c) of the Constitution. This is irregular. This was not noticed at the time of hearing but my attention was attracted to it while dictating the present order. I will deal with each of these appeals — Criminal Appeal No. 84 of 1951 and 88 of 1951 separately.

(7) In order to appreciate properly the points raised by Mr. Shukla it is necessary to give a few facts. I will mention only such of them as are necessary for the purposes of the present application.

(8) As already stated, there was a riot by the mill workers of the Malwa Mill on the morning of the 20th of August 1950. The riot started inside the Mill premises some time before 9 A.M. At about 9 A.M. the Manager put up a notice announcing that the Mill was closed. Sub-Inspector of Police, Ibrahim who was already there telephoned to Police Station Pardeshipura requesting the Station Officer to come over to the Mill. Accordingly Sub-Inspector Narayan Singh, the Station Officer went there. He tried to persuade the women workers to go back to their department and start work, but they would not listen to him. As time passed the riot grew worse. At about 9-15 A.M. Deputy Superintendent Joshi along with Sub-Inspector Chhoteram Singh also came up to Malwa Mill. He tried to pacify the labourers but was unsuccessful. Finding that the labourers were not pacified he ordered the Police to disperse the crowd.

Thereupon the labourers began to shower brickbats and stones on the Police. Deputy Superintendent Joshi, Sub-Inspector Narayansingh and Sub-Inspector Chhotaramsingh fearing that the small force they had, might be overwhelmed by the mob took shelter near the gatekeeper's room. Deputy Superintendent Joshi and Sub-Inspector Narayansingh were both injured and were bleeding. At this stage under orders from Deputy Superintendent Joshi, Narayansingh fired 5 shots from the revolver. Accidentally he fell down while doing so. Thereupon Deputy Superintendent Joshi took over the revolver from him and fired two more shots. Narayansingh got up and two more shots were fired. 2 or 3 labourers were hit.

Deputy Superintendent Joshi thereupon asked Sub-Inspector Narayansingh to go and get more men. Narayansingh came out of the main gate with his revolver in hand. He was followed by Deputy Superintendent Joshi. Joshi had nothing but a stick in his hand at that time. Walking close by the wall of the Mill, Sub-Inspector Narayansingh made his way towards Pardeshipura Police Station. Deputy Superintendent Joshi on the other hand came on the main road outside the Mill gate. A large number of labourers had gathered there. Some 25 or 30 labourers from inside the Mill followed Joshi. This party included the 5 applicants before us.

(9) The batch of 25 or 30 labourers which followed Deputy Superintendent Joshi was shouting for his blood. He was surrounded by these labourers at a short distance from the Mill gate and assaulted with iron bars and bamboo sticks. He fell down on the ground and became unconscious. Immediately news of the assault on Deputy Superintendent Joshi reached Dr. Nagu a Medical Practitioner of the town who has dispensary at a distance of 100 or 150 feet from the spot where Joshi was lying. Dr. Nagu hurried to the place of occurrence and lifted the unconscious Police Officer with the help of another person into his jeep and removed him to Maharaja Tukojirao Hospital. Deputy Superintendent Joshi expired in the Hospital at about 1 P.M.

(10) All the applicants before us pleaded not guilty. They denied the prosecution version. Their case was that after a number of shots were fired by the Police to quell the riot inside the Mill premises and some labourers were injured, the persons standing outside the Mill gate who could not see what had actually happened lost their head and being infuriated set upon Deputy Superintendent Joshi at a short distance from the Mill gate. He dropped down on the ground and thereupon the mob ran away. Meanwhile some person came out of the restaurant known as 'Kailash Hotel' with a burning faggot in his hand and struck Joshi with it. Simultaneously there arrived on the spot one Banarasi Pehalwan with two or three other companions. It was suggested that Banarasi Pehalwan being a Goonda naturally there was enmity between him and Deputy Superintendent Joshi. Taking advantage of the circumstances Banarasi Pehalwan and his companions also gave him a

number of blows till Dr. Nagu arrived on the spot in his jeep and then they ran away.

This version was however not accepted and we have held that the prosecution version was correct. This was that Sub-Inspector Narayansingh and Deputy Superintendent Joshi were followed by a crowd of labourers from inside the Mill gate and as Joshi reached what is popularly called 'Gol Chakkar' it was some members of that crowd and not those who were standing round the 'Gol Chakkar' from before, that started the attack upon the deceased. We have further held that it is possible that once the attack upon Joshi had started, some men from amongst those that were standing there already also joined in it; or as suggested by the appellants Banarasi who came on the scene later may have also joined the assailants and inflicted some of the injuries that were found on the person of Deputy Superintendent Joshi. I have observed at page 33 of my judgment:

"But it is not correct to say that the attack on Joshi was not started by the crowd that followed him from inside the Mill."

(11) I will now proceed to consider the points raised by Mr. Shukla. I will first deal with the application in so far it relates to the disposal of Criminal Appeal No. 84 of 1951 and confirmation of the death sentences passed upon Babulal Tendwa and Madanlal.

(12) Though the application mentions a large number of grounds only three main points were urged by the learned counsel at the hearing:

(1) That the Court of Sessions which tried the case was not properly constituted;
(2) That a person cannot be charged twice for the same offence, and;
(3) That Babulal Tendwa and Madanlal could not be held responsible for what was done by Banarasi and his companions or the person who is said to have come out with a burning faggot from 'Kailash Hotel'.

(13) I will deal with these points in the order in which they have been stated.

(14) After the record was received by the Sessions Judge from the Committing Magistrate's Court he summoned 8 assessors for the date fixed for the commencement of the trial. Unfortunately, however, only one of the assessors summoned was present in Court on the date fixed. In the absence of the required number of assessors, the learned Sessions Judge chose two more assessors from the persons who were present in the Court compound and whose names were found in the list of assessors. The trial was held with the aid of those three assessors.

(15) It was pointed out by Mr. Shukla that under S. 328 of the Code of Criminal Procedure every summons to a juror or assessor must be in writing and that under S. 284 the assessors who are to assist at the trial must be chosen from the persons summoned to act as such. In the present case, it appears that no written summonses were issued to the two assessors who were chosen from amongst those present in the Court compound. It was contended by Mr. Shukla that this vitiates the trial. This contention was raised before us at the hearing of the appeal and was rejected by us.

(16) It was not contended by the learned counsel that the failure to literally comply with the provisions of S. 284 of the Code of Criminal Procedure had resulted in any prejudice to the accused. They contended however that the provisions of Ss. 284 and 328 Criminal P. C. were mandatory and the failure to observe them literally vitiated the trial. We rejected this contention.

(17) The principles which should guide this Court in granting a certificate of fitness cannot be different from those which the Supreme Court had adopted for itself in granting special leave to appeal against decisions of High Court in criminal cases. It was laid down in the case of 'PRITAM SINGH v. STATE', AIR 1950 SC 169 that:

"Though the Supreme Court was not bound to follow the decisions of the Privy Council too rigidly.....yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this Court in granting special leave."

Their Lordships further observed that:

"Generally speaking, Supreme Court will not grant special leave unless it is shown that exceptional and special circumstances exist and that substantial and grave injustice has been done."

(18) Once it is conceded that no prejudice was caused to the accused any irregularity in choosing the assessors should, in my opinion, not be a ground which would justify us in granting a certificate of fitness under Art. 134 of the Constitution.

(19) The present applicants were tried in what I have called the riot case in an earlier portion of this order. It was contended by Mr. Shukla that as the murder of Deputy Superintendent Joshi was a part of the same transacton i.e., riot in the Malwa Mill, his clients could not lawfully be put on trial a second time on the same facts. We have given the grounds for rejecting this contention. They are found at pages 17 and 18 of my judgment. I have nothing to add to them. The point appears to me to be devoid of substance and accordingly cannot justify the grant of a certificate of fitness under Art. 134 of the Constitution.

(20) The following extract from my judgment will show the view of the case which I have taken:

"I have no hesitation in accepting the prosecution version that Sub-Inspector Narayan Singh and Deputy Superintendent Joshi were followed by a crowd of labourers from inside the Mill gate and as Joshi reached the 'Gol Chakkar' it was some members of that crowd, and not those standing round the 'Gol Chakkar' from before, that started the attack upon the deceased. Naturally the number that formed the crowd which followed the Police Officer from inside the Mill gate has not been definitely ascertained. Most of the witnesses put it at between 30 and 40. Constable Khanchand however says that it was a much larger number. May be that once the attack upon Joshi had started some men from amongst those that were standing there already also joined in it; or as suggested by the appellant Banarsi who came on the scene later may have also joined the assailants and inflicted some of the injuries that were found on the person of Deputy Superintendent Joshi. But it is not correct to say that the attack on Joshi was not started by the crowd that followed him from inside the Mill."

(21) The point sought to be made by Mr. Shukla was that after inflicting some injuries upon Deputy Superintendent Joshi the present applicants left the place and some other persons inflicted further injuries upon the unfortunate Officer after the present applicants had left. Mr. Shukla argued that his clients cannot be held liable for the injuries which were inflicted after they left the place. In view which I have taken the whole incident from the time that Sub-Inspector Narayansingh and Deputy Superintendent Joshi came out from the Malwa Mill gate followed by 25 or 30 labourers till he was assaulted and later up to the arrival of

Dr. Nagu was one transaction and all those who participated in the assault upon the deceased Police Officer were members of one unlawful assembly. The mere fact that some of the members of that assembly ran away after inflicting one or two injuries each upon the deceased cannot absolve them of the responsibility for the death of Deputy Superintendent Joshi even though it was not the direct result of the injuries inflicted by any one of the present applicants but was the cumulative result of the injuries inflicted by them and other members of the same unlawful assembly. It is impossible to dissociate the act done by one member of an unlawful assembly from the acts of other members of the same assembly if all those acts form part of the same transaction.

(22) None of the grounds mentioned above would in my view of the matter, justify the grant of a certificate of fitness of the case for an appeal to the Supreme Court.

(23) Whatever I have said about Criminal Appeal No 84 of 1951, applies also to the Criminal Appeal No. 88 of 1951 as both the cases were treated as one by Mr. Shukla counsel for the applicants.

(24) The application is accordingly rejected.

(25) MEHTA, J.: I agree.

V.R.B. Application dismissed.

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(INDORE BENCH)
DIXIT AND MEHTA JJ.

Vishwanath and another, Appellants v. Kanak Mal and another, Respondents.

Civil Misc. Appeal No. 42 of 1951, D/- 27-11-1951.

(a) Civil P. C. (1908), O. 40, R. 1 (2) — "Any person" — Suit on basis of simple mortgage — Appointment of receiver.

Sub-rule 2 is by way of an exception and has the effect of limiting the operation of the main provision in sub-rule 1. Sub-rule 2 cannot be construed so as to totally destroy the power given to the Court under sub-rule 1. Sub-rule 2 of Rule 1 is for the benefit of a person who is not a party to the suit and debars the Court from removing such a person from possession. Thus, in a suit brought on the basis of a simple mortgage, the Court is competent to appoint a receiver of the mortgaged property. AIR 1936 All 495 (FB), Dissent. Case law referred. (Paras 4 and 5)

Anno: C. P. C., O. 40, R. 1 N. 49 Pt. 6.

(b) Civil Procedure Code (1908), O. 40, R. 1 — "Just and Convenient" — Discretion of Court —Mortgagee entitled to have rent of mortgaged property towards satisfaction of interest — Mortgagor omitting to pay rent — Appointment of receiver in mortgage suit.

Order 40, R. 1 confers a discretion on the Court in the matter of the appointment of a receiver and the only restriction on this discretionary power of the Court is that put by the words "just and convenient." The question whether it is just and convenient in a mortgage suit to appoint a receiver must necessarily be determined with due regard to the rights of the parties under the mortgage transaction and the circumstances of the case. In determining the question, it must be borne in mind that the appointment of a receiver is essentially on equitable grounds and the object of equity in appointing a receiver to take charge of a mortgaged property, is to protect the security. The appointment of a receiver is not intended to affect the rights of the mortgagor and the mortgagee. Nor has it that effect. Where by the terms of the mortgage deed the mortgagees are entitled to retain possession until the payment of the mortgage money and are also entitled to have the rents paid towards the satisfaction of the interest and where the mortgagors by taking the property on rent as tenants omit to realise the rents from the sub-tenants or having realised, omit to pay it to the mortgagees, it cannot seriously be maintained that it is not just and convenient to appoint a receiver of the mortgaged property. AIR 1936 Rang 290; AIR 1939 Rang 321 (FB) and AIR 1939 Bom 54, Considered. (Para 5)

Anno: C. P. C., O. 40, R. 1 N. 4 P. 13.

(c) Civil P. C. (1908), O. 40, Rr. 1 and 3 — Selection of person as receiver — Discretion of Court — Appointment of receiver without taking security.

In the matter of the selection of a person as the receiver or taking security from him, the Court has unfettered discretion. The Court is not obliged to appoint a person of the choice of the parties as the receiver and has the discretion to appoint a receiver without asking him to furnish security. (Para 6)

Anno: C. P. C., O. 40, R. 1 N. 11; O. 40, R. 3 N. 1 P. 2.

Pande, for Appellants; Newaskar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('37) 58 All 949: (AIR 1936 All 495 FB)	4, 5
('43) AIR 1943 All 1: (204 Ind Cas 210 FB)	5
('39) ILR (1939) Bom 82: (AIR 1939 Bom 54)	5
('35) AIR 1935 Lah 17: (16 Lah 366)	5
('32) AIR 1932 Mad 193: (136 Ind Cas 771)	5
('42) AIR 1942 Nag 1: (ILR (1942) Nag 118)	5
('45) AIR 1945 Oudh 25: (1944 Oudh WN 303)	5
('42) AIR 1942 Pat 240: (200 Ind Cas 649)	5
('36) AIR 1936 Rang 290: (14 Rang 292)	5
('39) AIR 1939 Rang 321: (183 Ind Cas 728 FB)	5
(1909) 2 KB 903: (78 LJKB 1108)	5

DIXIT J.: This is an appeal from an order made by the Additional District Judge of Indore appointing a receiver of the mortgaged property in the plaintiff-respondents' suit to enforce four mortgages executed by the defendant-appellants in their favour. The mortgage-deeds were executed on four different dates during the period from 24-1-46 to 12-5-48 as security for the repayment of a total sum of Rs. one lac. By the terms of the mortgage-deeds, the mortgagees were entitled to retain possession until the repayment of the mortgage-money and to have the rent of the property paid towards the interest on the mortgages. After the execution of each of these mortgages the mortgagors themselves took the property on rent and undertook to realise the rents from the property and pay it regularly to the mortgagees towards the interest. The last 'Kirayenama' was executed on 12-5-48. By this rent-deed, the mort-

gagors took the property on rent for a period of one year and agreed to pay regularly Rs. 750/- per month as rent to the mortgagees.

(2) The plaintiffs instituted the suit on 20-10-49 for the recovery of Rs. 107515/- which was then the amount due on the mortgages. On 22-1-51 the plaintiffs filed an application for the appointment of a receiver of the mortgaged property alleging that the mortgagors were not paying to them the rent recovered by them; that interest on the mortgage-debt had considerably accumulated; that the property had deteriorated in value; that the mortgagors were not effecting the necessary repairs to the mortgaged property and that they were also encumbering their other property by mortgaging it. In resisting the application, the defendants denied in a general way these allegations and said that the Court had no jurisdiction to appoint a receiver under O. 40, R. 1 in the case of a simple mortgage, that the mortgaged property had considerably increased in value, that the mortgagors were in possession of other property and that the application having been made nearly fourteen months after the institution of the suit was not 'bona fide'.

(3) On behalf of the appellants, Mr. Pande challenges the order of the trial Court on two grounds. Firstly, he contends that in this suit based upon simple mortgages, the Court has no jurisdiction to appoint a receiver. Secondly, it is said that it is not just and convenient to appoint a receiver in the present case. In my opinion, both these contentions must be rejected.

(4) On the first head, the argument of the learned Counsel for the appellants is that after the expiry of the term of one year fixed by the last mortgage executed on 12-5-48 and by the termination of the period of tenancy fixed by the rent-deed executed on the same date, the relationship of landlord and tenant between the parties ceased, and the mortgagees were not entitled to get possession of the mortgaged property. It is, therefore, said that the mortgagees have not a present right to remove the mortgagors from possession of the property and that in view of the provisions of O. 40, R. 1 (sub-r. 2), no receiver of the mortgaged property can be appointed.

The contention therefore, of the learned Counsel for the appellants, that in a suit based upon simple mortgages, a receiver of the mortgaged property cannot be appointed, rests on the assumption that sub-r. (2) of O. 40, R. 1 is intended for the protection of any person in possession whether he is or is not a party to the suit. In support of this view, Mr. Pande relies on a decision of a Full Bench of the Allahabad High Court in 'ANANDILAL v. RAM SARUP', 58 All 949. In my opinion, sub-r. 2 of R. 1 of O. 40 is for the benefit of a person who is not a party to the suit and debars the Court from removing such a person from possession. Under sub-r. 1 of R. 1 of O. 40, the Court has power to appoint a receiver of "any" property where it appears to the Court to be just and convenient. This jurisdiction of the Court is limited by sub-r. 2 which says:

"Nothing in this rule shall authorise the Court to remove from the possession and custody of property any person whom any party to the suit has not a present right so to remove."

(5) Sub-r. 2 is thus by way of an exception and has the effect of limiting the operation of the main provision in sub-r. 1. Sub-r. 2 cannot be construed so as to totally destroy the power given to the Court under sub-r. 1. It is obvious that if sub-r. 2 of O. 41 R. 1 is construed as affording protection also to persons who are parties to the suit, the power of the Court to appoint a receiver would then be confined to the very rare cases where the property is 'in medio'. Such a construction would have the effect of almost nullifying Cl. (b) sub-r. 1 of O. 40 R. 1 and cannot be accepted. Again from the language itself of sub-r. 2, it follows that the rule takes away the power of the Court to remove from possession a person other than a party to the suit. This sub-rule speaks of the removal:

"from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

The words "any person" have been used in contra-distinction to the words "any party to the suit" and thus a distinction is made between a person who is a party to the suit and a person who is not a party to the suit. The words mean that the person in possession cannot be removed whom none of the parties to the suit have a present right to remove. I am fortified in the view I am taking of sub-r. 2 of R. 1 of O. 40 by numerous decisions of various High Courts. A reference may be made to, 'MT. SUKHARANIABAI v. LAXMIKANTRAO GANPATRAO', AIR 1942 Nag 1; 'DAMODAR MORESHWAR v. RADHABAI DAMODAR', ILR 1939 Bom 82; 'BANWARI LAL v. BALDEO SAH', AIR 1942 Pat 240; 'GOBIND SINGH v. PUNJAB NATIONAL BANK, LTD', AIR 1935 Lah 17; 'VITHILINGA PANDARASANNADHI v. ALAGAPPA MANIAGARAR', AIR 1932 Mad 193; 'MA HNIN YEIK v. K. A. R. K. CHETTYAR FIRM', AIR 1939 Rang 321 and 'SATGUR PRASAD v. HAR KISHAN DAS', AIR 1945 Oudh 25.

The Allahabad High Court, no doubt, took a different view in 'ANANDI LAL v. RAM SARUP', 58 All 949, but that view does not appear to me to be in consonance with the language used in O. 40 R. 1. The decision of the Allahabad High Court has been dissented from by other High Courts. A later Full Bench case, 'MT. TULSHA DEVI v. SHAH CHIRONJU LAL', AIR 1943 All 1, doubted the correctness of the decision in '58 All 949' and recommended an amendment of sub-r. 2 of O. 40, Rule 1. The Sub-rule has now been amended in Allahabad so as to make it clear that a party to the suit is not included in the words "any person".

In view of these and other decisions which were cited at the bar, I think it is scarcely open to the appellants to contend that the words "any person" in sub-r. 2 are wide enough to include also persons who are parties to the suit and that, therefore, in a simple mortgage, the Court is not competent to appoint a receiver of the mortgaged property. The objection, therefore, that the learned Additional District Judge had no jurisdiction to appoint a receiver in the plaintiff's suit must be overruled.

Upon the question whether in this particular case, the learned Additional District Judge was right in appointing a receiver, Counsel for the appellant argued that the fact that interest was in arrear by itself was not sufficient to justify the appointment of a receiver and that the lower Court should have, for that purpose, held an inquiry to determine whether the non-payment of rent and the consequent accumulation of interest was wilful on the part of the mortgagors or due to circumstances over which they had no control, and whether the mortgaged property was more than sufficient to cover the mortgage-debt. It was also said that under one of the terms of the mortgage executed on 12-5-48 and by an agreement executed on the same date varying the terms of previous mortgages, the mortgagees were only entitled to get a yearly instalment of Rs. 5000/- without possession of the property or the rents thereof.

Under O. 40, R. 1 a Court has power to appoint a receiver of any property "where it appears to the Court to be just and convenient". This rule confers a discretion on the Court in the matter of the appointment of a receiver and the only restriction on this discretionary power of the Court is that put by the words "just and convenient". In 'EDWARDS & CO. v. PICARD', 1909 2 KB 903, the words "just and convenient" have been construed as meaning that "it is practicable and the interests of justice require it". To my mind, the question whether it is just and convenient in a mortgage-suit to appoint a receiver must necessarily be determined with due regard to the rights of the parties under the mortgage transaction and the circumstances of the case. In determining the question, it must be borne in mind that the appointment of a receiver is essentially on equitable grounds and the object of equity in appointing a receiver to take charge of a mortgaged property, is to protect the security. The appointment of a receiver is not intended to affect the rights of the mortgagor and the mortgagee. Nor has it that effect.

In England the Courts of Equity normally appoint a receiver in a mortgage suit where interest is in arrear and whether or not the property appears to be of sufficient value to cover the mortgage-debt and interest and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost. The reason for the appointment of a receiver in such circumstances is mainly this, that but for the time taken in the proceedings in the Court before the sale of the property takes place, the mortgagee would have received the proceeds of the sale on the day on which he had filed the suit. The Court has, no doubt, the power to refuse to appoint a receiver even when the interest payable under the mortgage is in arrear if some special reasons exist, e.g., when the interest has been in arrear from a very short period, or when a mortgagee has refused to accept it even when tendered.

Those principles were followed by a Division Bench of the Rangoon High Court in 'ALLY RAMZAN v. MESSRS. BALTHAZAR & SON LTD.', AIR 1936 Rang 290 and an order of the appointment of a receiver in a suit on the basis of a mortgage created by a deposit of title deeds was upheld on the ground that the mortgagee possessed substantive rights to the rents and profits of the property and that the interest on the mortgage-debt was in arrear. This decision was considered by a Full Bench of the Rangoon High Court in 'AIR 1939 Ran 321' and it was observed that it went too far in saying that in a simple mortgage-suit when interest is in arrear, the Court will normally appoint a receiver. The learned Judges constituting the Full Bench of the Rangoon High Court also said that the governing words of O. 40, R. 1 are whether it is just and convenient and in deciding whether a receiver should be appointed, due weight must be given to all relevant considerations and that the fact that interest on the mortgage debt is in arrear can only be one of the factors in deciding whether a receiver should be appointed. In 'ILR (1939) Bom 82', a receiver in the case of a simple mortgage was appointed because interest on the mortgage debt and rents and taxes of the mortgaged-property were in arrears. Beaumont C. J., reserved his opinion on the question whether interest being in arrear by itself would have been sufficient for the appointment of a receiver. One may feel doubt as to whether the circumstance that interest is in arrear, is by itself conclusive in appointing a receiver in a simple mortgage suit and I express no opinion on the point but I feel where, as in the present case, by the terms of the mortgage deed the mortgagees were entitled to retain possession until the payment of the mortgage money and were also entitled to have the rents paid towards the satisfaction of the interest and where the mortgagors by taking the property on rent as tenants and by omitting to realise the rents from the sub-tenants or having realised, by omitting to pay it to the mortgagees, (sic) it cannot seriously be maintained that it is not just and convenient to appoint a receiver of the mortgaged property.

Here, the appellants, nowhere, say that they have regularly paid interest or rent to the mortgagees, or that the interest in arrears is insignificant or that the mortgagees have been realising the rents themselves from the sub-tenants. The appellants also admit in their reply to the petition for the appointment of a receiver that they have effected mortgages on their other property. It is obvious that by the continued omission of the mortgagors to pay the interest on the mortgage debt or to allow the mortgagees to realise rent, the mortgage-security is in the danger of being rendered proportionately inadequate. In these circumstances, I do not understand the purpose of the inquiry which the appellants contend should have been held by the lower Court before appointing a receiver.

The contention that under one of the conditions of the mortgage-deed and agreement executed on 12-5-48, the mortgagees were entitled to a yearly instalment of Rs. 5000/- only, may, without prejudicing the trial of the issue raised in the suit on this question, be disposed of by saying that I do not read the condition as in any way affecting the right of the mortgagees to retain possession of the property until the repayment of the mortgage-money and to have the rents of the property paid towards the interest. In my opinion, having regard to the particular circumstances of the case and to the mortgage-contract made between the parties themselves, the appellants, by their failure to realise, or having realised to pay, the rents of the property, to which the mortgagees were entitled under the mortgage deed, and thus by allowing the interest to accumulate for many years, have been pursuing a course of conduct which cannot be said to be fair or equitable. The Court below was, in my view, fully justified in appointing a receiver of the mortgaged property.

(6) Learned Counsel for the appellants attacked the order of the lower Court also on the grounds that it is vague and does not give any indication of the duties and powers of the receiver when it says that he shall exercise "all such powers which are necessary for the realisation and management of the suit property", that the direction in the order about the remuneration of the receiver is equally vague, and that the person appointed as the receiver was not selected with the approval of the parties and that no security has been taken from the receiver. There is no substance in any of these objections. It is clear from the application for the appointment of the receiver and the order of the Court that the receiver has been appointed for the purpose of realising the rents and profits accruing from the property, and taking possession of the property and the rents and profits thereof until it is decided who is entitled thereto. The order of the lower Court states that the receiver will be paid remuneration "on percentage basis to be determined later on." The amount of Rs. 200/- which the plaintiffs have been directed to deposit for the remuneration of the receiver is clearly provisional and intended to be adjusted in the total

amount of remuneration the receiver would get on the basis yet to be determined. In the matter of the selection of a person as the receiver or taking security from him, the Court has unfettered discretion. The Court is not obliged to appoint a person of the choice of the parties as the receiver and has the discretion to appoint a receiver without asking him to furnish security. If the appellants think that the person selected should not have been appointed as the receiver or that he should be asked to give security, they are not precluded from putting these objections in the trial Court.

(7) For the above reasons, I would dismiss this appeal with costs.

(8) MEHTA, J.: I entirely agree with my learned brother Dixit J.

V.R.B. Application dismissed.

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(INDORE BENCH)

MEHTA, J.

Mainabai and another, Appellants v. Meghraj Jodhrajji and others, Respondents.

Civil Second Appeal No. 368 of 1949, D/- 14-11-1950.

Civil P. C. (1908), O. 21, R. 57 — Execution dismissed for default of decree-holder—Attachment ceases — Subsequent purchase of property is valid.

Where the Court dismissed an execution application even at the request of the decree-holder, the legal consequence of such dismissal is that the attachment is released and where the proceeding is struck off at the request of the decree-holder it amounts to a default within the meaning of O. 21, R. 57 and the attachment ceases to exist. Where the decree-holder committed default in not carrying out execution for the sale of the attached property, the attachment ceases and the purchase of the property by a person subsequent to this when the property was not under attachment is perfectly valid. (Para 4)

Anno: Civil P. C., O. 21, R. 57 N. 2 and 3.

Patel, for Appellants.

REFERENCES: Courtwar/Chronological/ Paras.
('34) AIR 1934 Lah 395: (150 Ind Cas 1053) 4
('38) AIR 1938 Lah 590: (181 Ind Cas 14) 4
('35) AIR 1935 Mad 17: (154 Ind Cas 736) 4
('50) AIR 1950 Mad 2: (ILR (1950) Mad 39) 4

JUDGMENT: The facts leading to this appeal are as follows: The plaintiff Mainabai and her son Ramratan filed suit for a declaration that their house situated at Ratlam was not liable to attachment and sale in execution of the decree obtained by Meghraj and Ramnarayan against Hariram Darji. Hariram Darji is dead and respondents Nos. 3, 4 and 5, Ratanlal, Laxminarayan, and Mangilal are brought on record as his sons and legal representatives of the deceased Hariram. Mainabai's objection under O. 21, R. 58 was disallowed and hence this declaratory suit under O. 21, R. 63.

(2) Originally, the house attached belonged to Hariram Darji, the judgment-debtor Hariram Darji sold the house in suit on 1-3-1943 to Mainabai and her son Ramratan in consideration of Rs. 2497/-. The house in suit was first attached on 22-2-1939 in execution case No. 386 of 1938 by the decree-holder. This execution was disposed of on 16-10-1939. The Court's order was that the house shall remain under attachment and as the decree-holder does not want to proceed with the execution the file be disposed of. Then second execution case No. 499 of 1939 was presented on 15-3-1940. This was disposed of on 12-5-1941. The decree-holder remained absent but the pleader for the decree-holder was present. In this execution the sale proclamation was announced by beat of drums but as there were no bidders and the decree-holder was also not present, the execution was struck off and the house continued to remain in attachment.

The third execution case No. 170 of 1942 was presented on 22-4-1943. In this execution Meghraj and Ramnarayan prayed for rateable distribution in the execution, of one Champalal Kothari. The same house was being sold in Champalal's decree. This execution was disposed of on 14-12-1944 and the proceedings state that the decree-holder's pleader was present. The decree-holder was absent and his pleader stated that he had no instructions and consequently the execution was dismissed for default.

The third execution case No. 170 of 1942 was pending in the execution Court, the decree-holder filed appeal to the Ratlam High Court and the High Court held that the attachment continued and the house shall remain under attachment. The High Court sent back the execution file on 18-5-1945 and the execution case was renumbered as 144 of 1944; this was disposed of on 11-6-1948 stating that the appeal has been filed in the High Court and the decree-holder does not want to proceed with the execution, pending appeal in the High Court. Hence execution was consigned to the Record room.

(3) The main question is whether at the time when Hariram Darji sold the house in suit on 1-3-1943 to Mainabai and Ramratan, the house was under attachment or the attachment had ceased.

(4) Under O. 21, R. 57 where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease. Mr. Patel's argument was that on 16-10-1939 the decree-holder committed default and did not proceed further in the execution. The execution was dismissed on account of his default with the result that upon the dismissal of such application for execution the attachment ceased. Since the attachment had ceased and there was no order for re-attachment there is nothing to prevent the judgment-debtor from selling the property to Mainabai on 1-3-1943 and Mainabai acquired the rights in the property as a purchaser. As long as the property remained under attachment during the pendency of attachment it cannot be sold. But once the attachment was removed by the default of the decree-holder then the attachment ceases. In this case the mere order of the Court that the attachment shall continue will have no force because the execution was dismissed as the decree-holder did not take steps to proceed with the execution.

Mr. Patel relied on the cases, 'NANU MAL v. AMARNATH', AIR 1938 Lah 590; DAIM SHAH v. VIR BHAN', AIR 1934 Lah 395; 'AYYAPPA NAICKER v. THAYAMMA', AIR 1935 Mad 17; 'VENKATA RAO v. SURYA RAO BAHADUR GARU', AIR 1950 Mad 2. Ratio decidendi in all the above decisions is where in execution of a decree the Court orders that the record shall be consigned

to the record room and the attachment be maintained. the order, howsoever worded, means that the execution application is dismissed and the attachment is terminated. Such applications cannot be revived. On a careful perusal of the execution cases Nos. 386 of 1938 and 499 of 1939, it appears that the decree-holder had committed default and the Court was unable to proceed further with the application for execution and under the circumstances it was the duty of the Court either to dismiss the application or adjourn the proceedings to a future date. It appears that the execution was not adjourned but it was dismissed because of the default on the part of the decree-holder to take further steps in the sale of the attached property.

The word 'default' includes failure to do what a decree-holder is bound to do i.e., to proceed with the execution, where a Court dismissed an execution application even at the request of the decree-holder the legal consequence of such dismissal is that the attachment is released and where execution proceeding is struck off at the request of the decree-holder it amounts to a default within the meaning of O. 21, R. 57 and the attachment ceases to exist.

Hence, on a consideration of all the authorities discussed above, it appears to me that the decree-holder committed default in not carrying out execution for the sale of the attached property and hence the attachment ceased. Under these circumstances the purchase of the house by Mainabai and Ramratan on 1-3-1943 was a perfectly valid sale. At that time the property was not under attachment.

(5) I, therefore, allow the appeal, set aside the judgment and decree of the lower Appellate Court and hold that the property in dispute belongs to the plaintiff-appellants and is not liable to attachment and sale in execution of a decree. The plaintiff-appellants' prayer is, therefore granted and they are declared to be the owner of the house in dispute. The plaintiff-appellants are entitled to costs throughout.

R.G.D. Appeal allowed.

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(INDORE BENCH)

MEHTA AND CHATURVEDI JJ.

Sajjanbai, Appellant v. Prabhulal and others, Respondents.

Second Appeal No. 49 of 1949, D/- 24-10-50.

(a) Hindu Law—Maintenance — Wife's right to separate maintenance — Abandonment by husband without valid reasons is sufficient to entitle her to live apart from husband—Second marriage of husband if sufficient cause of action—Unfounded imputation of unchasity, how far ground for separate maintenance.

Hindu law while it enjoins upon the wife the duty of attendance on, obedience to and veneration for the husband, it also inculcates that the husband must honour the wife and treat her with affection and courtesy. Wife living apart from her husband for any improper purpose may at any time return and claim to be maintained. Her right is not forfeited but is suspended during the time she commits a breach of the duty by living apart.

Where the wife claims separate maintenance from her husband she must show that he abandoned her, deserted her or expelled her from the house without any justifiable cause. (Para 6)

Grounds which would be available to a wife to defeat a suit for restitution of conjugal rights by a husband would also entitle her to live apart from her husband & claim a separate maintenance. Consequently where the husband makes an offer to take the wife back if there are grounds to justify the refusal of the relief by way of restitution of conjugal rights by the husband, if he had brought such a suit even though cruelty may not be proved, the wife's claim for maintenance cannot be negatived merely by reason of such an offer. AIR 1936 Mad 609, Rel. on. (Paras 7, 22)

If the wife is obliged to live away from her husband for justifiable reasons, and the husband during the pendency of the suit for maintenance makes an offer to take the wife back, the right of maintenance cannot be negatived merely on that ground. An offer of this kind must be carefully scrutinised with a view to determine whether it is a bona fide one. AIR 1936 Mad 609; AIR 1936 Bom 138, Rel. on. (Para 8)

Second marriage of the husband would not by itself furnish the plaintiff wife with a cause of action for living apart from her husband, prior to the passing of the Act XIX of 1946. But still it would be a factor to be taken into account in considering whether the offer of the husband to take her back is bona fide or not. AIR 1940 Mad 292, Ref. (Para 11)

An unfounded imputation upon the wife's chastity unless it is of such a kind and so constant as to endanger the health of the wife, is not sufficient to constitute legal cruelty, as to entitle the wife live apart from her husband. Under Indian Law cruelty in the legal sense need not necessarily be physical violence. Case law reviewed. (Para 21)

Apart from other considerations, under Hindu law cruelty is not necessary if there has been abandonment of wife without valid reasons to entitle her to separate maintenance. 6 Ind Cas 525 (Bom); 2 Bom 573 (FB); 2 Bom 634; AIR 1950 EP 317, Rel. on. (Para 23)

(b) Civil P. C. (1908), S. 151; O. 7, R. 7; O. 8, R. 8 — Subsequent events.

The ordinary rule is that a Court should give its decision on the facts and circumstances as they existed at the date of the institution of the suit and should ordinarily not taken notice of the events which happened after such a date. (Para 24)

Anno: C. P. C., S. 151 N. 3, 4; O. 7, R. 7 N. 4 O. 8, R. 8 N. 1.

S. M. Samvatsar, for Appellant; D. C. Bharucha, for Respondents Nos. 1 and 2.

REFERENCES: Courtwar/Chronological/	Paras
('82) 4 All 374: (1882 All WN 82)	13
('75-77) 1 Bom 164	13a
('77-78) 2 Bom 573 (FB)	23
('77-78) 2 Bom 634	23
('10) 6 Ind Cas 525: (12 Bom LR 373)	23

('36) 60 Bom 455: (AIR 1936 Bom 138) 9
('50) AIR 1950 EP 317: (52 Pun LR 297) 23
('28) AIR 1928 Lah 502: (108 Ind Cas 175) 6
('23) 46 Mad 791: (AIR 1924 Mad 49) 22
('36) AIR 1936 Mad 609: (165 Ind Cas 314) 7
('40) AIR 1940 Mad 292: (41 Cri LJ 532) 11
('29) AIR 1929 Oudh 121: (4 Luck 355) 22
('14) 22 Ind Cas 945: (AIR 1914 Low-Bur 233) 18
(1940) 3 All ER 380: (109 LJP 108) 17
(1942) 2 All ER 637 18
(1828) 1 Hagg Ecc 163: (162 ER 543) 16
(1903) 89 LT 74 19
(1895) P 315: (64 LJP 105) 14
(1869) 2 P & D 31 15

CHATURVEDI, J.: This is plaintiff's second appeal in a suit for maintenance filed against the respondent No. 1, Prabhulal, husband of the plaintiff; respondent No. 2, Bhagirath, plaintiff's father-in-law and respondent No. 3, Rameshwar brother of respondent No. 1, and son of respondent No. 2. The suit was decreed by the trial Court; but the first appellate Court allowed the defendant's appeal and dismissed the suit of the plaintiff.

(2) In para No. 4 of the plaint the plaintiff clearly stated that she was driven out of her house by the defendants in the month of Ashad of Samvat year 2002 and since then she had been residing with her mother in Alhed. The suit was resisted on behalf of the defendants on several grounds and the main ground taken was that the plaintiff was unchaste and that she had of her own accord left the house of her husband and went to reside with her mother without any justifiable reason.

(3) Several issues were framed on the 27th April, 1947. Issues Nos. 1, 2 and 5 are important ones. They are as follows:

1. Whether the defendants drove the plaintiff out and refused to maintain her?

2. Whether the defendants prove the unchastity of the plaintiff. If so how does it affect the suit? and

5. Whether the plaintiff refuses to live with the defendants without lawful justification?

(4) The trial Court came to distinct findings on issues Nos. 1 and 5 that the plaintiff was driven out by her husband and her father-in-law; that after her departure from the house, defendant No. 1, took another wife and no attempt was made to send for the plaintiff from Alhed. It, therefore, came to the conclusion that the plaintiff did not refuse to live with the defendants without any lawful justification.

(5) As regards issue No. 2, it may be mentioned that after the evidence was completed an application was made by the defendants to the Court for permitting them to amend their written statements. This permission being accorded, Issue No. 2, was deleted under an order of the Court passed on the 29th of March 1948. This is important to note that defendant No. 1, and his father defendant No. 2, in their endeavour to gratify their hatred against the plaintiff, did not even hesitate to asperse her character. The defendant No. 1, even in his statement before the Court used certain expressions in reference to his wife which showed that the defendants Nos. 1 and 2 all along suspected intimate relations between the plaintiff and defendant No. 3. The Courts below have not touched this point but we must formally record our opinion that there is no evidence sufficient to warrant any imputation against the plaintiff's moral character.

(6) The learned District Judge did not approach the subject in any systematic way. There is no finding by him on the first issue. In fact Issue No. 1 has not been touched by him in his judgment. This judgment proceeds upon the duties of Hindu wife towards her husband; and there is no doubt, that the Hindu Law while it enjoins upon the wife the duty of attendance on, obedience to, and, veneration for, the husband, it also inculcates that the husband must honour the wife and treat her with affection and courtesy. A wife living apart from her husband for any improper purpose may at any time return and claim to be maintained. Her right is not forfeited but is suspended during the times she commits a breach of the duty by living apart from her husband. Where a wife claims separate maintenance from her husband she must show that he abandoned her, deserted her, or, expelled her from the house without any justifiable cause.

As mentioned above the learned District Judge instead of deciding Issue No. 1, tried to effect a compromise between the parties, and on his failure observed that respondent No. 1, desired to take the plaintiff back in his house, but the plaintiff refused, and on the basis of a judgment reported in 'SHER SINGH v. SHAM KAUR', AIR 1928 Lah 502, held that a wife cannot be entitled to separate maintenance when the husband is willing to take her back in his house and keep her and she refuses to accept that offer without sufficient justification. The learned Judge also held that no physical violence or legal cruelty has been proved by the plaintiff in the case and and on these two grounds he allowed the appeal and dismissed the plaintiff's suit for maintenance.

(7) Mr. Samvatsar, learned counsel for the appellant, places his reliance on 'K. J. VENKATAPATHI NAYANIVARU v. PUTTAMMA NAGITH', AIR 1936 Mad 609, in which it has been held and with respect we concur with the views that the grounds which would be available to a wife to defeat a suit for restitution of conjugal rights by a husband would also entitle her to live apart from her husband and claim a separate maintenance. Consequently where the husband makes an offer to take the wife back, if there are grounds to justify the refusal of the relief by way of restitution of conjugal rights by the husband, if he had brought such a suit even though cruelty may not be proved, the wife's claim for maintenance cannot be negatived merely by reason of such an offer.

(8) This ruling has also rightly been cited as an authority for the proposition that if a wife is obliged to live away from her husband for justifiable reasons, and the husband during the pendency of a suit for maintenance makes an offer to take the wife back, the right of maintenance cannot be negatived merely on that ground. An offer of this kind must be carefully scrutinised with a view to determine whether it is a bona fide one.

(9) In 'APPIBAI v. KHIMJI GOOVERJI', 60 Bom 455: AIR 1936 Bom 138, counsel had relied upon an offer made by the defendant, for first time in his cross-examination that he was willing to take the plaintiff back if she came to live with him, and his counsel repeated the same offer in his closing address. Mr. Justice B. J. Wadia at page 477, observed:

> "The Court is entitled to consider the bona fides of the husband's offer to take back his wife. But in my opinion the defendant's offer was not bona fide. It was not only belated, but was evidently prompted more by a desire to avoid the risk of payment of separate maintenance rather than by a desire to take back the plaintiff as his wife."

(10) The learned District Judge, without considering the offer of defendant No. 1, from this point of view, came to the conclusion that the wife was not willing to return to her husband's home and dismissed the suit.

(11) Mr. Samvatsar then raises two other points in this appeal. The first point is about the second marriage already performed by defendant No. 1 and the learned counsel thinks that it is a good cause for the plaintiff for not going back to the house of her husband defendant No. 1. In our opinion, this second marriage itself would not furnish the plaintiff with a cause of action prior to the passing of Act No. XIX of 1946. Of course as observed by Pandurang Rao, J., in 'SUNDARAMMAL v. PALANIANDI MUDALI', AIR 1940 Mad 292, in a case for maintenance by a wife against her husband under Section 488 of the Code of Criminal Procedure:

> "The fact of the husband marrying a second wife though not a just ground for his wife's refusal to live with him, is still a factor to be taken into account in considering whether the offer of the husband to take her back is bona fide or not."

(12) It has been much pressed upon us by Mr. Samvatsar, that the unjust aspersion on the chastity of the plaintiff cast by the defendant No. 1, amounted to cruelty and that on this ground alone the plaintiff should not be asked to return to her husband's house or forfeit her maintenance.

(13) In AUGUSTIN v. AUGUSTIN', 4 All 374, Justice Straight held that a false charge by a husband against his wife of adultery, although such a charge is made wilfully, maliciously, and without reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation.

(13-a) The whole case law on this point was considered by Melvill, J., in 'YAMUNABAI v. NARAYAN MORESHWAR', 1 Bom 164 at pages 171 and 174, and the conclusion at which the learned Judge arrived was that we should not be justified under Hindu Law, any more than under English Law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty. He further observed that in a suit between Hindus we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, viz.: — that there must be actual violence of such a character as to endanger personal health or safety or there must be reasonable apprehension of it.

(14) In 'RUSSELL v. RUSSELL', 1895 p. 315:64 L J p. 105, a wife who had persistently and maliciously spread false reports of unnatural offence committed by her husband, was held not guilty of legal cruelty as there had been no bodily hurt or injury to the health or even a reasonable apprehension of it. In this case, the question of defining 'legal cruelty' caused the House of Lords considerable difficulty and there was no unanimity, of opinion as to what constitutes 'legal cruelty.' Out of a Bench of 9, four including the Lord Chancellor laid down that 'legal cruelty' must not be confined to cases of personal danger. The test according to them is, whether the conduct of the husband or wife has made the continuance of cohabitation and the performance of conjugal duties an impossibility; five noble Lords, on the other hand, disagreed with the above test and held that the true criterion was whether there had been injury to the body or health or the reasonable apprehension of it. Certain observations made by Lord Hershell in this case, have been quoted as showing the line of reasoning adopted by the majority of the Lords in this appeal:

> "I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adopting it on established principles to changing conditions which social development involves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterised the last century in this respect, there has been no alteration and no new delevopments. I think it is impossible to do otherwise than proceed upon the old laws."

These remarks prompted the Courts in some cases, to mould the established principles of law to the changing conditions of modern life.

(15) In KELLY v. KELLY', (1869) 2 P & D 31 at p. 59, Channel B, in the course of the judgment observed:

> "It is obvious that the modes by which one of the two married persons may make the life or health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the Court should supply the remedy by separating the parties."

(16) In BRAY v. BRAY', (1828), 1 Hagg ECC, 163, Sir John Nicholl observed with regard to the conduct of the husband who accused his wife of the most abominable intercourse that can possibly be conceived, no less than incest with one of her nearest relations:

> "It is not, I think, possible to conceive cruelty of a more grievous character (except perhaps great personal violence) than the accusation made by this husband against his wife."

(17) In HORTON v. HORTON', 1940 3 All E R 380, the cruelty alleged was that of nagging complaints of her husband's association with other women, etc. Medical evidence showed that the husband's health had been affected. It was held by Bucknill, J., that wife's conduct amounted to legal cruelty.

(18) The criterion for such cases has been well laid down in 'ATKINS v. ATKINS', 1942:2 All E R 637, that the defaulting spouse should be proved to have been guilty of deliberate misbehaviour the effect of which either has been, or, must be, in the ordinary course, to injure the health bodily or mental of the other spouse. Usually nagging is insufficient, unless it can be proved to have endangered the health of the spouse. Henn Collins, J., held in this case, that constant nagging will become completely intolerable and the Court would intervene for the protection of the person where bickering was of such a kind and so constant as to endanger the health of the spouse on whom it was inflicted. It is very well known, as the learned Judge observes in this case, that constant dropping of water wears the stone.' In an Indian case in Lower Burma Chief Court, Robinson, J., held in 'YIN KYE MG v. MA SEIN', 22 Ind Cas 945 (LB) that constantly charging the wife with adultery is sufficient cruelty.

(19) In JEAPES v. JEAPES', (1903), 89 L T 74; 27 Digest 284, wife's health was found to be injured by the husband's spreading false reports about her and it was held to come within the meaning of legal cruelty.

(20) The rule of law, has been summarised in a succinct form in Vol. X, page 652, Section 957 in Halsbury's Laws of England (Hailsham edition):

> "Mere vulgar or even obscene, abuse, or false accusation of adultery, incestuous adultery, or unnatural practices are not grounds for relief ex-

cept on the principle of cumulative, or constructive cruelty of a kind injuring health or calculated to do so."

(21) We, therefore, come to the conclusion that an unfounded imputation, upon the wife's chastity unless it is of such a kind and so constant as to endanger the health of the wife, is not sufficient to constitute legal cruelty.

(22) The learned District Judge, of course, has not considered the case from this point of view. He has written a very brief judgment and had taken for granted that cruelty in the legal sense is only physical violence. It has been laid down in several judgments of the High Courts in India that under the Indian Law cruelty in the legal sense need not necessarily be physical violence. A course of conduct, which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing the husband a decree for restitution of conjugal rights: 'KONDAL RAYAR v. RANGANAYKI AMMAL', 46 Mad 791 and 'MT. CHILHA v. CHEDI', AIR 1929 Oudh 121 and it is also well established that the grounds which would be available to a wife to defeat a suit for restitution of conjugal rights by a husband would also entitle her to live apart from her husband and claim separate maintenance.

(23) Apart from all other considerations, according to Hindu Law, cruelty is not necessary, if there has been abandonment of the wife, to entitle her to separate maintenance 'SITABAI v. RAMCHANDRA RAO', 6 Ind Cas 525:12 Bom L R 373. According to Yajnyavalkya, a mere abandonment of his wife by a husband, if she is chaste, is sufficient to entitle her to separate maintenance. A wife forsaken by her husband without valid reasons may according to Yajnnyavalkya even, compel her husband to pay a third of his wealth, or if poor, to provide maintenance for her (See Colebrooke's Digest of Hindu Law, Vol. 1, Book 4, page 72). The texts collected in 'SAVITRIBAI v. LaXMIBAI', 2 Bom 573, at p. 597-98, seem to show that a husband who deserts a "faultless wife", or a wife "who obeys his commands", is bound to maintain her even though living apart. In 'SIDLINGAPA v. SIDAVA', 2 Bom 634, it was held that a wife could claim separate maintenance if the husband refuses to maintain her in his house. There is, in fact, no substantial difference between the case of a husband who wants to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who with like intent, is guilty of conduct equivalent to driving his wife away: 'RAM SARUP v. DEV KUMARI', AIR (37) 1950 E P 317.

(24) We regret to say that the approach of the subject by the learned District Judge has been rather unsystematic and somewhat defective. He ought to have given a finding on the question whether the defendants drove the plaintiff out of the house and refused to maintain her which is the subject-matter of Issue No. 1. The trial Court on the basis of the sworn testimony of Tejmal, Bansantilal, Mohammad Bux and Fakir Chand came to the conclusion that the allegations in the plaint about the plaintiff being driven out by the defendants were correct. The learned District Judge without considering the judgment of the trial Court or attempting to discuss the evidence or even without careful analysis and appraisement of the evidence adduced arrived at no conclusion in this regard, but, on other grounds, dismissed the plaintiff's suit. An appellate Court ought to pay respect to the opinion of a Judge who had the opportunity of watching the demeanour of the witnesses and listening to them, and if after doing this, he feels that there has been a wrong appreciation of the evidence by the trial Court, then, in that case he can, after giving definite reasons in his judgment, arrive at a finding contrary to that of the trial Court. The learned District Judge, appears to have fallen into an error when subsequent developments in his Court took place between the parties for arriving at a compromise and he seems to have been favourably impressed by the first two defendants, but took a rather unpleasant impression of the plaintiff's attitude in his Court. In this connection we might remind him that the ordinary rule is that a Court should give its decision on the facts and circumstances as they existed at the date of the institution of the suit and should ordinarily not take notice of the events which happened after such a date.

(25) Under the circumstances, we have no alternative but to remit the case back for a finding on Issue No. 1 by the learned District Judge. In our opinion there can be no proper adjudication of Issue No. 5 unless and until first a decision is given on Issue No. 1, as the former issue being a part and parcel of the latter issue, the two could not have been treated separately.

(26) We, therefore, allow the appeal and set aside the decree and judgment of the District Judge, and remit the case back to him for disposal of the first appeal, according to law, and, in the light of the observations made above, after hearing arguments afresh. Considering the relations between the parties we leave them to bear their own costs.

(27) MEHTA, J.: I agree with my learned brother Chaturvedi, J., that the case be sent back to the District Judge, Garoth, because he has not applied his mind and given his findings on the essential aspect of the case whether the defendant husband had by his behaviour & conduct abandoned the plaintiff appellant (wife) and whether the plaintiff appellant was living away from her husband for justifiable reasons. Mr. Samvatsar urged that the husband had practically driven away his wife from the house. The defendant respondent Prabhulal had married a second wife, he had cast wild aspersions against the chastity of his wife. No self respecting wife could under the circumstances of the case remain under the roof and protection of her husband. It was with a view to defeat the claim of plaintiff-appellant Sopanbai that he made pretence of taking her back. It was not bona fide offer. It appears to me that under the circumstances the conduct of the husband had made the continuance of cohabitation and performance of conjugal duties well nigh impossible.

(28) The District Judge's balance of mind was tilted because he tried to persuade and bring about reconciliation but he failed in his attempt. He did not care to come to a finding as to who was responsible for desertion. He found fault with the wife for not living under the care and protection of the husband and when the latter had made that offer. Was it a bona fide offer?

R.G.D. *Case remanded.*

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(INDORE BENCH)

MEHTA J.

Baboolal, Applicant v. State through Police Mandsaur M. B., Opponent.

Criminal Revn. No. 102 of 1951, D/- 17-3-52.

(a) Madhya Bharat Food Grains Control Order, S. Y. 2005 (1948), S. 1 (c) — Notification issued under S. 1 (c) not specifying time and area where Order is to be in force — Order cannot be said to be in force — Order held not in force on relevant date at place of alleged offence — No conviction can be based on it.

Under Section 1 (c), Madhya Bharat Food Grains Control Order, S. Y. 2005 (1948), promulgated by the Director of Food, under the powers delegated to him by the Government in pursuance of S. 5, Madhya Bharat Essential Supplies (Temporary Powers) Act, the Order comes into force in the United State of Madhya Bharat on such date and in such areas as the Director of Food may by notification specify. Thus specification of date and area is obligatory before the Order comes into force. Where the notification (published on 23-10-1948) did not disclose the area to which it was to apply the order could not be held to be in force in the area (The Food Grains Control Order held was not in force in Mandsaur on the relevant date (20-7-1950, which was the date of offence) and therefore no conviction could be based on the alleged breach of the Order). (Paras 8, 9, 10)

(b) Interpretation of Statutes — Statute when takes effect.

Enactment of statute is not the same as its taking effect as law. Statutes do not always take effect as soon as enacted, the effective date may be postponed either by virtue of their own provisions or by the term of the general law or a constitutional requirement upon the subject. (Para 6)

S. M. Samvatsar and V. T. Kotwal, for Applicant; The Government Advocate, for the State.

ORDER.: The facts leading to this Criminal Revision application are as follows: The applicant-accused Babulal s/o Mannalal of Mandsaur was put up for trial in the Court of Additional District Magistrate, Mandsaur, for charge under Section 3 (a) of Foodgrains Control of S. Y. 2005 and Section 8 of Essential Supplies Temporary Powers Act and was sentenced to pay a fine of Rs. 150/- and in default rigorous imprisonment for 6 months. The petitioner preferred an appeal to the Sessions Judge, Mandsaur, but it was dismissed. The accused Babulal s/o Mannalal is the manager of the shop of Ramratan Pannalal at Mandsaur. It is alleged that in July 1950, this firm while dealing as adatia & commission agent dealt in grains to the extent of 470 maunds of maize (Makka). It was supplied by them to different merchants at Ratlam and Ramratan Pannalal as adatia earned a commission of Rs. 104-7-6. The case of the prosecution is that the firm Ramratan Pannalal had not obtained license to deal in grain as a wholesale dealer. Therefore the District Magistrate Mandsaur convicted the accused under Section 3 (a), Madhya Bharat Foodgrains Control Order of S. Y. 2005 (1948).

(2) The aforesaid section states that no person shall deal in foodgrains as a wholesale dealer except under and in accordance with a license issued by an officer authorised by Director of Food, Madhya Bharat.

(3) The main contention of Mr. Samvatsar, learned pleader for the petitioner is that in July 1950, the Foodgrain Control Order of S. Y. 2005, was not in force in Mandsaur and therefore the petitioner had not contravened the aforesaid order and, therefore, the conviction under the Foodgrains Control Order is illegal and must be set aside.

(4) It appears that in pursuance to Section 5, Madhya Bharat Essential Supplies Temporary Powers Act, power was delegated to the Food Controller by the Government vide Notification No. 2058, dated the 18th October 1948. The Government delegated powers to the Food Controller and accordingly the Food Controller promulgated the Madhya Bharat Foodgrains Control Order Samvat 2005 (1948). Section 1, Clause (b) stated that it extends to the whole of the United State of Madhya Bharat. Clause (c) runs as follows:

"It shall come into force on such date and in such areas as the Director of Food, Madhya Bharat may, by notification specify."

Mr. Samvatsar contended that the Director of Food did not specify by a separate notification the area to which the Foodgrains Control Order was to apply and also the date from which the order was to come into force.

(5) The Government Advocate on the other hand argued that as stated in Section 1, Clause (b) Madhya Bharat Foodgrains Control Order S. Y. 2005 extended to the whole of the United State of Madhya Bharat. Further in pursuance of Subclause (c) of Section 1 of the Foodgrains Control Order S. Y. 2005, the Director of Food, Madhya Bharat specified that the Foodgrains Control Order shall come into force from the publication of the notification in Madhya Bharat Gazette, viz., 23rd October 1948 and it indicated that Subhas, Administrators and Amins and Tahsildars shall exercise powers in area under their control. The contention of the Government Advocate is that the legislature intended that Madhya Bharat Foodgrains Control Order should be made applicable to the whole of Madhya Bharat and left it to the discretion of Food Controller to declare the date of its commencement to the whole of Madhya Bharat or part of its area.

(6) In my opinion the argument of the learned Government Advocate is not tenable. Section 1, Clause (b) merely states that the Foodgrains Control Order is enacted for the whole of Madhya Bharat. But enactment is different from its effectiveness. In Crawford's Statutory Construction page 151 it is stated that the enactment of a statute is not the same as its taking effect as law. Statutes do not always take effect upon their enactment but the effective date may be postponed either by virtue of their own provisions or by the terms of a general law or a constitutional requirement upon the subject. Here Section 1, Clause (c) clearly states that the Madhya Bharat Foodgrains Control Order shall come into force on such date and in such areas as the Director of Food may by notification, specify.

(7) The Director of Food did not specify the areas to which the order was to apply by a separate gazette notification. It was this lacuna which prompted the authorities to publish in Madhya Bharat Gazette, dated the 20th January 1951, that it shall apply to the whole of Madhya Bharat.

(8) In my opinion both the date of coming into force and specification of area are obligatory before the Madhya Bharat Foodgrains Control Order can come into force.

(9) The notification of 20th October 1948, published in Madhya Bharat Gazette on 23rd October 1948,

does not disclose the area to which it shall apply. The indication that the Suba in Districts, Tahsildars in Tehsil and Administrators shall exercise the authority possessed by Food Controller refer to delegation but no area is specified. Under the circumstances the contention of the petitioner that there was no Foodgrains Control Order in force in Mandsaur on 20th July 1950 must prevail. Hence the petitioner is not guilty of the breach of an order which was not prevalent in that area on the date of transaction.

(10) I, therefore, acquit the accused of the charge and direct that the fine, if paid, be refunded. This judgment will also govern Criminal Revision No 106 of 1951.

R.G.D. *Accused acquitted.*

AIR 1952 MADHYA BHARAT 145
(INDORE BENCH)
MEHTA J.

Munnalal Bhagirath, Appellant v. Zamaklal Gumchandji and another, Respondents.

Civil Second Appeal No. 204 of 1949, D/- 14-11-1950.

T. P. Act (1882), S. 55, Cl. (6) (b) — Seller's title doubtful — Buyer can refuse to carry out transaction of purchase — Buyer rightly declining to accept delivery — He is entitled to a charge on property against seller for earnest money paid by him.

Where the seller's title would be doubtful and where there is a reasonable probability of litigation in respect of the property agreed to be purchased, the plaintiff buyer would be quite correct in declining to carry through the transaction of purchase and declining to accept the delivery. The Court will not force a doubtful title upon the purchaser. AIR 1943 Sind 92, Rel. on.

When the buyer properly declines to accept the delivery then he is entitled to recover back his earnest money. He is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the sellers interest in the property for the amount of the earnest money paid by the buyer.

(Para 4)

Anno: T. P. Act, S. 55 N. 2, 13, 20, 21.

S. D. Sanghi and M. E. Deo, for Appellant; S. M. Samvatsar and G. M. Chafekar, for Respondent No. 1.

REFERENCES: Courtwar/Chronological/ Paras

('43) AIR 1943 Sind 92: (ILR (1942) Kar 543) 4

JUDGMENT.: This is defendant No. 2, Munnalal's Second Appeal and the facts leading to this appeal are as follows:

(2) The defendant No. 1 Kashibai wife of Wasudeo Duberkar agreed to sell her house No. 49-50 in Imli Bazar to the plaintiff for Rs. 6,000/-. On 17-1-1946, Rs. 300/- were paid by way of earnest money and the sale was to be registered in 21 days, i.e., on or before the 7th February 1946. In the agreement of sale Ex. P1, it was further stated that in case the plaintiff failed to abide by his agreement the earnest money would be forfeited. The time for formal registration which was originally fixed on 7-2-1946, was further extended to 15-2-1946 vide endorsement on Ex. P/1 with the consent of both the parties. Then with the consent of both the parties it was further extended to 15-3-1946. Ultimately on 4-9-1946 the pltff. Zammaklal filed a suit for recovering back his earnest money because he came to know that the defendant Kashibai was only a limited owner of the property and that one Malhari Duberkar who claimed to be the reversioner questioned the right of Kashibai to sell the property and therefore the plaintiff declined to carry out the agreement and asked for the return of the earnest money. On 25-5-1946 Kashibai defendant No. 1 sold the house to one Munnalal defendant No. 2 in the present suit. Zammaklal therefore filed suit for recovery of Rs. 312-3-0, inclusive of interest from the defendants from the property sold.

(3) The trial Court dismissed the plaintiff's suit. In appeal the District Judge reversed the Judgment and decree of trial Court and decreed the plaintiff's suit against defendant No. 1 Kashibai personally and against defendant No. 2 as a charge on the property. The defendant No. 2 Munnalal has come up in second appeal.

(4) The only question in this appeal is whether the buyer, i.e., the plaintiff is entitled to recover back the earnest money. Now Section 55, Clause 6 (b) of the Transfer of Property Act states that when the buyer properly declines to accept the delivery then he is entitled to recover back his earnest money. It is further stated that unless the buyer has improperly declined to accept the delivery of this property he is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery. Hence it appears that the buyer does not lose his charge under Section 55, Clause 6 (b) of the Transfer of Property Act unless he has improperly declined to accept the delivery.

Now in this case it would appear that the plaintiff was informed by defendant Kashibai who wanted to sell the property that her husband has left no relation and that she is the absolute owner of the property and subsequently it turned out that one Malhari was a reversioner. This cast a clog on the plaintiff's title and consequently the plaintiff extended the date for a formal registered conveyance. Then the plaintiff Zammaklal in his re-examination stated that he agreed to extend the time because the defendant Kashibai stated that she would obtain the signature of Malhari on the sale-deed. She failed to do so and therefore the plaintiff did not want to purchase the house which would involve him in any litigation. 'TULSIDAS v. PRITBAI', AIR 1943 Sind 92, it was held that where the seller's title would be doubtful and where there is reasonable probability of litigation in respect of the property agreed to be purchased, the plaintiff would be quite correct in declining to carry through the transaction of purchase and declining to accept the delivery. The Court will not force a doubtful title on the purchaser. Here the plaintiff made an effort that if Malhari would sign the registered sale-deed he is prepared to take the delivery of the house but that was also refused. Under these circumstances the plaintiff was perfectly justified in not accepting the delivery and he has got a charge on the property sold on the application of Section 55, Clause 6 (b). Therefore, the judgment and decree of the lower Court is quite correct.

(5) I would dismiss the appeal with costs.

R.G.D. *Appeal dismissed.*

AIR 1952 MADHYA BHARAT 146
(GWALIOR BENCH)
CHATURVEDI J.

Brajraj Singh, Appellant v. Yogendrapal Singh, Respondent.

C. S. A. No. 25 of 1949, D/- 27-2-52.

(a) Evidence Act (1872), Ss. 63, 65, 68 — Secondary evidence — Certified copy — Will reciting fact of adoption — Proof of execution is essential.

A copy of a will is not a sufficient evidence of the fact of adoption recited in the will. It is necessary for a party to prove the execution of the original. A certified copy is sufficient secondary evidence under Section 63 of the existence, conditions, and contents of the deed but not of its execution, which must be proved as required under S. 68 of the Evidence Act. AIR 1924 Lah 303 and AIR 1925 All 56, Rel. on. (Para 2)

Anno: Evidence Act, S. 65 N. 1, 2; S. 68 N. 1.

(b) Evidence Act (1872), S. 87 — History book — No presumption as to accuracy can be raised.

Under Section 87 of the Evidence Act, a Court can only presume that the History was written or published by the person and at the time and place, by whom or at which it purports to have been written or published. The presumption is with regard to publication, authorship etc., but not with regard to accuracy. (Para 3)

Anno: Evidence Act, S. 87 N. 1.

(c) Evidence Act (1872), S. 35 — Revenue or Village papers — Members of joint family shown as owners of definite shares — Presumption as to separation not to be raised.

A collector's book is kept for purpose of revenue and not for purposes of title, and a definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and in no case can it be regarded that such a definition of shares is sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated. 18 All 176 and AIR 1920 PC 46, Rel. on. (Para 5)

Anno: Evi. Act, S. 35 N. 10.

(d) Hindu Law — Partition — Cesser of commensality does not necessarily indicate separation.

A mere cesser of commensality would not necessarily indicate separation in estate, for a member of a joint Hindu family may become separate in food or residence for his own convenience. (Para 6)

Bhagwan Das Gupta, for Appellant; Bhagwan Swaroop, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.
('20) 47 Ind App 57: (AIR 1920 PC 46) 5
('96) 18 All 176: (1896 All WN 23) 5
('25) AIR 1925 All 56: (82 Ind Cas 306) 2
('24) AIR 1924 Lah 303: (71 Ind Cas 568) 2

JUDGMENT: This is defendant's second appeal arising out of a suit filed by the respondent plaintiff against the defendant for declaration of his right of ownership of eight annas share in the three Zamindari properties situated in District Morena. The Subordinate Judge, Morena decreed the suit and this decree was upheld by the District Judge Morena. It is common ground that Maharaj Singh and Harbaksh Singh were real brothers. Harbaksh Singh had two sons Narendrapalsingh and Bhikam Singh. The plaintiff Yogendra Singh is the son of Narendrapal Singh and the defendant Brajraj Singh is the son of Bhikam Singh. The plaintiff alleged that his father had died when the plaintiff was a minor and his uncle Bhikam Singh, as Manager of the Joint Hindu family managed the properties and during the minority of the plaintiff his uncle got his sole name recorded in the record of rights as owner of the zamindari properties in villages Babadipura, बबडापूर Tonga and Bilgaon Kwary बिलगांक्वारी. Bhikam Singh died on 4th February 1940 and his son the defendant applied for mutation of his name in stead of Bhikam Singh. The plaintiff then also applied for mutation as he also considered himself to be the owner of the property. This dispute led him to file this suit which had been decreed by the Courts below.

(2) The defendant resisted the suit on several grounds but the main ground is that Narendrapal Singh, the plaintiff's father, had gone away to another family as an adopted son of Maharaj Singh and therefore the defendant thinks that he cannot get anything out of the Joint Family property as Narendrapal Singh had severed his relation with the joint family. It was also contended by the defendant that the Zamindari properties in village Babadipura, Tonga and Bilgaon Kwary were purchased by his father Bhikam Singh with his separate money during the period 1926 to 1928. The decision of the present case hinges on the question whether Narendrapal Singh had gone out of the family or not? It will be sufficient to observe here that no adoption deed had been produced before the Courts below and no evidence has been adduced to prove the adoption i.e. to prove the ceremony of giving and taking in adoption. The only thing produced is a copy dated 7th October 1918 purported to be by Mt. Roop Kuwar widow of Maharaj Singh, in which it is mentioned that Narendrapal Singh was adopted by Maharaj Singh and when Narendrapal Singh died on 5th September 1918 the widow authorised Yogendrapal Singh to be the owner of her property both movable and immovable which was in Behrara and Kanhara. The original will has not been produced. Evidence of the scribe or of a attesting witness was necessary for proving the will and this evidence has been lacking in this case. It is necessary for a party to prove the execution of the original 'CHUHAMAL v. RAHIM BAKSH', AIR 1924 Lah 303. A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions, and contents of the deed but not of its execution, which must be proved as required under S. 68 of the Evidence Act. 'KARIMMULLAH v. GUDAR KOERI', AIR 1925 All 56. In my opinion the two Courts below were correct in refusing to recognise this copy of the will as evidence of adoption.

(3) Mr. Bhagwan Das Gupta, learned counsel for the appellant, has drawn my attention to page 133 of the History of Jageerdars "Gwalior State (Vol. 2) and asks me to infer from a perusal of the above mentioned page that Narendrapal Singh was adopted by Maharaj Singh. The learned counsel contended that this History is published under authority and should be believed to be true. Under S. 87, of the Evidence Act this Court can only presume that the History was written or published by the person & at the time & place, by whom or at which it purports to have been written or published. The presumption is with regard to publication, author-

ship etc. but not with regard to accuracy. The History of Jageerdars cannot be taken to be of any use in this matter nor does it mention that Narendrapal Singh was adopted by Maharaj Singh. The only fact referred to on page 133 of the book is this that Narendrapal Singh applied for mutation in his favour and alleged that he was the adopted son of Maharaj Singh but this was not recognised by Darbar. As regards the will I have observed above that it was not proved and we do not know what happened to the property left by Mt. Roop Kuwar. If Narendrapal Singh had been adopted by Maharaj Singh, there would have been no necessity for executing a will by Mt. Roop Kuwar; for the property of Maharaj Singh would have, in natural course, devolved upon Narendrapal Singh. In my opinion the Courts below are correct in repelling the contention of the defendant that Narendrapal Singh had gone out of the family. And I am satisfied that the family was joint.

(4) An application dated 13th October 1930 bearing the signature of Bhikam Singh in file No. 1 of 79 X 8 Tehsil Sabalgarh also states the same fact that the family was joint in 1930. Niranjanlal who is acquainted with the hand writing of Bhikam Singh deposes that the signature on this application is that of Bhikam Singh and it transpires that Bhikam Singh was the Manager of the joint Hindu family and in that capacity he has filed this application Umrao Singh who appears as a witness on behalf of the defendant admitted in cross-examination that the family was joint and there has been no partition uptill now. In my opinion there is sufficient evidence produced in the file to show that the Zamindari properties in villages Babadipura, Tonga and Bilgaon Kwary are properties of a joint Hindu family and the plaintiff is entitled to a moiety.

(5) In the records of right relating to the Zamindari properties in villages Panihari, Deori and Baroli, Yogendra Singh's name appears along with the defendant's name as owner of half and half. If Narendrapal Singh had gone to another family this would not have been recorded as such. Of course the collector's book is kept for purpose of revenue and not for purposes of title, and a definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and in no case can it be regarded that such a definition of shares is sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated 'GAJANDRA SINGH v. SARDAR SINGH', 18 All 176 approved by the Privy Council in 'NAGESHAR BAKSH SINGH v. MT. GANESHA', 47 Ind App 57: AIR 1920 PC 46.

(6) The next point for determination is whether these villages had been purchased by Bhikam Singh with his separate money, or, with the aid of the joint family property, when Bhikam Singh was the Manager of the joint Hindu family.

(After discussion of evidence the judgment proceeds:) From the evidence I am satisfied that there has been no division of right or severence of right and the family continues to be joint in estate. I am clear in my mind that mere cesser of commensality would not make the two cousins separate in estate, for a member of a joint Hindu family may become separate in food or residence for his own convenience. If the family is joint as I hold it to be, the question of limitation does not arise, and, I am also of the opinion that a prayer for possession was not needed at all.

(7) I therefore dismiss the appeal with costs.

K.S. Appeal dismissed.

AIR 1952 MADHYA BHARAT 147

(INDORE BENCH)

KAUL C. J.

Laxmanrao, Applicant v. Dagubai and another, Opponents.

Civil Revn. No. 154 of 1949, D/- 4-1-51.

(a) Court-fees Act (1870), S. 12 — Order that court-fee paid is sufficient — No revision lies — Civil P. C. (1908), S. 115.

No revision lies from an order that the court-fee paid on a plaint is sufficient. (Para 5)

The question is governed by S. 115, Civil P. C. The Court-fees Act itself contains no provision dealing with the question. (Para 5)

The finding on the question does not constitute a case decided within S. 115, Civil P. C. and further no question as to exercise of jurisdiction not vested in the Court arises. Even if the view taken by the lower Court is wrong, at the worst, it has been guilty of an error of law and the revisional jurisdiction of the High Court cannot be exercised under Section 115 merely to correct an error of law committed by a subordinate Court. AIR 1918 PC 188; 29 Cal 651, Rel. on. (Paras 5, 6)

Anno: Court-fees Act, S. 12 N. 13; Civil P. C., S. 115 N. 4.

(b) Court-fees Act (1870), S. 7 (iv) (c) and Schedule II, Art. 17 (iii) — Indore Court-fees Act, Schedule II, Entry 11 (iii) — Suit for declaration that certain deed is void — Cancellation deliberately not claimed — Plaintiff need not pay ad valorem court-fee.

The court-fee payable on a plaint is to be determined by the language of the plaint and not by an inquiry into the intention of the plaintiff which induced her to give her plaint a particular form. (Para 7a)

The Court-fees Act puts cases, to obtain declaratory decree or order where consequential relief is prayed for, and those to obtain a declaratory decree where no consequential relief is prayed in two different categories. Obviously it is open to a plaintiff to frame his suit in the manner he is advised. (Para 7a)

The Court cannot compel the plaintiff to add a prayer for consequential relief when he has not in fact asked for such relief. Hence where a plaintiff claims a declaration that a certain registered deed is void and does not affect his interests and deliberately avoids claiming consequential relief such as cancellation of it, he need not pay ad valorem court-fee on the subject-matter. AIR 1935 All 817, Foll. (Para 7a)

Anno: Court-fees Act, S. 7 (Gen.) N. 3; Section 7 (iv)(c) N. 5.

V. R. Newaskar, for Applicant; S. D. Sanghi, for Opponents.

REFERENCES: Courtwar/Choronological/ Paras.

('19) 46 Ind App 24: (AIR 1918 PC 188) 6
('32) AIR 1932 All 485: (54 All 812 FB) 7
('35) AIR 1935 All 817: (156 Ind Cas 494 FB) 7
('02) 29 Cal 651 6
('08) 35 Cal 202: (35 Ind App 22 PC) 7
('12) 39 Cal 704: (15 Ind Cas 427) 7

('13) 40 Cal 615: (21 Ind Cas 404)	7
('34) 1934 Indore LR 236	7
('28) AIR 1928 Lah 221: (106 Ind Cas 817)	6
('25) AIR 1925 Mad 713: (87 Ind Cas 660)	7
('18) 45 Ind Cas 238: (AIR 1918 Pat 482)	7
('31) AIR 1931 Pat 78: (10 Pat 432)	7

ORDER: This is an application for revision of an interlocutory order passed by the learned District Judge holding that the Court-fee paid by the plaintiff Mt. Dagubai in a suit pending in his Court was sufficient.

(2) The facts which gave rise to this application are as follows.

(3) Mt. Dagubai widow of Baburao instituted a suit in the Court of the District Judge Indore praying for a declaration that a deed executed by her in favour of Laxmanrao having been obtained by exercise of fraud and undue influence was null and void. She further prayed that the same may be cancelled. She joined one Madhorao as a co-plaintiff with her. Laxmanrao filed his written statement to the plaint. Among other pleas raised in defence it was objected that the Court-fee paid on the plaint was insufficient. Dagubai though she valued the suit for the purposes of jurisdiction at Rs. 12,000/- paid a court-fee of Rs. 15/- only on her plaint. In view of the objection raised she amended her plaint with the permission of the Court. By the amended plaint the only relief asked for was a declaration to the effect that the deed in question having been obtained from Dagubai by exercise of undue influence was null and void. The learned District Judge of Indore before whom the matter came up for consideration framed a number of issues on the pleadings. Issue No. 4 ran thus: Is the court-fee paid on the plaint sufficient?

(4) This issue was decided as a preliminary issue and answered in favour of the plaintiff. Dissatisfied with this order Laxmanrao has come up in revision.

(5) It was contended on behalf of the opposite party that no revision lies. The case was argued before me at considerable length and having given my careful consideration to the argument advanced I am of opinion that this objection must prevail. Dagubai's case as set out in her plaint was that she intended to execute a deed of adoption but on account of a fraud practised upon her and the misrepresentations made by Laxmanrao she was in ignorance of actual facts, induced to put her signature on what on the face of it was a deed of gift. This according to her was null and void in the eye of law. She brought a suit for a declaration to that effect. No question of jurisdiction arises in the present case. The suit as already stated was valued for the purposes of jurisdiction at Rs. 12000/-. Dagubai's contention was that it was a pure suit for declaration where no consequential relief was prayed for. Accordingly it was covered by Schedule II entry No. 11 (iii) of the Indore Court-fees Act which corresponds to Schedule II Article 17 (iii) of the Indian Court Fees Act — Plaint or memorandum of appeal to obtain a declaratory decree where no consequential relief is prayed. Under the Indore Court Fees Act such a suit is liable to payment of a fixed court-fee of Rs. 15/-. The question whether a decision as regards the sufficiency of court-fee in such a matter is obviously governed by the provisions of the Court-Fees Act. But that Act contains no provision dealing with the question whether an order determining such a matter is open to revision by the High Court or not. The question must therefore be governed by the provisions of Civil P. C. S. 115. If the matter is governed by that section clearly no revision lies. In the first place there is no justification to warrant a conlcusion that the finding on issue No. 4 given by the learned Additional District Judge in the present case constitutes "a case decided" within the meaning of that expression used in S. 115, Civil P. C. and secondly no question as to exercise of a jurisdiction not vested in the Court arises. Though it is a well settled practice of this Court that it would ordinarily not interfere in revision with interlocutory orders passed by subordinate Courts, even if one were to hold as has been done by certain High Courts that interlocutory orders may in certain circumstances be revised by the High Court, this is not a case which would fall in the category of the orders which would thus be revisable. One of the reasons for the view stated above is that another remedy is open to the present petitioner and he can challenge the order under S. 12(ii) of the Court-fees Act.

(6) Assuming that the contention put forward on behalf of the present petitioner that such a suit as was brought by Dagubai falls under S. 7(IV) (c) and not Schedule II, Art. 17 of the Court-fees Act, it cannot be said that in proceeding with the suit under an erroneous view of the law the Court has usurped a jurisdiction which was not vested in it. The failure to pay the prescribed court-fee on the plaint will not affect the jurisdiction of the Court to entertain the suit. (see 'RACHAPPA SUBRAO v. SHIDAPPA VENKATRAO', 46 Ind App 24 (PC), as well as 'MT. JANTAN v. AHMAD', AIR 1928 Lah 221 and 'PRAMATHA CHANDRA v. KHETRA MOHAN', 29 Cal 651 at p. 654). If a Court disposes of a suit on which sufficient Court fee has not been paid its decision will not be without jurisdiction. Accordingly, even if the view taken by the lower Court is wrong, at the worst, it has been guilty of an error of law and the revisional jurisdiction of the High Court cannot be exercised under S. 115, Civil P. C. merely to correct an error of law committed by a subordinate Court. I hold accordingly that the present revision application is not entertainable.

(7) But as the case was argued before me at great length by Mr. Newaskar I would briefly indicate my view on the merits of the question raised.

(7a) It was contended by the learned counsel that where a plaintiff so frames his plaint as to disguise the real object of the suit and gives it a different appearance with the purpose of saving court-fee it is the substance of the claim which should be looked at and not merely the language in which the relief is asked for. In support of his contention the learned counsel referred to a number of cases, including 'HARIHAR PRASAD SINGH v. SHYAM LAL SINGH', 40 Cal 615; 'KAMALA PRASAD v. JAGARNATH PRASAD', AIR 1931 Pat 78. 'MT. NOOWOOAGAR OJAIN v. SHIDHAR JHA', 45 Ind Cas 238(Pat); 'KALU RAM v. BABU LAL', AIR 1932 All 485 (FB); 'PHULKUMARI v. GHANSHYAM MISRA', 35 Cal 202 (PC); 'VENKATA RAMANI AIYAR v. M. NARAYANASAMI AYYAR', AIR 1925 Mad 713; 'DEOKALI KOER v. KEDARNATH', 39 Cal 704 and 'KHEMRAJ v. JAVARCHAND', 1934 Indore LR 236. The Court-fees Act puts cases, to obtain declaratory decree or order where consequential relief is prayed for, and those to obtain a declaratory decree where no consequential relief is prayed in two different categories. Obviously it is open to a plaintiff to frame his suit in the manner he is advised. The original suit instituted by Dagubai was probably one falling under the first of these categories. She decided however to amend her plaint and to so alter her relief paragraph as to make it a suit clearly falling under the second category. The permission for amendment having been granted the question of court-fee must be determined on the plaint as it stands

after the amendment. Even though her object might be to escape the payment of higher court-fee there is nothing in the law which would debar her from doing so. The court-fee payable on a plaint is to be determined by the language of the plaint and not by an inquiry into the intention of the plaintiff which induced her to give her plaint a particular form. I am supported in this view by the decision of a Full Bench of the Allahabad High Court in 'BISHAN SARUP v MUSA MAL', AIR 1935 All 817. It was held by the Full Bench that where a plaint is so worded as to disclose a suit falling either under S. 39 or S. 42 of the Specific Relief Act, it is not open to a Court to treat the suit as one falling within the purview of S. 39, if the plaintiff desires it to be construed as one under S. 42. If on a perusal of the plaint the Court considers that it is one in which further relief should have been asked for then it may refuse to grant a declaration. The Court cannot compel the plaintiff to add a prayer for consequential relief when he has not in fact asked for such relief. Hence where a plaintiff claims a declaration that a certain registered deed is void and does not affect his interests and deliberately avoids claiming consequential relief such as cancellation of it, he need not pay ad valorem court-fee on the subject-matter. I respectfully follow the view taken in that case and hold that the court-fee paid by Dagubai on her plaint as it stood after amendment was sufficient.

(8) The application is dismissed with costs.

V.B.B. Application dismissed.

AIR 1952 MADHYA BHARAT 149

(FULL BENCH)

KAUL C. J., SHINDE, DIXIT, ABDUL HAKIM KHAN AND CHATURVEDI JJ.

Gulabchand Gambhirmal, Petitioner v. Kudilal Govindram and another, Opponents.

Civil Misc. Appln. No. 54 of 1950, D/- 21-1-1952.

Constitution of India, Art. 133 — Decree of affirmance — Substantial question of law — Decision of Court immediately below — Civil P. C. (1908), S. 110.

An appeal preferred by the petitioner from the judgment and decree dated 2-12-1948 in appeal of a Division Bench of the High Court was rejected by the Special Bench on the preliminary ground that it was incompetent for the reason that under S. 25 of the High Court of Judicature Act, (Act No. VIII of 1949) no appeal lay from a decree or an order passed by a Divisional Bench of the High Court before the coming into force of the High Court Act on 18-1-1949.

(Per Kaul C. J., Bhide, Dixit and A. H. Khan JJ.): 'Held' that the order of the Court dismissing the Special Appeal on the ground that no appeal lay under S. 25 of the Act was not an order which affirmed the decision dated 2-12-1948 of the Division Bench. The expression "affirms the decision of the Court immediately below" implies that the Court had dealt judicially with the decision of the Court below and upheld it. Where the Court holds that it has no jurisdiction to entertain an appeal from the decision of the Court below and rejects the appeal, it cannot be held that the decision of the Court below is affirmed by the rejection of the incompetent appeal: 'AIR 1914 P. C. 66 Foll.; AIR 1932 All 312; 20 All. 367 and AIR 1933 Lah 690 Disting. (Para 4)

Further, the proposed appeal involved a substantial question of law. A question of law in respect of which there may be difference of opinion is a substantial question of law. The question of law involved in the Special Appeal was whether a decree or an order passed by a Division Bench of the High Court, and final and conclusive under the Madhya Bharat High Court Ordinance (Ordinance No. II of 1948) was appealable under section 25 of the High Court Act which brought into existence a right of appeal which did not previously exist under the Ordinance. This question turned upon the construction of S. 2(b) of the High Court Act. The question of the scope and purpose of S. 2(b) of the Act and the construction of its language was reasonably debatable. AIR 1927 PC 242. (1905) A. C. 369 Ref. (Paras 6, 7)

(Per Kaul C. J. & Chaturvedi J.): Further the decision sought to be challenged before the Special Bench was not one of the Court "immediately below". It was the decision of the High Court itself and therefore the case was not one to which the last part of Art. 133(1) could apply. (Para 14)

Anno: C. P. C., S. 110, N. 12, 13, 15, 17.

N. P. Engineer, K. A. Chitale, S. M. Samvatsar, V. R. Newaskar, for Petitioner; Amin, Chandra Bhan Sanghi and N. H. Dravid, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

('14) 36 All 350: AIR 1914 PC 66 4
('27) AIR 1927 PC 242: (9 Lah 284) 3, 7
('98) 20 All 367: (1898 All W N 77) 5
('33) 54 All 390: (AIR 1932 All 312) 3, 5
('28) 52 Bom 753: AIR 1928 Bom 371 19
('16) 43 Cal 90: AIR 1916 Cal 973: 33 Ind Cas 745 19
('41) 45 Cal WN 1002 20
('28) AIR 1928 Lah 537: (109 Ind Cas 863) 20
('32) 13 Lah 338: AIR 1932 Lah 121 (2) 20
('33) 14 Lah 609: (AIR 1933 Lah 690) 5
('44) AIR 1944 Lah 458: ILR (1945) Lah (FB) 242 21
('50) AIR 1950 Madh B 112: 1 Madh BLR 229 24
('51) AIR 1951 Madh B 1: (ILR (1952) Madh B 15 FB) 24
(1905) AC 369: (74 LJPC 77) 3, 7

DIXIT, J.: This is a petition for leave to appeal to the Supreme Court from the order made in Civil Special Appeal No. 5 of 1949 whereby an appeal preferred by the petitioner from the judgment and decree dated 2-12-1948 in appeal of a Division Bench of this Court was rejected by us on the preliminary ground that it was incompetent for the reason that under Section 25 of the High Court of Judicature Act, (Act No. VIII of 1949) no appeal lay from a decree or an order passed by a Division Bench of this Court before the coming into force of the High Court Act on 18-1-1949. The facts of the suit which gave rise to the Special Appeal are stated in the judgment dated 2-12-1948 of the Division Bench in Civil First Appeal Nos. 51 and 61 of 1948 and need not be recapitulated here.

On the question of the maintainability of the Special Appeal purported to have been filed under Section 25 of Act No. VIII of 1949, it was contended before us that Act No. VIII of 1949 was retrospective in its operation, and that even

if the decree of the Division Bench appealed from had become final under the Madhya Bharat High Court of Judicature Ordinance (Ordinance No. II of 1948), it was appealable under Section 25 of Act No. 8 of 1949 read with Section 2 (b) of the Act which gave it retrospective effect; that in view of the provisions of Section 40 of the Act No. VIII of 1949 which repealed Ordinance No. II of 1948, and its amending Ordinances, the decree made by the Division Bench should, in law, be deemed to have been passed under Act No. VIII of 1949 and further that in interpreting the provisions of this Act, the provisions of the repealed Ordinances should not be looked into for the purpose of showing that the decree appealed from had become final or for establishing that S. 2(b) of Act No. VIII of 1949 was passed with the same object and for the same purpose as S. 4(b) of the repealed Ordinance No. II of 1948.

These contentions were rejected by us and we held that S. 2(b) of the High Court Act was only a re-enactment of S. 4(b) of Ordinance No. II of 1948, and that its scope and purpose was simply to define the jurisdiction of the High Court; that the proviso to section 40 of the High Court Act merely safeguarded the validity of the matters mentioned in the proviso and acts done under the Ordinance, and prevented the High Court Act from interfering with rights already acquired by a party and that it did not give to a party any further right than he already had or give to the High Court Act a retrospective effect; and that there was nothing in the language of S. 25 of the High Court Act to indicate that it was intended to apply to orders and decree final at the date when the High Court Act came into force.

(2) The petitioner seeks a certificate under Article 133(1) of the Constitution. It is not disputed that the case fulfils the requirements of Article 133(1) as regards the value of the subject-matter and the only question is whether the other conditions of Article 133(1) are satisfied. In seeking permission to carry this matter on appeal to the Supreme Court, Shri Engineer, learned counsel appearing on behalf of the petitioner, urges that the order of this Court rejecting the appeal as incompetent did not affirm the decision of the Court immediately below & that, therefore, the petitioner is entitled to the leave asked for without showing that the proposed appeal involves some substantial question of law.

It is said that affirmance of the decision of the Court immediately below implies jurisdiction to entertain an appeal from the decision and to dispose it of on merits; that if there is no jurisdiction to entertain the appeal, the decree appealed from cannot be varied or affirmed and that, therefore, the order of this Court dismissing the Special Appeal on the ground that it had no jurisdiction under S. 25 of the Act to entertain the appeal was not an affirmance of the decision of the Division Bench. In the alternative, it is urged that even if the order of this Court rejecting the appeal is taken as an order affirming the decision of the Division Bench, the order involves a substantial question of law namely the interpretation of sections 2(b), 25, 37 and 40 of the High Court Act.

Learned counsel for the petitioner argues that a substantial question of law need not be a question of general importance; and that if a question of law arises between the parties and is one on which there may be room for reasonable doubt, or difference of opinion, then it would be a substantial question of law within the meaning of Article 133 of the Constitution of India. It is said that having regard to the aim, scope and object of Act No. VIII of 1949, and the language of the sections referred to above, the question whether under S. 25 of the Act, decrees and orders made by a Division Bench before the coming into force of the High Court Act are appealable, is reasonably debatable.

(3) The petition is opposed by the opponents, the proposed respondents, on the ground that the order of this Court rejecting the Special Appeal affirmed the decision of the Division Bench and that there is no substantial question of law so as to justify the grant of leave under Article 133(1) of the Constitution. Mr. Amin's contention is that though the appeal was dismissed on the preliminary ground that no appeal lay under S. 25 of the Act, nonetheless, the order dismissing the appeal affirmed the decision of the Court below inasmuch as the result of the order was that the decision of the Court below stood unaltered. In support of the contention that the order of this Court rejecting the appeal affirmed the decision of the Court below, Mr. Amin relied upon the decision of the Allahabad High Court 'MAHADEO SAHAI v. SECRETARY OF STATE', 54 All. 390, where it was held that the dismissal of an appeal by the High Court on the failure of the appellant to furnish security for the costs of the respondent was an order "affirming the decision of the court below" within the meaning of the last paragraph of S. 110, C. P. C.

Learned counsel for the opponents does not dispute the proposition that a question of law in respect of which there may be difference of opinion is a substantial question of law. He, however, contends that this court held that the decision dated 2-12-1948 of the Division Bench was not appealable under S. 25 of the High Court Act and that, therefore, the appeal was incompetent on a consideration of the language of Ss. 2(b), 25, 37, 40 of the High Court Act and on an application of the principles laid down by the Privy Council in 'DELHI CLOTH AND GENERAL MILLS CO. v. COMMR. OF INCOME TAX DELHI', AIR 1927 P. C. 242 and in the case of 'COLONIAL SUGAR REFINING CO. v. IRVING', (1905) A. C. 369 and that therefore, as the matter is covered by these authoritative decisions, it cannot be said that it involves a substantial question of law.

(4) In my opinion, there is considerable force in the contention of the learned counsel for the petitioner that the order of this Court dismissing the Special Appeal on the ground, that no appeal lay under S. 25 of the Act, is not an order which affirms the decision dated 2-12-1948 of the Division Bench. It seems to me that the expression "affirms the decision of the Court immediately below" implies that the High Court has dealt judicially with the decision of the Court below and upheld it. Where, as in the present case, the Court holds that it has no jurisdiction to entertain an appeal from the decision of the Court below and rejects the appeal, it seems to me difficult to say that the decision of the Court below is affirmed by the rejection of the incompetent appeal. This view receives some support from the decision of the Privy Council in 'ABDUL MAJID v. JAWAHIRLAL', 36 All 350: AIR 1914 P. C. 66. In that case, their Lordships of the Privy Council considered the question of the effect of the dismissal of an appeal in the Board for want of prosecution.

Lord Moulton in delivering the judgment of the Board observed:

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit, and could in no sense, be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that, therefore, he was in the same position as if he had not appealed at all."

(5) It follows, a fortiori, from these observations that when an appeal is dismissed on the ground that no appeal lay, it cannot be said that the order dismissing the appeal is an order adopting or confirming the decision appealed from. This Privy Council decision has not been referred to in the judgment of the Allahabad High Court, in 'MAHADEO SAHAI v. SECRETARY OF STATE', 54 All 390. Furthermore, in my judgment, the decisions of the Allahabad High Court in 54 All 390 & 'BENI RAI v. RAM LAKHAN RAI', 20 All 367 and of Lahore High Court in 'CHUHI LAL TULSI RAM v. AMIN CHAND', 14 Lah 609, are distinguishable on the ground that in those cases the appeals were competent and the High Court had jurisdiction to entertain them, and the order dismissing the appeal could be regarded as one passed dealing judicially with the matter and holding that the appeal was not supported. I am, therefore, inclined to think that in the present case, the petitioner is entitled to the leave asked for without showing that the proposed appeal involves some substantial question of law.

(6) I do not wish to base the grant of permission to appeal to the Supreme Court solely on the ground that our order dismissing the Special Appeal was not an order affirming the decision of the Division Bench, as I am of the view that the proposed appeal involves a substantial question of law. The question of law involved in the Special Appeal before us was whether a decree or an order passed by a Division Bench of this Court and final and conclusive under the Madhya Bharat High Court Ordinance (Ordinance No. II of 1948) was appealable under S. 25 of the High Court Act, which brought into existence a right of appeal which did not previously exist under the Ordinance. This question turned upon the construction of S. 2(b) of the High Court Act, which made the Act applicable to

"all criminal and civil Proceedings including those under testamentary, intestate, matrimonial, divorce and insolvency jurisdiction pending in the Courts in any State on the date on which the State is included in the United State and to such proceedings, arising in the said States, after those dates."

(7) The main contention of the petitioner who was the appellant before us, was that the High Court Act should be construed according to the natural meaning of the language of the Act and that in the construction of the Act and particularly S. 2(b) any considerations derived from the previous state of law, namely, the Ordinance No. II should not be taken into account and that so construing the necessary implication of section 2(b) of the High Court Act was to make it retrospective so as to affect even vested rights. This method of construction did not commend itself to us and we held that having regard to the scope and purpose of S. 2(b) of the Act and that of the similarly worded S. 4(b) of the Ordinance, the section simply defines the jurisdiction of this Court and that there was no ground to read into the generality of the expression used in section 2(b) of the Act an intention to give retrospective effect to section 25 of the High Court Act or to any other provision of the statute.

There was no dispute then, even as there is none now, as to the well-established principles applicable in determining whether a statute is retrospective in operation. The real question before us was one of the construction of the language of section 2(b) of the High Court Act. I feel it is possible to maintain that the question of the scope and purpose of section 2(b) of the Act and the construction of its language is reasonably debatable. I do not think that it can seriously be said that the contentions of the appellant in the Special Appeal were devoid of any substance and that we dealt with them at length simply out of respect to the learned Counsel advancing them. If we were to accept the contention of the learned Counsel for the opponents that the question is concluded by the principles laid down by the Privy Council in the cases of 'DELHI CLOTH & GENERAL MILLS CO. v. INCOME TAX COMMR., DELHI', AIR 1927 PC 242 and 'COLONIAL SUGAR REFINING CO. v. IRVING', 1905 AC 369, it would mean that an aggrieved party would not be able to obtain leave to appeal to the Supreme Court in any case where the question is whether a particular statute on its language has retrospective effect.

(8) For these reasons, in my opinion, the present case is one in which the Court ought to issue a certificate granting leave to appeal to the Supreme Court under Article 133(1) of the Constitution of India. Costs in respect of this application should, in my view, abide the final decision of the proposed appeal.

(9) SHINDE, J.: I agree.

(10) KHAN, J.: I agree.

(11) KAUL, C. J.: I agree and will add only a few observations of my own.

(12) It is not disputed that the decree sought to be challenged is a decree in a case in which the value of the subject-matter in dispute in the court of first instance and still in dispute on appeal was and is not less than Rs. 20,000/-. It was contended however that the decree of the Full Bench affirmed the decree of the Court immediately below and accordingly in order to be entitled to appeal to the Supreme Court the appellant must further show that the appeal involves a substantial question of law. Mr. Amin argued that no such question was involved and unless we were prepared to certify that the case was a fit one for appeal to the Supreme Court under Article 133(1)(c) of the Constitution the application be rejected. I am unable to accept this contention. We are not asked to hold that the case was a fit one for appeal to the Supreme Court under Article 133(1)(c) of the Constitution. Therefore two points arise for consideration: (1) Did the decree appealed from affirm the decision of the court immediately below? If so, (2) Does the appeal involve some substantial question of law?

(13) The Full Bench dismissed the appeal as it held that the decision of the Division Bench had become final & no appeal against it could be entertained. In other words, the Full Bench deemed itself precluded from considering the matter at all. Accordingly, no question of affirmance of the decision sought to be challenged before it could arise. The Full Bench held that it had not the authority to touch the decision of the Division Bench. It could neither affirm the

decision nor reverse or modify it. I am clear therefore that this was not a case of affirmance of the decree which was sought to be challenged before the Full Bench.

(14) It will further be noticed that the decision sought to be challenged before the Full Bench was not one of the court "immediately below". It was the decision of the High Court itself and therefore the case is not one to which the last part of Article 133(1) can apply.

(15) For the reasons given above, I am of opinion that the applicant is entitled to appeal to the Supreme Court as a matter of right without obtaining a further certificate that a question of law is involved in the appeal. Were it held however, that the Full Bench affirmed the decree of the court immediately below, I am satisfied that a substantial question of law is involved in the appeal. This question is, what is the true scope of S. 2(b) of Act 8 of 1949, and if the interpretation put upon it by the Full Bench is correct. Another substantial question of law in the case is whether S. 25 of the said Act could have retrospective operation?

(16) 'CHATURVEDI, J.': I agree that a certificate be granted under Article 133(1)(a) of the Constitution to the effect that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees. I am of opinion that no other certificate is required or can be granted in this case.

(17) A further certificate that the appeal involves some substantial question of law can be granted only if a case comes under the last para. of Clause (1) of Article 133 of the Constitution. This requires two things: first, a decision of a court immediately below the High Court; and secondly, the affirmance of this decision by the High Court. Where the first condition is not fulfilled an inquiry into the existence of the second condition is not called for.

(18) The question then arises: Whether the decision of the Division Bench of this Court, passed in appeal, on 2-12-1948, from a judgment of a single Judge of Indore State High Court, sitting on the original side, is a decision of "a Court immediately below" the High Court within the meaning of the expression in the last paragraph of Article 133(1) of the Constitution?

(19) It may not be improper here to refer to the divergence of judicial opinion on the point whether a Judge of a High Court sitting alone is or is not a "court immediately below" the High Court when an appeal from the single Judge lies to the Division Bench of that court. One view is that such a court is not subordinate to the High Court and is not a "court immediately below" within the meaning of Section 110 of the Civil Procedure Code (Act V of 1908). Reference may be made in this connection to 'DEBANDRANATH v. BIBUDHENDRA MANSINGH', 43 Cal 90: AIR 1916 Cal 973: 33 Ind Cas 745. This is a decision of Sir Lawrence Jenkins, C. J., and Chatterji J. and the view of their Lordships can find support, though indirectly, from certain observations made by a Division Bench of the Bombay High Court in 'BADRUDDIN ABDUL RAHIM v. SITARAM VINAYAK', 52 Bom 753: AIR 1928 Bom 371. This view is based upon the idea that a Judge sitting alone is not a subordinate court, but performs a function directed to be performed by the High Court; and that an appeal from one tribunal to another tribunal which is differently constituted stands on a different footing from an appeal from the judgment of a tribunal where only the Judge constitutes the tribunal, to the same tribunal, where two or more Judges constitute the same tribunal.

(20) In 1941, the Calcutta High Court (Derbyshire, C. J. and Panckridge J.) without referring to the 1916 decision held in 'PROBHAWATI KANWAR v. PANMAL LODHA', 45 Cal W N 1002, that where a Bench of two or more Judges has affirmed on a Letters Patent Appeal the judgment of a Judge of the High Court, sitting singly on the original side, the decision of the single Judge is the decision of a court 'immediately below' within the meaning of S. 110 of the Civil Procedure Code. This view was in consonance with the decisions reported in 'MINNA HEALTHERLY v. C. B. SEN', AIR 1928 Lah 537 and in 'GOPAL LAL v. BALKISHEN', 13 Lah 338: AIR 1932 Lah 121 (2).

(21) In 'SHEIKH WAHIDUDDIN v. MAKHAN LAL', AIR 1944 Lah 458:ILR (1945) Lah 242 (FB), it was decided by a Majority (Din Mohammad and Abdur Rahman, JJ.) that where an appeal is preferred under the Letters Patent to the High Court from the judgment of a single Judge of the High Court sitting on the original side, the latter is a court immediately below the High Court Bench which disposes of the appeal. But a Judge sitting singly on the appellate side of the High Court is not a court immediately below the Letters Patent Bench which hears an appeal from his decision. In his dissenting note, Blacker, J., pointed out, and in my opinion rightly, that no distinction can be made between the status vis-a-vis the High Court of a single Judge trying an original case and a single Judge hearing an appeal. It was observed that if a Judge sitting singly on the original side of the High Court is a Court immediately below the Court which hears appeal from his decision a Judge sitting singly on the appellate side of the High Court is also a court immediately below the Letters Patent Bench which hears an appeal from his decision.

(22) Thus, there are two contrary views: one, holding that a Bench of the High Court is not a Court immediately below the larger Bench which hears an appeal from its decision; another, holding that the very fact that an appeal is provided from decision of a Bench to a larger Bench implies that the first Bench is placed immediately below that of the larger Bench hearing an appeal from its decisions. For the purposes of this case, it does not appear to be necessary to express any opinion on the point which view is correct; for, according to both the views, the decision of the Division Bench of this Court on 2-12-1948, cannot be held to be that of "a Court immediately below".

(23) Assuming that the second view is the correct one, it will be seen that it is based upon the idea that the term "appeal" means the judicial examination by a Higher court of the decision of an inferior court and that the very word 'appeal' implies the existence of two courts, higher as well as an inferior one.

(24) It has unanimously been held by us in two Full Bench cases (1) 'DAULAT SINGH v. EMPEROR', AIR 1950 Madh B 112:1 M, B. L. R. 229 (FB), and in (2) 'GULABCHAND v. KUDILAL', AIR 1951 Madh B 1 (FB), that no appeal lay to the Full Bench from a decision of a Division Bench of this court if that decision was given before 18-1-1949. This is the opinion of all the present six Judges, including that of my Lord the Chief Justice. If from a decision of a Division Bench no appeal to a Full Bench was competent, it follows from this, as a corol-

lary, that the decision dated 2-12-1948 of the Division Bench of this court was final and it cannot be held to be that of 'a court immediately below' the High Court. If there is no decision of a court immediately below, the question whether this decision was affirmed or not does not at all arise and consequently does not call for any expression of opinion on this point.

(25) On the basis of this reasoning, I am of opinion that the case does not fulfil the requirements of the last para of Article 133 (1) of the Constitution and a further certificate that the appeal involves substantial question of law is neither necessary nor can it be granted in this case. I may also add that where a point is covered by a decision of all the Judges of a High Court, without any difference of opinion, that point cannot be deemed to be a 'reasonably debatable' point, and a reasonably debatable point howsoever important it may be from the mere academic point of view, cannot amount to substantial question of law within the meaning of Article 133 (1) of the Constitution.

(26) By the Court. (Kaul, C. J.) The order of the Full Bench is pronounced by me today. A certificate be granted to the applicant as ordered.

D.H. Certificate granted.

AIR 1952 MADHYA BHARAT 153

(GWALIOR BENCH)

SHINDE, J.

Ramprasad S/o Raghuwarprasad, Applicant v. Jamnaprasad S/o Khoobchand, Opponent.

Civil Revn No. 73 of 1951, D/- 5-10-1951.

Civil P. C. (1908), S. 2 (11) and O. 22, R. 3 — Intermeddler, who is.

The term 'intermeddler' has been used to mean what is known as an executor 'de son tort'. It is essential in order to constitute a person an intermeddler, that there should be an intention on his part to act as a legal representative and to represent the estate of the deceased. A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot be an intermeddler. A person would not be an intermeddler unless he takes upon himself to act as an executor or administrator without any just authority. Where, it is not alleged by the plaintiffs, that a person intermeddled with the estate of the deceased after his death, and where the only ground on which the plaintiffs seek to implead a person is that in the life-time of deceased he entered into a collusive transaction with the deceased and obtaining a fraudulent decree purchased the property in a court sale, these allegations do not make the person an intermeddler. AIR 1948 Mad 386, Rel. on. Chitaley's Civil Procedure Code cited with approval. (Paras 4, 5)

Anno: Civil P. C., O. 22, R. 3, N. 10.

Shivadayal, for Applicant; Dixit and Sahastrabudhe, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras ('48) AIR 1948 Mad 386: (1948-1 Mad L J 82) (Pr 5)

ORDER.: Ramprasad, applicant, has filed this application to revise the order of the Civil Judge, second class, Mehagaon dated 5-2-1951.

(2) Jamnaprasad and others filed a suit against Gayaram and Ramprasad for specific performance of a contract of sale. During the course of the proceedings, the court held that no decree for specific performance could be passed. The suit is, therefore, being prosecuted for the recovery of money. Gayaram died in July, 1949. On 30th September, 1949 the plaintiffs filed an application that Ramprasad be made a legal representative of the deceased Gayaram. The plaintiffs on 11-5-50 filed another application requesting the court to implead Badriprasad as legal representative of the deceased instead of Ramprasad. The court on 18-7-50 passed an order that it is not necessary to decide whether Ramprasad be impleaded as the legal representative of the plaintiffs, as the plaintiffs have given him up. On 14-10-1950 the plaintiffs made another application requesting the court to implead Ramprasad as a legal representative of the deceased Gayaram. On this application, the court held that Ramprasad is an intermeddler of the property of the deceased and as such he is the legal representative of Gayaram. Against this order, Ramprasad has filed this revision.

(3) The counsel for the opposite party raised a preliminary objection to this revision, that as the order under revision is appealable this revision is not competent. Counsel for the opposite party could not substantiate the objection that the order under revision is appealable. It is not denied that the order is passed under Order 22, R. 4. Under Order 43, R. 1 an order passed under Order 22, R. 4 is not appealable. The objection therefore, has no force.

(4) Turning now to the consideration of the point raised in this revision, it has to be determined whether Ramprasad can be impleaded as the legal representative of Gayaram on the ground that he intermeddled with the property of the deceased. The expression 'legal representative has been defined in S. 2 (11) of the Civil Procedure Code, which runs as follows:

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

The term 'intermeddle' has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority, or an intention to exercise the functions of an executor or administrator. In other words, it has been used to mean what is known as an executor 'de son tort.' It is, therefore, essential in order to constitute a person an intermeddler, that there should be an intention on his part to act as a legal representative and to represent the estate of the deceased. A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot, therefore, be an intermeddler within the meaning of the definition. (Vide Civil Procedure Code by Chitaley Vol. 11 Edn V at Page 2670.)

Executor 'de son tort' has been described in Wharton's Law Lexicon as follows:

"If a stranger take upon himself to act as executor or administrator without any just authority, he is called in law an executor of his own wrong, 'de son tort', and is liable to the extent of the assets which have come to him and to all the trouble of an executorship without any of the profits or advantages".

(5) This description of an intermeddler makes it quite clear that a person would not be an intermeddler unless he takes upon himself to act as an executor or administrator without any just authority. A person, therefore, must have an intention to act as a legal representative and to represent the estate of the deceased. It is not alleged by the plaintiffs that Ramprasad intermeddled with the estate of the deceased after his death. No evidence has been adduced to show that Ramprasad has intermeddled with the estate of the deceased. The only ground on which the plaintiffs seek to implead Ramprasad is that in the lifetime of Gayaram, Ramprasad entered into a collusive transaction with Gayaram and obtaining a fraudulent decree purchased the property in a court sale. Even if these allegations be held to be true, they do not make Ramprasad an intermeddler. The property was purchased in a court sale during the lifetime of Gayaram. In 'CHOCKALINGAM v. KARUPPAN', AIR 1948 Mad 386, their Lordships of the Madras High Court observed as follows:

> "It is true that 'legal representative' includes any person who intermeddles with the estate of a deceased person. But assuming that the respondent is in possession of family assets in excess of his due share, such possession dates back to the ineffectual partition of 1926 long before Subramanian died, and cannot, therefore, amount to intermeddling with the estate of a deceased person": Vide AIR 1948 Mad. 386, Para 6.

The same reasoning applies to this case. If Ramprasad obtained any collusive decree he did so in the lifetime of Gayaram and the purchase at a court's sale also was made during the lifetime of Gayaram. This act of Ramprasad, therefore, does not amount to intermeddling with the estate of the deceased.

Besides as already pointed out, no evidence has been adduced by the plaintiffs to show that Ramprasad had any intention to act as a legal representative and to represent the estate of the deceased. In these circumstances, the finding of the trial court that Ramprasad is an intermeddler is wrong in law. Other irregularities in the procedure followed by the trial court need not be commented upon as the order passed by the lower court must be set aside.

(6) I, therefore, accept the application in revision and set aside the order of the lower court dated 5-2-51. Applicant to get his costs of this revision from the opposite party.

D.H. Revision allowed.

AIR 1952 MADHYA BHARAT 154

(GWALIOR BENCH)

CHATURVEDI, J.

Ameer Mohammad, Appellant v. Jiwanlal and others, Respondents.

Civil Misc. Appeal No. 58 of 1949, D/- 26-2-1952.

(a) Civil P. C. (1908), O. 22, Rr. 10 and 11 — Assignment pending suit — Impleading of assignee as party to appeal.

> What R. 11 read with R. 10 means is that in making R. 10 applicable to appeals the word 'suit' in R. 10 should be read as including an "appeal" and not that the word 'suit' should be replaced by the word 'appeal.' In other words, 'suit' should be read as 'suit or appeal'. In this view of the matter, the appellate Court has jurisdiction to implead an assignee as a party to the appeal even when the assignment was made in his favour during the pendency of the suit: AIR 1944 Nag 137 and AIR 1946 Lah 33, Rel. on; AIR 1934 All 442 and AIR 1936 Oudh 224, Dissent from. (Para 2)

Anno: C. P. C., O. 22, R. 10, N. 14 Pts. 4 and 5.

(b) Civil P. C. (1908), O. 22, Rr. 10 and 11 — Assignee 'pendente lite' is not bound to apply.

> The provisions in Rr. 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal. An assignee pendente lite is not bound to file an application if his interest is protected. It is only when he finds that his interest is in jeopardy and not likely to be protected by the assignor that it becomes necessary for him to apply for leave to continue the suit or the appeal. (Para 4)

Anno: C. P. C., O. 22, R. 10, N. 2.

Abdul Hafiz, for Appellant. Ramroop Tiwari, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('34) AIR 1934 All 442: (149 Ind Cas 970) 2

('46) AIR 1946 Lah 33: (221 Ind Cas 556) 2

('44) AIR 1944 Nag 137: (ILR 1944 Nag 520) 2

('36) AIR 1936 Oudh 224: (160 Ind Cas 801) 2

JUDGMENT.: The respondent, an assignee 'pendente lite', has been allowed to be impleaded as an appellant in an appeal pending in the Court of the District Judge, Gwalior. Against this order, the plaintiff has filed this appeal. The facts are as follows: On 26-4-1932, Ameer Mohammad, plaintiff, filed a suit for declaration as well as for recovery of possession of some immovable property against Lt.-Colonel Sardar Clement Filose in the Court of Subordinate Judge, Sheopur, which was dismissed on 28-6-35 as time barred. The plaintiff filed an appeal on 3-6-36 in the Court of the District Judge. The appeal was in 1942 accepted and the suit was held to be within limitation and was remanded to the trial Court. On 12-2-45, the trial Court decreed the suit. Miss I. M. Filose, (daughter of Sardar Clement Filose, who had died) then, on 12-4-1945, filed an appeal in the District Judge's Court against the decree of the trial Court.

Miss I. M. Filose was in England and the appeal on her behalf was continued by her 'Mukhtear Am'. During the pendency of this appeal, on 28-2-1946, an application was filed by one Jeewanlal, the present respondent, alleging that on 30-8-1937 some suit property had been purchased by him from I. M. Filose for a sum of Rs. 2,100/- and he requested the Court to allow him to be impleaded as an appellant. The plaintiff-respondent opposed this application but his objections having been overruled, Jeewanlal was ordered to be impleaded on 15-8-1946 as an appellant in addition to I. M. Filose.

(2) Amir Mohammad, plaintiff, has now preferred this appeal against the order dated 15-8-1946 of the appellate Court and Mr. Abdul Hafiz places reliance on 'PHUL CHAND v. KHWAJA TAHER HUSSAIN', AIR 1934 All 442 in support of the proposition that where the assignment in favour of the applicant has been made during the pendency of the suit in the Court below and not during the pendency of the appeal the appellate Court has no jurisdiction under R. 10, O. 22 to implead the applicant as a party to the appeal. The Allahabad case was followed by the Oudh

Chief Court in 'In re: UMANATH BUX SINGH', AIR 1936 Oudh 224, and the Madras, Patna and Lahore High Courts seem to hold the same views. These decisions have been discussed and dissented from by the Nagpur High Court in 'C. WRIGHT NEVILLE v. E. H. FRESER', AIR 1944 Nag 137, and by the Lahore High Court in 'LAKSHMI NARAIN v. BABU', AIR 1946 Lah 33.

I respectfully agree with these later decisions in holding that the words "appellant", "respondent" and 'suit' in R. 11 are not to be substituted for the words "plaintiff", "defendant" and 'appeal' respectively as the learned Judges of the Allahabad High Court seemed to have thought in 'AIR 1934 All 442.' But the word "Plaintiff" used in O. 22, R. 11 has to be so read as to include an 'appellant'. Similarly the word 'defendant' has to include a 'respondent' and the word 'suit' has to include an 'appeal'. What R. 11 read with R. 10 means is that in making R. 10 applicable to appeals the word 'suit' in R. 10 should be read as including an "appeal" and not that the word 'suit' should be replaced by the word 'appeal'. In other words, 'suit' should be read as 'suit or appeal'. In this view of the matter, the appellate Court has jurisdiction to implead an assignee as a party to the appeal even when the assignment was made in his favour during the pendency of the suit.

(3) I may here also note that S. 359 of the Gwalior Civil Procedure Code is a translation of S. 372 of the old Code of 1877 which with slight modification is O. 22, R. 10 of the Code of 1908. The words "either in addition to or in substitution for the person from whom it has passed, as the case may be" found in S. 372 are omitted in R. 10, O. 22 but are preserved in S. 359 of the Gwalior Code.

(4) I also agree with the view that the provisions in Rr. 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal. An assignee 'pendente lite' is not bound to file an application if his interest is protected. It is only when he finds that his interest is in jeopardy and not likely to be protected by the assignor that it becomes necessary for him to apply for leave to continue the suit or the appeal.

(5) In the present case the 'factum' and the validity of the assignment had not been questioned by the plaintiff and neither abnormal laches nor 'mala fides' were apparent on the face of the record. The Court below under the circumstances was fully clothed with jurisdiction to grant leave asked for by the respondent Jeewanlal and I do not think any interference is called for in the decision given.

(6) I dismiss the appeal with costs.

V.R.B. Appeal dismissed.

AIR 1952 MADHYA BHARAT 155

(INDORE BENCH)

KAUL, C. J. AND MEHTA, J.

Mohammad Raffique, Accused-Appellant v. The State.

Criminal Appeal No. 1 of 1950, D/- 18-4-1950.

(a) Criminal P. C. (1898), Ss. 285, 537 — Two out of four assessors ill and not attending trial — Trial proceeding with help of remaining assessors only — Validity of trial.

Out of the four assessors in a trial two were absent due to illness and the Sessions Judge, finding that they had sufficient reason to remain absent, dispensed with their presence and proceeded with the trial with the help of the remaining two assessors only, without taking any practicable steps to enforce their attendance. There was no prejudice to the accused.

'Held' that the defect in the trial did not affect its validity as the irregularity which had not in fact occasioned any failure of justice was curable under S. 537. (Para 4)

Anno: Cr. P. C., S. 285, N. 4.

(b) Penal Code (1860), S. 302 — Sentence — Brutal murder of innocent girl aged 3 years — Crime actuated by greed — Death penalty should be imposed. (Para 9)

Anno: I. P. C., S. 302, N. 2.

S. M. Samvatsar, for Appellant. P. R. Sherma, Govt. Advocate, for the State.

MEHTA, J.: The accused appellant Mohammad Raffique, son of Ghaseet Khan of Jaora was convicted under S. 302, I.P.C., and sentenced to transportation for life by the Sessions Judge Ratlam on 13-12-1949. The prosecution case is that accused Mohammad Raffique murdered a girl Memmona, aged 3 years on the 26th April 1949. The occurrence took place at Jaora. The first information report was lodged by Noormohammad, father of Memmona on 26th April, 1949 at about 9 P.M. Noor Mohammad went to the Police Station and reported that his daughter aged about 3 years who was wearing silver Kadas on feet and hands is missing and the Police should make efforts to find her out.

Later on, Noor Mohammad at about 10, P.M., produced Naharkhan before the police and Naharkhan informed the police that he had seen Memmona, the missing girl, in the company of the accused at about 6-30 P. M. on 26th April 1949. Acting on the basis of this information, the police apprehended the accused and the house of the accused was searched on 26th April at about 10 or 10-30 P. M. The girl was not found in the house of the accused. At about 11 or 12 midnight the accused disclosed to the police that he knew the place where the body of Memmona was lying. It was lying in a well and he would point it out. The accused took the Panchas and the police along with him and he took them to a well which is near Kalali. As it was dark, with the help of kerosene light they found dead body floating on the water. The body was lifted out of the well and it was identified to be the body of Memmona, daughter of Noormohammad.

(2) At about 1-30 A.M., the accused told the police that the silver kadas of Memmona were kept in his house and that he would point them out and produce them. The accused took the police and Panchas to his house and produced pairs of silver kadas. The kadas were tied in the handkerchief belonging to the accused and they were kept concealed behind a photo frame hanging on the wall. Articles P/2 & P/3 are the two silver kadas and Article P/4 is the handkerchief in which they were tied. On these facts, the accused was challaned and was committed to the Session. He was convicted and sentenced as noted above by the Sessions Judge, Ratlam.

(3) In this case there is no direct evidence of eye witnesses and the entire prosecution case hinges on the circumstantial evidence. There are three prominent incriminating circumstances:

(1) The accused was last seen in the company of the deceased Memmona at about 6 or

6-30 P.M. by Naharkhan & others on 26th April 1949.

(2) The dead body of Memmona was shown by the accused.

(3) The pair of silver kadas, articles P/2 & P/3 were recovered at the instance of the accused and from his house; and

(4) The point No. 4 taken up by Mr. Samvatsar, counsel for the accused at a later stage relates to contravention of S. 285, Criminal P.C.

(4) I will dispose of point No. 4 first. The trial commenced on 11-11-1949 with four assessors to start with. On 14-11-1949 one Sultan Hamid, one of the assessors, sent a telegram stating "Detained by the Doctor. Regret unable to attend court". The Sessions Judge passed order on the 15th November, 1949, dispensing the presence of Sultan Hamid on sufficient ground and hence the trial proceeded with the help of 3 assessors. From 15-11-1949 it was adjourned to 12th December, 1949. On 12-12-1949, one Mulla Haiderali was not present. From the proceedings of the 12th December, it appears that Mulla Haiderali was ill and he remained absent. On 12th & 13th December, there were two assessors and the trial proceeded with the help of two assessors only. The two assessors gave their opinion that the accused is not guilty.

Mr. Samvatsar contended that if during the course of trial with the aid of assessors, any assessor for sufficient cause is prevented from attending throughout the trial and absents himself and it is not practicable to enforce his attendance, the trial shall proceed with the aid of other assessors but before proceeding with the trial with the remaining assessors, the court should ascertain whether the absence of assessors was due to sufficient cause. If the Sessions Judge proceeds with the trial without ascertaining whether his absence was due to sufficient cause and without taking steps practicable to enforce his attendance, the trial is vitiated. In this connection I may state that the Sessions Judge was satisfied that there was sufficient reason for the assessors to remain absent. Both Sultan Hamid and Haiderali were prevented from attending the court and, therefore, the Sessions Judge dispensed with their presence and proceeded with the aid of remaining assessors. If the Sessions Judge did not take any practicable steps to enforce the attendance of the assessors and proceeded with the trial with the aid of remaining assessors, it has not prejudiced the accused and the defect in a trial did not affect its validity and the irregularity was curable under S. 537, Criminal P.C. because the irregularity had not in fact occasioned the failure of justice and that no such failure of justice has been shown.

(5-8) (His Lordship then took up points 1 to 3 and after discussing the evidence, continued as follows:) From the circumstantial evidence discussed by me above, there appears to be no doubt in my mind that the accused murdered the unfortunate girl in order to rob her of the pair of silver kadas and I hold the accused guilty under S. 302, I.P.C.

(9) It is a case of brutal murder of an innocent girl, aged 3 years and the crime was actuated by greed. It is a sordid brutal murder and the learned Sessions Judge should have imposed, in the circumstances of the case, death penalty. However, I would confirm the order of conviction and sentence, and dismiss the appeal.

(10) KAUL, C. J.: I agree with the conclusion arrived at by Mehta, J. and with the order proposed to be passed by him. The only reason why we refrain from issuing notice to the accused for enhancement of sentence is that the matter is already one year old.

(11) 'BY THE COURT': The appeal is dismissed.

D.R.R. Appeal dismissed.

AIR 1952 MADHYA BHARAT 156

(INDORE BENCH)

SHINDE AND A. H. KHAN, JJ.

Naharkhan and another, Appellants v. Mohammad Abdul Majidkhan and another, Respondents.

Civil Special Appeal No. 8 of 1949, D/- 6-2-1952.

(a) Limitation Act (1908), Arts. 115, 120 —Applicability — Breach of contract to marry — Suit for return of ornaments and clothes given to girl — Limitation.

A sued B for return of ornaments and clothes given by A to B whose daughter was engaged to be married to A's son. B broke the contract by giving her in marriage to some other person. Suit was brought within 3 years of the date of marriage.

'Held' ('Per A. H. Khan, J.'): Though a betrothal is a contract, a suit for return of ornaments is one for return of species and cannot be treated as one for compensation for breach of contract. It is, therefore, governed not by Art. 115 but by Art. 120. AIR 1919 Lah 109 (1) Disting. (Para 2)

('Per Shinde, J'): Although the words 'return of ornaments' have been used in the prayer, a joint relief has been claimed for ornaments, clothes and other expenses incurred. Thus the relief claimed is for the price of ornaments and clothes and compensation for the expenses incurred. The suit is therefore clearly one for damages for breach of contract which is covered by Art. 115 and being brought within three years of the date of marriage was within time. AIR 1919 Lah 109 (1) Foll. (Paras 15, 16)

Anno: Limitation Act, Art. 115, N. 15, 16 Art. 120, N. 2.

(b) Limitation Act (1908), Arts. 48 and 49 — Applicability.

'Per A. H. Khan, J.': Article 49 and Article 48 must be read together in order to have a clear idea as to what the law is. Both the Articles apply to the suits in which relief is sought in respect of specific movable property. In addition they apply when the property is wrongfully taken or wrongfully detained. Article 49 seems to refer to actions ex delicto, in other words, it applies to tortious actions. It does not apply where the suit is based on a breach of contract. AIR 1939 Nag 177, Rel. on. (Para 8)

Anno: Lim. Act, Art. 48, N. 2, Art. 49, N. 2.

S. D. Sanghi, for Appellants; Ahmad Khan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('19) AIR 1919 Lah 109 (1): (50 Ind Cas 735) 5, 6, 15

('26) 49 Mad 468: (AIR 1926 Mad 615 FB) 9

('39) AIR 1939 Nag 177: (ILR (1939) Nag 498) 7, 8

A. H. KHAN J.: This is an appeal against the order of remand passed by Nasrat Mohammad Khan, J. of Jaora High Court on 31-7-1948.

(2) The short facts of the case are that the plaintiffs brought a suit on 1-4-1945 against the defendants on the allegation that plaintiff, Abdul Majid's son, Sharif Khan was engaged to be married to Must. Sugara, daughter of defendant No. 1. At the betrothal ceremony, some ornaments and clothes were given by the plaintiff to the defendant. But as the marriage could not come off and the betrothal was cancelled, the plaintiffs filed the suit for the return of articles given on the occasion of betrothal.

(3) The Trial Court, holding that the betrothal was broken by the plaintiff, and that the suit was barred by time, dismissed it. In appeal, the District Judge of Jaora reversed the findings of the Trial Court and holding that the suit was within time, remanded it for the decision of other issues that had remained unsettled. Against this decision, the defendants went up in appeal, before the High Court of Jaora. The Single Bench of the Jaora High Court held that Article 120 and not Article 115, Limitation Act was applicable to the case and held the suit to be within time. According to Jaora High Court Rules, a further appeal is competent against the judgment of a Single Bench. Necessary permission having been obtained, the defendant has filed this appeal before us.

(4) The question for our determination is whether the suit is or is not time barred.

(5) The learned counsel for the appellant contends that Article 115 is applicable to this case. He argues that the betrothal is a contract and the breaking of it amounts to the breach of contract and that this suit should be treated as one for compensation. The period prescribed for filing a suit is 3 years from the time the contract is broken. The learned counsel has referred us to 'MEWA SINGH v. NARAIN SINGH', AIR 1919 Lah 109 (1).

(6) In the first place, I do not agree that the case is covered by Article 115, Limitation Act. That a betrothal is a contract I agree. But on referring to the plaint of the case, I find that it is for the return of " जवरात पारचाजात व दिगर मसारिफ ..... " and it is obvious that a suit for the return of the species cannot be treated as a suit for compensation. I have carefully gone through 'MEWA SINGH v. NARAIN SINGH', AIR 1919 Lah 109. It does not appear from it that it was a case for the return of ornaments that were given at the time of betrothal. On the contrary, it was a suit "on account of damages for breach of betrothal contract." I am afraid the Lahore ruling does not help the appellant.

(7) The learned counsel for the appellant has also referred to Article 49, Limitation Act, and he says that if Article 115 does not apply, then the case is covered by Article 49 and in support of his contention he has cited 'BULAKHIDAS NARSINGDAS v. RADHAKISAN GOPIKISAN', AIR 1939 Nag 177.

(8) Article 49 and Article 48 must be read together in order to have a clear idea as to what the law is. Both the articles apply to suits in which relief is sought in respect of specific movable property. In addition, they apply when the property is wrongfully taken or wrongfully detained. In Rustomji's law of Limitation it is said that Article 49 seems to refer to actions ex delicto, in other words, it applies to tortious actions. But in this case, the suit is based on a breach of contract and the question of an action based on tort does not arise. In 'BULAKHIDAS NARSINGDAS v. RADHAKISAN GOPIKISAN', AIR 1939 Nag 177, it is said Art. 49 contemplates a case of a cause of action arising ex delicto. If it is so (and this view finds support elsewhere too) then there is no doubt that the present case is ex contractu and Article 49 would not apply.

(9) It has been observed in 'VENKATA GURUNADHA RAM SESHAYYA v. TRIPURISUNDARI COTTON PRESS, BEZWADA', 49 Mad 468 (FB), that the Limitation Act is one of those unfortunate pieces of Indian legislation which, by trying to provide for everything conceivable, very often ends by leaving out cases of the most glaring description. To me it appears that it is precisely for cases such as the present one that the legislature in its wisdom enacted Article 120, which is often spoken of as the Omnibus article. It is common ground that the suit, if Art. 120 is applied is within time.

(10) In the view that I take of the matter, I think the learned Judge of the Jaora High Court has rightly held that Article 120 of the Limitation Act applies to this case and there is no reason for any interference in the order of remand.

(11) Appeal disallowed with costs.

(12) SHINDE J.: The question for consideration in this appeal is what Article of the Limitation Act is attracted in this case. My learned brother Abdul Hakim Khan, J. is of the opinion that Article 120 which is generally referred to as the omnibus Article is applicable to this case. I find certain amount of difficulty in concurring with this view. Although I agree with my learned brother that the suit is not barred by time, my grounds for holding the same are different and hence I am constrained to write a separate judgment.

(13) The facts of the case briefly are these. Plaintiff, Abdul Majid's son, Sharifkhan was engaged to be married to Mst. Sugara, daughter of Naharkhan defendant No. 1. At the time of betrothal, and on other occasions the plaintiff alleges that he gave ornaments, clothes, and sweetmeats worth Rs. 199/13/- and also incurred miscellaneous expenses to the extent of Rs. 49-12-6. He further alleges that the defendant broke the contract and married Mst. Sugara to some one else on 28th April 1942. On these allegations, the plaintiff seeks the following relief:

मुद्दयान मुस्तदी है कि वाद तहकीकात जाप्ता डिक्री वापसी जेवरात व पारचेजात व दीगर मसारिफ व मुजब फेहरिस्त मुन्सलका किमती रू० २४९ रू० ९ आ० ६ पा० की डिक्री वह वक मुद्दयान खिलाफ मुद्दाअलहम सादिर फरमाई जावे।

The trial court holding that the betrothal was broken by the plaintiff and that the suit was barred by limitation dismissed the suit of the plaintiff. On appeal the District Judge, Jaora, reversed the findings of the trial court and holding that the suit was within time remanded the case for the decision of other issues. Against that order of remand, the defendants preferred an appeal before the High Court of Jaora. The Single Bench of the Jaora High Court held that Article 120 and not Article 115, Limitation Act, was applicable to this case. Against that decision the defendants have filed this appeal.

(14) As already stated we have to see what Article is applicable to this case, as detailed in

the plaint. Although in the prayer the plaintiff uses the words "वापसी जेवरात व पारचे जात" (return of ornaments and clothes) actually the plaintiff is not asking for the return of specific ornaments and clothes. He is actually asking for a decree for Rs. 249-9-6. If that were not so, the relief would have distinctly stated that in case the plaintiff fails to return the ornaments and clothes, their price may be allowed to the plaintiff. Besides the relief claims a decree not only for ornaments and clothes but also for other expenses incurred. These other expenses incurred cannot be specifically decreed. Consequently, the relief cannot be for the return of the ornaments. Although the words 'return of ornaments' have been used in the prayer, a joint relief has been claimed for ornaments, clothes and other expenses incurred. There is no doubt, therefore, that the relief claimed is for the price of ornaments and clothes and compensation for the expenses incurred.

(15) Moreover, the heading of the suit is as follows:

दावा बाबद किमत जेवरात व सरफा मंगनी वगैरा किमत रुपये २४९-९-०

This supports my view that the suit is not for the return of the specific ornaments and clothes. From the facts detailed in the plaint, it is clear to me that the suit is for damages for the breach of contract. Under S. 73, Contract Act, when a contract is broken the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. This is precisely what the plaintiff is asking for. He alleges that as the defendant broke the contract of marriage he may be given damages caused to him by the loss of ornaments, clothes and other expenses incurred in consideration of the marriage. The suit, in my opinion, therefore, is covered by Article 115, Limitation Act. I am supported in this view by the decision of the Lahore High Court reported in 'MEWA SINGH v. NARAIN SINGH', AIR 1919 Lah 109 (1).

(16) Even if Article 115 is applied to this case, the suit does not become time barred. In the case of Article 115, the period of limitation begins to run from the date the contract is broken. In para No. 4 of the plaint, it is stated that the defendant married his daughter to some one else on 28th April 1942. Evidently, therefore, the contract was broken on 28th April 1942. The suit was filed on 1-4-1945. As the suit is filed within three years from the date on which the contract was broken it is clearly within time.

(17) For these reasons I see no reason to interfere with the order passed by the learned Judge of the Jaora High Court.

D.R.R. Appeal dismissed.

AIR 1952 MADHYA BHARAT 158

(GWALIOR BENCH)

SHINDE, C. J.

Jeetmal and others, Appellants v. Gendmal, Kesrimal and others, Respondents.

Second Appeal No. 34 of 1949, D/- 7-4-1952.

Civil P. C. (1908), O. 1, R. 8 — Suit by a few members — Majority objecting.

There must be at least the Majority of the community with the plaintiffs before they can be allowed to sue in a representative capacity under O. 1, R. 8. Where it is alleged that the right of pre-emption accrues to the whole Porwal community, and there are about 30 members of the community and 20 of them objected to the permission being given to the plaintiffs, they cannot be allowed to sue in a representative capacity as the majority of the community is against such a course of action: 'Case law discussed.' (Para 2)

Anno: C. P. C., O. 1, R. 8, N. 8.

Sahasrabuddhe, for Appellants. Patankar and Misra, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('16) 40 Bom 158: (AIR 1916 Bom 261) 2
('21) AIR 1921 Mad 682: (64 Ind Cas 618) 2
('29) AIR 1929 Mad 44: (107 Ind Cas 789) 2
('48) AIR 1948 Mad 516: (1948-1 Mad L J 379) 2
('49) AIR 1949 Mad 653: (1949-1 Mad L J 540) 2
('34) AIR 1934 Rang 347: (153 Ind Cas 539) 2

JUDGMENT: This is plaintiffs' appeal against the judgment and decree of the District Judge, Shajalpur. One Chhotelal sold his house to a third party. The Porwal community of Shujalpur claimed a right of pre-emption. Seven persons joined together and filed a suit for pre-emption and also applied for permission under S. 27, Gwalior Civil P.C. equivalent to O. 1, R. 8, Civil P.C. to sue in a representative capacity. The trial court held that the plaintiffs are not entitled to file a suit in a representative capacity. As the plaintiffs refused to continue the suit in their personal capacity, the suit was dismissed. The same decree was affirmed by the District Judge. Hence the plaintiffs have filed this second appeal.

(2) Mr. Sahasrabuddhe who appears for the appellants contends that as the act of the plaintiffs is in the interest of the community, permission should be given to them to sue in a representative capacity. He further contends that 'HARKISONDAS SHIVLAL v. CHHAGANLAL NARSIDAS', 40 Bom 158, on which both the lower courts have relied, has not been followed in 'ABDUL GHANI SAHIB v. SUBRAMANIA CHETTIAR', AIR 1929 Mad 44, and 'MAHOMED HASSAN SAHIB v. PODANUR 'SUNNATH JAMATH', AIR 1948 Mad 516. O. 1, R. 8 runs thus:

> "Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

There are thus two essentials which must be fulfilled before permission can be given under O. 1, R. 8. (1) The parties must be numerous; and (2) they must have the same interest in the suit.

In 40 Bom 158 Batchelor J., observed as follows:-

> "We have had a very careful argument from Mr. Desai on behalf of the plaintiffs-appellants, but I am of opinion that this suit was misconceived and must fail. As I have shown, the plaintiffs purported to be suing on behalf

of the whole Mojumpur section, or sub-caste, by virtue of O. 1, R. 8. But, it seems to me clear upon the very face of things that the plaintiffs could not, under O. 1, R. 8, sue on behalf of those numerous members of the Mojumpur section who admittedly were and are in diametrical opposition to them in this present controversy. In no sense could these persons be said, I think, to be represented by the plaintiffs in this suit. For, in no sense could it be said, as the language of the Rule requires that they and the plaintiffs held the same interest in the suit and that the plaintiffs in bringing this suit were suing for or on behalf of these dissentient members."

'AIR 1929 Mad. 44' approved the view taken in 'PERIYAVA NADAR v. NANA', AIR 1921 Mad 682. Napier J. in that case made the following observations:

"Where there are large communities, it is obvious that there must undoubtedly be differences of opinion; and if no suit can be brought by any member of a caste under O. 1, R. 8, unless they represent the view of every member of the community or of a majority whose view bind the whole, this rule is inapplicable to any suit brought to decide questions in issue between the members, and can only be availed of for the purpose of bringing suits on behalf of a community against a third party. I can only say that I have never heard this proposition put forward before us, as a ground of objection to suits which have been filed to ascertain the rights of members of the community inter se. The words are 'where there are numerous persons having the same interest in one suit one or more of such persons may, with the permission of the Court, sue ..... on behalf of all persons ... .so interested'. They are not 'the same interest in the subject-matter of the suit' and I have always understood this rule to be applicable to cases where one person seeks to represent a number of other persons who agree with him in the contention which he has raised in the suit as to the rights of the various members of the community."

This case was filed to ascertain certain rights of the members of the community inter se. But the present case is quite different. In the present case, it is alleged that the right of pre-emption accrues to the whole Porwal community. The question is whether a few members of the community can be allowed to sue in a representative capacity when the majority of the community is against such a course of action. 'A. I. R. 1948 Mad 516' on which reliance has been placed is again a case relating to a dispute among the members of the Sunnath Jamath of Podanur. The facts of that case therefore, were different from the facts of the present case.

In 'CHANDAPPA INDRA v. JAGATAPALA', AIR 1949 Mad 653, Mack J. made following observations:

"The first condition for the operation of O. 1, R. 8 is that there should be 'Numerous persons having the same interest in one suit'. In such a case one or more of such persons may, with the permission of the court, sue or be sued on behalf of all persons so interested. It is not necessary that all members of a Sangham or of an Association should have an identical interest in the suit. There may be opposition between two groups and bona fide representatives of each group can file a representative suit to have such disputes resolved under O. 1, R. 8, to save multiplicity of suits. The sole criterion is whether the plaintiff or plaintiffs are representatives of numerous persons having the same interest in one suit. In the present case, the mere fact that 12 members of the Sangham have appeared and filed affidavits dissociating themselves from the petitioner's suit and strongly opposing him, would not per se deprive the plaintiff of his right to file a representative suit."

In 'PE TRUE MAUNG v. U THEY', AIR 1934 Rang 347 Mackney J. observed as follows:

"Although four dissentient members of the society do not wish the suit to be brought, they advance no valid reason why it should not be brought. There is no doubt that the association is functioning and that the plaintiff-respondent has been authorised by a large majority of members to prosecute this suit. No doubt it is all very comfortable for the members of the society who have borrowed money therefrom that they should not be sued for the return of that money, but the majority of the members clearly have a right to sue for its return when they so desire."

These two decisions clearly indicate that if the substantial majority of the members of a body are of one opinion an order may be made by the court giving permission under O. 1, R. 8. This being the position in law, the contention put forward by the appeliant cannot be accepted. Both the lower Courts have held that not only that it has not been proved that the majority of the Porwal Community is with the plaintiffs but the plaintiffs' witnesses have not even tried to show how many members of the community are with the plaintiffs. It also appears from the record that there are about 30 members of the community and 20 of them objected to the permission being given to the plaintiffs. In these circumstances even if the extreme view expressed by their Lordships of the Bombay High Court in '40 Bom. 158' be not followed, the plaintiffs' appeal cannot succeed. As laid down in 'AIR 1949 Mad. 653' and 'AIR 1934 Rang 347' there must be at least the majority of the community with the plaintiffs before they can be allowed to sue in a representative capacity under O. 1, R. 8. As it is not proved in this case that the majority of the Porwal community is with the plaintiffs, the suit cannot succeed.

(3) The appeal is, therefore, dismissed with costs.

D.H.

Appeal dismissed.

AIR 1952 MADHYA BHARAT 159

(GWALIOR BENCH)

SHINDE, C. J.

Mst. Sushila Devi, Applicant v. Mannomal, Opponent.

Civil Revn. No. 93 of 2005, D/- 14-2-1952.

(a) Civil P. C. (1908), S. 115 — Misappreciation of evidence — Not a ground for revision.

An erroneous appreciation of evidence cannot be made a ground for revision under S. 115, Civil P. C., because it is not a question which affects jurisdiction. Hence the High Court will not interfere in revision with a finding as to ownership on ground that it is against the weight of the evidence: AIR 1930 Mad 225(2); AIR 1919 Mad 796;

AIR 1937 Pat 357 and AIR 1945 Bom 386 Ref. (Para 2)

Anno: C. P. C., S. 115, N. 2, 13.

(b) Civil P. C. (1908), O. 21, R. 103 — Suit based on different right and not on adverse order — Bar of — Limitation — Limitation Act (1908) Art. 11 A — Gwalior Limitation Act, Arts. 2(a), 30 and 56.

If a suit is based on the adverse order passed under O. 21, R. 101, Civil P. C., then it, no doubt, has to be filed within one year which is the period prescribed by Article 11A, Indian Limitation Act (corresponding to Article 2(a) of the Gwalior Limitation Act). But a suit based on some other cause of action is not precluded by R. 103 of O. 21, (corresponding to S. 342(4), Gwalior Civil P. C.). AIR 1927 Bom 184; AIR 1946 Mad 324 Rel. on. (Para 3)

In execution of a decree for arrears of rent and ejectment, the decree-holder obtained possession of the house. An objection under O. 21, R. 100, C. P. C. by a purchaser from the judgment-debtor was allowed. The decree-holder then filed a suit for declaration that the sale deed in favour of the objector was void and also for possession of the house.

'Held' that O. 21, R. 103, C. P. C. was no bar to the suit and that it was governed by Art. 30 or 53, Gwalior Limitation Act. (Para 4)

Anno: C. P. C., O. 21, R. 103, N. 2, 5.

Bhagwanswaroop and Anand Bihari Misra, for Applicant; Shivdayal, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras
('27) AIR 1927 Bom 184: (51 Bom 158) 3
('45) AIR 1945 Bom 386: (47 Bom LR 320) 2
('19) AIR 1919 Mad 796: (35 Mad LJ 251) 2
('30) AIR 1930 Mad 225(2): (196 Ind Cas 97) 2
('46) AIR 1946 Mad 324: (1946-1 Mad LJ 104) 3
('37) AIR 1937 Pat 357: (167 Ind Cas 492) 2

ORDER: This is defendant's revision against judgment and decree of the District Judge, Gwalior, who dismissing her appeal confirmed the decision of both the lower courts. The facts of the case briefly are as follows. One Kalyan executed a sale deed of a house in favour of Mannomal on 24-1-24. Kalyan executed a rent note and continued to live in the same house. As rent was not paid for considerable period, Mannomal filed a suit for ejectment and for arrears of rent. That suit was decreed on 8-5-31. During the pendency of the suit, Kalyan died. Hence Mannomal executed the decree against Mst. Sasso and obtained possession of the house. This house was sold by Mst. Sasso to Sushila Devi on 22-1-32. Sushila Devi filed an objection under S. 342, Gwalior Code of Civil Procedure corresponding to O. 21, R. 100 of the Indian Civil Procedure Code. That objection was upheld and Mst. Sushila Devi was put in possession of the house on 2-3-33. The decree-holder filed a revision petition in the Gwalior High Court, which was dismissed on 9-1-35. Hence Mannomal filed the present suit for a declaration that the sale deed of 22-1-32 in favour of Sushila Devi is void and also for the possession of the house. That suit was decreed by all the lower courts. Hence the defendant has filed this revision.

(2) The learned counsel for the applicant has raised two points before me. The first is that the suit is time barred and the second is that a part of issue No. 1 (in respect of ownership) has been wrongly decided. The second point can be disposed of on a short ground that in a revision no objection can be raised regarding erroneous appreciation of evidence. It is not contended by the applicant that the lower courts have decided the question of ownership in favour of Kalyan without any evidence. But the contention of the applicant is that it is against the weight of evidence that Kalyan has been found to be the owner of the suit house. The question regarding appreciation of evidence cannot be raised in revision; because it is not a question which affects jurisdiction. In 'APPU PILLAI v. NATARAJA PILLAI', AIR 1930 Mad 225 (2), it has been held that in a suit in an election dispute High Court cannot interfere in revision with the lower court's order on grounds which involve nothing more nor less than appreciation of evidence, and decide for itself on the question of fact, whether the votes were valid or not valid; the High Court has to confine itself to the question of jurisdiction only. Similar view was expressed in 'In re: KRISHNASWAMI IYER', AIR 1919 Mad 796. In 'GAYA PRASAD v. PARICHHAN SAHU', AIR 1937 Pat 357, Rowland, J. expressed the same view. In 'SAVLARAM GANGARAM v. VISHWANATH ANANT', AIR 1945 Bom 386, a Division Bench of the Bombay High Court held that a wrong decision by the lower court on a question e.g., whether certain land, in fact, was sold or was wrongly sold which it had jurisdiction to decide, cannot bring the question within the scope of S. 115, Civil P.C. The question is now well settled that erroneous appreciation of evidence cannot be the ground for revision under S. 115, Civil P.C. The point raised by the applicant, therefore, cannot be considered.

(3) Turning now to the first point, the contention of the applicant is that the suit should have been filed within one year from the date of the adverse order passed under O. 21, R. 101, Civil P.C. There is no doubt that R. 103 of O. 21 (corresponding to sub-section 4 of S. 342, Gwalior Code of Civil Procedure) expressly provides that subject to the result of any suit the order passed under R. 101 shall be conclusive. But the suit contemplated by R. 103 is a suit to establish the right to the present possession of the property. If that suit is not instituted within one year, which is the period of limitation prescribed, then the adverse order would no doubt be conclusive. But it does not bar a suit which the claimant institutes on a different cause of action. If a suit is based on the adverse order passed under R. 101, then it, no doubt, has to be filed within one year which is the period prescribed by Article 11A, Indian Limitation Act (corresponding to Article 2 (a), Gwalior Limitation Act.) But a suit based on some other cause of action is not precluded by R. 103, Order 21. In 'LAKSHMIPATHIRAJU v. VENKATASWAMI', AIR 1946 Mad 324, it was held that if the title which was put forward as the basis of a suit was the same as the title which was put forward in execution proceedings as the basis for an order in a party's favour, then O. 21, R. 103 would be a bar; but not otherwise. In 'RUKHMABAI DATUSA v. FAKIRSA HANMANTSA', AIR 1927 Bom 184, a Division Bench of the Bombay High Court held as follows:

"Where the basis of the claim in the suit is the same as that put forward in the miscellaneous objection proceedings to the present

possession, Art. 11-A would apply; but where the basis of the claim in the suit is distinct and different and the possession claimed is not present possession but only by way of consequential relief to the decree being set aside, the Article cannot apply."

[4] Examining now the present suit in the light of this proposition, I find that the basis of the suit is entirely different from the basis of the claim put forward in the objection proceedings. In the objection proceedings Mannomal was executing his decree for ejectment. Basis of the claim put forward in the objection proceedings was the decree for ejectment and for arrears. In the present suit the plaintiff prays for a declaration that the sale-deed dated 21-1-1932 in favour of Sushila Devi be declared to be void and inoperative; and as a consequential relief he prays for the possession of the house. Consequently R. 103, O. 21 (corresponding to sub-s. 4 of S. 342, Gwalior Civil P. C.), is no bar to the present suit. The suit is governed by Art. 30 or 53, Gwalior Limitation Act. In both cases, the suit is within time. The contention raised by the applicant, therefore, cannot be accepted.

[5] For the reasons given above, the revision is dismissed with costs.

K.S. *Revision dismissed.*

A. I. R. 1952 Madhya Bharat 161

(INDORE BENCH)

A. H. KHAN J.

State v. *Mangilal Shankarlal Jaiswal and another—Opponents.*

Criminal Misc. Appln. No. 117 of 1951, D/- 10-3-1952.

(a) Criminal P. C. (1898), Ss. 496 and 497 (1)—"Appears"—Meaning of—Anticipatory bail.

The word "appears" occurring in Ss. 496 and 497 admits of appearance through a counsel. An anticipatory bail can therefore be granted. Not only has the High Court the power to grant such bail but a Magistrate also enjoys such power and can release a person on bail without his personal appearance before the Court : *Case law considered.* [Paras 2, 6 and 14]

Anno. Cr. P. C., S 497, N 3, Pt 1.

(b) Interpretation of statutes—Precedents.

Mere precedents are not by themselves a sufficient guide; the wordings of the sections are to be examined with thoroughness and, if on a reasonable construction, a more desirable and equitable view can be taken, it should be taken and mere technicalities should not be allowed to prevail. [Para 16]

Anno. C. P. C. Pre N 15.

Govt. Advocate – for the State ; Karanjkar — for Opponents.

REFERENCES : Courtwar/Chronological Paras.

('45) ILR (1945) 26 Lah 57 : (AIR 1945 P C 94) ; Cri L J 662. 46
('06) 10 Cal W N 1093 : (4 Cri L J 221). 14
('24) 51 Cal 402 : (AIR 1924 Cal 476 : 25 Cri L J 782). 17
('50) AIR 1950 E P 53 : (51 Cri L J 480 FB). 8
('42) Cri Misc No. 592 of 1942 (Lah) 13, 14, 15
('49) AIR 1949 Lah 51 : (50 Cri L J 336) 17
('47) Case No. 10-11 of 2003 reported in Gwalior Law Rep. 340 (Madh-B). 13, 14
('41) AIR 1941 Sind 89 : (42 Cri L J 708). 2
('50) AIR 1950 Sind 19 : (51 Cri L J 705). 13, 14

Order.—This is an application which is moved by the learned Government Advocate, for cancellation of a bail granted to the accused by the District Magistrate, Mandsaur, on 5th July 1951, on the ground that the learned District Magistrate granted an anticipatory bail which is not warranted by law.

[2] Mr. Karanjkar counsel for the non-applicants has filed a copy of an order of the Sessions Judge, Mandsaur, dated 2-11-51 which shows that both the non-applicants were released on bail after their appearance before the Sessions Judge. In view of this later order, it is argued that this application loses much of its force. But the point being one of general importance, I may state that in Case No. 10-11 of 2003, Criminal Revision Judicial Committee, Huzar Darbar Gwalior, reported in the *Gwalior Law Reporter* 340 of 2003, June 1947, I had occasion to consider the proposition of an anticipatory bail and, after giving my reasons in detail, I came to the conclusion that it could be granted. I adhere to the same view and do not consider that the order of the District Magistrate Mandsaur, can be challenged on the mere ground that he granted the bail before the actual arrest of the accused.

[3] It seems that the learned Government Advocate requested the Hon'ble the Chief Justice (Mr. P. K. Kaul) now retired, to refer this question for the consideration of a Full Bench. But he did not do so, and, I am inclined to think that he agreed with my views on the subject and in consequence considered it futile to refer it to a Full Bench, as requested by the learned Government Advocate.

[4] I would like to refer to some of the considerations that prevailed with me, and, in so doing, I must recapitulate the reasons that led me to hold the view I did.

[5] The entire question in fact turns upon the meaning of the word 'appears', occurring in Ss. 496 and 497, Criminal P. C., under Chap. 39, which deals principally with provisions relating to bail. These sections envisage four ways in which an accused comes before the Court and asks for a bail. The first is when an accused is arrested, the second when he is detained without warrant by Police, the third is when he is otherwise brought before the Court, and the fourth is when he "appears." The three earlier ways present no difficulty; it is the last that requires elucidation.

[6] Now does the word "appear" mean that the accused should be present in the Court personally, or, does it admit of appearance through a counsel? That the word 'appear' is susceptible of both constructions is beyond the pale of controversy. My contention is that wherever in the Criminal Procedure Code, the personal appearance of the accused is implied, the expression used is "personal attendance," which occurs in Ss. 205 and 353, Criminal P. C. This difference in phraseology

furnishes a guide and clue as to which of the two meanings is more apt.

[7] It is sometimes said that a bail without personal appearance before the Court is unthinkable. That is a dogmatic assertion. A little reflection is needed and we find that under a bailable warrant, the accused is never brought before the Court and is let off on bail without making his personal appearance before the Court.

[8] Section 497, Criminal P. C., underwent an amendment by S. 136, Criminal P. C., Amendment Act, 1923 (XVIII [18] of 1923) and though the change did not affect the word "appears", yet the amendment as a whole was regarded as the result of a liberalizing influence on the policy of the Legislature, and the effect is that the discretion of the Courts has become less fettered than before: *In the matter of Nagendra Nath*, 51 Cal. 402 at p. 417.

[9] In pursuance of this liberalised policy of law, and also having regard to the present democratic set-up under the Constitution and its humane spirit, as distinguished from the beaurocratic system that prevailed before, let us pause and consider one aspect of the matter, which may conclusively settle the question. Those who have long experience of the law and the Law Courts realise that there are cases (however few and far between they may be) when the Police under the colour of its duty directs its energies towards *harassment* and persecution of a person, who ought to have been left alone.

In such cases whatever the result may be (the person may be eventually discharged or acquitted) but the Police in the meantime does cause him indignity and hardship which cannot be adequately described. And it may be that a good and respectable citizen is the object of this attention. If in such circumstances, or others like it, a person were to approach the Court, I conceive no harm if an anticipatory bail is allowed. In such cases, the attitude of the accused is that he avoids arrest and goes in hiding. The Police in such circumstances cannot arrest him. Now if the accused has confidence in the Court, he applies for bail and says :

"Sir I have no faith in the Police; they are against me. But I have every confidence in the Court and I want to vindicate my honour. But the Police went to dash me to the ground."

It is a known fact that once a man is in a Police lock-up, his subsequent acquittal does not make amends for the indignity suffered by him.

[10] I may be pardoned for venturing to remark that the practice of anticipatory bail came to be established in Gwalior State with a population of 40 lacs, in Samvat 1888. It is now well-nigh a quarter of a century since it prevailed and during my 18 years' experience as a Judge of the High Court in Gwalior, I did not come across a single instance where there was any harm as a result of establishing this practice.

[11] It goes without saying that an anticipatory bail is applied for in very exceptional circumstances. Invariably the Police succeeds in arresting the 'wanted man'. But in a few cases when he evades arrest, it is then and then alone that an application for anticipatory bail is made.

[12] The bail in anticipation merely affords more convenience to the public and, of course, if the accused were in any way to abuse the privilege the bail can always be cancelled. Thus I find that an anticipatory bail is not only in conformity with the liberalised policy of law, but is a measure which in no way obstructs the course of justice.

[13] The learned Government Advocate has drawn my attention to the following cases: *Emperor* v. *Abubakar Muhammed*, A. I. R. 1941 Sind 83, *Mahomed Abbas* v. *The Crown*, A. I. R. 1950 Sind 19, *Amirchand* v. *The Crown*, A. I. R. 1950 E. P. 53 and *Abdul Sattar* v. *The Crown*, A. I. R. 1949 Lah. 51.

In the first three cases, it has been held that no anticipatory bail can be granted, while in the fourth case, a contrary view has been adopted. I have gone through all these cases.

[14] I find that in *Emperor* v. *Abubakar Md.*, A. I. R. 1941 Sind 83, *Mahomed Abbas* v. *The Crown*, A. I. R. 1950 Sind 19 and *Amirchand* v. *The Crown*, A. I. R. 1950 E. P. 53, the discussion has mainly centered round the point whether S. 498 has in any way enlarged the powers of the Sessions Court or the High Court so as to admit a person to bail, who has not been arrested. In *Abdul Sattar* v. *The Crown*, A. I. R. 1949 Lah. 51, I find support for my view, but my reasons are totally different from those that have been discussed in the ruling. In fact, no High Court has considered the meaning of the word "appears" occurring in S. 497, Criminal P. C. and no arguments were addressed to their Lordships on the grounds that I have stated. Not only do I hold that the High Court has such powers, but I am also of the opinion that a Magistrate enjoys such powers too, and, can release a person on bail without his personal appearance before the Court.

The reasons I have already stated in the earlier part of this judgment and it is unnecessary to cover the ground again. They have not been considered so far, let alone their being dissented from. Most of these rulings have referred to *Jai Ram* v. *Emperor*, I. L. R. (1945) 26 Lah. 57, in which their Lordships of the Privy Council have been pleased to say that the High Court has no inherent powers, apart from those expressly given in the Criminal Procedure Code. In holding that an anticipatory bail can be granted, I have not sought any power from section 561-A, Criminal P. C., but I take my stand on the interpretation of the word 'appears' in S. 497 of the Code. All I say is that the language employed by the Legislature is both exact and comprehensive and it calls for a careful appreciation for its due interpretation.

[15] It appears that one of the Judges in these rulings has realised the necessity of possessing such powers and Das C. J. in *Amirchand* v. *The Crown*, A. I. R. 1950 E. P. 53 at p. 56 has observed:

"I realise that some such power to grant anticipatory bail may be useful and even desirable, but the Court cannot arrogate to itself such power if the Legislature has not thought fit to give it to the Court."

This observation deplores the lack of such power, but I submit that the power is there; it has to be discovered.

[16] In the end I venture to suggest that mere precedents are not by themselves a sufficient guide, the wordings of the sections are to be examined with thoroughness and, if on a reasonable construction, a more desirable and equitable view can be taken, I submit that it should be taken and mere technicalities should not be allowed to prevail. In the view that I have taken, no question of interpreting the word 'bail' arises. The section referred to says that if an accused person appears, then the Court may if it thinks proper grant a bail. The question of his arrest or any restraint which he may be under, does not at all arise.

[17] There are two cases which lend support to the conclusion I have ventured to arrive at. One is of *Khwaja Nazir Ahmed*, Cri. Misc. No. 592 of 1942 (Lah.) in which Young C. J. of Lahore High Court, as far back as 1943 granted an anticipatory bail. And the other case is reported in *In re Johur Mull*, 10 Cal. W. N. 1093 in which Mitra J. of Calcutta took a similar view. The latter case is a Division Bench decision.

[18] For reasons stated above, the application is rejected.

B./V.R.B. *Application dismissed.*

A. I. R. 1952 Madhya Bharat 163

REGE J.

Ramdas Bherudas — Applicant v. *Bherudas Narsinghdas — Opponent.*

Criminal Revn. No. 79 of 1948, D/- 10-11-1948.

Criminal P. C. (1898), S. 256 — Right to cross-examine prosecution witnesses after charge.

The right of the accused to cross-examine theprosecution witnesses after the framing of charge is an indefeasible one and omission to give the accused the benefit of this right vitiates the proceedings. [Para 3]

Anno. Criminal P. C. S. 256 N. 6 pt. 2.

Pradhan — for Applicant.

REFERENCES: Courtwar/Chronological/ Paras

('37) A. I. R. 1937 All. 127 : (38 Cri. L. J. 361). 3

(1900) 2 Bom. L. R. 542. 3

(1900) 27 Cal. 370 : (4 Cal. W. N. 469). 3

('10) 37 Cal. 236 : 11 Cri. L. J. 128. 3

('31) A. I. R. 1931 Lah. 186 : (32 Cri. L. J. 1202). 3

('20) 43 Mad. 411:(A.I.R.1920 Mad. 201:21 Cri.L.J.297). 3

('26) 5 Pat. 110: (A.I.R. 1926 Pat. 214:27 CriL.J. 499). 3

Order.—The petitioner was tried on the complaint of one Bherudas s/o Narsinghdas on charges under Ss. 417 and 498, Penal Code and sentenced on conviction of both the offences to a fine of Rs. 50 and six months rigorous imprisonment in default. He has come up in revision and his learned counsel contends that the cross-examination of the witnesses for the prosecution was wrongly shut out and that even on the evidence as it stands, no conviction can be founded.

[2] The complainant's case as stated in the complaint is that he and his wife Musammat Ganga were invited by the accused at the Nukta of his mother. There the accused prevailed on the complainant to let Ganga stay on for a week as his wife was in child-bed. The complainant went after a week to fetch Ganga but she was not there and on inquiry the accused told him that she had been sent to Dhar with one Goverdhan. Gangabai's mother lives with one Sunderlal, head Constable Police, at Dhar. Sunderlal told the complainant that the accused had left Gangabai with him for giving her away in Natra. The plea of the accused is that Gangabai returned, with her brother who had also come for the Nukta.

[3] After the charge was framed the complainant was called upon to pay process for securing the attendance of his witnesses for cross-examination; and on his failure to do so, the learned Magistrate passed an order on 17-3-48 "क्रॉस रद्द किया जाता है". The learned Magistrate should have realised that he was by this order punishing the accused by deprivation of his right of cross-examination for the sin of the complainant. It is settled law that such a right is indefeasible, and omission to give the accused the benefit of this right vitiates the proceedings. I would refer in this connection to cases reported in *Zamunia* v. *Ramtahal*, 27 Cal. 370 : (4 C. W. N. 469); *Inder Rai* v. *Emperor*, 37 Cal. 236 : (11 Cri. L J. 128); *Queen Empress* v. *Nasarvanji*, 2 Bom. L. R. 542; *Ramchandra Modak* v. *Emperor*, 5 Pat. 110 : (A. I. R. (13) 1926 Pat. 214 : 27 Cr. L. J. 499); *Harkishen Das* v. *Emperor*, A.I.R. (24) 1937 ALL. 127 : (38 Cr. L. J. 361); *Chint Ram* v. *Emperor*, A. I. R. (18) 1931 Lah. 186: (32 Cr. L. J. 1202) and *Lockley* v. *Emperor*, 43 Mad. 411 : (A.I.R. (7) 1920 Mad. 201: 21 Cr. L. J. 297). In this view the learned Magistrate erred in cancelling the cross-examination and the true consequence of the cancellation is to render the evidence incomplete and the conviction must be set aside.

[4] I shall, therefore, examine the evidence as it is to decide whether I should remand the case for retrial. There is no suggestion that the accused intended to cheat when he first asked the complainant to let his wife stay behind. P. W. 2 Ramdas and P. W. 3 Bhagwandas state that Gangabai is actually at Dhar with her mother. P. W. 4 Narsingdas says she lives at Dhar with her brother; P. W. 1 Govardhandas says that she went with her brother to Dhar. There is no suggestion that Gangabai is a minor and the evidence as it falls short of proof of any act on the part of the accused to detain her with intent provided for in S. 498, Penal Code, no purpose would therefore be served by ordering a retrial. I acquit the accused . The fine if paid be refunded.

G. M. J. *Accused acquitted.*

A. I. R. 1952 Madhya Bharat 164
(GWALIOR BENCH)

SHINDE J.

Chunnilal and others — Applicants v. *Jenwardas and another — Opponents.*

Civil Revn. No. 147 of S. 2005, D/- 23-1-1952.

Civil P. C. (1908), S. 11 — Suit against several defendants — Other defendants deriving title through first defendant — Appeal — First defendant not made party — Decision of lower Court in favour of defendant 1 operates as res judicata between plaintiff and other defendants also.

A sued *B C* and *D* for declaration that a sale deed by his brother *B* selling certain joint family property to *C* and *D* was void. Trial Court decreed the suit but the first appellate Court held the deed to be valid. Against this decision, *A* filed a second appeal making only *C* and *D* respondents:

Held that the finding of the first appellate Court that the deed was valid was res judicata between *A* and B, who was not party to the second appeal. That finding carried with it also the finding that the deed was valid as between *A* and the purchasers *C* and *D* and became res judicata even in their case: A.I.R. 1927 P.C. 252, *Rel. on.* [Para 3]

Anno. C. P. C., S. 11, N. 116.

Karkare, Kedarnath and Mungre — for Applicants: Krishnabahadur, Vidyasagar and Ab. Hafiz — for Opponents.

REFERENCES : Courtwar/ Chronological/ Paras

('27) A. I. R. 1927 P. C. 252 : (6 Rang. 29). 3
('25) A. I. R. 1925 Rang 108 : (2 Rang. 541). 2

Order. — This is defendant's application in revision against the decree of the District Judge, Guna. The short facts of the case are that one Jinwardas filed a suit in the Court of the Pargana Judicial Officer Mungawali against Chhunilal, Hiralal and Guljarilal on the allegation that Guljarilal who was his brother sold the house to Chhunilal and Hiralal by a sale deed dated 10-9-1935; that the house being a joint family property Guljarilal had no right to sell it; that the sale deed was without consideration and without any legal necessity. The plaintiff on these allegations prayed that the sale deed be declared to be void and possession be given to him. The trial Court decreed the suit. On appeal the District Sub-Judge held that the sale deed was valid and dismissed the suit of the plaintiff. Against this decree Jinwardas filed an appeal in the District Court against Chunilal and Hiralal. The District Judge reversing the decree of the District Sub-judge confirmed the decree of the trial Court. Against this judgment and decree Chunilal and Hiralal have filed this revision.

[2] The learned counsel for the applicant contends that in the appeal filed before the District Judge by Jinwardas, Guljarilal was not made a party. Consequently, the District Sub-Judge's finding that the sale deed is valid has become res judicata, as between the plaintiff and Guljarilal. Therefore, this finding must also be considered to be res judicata as between the plaintiff and Chunilal and Hiralal who are purchasers of the house from Guljarilal. This contention has great force. The fact that Guljarilal was not made a party in the District Judge's Court has not been disputed by the non-applicant. As far as Guljarilal is concerned, therefore, the finding that the sale deed is valid has become final. The same finding, therefore, must be considered to be final between the plaintiff and the purchasers from Guljarilal. In *Chokalingam Chetty* v. *Singaram Chetty*, A. I. R. 1925 Rang. 108 their Lordships of the Rangoon High Court observed as follows :

"When the present appeals were argued, it was pointed out that the foundation of the title of all the defendants was the sale deed from the K. P. joint family to Bansilal Abirchand. It was pointed out that the decrees of the lower Courts declared this sale to be perfectly valid as between the plaintiff Bansilal Abirchand and the E. N. M. K. firm. This finding has been left unappeald against by the omission of Bansilal Abirchand from the appeals; and it was contended that this made the point res judicata between the plaintiff and Bansilal Abirchand. Hence, it would also be res judicata as between the plaintiff and the sub-purchaser from Bansilal Abirchand.

The point appears to be indisputable and the question arose as to whether Bansilal Abirchand and the E. N. M. K. firm could be added as respondents in the present appeals."

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[3] The same case went to the Privy Council. Their Lordships of the Privy Council observed as follows :

"The learned Judges state in their judgment that when the appeals came on for argument it was pointed out that the foundation of all title of the defendants was the sale deed to the first defendant; that the decrees of the lower Court declared the sale deed to be perfectly valid as between the plaintiff and the defendant 1; that owing to the failure to make the defendant 1, a respondent, there was no appeal from this finding which had consequently become res judicata as between the plaintiff and the first defendant, and must also be regarded as res judicata against the respondents, who claimed through the first defendant, or in other words, as it was put by the learned Judges at the end of the judgment, the finding that the sale to the first defendant was good, carried with it a finding that it was also good as between the plaintiff and the purchasers from defendant 1.

As regards this question, their Lordships agree with the learned Judges of the High Court that the plaintiff cannot be allowed in these appeals to question the validity of the sale to the first defendant or to set up in the first suit the benami character of the purchase by the E. N. M. K. firm from the first defendant so long as the findings in favour of the first defendant and the E.N.M.K. firm stand, and are, therefore, of opinion that as regards this part of the case the plaintiff must fail unless defendant 1 and E. N. M. K. firm are made parties to the appeal." Vide *Chokalingam Chetty* v. *Seethai Ache*, A.I.R. 1927 P. C. 252 at p. 255.

This authoritative decision of the Privy Council concludes the point at issue. As Guljarilal was not made a party in appeal before the District Judge, finding of the District Sub-Judge that the sale deed is valid is res judicata as between the plaintiff and Guljarilal. That finding carries with it a finding that it is valid as between the plaintiff and the purchasers from Guljarilal. In these circumstances the contention raised by the applicant must be upheld.

[4] Accordingly, I allow this revision and setting aside the decree of the District Judge restore that

of the District Sub-Judge. In the peculiar circumstances of this case, I order the parties to bear their own costs of this revision.

B./D.R.R. *Revision allowed.*

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(INDORE BENCH)

CHATURVEDI J.

Ratan Singh — Applicant v. *Raghubir Singh —Opponent.*

Criminal Revn. No. 75 of 1951, D/- 17-4-1952.

(a) Criminal P. C. (1898), Ss. 145 (6) and 439—Question as to which party is in possession on date of dispossession—Question is one of fact — Finding thereon will not be disturbed in revision. [Para 4]

Anno. Cr. P. C., S. 145, N. 25 & 61, S. 439 N. 15 Pt. 1.

(b) Criminal P. C. (1898), S. 145 (1) — Preliminary order—Omission to clearly specify subject-matter of dispute—Effect.

Where the party who is alleged to have dispossessed the other party to a proceeding under S. 145 knows very well the subject matter of the dispute, an omission to clearly specify it in the preliminary order is only a minor defect of procedure and can be ignored : A. I. R. 1920 Cal. 344, *Disting.* ; 27 All. 296, *Ref.* [Para 5]

(c) Criminal P. C. (1898), S. 145 (1)—"Parties concerned in such disputes"—Meaning.

The words "the parties concerned in such dispute" in S. 145 (1) must have been intended to extend to persons other than the actual disputants. [Para 6]

Where one *C* could have been, but was not, made a party to the proceeding and she was the mother-in-law of one of the parties to the proceeding and was represented by him as her mukhtyar-am :

Held that failure to add *C* as a party to the proceedings was not a serious matter when she was not concerned in the dispute likely to cause breach of peace and it could not be a ground for interference by the High Court, as the question was one of procedure by which the jurisdiction of the Magistrate was not affected : A. I. R. 1945 Oudh 62 ; A.I.R. 1917 Pat. 435 and 30 Cal. 155 (F. B.), *Rel. on.* [Para 6]

Anno. Cr. P. C., S. 145, N. 19, Pts. 4 to 7.

(d) Criminal P. C. (1898), Ss. 145 (3) and 537—Non-publication of order—Effect.

If a trial is conducted in a manner expressly prohibited by the Code then alone the trial will be vitiated and S. 537 will not cure it : A. I. R. 1927 P. C. 44 ; 25 Mad. 61 and A.I.R. 1947 P. C. 67, *Foll.* [Para 10]

The object of S. 145 is clearly to bring to an end by a summary process disputes relating to land etc., which are in their nature likely to end in breaches of the peace. Considering the main object with which the section was enacted, the only procedure expressly prohibited by the Code is when the Magistrate initiates proceedings under S. 145 without coming to a conclusion whether a dispute concerning the land in question exists which is likely to result in a breach of the peace. It cannot, therefore, be held that if the notice is not published in the manner prescribed by S. 145 (3) the Magistrate loses his jurisdiction to hold an inquiry into the question of possession. The non-publication of the order at or near the subject-matter of the dispute is an irregularity by reason of which the High Court can set aside the proceedings only if it is shown that any party has been prejudiced thereby. If objection to the non-publication of the order has not been taken at earlier stage it can safely be inferred therefrom that no party has been prejudiced in any manner : *Case law discussed.* [Para 10]

Anno. Cr. P. C., S. 145, N. 3, Pt. 5, N. 15, Pts. 7 to 9; S. 537, N. 6, Pts. 7 to 9.

(e) Criminal P. C. (1898), S. 145 (4)—"Then"—Word applies to time or order of Magistrate's proceedings.

The word "then" applies only to the time or order of the Magistrate's proceedings and was not intended to deprive him of jurisdiction, if the notice had not been duly published. [Para 11]

Anno. Cr. P. C., S. 145, N. 28.

S. D. Sanghi—for Applicant ; Balwant Singh — for Opponent.

REFERENCES : Courtwar/ Chronological/	Paras
('02) 25 Mad. 61 : 28 Ind. App. 257 P. C.	8, 9
('27) 54 Ind. App. 96 : 5 Rang. 53 : A.I.R. 1927 P.C. 44 : (28 Cri. L. J. 259)	8, 9
('47) A.I R. 1947 P. C. 67 : (48 Cr. L. J. 533)	9
('05) 27 All. 296 : (1904 All. W. N. 234)	5
('33) 55 All. 301 : (A. I. R. 1933 All. 264 : 34 Cr. L. J. 414 F. B.)	9
('03) 30 Cal. 155 : (6 Cal. W. N. 737 F. B.)	6
('06) 33 Cal. 68 : (2 Cr. L. J. 618)	7
('20) 24 Cal. W. N. 621 : 21 Cr. L J. 593 : 57 Ind. Cas. 161 ; (A.I.R. 1920 Cal. 344)	5
('17) A.I.R. 1917 Lah. 35 (1) : (18 Cr. L. J. 633)	7
('38) A.I.R. 1938 Lah. 345 : (39 Cr. L. J. 702)	7
('45) A I.R. 1945 Oudh 62 : (1944 Oudh W. N. 479)	6
('17) A.I.R. 1917 Pat. 435 : (18 Cr. L. J. 692)	6

Order.—This revision application arises out of proceedings under S. 145, Criminal P. C. The short facts of the case are that one Raghubir Singh who is the non-applicant in this case made an application to the Court of Sub-Divisional Magistrate, First Class, Neemuch, against the petitioner Ratan Singh alleging that a plot of land behind his house No. 962 in Neemuch city was in his possession but he had been dispossessed by the petitioner Ratan Singh on 9-7-1950. This dispossession was caused by storing some stones and bricks near the back-door of the said house No. 962 and it was alleged that there was likelihood of breach of peace. The Magistrate after the examination of complainant passed a preliminary order holding that a dispute existed which might cause breach of peace. After recording the evidence adduced by the parties, the learned Magistrate came to the conclusion that the complainant had been in possession of the piece of land in dispute and was wrongly dispossessed by the petitioner.

[2] He, therefore, declared under sub-cl. (6) of S. 145 that the complainant was entitled to possession of the disputed land until he was evicted therefrom in due course of law. He also passed an order forbidding all disturbance of such possession until such eviction and directed that the possession of the complainant be restored to him.

[3] The petitioner went in revision against this order to the Court of Additional District Magistrate. But his revision was dismissed. He now comes to this Court and asks me to revise the orders of the Courts below.

[4] The question whether Raghubir Singh was in possession of the piece of land in dispute or whether Ratan Singh was in possession of it, on 9th July 1950, is a question of fact and a Court of revision cannot disturb findings of fact. In this view of the matter, there is not much substance in this application and I should have straightway

dismissed this revision petition. Mr. Sanghi, learned counsel for the petitioner, however, brings to my notice certain irregularities which, according to him, go to the root of the case, and on the basis of these irregularities Mr. Sanghi contends that the orders of the Courts below should be set aside.

[5] The first irregularity according to the learned counsel is in the preliminary order passed in the case and Mr. Sanghi contends that it was bad in law as the property in dispute was not therein properly specified and described. Reliance is placed on *'In re petition of T. A. Martin'*, 27 ALL. 296. The preliminary order passed in that case by the Magistrate gave no information as to the subject of the dispute and it left the persons to whom the notice was ordered to be issued quite in the dark as to the property in regard to which they had to set forth their respective claims. The Allahabad High Court (Banerji J.) in that case held that inadequacy of such order gave the High Court jurisdiction to interfere and the order of the Magistrate was set aside. In another case *Shiv Narain* v. *Satish Chandra*, 24 Cal. W. N. 621 :21 Cr. L. J. 593:57 Ind. Cas, 161, a Division Bench of the Calcutta High Court observed that in drawing up a preliminary order in a proceeding, under S. 145 the subject-matter of the dispute should be clearly specified and an omission to do so amounts to a serious defect.

In this case, the dispute related to 300 bighas of land but it was not certain whether this land was in Mouza Jatrasindhe or in Rafaitpore. The Magistrate in his preliminary order had referred only to "300 bighas of land in Mouza Jatrasindhe" and under these circumstances, the observations of the Calcutta High Court were quite justifiable. The facts of that case however do not apply to the present case. Here, the only dispute related to a piece of land behind the complainant's house and the present petitioner Ratan Singh to whom notice was issued knew very well the subject-matter of the dispute and was not left in the dark as to the property in regard to which he was to set forth his claim. In my opinion, where the accused knew very well the subject-matter of the dispute an omission to clearly specify it in the preliminary order is only a minor defect of procedure and can be ignored.

[6] The next irregularity pointed out by Mr. Sanghi is that a notice was not issued to Chaturibai who was interested as a claimant to the property in dispute. According to Mr. Sanghi, she ought to have been added as a party to the proceedings and a notice ought to have been issued to her under sub-cl. (1) of S. 145, Criminal P. C., which lays down that the magistrate, if satisfied that a dispute likely to cause a breach of peace exists concerning any land etc., within the local limits of his jurisdiction, shall make an order in writing and require the persons concerned in such dispute to attend his Court in person or by pleader. The question is what is the meaning of "the parties concerned in such dispute"? The whole S. 145 may be referred to in this connection. It may be noted that sub-s. 3 requires the publication of the order at or near the subject of dispute; which is intended to serve as a general notice to all persons interested; sub-s. 5 then allows any person interested, other than the parties expressly required to attend, to intervene and show that there is no real dispute existing; and sub-s. 7 evidently contemplates the substitution of legal representatives of deceased parties.

It appears to me on a consideration of these sub-sections and of the language used therein that the words "the parties concerned in such dispute" must have been intended to extend to persons other than the actual disputants; and Chaturibai could have been made a party to the proceedings; but considering that she is the mother-in-law of the petitioner Ratan Singh and was represented by the petitioner, as her Mukhtyar-am, failure to add Chaturibai as a party to the proceedings under S. 145 is not a serious matter when she was not concerned in the dispute likely to cause breach of peace and, in my opinion, it cannot be a ground for interference by this Court. I am fortified in this view by *Bisram* v. *Kamta Prasad*, A. I. R. 1945 Oudh 62 and *Mukhal Singh* v. *Ramsaroop Singh*, A. I. R. 1917 Pat. 435. Apart from other considerations, I respectfully concur in the following observations of Hill J. in the Five Judges Full Bench decision in *Krishna Kamini* v. *Abdul Jubbar*, 30 Cal. 155 :

> "A Magistrate would no doubt be acting without jurisdiction, if he entered upon his inquiry without having issued the orders contemplated by cl. 1 of the section. But questions of whether *A* ought to have been added as being a person likely to be affected by the proceeding, or *B* omitted as not being concerned in it, or whether *C* was added at too late a stage, and such like, are questions of procedure by which the jurisdiction of the Magistrate is not affected."

[7] Mr. Sanghi then invites my attention to the wording of S. 145, Criminal P. C., which after providing in cl. (1) how the initial order is to be drawn up and what it is to contain, lays down, in cl. (3) that a copy of the order shall be served upon such person or persons as the Magistrate may direct, and that at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute. This is followed by cl. (4), which lays down that the Magistrate shall *then* enquire into the question of possession of the subject-matter of the dispute. Mr. Sanghi contends that the words *"at least one copy shall be published"* impose a duty on the Court and must be taken to be mandatory. He relies upon p. 378 para. 3 of Maxwell on Interpretation of Statutes (1946 edition). He is of opinion that the publication of the notice on the land in dispute under cl. 3 is a condition precedent to the holding of an inquiry under cl. 4 and

that such non-publication of the order takes away the jurisdiction of the Court.

There is no doubt there are certain observations in *Chanan Singh* v. *Emperor*, A. I. R. 1938 Lah. 345 which lend some support to the contention of Mr. Sanghi; but I am disposed to agree with the views of Chevis J. in *Nur Baksh* v. *Emperor*, A. I. R. 1917 Lah. 35 (1) that the omission to serve a copy of the order on the parties as required by S. 145 sub-cl. 3 does not necessarily invalidate proceedings if no prejudice has been caused to the accused by it. The same view had been held in *Sukhlal Sheikh* v. *Tara Chand*, 33 Cal. 68 where a Full Bench of five Judges came to the conclusion that the provisions as to the publication of the copy of the order in S. 145 (3) relate to a matter of procedure only and not of jurisdiction; and that if cl. (1) of S. 145 has been complied with the Magistrate has jurisdiction to deal with the case and the mere fact that he omitted to have a copy of such order published by affixing it to some conspicuous place at or near the subject of dispute does not deprive him of jurisdiction but is only an irregularity in his procedure.

Ghose J. who expressed the minority opinion held the view that the Magistrate acquires jurisdiction when the conditions of cl. (1) have been fulfilled; cls. 3 and 4 lay down the procedure by which the jurisdiction *is to* be exercised, but the procedure prescribed is mandatory and not simply directory. When a Magistrate fails to comply with cl. 3 he does not act without jurisdiction, but illegally in the exercise of his jurisdiction and the High Court has the power to interfere. But, such non-compliance is not an illegality unless some prejudice to any party has been thereby occasioned.

[8] I agree with Mr. Sanghi that sub-cl. (3) of S. 145, lays down a mandatory provision but I am also of the opinion that the breach of a mandatory provision of the Criminal Procedure Code does not vitiate the whole trial or proceedings. In *Abdul Rahaman* v. *Emperor*, 54 Ind. App. 96 : 5 Rang. 53 : A. I. R. 1927 P. C. 44 a mandatory provision of the Code i. e., provision of S. 360 had been broken. But their Lordships held that it was merely an irregularity which was curable under S. 537 of the Code, as no failure of justice had been occasioned and the accused had not been in any way prejudiced.

Their Lordships distinguished that case from the case of *Subrahmania Ayyar* v. *Emperor*, 25 Mad. 61 : 28 Ind. App. 257 (P. C) where the trial of a man, on charges of extortion in which forty-one criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences and these committed within a period of twelve months, was held bad and the conviction was quashed because the provision of S. 537 did not cure it. Their Lordships pointed out that the procedure adopted in *Subrahmania Ayyer's case*, was one which the Code had positively prohibited, and that it was possible that it might have worked actual injustice to the accused.

[9] It has been pointed out in several cases (e.g. *Kapurchand* v. *Suraj Prasad*, 55 ALL 301 F.B. at p. 312) that although in *Subrahmania's case*, which was decided in 1901, their Lordships of the Privy Council drew this distinction between an "illegality" and "irregularity" in the latter case *Abdul Rahaman* v. *Emperor*, (A.I.R. 1927 P. C. 44), no such distinction was referred to and the Legislature thereafter did not introduce the word 'illegality' in S. 537 or anywhere else in the Code although the section was amended after 1901. In *Kottaya* v. *Emperor*, A. I. R. 1947 P. C. 67 the Judicial Committee held that when a trial is conducted in a manner different from the one prescribed by the Code as in *Subrahmania's case*, 28 Ind. App. 257, the trial is bad, and no question of curing an irregularity arises; but, if the trial is conducted substantially in a manner prescribed by the Code, but some irregularity occurs in the course of such conduct the irrregularity can be cured under S. 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code.

Their Lordships further observed in this case that the distinction drawn in many cases of India between an 'illegality' and an 'irregularity' is one of degree rather than of kind. In this case their Lordships held the trial to be valid notwithstanding the breach of a mandatory provision in S. 162.

[10] From a perusal of the three decisions of their Lordships of the Judicial Committee referred to above it is quite clear that if a trial is conducted in a manner expressly prohibited by the Code then alone the trial will be vitiated and S. 537 will not cure it. In construing sub-cl. 3 of S. 145 we have, however, to bear in mind the purpose with which this section was enacted. Its object is clearly to bring to an end by a summary process disputes relating to land, etc., which are in their nature likely to end in breaches of the peace. Considering the main object with which the section was enacted the only procedure expressly prohibited by the Code is when the Magistrate initiates proceedings under S. 145 without coming to a conclusion whether a dispute concerning the land in question exists which is likely to result in a breach of the peace.

It therefore seems to be improper to lean too much in attempting to construe the section upon analogies derived from suits and other civil proceedings, the results of which are very different from those of proceedings under S. 145. Clause 3 provides for the publication of a copy of the order in a conspicuous place at or near the subject-matter of dispute, probably with the

intention of guarding against collusive proceedings, as well as to give to any one interested, who may through an oversight or otherwise not have received a summons, an opportunity of coming with his claim, and also to notify generally to all persons in the locality that a proceeding under the section has been set on foot. I am therefore unable to hold that if the notice is not published in the manner prescribed, the Magistrate loses his jurisdiction to hold an inquiry into the question of possession. In my opinion, the non-publication of the order at or near the subject matter of the dispute is an irregularity by reason of which this Court can set aside the proceedings only if it is shown that any party has been prejudiced thereby.

Clearly S. 537, Criminal P. C. cures the defect pointed out by learned counsel for the petitioner. That section refers to any error, omission, or irregularity, in any proclamation, order, or judgment, before, or during trial, or any inquiry or other proceedings under the Criminal Procedure Code, and definitely states that unless any such error, omission, or irregularity has occasioned a failure of justice no finding, sentence or order can be altered or reversed on appeal or revision. In the Explanation appended to that section it is enacted that in determining whether any error, omission, or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could or should have been raised at an earlier stage in the proceedings.

It is admitted that no such objection was raised by the petitioner during the time the proceedings were going on before the Magistrate. It can safely be inferred therefrom that the petitioner had not been prejudiced in any manner. It is admitted that the property in dispute is situated within the local jurisdiction of the Magistrate; it is also conceded that the initial order was notified to Ratan Singh, the petitioner, who was intended to be affected by the proceedings; and it is not questioned that the Magistrate was competent to initate and carry on proceedings under S. 145, Criminal P. C. All the elements necessary to make an order under Cl. 6 of S. 145 consequently existed and the Magistrate was competent to pass the order which he subsequently passed.

[11] Much reliance has been placed by the learned counsel for the petitioner upon the word "then" in Sub-s. 4. But this word applies only to the time or order of the Magistrate's proceedings and was not intended to deprive him of jurisdiction, if the notice had not been duly published. That being so, any omission of the nature indicated by the learned counsel for the petitioner in his arguments will not be sufficient to vitiate these proceedings; and I am of opinion that this Court ought not to interfere with the decision of the learned Magistrate in this case; though at the same time I desire to impress upon the Magistrate the necessity of a strict compliance with Sub-s. (3) of S. 145, Criminal P. C.

[12] With these remarks I dismiss the revision.

B./V.R.B. *Revision dismissed.*

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(INDORE BENCH)

A. H. KHAN J.

Chajulal—Appellant v. *Gokul and another—Respondents.*

Second Appeal No. 57 of 1950, D/-28-2-1952.

(a) Specific Relief Act (1877), Ss. 39 & 40—Reasonable apprehension of serious injury — Evidence Act (1872), S. 13.

The plaintiff owned a house. His neighbour (defendant 1) mortgaged his house with possession to defendant 2. The plaintiff alleged that the mortgagor had wrongly stated the following facts in the mortgage deed:(1) that the middle wall was of exclusive ownership of defendant 1. In fact, it was a common wall and belonged to both; (2) that the drain-water from the house, that was mortgaged, flowed through the house of the plaintiff; (3) that defendant 1 had a right of way for the sweeper to go through the courtyard of the plaintiff's house. It was stated that the above recitals in the mortgage deed were likely to prejudice him in the future, and because they infringed upon his rights, they should be cancelled:

Held, that the recitals in the deed, if wrong, were most annoying and could cause apprehension which would not be without rhyme and reason A person may regard a threat, consisting of the loss of the amenities of his house, as quite a serious matter. Looked at from this point, the plaintiff had a reasonable apprehension that serious injury might accrue to him and he was justified in instituting the proceedings he had taken. The plaintiff could bring a suit of the nature he had filed. *Case law discussed.* [Paras 9, 15]

Anno. S. R. Act, S. 39, N. 2; S. 40, N. 1; Evidence Act, S. 13, N. 1, 12.

(b) Civil P. C. (1908), S. 100 & O. 41, R. 25—Appellate Court not deciding other questions of facts agitated in appeal before it—High Court in second appeal would not go into these questions — Case should be remanded. [Para 16]

Anno. C. P. C., S. 100, N. 11; O. 41, R. 25, N. 11.

Vaidya D. P.—for Appellant; *Nevaskar—for Respondents.*

REFERENCES: Courtwar/Chronological — Paras.

(1885) 11 Cal. 301: (12 Ind. App. 23 P. C.) — 14
('38) A. I. R. 1938 Bom. 37: (174 Ind. Cas. 24). — 10
('81) 6 Cal. 171: (6 Cal. L. R. 439). — 14
('27) 31 Cal. W. N. 32: (A. I. R. 1927 Cal. 1). — 14
('28) 55 Cal. 355: (A. I. R. 1928 Cal. 315). — 14
('93) 16 Mad. 194. — 14
('36) A I. R 1936 Pat. 543: (15 Pat. 260). — 12
('39) A.I.R. 1939 Rang. 332: (183 Ind Cas. 746 F B). — 10, 11

Judgment.—This second appeal arises out of a suit brought by the plaintiff for the cancellation of a part of mortgage deed and allowing the residue to stand. The trial Court (Munsiff Court, Khargone) decreed the suit, but on appeal, the District Judge of Mandleshwar in Civil Appeal No. 32 of 1949, non-suited the plaintiff on the ground that such a suit could not be maintained.

[2] The facts in short are that the plaintiff Chajulal owns a house No. 272 in Kalali Mohalla Khargone. His neighbour Hiralal (defendant 1)

mortgaged his house No. 271 with possession to Gokul s/o Sitaram, who is defendant 2 in this case. The plaintiff alleges that Hiralal, the mortgagor has wrongly stated the following facts in the mortgage-deed: (1) That the middle wall is of exclusive ownership of Hiralal defendant 1. In fact it is a common wall and belongs to both. (2) That the drain-water from the house, that is mortgaged, flows through the house of the plaintiff. (3) That Hiralal has a right of way for the sweeper to go through the court-yard of the plaintiff's house.

[3] It is stated that the above recitals in the mortgage-deed are likely to prejudice him in the future, and, because they infringe upon his rights, they should be cancelled.

[4] The trial Court, as already stated had decreed the suit, but the learned District Judge of Mandleshwar held that this could not be treated as a suit under S. 39, Specific Relief Act, nor one under S. 31, Specific Relief Act and that the suit as it is, is not maintainable.

[5] The learned counsel for the appellant contends that S. 31, Specific Relief Act does not apply to this suit and that he had not brought the suit under that section. He says this must be treated as falling within the orbit of Ss. 39 and 40, Specific Relief Act.

[6] While S. 39, Specific Relief Act, deals with the cancellation of a document, S. 40 of the Act, further provides for cancellation in part only, so that the residue may stand. It may be said that after enacting S. 39, it was not necessary to add S. 40, because when the Court is empowered to cancel the whole of an instrument, it implies, that power to cancel a document in part is also there. It is a well known mathematical proposition, no less true in other spheres too, that the whole includes a part as well.

[7] Both these sections (Ss. 39 and 40, Specific Relief Act), are based on the principle of protective and preventive justice. It may be that a person is afraid that an instrument, the cancellation of which he seeks, may be used against him when evidence to impeach it may be lost or it may involve him in some future litigation, when the facts may no longer be capable of proof or when their proof may become obscure by lapse of time. To prevent future mischief, and the consequent injustice the Courts of Equity have interposed in such instances.

[8] Before S. 39, Specific Relief Act, can be invoked, the plaintiff must show that there is a reasonable apprehension that if the instrument is left outstanding, it may cause serious injury.

[9] Reverting to the facts of the case, obviously, the apprehension which exists in the mind of the plaintiff is that the insertion of the right of passage for the sweeper, the right of the flow of water on the land of the plaintiff and the claim to the exclusive ownership of the middle wall in the mortgage deed, may in the future cause him injury, when his evidence to impeach these may be lost. There is no doubt that the recitals in the deed, if wrong, are most annoying and can cause apprehension which will not be without rhyme and reason. A person may regard a threat, consisting of the loss of the amenities of his house, as quite a serious matter. Looked at from this point. I think the plaintiff has a reasonable apprehension that serious injury may accrue to him and he seems justified in instituting the proceedings he has taken.

[10] The learned counsel for the respondents has argued that the recital in the mortgage deed at the most amounts to an admission and it does in no way touch the plaintiff. The recital being of no binding force so far as he is concerned, the plaintiff need entertain no fear and his apprehension is too vague to be termed reasonable. To support the above contention he has cited, *Jeka Dula* v. *Bai Jivi*, A. I. R. 1938 Bom. 37 and *Ba Maung Maung* v. *Maung Ba Yin*, A. I. R. 1939 Rang. 332 (F. B.).

[10a] The Bombay case that has been cited lays down that mere speculation as to unknown and vague complication arising in future is no ground under S. 39. But, in the present case, the complication is definitely known and is real. For this reason, this ruling does not apply to the facts of the case under consideration.

[11] Similarly A. I. R. 1939 Rang. 332 is inapplicable.

[12] The learned counsel for the appellant refuted the argument that the recital is of no legal consequence by submitting that the recital can be used against his client under S. 13, Evidence Act. But the learned counsel for the respondents, relying upon *Jyoti Prashad Singh* v. *Bharat Shah Babu*, A. I. R. 1936 Pat. 543 holds that the recital cannot be tendered in evidence against the plaintiff under S. 13, Evidence Act.

[13] I have carefully studied the wordings of S. 13, Evidence Act, and the ruling referred to by the learned counsel for the respondents.

[14] The interpretation of S. 13, Evidence Act is not free from difficulty. Although the Patna Ruling says (basing its decision on a case decided by a Full Bench of 3 Judges of Calcutta in *Brojendra Kishore* v. *Mohim Chandra*, 31 Cal. W. N. 32, that mere assertion of a right in a document is not a claim to a right and does not, therefore, come within the meaning of S. 13, but a reference to *Vythilinga* v. *Venkatachala*, 16 Mad. 194 and *Monmotha Nath* v. *Rajeswar Rai*, 55 Cal. 355 would show that it is possible to hold a different view. *Gajjalal* v. *Fatteh Lal*, 6 Cal. 171 was an authority for the proposition that the decision of a suit between two persons, cannot be admitted in evidence under S. 13, Evidence Act against a person who is a stranger and is not a party to the suit. In this case, Mitter J. dissented from the majority view.

Much of the authority of this Calcutta judgment appears to have been shaken by a subsequent

Privy Council decision in the case of *Ram Bahadur Singh* v. *Lucho Kocr*, 11 Cal. 301 (P. C.). I would not, in this case, like to embark on a discussion of what may and what may not be evidence under S. 13, Evidence Act. I would not go beyond remarking that there are conflicting authorities on the construction of the section and the apprehension of the plaintiff is not without foundation.

[15] In the view that I have taken in the matter, I hold that the plaintiff can bring a suit of the nature he has filed.

[16] I find on perusal of the record that I should send this case back to the District Judge, who merely held that the suit as framed would not lie. He did not decide other questions of facts, that were agitated in the appeal before him. This being a second appeal, I would not go into those questions. So, it is just and proper that the case should be remanded.

[17] In result, I allow the appeal and setting aside the judgment of the learned District Judge, send the case back to him with a direction that he should decide other questions raised in appeal before him. An opportunity should be afforded to the parties to argue the appeal and the case be decided anew. The costs of this appeal shall abide by the result of the decision to be given by the District Judge.

B./D.H. *Appeal allowed.*

A. I. R. 1952 Madhya Bharat 170
(GWALIOR BENCH)
FULL BENCH

SHINDE C. J., DIXIT AND CHATURVEDI JJ.

Laxminarayan — Applicant v. *The State.*

Criminal Misc. Case No. 56 of 1951, D/- 5-2-1952.

Constitution of India, Art. 134 (1) (c) — Certificate of fitness — Guiding principle.

Under Art. 134 (1) (c) a case cannot be certified as a fit one for appeal if no injustice of a serious and substantial character has occurred to the petitioner and if the case does not involve such a substantial question of law as by reason of the question being unsettled or by reason of there being conflict of existing authorities as to the principle of law involved, requires an authoritative decision from the highest Court in the land : *Case law relied on.* [Para 3]

Government Advocate —for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('50) A.I.R. 1950 S. C. 169 : (51 Cri. L. J. 1270). 2
('51) Cri. Misc. Case No. 159 of 1951 (M. B.-Gwalior). 2
('51) Cri. Misc. Case No. 17 of 1951 (M.B.-Gwalior). 3
('51) Cri. Misc. Case No. 44 of 1951 (M. B.-Indore). 3

Shinde C. J.—This is an application for leave to appeal to the Supreme Court. The short facts of the case are as follows : The accused Laxminarayan was convicted under S. 292, Gwalior Penal Code, corresponding to S. 302, Penal Code, by the Sessions Judge, Gwalior, and was sentenced to 14 years' rigorous imprisonment and a fine of Re. 1. A Division Bench of this Court dismissed the appeal preferred by the accused Laxminarayan but enhanced the sentence to rigorous imprisonment for life. Against that decision, an appeal was preferred under S. 25, Madhya Bharat High Court of Judicature Act. That appeal was dismissed on 9-2-1951. After the dismissal of his appeal by the Full Bench on 9-2-1951 the accused has filed this application which is dated 7-11-1951.

[2] From the facts of the case given above it is clear that the application has been filed nearly nine months after the date of the final order. This delay cannot be construed as anything but inordinate. Apart from this we do not consider that the case is a fit one for appeal to the Supreme Court. There is no doubt that the present case is not covered by sub-cl. (c) of Cl. 1 of Art. 134 of the Indian Constitution. A certificate for appeal to the Supreme Court can only be given if the case is a fit one. In several cases this Court has laid down the conditions under which leave to appeal to Supreme Court can be granted. In *Indore State* v. *Rajkumarsingh*, Cri. Misc. Case No. 159 of 1951, a Division Bench of this Court observed as follows :

"Except in cases falling under sub-cls. (a) and (b) of Art. 134 in all other criminal matters the Constitution of India intends that the High Courts in the respective States in the territory of India should normally and ordinarily be final Courts of appeal and that in determining the question whether a case is a fit one for appeal the principles and conditions which the Supreme Court itself would follow in exercising its discretion in granting special leave under Art. 136 should be borne in mind."

In that case the learned Chief Justice relying on the observations of the Supreme Court in *Pritam Singh* v. *State*, A. I. R. 1950 S. C. 169, observed as follows :

"A Court would not be justified in granting a certificate of fitness for appeal, even if its decision involved a substantial question of law unless it was satisfied that it had resulted in grave and substantial injustice."

[3] Similar observations were made by a Division Bench of this Court in *Krishnakant Vyas* v. *State*, Cri. Misc. Case No. 44 of 1951 (Indore). In *Prahladsingh* v *State*, Cri. Misc. Case No. 17 of 1951 (Gwalior), a Division Bench of this Court took the view that under Art. 134 (1) (c) a case cannot be certified as a fit one for appeal if no injustice of serious and substantial character has occurred to the petitioner and if the case does not involve such a substantial question of law as, by reason of the question being unsettled or by reason of there being conflict of existing authorities as to the principle of law involved, requires an authoritative decision from the highest Court in the land. Following these principles we find that the application must be rejected. The applicant has given no grounds on which he bases his claim for leave to appeal. The decision of the Full Bench does not disclose that the case involves a substantial question of law which by reason of its being unsettled or by reason of there being a conflict of existing authorities needs an authoritative decision from the Supreme Court; nor is there any reason to hold that any injustice of serious or substantial

character has occurred to the petitioner. In these circumstances this application must be rejected.

[4] Accordingly the petition for a certificate that the case is a fit one for appeal is rejected.

[5] **Dixit J.**—I agree.

[6] **Chaturvedi J.**—I agree.

A./G.M.J. *Petition rejected.*

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* A. I. R. 1952 Madhya Bharat 171

(Indore Bench)

FULL BENCH

KAUL C. J., SHINDE, DIXIT, A. H. KHAN AND CHATURVEDI JJ.

Chandulal—Applicant v. *Babulal—Opponent.*

Small Cause Revn. No. 49 of 1949, D/- 4-10-1950.

†*(a) Madhya Bharat High Court of Judicature Act, Smt. 2005 (VIII [8] of 1949), S. 29 (b) — Full Bench decision — Power of Single Judge to doubt and refer it for reconsideration—(Precedents).

In view of S. 29 (b) it is clear that a Single Judge can entertain a doubt in respect of a Full Bench ruling and can write to the Chief Justice for reconsideration of it by a larger Full Bench. In the reference to the Chief Justice the Single Judge can express his doubts on the decision of the Full Bench, but he is not authorised to state that that decision is erroneous. [Paras 3, 5]

(b) Precedents — Full Bench decision — Binding effect—Can be disregarded by subsequent Full Bench of more Judges.

The rule of practice laid down by every High Court and now very well settled is that a Single Judge is bound by a Division Bench ruling and the Division Bench is bound by a ruling of the Full Bench irrespective of the fact whether it is a unanimous decision or only a majority decision. Similarly, a practice has grown up and is very well established that a former ruling of Full Bench of less number of Judges can be 'disregarded' by a subsequent majority opinion of the Full Bench consisting of more number of Judges. Though it is doubtful whether the subsequent Full Bench can, in the strict sense of the term, overrule the former Full Bench ruling, it does not imply that the subsequent Full Bench cannot examine the matter or that it is not competent to take a contrary view, if it is convinced that the prior decision is erroneous. [Paras 7, 8]

So far as Full Bench decisions are concerned in India the practice has been that till a Superior Court sanctions one as a good law and overrules the other, the High Court concerned and the inferior Courts under the High Court are bound by the later ruling of a Full Bench consisting of more Judges. [Para 9]

Anno. C. P. C., Pre. N. 15.

(c) Precedents—Circumstances which lessen authority of precedent.

The following circumstances tend to lessen the authority of a precedent: (a) Where the question passes *sub silentio* without argument at the bar; (b) Where the reasoning is defective; and (c) Where its result is embarrassing or unjust. [Para 10]

Anno. C P. C., Pre. N. 15.

†*(d) Precedents — Decisions of High Courts of covenanting States forming Madhya Bharat — Binding effect — Duty of subordinate Courts—*Held* that A. I. R. 1950 Madhya Bharat 31 (F. B.) should be disregarded.

Madhya Bharat High Court cannot be looked upon as successor to Indore High Court or any High Court of any Covenanting States. The High Courts in Covenanting States were altogether abolished and an independent High Court with power and stability and fresh outlook had come into existence. Consequently High Courts of former Covenanting States cannot be regarded as of equal rank with the present Madhya Bharat High Court. [Para 12]

If rulings of any High Court of Covenanting States are cited before the subordinate Courts and if any guidance is needed, they should be asked to consider them on their own merits; where there is no ruling of the Madhya Bharat High Court or of the Supreme Court, and if a ruling of a High Court in India differs from a ruling of a High Court in a Covenanting State the subordinate Courts should follow that ruling which, in their own judgment, appears to be the better ruling, but it does not imply that they are bound to follow a ruling of any High Court, if in the exercise of their own reason and judgment they come to a different conclusion. [Para 14]

Held, that the Full Bench decision in A. I R. 1950 Madhya Bharat 31 (F. B), should be disregarded and that the decisions of former Indore High Court should not be held binding on the Madhya Bharat High Court or on the Courts subordinate to it. [Para 13]

Anno. C. P. C, Pre. N. 15.

Roshanlal Khabya — for Applicant; *V. R. Nawaskar — for Opponent.*

REFERENCES: Courtwar/Chronological/ Paras.

('29) A. I. R. 1929 All. 593: (51 All. 910). 7
('31) 1931 All. L. J. 865: A. I. R 1931 All. 567 F. B. 4
('36) A. I. R. 1936 All. 555: (164 Ind. Cas. 200). 4
('94) 18 Bom. 377. 7
('21) 45 Bom. 834: (A. I. R . 1921 Bom. 3 : 22 Cri. L. J. 241 (F. B.).) 7
('41) A. I. R. 1941 Bom. 408: (43 Cri. L. J. 167). 6, 7
('79) 4 Cal. 831: (2 Cal. L. R. 319 F. B.) 3
('27) 54 Cal. 266: (A. I. R. 1926 Cal. 1153 F. B) 3
('20) 1 Lah. 25: (A. I. R. 1920 Lah. 321 (1).) 12
('25) 6 Lah. 87: (A. I. R. 1925 Lah. 341). 12
('29) A. I. R. 1929 Lah. 174: (118 Ind. Cas. 434). 12
('46) S. A. No. 143 of 1946 (M. B.-Indore). 17
('49) 1949 Madh. B. L. R. 81 : (A. I. R. 1950 Madh-B. 31 F. B.) 6, 11, 12, 13, 17, 21, 24, 28
('27) A. I. R. 1927 Rang. 4 : (4 Rang. 313 (F. B.)). 11, 12, 20
(1905) 2 K. B. 695: (54 L. J. K. B. 959). 8

Chaturvedi J. — The point referred to us is, "Whether a Full Bench decision reported in 1949 M. B. Law Reporter p. 81 is correct?" In that decision it was held that the decisions of the former Indore State High Court are binding on Madhya Bharat High Court, Sanghi J. (who has since then retired) felt embarrassed by this decision and was of opinion that "the decision is so clearly wrong that if allowed to stand, it will create confusion and cause much embarrassment to the Judges of this Court." He therefore, desired that the question should be considered by a larger Full Bench, so this matter has been placed before this Bench.

[2] Mr. Niwaskar has raised a preliminary objection stating that Sanghi J., was not competent to make this reference and to criticise the Full Bench decision as he was bound by it.

[3] According to S. 29 (b), Madhya Bharat High Court of Judicature Act Samvat 2005 (ACT VIII [8] of 1949), a case of special or novel character of involving any important point of law or custom having the force of law or of the consideration of any document, set down before a single Judge for hearing, may be referred at his instance, or at the instance of the Division Bench to a Full Bench to

be nominated by the Chief Justice. Considering this provision in our High Court Act I have no hesitation in holding that Sanghi J. could entertain a doubt upon the aforesaid Full Bench ruling and could write to the Chief Justice for reconsideration of the ruling by a larger Full Bench. In all such matters it is discretionary for the Chief Justice to form a Special Bench to reconsider the decision of a previous Full Bench. In *Enat-Ullah* v. *Kowsher Ali*, 54 Cal. 266, the Chief Justice of Calcutta High Court was confronted with a request from the Division Bench which felt some doubt about the correctness of a Full Bench decision in *Lalla Nowbat Lalla* v. *Lalla Jewan Lall*, 4 Cal. 831. Before referring the matter to a Special Bench Sanderson C. J. made the following note:

"I have made enquiries, and I understand that in a case in which a Division Court doubts the correctness of a Full Bench decision, by which the Division Court is bound, and the Division Court considers that the matter should be considered by a Bench, specially constituted, it has been the practice for the Division Court to bring the matter to the notice of the Chief Justice and to consult him as to the propriety of a Bench being specially constituted to consider the matter. A decision of a Full Bench is binding on all Division Courts, unless it is subsequently reversed by a Bench specially constituted or by a rule laid down by the Judicial Committee of the Privy Council, and it is obvious that it might lead to serious results if a Division Court, whenever it felt inclined to differ from a decision of a Full Bench, could refer the matter to a Special Bench and the Chief Justice was compelled to form such Special Bench whether he thought it necessary or not. In this case, I think that there are suffiicient reasons why the decision of the Full Bench in the case of *Lalla Nowbut Lalla* v. *Lalla Jewan Lall*, should be further considered, and that a Special Bench should be appointed when it is possible, having regard to the other work in the Court."

[4] This note gives the correct statement of the rule of practice as to when the case should be referred to the Full Bench. Whether the reference is made by a Single Judge or the Division Bench is immaterial. This also shows that the matter is entirely within the discretion of the Chief Justice and once he has exercised that discretion it is not open to any judge or any litigant to question the propriety of his orders. Of course, the learned Judge on the Single Bench was not authorised to criticise the Full Bench decision which was binding on him. In a case in Allahabad High Court a learned Judge (Niamat Ullah J.) also expressed his opinion that the view of the Full Bench in *Shabir Husain* v. *Chandoo Lal*, 1931 ALL. L. J. 865 : A. I. R. 1931 ALL. 567 (F. B.) was not correct so far as the liability of a custodian as a surety is concerned. The Division Bench of the Allahabad High Court in *Gendamal* v. *Sukh Darshan Lal*, A. I. R. 1936 ALL. 555 took objection to the criticism of the Full Bench decision by a Single Judge and observed:

"It is open to a Single Judge of this Court to entertain a doubt on any question of law, but he is bound to follow the Full Bench ruling and the operative portion of his order must be in strict accordance with the ruling of the Full Bench and should in no way deviate from it."

[5] This has my respectful concurrence and a severe criticism of the Full Bench decision by Sanghi J. in his order of reference is certainly open to objection. He could have expressed his doubts on the decision but the learned Judge was not authorised to state that the decision of the Full Bench was erroneous.

[6] Mr. Newaskar has then tried to raise a doubt whether this Bench, as a Court of co-ordinate jurisdiction is competent to overrule the Full Bench decision in *Dagdu Madhav* v. *Tulsiram*, 1949 Madh. B. L. R. 81. This point has not been fully argued by Mr. Newaskar but he placed reliance on *Ningappa Ramappa* v. *Emperor*, A. I. R. 1941 Bom. 408, where on p. 409, Beaumont C. J., delivering the judgment of the Division Bench observed as follows:

"There can be no doubt that a Full Bench can overrule a Division Bench, that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench merely because the later Bench consists of more Judges than the earlier. If that were the rule, it would mean that a Bench of 7 Judges by a majority of four to three, could overrule a unanimous decision of a Bench of six Judges, though all the Judges were of co-ordinate jurisdiction."

[7] The learned Chief Justice in the above case was dealing with a question which had been considered in 1894 in *Queen Empress* v. *Mugappa*, 18 Bom. 377. The Full Bench of Bombay High Court consisting of four Judges, (Sargent C. J., Telang, Candy and Fulton JJ.) had in this case arrived at certain conclusion. This Full Bench decision was reconsidered in 1921 in *Emperor* v. *Purshottam Ishar*, 45 Bom. 834 (F. B.) by another Full Bench of five Judges (Macleod C. J., Shah, Pratt, Fawcett & Setalvad JJ.); and four judges came to the conclusion that 18 Bom. 377 was wrongly decided. Shah J., however, dissented from this proposition and agreed with the views of 18 Bom. The net result was that 18 Bom. 377 was overruled; but apparently the opinion of the four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. This circumstance was mainly responsible for the doubt expressed by Beaumount C. J. in *Ningappa Ramappa* v. *Emperor*, A.I.R. 1941 Bom. 408. It is true that there is very little authority on the powers of Full and Special Benches of the High Court but the anomaly referred to by the learned Chief Justice can also be apparent when four or five Judges, each on Single Bench, take separately one view, and the Division Bench takes a different view altogether; or when three or four Division Benches take one view but this view is overruled by a Full Bench of three Judges. The rule of practice, however, laid down by every High Court and now very well settled is that a Single Judge is bound by a Division Bench ruling and the Division Bench is bound by a ruling of the Full Bench, irrespective of the fact whether it is a unanimous decision or only a majority decision :

vide Deep Chand v. *Sheo Prasad*, A.I.R. 1929 ALL. 593.

Similarly a practice had grown up and is very well established that a former ruling of Full Bench of less number of Judges can be 'disregarded' by a subsequent majority opinion of the Full Bench consisting of more number of Judges. Where there is no express statutory provision, the practice of the Court tends to become the law of the Court. Cursus curiæ est lex curiæ. It is, therefore, not desirable to depart from the long course of judicial comity and upset what has been regarded all over India as a settled rule of practice for over fifty years. "There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank;"; writes Odgers in his work in his 'On The Common Law' (Edn. 3 Vol. 1 pp. 64-65),

"it does so simply from what may be called the comity among Judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions; it does so on the ground of judicial comity. This so-called comity has, however, been formulated into rules which, though unwritten, are habitually followed by our Courts."

[8] The previous ruling of a Full Bench of three Judges can therefore be re-considered by this Bench consisting of five Judges and we can see whether it should be followed or not. I am however doubtful whether this Bench can, in the strict sense of the term, overrule the former Full Bench ruling, but this does not imply that we cannot examine the matter or that it is not competent to us to take a contrary view, if we are convinced that the decision is erroneous. In *London County Council* v. *Schewzik*, (1905) 2 K. B. 695 at p. 700, Lord Alverstone C. J. observed that :

"the Court of Appeal have recently recognised that it is desirable in the public interest, and in order that people may know it with certainty what their position is, that Courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the Courts to say that the previous decisions ought not to be followed."

Salmond in his Jurisprudence (Edn. 10, Art. 61, pp. 188-189) dealing with 'the effect of disregarding a precedent' observes:

"The disregard of a 'precedent' assumes two distinct forms; for, the Court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior, jurisdiction.. Two Courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antimony thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain."

[9] So far as Full Bench decisions are concerned, in India, the practice has been that till a Superior Court sanctions one as a good law and overrules the other, the High Court concerned and the inferior Courts under that High Court are bound by the later ruling of a Full Bench consisting of more Judges. To this practice we also desire to adhere.

[10] Now Salmond in his Jurisprudence (Edn. 10, p. 188) mentions, inter alia, the following circumstances which tend to lessen the authority of a precedent : (a) Where the question passes sub silentio without argument at the bar, (b) Where the reasoning is defective, and (c) Where its result is embarrassing or unjust.

[11] With very great respect to the learned Judges, who decided the case, all the above three circumstances fully apply to the Full Bench decision reported in *Dagdu* v. *Tulsiram*, 1949 Madh. B. L. Re. 81. There was no argument at the bar and the learned counsel for the parties had conceded in this case that the Indore State High Court was not a Court of inferior status to that of the High Court of Madhya Bharat and the former must be looked upon as a Court of co-ordinate jurisdiction. Again they relied on *Ma Mya* v. *Ma Thein*, A.I.R. 1927 Rang. 4 and did not dispute the correctness of the decision (pp. 84-85) or, correctness of the application of the principle to this case.

[12] In my opinion this led to the defective reasoning in that case. It was presumably overlooked that it was not a case of increase by acquisition of territory of the geographical limits of former Indore State that led to the formation of the present State of Madhya Bharat. Again it was not the Indore State High Court that had developed into the Madhya Bharat High Court. By no stretch of imagination Madhya Bharat High Court can be looked upon as successor to Indore High Court or any High Court of any Covenanting States. It was in fact a voluntary merger of twentytwo smaller units, some of them, of course, with distinct progressive outlook, but all with autocratic rule, to form a larger unit of Madhya Bharat in order to fall in line with other sister States of India with democratic institutions It is true that these smaller units had integrated to form the new Madhya Bharat State; but it is not true that the High Courts of Covenanting States had also integrated to form the present Madhya Bharat High Court. In fact the High Courts in Covenanting States were altogether abolished and an independent High Court with power and stability and fresh outlook had come into existence, Consequently High Courts of former Covenanting States cannot be regarded as of equal rank with the present Madhya Bharat High Court.

It is not a case where a High Court had succeeded either a Chief Court or a Court of Judicial Commissioner and so the ratio decidendi in *Ma Mya* v. *Ma Thein*, A. I. R. 1927 Rang. 4, *Gurbhaj*

v. *Lachhman*, 6 Lah. 87 ; *Sherkhan* v. *Muzaffar Khan*, 1 Lah. 25 : 55 Ind. Cas. 359 (Sic.) or *Lachhman Singh* v. *Naman*, A. I. R. 1929 Lah. 174, cannot be made applicable to the case before us. The relation between the Court of appeal and the Court of Exchequer Chamber in England is also not in any way genuinely applicable to the relation of Madhya Bharat High Court and the former High Court of Indore State. Clearly the case *Dagdu Madhav* v. *Tulsiram*, 1949 Madh. B. L. R. 81, was decided on fundamentally wrong principles and cannot be taken to be good law. Sanghi J., had referred to his own embarrassment in the case in which Indore High Court ruling was cited before him and which according to the decision in 1949 Madh. B. L. R. 81 was binding on him but which had dissented from the view held even by the Judicial Committee of the Privy Council. What should the Courts do in such circumstances? Again, if Indore High Court ruling is binding on this Court, the rulings of Gwalior, Ratlam, Dhar, Dewas or Jaora High Courts will also be binding and the difficulty and embarrassment of this Court will find no limit if on a certain question three or four different views may be available and all may be taken to be binding. If 1949 Madh. B. L. R. 81, is construed to mean that Indore High Court rulings are binding on cases coming from Indore District only, in that case Gwalior High Court ruling will be impliedly held to be binding on cases coming atleast from the northern five districts, and other territory which belonged to Gwalior State; Ratlam High Court rulings on cases coming from Ratlam District, and so on and so forth. That the binding nature of different High Courts in Covenanting States should depend upon the different localities is a proposition fraught with danger and may ultimately lead to gross injustice in many cases. Any insistence on the principle of *stare decisis*, either district-wise or on territorial basis, is bound to lead to absurd results.

[13] After taking into consideration all these circumstances I come to the conclusion that the Full Bench decision in *Dagdu* v. *Tulsiram*, 1949 Madh. B.L.R. 81 should be disregarded and that the decisions of former Indore High Court should not be held binding on this Court or on the Courts subordinate to it. In my opinion this reference should be answered accordingly.

[14] If rulings of any High Court of Covenanting States are cited before the Subordinate Courts, and if any guidance is needed, they should be asked to consider them on their own merits; where there is no ruling of this Court or of the Supreme Court, and if a ruling of a High Court in India differs from a ruling of a High Court in a Covenanting State the Subordinate Courts should follow that ruling which, in their own judgment, appears to be the better ruling, but it does not imply that they are bound to follow a ruling of any High Court, if in the exercise of their own reason and judgment they come to a different conclusion.

[15] The question whether the decisions of Madhya Bharat High Court delivered before 26-1-1950 are binding on this Court or not does not arise in this reference and I do not think it will be proper to express any opinion on this point.

[16] **Kaul C. J.**—I have read the judgment dictated by Chaturvedi J., with which I generally agree and will add only a few words of my own.

[17] Under S. 29 of our High Court of Judicature Act a case coming before a single Judge if it involves a point of law, may be referred by him to a Division Bench or at his instance it may be referred to a Full Bench nominated by the Chief Justice. Whenever this is done it is for the Division Bench or the Full Bench to which a reference is made to decide the case. If a case is referred by a single Judge because he doubts the correctness of a previous decision given by a Division Bench or a Full Bench it will be the duty of the Full Bench to which the case is referred to express an opinion as to the correctness or otherwise of the previous decision. Under the circumstances it is difficult to understand the reason for the course adopted by the Full Bench in *Dagdu Mahadev* v. *Tulsiram*, 1949 Madh. B. L. R. 81. Instead of expressing any opinion on the correctness of the decision given in Second Appeal No. 143 of 1946 of Indore High Court concerning which a doubt was expressed by Sanghi J., the learned Judges composing the Full Bench held that the Full Bench decision of the Indore High Court just referred to was binding on the single Judge who made the reference and returned the case to him for decision in accordance with the law. They appear to be of opinion that it was not open to Sanghi J. to make the reference. I regret I am unable to agree with this view. Clause 27 of Ordinance II [2] of 1948 which was then in force but has since been repealed and replaced by Act 8 of 1949 is clear. It runs thus :

"(a) Any case, civil or Criminal of a special or novel character or involving any important point of law or custom having the force of law or of the constructions of the document, set down before a single Judge for hearing, may be referred by him at any time during the hearing or by the Chief Justice at any time to a bench nominated by the Chief Justice and a case so referred shall be heard and decided by the bench to which it is referred.

(b) Any such case as is mentioned in cl. (a) may be referred at the instance of single Judge or a bench to a Full Bench to be nominated by the Chief Justice.

(c) A Full Bench shall consist of three or more Judges of the High Court. When a case is heard by a bench of three or more Judges and they are not in agreement as regards the decision, the decision shall be in accordance with the opinion of the majority of the Judges. A Judge who does not agree with the majority shall, however, record his decision and the reasons therefor."

The clause has been bodily reproduced in the High Court of Judicature Act 8 of 1949 as S. 29. Whatever be the case in other High Courts so far as Madhya Bharat High Court is concerned the matter was governed by cl. 27 of Ordinance II [2]

of 1948 which empowered a single Judge to make a reference to a Division Bench or a Full Bench. I am, therefore, of opinion that if the view taken by the Full Bench was that Sanghi J. could not make the reference it was erroneous. The question being covered by an express legislative provision is not open to argument.

[18] The Full Bench further held :

I. That the High Court of Judicature at Indore was not a Court of inferior status to that of High Court of Madhya Bharat and, therefore, the Indore High Court must be looked upon as a Court of co-ordinate jurisdiction ;

II. That the decisions of Indore High Court being of a tribunal of co-ordinate jurisdiction should be held to be binding authority in the same manner as the decisions of the Madhya Bharat High Court as established under Ordinance II [2] of 1948 ; and

III. That such decisions must be followed by all subordinate Courts in respect of matters decided therein.

[19] With the greatest respect I may point out that the view taken by the Full Bench is vitiated in as much as it ignored the all important fact that the Indore High Court and the Madhya Bharat High Court were not two Courts in the same State. Prior to 22-4-1948 Indore, Gwalior and other States in Malwa which now form Madhya Bharat were independent or semi-independent States. They owed no allegiance to one another nor were they bound to one another by any other ties. Every one of these States had its own Ruler and its own judicial system. The High Courts in these States had different constitutions and each such Court derived its authority from an entirely different source. They were as independent of each other as for instance the Courts established in different States of Central and Western Europe —France, Belgium, Holland, Germany, Italy, Switzerland, etc., etc. So long as these States existed as independent political entities there could for obvious reasons be no question of a Court in one State being considered a Court of co-ordinate jurisdiction in another State for the purpose of determining whether the decisions of one Court were binding on the other.

In all the cases to which reference has been made the question was considered in relation to Courts in the same State. It has never been contended that the decisions of a Court in France have any authority in Courts in England or Belgium. It is true that if the laws in force in two States are the same, the judgments delivered by a Court in one State may be considered by a Court in another State, but this would not be for the reason that the judgment has any binding authority in the latter Court. If they are referred to, it is in order to see how the question has been determined in a foreign Court. It has no more binding authority than the opinion expressed by a writer in a treaties on law dealing with the same subject.

[20] It may be pointed out that the formation of Madhya Bharat cannot be regarded only as a change in the Constitution of each of the Covenanting States as a result of political evolution. As a result of the covenant entered into on 22-4-1948 by the Rulers of these States by which they agreed to integrate their territories in one State with a common Executive, Legislature and Judiciary the former States ceased to exist as such. The inauguration of the United State of Madhya Bharat on 28-5-1948 brought into existance an altogether new political entity wholly different in character, status and political incidents. It is clear that in such circumstances the High Courts in any of the Covenanting States cannot be said to be Courts of co-ordinatate jurisdiction with the High Court of Madhya Bharat. For the reasons stated the Full Bench decision of Rangoon High Court in *Ma Mya* v. *Ma Thein*, A. I. R. 1927 Rang. 4 cannot be of any assistance in determining the matter before us.

[21] Reference was made in the Full Bench decision in *Dagdu Madhav* v. *Tulsiram*, 1949 Mad. B. L. R. 81 to cl. 3 of Ordinance I of 1948 as also to cl. 5 of Ordinance II of 1948 which ran as follows:

Clause 3 of Ordinance I of 1948 :

"When the administration of any Covenanting State has been taken over by the Raj Pramukh as aforesaid, or when any State has been merged in the State of Madhya Bharat as aforesaid, all laws, Ordinances, Acts, Rules, Regulations, etc., having the force of law in the said State shall continue to remain in force until repealed or amended under the provisions of the next succeeding section, and shall be construed as if references in them to the Ruler or Government of the State were references to the Raj Pramukh or the Government of the United State respectively."

Clause 5 of Ordinance II of 1948:

"(a) The High Court shall apply the laws and the usages prevailing in any State forming part of the United State to Civil, Criminal and other proceedings in that State till such time as a duly constituted authority modifies them.

(b) In enforcing these laws and usages, the High Court may be guided by the principles of law and equity, practice and procedure embodied in the analogous laws and usages prevailing in the Indian Union as interpreted by the several High Courts and the Judicial Committee of the Privy Council as well as the Federal Court of India."

[22] The Full Bench, if I may say so without disrespect, rightly held that the term "Laws and usages" as used in these two clauses "cannot be held strictly speaking to cover judicial decisions.' But their Lordships went further and held that in view of the circumstances in which the United State came into existence it cannot be believed that there can be any intention to deprive judicial decisions of the highest tribunal in the Covenanting States of their validity or force by the mere establishment of a common High Court. The last mentioned proposition, it appears to me, ignores the basic principle on which the authority of judicial decisions rests. A decision given by the

High Court in any State has binding authority on the Courts subordinate to that High Court, because of the relation, superior and subordinate that subsists between the High Court and those Courts. As regards other Courts of equal rank in the same State it has no binding authority except for the respect which its sound exposition of the law and the logical reasoning on which its conclusions are founded may command. In our own country we have a High Court in each State. Though the decisions of one High Court are accorded the greatest respect in other High Courts they are not binding either on the High Courts or the Subordinate Courts in other States.

(23) To give effect to the decision arrived at by the Full Bench and to carry it to its logical conclusion might, as pointed out by Chaturvedi J. in his judgment, lead to anomalies and difficulties which it would not be easy to get over. If the decisions of Indore High Court are held binding on Madhya Bharat High Court there appear to be no good grounds why the same effect should not be given to the decisions of other High Courts of more than a score of Covenanting States which integrated to constitute Madhya Bharat. I am unable to read any such intention into the provisions of the ordinances to which reference has been made above, or in any of the sections of Act 8 of 1949. The decisions of Indore High Court are certainly entitled to the greatest respect but I am unable to hold that they are binding either on Madhya Bharat High Court or on the Courts subordinate to it. They have the same authority in the Courts in this State as the decisions of the Bombay, Madras, Calcutta, Allahabad or Patna High Courts.

(24) I would therefore answer the two questions referred by Sanghi J. thus:

1. The decision reported in 'DAGDU MADHAV v. TULSIRAM', 1949 Madh. B.L.R. 81 does not lay down correct law; and

2. The decisions of Indore High Court or of any of the High Courts functioning in the Covenanting States, though entitled to respectful consideration, are not binding on any Courts in Madhya Bharat.

(25) SHINDE J.: I am in entire agreement.

(26) KHAN J.: I concur.

(27) DIXIT J.: I agree and I have nothing to add to the observations of my Lord the Chief Justice. I agree to the answers preferred to the reference.

(28) BY THE COURT: Our answer to the reference made by the learned Judge is as follows:

1. The decision reported in 'DAGDU MADHAV v. TULSIRAM', 1949 Madh. B.L.R. 81 does not lay down correct law, and

2. The decisions of Indore High Court or of any of the High Courts functioning in the Covenanting States, though entitled to respectful consideration, are not binding on any Courts in Madhya Bharat.

(29) The case shall go back to the single Judge without answer to the reference.

A/D.R.R. Reference answered accordingly.

A.I.R. 1952 MADHYA BHARAT 176

(GWALIOR BENCH)

SHINDE C. J. AND DIXIT J.

Railway Magistrate, Lashkar, Applicant v. Rajjanlal, Opponent.

Criminal Misc. Case No. 47 of 1951, D/- 29-2-1952.

(a) Contempt of Courts Act (1926), S. 3 — Apology.

Where the contempt is of a grave character, in the interest of administration of justice it is but proper that the contemner should be punished in spite of his unqualified apology. Case law discussed. (Para 4)

Ann: C.C. Act, S. 3 N. 2.

(b) Contempt of Courts Act (1926), S. 2(3) — Scope of.

The gist of S. 2(3) is that where the act of the accused is punishable under the Penal Code as contempt, the High Court cannot take any cognizance under the Contempt of Courts Act.

Where a person called at the residence of the Magistrate and asked him to release the accused on bail if he (the Magistrate) desired that he should not be humiliated:

Held that the act of the person was not punishable as contempt under the Penal Code. Consequently the High Court could take cognizance of the contempt committed in respect of the Court subordinate to it. (Para 3)

Anno: C.C. Act, S. 2 N. 6.

Deputy Govt. Advocate, for Applicant; Anand, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras
('39) AIR 1939 All 247: (181 Ind Cas 558) 4
('65) 4 WR 86 (Cal) 4
('40) AIR 1940 Nag 407: (191 Ind Cas 671) 4
('40) AIR 1940 Oudh 178: (41 Cr L.J. 233) 4
('48) AIR 1948 Oudh 114: (49 Cr LJ 108) 4

SHINDE C. J.: The facts of the case which has given rise to these proceedings are as follows:

(2) On 20th August 1951 the Government Railway Police Bina, forwarded Chandrasen and 3 other accused charged under S. 451 Penal Code to the Court of the Railway Magistrate Lashkar and requested for their remand. On the same day an application for bail was moved on behalf of the accused which was fixed for hearing on 31st August. On the 31st August at about 8-30 a.m. two persons called at the residence of the Railway Magistrate. When the Railway Magistrate saw them one Rajjanlal after some casual talk began to plead for the accused Chandrasen and requested that he might be released on bail. The Railway Magistrate told them that no person who was alleged to have committed a non-bailable offence could be released on bail. On this reply Rajjanlal got up as if to go away, and asked his companion Bhimsen to go ahead. When Bhimsen went downstairs Rajjanlal uttered these words:

"अगर आप ये चाहते है की आप निचा न देखे तो आज चंद्रसेन की जमानत का हुकम दे दिजीयेगा."

The Railway Magistrate replied that no Government servant could be humiliated if he

followed the prescribed procedure. Being annoyed at Rajjanlal's conduct he asked Rajjanlal to go away. After this Rajjanlal went away. This incident was reported by the Railway Magistrate to the District and Sessions Judge who has forwarded it in original with his opinion that the conduct of Rajjanlal amounted to a contempt of Court. A notice was issued to Rajjanlal to show cause. In reply to the notice Rajjanlal appeared and has submitted an unconditional apology.

[3] Mr. Anand, who appears for Rajjanlal, raised a point of law. He contends that as the act of the accused is punishable under the Penal Code, this Court cannot take cognizance of contempt committed by the accused under sub-s. (3) of S. 2, Contempt of Courts Act, Gwalior. The High Court cannot take cognizance of contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Gwalior Penal Code. The gist of the sub-section is that where the act of the accused is punishable under the Code as contempt, the High Court cannot take any cognizance under the Contempt of Courts Act. The learned counsel was not able to show us that the act of the accused was punishable as contempt under the Penal Code. Consequently the contention raised by the counsel of Rajjanlal cannot be upheld.

[4] It is true that Rajjanlal has tendered unconditional apology but his act is most reprehensible. In *William Taylor* v. *Asmedh Koonwar*, 4 W. R. 86, Norman J. made following observations :

"It is contrary to the practice of all Courts of Justice, unfair to an adversary, a contempt of Court, highly dangerous to the administration of justice that a suitor on any pretext whatever should communicate with a Judge, either by letter or in conversation, or in any manner whatsoever other than, by public proceedings in open Court, respecting the merits of any case in which he is interested and which is either pending in the Court of such Judge or likely to come before him."

In *Additional Sessions Judge, Hardoi* v. *Banwarilal*, A. I. R. 1948 Oudh 114 Gulam Hussain C. J. and Misra J. held that a private communication by a stranger or a witness addressed to a Judge which is calculated to influence his decision, in a pending case constitutes grossest form of contempt. In *Emperor* v. *Gajadhar Prasad*, A. I. R. 1939 ALL. 247 Bennet and Verma JJ. held as follows :

"Where a member of a Legislative Assembly taking advantage of his position as a member of the Assembly issues instructions to a District Magistrate in respect of a trial pending before him which can only be issued by the High Court, he is guilty of contempt of Court. No member of the Legislative Assembly has any right to interfere in such a manner in the course of the administration of Criminal Justice."

In *District Magistrate Sultanpur* v. *Ramjas Yadava*, A. I. R. 1940 Oudh 178, Thomas C. J. and Radhakrishna J. held as follows :

"A letter written by a M. L. A., at a time when proceedings are pending in Court of Magistrate asking him to drop prosecution against certain persons grossly offends against the law of Contempt."

In *Sub-Judge, First Class, Hoshangabad* v. *Jawahar Lal Ramchand*, A. I. R. 1940 Nag. 407 Vivian Bose J. held as follows :

"A letter containing a threat and imputation against the Judge's impartiality that the Judge had acted unlawfully and with a view to cause him loss sent to a Judge seized of the case while he was still exercising jurisdiction in respect of it by a party to the case is the contempt of serious nature."

In the course of the judgment his Lordship observed as follows :

"Judges have to discharge responsible and often disagreeable duties and it is essential that they should be afforded utmost protection if the administration of Justice is to remain independent, clean, fearless, unbiassed and impartial."

There is no doubt that the act of the contemner in this case is most reprehensible. Although he has tendered an unqualified apology it does not entitle the offender to a discharge as a matter of right. Where the contempt is of a grave character, in the interest of administration of justice it is but proper that he should be punished in spite of his unqualified apology. Vide A. I. R. 1948 Oudh 114 and A. I. R. 1940 Nag. 407. Bearing this aspect in mind and also taking note of the fact that the contemner has tendered an unqualified apology we fine him Rs. 100 and also order him to pay Rs. 50 as costs to the Deputy Government Advocate. In default of payment of fine within two weeks he is to undergo simple imprisonment for one month.

[5] **Dixit J.**—I agree.

B/D.H. *Order accordingly.*

A. I. R. 1952 Madhya Bharat 177

(GWALIOR BENCH)

DIXIT J.

Mst. Chandelinju and others—*Appellants* v. *Raghunathsingh and others*—*Respondents.*

Second Appeal No. 47 of 1950, D/-26-4-1952.

(a) Limitation Act (1908), S. 19 — Conscious acknowledgment of existing liability — Entry in settlement record and application for mutation held valid acknowledgments.

For an acknowledgment to save limitation, it is necessary that it must be an acknowledgment of an existing liability and it must be as the word 'acknowledgment' implies a conscious acknowledgment of the liability. [Para 4]

A khewat entry was verified and signed by the settlement officer and by the mortgagee who admitted therein the fact that he was in possession of the mortgage lands by virtue of a registered mortgage deed. On the mortgagee's death his sons applied for mutation in their favour stating in the application that they were mortgagees. The settlement entry and the application were made within 30 years of the date of execution of the mortgage.

Held that both the khewat entry and the application for mutation amounted to conscious acknowledgment of existing liability: A. I. R. 1948 Oudh 257, *Rel. on*; A. I. R. 1943 All. 393, *Disting.*; 1949 Madh. B. L. R. 212, *Expln.* [Paras 3 and 4]

Anno. Lim. Act, S. 19, N. 18, Pt. 10.

(b) Limitation Act (1908) S. 19, Explanation 1 — Acknowledgment need not be addressed to plaintiff.

The view that under Section 19 an acknowledgment of the liability must be addressed to the plaintiff or some one through whom he claims is not in accord with the clear language of Explanation (1) to Section 19. 27 Cal. 1004 PC Disting. (Para 4)

Anno: Lim. Act, S. 19 N. 46 Pt. 4.

Bhagwandas Gupta, for Appellants; Shiv Dayal, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

(1900) 27 Cal 1004: (27 Ind App 103 PC) 4
('43) AIR 1943 All 393: (1943 All LJ 548 FB) 3
('84) 8 Bom 99 3
('49) 1949 Madh-B LR 212 4
('48) AIR 1948 Oudh 257: (1948 Oudh WN 114) 3

JUDGMENT: This is an appeal by the plaintiffs against a decision of the District Judge, Bhind affirming the judgment and the decree of the Civil Judge Second Class, Lahar whereby plaintiffs' suit for redemption of a mortgage was dismissed on the ground that it was barred by time.

(2) The plaintiffs sued to redeem a mortgage alleged to have been executed on 22-7-1895 in favour of Baldeosingh the father of the present respondents. The suit was filed on 25-7-1940, that is beyond the period of limitation prescribed for redemption suits by the law of Limitation then in force. It was admittedly barred by time. But the plaintiffs relied on an entry in the Khewat of Samvat 1978 to show that the defendant mortgagee had before the Settlement Officer acknowledged the fact that he was in possession of the property as a mortgagee. It was alleged by the plaintiffs that this entry which was made on 24-8-1916 was signed and verified by the Settlement Officer and by the mortgagee Baldeosingh and that it amounted to an acknowledgment within the meaning of Section 19 of the Limitation Act and this the plaintiffs' suit was within time.

The plaintiffs also relied on an application said to have been made on 14-9-1921 by the respondents for mutation in their favour after the death of their father Baldeosingh. It was said that in this application the defendants stated that they were mortgagees and that, therefore, this application also constituted an acknowledgement under Section 19 of the Limitation Act and was sufficient to save limitation. The trial court held that the plaintiffs had failed to prove the fact that the settlement entry was signed by the original mortgagee Baldeosingh and the fact that after his death the defendants had applied to the Tehsildar for mutation in their favour. The suit was, therefore, dismissed by the trial court as barred by time.

In appeal the learned District Judge without giving any finding as to whether the documents relied on by the plaintiffs had been proved, held that even if they had been proved, they would not constitute in law acknowledgment within the meaning of Section 19 of the Limitation Act. When the appeal last came up for hearing before me I observed that the question whether a particular document constituted an acknowledgment under Section 19 of the Limitation Act was not merely a question of abstract law but was one which had to be determined with reference to its contents and the circumstances and the law under which it was brought into existence.

I also said that the learned District Judge had erred in omitting to give any finding as to the nature and contents of the documents relied on by the plaintiffs for saving limitation and in coming to the conclusion that the documents even if proved were not sufficient to save limitation under Section 19 of the Limitation Act. I, therefore, directed the learned District Judge to return a finding as to the contents of the Khewat entry and the application for mutation and the circumstances in which they were made.

(3) The learned District Judge has now returned the findings. He has found that the Khewat entry was made on 24-8-1916 that it was verified and signed by the Settlement Officer and by the original mortgagee Baldeosingh, and that by that entry Baldeosingh admitted the fact that he was in possession of the mortgage lands by virtue of a registered mortgage-deed. He has also found that on 14-9-1921 the defendants applied to the Tehsildar for mutation in their favour as the heirs of the mortgagee Baldeosingh. These findings of fact have not been challenged before me by the learned counsel for the parties.

(4) The question then arises, whether the Khewat entry and the application for mutation constitute valid acknowledgments under Section 19 of the Limitation Act. For an acknowledgment to save limitation, it is necessary that it must be an acknowledgment of an existing liability and it must be as the word 'acknowledgment' implies a conscious acknowledgment of the liability. Taking the settlement entry first it is clear that it was made within 30 years of the date of the execution of the mortgage. The mortgage was executed on 22-7-1895 and the settlement entry was made on 24-8-1916. The liability under the mortgage was, therefore, clearly subsisting on the date on which the entry in the Khewat was recorded. This entry was signed and verified by the Settlement Officer and by Baldeosingh the original mortgagee.

I see no reason to suppose that when Baldeosingh signed this entry he was unaware of the 30 years' period prescribed for a suit of redemption, and of the fact that the purpose of the settlement entry was to ascertain whether his liability to pay land revenue was as a proprietor or as a mortgagee of the land and that, therefore, when he signed that entry he merely admitted the fact that his possession of the land originated under a mortgage and that by signing that entry he was in no way acknowledging the fact that the mortgagor's right to redeem the property subsisted. There being no doubt as to the date of execution of the mortgage and as to the period of limitation for a redemption suit, it must be held that when Baldeosingh signed the Khewat entry which was clearly recorded within 30 years of the date of the execution of the mortgage, he consciously admitted the title of the mortgagor and the liability of the mortgage to be redeemed.

The view that in such circumstances an entry in a settlement record signed by the person in possession and acknowledging the fact that his possession was that of a mortgagee, constitutes a conscious acknowledgement of the existence of the liability in respect of a mortgage within the meaning of Section 19 of the Limitation

Act is supported by a decision of Oudh Chief Court reported in — 'Sheo Prasad v. Rama Kant', AIR 1948 Oudh 257. The same view has been taken in a number of other cases which have been noted in Cnitaley's Limitation Act, 3rd Edition, Volume 1 at page 663. The learned counsel for the respondents has strongly relied on a Full Bench decision of Allahabad High Court, namely —'Gur Saran v. Shib Singh', AIR 1943 All 393 to support the proposition that such settlement entries do not amount to acknowledgments under Section 19 of the Limitation Act.

In my opinion, the decision of the Allahabad High Court is not in point here. In that case there was an oral mortgage and the date on which it was executed was unknown. The plaintiff mortgagor in that suit relied on an entry in the Khewat of 1878 in which the person in possession of the property sought to be redeemed was shown as a mortgagee. The controversy in Allahabad case centered round the question whether when the date of the mortgage and the specific terms thereof were unknown an acknowledgment contained in the settlement record could be taken as an acknowledgment by the mortgagee that as a matter of fact the entry was made at a time when the liability for redemption subsisted and the period of limitation prescribed for redemption suit had not elapsed from the date of the mortgage. The Allahabad High Court held that from the mere entry of mortgage in Khewat signed by the mortgagee a presumption as to the existence of subsisting mortgage cannot be drawn.

I do not regard the decision of the Allahabad High Court as an authority for the proposition that even when it is proved by evidence 'aliunde' that the entry in settlement record was made when the mortgage was subsisting, the entry in the Khewat cannot be taken as constituting a valid acknowledgment under Section 19 of the Limitation Act. The Allahabad decision only lays down that the entry of a mortgage in the settlement record, where the date of the execution is unknown, is good evidence of the factum of mortgage, but it is no evidence of the date of the mortgage or of the fact that on the date of the entry the mortgage was subsisting or that the entry was made within the prescribed period of limitation for redemption suits. This decision is, therefore, clearly distinguishable from the present case.

In the present case the date of the execution of the mortgage and the fact that the settlement entry was made within the prescribed period of limitation have been established independently of the 'Kewat' entry. Counsel for the respondent also relied on — 'Dharma Vithal v. Govind Sadvalkar', 8 Bom. 99. But this decision in no way helps the respondents. It lays down the proposition which I have already stated above namely that the question whether a document constitutes an acknowledgment of liability depends purely on the terms of the document and their consideration by the court and the acknowledgment must be with the conscious intention of acknowledging the liability. In my view the settlement entry which was made on 24-8-1916 satisfies the tests of an existing liability and conscious admission and is, therefore, a valid acknowledgment sufficient to save limitation.

(4a) As regards the statement in the application of the defendant-respondents for mutation, that their father Baldeosingh held the land as a mortgagee, I think it clearly amounts to a conscious acknowledgment of an existing liability in regard to the mortgage. For on the date on which the application for mutation was made i.e., 14-9-1921 the mortgage was redeemable, it having been executed on 22-7-1895 and by that application the defendants as the heirs of the Baldeosingh claimed that their names be substituted in place of Baldeosingh's name not as proprietors of the land but as mortgagee. Thus, they clearly admitted the fact that their title to the land was as mortgagees.

Learned counsel for the respondents had drawn my attention to the observations of the Privy Council in — 'Fatimatulnissa Begum v. Sunder Das', 27 Cal 1004 to the effect that a statement in an application for mutation of the names by the heirs of a deceased mortgagee that their predecessor held the property as a mortgagee is not a valid acknowledgment as it is not an acknowledgment made to the mortgagor. The view that under Section 19 of the Limitation Act an acknowledgment of the liability must be addressed to the plaintiff or some one through whom he claims is not in accord with the clear language of explanation (1) to Section 19. The Privy Council itself in a number of later decisions, has taken the view that an acknowledgment under Section 19 need not be addressed to the plaintiff or to any one through whom he claims.

That being so the observation in '27 Cal 1004', must be taken as meaning only that in that particular case the Privy Council held that there was no sufficient acknowledgment. The Privy Council case cannot be regarded as laying down a proposition quite contrary to the clear wording of explanation (1) to Section 19 of the Limitation Act. I am aware of a decision of this court in — 'Bhero v. Lachhi Ram', 1949 Madh. B. L. R. 212 in which Chaturvedi J. has held that such a statement in an application for mutation is not an acknowledgment of a subsisting liability under the mortgage. In that case the mortgage was executed on 21-10-1901 and the application for mutation was made on 24-12-1930. But the learned Judge did not consider the precise question whether a statement in an application for mutation that the property was held under a mortgage could be regarded as a conscious acknowledgment of liability when it was otherwise manifest that on the date of the application for mutation the liability was not barred by time.

It is clear from the judgment in the case of —'Bhero v. Lachhiram', 1949 Madh. B. L. R. 212 that the learned Judge only intended to hold that such a statement in an application for mutation is in itself no proof of the fact that the liability is subsisting. If the learned Judge intended to go further and hold that a statement in an application for mutation that the property was held under a mortgage would not constitute a good acknowledgment even when it is otherwise shown that on the date of application for mutation the liability was subsisting, then I must express my dissent with the view. I would have referred this question to a larger bench for decision but as in the present case even if the application for mutation dated 14-8-1921 is ruled out of consideration there still remains the statement in the settlement entry of 24-8-1916 which keeps alive the mortgage of 22-7-1895.

(5) For the above reasons, I hold that the plaintiffs' suit is not barred by limitation and

allow this appeal. The suit is remanded to the trial court for decision on its merits. I grant costs to the appellants incurred in this court and the lower appellate court. The costs incurred in the trial court will abide the result of the suit on merits.

B/V.R.B. Appeal allowed.

A. I. R. 1952 MADHYA BHARAT 180 (GWALIOR BENCH)

CHATURVEDI J.

Kamal Chand, Applicant v. Amer Chand, Opponent.

Criminal Ref. No. 11 of 1952, D/- 4-6-1952.

† Criminal P. C. (1898), S. 198 — Wife defamed by allegation of theft against her — Husband cannot file complaint without leave of Court — Provisions are mandatory.

Ordinarily a complaint of a criminal offence may be filed by any person, not necessarily by the person aggrieved; but there are certain exceptions to this rule, one of which is contained in S. 198. In cases falling under S. 198, the principle acted upon is that a Hindu lady residing with her husband, her father, her brother or her son is a member of his family, and her reputation is bound up with the reputation of the person in whose house she resides. If any imputation is made against her character that would affect as much the relative with whom she is living as herself, and therefore, where the alleged offence is defamation imputing unchastity, the party "aggrieved" is not necessarily the party directly defamed but includes also the husband or other relatives whose reputation is also affected and suffers injury. 25 Bom 151 FB; 14 Mad 379; 32 Cal 425, Rel. on. (Paras 2, 4)

The same principle, however, cannot be made applicable to those cases where there is no imputation of unchastity and in such cases the question whether the husband is a person aggrieved within the meaning of S. 198 must be determined with reference to the nature of the accusation and having regard to the special circumstances of each case. If the allegation against the female is that she has stolen some property it cannot be said that the personal reputation of her husband has been harmed in any way and it cannot be maintained in such cases that the defamer's object was to vilify the husband and not the wife. In such a case, the husband is not the person aggrieved within the meaning of the section and cannot file a complaint without the leave of the Court. (Para 5)

But proviso to S. 198 clearly renders it permissible in the case of a woman, who according to customs and manners of the country ought not to be compelled to appear in public, that a complaint of any of the offences specified in S. 198 be taken cognisance of by a Court on a complaint made by some other person on behalf of such woman, provided the leave of the Court is taken for the purpose. Thus the husband can lodge a complaint with the permission of the Court. The provisions of S. 198 are mandatory and the trial without such leave is void, even if no objection is taken, for consent cannot confer jurisdiction: AIR 1935 Oudh 6, Rel. upon. (Para 8)

Anno: Cri. P. C., S. 198 N. 4 and 8.

Deputy Government Advocate and Inamdar, for Applicant; Ragunandan Swaroop, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras

('01) 25 Bom 151: (2 Bom LR 665 FB) 4, 6
('05) 32 Cal 425: (8 Cal WN 515) 4
('24) 5 Lah 301: (AIR 1924 Lah 559: 26 Cri LJ 342) 4
('91) 14 Mad 379: (1 Mad LJ 242) 4
('35) 10 Luck 277: AIR 1935 Oudh 6: (36 Cri LJ 116) 8
('34) AIR 1934 Sind 188: (36 Cri LJ 408) 5

ORDER: The petitioner Kamal Chand had lodged a report in the police alleging that Imarti Bai, wife of the complainant Amar Chand, had stolen his silver bunch of keys. This allegation was subsequently found to be false. Amar Chand, the complainant, then lodged a complaint against Kamal Chand under Section 500, I. P. C. and the petitioner was convicted by the City Magistrate, Lashkar, under that section and was sentenced to pay a fine of Rs. 50/-. The petitioner went to the Sessions Judge, Gwalior in revision and the learned Sessions Judge has recommended that the conviction of Kamal Chand petitioner be set aside on the ground that the complaint against the petitioner was not lodged by Imarti Bai but was lodged by her husband.

(2) Ordinarily a complaint of a criminal offence may be filed by any person, not necessarily by the person aggrieved; but there are certain exceptions to this rule, one of which is contained in Section 198, Criminal Procedure Code, the first part of which reads as follows:

"No Court shall take cognisance of an offence falling under Chapter 19 or Chapter 21, I. P. C. or under Sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence."

(3) The offence of defamation is made punishable under Chapter 21 of the Indian Penal Code and consequently no Court can take cognisance of an offence of defamation except upon a complaint made by some person aggrieved by such offence. The question for determination in the present case, is whether Amar Chand, the complainant, is a person aggrieved within the meaning of Section 198, Criminal Procedure Code?

(4) There are several rulings which lay down that where the wife is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate can take cognisance of a complaint under Section 198, Criminal Procedure Code. These cases are reported in — 'Gurudit Singh v. Emperor', 5 Lah 301; — 'Chhota Lal Lallubhai v. Nathabhai Bechar', 25 Bom 151 and in — 'Chellam Naidu v. Ramasami', 14 Mad 379. In — 'Thakurdas Sar v. Adhar Chandra', 32 Cal 425, where the alleged offence was defamation imputing unchastity to a Hindu widow, it was held, that her brother, with whom she was residing at the time, was a person aggrieved within the terms of Section 198, Criminal Procedure Code. The learned Judges considered the case reported in '25 Bom 151 FB' and expressly disagreed from the view expressed by Ranade J., the dissenting Judge.

In all these cases the principle acted upon appears to be that a Hindu lady residing with her husband, her father, her brother, or her son is a member of his family, and her reputation is bound up with the reputation of the person in whose house she resides. If any imputation is made against her character that

would affect as much the relative with whom she is living as herself, and, therefore, where the alleged offence is defamation imputing unchastity, the party "aggrieved" is not necessarily the party directly defamed but includes also the husband or other relatives whose reputation is also affected and suffers injury. Considering the circumstances and condition under which people live in India and where the imputation of an unchastity of a female makes the whole family liable to social ostracism the propriety of the application of the principle alluded to above cannot be disputed. In all such cases the defamer's object is always to vilify the relatives and not the female alone. The imputation in such cases is that the relatives knew of the female's unchastity and with that knowledge lived with her.

(5) The same principle however cannot be made applicable to those cases where there is no imputation of unchastity and in such cases the question whether the husband is a person aggrieved within the meaning of Section 198 must be determined with reference to the nature of the accusation and having regard to the special circumstances of each case. If the allegation against the female is that she has stolen some property it cannot be said that the personal reputation of her husband has been harmed in any way and it cannot be maintained in such cases that the defamer's object was to vilify the husband and not the wife; for, in such a case, the slanderous words spoken or written do not impute any personal misconduct to the complainant. It is no doubt true that the husband's feeling would be injured and also his reputation to a certain extent. But it is also to be borne in mind that a person 'aggrieved' does not mean a person whose feelings have been hurt by the alleged defamation. If the term was intended to be capable of such extensive and elastic applicability, as pointed out in — 'Husseinbhoy v. Emperor', AIR 1934 Sindh 188, there could hardly have been any reason to lay down a restriction in the first part of Section 198 or to incorporate the provisions to that Section in 1923 by an amending Act.

(6) The following observations of Jenkins C. J. in — 'Chhotalal v. Nathabhai', 25 Bom. 151 FB are, in my opinion, important:

"I am unable to find in the Code any limitation of the sense in which the word 'aggrieved' is used. Nor is there any indication of the kind of grievance which may qualify a man to complain. Still I think it must be conceded that any fanciful or sentimental grievance would not suffice; it must be such a grievance as the law can appreciate: it must be what has been termed a legal grievance and not a 'stat pro ratione voluntas' reason."

(7) In the present case where the wife was accused of theft in my opinion, the husband cannot be deemed to have a legal grievance; for, whatever pain of mind he may suffer from the slander of his wife, the injury caused to him is mediate or remote and not immediate or proximate. There is no imputation of personal misconduct of the husband involved in the accusation. I must hold, therefore that, in the present case, the husband Inder Chand, in the circumstances of this case, was not a person aggrieved within the meaning of Section 198, Criminal Procedure Code, and was not competent to lodge a complaint.

(8) The proviso to Section 198 clearly renders it permissible in the case of a woman, who according to customs and manners of the country ought not to be compelled to appear in public, that a complaint of any of the offences specified in Section 198 be taken cognisance of by a Court on a complaint made by some other person on behalf of such woman, provided the leave of the Court is taken for the purpose. Inder Chand could have lodged the complaint with the permission of the Court; but such permission was never obtained in this case. The provisions of the Section are mandatory and the trial without such leave must be held to be void. Even if no objection with regard to jurisdiction is taken in the trial Court this cannot confer jurisdiction on the Magistrate who tried the applicant. I am fortified in this view by a decision of the Oudh Chief Court reported in — 'Jagdish Narain v. Shams Ara Begam', 10 Luck 277: AIR 1935 Oudh 6.

(9) Under these circumstances, the reference is accepted and the conviction and the sentence of the applicant is set aside. Fine if paid will be refunded.

B/R.G.D. Reference accepted.

A. I. R. 1952 MADHYA BHARAT 181 (GWALIOR BENCH)

SHINDE C. J. AND DIXIT J.

Smt. Shanta Devi, Applicant v. Custodian, Evacuee Property, M. B. Government and another, Opponents.

Civil Misc. Petn. No. 237 of 1951, D/- 2-5-1952.

(a) Constitution of India, Arts. 19 (1) (f) and 31 — Deprivation of property under S. 40 of Administration of Evacuee Property Act (1950) — Administration of Evacuee Property Act (1950), S. 40.

The right to hold, acquire and dispose of property is not absolute. It is subject to the limitations specified in Art. 19 (5) and to the provisions contained in Art. 31. The question of the right of a citizen to hold, acquire or dispose of the property can arise only so long as his property has not been taken away under Art. 31. If he has been deprived of his property under Art. 31 (1) or if his property has been acquired or taken possession of under Art. 31 (2) no question of his acquiring, holding or disposing of that property could possibly arise under Art. 19 (1) (f). If the petitioner has been deprived of his property under S. 40 of the Administration of Evacuee Property Act, 1950 then Art. 19 (1) (f) of the Constitution has no application to his case. The applicant must then show that quite apart from Art. 19 (1) (f) the Act in question is otherwise invalid: AIR 1950 SC 27; AIR 1951 SC 41, Foll.; AIR 1951 Bom 440, Rel. on. (Paras 8, 9)

(b) Constitution of India, Art. 31 (1) — Scope of.

Clause (1) of Art. 31 only contains a declaration of the fundamental rights in a negative form, namely, that no person shall be deprived of his property save by authority of law. In other words, this clause implies that a person may be deprived of his property, provided he is so deprived by authority of law. Art. 31 (1) by itself in no way helps the petitioner. It is only if he shows that the legislation in question is otherwise invalid, that he can question the constitutionality of the Act on the ground

that the Act infringes the provisions of Art. 31 (1). (Para 9)

(c) Constitution of India, Art. 19 (1) (f) and (5) — Administration of Evacuee Property Act (1950) — Validity.

(Obiter): The restrictions imposed by the Administration of Evacuee Property Act are reasonable and in the interests of the general public. Having regard to the events which happened soon after the partition in 1947 and also taking into consideration the entire scheme of the Act which is to make a provision for the custody, management and the administration of evacuee property until a satisfactory and final settlement takes place between India and the Dominion of Pakistan, it cannot be said that the Administration of Evacuee Property Act, 1950 does not satisfy the requirements of Art. 19 (5): Case law Rel. on. (Para 10)

(d) Constitution of India, Arts. 20, 245, 246 and 248 — Power of Parliament to pass retrospective legislation for Madhya Bharat — General Clauses Act (1897), S. 6.

There is no doubt that the Administration of Evacuee Property Act, 1950 is meant to be retrospective. There is in our Constitution a limitation on the power of the Legislatures to make retroactive criminal legislation. These limitations are stated in Art. 20. But except for this Article, there is no other provision in the Constitution which points to any limitation of the plenary powers of the Parliament and the State Legislatures so long as they keep within the ambit of the subjects of the legislation specifically assigned to them. There is nothing in Arts. 245, 246 and 248 to indicate an intention to withhold from the Parliament the same absolute discretion as the British Parliament has with regard to past events as well as present and future, provided of course Parliament confines itself to the specified subjects and legislates within the limitations prescribed by Art. 20. From the principle of the supremacy of the Parliament and the State Legislatures within their allotted spheres, it follows that in the absence of express provision to the contrary, the Parliament and any State Legislature can give to their laws otherwise valid, retrospective or prospective operation. The Constitution does not restrict or limit the legislative competence of Parliament so as to make it exercisable only with regard to that part of territory of India or only with regard to those subjects in regard to which the Dominion Legislature had before 26-1-1950 the power to legislate. The question therefore of the power of Parliament to legislate retrospectively or prospectively with respect to a subject, is in no way affected by the powers of the Dominion Legislature under the Government of India Act, 1935. It is to the provisions of the present Constitution that we must look for determining the powers of the Parliament. Section 6 of the General Clauses Act cannot be invoked in such cases for holding that the effect of the repeal of the Government of India Act, 1935 is to confirm for ever the rights vested in the citizens just before the commencement of the Constitution and to deny to the Parliament and the State Legislatures the power of interfering with those rights by enacting retrospective legislation under the powers enforced on them by Arts. 245 and 246 of the Constitution. Section 6 of the General Clauses Act which merely lays down one of the general rules of construction of statutes, can have no applicability where the Government of India Act 1935 is not merely repealed but is substituted by a new Constitution under which the Parliament and the State Legislature are not prohibited from legislating for the past and of interfering with vested rights. Section 6 of the General Clauses Act would have again no applicability where the Parliament and the State Legislatures with the legislative competence of retrospective legislation pass an enactment giving it in express terms retrospective effect. Further before 26-1-50, the Dominion Legislature functioning under the Government of India Act 1935, had the power to legislate for State of Madhya Bharat with respect to the custody, management and disposal of property declared by law to be evacuee property, by virtue of the instrument of Accession executed by the Raj-Pramukh of Madhya Bharat accepting inter alia all the matters mentioned in the Concurrent List as matters with respect to which the Dominion Legislature may make laws for the State of Madhya Bharat. Thus, the Parliament can make for Madhya Bharat State retrospective legislation with respect to the custody, management and disposal of property declared by law to be evacuee property. AIR 1950 SC 27; AIR 1952 Madh-B 57, Foll.; AIR 1951 Raj 94 (2), disting. and dissent. (Para 11)

Anno: G. C. Act, S. 6 N. 1, 2.

(e) Administration of Evacuee Property Act (1950), S. 58 (3) — Under Gwalior State Evacuee Property Management Ordinance (S. 2004) and Madhya Bharat Evacuee Property Management Ordinance (32 of 1948) and Act (20 of 1949) vendor not an evacuee — Gwalior State Ordinance not containing any provision for transfer by evacuee — Held intimation given by vendor to custodian under Gwalior State Ordinance of sale of his house and order passed by custodian "filed the intimation" was not in any sense a confirmation of sale which was saved by Administration of Evacuee Property Ordinance, 1949 and Administration of Evacuee Property Act, 1950 which were subsequently brought into force in Madhya Bharat. (Para 12)

Bhagwan Das Gupta, for Applicant; K. A. Chitale, Advocate-General and Shiv Dayal, Deputy Government Advocate, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

('50) AIR 1950 SC 27: (51 Cri LJ 1383) 8, 11
('51) AIR 1951 SC 41: (ILR (1951) Hyd 461) 8
('50) AIR 1950 SC 211: (52 Cri LJ 550) 10
('51) AIR 1951 SC 118: (ILR (1951) Hyd 221) 10
('51) AIR 1951 All 746: (1951 All LJ 576 FB) 10
('51) AIR 1951 Bom 440: (53 Bom LR 621) 8, 10
('52) AIR 1952 Madh-B 57: (ILR (1952) Madh-B 178) 11
('51) AIR 1951 Mad 930: (1951-2 Mad LJ 1) 10
('51) AIR 1951 Raj 94 (2): (1951-20 ITR 214) 11

DIXIT J.: In this petition under Art. 226 of the Constitution of India, the petitioner Shanta Devi challenges the validity of the Administration of Evacuee Property Act, 1950 (Act No. XXXI of 1950) and of certain orders made thereunder by the Custodian of Evacuee Property Madhya Bharat Government declaring a house purchased by the petitioner from one

Manavar Khan to be evacuee property and rejecting an application preferred by the applicant for the confirmation of the sale in her favour. The petitioner seeks the relief that the order of the Custodian be quashed and the house be restored to her.

(2) The facts, briefly stated, are that on 16-8-48 the petitioner Shanta Devi purchased from Manavar Khan, who was employed by the Municipal Committee Lashkar as an Overseer, a house belonging to him and situated in Lashkar. The sale transaction was made by a registered sale deed and was for a consideration of Rs. 3600/-. At the time of sale there was in force in the territory of Madhya Bharat comprising of the former Gwalior State an Ordinance "for the management of property left behind by the evacuees in Gwalior State." The title of this Ordinance was "Evacuee Property Management Ordinance Gwalior State, Samvat 2004." Under Section 2 of this Ordinance, an evacuee was defined as

> "a person who on account of communal feelings has whether temporarily or permanently left Gwalior State for any place situated therein (sic.)."

The Ordinance did not lay down any procedure for the confirmation by the Custodian appointed under the Ordinance of any transfer of any right or interest in any property by an evacuee. But Section 15 of the Ordinance provided that if any person was in possession of an immovable property of any evacuee with his consent or under a deed duly executed by the evacuee then the person in possession shall not be evicted from the property, if he had made a report to the Custodian.

As on the date of the sale, Manavar Khan was in Gwalior State and as he continued to remain in Gwalior State while the Ordinance was in force, it was really not necessary for Shanta Devi or Manavar Khan to make a report of the sale transaction to the Custodian. However, on 20-8-1948 Manavar Khan informed the Custodian about the sale of the house effected by him in favour of the petitioner, Shanta Devi. The Custodian ordered the report made by Manavar Khan to be filed as Manavar Khan not being an evacuee within the meaning of the ordinance, the Custodian could not have entertained the report made by Manavar Khan. The Gwalior State Evacuee Property Management Ordinance was repealed by the Madhya Bharat Evacuee Property Management Ordinance (Ordinance No. 32 of 1948) which came into force on 15-11-48. This Ordinance was replaced by an Act of the Madhya Bharat Legislature which came into force on 19-2-1949 being Act No. XX of 1949 and substantially this Act reproduced the provisions contained in the Ordinance No. 32 of 1948.

Clause 3 of Section 2 of the Act defined "an evacuee" as a person

> "ordinarily residing in or owning property or carrying on business within the territories comprising in the United State, who on account of civil disturbances or the fear of such disturbances leaves or has since 15-8-47 whether temporarily or permanently, (left?) the State for a place outside the State."

It might be stated that in both the Ordinance No. 32 of 48 and the Act No. 20 of 1949, it was provided that if an evacuee has transferred any immovable property after the 15-11-47 and before the enforcement of the Ordinance or the Act, the transferee should get the transfer confirmed by the Custodian by an application made to him in that behalf before the 30-4-49. As Manavar Khan continued to remain in Madhya Bharat while Ordinance No. 32 of 48 and the Act No. 20 of 1949 were operative, he could not be treated as an evacuee under the Ordinance or the Act and the petitioner accordingly did not take any step, and was not required to take any step to get the sale of the house by Manavar Khan to her, confirmed by the Custodian.

(3) On 18-10-49, the Central Ordinance, namely, "The Administration of Evacuee Property Ordinance, 1949 which extended to every Acceding State came into force in Madhya Bharat. By Sec. 55 (2) of this Ordinance, the Madhya Bharat Evacuee Property Management Act, No. 20 of 1949 stood repealed. This Ordinance was replaced by an Act of the Union being Act XXI of 1950 which came into force on 17-4-50. It appears that soon after the coming into force of this Act, Manavar Khan migrated to Pakistan. He, therefore, became an evacuee as defined in Section 2 (d) of the Act. Thereupon, the Custodian, Madhya Bharat Government after issuing notice to the petitioner and holding an inquiry passed an order on 16-6-50 under Section 7 (1) of the Act declaring the house purchased by Shanta Devi from Manavar Khan to be evacuee property. Shanta Devi, then, appealed against the order of the Custodian declaring the house as evacuee property to the Court of District Judge, Gwalior. The appeal was rejected as incompetent.

Thereafter, on 23-12-50, the petitioner applied to the Custodian under Section 40 of the Act for the confirmation of the sale. The Custodian rejected this application as barred by time. Shanta Devi, then, appealed to the Custodian General, Government of India, against the order of the Custodian, Madhya Bharat Government rejecting her application for the confirmation of the sale. The Custodian General rejected the appeal and upheld the order of the Custodian. Subsequently, Shanta Devi preferred a review petition to the Custodian General, which was also rejected on 11-6-51. Thereafter, on 26-9-51 she filed the present petition in this court.

(4) The grounds on which the petitioner challenges the validity of the Administration of the Evacuee Property Act, 1950 are not stated in the petition with clarity or precision. But before us Mr. Bhagwandas Gupta learned counsel for the applicant attacked the legislation in question mainly on the ground that the Administration of Evacuee Property Act, 1950, taken as a whole infringes the right to property guaranteed by Article 19 (1) (f) and Article 31 (1) of the Constitution. It is also contended that the sale of the house by Manavar Khan to the petitioner was perfectly legal and valid under the laws operating in Madhya Bharat before the Administration of Evacuee Property Act, 1950 was brought into force in Madhya Bharat, and that before the commencement of the Constitution, the petitioner had become the full owner of the house and had acquired a vested right therein and that as under the Constitution the Parliament is forbidden to pass ex post facto laws so as to withdraw a legally vested right. The impugned Act which has been made retrospective by the definition contained therein of an 'evacuee' and 'evacuee property', and by Section 58 (3) of the

Act, affects vested rights and is therefore unconstitutional.

It is also urged that Parliament has no power to make a law impairing transfers of property made in Madhya Bharat by evacuees before 26-1-50, as the authority of the Dominion Legislature to legislate for Madhya Bharat in the matter of custody, management, & disposal of any property including evacuee property was excluded before 26-1-50. A faint attempt was also made to challenge the orders of the Custodian on the ground that they were in excess of jurisdiction conferred on the Custodian.

(5) The petition is opposed by the non-applicants. In the return filed on their behalf, it is stated that the petitioner having failed to apply within time for the confirmation of the sale in her favour, she cannot now be allowed to seek the remedy under Article 226; that the Administration of Evacuee Property Act, 1950 is a valid piece of legislation and that none of the fundamental rights of the petitioner under Article 19 (1)(f) or Art. 31 have been violated in any way by the orders or action of the Custodian or the Custodian General.

(6) Before considering the contentions of the applicant, it seems to me necessary to refer to the material provisions and the scheme of the Administration of Evacuee Property Act, 1950 under which the house purchased by the petitioner was declared evacuee property and her application for the confirmation of the sale was rejected. As the Preamble of the Act says, the object of the Act is to provide for the administration of evacuee property, and for certain matters connected therewith. Section 2 is the definition section. Clause (d) (i) of Section 2 defines "evacuee" as any person

> "who on account of the setting up of the Dominions of India & Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1-3-47 left any place in a State for any place outside the territories now forming part of India".

Sub-clauses (ii) and (iii) of clause (d) define other categories of evacuees with which we are not concerned in this petition. Clause (e) contains the definition of "intending evacuee." This is not material to the present case.

Then clause (f) defines "evacuee property" as any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity) and includes any property — (1) which has been obtained by any person from an evacuee after 14-8-1947, by any mode of transfer, unless such transfer has been confirmed by the Custodian, or (2) belonging to any person who after 18-10-1949 has done or does any of the acts specified in clause (e) of Section 2, or in which any such person has any right or interest to the extent of such right or interest. Certain properties are excluded from this definition. But we are not concerned here with these excluded properties. Coming now to Section 7 of the Act, we find that it provides that where the Custodian is of opinion that any property is evacuee property within the meaning of the Act, he may after causing notice thereof to be given in the prescribed manner to the persons interested and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property.

Under Section 8, property declared as evacuee property is deemed to be vested in the Custodian for the State. Section 9 gives to the Custodian the power to take possession of evacuee property vested in him, from any person who refuses to surrender the property to him. Sec. 10 defines the powers and duties of the Custodian for the purposes of securing, administering, preserving and managing any evacuee property which has vested in him. The Custodian may carry on business, appoint a manager, or require any person to furnish such returns as are necessary, search any building or place where he has reason to believe that any evacuee property or document concerning it is kept, institute or defend legal proceedings, raise loans on the security of the evacuee property, make payments to the members of the family of the evacuee and transfer the property and may even sell it with the prior permission of the Custodian General. Sections 11 to 14 deal with trust properties, variations and cancellation of leases and allotments of evacuee properties, payments to Custodian in valid discharge of debts and recouping of expenditure by Custodian.

Under Section 15, the Custodian is required to maintain accounts of evacuee property vested in him. Section 16 lays down the procedure for restoration of property in certain cases to an evacuee. Sections 17 and 18 lay down certain consequences of vesting of property in the Custodian. Sections 19 to 23 contain provisions relating to 'intending evacuees'. Sections 24 to 28 which form Chapter V make provisions for appeals, review or revision. It must be noted that an appeal against an original order passed by the Custodian declaring a person an evacuee under sub-clause (1) or sub-clause (ii) of cl. (d) of section or from an order declaring the property an evacuee property under sub-clause 1 of clause (f) of sub-section 2 lies to the Custodian General. When a person is declared to be evacuee within the meaning of section 2 (d) (iii) or when the property is declared to be an evacuee property within the meaning of Section 2 (f) (2) then an appeal lies to the District Judge nominated in that behalf by the State Government. Section 26 gives the power of review or revision to the Custodian, Additional Custodian or authorised Deputy Custodian. Chapter VI consisting of Sections 29 to 39 provides for penalties and procedure.

Then follows Chapter VII which contains sections dealing with miscellaneous matters. The important sections that must be noted are Secs. 40 and 58. Under Section 40, no transfer of any right or interest in any property made in any manner after 14-8-47 by or on behalf of any person whose property is notified or declared to be evacuee property shall be effective so as to confer any rights or remedies on the parties to the transfer or any person claiming under them unless the transfer is confirmed on an application made to the Custodian by the transferor, the transferee or any person claiming under them within the prescribed period. Sec. 58 of the Act repeals the Administration of Evacuee Property Ordinance, 1949 and any law corresponding to the Act which was in force in any State immediately before the commencement of the Act. It further provides that the repeal shall not affect the previous operation of that Ordinance or corresponding law, and subject thereto anything done or any action taken in the exercise of any power conferred by or under that Ordinance or corresponding law,

> "shall be deemed to have been done or taken in the exercise of the power conferred, under

this Act as if this Act were in force on the day on which such thing was done or action was taken."

(7) It is clear from what has been stated above that the object of the Administration of Evacuee Property Act, 1950 is simply to deal with the custody, management and administration of evacuee property. Under the Act the State or the Custodian does not become the owner of the evacuee property; the title of the evacuee in the property is not destroyed or extinguished. The evacuee is only restrained from exercising his rights as an owner of the property until the Parliament finally decides the ultimate fate of the evacuee property and the rights of the owners of those properties. A transferee of the evacuee property if he fails to get the transfer confirmed by the Custodian, is deprived of the property. But the property vests in the Custodian for the purpose of the Act, that is, for the purpose of custody, management and administration. The necessity for passing such a legislation extending to the whole of India except the States of Assam, West Bengal, Tripura, Manipur, Jammu and Kashmir, is now well known.

After the setting up in 1947 of the two Dominions of India and Pakistan, communal disturbances on an unprecedented scale followed and on account of fear of such disturbances, a large number of people migrated from one Dominion to the other leaving behind them properties worth crores of rupees. It, therefore became imperative for the Government to take upon itself the administration and the management of such uncared property. The various Provinces and the States had promulgated different Ordinances dealing with evacuee property. It was, however, felt that there should be uniform legislation relating to evacuee property throughout India. By Act No. IV of 1949 the Government of India Act, 1935 was amended and "the custody, management and disposal of the property including agricultural land declared by law to be evacuee property" was added as a subject of legislation in the Concurrent List. On 18-10-49 an Ordinance called the Administration of Evacuee Property Ordinance was promulgated which extended to all the Provinces of India (except Assam and West Bengal) and to every Acceding State. The Ordinance was subsequently replaced by the Administration of Evacuee Property Act, 1950, which substantially reproduced the provisions contained in the Ordinance.

(8) Proceeding now to consider the grounds on which the learned counsel for the petitioner challenges the validity of the Act, in the first place, it is contended that Article 19 (1) (f) guarantees to all citizens the right to acquire, hold and dispose of property and that the law contemplated by Article 31 (1) by which a person may be deprived of his property must be a valid law, that is to say, it is contended, a law which does not offend Article 19 (1) (f); and that inasmuch as the Act in question interferes with the rights of an evacuee and of a transferee from him of holding, possessing and disposing of property and also in certain cases extinguishes the title of a transferee, the Act is not a valid law and that, therefore, it is repugnant to Art. 19 (1) (f) and Article 31 (1), and is unconstitutional. To me it appears that this argument is based on an insufficient appreciation of the nature and scope of fundamental rights relating to property guaranteed by the Constitution.

The right to hold, acquire and dispose of property is not absolute. It is subject to the limitations specified in Article 19 (5) and to the provisions contained in Article 31. The Constitution does not prohibit the State from depriving any person of his property or of taking possession of or acquiring the property for public purposes. It is obvious from an examination of the provisions of Article 19 (1) (f) read with clause 5 of that Article and Article 31 that reasonable restrictions on the exercise of the right to acquire, hold or dispose of property can be imposed either in the interests of the general public or for the protection of the interests of any Scheduled tribe; (2) that a person may be deprived of his property by authority of law; (3) and that the State may acquire any property or take possession of it for public purposes on payment of compensation. It must be remembered that Article 19 (1) (f) speaks of the general rights of a citizen to acquire, hold and dispose of the property; while Article 31 is concerned with the specific right to the property and prescribes the conditions under which a person may be deprived by the State of his property or his property may be, acquired or taken possession of by the State for public purposes.

It is clear that the question of the right of a citizen to hold, acquire or dispose of the property can arise only so long as his property has not been taken away under Article 31. If he has been deprived of his property under Article 31 (1) or if his property has been acquired or taken possession of under Article 31 (2) no question of his acquiring, holding or disposing of that property could possibly arise under Article 19 (1) (f). A citizen cannot clearly maintain that his right to hold, acquire or dispose of his property has been interfered when in fact he has been deprived of that property under Article 31. In 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27 it was pointed out by the Supreme Court that the rights conferred by Article 19 (1) (a) to (e) and (g) would be available to the citizen until he was under Article 21 deprived of his life or personal liberty according to procedure established by law.

On the same reasoning, it would seem that the right to property guaranteed by Article 19 (1) (f) would be available to the citizen until he is deprived of his property under Article 31 (1) or his property is acquired or taken possession of under Article 31 (2). That Article 19 (1) (f), is operative in the case of only those whose property has not been taken away under Article 31, has been made very clear by the observations of Das J., in para 74 of the judgment of Supreme Court in — 'Chiranjit Lal v. Union of India', AIR 1951 SC 41. In — 'Abdul Majid v. P. R. Nayak', AIR 1951 Bom 440, the Bombay High Court has also taken the view that the rights guaranteed by Article 19 (1) (f) can only be enjoyed provided the citizen is in a position to enjoy those rights and provided those rights can be enjoyed although he has been deprived of his property under Article 31(1) or his property has been acquired or taken possession of under Art. 31 (2).

(9) It is thus quite clear that if the petitioner has been deprived of his property under Section 40 of the Administration of Evacuee Property Act, 1950 then Art. 19(1)(f) of the Constitution has no application to his case. The appct. must then show that quite apart from Art. 19 (1) (f) the Act in question is otherwise invalid.

Learned Counsel for the applicant says that when tested by the provisions of Article 31 (1) this Act is void. It is not disputed by him that by clause 5 of Article 31, he is precluded from objecting to the Act on the ground that it violates the provisions of Article 31 (2). I find it difficult to see in what way Article 31 (1) assists the applicant. For the purposes of this petition, it is unnecessary to consider the question whether clause (1) of Article 31 should be construed in isolation from the rest of the Article or whether clauses 1 and 2 of Article 31 should be read together, or to determine whether the word 'deprived' as used in clause (1) has the same meaning as compulsory acquisition in clause 2 or whether 'deprivation' referred to in clause 1 must be taken to cover deprivation otherwise than by acquisition or requisitioning of property dealt with in clause 2.

On these points, learned Counsel for the petitioner did not address any arguments before us. If it is assumed that clauses 1 and 2 of Article 31 must be read together and "deprivation" in clause (1) has the same meaning as compulsory acquisition or taking possession of property mentioned in clause (2) then clearly the petitioner is prohibited by clause 5 of Article 31 from challenging the Act on the ground that it is repugnant to the provisions of Clause (2) and therefore also to the provisions of clause (1); if, on the other hand, clause (1) of Article 31 is construed in isolation from the rest of the Article, and the legislation in question falls under that clause, then the only question that can arise for consideration is whether the deprivation of property complained of is by authority of law, that is, by a valid law passed by the legislature. For, clause (1) of Article 31 only contains a declaration of the fundamental rights of private (sic) in a negative form, namely, that no person shall be deprived of his property save by authority of law. In other words this clause implies that a person may be deprived of his property, provided he is so deprived by authority of law. Mr. Bhagwandas Gupta for the applicant challenges the validity of the impugned Act on the ground that it was passed by the Parliament without having legislative competence.

I will deal with this objection later on; but apart from this objection, the petitioner has not raised any other objection to show that the Act under which he has been deprived of his property is not a valid law. It is clear, therefore, that Article 31 (1) by itself in no way helps the petitioner. It is only if he shows that the legislation in question is otherwise invalid, that he can question the constitutionality of the Act on the ground that the Act infringes the provisions of Article 31(1). In the present case the petitioner has not been able to show that the Administration of Evacuee Property Act, 1950 is not a valid law. That being so, the petitioner's contention that there has been an infringement of his fundamental right under Article 19 (1) (f) or Article 31 (1) cannot be accepted.

(10) I ought to state that it is not the contention of the applicant that even after he has been deprived of his property under Section 40 of the Act, there still remain certain rights of his in the property, which he is entitled to enjoy under Article 19(1)(f). It has also not been suggested to us that so far as an evacuee is concerned, certain rights still remain with him even after the declaration of his property as an evacuee property and even after the Custodian has taken possession of the property and has assumed its management and that the provisions in the Act preventing the evacuee to transfer his property violate Article 19 (1) (f). It is therefore, really not necessary for us to consider whether any of the restrictions imposed by the Act on the exercise of the rights in the property by an evacuee is a reasonable restriction in the interests of the general public. If it were necessary to decide the point, I would be prepared to hold that the restrictions imposed by the Act are reasonable and in the interests of the general public.

The Supreme Court has pointed out in — 'Dr. N. B. Khare v. State of Delhi', AIR 1950 SC 211 that in deciding on the reasonableness or otherwise of the restrictions imposed by law the substantive as well as the procedural provisions of the law should be examined. The case of — 'Chintamanrao v. State of Madhya Pradesh', AIR 1951 SC 118 also indicates that if there is a reasonable relation between the provisions of the Act and the purpose the Act has in view, then if those provisions contain any restrictions, they would be reasonable. On these tests and having regard to the events which happened soon after the partition in 1947 and also taking into consideration the entire scheme of the Act which is to make a provision for the custody, management and the administration of evacuee property until a satisfactory and final settlement takes place between India and the Dominion of Pakistan, it cannot be said that the Administration of Evacuee Property Act, 1950 does not satisfy the requirements of Article 19 (5). This is also the view of the Bombay, Madras and Allahabad High Courts. See — 'Abdul Mazid v. P. R. Nayak', AIR 1951 Bom 440; — 'M. B. Namazi v. Deputy Custodian of Evacuee Property Madras', AIR 1951 Mad 930 and — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (FB).

(11) The next contention advanced on behalf of the applicant is that the Administration of Evacuee Property Act, 1950 is invalid because it is retrospective in its operation. The argument is that the Parliament has no power of enacting laws with retrospective effect and that in any case it is incompetent to extend the retrospective operation of the enactment passed by it, to a period anterior to 26-1-50, when the Constitution came into force and that as by the definition of "evacuee" and "evacuee property" given in the Act and by Section 58 (3) the Act has retrospective effect so as to change the character of past transactions entered upon the faith of the then existing laws, the Act is invalid. There is no doubt that the Administration of Evacuee Property Act, 1950, is meant to be retrospective. But the contention that the retrospective provisions of the Act are not within the competence of the Parliament seems to me utterly untenable. The question turns entirely on the meaning of Arts. 245, 246, and 248 of the Constitution which confer on the Parliament the power to legislate. The effect of these Articles is that subject to the provisions of the Constitution the Parliament has power to make laws for the whole or any part of the territory of India with respect of any of the matters enumerated in the "Union List" and the Concurrent List.

Parliament has also exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. Under Entry 41 of the Concurrent List, power is given to Parliament to legislate with respect to custody, management and disposal of property including agricultural land, declared by law to be evacuee property. Now the principle that the Parliament and the State Legislatures are, within the statutory limits assigned to them, bodies possessing plenary powers is so well settled as to be free from doubt. From this principle of the supremacy of the Parliament and the State Legislatures within their allotted spheres, it follows that in the absence of express provision to the contrary, the Parliament and any State Legislature can give to their laws otherwise valid, retrospective or prospective operation. There is in our Constitution a limitation on the power of the Legislatures to make retroactive criminal legislation. These limitations are stated in Article 20. But except for this Article, there is no other provision in the Constitution which points to any limitation of the plenary powers of the Parliament and the State Legislatures so long as they keep within the ambit of the subjects of the legislation specifically assigned to them. There is nothing in Articles 245, 246 and 248 to indicate an intention to withhold from the Parliament the same absolute discretion as the British Parliament has with regard to past events as well as present and future, provided of course Parliament confines itself to the specified subjects and legislates within the limitations prescribed by Article 20.

It would indeed be a violent straining of the wide words of the power to make laws conferred by Articles 245, 246 and 248 if we were to read into them a prohibition of retroactive laws. To do so would be to add to the Constitution, without express words, the prohibition of retrospective laws over and above the limits set out in Article 20. During the course of his arguments, learned Counsel for the applicant pointed out that if no limitation is imposed on the power of the Parliament to define "evacuee" and "evacuee property" then the Parliament would have the power of declaring any class of citizens as evacuees and any property as evacuee property, even if the citizens and the property so declared have no relation, whatsoever, to the ordinary meaning of the expression 'evacuee'. It was said that in passing the impugned legislation, Parliament has abused its powers and included in the definition of "evacuee" even persons who may leave India not for Pakistan, but for any country other than Pakistan and has by giving the Act retrospective effect endangered the status and property of a large number of citizens for something which they did in the past innocently and on the faith of the then existing laws.

I do not think that on any of these grounds the Act can be held to be invalid. As pointed out by the Supreme Court in — 'Gopalan's case', AIR 1950 SC 27 and following that decision by this Court in the case of — 'Ram Dube v. Government of State of Madhya Bharat', AIR 1952 Madh. B. 57 when the Constitution has given to the Legislature the power to legislate with respect to certain matters in clear and unambiguous terms the Court cannot impose limitations on its exercise on extraneous considerations. It is true that a far-reaching power is capable of being abused. It is also true that if such a wide power is given to the Legislature, then there is an obligation on the Legislature to exercise it honestly and sensibly. But the fact that the power may be abused cannot be urged as an argument to show that the power is non-existent. Again, an enactment may be unreasonable, unfair and unjust; but these would be questions of policy which the Court cannot consider in determining whether the legislation is valid or invalid. The remedy for the impropriety of the legislation or for alleged abuse of power by Parliament or for the use of power to promote alleged improper object lies in the Parliament, in the political field, and not in the Courts.

It may be unreasonable, unjust or inexpedient to legislate for the past and to interfere with vested rights; but on the grounds of inexpediency or unreasonableness, a legislature cannot be denied the power, which the Constitution confers, to pass retrospective legislation, if it thinks fit. I am, therefore, unable to accept the contention of the learned Counsel for the applicant that the Administration of Evacuee Property Act, 1950, is invalid because it has retrospective effect. What I have stated above is sufficient to dispose of the additional ground of invalidation urged by the learned Counsel for the applicant, namely, that as prior to 26-1-50 the Dominion Legislature had no power to legislate with respect to the custody, management and disposal of property declared by law to be evacuee property so far as Madhya Bharat was concerned, the Parliament has under the Constitution no power of retrospective legislation with reference to that subject so as to affect any right in 'evacuee property' vested in a citizen in Madhya Bharat before 26-1-50. The contention is ill-founded.

As already stated, under the Constitution and subject to its provisions, Parliament has the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the Union List and the Concurrent List and that the subject matter of the impugned legislation is one enumerated in the Concurrent List; and further the power of the Parliament to Legislate within the appointed limits is absolute and supreme. The Constitution does not restrict or limit the legislative competence of Parliament so as to make it exercisable only with regard to that part of territory of India or only with regard to those subjects in regard to which the Dominion Legislature had before 26-1-50 the power to legislate. The question therefore of the power of Parliament to legislate retrospectively or prospectively with respect to a subject, is in no way affected by the powers of the Dominion Legislature under the Government of India Act, 1935. It is to the provisions of the present constitution that we must look for determining the powers of the Parliament. In support of his contention, learned counsel for the applicant relied on a decision of the Rajasthan High Court in — 'Madan Gopal v. Union of India', AIR 1951 Raj 94 (2).

In that case the question was of the validity of the imposition of income-tax under the Union Income-tax Act on incomes which accrued in Rajasthan prior to 1-4-1950. One of the questions raised in the case was whether the Parliament had power to make a law imposing income-tax in the Rajasthan territory prior to 26-1-50. The learned Judges of the

Rajasthan High Court while thinking that in view of their conclusions on other questions in that case, it was not necessary for them to express any view on the question of the legislative competence of the Parliament, thought it desirable to deal with the question as elaborate arguments were advanced before them. They observed that as the authority of the Dominion Legislature under the Government of India Act, 1935 in the matter of legislation for the purpose of imposition of income-tax was excluded in the Rajasthan before 26-1-50 and as the Government of India Act, 1935 has been repealed by Article 395 of the Constitution, therefore, by virtue of Article 367 and Sec. 6 of General Clauses Act, the previous operation of Section 101 of the Government of India Act, 1935, which dealt with the legislative powers of the Dominion Legislature could not be affected by subsequent legislation. On this reasoning the learned Judges came to the conclusion that under the present Constitution, the Parliament has power to make laws for the imposition of income-tax in Rajasthan from 26-1-50 onward and not retrospectively.

Without in anyway deciding the point as to the validity of the imposition of income-tax in circumstances such as those present in the Rajasthan case, I must say with all respect to the learned Judges that I find it difficult to see how Section 6 of the General Clauses Act could be invoked in such cases for holding that the effect of the repeal of the Government of India Act, 1935 is to confirm for ever the rights vested in the citizens just before the commencement of the Constitution and to deny to the Parliament and the State Legislatures the power of interfering with those rights by enacting retrospective legislation under the powers conferred on them by Articles 245 and 246 of the Constitution. It appears to me that Sec. 6 of the General Clauses Act which merely lays down one of the general rules of construction of statutes, can have no applicability where the Government of India Act, 1935 is not merely repealed but is substituted by a new Constitution under which the Parliament and the State Legislatures are not prohibited from legislating for the past and of interfering with vested rights.

Section 6 of the General Clauses Act would have again no applicability where the Parliament and the State Legislatures with the legislative competence of retrospective Legislation pass an enactment giving it in express terms retrospective effect. The decision of the Rajasthan High Court is also not in point here. It can be distinguished on the ground that before 26-1-50, the Dominion Legislature functioning under the Government of India Act 1935, had the power to legislate for this State with respect to the custody, management and disposal of property declared by law to be evacuee property by virtue of the Instrument of Accession executed by the RajPramukh of Madhya Bharat accepting inter alia all the matters mentioned in the Concurrent List as matters with respect to which the Dominion Legislature may make laws for the State of Madhya Bharat. There is thus no force in the contention of the learned counsel for the applicant that the Parliament cannot make for this state retrospective legislation with respect to the custody, management and disposal of property declared by law to be evacuee property.

(12) Learned Counsel for the applicant did not press on us the contention that the orders of the Custodian declaring the house purchased by her to be evacuee property and rejecting her application for the confirmation of the sale were in excess of the jurisdiction conferred by the Administration of Evacuee Property Act, 1950 on the Custodian. He conceded that if the Act is held valid he could not on the facts and the circumstances, in which the orders were passed by the Custodian in the present case, challenge them as being those passed by the Custodian without jurisdiction or in excess of jurisdiction. It must be noted that Section 58 (3) of the Act by which anything done or any action taken in the exercise of any power conferred by or under the Administration of Evacuee Property Ordinance 1949 is deemed to have been done or taken in the exercise of the powers conferred by or under the Act, in no way helps the petitioner. The sale was not confirmed under the Ordinance and indeed there was no occasion for the petitioner to have the sale confirmed under the Ordinance as the property was not declared as an evacuee property under the Ordinance. Likewise, the analogous provisions in Section 55 (3) of the Ordinance by which all actions taken under the Madhya Bharat Evacuee Property Management Act, Samvat 2005 were saved, is also of no assistance to the petitioner.

Under the Madhya Bharat Evacuee Property Management Act Sm. 2005 and Madhya Bharat Evacuee Property Management Ordinance Samvat 2005, Manavar Khan the vendor was not an evacuee and consequently no proceedings were taken for the confirmation of the sale in favour of the petitioner. The Madhya Bharat Evacuee Property Management Ordinance Samvat 2005 repealed the Gwalior State Evacuee Property Management Ordinance Samvat 2004 & saved all actions taken under the repealed ordinance. But under the Gwalior State Ordinance also Manavar Khan was not an evacuee. The Gwalior State Ordinance did not contain any provision for the confirmation of a transfer by an evacuee. That being so, it cannot be maintained that the intimation which Manavar Khan gave to the Custodian under the Gwalior State Ordinance of the sale of the house by him to the petitioner and the order passed by the Custodian "filed the intimation" is in any sense a confirmation of the sale which is saved by the laws referred to above which were subsequently brought into force in Madhya Bharat.

(13) On a careful consideration of the various points urged on behalf of the applicant, I am of the opinion that the Administration of Evacuee Property Act, 1950 is a valid piece of legislation and the orders passed by the Custodian in exercise of the powers conferred on him under that Act, declaring the house purchased by the applicant from Manavar Khan an evacuee property and rejecting her application for the confirmation of the sale are valid. This application must therefore, be dismissed. In the circumstances of the case, I think there should be no order as to costs of this petition.

(14) SHINDE C. J.: I entirely agree.

B/D.H. Application dismissed.

A. I. R. 1952 MADHYA BHARAT 189
(INDORE BENCH)
FULL BENCH

KAUL C. J., DIXIT AND MEHTA JJ.

Champalal, Applicant v. State.

Criminal Revn. No. 71 of 1950, D/- 6-10-1950.

(a) Criminal P. C. (1898), S. 498 — Power of High Court and Court of Sessions to grant bail — Scope of.

The power given to the High Court and to the Court of Sessions under S. 498 is not merely incidental and instrumental power to carry into execution all the powers given to a trial Court under S. 497. The power is clearly supplementary or subsidiary in that, it completes the provisions of S. 496 with regard to the grant of bail to accused persons. It is wide, uncontrolled by any of the restrictions mentioned in S. 497: AIR 1931 All 504 and AIR 1948 All 26, Rel. on. (Para 5)

Anno: Cr. P. C., S. 498 N. 1.

(b) Criminal P. C. (1898), Ss. 498 and 561A — Power of High Court to cancel bail granted by it — Power of Magistrate to cancel bail granted by High Court.

It is true there is under S. 498 no power to cancel bail as there is in section 497. But, if bail is granted by the Sessions Judge under S. 498, the High Court can, as a Court of revision, cancel the bail. So also, where the bail is granted by the High Court under S. 498, the High Court can in the exercise of its inherent power saved under S. 561A, cancel the bail, if facts are brought to its notice which show that, unless the person so released on bail by it under S. 498 is re-arrested and taken into custody, the ends of justice will be defeated. AIR 1945 PC 94, Expl. and dist. (Para 5)

A direction in the order of the High Court granting bail to the effect, that if at any time, the Magistrate is satisfied that there are reasonable grounds for believing that the accused is tampering with the prosecution witnesses, he would be at liberty to cancel the bail, is not a direction delegating to the Magistrate, the power of the High Court to cancel the bail as the High Court by its order granting the bail has also exercised its discretion to cancel the bail in future leaving it to the Magistrate to determine the fact of tampering the prosecution witnesses. Conditional orders of this kind are in many cases convenient and are certainly not unusual in matters relating to bail and it is within the competency of the High Court to make such orders. AIR 1932 All 534; AIR 1945 Mad 250 and AIR 1948 All 366, Foll. (Para 7)

Anno: Cr. P. C., S. 498 N. 5; S. 561A N. 1.

H. Sanghi and C. B. Sanghi, for Applicant; Advocate General, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('45) AIR 1945 PC 94: (46 Cri LJ 662) 2, 6
('32) AIR 1932 All 534: (33 Cri LJ 684) 7
('33) 54 All 115: (AIR 1931 All 504: 33 Cri LJ 94)
('48) AIR 1948 All 26: (48 Cri LJ 941) 5
('48) AIR 1948 All 366: (49 Cri LJ 521 FB) 5
('40) AIR 1940 Bom 40: (41 Cri LJ 251) 7
('45) AIR 1945 Mad 250: (47 Cri LJ 106) 11

DIXIT J.: This reference arises out of a revision petition against an order dated 29-6-1950 of the Additional District Magistrate, Jhabua, cancelling the bail of the applicant Champalal and ordering his rearrest. The applicant Champalal was arrested on 9-10-49 in connection with offences under sections 395, 397, 398, 126, 120 (b), 148, 332 read with section 109 I. P. C. A challan against him for these offences was filed on 31-12-49 in the Court of the Additional District Magistrate, Jhabua. The accused then applied to the Magistrate as also to the Sessions Judge, Jhabua, for being released on bail, but his applications were rejected. Ultimately the applicant was ordered to be released on bail by my learned brother Mehta J. The order dated 23-5-1949 directing the release of the accused on bail also mentioned that:

"in case the accused applicant tries to tamper with the prosecution evidence for which there must be definite proof, the trial Court will be at liberty to cancel his bail bond."

In accordance with this order the applicant was released on bail. But on 21-6-1950 the prosecution presented an application to the Additional District Magistrate, Jhabua for the cancellation of bail on the ground that the accused was tampering with the prosecution witnesses. The Additional District Magistrate after recording the evidence of some witnesses found that the applicant was tampering with the prosecution witnesses and on 29-6-50 ordered the cancellation of the bail and rearrested the applicant.

(2) The question, that arises for determination in this reference, and on which alone arguments were addressed at the Bar, is, whether in the above circumstances the Additional District Magistrate had the power to cancel the bail granted by this Court on finding that the accused was tampering with the prosecution witnesses. The contention of Mr. Hazarilal Sanghi, who appeared for the applicant, is that sections 497 and 498 of the Criminal Procedure Code must be read together, and that, when a person is directed to be admitted to bail by this Court, the provisions of sub-section 5 of Section 497 of the Code would apply and, therefore, the bail can be cancelled only by this Court. It was argued that sections 497 and 498 of the Code do not confer on the Magistrate the power to cancel the bail granted by this Court and that when the Magistrate does not possess that power, no suggestion or direction given by this Court under Section 561A of the Code could confer on the Magistrate a power to cancel the bail granted by this Court. In support of his contentions Mr. Sanghi relies mainly on certain observations of their Lordships of the Privy Council in — 'Jairam Das v. Emperor', A.I.R. 1945 P.C. 94. The observations on which reliance has been placed on behalf of the applicant are these:

"The High Court either does possess a power to grant bail in the given circumstances or it does not. If it possesses the power, it possesses it independently of any suggestion or direction given by their Lordships. If it does not possess, no suggestion or direction made or given by their Lordships could confer such a power."

The Privy Council further observed in — 'Jairam Das v. Emperor', that:

"In truth the scheme of Chapter XXXIX is that sections 496 and 497 provide for the granting of bail to accused persons before

trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426 .....Finally, their Lordships take the view that chapter XXXIX of the Code together with Section 426 is, and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail."

(3) The learned Advocate General, on the other hand, contends that section 498 of the Code is quite independent of section 497 and is not controlled by section 497; that the power conferred by sub-section 5 of Section 497 to cancel bail and rearrest of an accused is expressly limited to cases in which the accused has been released under section 497 of the Code and that sub-section 5 of section 497 does not apply to an accused person who has been released on bail under Section 498 of the Code. It was contended that as section 498 of the Code does not make any provision for the cancellation of bail and as there is no special provision to the contrary, the High Court can under Section 561 of the Code make an order directing the cancellation of bail and rearrest of the accused person in order to see that the ends of justice are not defeated. It was said that in giving the liberty to the Magistrate to cancel the bail in the event of the accused person being found tampering with the prosecution witnesses the High Court has not in any way delegated its power to cancel the bail to the Magistrate or conferred power to the Magistrate which he did not possess but has simply made a conditional order of bail which was to be operative only so long as the accused did not indulge in certain specified activities and that such a qualified order of bail could be made by the High Court under section 498 read with Section 561A of the Code.

(4) In dealing with the contentions of the learned counsel for the applicant and of the learned Advocate General, it is first necessary to examine the provisions of Sections 497 and 498 of the Cr. P. C. Section 497 deals with the powers of the trial Court to grant or refuse bail to persons accused of non-bailable offences. Sub-section 1 of this section refers to a stage when the accused is first brought before a Court. At this stage there is little or no evidence for a Court to act upon and the matter of granting bail to the accused is entirely in the discretion of the Court subject to the restriction that if there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life, the accused shall not be released on bail except when the accused is a minor under sixteen years of age or a woman or a sick or an infirm person in which case he may be released on bail. If the accused is not released at the initial stage of his appearance in a Court, he can still be released subsequently during investigation, inquiry or trial if there are no reasonable grounds for believing that he has committed a non-bailable offence but there are sufficient grounds for further inquiry into his guilt. Then again if after the conclusion of the trial and before the delivery of the judgment the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any non-bailable offence, the Court must release the accused if he is in custody on the execution by him of a bond without sureties for his appearance to hear the judgment delivered. A person who has been released on bail under section 497 can under sub-section 5 of this section be arrested and committed to custody by the High Court or a Court of Session as well as by any other court if that other Court has ordered the release on bail. It is obvious from the provisions of section 497 that it gives ample discretion to the trial Court to order release on bail in cases of non-bailable offences subject to the restrictions mentioned in sub-sections 1, 2 and 4. The High Court has also the power to grant or revoke bail under section 497 as a Court of revision under Section 439 of the Criminal Procedure Code.

(5) Now coming to section 498, it will be observed that this section deals with three matters, viz. (1) fixing the amount of bond; (2) the power of the Hign Court and the Court of Sessions to admit any person to bail in any case whether appealable on conviction or not, and (3) the power of the High Court and the Court of Sessions to reduce the bail required by a Police Officer or a Magistrate. If the provisions of Section 497 are compared with those of 498 the conclusion seems to be irresistible that the High Court and the Court of Sessions are invested by section 498 with wide powers in the matter of granting or refusing bail not only as Court of superior or revisional jurisdiction but they have concurrent jurisdiction with the Courts of trial Magistrates in the matter.

The High Court can under Section 498 revise the order of the trial Court and hold that the Court should have exercised the discretion in favour of granting bail. The High Court can grant bail to accused persons under section 498 when the grant of bail to the accused by the trial Court is not permissible under section 497. The High Court and the Court of Sessions can also reduce the amount of bail fixed by the Magistrate. The power to grant bail under this section is clearly unfettered by any conditions or limitations imposed by section 497. There are numerous authorities in favour of this proposition. A reference need only be made to — 'Joglekar, K. N. v. Emperor', 54 All 115 (SB) and — 'Kripa Shankar v. Emperor', AIR 1948 All 26. I think it is impossible to contend that the power given to the High Court and to the Court of Sessions under section 498 is merely incidental and instrumental power to carry into execution all the powers given to a trial Court under S. 497. The power is clearly supplementary or subsidiary, in that it completes the provisions of sections 496, 497 with regard to the grant of bail to accused persons. In my opinion, the powers to grant bail by the High Court or by the Court of Sessions under Section 498 are wide, uncontrolled by any of the restrictions mentioned in Section 497. It is true there is under section 498 no power to cancel bail as there is in section 497. But if bail is granted by the Sessions Judge under Section 498, the High Court can as a court of revision cancel the bail. So also where the bail is granted by the High Court under Section 498 the High Court can in the exercise of its inherent power saved under section 561A cancel the bail. For, the High Court has inherent power to see that the trial is properly

conducted and that the ends of justice are not defeated, and if facts are brought to the notice of the High Court which show that unless the person released on bail by the High Court under section 498 is rearrested and taken into custody, the ends of justice will be defeated, the High Court has inherent power to cancel the bail and direct his rearrest.

(6) To my mind, the observations of the Privy Council in — 'Jairam Das v. Emperor', AIR 1945 PC 94 do not affect the above view of the meaning and scope of section 498 which has so far been taken by the various High Courts in India. In — 'Jairamdas v. Emperor', the Privy Council considered the case of granting bail to a convicted person and to whom the Privy Council had given special leave to appeal against his conviction and sentence. The Privy Council held that the High Court has no power to grant bail to a convicted person under section 498 or 561A of the Code and to whom the Privy Council has granted special leave to appeal against his conviction. The decision of the Privy Council is based on the reasoning that after disposal of criminal appeal by the High Court it becomes functus officio and it has no longer any seisin of the case and cannot grant bail to a convicted person and further that the chapter XXXIX of the Cr. P. C., deals only with the granting bail to accused persons and not to persons who have been convicted and that Sec. 498 of the Code has no reference to convicted persons; for, if they were covered by S. 498, it would confer on the Court of Sessions a power to grant bail to a convicted person appealing to the High Court which under Section 426 is confined to the High Court. The Privy Council also observed that the jurisdiction to grant bail can exist only under statutory provisions and that the High Court has no inherent jurisdiction to grant bail to convicted persons and that Section 561A of the Code confers no such powers on the High Court.

In my opinion, the observations of their Lordships of the Privy Council referred to the learned Counsel on behalf of the applicant must be understood with reference to the facts under consideration in that case and limited in meaning by those facts. The Privy Council did not in AIR 1945 P.C. 94 consider the question whether the High Court had the power under Sec. 498 to grant bail to accused persons. It cannot, therefore, be said that the observations of the Privy Council that

> "the scheme of chapter XXXIX is that S. 496 and S. 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision"

are intended to convey the meaning that Sec. 496 and S. 497 contain a complete and exhaustive provision with regard to the grant of bail to accused persons by Courts and that Section 498 contains merely incidental and instrumental provisions to carry into execution the powers granted to Courts under s. 497. It is noteworthy that along with the word "ancillary" the Privy Council also used the words "or subsidiary" thereby indicating that sections other than 496 and 497 in Chapter XXXIX of the Code deal with matters not merely incidental to the execution of the power conferred on the Courts under section 497 but they also supplement the provisions contained in sections 496 and 497 with regard to the grant of bail to accused persons. I have already indicated above how the provisions of section 498 supplement the power under s. 497 to grant bail.

Similarly the observation of the Privy Council that Chapter XXXIX of the Code excludes the existence of any additional inherent power in a High Court relating to the subject of bail must be understood with reference to the question that was under consideration before the Privy Council, viz., whether the High Court has inherent power to grant bail. These observations do not, in my view mean that the High Court cannot in the exercise of its inherent powers saved under S. 561-A make any order as may be necessary to give effect to any order under Chapter XXXIX, or to prevent abuse of the process of the Court or otherwise to secure the ends of justice in relation to an order under Chapter XXXIX. Those observations are only intended to emphasise the fact that the jurisdiction to grant bail exists only under statutory provisions and the High Court has no inherent jurisdiction to grant bail to convicted persons.

(7) There remains for consideration the question whether when the High Court grants bail to an accused person under Section 498 and directs in that order that it would be open to the Magistrate to cancel the bail if the accused person tampers with the prosecution witnesses, does the High Court delegate to the Magistrate its power to cancel bail and thus confer on him a power which he does not possess under the Code. In my opinion, a direction in the order of the High Court granting bail to the effect that if at any time the Magistrate is satisfied that there are reasonable grounds for believing that the accused is tampering with the prosecution witnesses he would be at liberty to cancel the bail, is not a direction delegating to the Magistrate the power of the High Court to cancel the bail. The High Court by its order granting the bail has also exercised its discretion to cancel the bail in future on the ground of tampering with prosecution witnesses, leaving it to the Magistrate to determine the fact of tampering the prosecution witnesses, necessary for the High Court's direction with regard to the cancellation of the bail to become operative. The High Court has by such an order as in this case while granting bail to the accused has also taken the decision to cancel the bail on the ground of tampering the prosecution witnesses and the High Court has itself laid down the condition with regard to the operation of the order granting bail and its cancellation in future and every thing which is to follow upon the condition being fulfilled.

Conditional orders of this kind are in many cases convenient and are certainly not unusual in matters relating to bail and it is within the competency of the High Court to make such orders. The view that the High Court has power to rescind any order issued under Sec. 498 by it in the exercise of its inherent powers preserved under S. 561A of the Code and that a Magistrate would have the power to cancel the bail if the High Court's Order granting bail to the accused specifies that the grant of bail is only temporary and that it would be open to the Magistrate to cancel the bail at a certain stage in the proceedings or on the fulfilment of certain conditions, has also been taken in — 'Mirza Mohammad v. Emperor', AIR 1932 All. 534; — 'Crown Prosecutor Madras v. N. S. Kri-

shnan', AIR 1945 Mad 250 and — 'Seoti v. Rex', AIR 1948 All 366 (FB).

(8) For the above reasons, in my judgment, the Additional District Magistrate Jhabua had the power to cancel the bail granted by this Court to the applicant when the Magistrate in accordance with the order of this Court granting the bail found as a fact that the applicant was tampering with the prosecution witnesses. As no arguments were addressed by the learned Counsel for the applicant and the Advocate-General on the finding of the Magistrate as to the tampering of prosecution witnesses, I express no opinion as to its legality or correctness.

(9) MEHTA J.: I agree with my learned Brother Dixit J. that in pursuance of the direction given by the High Court the Additional Magistrate Jhabua had the power to cancel the bail bond.

(10) It appears to me that the powers conferred on the Sessions Court and the High Court under Section 498, Criminal Procedure Code are wider than those conferred under section 497, Cr. P. C.

(11) At the time of releasing the accused on bail under Section 498, this court has got inherent powers to impose a condition that in case the accused enlarged on bail tampers with prosecution witnesses the bail bond would be cancelled. This Court has got inherent powers under section 561A to see that the trial is properly conducted and that the ends of justice are not defeated and if facts are brought to the notice of the Court that the person released on bail is tampering with prosecution witnesses and the ends of justice will be defeated if he is not re-arrested, then the court trying the accused has got the powers to cancel the bail bond and re-arrest him. Vide — 'Emperor v. Rautmal Kanumal', AIR 1940 Bom. 40.

(12) KAUL C. J.: I agree with the view of law taken by Dixit J. that the High Court had the power to grant bail subject to the condition that the Magistrate who took cognizance of the case could cancel the bail if the accused was found to be tampering with the prosecution evidence, and that the order cancelling the bail passed by the Magistrate in this case cannot be held to be invalid for want of legal authority.

(13) At the hearing before the Full Bench the question whether on merits there was a case for cancellation of bail or not was not argued. The case will now be fixed before a Single Judge for consideration of that matter.

A/G.M.J. Reference answered in the affirmative.

A. I. R. 1952 MADHYA BHARAT 192
(GWALIOR BENCH)

DIXIT J.

Chhote Lal Nand Kumar, Applicant v. Chote Lal Jwala Prashad and another, Non-Applicants.

Civil Revn. Petn. No. 153 of 1951, D/- 17-11-51.

Civil P. C. (1908), S. 151 and O. 25 R. 1 — Security for costs from plaintiff — Use of inherent powers.

With the substitution of the word 'India' for the words 'the States' in Order 25 Rule 1, the Court can exercise its discretion under this Rule only when the plaintiff does not reside in India. After the coming into force, in Madhya Bharat, of the Code of Civil Procedure (Amendment) Act (1951) extending the Code of Civil Procedure, 1908 to Madhya Bharat and making certain amendments in the Code, an order for security for costs cannot be made. On the ground that the plaintiff resides out of Madhya Bharat and does not possess any immoveable property within Madhya Bharat the inherent power of the Court under S. 151 cannot be invoked in matters for which the Code does actually provide. When the Code makes specific provisions in O. 25 R. 1 for taking of security for costs from the plaintiff, then only in those cases security for costs may be demanded from the plaintiff. Even if it may be held that the Court has this inherent power, it is not a case for the exercise of it where the defendants have not alleged or shown any circumstances, apart from the residence of the plaintiff and his not possessing any property in Madhya Bharat, to justify the demand of security from the plaintiff. AIR 1932 Sind 33, disting. (Paras 2, 3)

Anno: C. P. C., S. 151 N. 2 O. 25 R. 1 N. 2.

Prabhu Dayal Gupta, for Applicant; Ram Krishan Dixit, for Non-Applicants.

REFERENCE..... Para.

('32) AIR 1932 Sind 33: (140 Ind Cas 233) 3

ORDER: This is a revision petition against an order of the District Judge Bhind, directing the plaintiff applicant to give security for the payment of all costs likely to be incurred by the defendant non-applicants in a suit filed by the plaintiff against the defendants for a declaration of title to and possession of a certain house. The order in question was passed by the learned District Judge on an application by the defendants to the effect that the plaintiff resides out of Madhya Bharat and does not possess any immovable property within Madhya Bharat. On inquiry, the learned District Judge found this statement of the defendants correct and made the order as regards the security for costs.

(2) The only contention advanced on behalf of the applicant is that after the coming into force, in this State, of the Code of Civil Procedure (Amendment) Act, (1951) Act No. II of 1951 extending the Code of Civil Procedure, 1908 to Madhya Bharat and making certain amendments in the Code, an order for security for costs can be made, only when the plaintiff does not reside in India and that as the plaintiff resides in India, he cannot be called upon to furnish under Order 25 Rule 2 (sic) security for costs.

(3) The order of the learned Sessions Judge cannot, I think, be supported. Section 3 of the C. P. Code (Amendment) Act (1951) provides that in the Code of Civil Procedure "unless otherwise expressly provided for the words "the States" wherever they occur, the word 'India' shall be substituted". The amendment Act, nowhere, says that this substitution is not to be made in Order 25 Rule 1. It is, therefore, clear that with the substitution of the word 'India' for the words 'the States' in Order 25 Rule 1, the Court can exercise its discretion under this Rule only when the plaintiff does not reside in India. The present case does not, therefore, fall within the purview of Order 25 Rule 1. Learned counsel for the non-applicants does not contend that it does. He, however, argues that the court has inherent power to

order a plaintiff to give security for costs even in cases not covered by Order 25 Rule 1. In support of this contention, counsel for the non-applicants relies on — 'Chainrai Valiram v. Sunday Times Ltd.', AIR 1932 Sind 33.

I am unable to accepr this contention. In my opinion, the inherent power of the Court under Section 151 cannot be invoked in matters for which the Code does actually provide. It seems to me that when the Code makes specific provisions in Order 25 Rule 1 for taking of security for costs from the plaintiff, then only in these cases security for costs may be demanded from the plaintiff. To hold otherwise would be to render nugatory the provisions of Order 25 Rule 1. Even if it be held that the court has this inherent power, this does not seem to me to be a case for the exercise of it, for the defendants have not alleged or shown any circumstances apart from the residence of the plaintiff and his not possessing any property in Madhya Bharat, to justify the demand of security from the plaintiff.

The decision of the court of Judicial Commissioner, Sind reported in — 'AIR 1932 Sind 33' is distinguishable on the ground that in that case the question was whether the inherent power of the court under Section 151 could be exercised for demanding of security from the plaintiff who in addition to his being a pauper was a mere nominal plaintiff and was carrying on litigation for the sole benefit of another person. That decision is not an authority for the proposition that on the grounds alleged with reference to residence and possession of property if an order for security under Order 25 Rule 1 could not be made, it could still be made under Section 151 without showing any exceptional circumstances.

(4) For the above reasons I am inclined to think that the order dated 29-8-51 demanding security for costs from the plaintiff applicant is not legal. I, therefore, accept this revision petition and set aside the order. In the circumstances of the case, parties shall bear their own costs of this petition.

B/D.H. Revision allowed.

A. I. R. 1952 MADHYA BHARAT 193
(INDORE BENCH)

DIXIT J.

Narwarsingh and others, Applicants v. State.

Criminal Misc. Appln. No. 142 of 1951, D/- 21-2-1952.

Criminal P.C. (1898) S. 352 — Trial in jail — Validity — Duty of Magistrate.

There is nothing in the Criminal Procedure Code to compel a Magistrate to hold his court in the usual Court-premises. Section 352 of the Code gives a wide discretion to the Magistrate as regards the place where a trial or inquiry is to be held. The ordinary rule is no doubt that the trial or inquiry should be held in the usual court-room. But, there may be circumstances under which the Magistrate may think it expedient for reasons of security for the accused or for the witnesses or for any other valid ground to hold the trial in Jail premises. (Para 3)

But the Magistrate must realise that the place where the trial is held must be something like an open court to which the public generally may have access so far as the same can conveniently contain them. It is also the duty of the Magistrate to see that proper facilities are given to the members of the Bar and the members of the public and that they are not restricted by the Jail rules or by the officers-in-charge of the Jail in attending the trial or inquiry: AIR 1947 All. 436, AIR 1950 Mad. 696 and AIR 1952 Cal. 91 Rel. on. (Para 3)

Hence, where a special Magistrate holds the trial within Jail premises observing the above formalities it cannot be said that the trial is illegal or prejudicial to the accused merely because it is being held in Jail premises. (Para 3)

Anno: Cr. P. C. S. 352 N. 2.

Narwarsingh, Applicant, in person; Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('47) AIR 1947 All 436: (48 Cri LJ 868) 3
('52) AIR 1952 All 91: (55 Cal WN 619) 3
('50) AIR 1950 Mad 696: (ILR (1951) Mad 246) 3

ORDER: In this application Thakur Narwarsingh who along with some other persons is being tried by Mr. H. B. Agarwal, Special Magistrate, for offences under Ss. 395, 397, 398, 120-B, 460, 332, 149, 458, I. P. C. The applicant complains that the Ruler of Zabua, under whose instigation cases relating to the above offences have been instituted against him, resides in Indore and is influencing the prosecution witnesses against him and that the witnesses which he himself wishes to produce in defence are residents of Zabua and Zaknawada which places are at a considerable distance from Indore, and further says that his trial in the Indore Central Jail premises is likely to prejudice him. On these grounds the applicant prays that his trial should be held either at Dhar at Ujjain and that in no case should it be held in the Jail premises.

(2) I have heard the petitioner who was present in person, and the learned Government Advocate. In my opinion the application must be refused. It is not the allegation of the applicant that Mr. Agarwal, the Special Magistrate, is prejudiced against him and the applicant does not ask for a transfer of the cases pending against him from Mr. Agarwal's court to any other court. The applicant no doubt stated before me that during the course of examination of certain witnesses the Special Magistrate suggested questions to the Public Prosecutor and he also suggested answers to the witnesses. A similar allegation has also been made by the other accused persons, who are being tried along with the applicant, in a separate application which is not supported by any affidavit. This allegation appears to me so indefinite and general in character that I am not persuaded even to ask the Magistrate to send to this Court his observations with regard to this allegation. There is therefore, no question of the transfer of the cases pending against the applicant from the Court of Mr. Agarwal to any other court.

(3) As to the objection about holding of the trial in Jail premises, I think there is no force in it. The Government has appointed Mr. Agarwal, as a Special Magistrate under Section 14 of the Code of Criminal Procedure to try the cases against the applicant and has defined the area of his jurisdiction as comprising the entire Madhya Bharat. In holding the trial in the Central Jail premises, Indore, the Magistrate is therefore, holding the trial within the

limits of his jurisdiction. There is nothing in the Criminal Procedure Code to compel a Magistrate to hold his court in the usual Court premises. Section 352 of the Code gives a wide discretion to the Magistrate as regards the place where a trial or inquiry is to be held. The ordinary rule is no doubt that the trial or inquiry should be held in the usual court-room. But there may be circumstances under which the Magistrate may think it expedient for reasons of security for the accused or for the witnesses or for any other valid ground to hold the trial in Jail premises. In — 'Kailashnath v. Emperor', AIR 1947 All. 436, Malik J. (as he then was) observed that there is no provision in the Criminal Procedure Code which compels a Magistrate to hold his court in the usual court-room. Section 352 probably contemplates that a Magistrate can hold his Court anywhere he likes. But the Magistrate wherever he may be compelled to sit by executive orders, is bound by the provisions of Section 352, and he must realise that the place where the trial is held must be something like an open court to which the public generally may have access so far as the same can conveniently contain them. Malik J. also stated that it was the duty of the Magistrate to see that proper facilities are given to the members of the Bar and the members of the public and that they are not restricted by the Jail rules or by the officers-in-charge of the Jail in attending the trial or inquiry.

To the same effect are the decisions of the Madras and Calcutta High Courts reported in — 'In re Ganesan', AIR 1950 Mad 696 and — 'Prasanta Kumar v. State', AIR 1952 Cal 91. I am in respectful agreement with these decisions and I do not think that it can be held that the trial of the applicant would be invalid or would be prejudicial to him merely because it is being held in Jail premises. In the present case, the Special Magistrate is holding the trial in Jail not because there is a direction in the order of the Government appointing him as Special Magistrate that he should hold the trial in the Central Jail, at Indore, but because, the Magistrate has in his discretion decided to hold the same in the Jail premises. On the 15th of December 1951, the Magistrate passed an order stating that for reasons of security it was desirable that the trial should be held in the Central Jail premises. In this order, the Magistrate has also emphasised the fact that his court will be an open court and that all facilities will be given to the pleaders and members of the public for attending the proceedings in his Court and that they shall have free access to the Jail premises. This order was passed by the Special Magistrate in the presence of the applicant and the other accused persons and they were also informed of the facilities which the Magistrate proposed to give to the pleaders and the public. In these circumstances I do not think that the applicant can have any reason to complain that the trial in the Jail premises is prejudicial to him. I am confident that if later on the Magistrate finds or if it comes to his notice that the access of the public or the members of the Bar is restricted in any way, he will no doubt reconsider the matter and pass appropriate orders about the continuance or otherwise of the trial in the Jail premises, after giving full reasons for his decision. I fail to see how on the ground that the Raja of Zabua is influencing the witnesses or that the applicants' witnesses live in Zabua or Zaknawada, this court can direct the Magistrate to sit at Dhar or Ujjain.

(4) For the above reasons the petition is rejected.

B/K.S. Petition rejected.

A. I. R. 1952 MADHYA BHARAT 194 (GWALIOR BENCH)

DIXIT J.

Ram Sahay, Applicant v. The State.

Criminal Revn. No. 41 of 1951, D/- 10-9-1951.

(a) Gwalior State Rules for the Recovery of Government Dues (2001 Sm) Rr. 2 and 10 — Effect of — If supersedes S. 236 Gwalior State Excise Manual — Gwalior State Excise Manual (1995) S. 236.

The effect of reading Rule 2 of the Gwalior State Rules for the recovery of Government dues Smt 2001, with Rule 10 of those Rules, is that if in any enactment, there was any provision for the recovery of sums due to the Government under the Act, the provisions of that Act would continue to be operative; but that, on the other hand, if the enactment did not contain any specific provision for the recovery of such amount, but only directed that any amount due under the Act would be recoverable as an arrear of land revenue, then, the procedure specified in Rule 10 would apply. (Para 3)

R. 10 superseded the provisions of S. 236 of the Gwalior State Excise Manual.

Hence, until at least the application of the Revenue Recovery Act 1890, to the State of Madhya Bharat on 20-4-1950 the procedure for the recovery of sums due to the Government under the Madhya Bharat Excise Act, in the territory of Madhya Bharat comprising the former Gwalior State, was the one specified in Rule 10 of the Gwalior State Rules for the recovery of the Government dues Samvat 2001. (Para 3)

(b) Opium and Revenue Laws (Extension of Application) Act (33 of 1950) S. 4 — Effect of.

The effect of S. 4 of the Act is to repeal the Gwalior State Rules for the Recovery of Government Dues, Samvat 2001 which embody a law corresponding to the Revenue Recovery Act, 1890. (Para 4)

(c) Revenue Recovery Act (1890) S. 7 — Scope.

Section 7, Revenue Recovery Act, preserves the continuity of the specific provisions of any enactment for the recovery of sums recoverable as arrears of land revenue. A direction in an enactment that any sum due to the Government under the Act would be recoverable as arrears of land revenue, is clearly not a specific provision for the recovery of such a sum. (Para 4)

Patankar, for Applicant; Shiv Dayal Deputy Government Advocate, for the State.

ORDER: This is a petition in revision to set aside the proceedings under section 244 Kanoon Mal Gwalior Samvat 1893 pending in the Court of First Class Magistrate, Morar for the realisation of certain Government dues recoverable as arrears of land revenue under section 31 of the Madhya Bharat Excise Act Samvat 2006 (Act No. 29 of 1949) from the applicant. It appears from the record that on 5-4-1950, the Superintendent, Customs and Excise Department addressed a letter to the First Class Magis-

trate Morar stating that an amount of Rs. 52000/- was due from the petitioner and that he had failed to pay the amount inspite of a notice to that effect, and requesting the Magistrate to take proceedings under section 236 of the Gwalior Excise Manual Samvat 1995 for the recovery of the amount as arrears of land revenue. The learned Magistrate declined to take any action on the basis of the letter. Subsequently, on 18-7-50, a proper application was filed by the Department for the recovery of the amount. The Magistrate, then, directed that on payment of the necessary fees by the Department, a warrant of attachment against the property indicated by the Department be issued. On 26-7-50 the petitioner asked the Court to dismiss the application presented to it by the Department on the ground that the Magistrate had no jurisdiction to take any proceedings for the recovery of the amount. The learned Magistrate overruled the petitioner's objection. Thereupon, the applicant went up in revision to the Court of Sessions Gwalior. The learned Sessions Judge, Gwalior rejected the revision petition.

(2) Mr. Patankar who appeared on behalf of the applicant submitted that in filing the petition before the First Class Magistrate, Morar, for the recovery of the amount, as arrears of revenue in accordance with the provisions of the Kanoon Mal, the Superintendent Customs and Excise wrongly followed section 236 of the Customs and Excise Manual, 1995, which had been superseded by section 10 of the Gwalior "Sarkari Matalabon ki Vasuli ke Niyam Samvat 2001" (Rules for the realisation of Government Dues). It was said that these Rules issued in Samvat 2001 were themselves repealed on 20-4-50 by the Union Act (XXXIII of 1950), namely, The Opium and Revenue Laws (Extension of Application) Act, 1950, which extended to the State of Madhya Bharat, the Revenue Recovery Act of 1890; and that, therefore, the recovery of the amount alleged to be due from the petitioner could only be in accordance with the provisions of the Revenue Recovery Act, 1890. The argument of the learned Deputy Government Advocate is that the effect of Rules 2 and 10 of the Gwalior State "Rules for the Realisation of the Government Dues Samvat 2001" was not to supersede section 236 of Customs and Excise Manual Gwalior State Samvat 1995, but to continue the applicability of the provisions of the Kanoon Mal for the recovery of amounts due under the Excise Act; that, therefore, the repeal of the Gwalior State "Rules for the Realisation of the Government Dues Samvat 2001" by the Opium and Revenue Laws, (Extension Application) Act, 1950 did not affect the operation of section 236 of the Excise Manual. Learned Deputy Government Advocate, further, said that as to the direction in section 236 of the Excise Manual, that any sum due to the Government under the Excise Act would be recoverable as an arrear of land revenue, was not a law corresponding to the Revenue Recovery Act, 1890, it could not be said to have been repealed under section 4 of the Opium and Revenue Laws (Extension Application) Act, 1950, and that on the other hand section 7 (a) of the Revenue Recovery Act, 1890 itself indicated that section 236 of the Excise Manual was to continue in force even after the application of the Revenue Recovery Act, 1890 to the State of Madhya Bharat.

(3) On an examination of the provisions of the laws referred to by the learned Counsel and on a careful consideration of their arguments, I am of the opinion that the argument of the learned Counsel for the applicant must prevail. In the Gwalior State Excise Act, there were no provisions for the recovery of any Government dues under that Act. The Gwalior State Customs and Excise Manual Samvat 1995 promulgated by the Gwalior Darbar embodied the rules under the Excise Act and the provisions to carry out generally the purposes of Gwalior Excise Act. Section 236 of the Manual provided that the recovery of any amount due under the Gwalior Excise Act would be in accordance with the provisions of Gwalior State Kanoon Mal as an arrear of land revenue. On 17-12-44, the Gwalior Darbar issued "Rules for the Realisation of Government Dues", These rules classified the Government demands under three heads, namely, Mulki, Mujmi and Vividh. Rules 4 to 9 dealt with the procedure for the recovery of Mulki and Mujmi demands. In respect of Vividh demands, that is miscellaneous demands other than Mulki and Mujmi demands, it was provided in Rule 10 that for the recovery of other Government dues, in respect of which there was no provision in those Rules or in any other Rules or Act, or in respect of which there was a direction in any rule and enactment that they would be recoverable as arrears of land revenue, the procedure laid down in Rule 10 would apply. Rule 2 of the Gwalior State Rules for the Recovery of Government dues Samvat 2001, directed that the Rules shall not affect those demands or the method of their realisation about which there were provisions in any other enactment. In my view, the effect of reading Rule 2 of the Gwalior State Rules for the recovery of Government dues Samvat 2001, with Rule 10 of those Rules, is that if in any enactment, there was any provision for the recovery of sums due to the Government under the Act, the provisions of that Act would continue to be operative; but that, on the other hand, if the enactment did not contain any specific provision for the recovery of such amount, but only directed that any amount due under the Act would be recoverable as an arrear of land revenue, then, the procedure specified in Rule 10 would apply. I do not think that Rules 2 and 10 can be construed in any other way. For to do so and to hold, that even after the coming into force of the Gwalior State Rules for the recovery of Government dues Samvat 2001, the procedure laid down in Kanoon Mal continued to apply for the recovery of sums declared under the various Acts as recoverable as arrears of land revenue, is to defeat the very object with which those rules were issued, namely, the object of providing a specific procedure for the realisations of sums recoverable under various Acts as arrears of land revenue. It must, therefore, be held that Rule 10 superseded the provisions of section 236 of the Gwalior State Excise Manual. The Gwalior State Excise Act was repealed by the Madhya Bharat Excise Act Samvat 2006. Section 31 of the Madhya Bharat Excise Act also laid down that sums due to the Government under that Act should be recoverable as arrears of land revenue in accordance with the law for the time being in force. It is, therefore, clear that until at least the application of the Revenue Recovery Act 1890, to the State

on 20-4-1950, the procedure for the recovery of sums due to the Government under the Madhya Bharat Excise Act, in the territory of Madhya Bharat comprising the former Gwalior State, was the one specified in Rule 10 of the Gwalior State Rules for the recovery of the Government dues Samvat 2001.

(4) That being the view I take of the effect of section 31 of the Madhya Bharat Excise Act and of Rules 2 and 10 of the Gwalior State Rules for the recovery of Government dues on section 236 of the Gwalior State Excise Manual, it is now necessary to see whether the Gwalior State Rules for the Recovery of Government Dues, Samvat 2001 are, as the learned Counsel for the applicant contends, repealed by the Opium and Revenue Laws (Extension of Application) Act 1950. Section 4 of the Extension of Application Act No. 33 of 1950 says:

"If immediately before the commencement of this Act, there is in force in any Part B States,.....any law corresponding to any of the Acts specified in section 2, other than the Taxation on Income (Investigation Commission) Act 1947 (XXX of 1947), that law shall upon the commencement of this Act stand repealed."

The Revenue Recovery Act, 1890 is one of the Acts mentioned in section 2 of Act No. 33 of 1950. On a plain reading of the provisions of the Gwalior State Rules for the Recovery of Government Dues Samvat 2001 and of the Revenue Recovery Act 1890, it cannot be denied that the Gwalior State Rules referred to above embody a law corresponding to the Revenue Recovery Act 1890. In my judgment the effect of section 4 of Act No. 33 of 50 is to repeal the Gwalior State Rules for the Recovery of Government Dues Samvat 2001. In fact the learned Counsel for the State did not contest the position that these Rules were repealed by section 4 of Act No. 33 of 1950. I do not think that section 7 of the Revenue Recovery Act, 1890 can be of any assistance to the counsel for the State. This section only saves the provisions of any other enactment for the time being in force for the recovery of the land revenue or of sums recoverable as arrears of land revenue. It is plain from the language used in that section that the section preserves the continuity of the specific provisions of any enactment for the recovery of sums recoverable as arrears of land revenue. A direction in an enactment that any sum due to the Government under the Act would be recoverable as arrears of land revenue is clearly not a specific provision for the recovery of such a sum. It may also be mentioned in passing that the provisions of an enactment would not include the provisions of any rules made thereunder. According to the definitions in the General Clauses Act 1897, an Act does not include a rule under the Act. It is no doubt true that rules validly made under an Act have the same force as the Act itself but I do not think that on that account it could be successfully contended that the rules themselves are enactment.

(5) For the above reasons, in my view the learned Magistrate erred in commencing proceedings under the provisions of Kanoon Mal for the recovery of the amount alleged to be due from the applicant. The remedy of the Superintendent of Customs and Excise for the recovery of the amount is to proceed by way of an application under the appropriate section of the Revenue Recovery Act, 1890.

(6) In the result, this revision petition is allowed and the proceedings pending in the Court of First Class Magistrate, Morar for the recovery of the amount demanded by the Excise Department are quashed.

B/K. S. Proceedings quashed.

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(GWALIOR BENCH)

KAUL C. J. AND SHINDE J.

Kesrimal, Appellant v. Bansilal, Respondent.

First Appeal No. 7 of 2004, D/- 5-1-1951.

(a) Court-fees Act (1870), Ss. 7 (iii) and 7 (ix) — Para (ix) applies to mortgage suit and not to suit for redemption of pledge — Such suit is governed by S. 7 Para (iii) — Suit held one for recovery of movable property pledged — Valuation for purposes of jurisdiction is market value of property — (Suits Valuation Act (1887), S. 8) — (T. P. Act (1882), S. 58) — (Contract Act (1872), S. 172) — (Gwalior Court-fees Act (Sm. 1964), S. 7, Para 8) — (Gwalior Suits Valuation Act, S. 2).

Under a mortgage of movable property there is a transfer of the ownership of the movable property and the transfer of possession is not necessary. But for a pledge of movable property the transfer of possession is necessary and sufficient. Transfer of ownership of the property is not effected in the case of a pledge. The essential difference between the nature of two transactions is that in the case of a mortgage, property in the thing mortgaged passes to the mortgagee while in the case of a pledge only possession is transferred and the ownership remains with the pawnor. (Para 4)

Plaintiff had pledged some gold ornaments and jewellery weighing certain number of tolas for Rs. 7,000/- with the defendant. Some months afterwards he again pledged some more ornaments and jewellery for Rs. 20,000 with the defendant. Later on the plaintiff redeemed some ornaments on payment of Rs. 7,000/- the remaining pieces still lying with the defendant. On the refusal of the defendant to return these ornaments on payment the plaintiff filed a suit for their redemption on payment of Rs. 20,000/- principal and Rs. 20,000/- as interest or in the alternative for price of the ornaments at the current price.

Held that the transaction being a pledge, S. 7, Para (8) of Gwalior Court-fees Act (Sm. 1964) (corresponding to S. 7, Para 9 of the Indian Act) had no application, since it applied to a case of a suit against mortgagee for the recovery of the property mortgaged. (Paras 4 and 7)

Held further that the suit was covered by S. 7, Para 3 of the Indian Court-fees Act, which applies to suits for movable property other than money where the subject-matter has a market value. Court-fee payable should be on the market value of the suit property, which was Rs. 77,000 according to the valuation put in by trial Court. Same value would determine the valuation for purposes of jurisdiction under S. 8 of the Indian Suits Valuation Act corresponding to S. 2 of the Gwalior Act). The District Judge who tried the suit,

having pecuniary jurisdiction limited to Rs. 50,000 had no jurisdiction to entertain the suit: Chitaley's Court-fees Act, Ref. (Para 7)

Anno: Court-fees Act, S. 7 (iii) N. 1, 4; S. 7 (ix) N. 1; Suits Valuation Act, S. 8 N. 1a; T. P. Act, S. 58 N. 4 and 11; Contract Act, S. 172 N. 1.

(b) Court-fees Act (1870), S. 12 (1) — The finality referred to in Section 12 (1) (corresponding to S. 11 of Gwalior Act) is only with reference to arithmetical calculations of court fees payable and not with reference to questions of classification — Decision of trial Court that S. 7, Para 9 of Indian Court-fees Act (S. 7, Para 8 of Gwalior Act) applies to the suit cannot be treated as final and conclusive under S. 12 (1) —(Gwalior Court-fees Act, (Sm. 1964), S. 11). (Para 9)

Anno: Court-fees Act, S. 12 N. 10.

(c) Civil P. C. (1908), O. 7, R. 10 — Trial of suit in court having no pecuniary jurisdiction — Trial and decree are null and void — Proper order is to return plaint for presentation to proper court. (Para 11)

Anno: Civil P. C., O. 7 R. 10 N. 1, 2.

Shejwalkar, for Appellant; Karkare and Parnerkar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('87) 9 All 191: (13 Ind App 134 PC) 11
('46) AIR 1946 All 456: (ILR (1946) All 454) 8
('87) 11 Bom 462 6
('99) 23 Bom 486 9
('16) 18 Bom LR 587: (AIR 1916 Bom 77) 4
('31) AIR 1931 Bom 234: (136 Ind Cas 176) 9
('12) 16 Ind Cas 963: (16 Cal LJ 375) 9
('16) 33 Ind Cas 891: (AIR 1918 Cal 947) 4
('41) AIR 1941 Cal 518: (196 Ind Cas 762) 9
('31) AIR 1931 Lah 378: (130 Ind Cas 643) 9
('35) 153 Ind Cas 53: (37 Pun LR 125) 10
('21) AIR 1921 Mad 696: (66 Ind Cas 837) 10
('31) AIR 1931 Mad 575: (54 Mad 561) 10
('37) AIR 1937 Mad 81: (ILR (1937) Mad 275 FB) 9
('42) AIR 1942 Mad 502: (202 Ind Cas 65) 9
('43) AIR 1943 Mad 73: (207 Ind Cas 304) 4
('25) AIR 1925 Nag 435: (87 Ind Cas 911) 9
('38) AIR 1938 Nag 481: (178 Ind Cas 97) 9
('42) AIR 1942 Oudh 481: (202 Ind Cas 126) 8
('43) AIR 1943 Oudh 338: (18 Luck 683 FB) 8
('25) AIR 1925 Pat 392: (4 Pat 336 FB) 9
('46) AIR 1946 Sind 103: (ILR (1945) Kar 445) 8

SHINDE J: This is a defendant's appeal against the judgment and decree of the District Judge, Mandsaur. One Bansilal resident of Jawad filed a suit against Kesrimal resident of Mandsaur as follows:

(2) The Firm Shreeram Baldeo pledged on 27-11-1920 golden ornaments and Jewellery weighing 397 tolas and 2 mashas for Rs. 7,000 with the defendant. The same firm again on 14-5-21 pledged golden ornaments and jewellery weighing 655 tolas and 9 mashas and a necklace of 4 strings containing pearls and emeralds for Rs. 20,000 with the defendant. On 2-8-1922 the said firm redeemed certain ornaments weighing 212 tolas by paying Rs. 7,000 to the defendant. The remaining ornaments weighing 840 tolas and 11 mashas are still with the defendant. The plaintiff Bansilal is now the sole owner of the Firm Shreeram Baldeo, as Kanhaiylal and Madanlal have assigned their rights to the plaintiff. As the defendant refuses to return the articles, a decree be passed for redemption on payment of Rs. 20,000 as principal and Rs. 20,000 as interest or in the alternative for the price of the pledged ornaments at the current rate. The District Judge passed the following decree:

A decree for redemption of pledged articles is passed in favour of the plaintiff against the defendant with costs on payment of Rs. 40,000 if the plaintiff pays Rs. 40,000 to the defendant the defendant is to return the pledged articles to the plaintiff; if the defendant fails to return the articles the plaintiff is entitled to receive Rs. 77,000 from the defendant.

Against this judgment and decree the defendant has preferred the present appeal.

(3) The counsel for the appellant has raised several contentions in this appeal. One of them is that the lower court had no jurisdiction to try the suit. As the question of jurisdiction is vital and goes to the very root of the case, I propose to deal with it first.

(4) The specific objection raised by the counsel is that as the value of the pledged articles was admittedly above Rs. 50,000 the lower court had no jurisdiction over the present suit. The present suit was filed on 9-7-1945. At that time the law relating to jurisdiction was contained in The Suits Valuation Act, Gwalior, Act No. 2 of Samvat 1964. Section 2 of the said Act provides for the value of suits for purposes of jurisdiction. The section reads as follows: (Here the section in Hindi quoted).

According to this section where in suits other than those referred to in Court-fees Act Samvat 1964, Section 7 paragraphs 5, 6, 8 and para 9, Clause (Dal) court-fees are payable ad valorem under the Court-fees Act Samvat 1964, the value as determinable for the computation of court-fees shall be the value for the purposes of jurisdiction. This section is analogous to Section 8 of the Indian Suits Valuation Act. The question for determination, therefore, is whether the present suit is covered by Section 7, paragraphs 5, 6, or 8 or 9 clause (Dal) of the Court-fees Act. If the present suit is not covered by any of these exceptions then the valuation for purposes of court-fees shall be the valuation for the purpose of jurisdiction. The lower court has held that the present suit is covered by para 8 of Section 7 of the Court-fees Act. This paragraph is equivalent to para 9 of Section 7 of the Indian Court-fees Act. This paragraph runs as follows:

"In suits against a mortgagee for the recovery of the property mortgaged, and in suits by mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute according to the principal money expressed to be secured by the instrument of mortgage".

It is clear from the language above that if the suit is covered by this paragraph then the valuation for purposes of court fees would be the principal money secured by the instrument of mortgage. The question that has to be examined is whether the transaction in dispute is a mortgage contemplated by para 8 of Section 7 of the Gwalior Court-fees Act. This paragraph no doubt contains the words 'recovery of the property mortgaged' and the word 'property' is capable of being interpreted as being applicable to both movable and immovable property. Hence, if any movable property is mortgaged a suit for its redemption will necessarily fall under this paragraph. It has, therefore, to be determined whether the transaction in dispute is a mortgage or a pledge. If it is a mortgage, then the suit will be covered by para 8 of Section 7 of the Gwalior Court-fees Act. If it is a pledge the said paragraph will not apply. (Vide, The Court-fees Act by Chitaley, 2nd Edition p. 261 and Court-fees Act by Diwan-

chand Obhrai, 2nd Edition p. 74). Under a mortgage of movable property there is a transfer of the ownership of the moveable property and the transfer of possession is not necessary. But for a pledge of movable property the transfer of possession is necessary and sufficient. Transfer of ownership of the property is not effected in the case of a pledge. (Vide — 'Radhakrishnan Chettiar v. Madras People's Bank Ltd.,' AIR 1943 Mad 73; — 'Tehiram Girdharidas v. Longin D' Mello', 18 Bom. L. R. 587; — 'Joyti Prakash v. Muti Prokash', 33 Ind. Cas. 891 (Cal.).) The essential difference between the nature of two transactions is that in the case of a mortgage, property in the thing mortgaged passes to the mortgagee while in the case of a pledge only possession is transferred and the ownership remains with the pawnor.

(5) In the present case if the parties' intention had been to enter into a transaction of mortgage, there was no need to deliver possession of the ornaments. Besides the words in the Noondbahi Index Nos. 7/2 and 7/3 are very significant. In both these entries the word used is 'GAINE' which is the corrupt form of the word 'GEHNA'. The word 'GEHAN' is not used for transactions of the nature of mortgage. It is always used to denote a pledge. The delivery of possession coupled with the use of the word 'GEHAN' in the Noondbahi clearly indicates that the transaction entered into was a pledge and not a mortgage. Consequently, the suit in question is not covered by para 8 of Section 7 of the Gwalior Court-fees Act.

(6) The learned counsel for the respondent contends that in the plaint the transaction is described as 'REHAN BILKABJA' and therefore it should be taken to be a contract of a mortgage. This argument has no force. The property pledged consists of articles of jewellery. Hence the use of the word 'REHAN BILKABJA' (usufructuary mortgage) is meaningless. By no stretch of imagination can it be called a usufructuary mortgage. The nature of the mortgage is to be determined by the intention of the parties as expressed in the deed, and not by the name used in the deed. It is the contents of the agreement, the jural relation constituted by it, that determined the nature of the contract. (Vide —'Abdulbhai v. Kashi', 11 Bom. 462.) A perusal of the entries in the Noondbahi, which are the copies of original record of the transaction, shows that they contain the word 'GAINE' and not the word 'REHEN'. Hence the use of the word 'REHEN' in the plaint does not alter the nature of the transaction.

(7) It is, therefore, evident that the contract entered into was in the nature of a pledge and not in the nature of a mortgage and hence it is not covered by para 8 of Section 7 of the Gwalior Court-fees Act. It is covered by paragraph 3 of Section 7 of the Gwalior Court-fees Act (Vide Court-fees Act by Obhrai, 2nd Edn. P. 74 Note 71 and Court-fees Act by Chitaley 2nd Edn. P. 261 Note 2). This paragraph is equivalent to para 3 of Section 7 of the Indian Court-fees Act. This paragraph runs as follows:

> "In suits for movable property other than money where the subject matter has market value — according to such value at the date of presenting the plaint."

As the articles in dispute have a market value and the present suit is for the recovery of movable property, the court-fees payable would be on the value of the articles on the date of the presentation of the plaint and according to Section 2 of the Suits Valuation Act, Gwalior, the same value would determine the jurisdiction of the court. It is admitted that the value of the articles is above Rs. 50,000. The lower court has estimated the value of the articles at Rs. 77,000. That the value of the articles in dispute is more than Rs. 50,000 is also clear from the cross-objections filed by the plaintiff-respondent in this court. The suit was filed on 9-7-1945. On that date, the District Court had jurisdiction to try suits up to the value of the Rs. 50,000.. It is, therefore, clear that the District Court had no pecuniary jurisdiction to try the suit as the valuation of the suit was above Rs. 50,000/-.

(8) Reliance has been placed on section 11 of the Indian Suits Valuation Act, and it is argued that an objection with regard to under-valuation or over-valuation should not be entertained as it has not been shown that the over-valuation or under-valuation has prejudicially affected the disposal of the suit. This argument cannot be sustained. At the time when the suit was filed the Suits Valuation Act Gwalior was in force. That Act does not contain a section analogous to Section 11 of the Indian Suits Valuation Act. Departmental order No. 5 of S. 1979 issued by the Legislative and Judicial Department Gwalior Government provides for the conditions under which the principles of the Indian laws are to be followed. The first of these conditions is that the principles of those laws, alone can be followed, which are of general nature, provided there is no analogous law prevailing in the State. As already stated, the Suits Valuation Act was in force in Gwalior; hence principles of the Indian Suits Valuation Act cannot be followed. Another condition, laid down by the said departmental order, is that the principles to be followed should not contravene provisions of any law or the policy of the State. Some of the principles contained in Section 11 of the Indian Suits Valuation Act are incorporated in Section 13 of the Gwalior Civil Procedure Code. That Section provides that jurisdiction cannot be ousted merely because the suit is overvalued by the plaintiff. But there is no provision with regard to under-valuation. Hence as Section 11 of the Indian Suits Valuation Act contravenes the provisions of Section 13 of the Gwalior Civil Procedure Code, the principles of that section cannot be followed.

It is also worthy of note that in this case there is no question of over-valuation or under-valuation. There is no dispute with regard to the fact that the value of the articles in question is above Rs. 50,000/-. The question is whether the suit is for redemption as contemplated by paragraph 8 of Section 7 of the Gwalior Court-fees Act or for the recovery of the movable property as contemplated by paragraph 3 of Section 7 of the said Act there is therefore, no dispute regarding the valuation. The question is whether on the admitted value the lower court had jurisdiction. Hence Section 11 has no application to the present suit. Where there is want of inherent jurisdiction, Section 11 does not apply. (Vide 'Shivalomal Gopaldas Firm v. Firm Bholashah Lakhmichand,' AIR 1946 Sind 103; —'Sitaram Singh v. Tikaram Singh,' AIR 1942 Oudh 481; —'Maqsood Ali v. Hunter,' AIR 1943 Oudh 338 (F.B.) and —'Mt Sunder v. Kandhayia Lal', AIR 1946 All 456.) For all these reasons this argument cannot be accepted.

(9) The learned counsel for the plaintiff-respondent next referred us to Section 11 of the Gwalior Court-fees Act and argued that every question relating to valuation for the purpose of determining the amount of any court-fee on a plaint or memorandum of appeal is to be decided by the court in which such plaint or memorandum of appeal is filed and such decision is

final as between the parties to the suit and hence no objection could be raised to the valuation determined by the lower court. This argument also has no substance. The equivalent Section of the Indian Court-fees Act is section 12. There is a consensus of judicial opinion that the words 'every question relating to valuation' refer only to the actual appraisement of value of a suit. The question under what category a suit falls for purposes of court fees is not within the purview of this section. In —'Narasimhalu v. China Ramayya,' AIR 1942 Mad 502 his Lordship of the Madras High Court held that the finality referred to in Section 12(1), is only with reference to arithmetical calculations of court fees payable and not with reference to questions of classification. The same view has been taken in —'Rabindra Nath v. Girindra Mohan,' AIR 1941 Cal 518; —'Motilal v. Shambhulal,' AIR 1938 Nag 481; —'Balkrishna v. Ramkrishna', AIR 1931 Bom 234; — 'Parmeshri v. Pannalal', AIR 1931 Lah 378 and — 'Krishna Mohan v. Raghunandan', AIR 1925 Pat. 392 (F. B.). In —'Govind v. Vithabai', AIR 1925 Nag 435, it was held that the question under what paragraph of Section 7 a suit would fall is not within this section. The same view has been taken in— 'Sundar Mal v. Murray', 16 Ind Cas 963 (Cal) and —'Dada v. Nagesh,' 23 Bom 486. In —'Madan Mohana v. Krupa Sindhu', 1937 Mad 81 (F.B.) their Lordships of the Madras High Court held that the words 'every question relating to valuation' in sub-section (1) of this section is of comprehensive nature and cannot be construed in the restricted sense of a question relating to appraisement of court fee as distinguished from the question of category. But in a later case cited above the same High court held that the question of category is not included in sub-section (1) of Section 12 (Vide AIR 1942 Mad 502). In any case the question whether sub-section (1) of Section 12 refers to the appraisement of value alone or includes category as well is not of much consequence in this case, as the decision with regard to valuation is final under Section 12 only for purposes of court fees and not for the purpose of jurisdiction. (Vide AIR 1942 Mad 502). The argument advanced by the learned counsel for the plaintiff-respondent, therefore, is of no avail to the respondent.

(10) The question of jurisdiction is vital in so far as proceedings before a court having no jurisdiction are of no effect. A court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass and all the proceedings in the suit before the return of plaint are of no effect. (Vide — 'Govindaswami v. Munayathiriyan', AIR 1921 Mad 696, — 'Sankappa Rai v. Keraga Pujari', AIR 1931 Mad 575 and — 'Feroze-ud-Din v. Harbhagwan Nanda', 153 Ind Cas 53 (Lah).

(11) The learned counsel for the plaintiff-respondent also raised a contention that as the powers to try suits of unlimited value were conferred on the District Court on 4-4-1946 and the suit was not tried on merits until that time the objection to the jurisdiction may be waived. No authority has been cited in support of this proposition. Where a suit is instituted in a court having no jurisdiction to try it the defect is a fatal one and cannot be cured by its subsequent transfer to a court having jurisdiction (Vide — 'Ledgard v. Bull', 9 All 191 (P.C.)). Even supposing that this proposition of law is correct, it is not true to say that this suit could have been cognizable by the District Court on 4-4-46. The suit was instituted on 9-7-1945. On that date only High Court, Gwalior, had powers to entertain the suit. If the suit had been filed in the High Court at Gwalior on 9-7-1945 it would have remained in the High Court until 9th September, 1948 (Vide letter No. 7190 of 1948 dated 9-7-50 from the Registrar, High Court, Indore to the Dy. Registrar High Court, Gwalior). It is true that the District Court was invested with powers to try the suits of unlimited amount, on 4-4-1946. (Vide Correction slips Nos. 3 and 10 issued by the Department of Law and Justice published in the Gwalior Government Gazette, dated 6th April 1946). But by notification No. 132 published in the Gazette of 22nd March 1947 it was ordered that High Court should try all the cases pending on 4-4-46. Hence if this suit had been filed in the High Court on 9-7-1945, this would have been a pending suit in the High Court on 4-4-1946 and the case would have, therefore, been tried by the High Court until 9th September 1948. On 9th September 1948 the learned Chief Justice of the Madhya Bharat High Court transferred all the original suits pending in the High Court to the District Court under Section 35 of the Ordinance No. 11 of Samvat 2005. All the proceedings, from the institution of the suit until the decree was passed, were taken in a court, which had no jurisdiction over the suit. All these proceedings are, therefore, null and void. In these circumstances the only remedy is to return the plaint for presentation to the proper court under Order 7, rule 10.

(12) In the view that I take the decree of the lower court must be held to be a nullity. It is, therefore, unnecessary to express any opinion with regard to other contentions raised by the appellant. I would, therefore, allow the appeal and setting aside the decree of the lower court, direct the District Judge to return the plaint for presentation to the competent court according to law. The appellant to get his costs of this appeal from the respondent.

(13) KAUL C. J. — I agree.

B/ R. G. D. Order Accordingly.

A. I. R. 1952 MADHYA BHARAT 199 (GWALIOR BENCH)

KAUL C. J. AND SHINDE J.

State v. Harishankar Chaturbhuj and others, Respondents.

Criminal Appeal No. 40 of 1950, D/- 15-5-1951.

Public Safety — Madhya Bharat Maintenance of Public Order Act (VII (7) of 1949), Ss. 7 and 11 — Notification in Gazette — Delegation of powers under S. 7 to subas for their respective districts — No specific order to individual subas is necessary — Contravention of order under S. 7, promulgated by District Magistrate under powers delegated by Gazette Notification No. 18, D/- 22-4-1949 published in M. B. Gazette, D/- 30-4-1949, is offence under Act.

All that is required by S. 11 is that the Government should by order direct that the powers conferred upon it by the Act shall be exercised or discharged by any officer or authority specifically mentioned in that direction. The expressions 'order' and 'direction' are not terms of art and have no technical meaning. They are used in S. 11, in the same sense in which they are used in common parlance. The order contemplated by S. 11 need not be specifically directed to the person who was to exercise the powers mentioned in the section. It will be sufficient to meet the requirements of the Section if the Government indicate

with sufficient clearness, so as to leave no room for doubt on the subject, that the powers conferred upon it by the Act shall be exercised by some authority specified by it in the said direction.

Notification No. 18 dated 22-4-1949 published in the Madhya Bharat Government Gazette dated 30-4-1949 whereby the Government had directed that all the powers and duties conferred or imposed on it under the Maintenance of Public Order Act except the power of imposing collective fines under S. 6 and the powers under S. 10 of the Act shall be exercised by the Subas in their respective Districts, held was sufficient in law to clothe the District Magistrate, Gird Gwalior with powers under S. 7 (1) and therefore the contravention of an order promulgated by the District Magistrate, Gird Gwalior, under these powers, prohibiting processions, meeting etc. would be an offence, under the Act. 'Dr. D. S. Parchure v. State', AIR 1951 Madh-B 108, Held not correctly decided. (Paras 12, 29)

Shiv Dayal, Deputy Govt. Advocate, for the State; J. M. Anand, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('45) AIR 1945 PC 156: (ILR (1945) Kar (PC) 371) 12, 25

('43) 'Emperor v. Sibnath Banerji', (AIR 1943 FC 75) 24

('47) AIR 1947 FC 38: (48 Cri LJ 886) 13, 14

('49) 1949 Madh BLR 258 13

('50) Cri Revn. No. 43 of 1950: (AIR 1951 Madh-B 108) 2, 8, 13, 28

KAUL C. J. — This is an appeal preferred on behalf of the State against an order of acquittal passed by the learned City Magistrate, Lashkar.

(2) The material facts are as follows:

On 9-8-1950 the District Magistrate Gird Gwalior made an order under Section 7 (i) of the Maintenance of Public Order Act prohibiting all persons, among other things from taking out or participating in any procession, making speeches or shouting any political or party slogans within a certain area till 16-8-1950. This order was proclaimed by loud speakers and other means. On 16-8-1950, this order was renewed and extended to 31-8-1950. The three respondents Harishankar, Ravi Dutta and Bhikamchand were prosecuted for contravention of this order and they were alleged to have taken out a procession and held a meeting within the prohibited area on 26-8-1950. The learned Magistrate has not recorded a clear finding on the question whether the order referred to above was actually contravened by any or all of the respondents named above. He however took the view that the Suba Gird was not clothed with the legal authority to make the order with the contravention of which the respondents were charged. In doing so, he followed the decision of a learned Judge of this court in — 'Dr. D. S. Parchure v. State' Crj Revn No. 43 of 1950. In view of the conclusion arrived at by him as to the legality of the order whereof a contravention was said to have been committed, he acquitted the respondents.

(3) The sole question for consideration which therefore arises is whether the District Magistrate Gird Gwalior had the legal authority to make the order of 9-8-1950.

(4) Under Section 7 of the Maintenance of Public Order Act (No. 7 of 1949) the Government may:

"For the purpose of securing public safety, public order or supplies and services essential to the life of the community, by general or special order prohibit, restrict or impose conditions upon the holding of processions, meetings or assemblies by any person, class of persons or organisations. (2) Any contravention of an order made under this section shall be punishable with imprisonment which may extend to one year or with fine or with both."

(5) Section 11 of the Act runs as follows:

"The Government may by order direct that any power or duty which is conferred or imposed on the Government, not being the power of imposing collective fines under Section 6, shall, in such circumstances and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority specifically mentioned in that direction."

(6) The case for the prosecution was that by Notification No. 18 dated 22-4-1949 published in the Madhya Bharat Government Gazette dated 30-4-1949 the Government had by order directed that all the powers and duties conferred or imposed on it under the Maintenance of Public Order Act except the power of imposing collective fines under Section 6 and the powers under Section 10 of the Act shall be exercised by the Subas in their respective Districts. It was contended on behalf of the respondents that the notification relied upon by the prosecution was not sufficient in Law to clothe the District Magistrate Gird Gwalior with the powers that the Government purported to delegate to him.

(7) The notification in question reads as follows:

(Police Section).

NOTIFICATION.

"No. 18, Indore dated the 22nd April 1949. In continuation of this office Notification No. 8, dated the 19th January 1949, the Government have been further pleased to direct that the powers of the District Magistrate under the United State of Gwalior, Indore and Malwa (Madhya Bharat) Maintenance of Public Order Act, Samvat 2005 (No. 7 of 1949), and the United State of Gwalior, Indore and Malwa (Madhya Bharat) Prohibition of Associations Dangerous to the Public Peace Act, Samvat 2005 (No. 19 of 1949), shall be exercised solely by the Subas in their respective districts. It is also notified for the public information that under Section 11 of the aforesaid Maintenance of Public Order Act the Government have also been pleased to delegate to the Subas for their respective Districts all powers and duties conferred or imposed on the Government under the said Act except the power of imposing collective fines under section 6 and the powers under Section 10 of the Act".

(8) The same contention which was raised on behalf of the respondents was urged on behalf of Dr. Parchure in 'Dr. D. S. Parchure v. State', Cri. Rev. No. 43 of 1950. That matter came up for consideration before a learned Judge of this Court and the contention put forward on behalf of the accused was accepted. Thus, the question before us is whether the view of this notification taken by the learned Judge in Dr. Parchure's case is correct.

(9) The learned Judge made the following observations in rejecting the argument advanced by the learned Government Advocate.

"In the case before me no order has been produced directing the Subas to exercise the powers of the Government as required in Section 11. The notification published in the Gazette is something different from an order or a direction to the

Subas; and is also not in substantial compliance with the requirements prescribed in Section 11 of the Maintenance of Public Order Act. What is required is only an order or direction to the Subas, not a notification to the Public about delegation of powers."

(10) In that case the then Suba of District Gird Gwalior was examined as a witness and he admitted that he did not receive any order or direction from the Government under Section 11 of the said Act. He further added that the notification published in the Gazette of 30-4-1949 was the only thing which he had in his mind when he passed the order whereof the legality was challenged.

(11) The position in the present case is practically the same. The District Magistrate who made and got proclaimed by the loud speakers and other means the order of 9-8-1950 was examined as a witness in this case. But neither the prosecution nor the defence asked him whether apart from the Notification published in the Gazette of 30-4-1949 he had received any order from the Government investing him with the powers under Section 11 of the Maintenance of Public Order Act.

(12) I will therefore consider whether the notification of 30-4-1949 was sufficient in law to clothe the Suba Gird Gwalior with the authority to make the order of 9-8-1950. A reference to Section 11 which has been reproduced earlier, will show that all that is required is that the Government should by order direct that the powers conferred upon it by the Act shall be exercised or discharged by any officer or authority specifically mentioned in that direction. The expressions 'order' and 'direction' are not terms of art and have no technical meaning. They are used in Section 11 in the same sense in which they are used in common parlance. An order is the same thing as a mandate or command and a direction according to Oxford Dictionary is "an instruction what to do", "an order". It will thus be seen that these words may at times be used as synonymous. The word 'order' brings forth the relation of the person or authority who issues the instructions to the person to whom these are issued more pointedly than the word direction. An order is generally issued by a superior to a subordinate.

The word delegate used in the notification has also no technical meaning. According to Oxford Dictionary it means 'commit authority etc. to'. The Maintenance of Public Order Act does not specify any particular form in which the order referred to in Section 11 is to be made. Therefore, in passing an order such as is contemplated by Section 11 the Government was free to choose its own form and to couch it in any words it considered proper. Nor can I find anything in Section 11 to support a contention which was put forward by the learned counsel for the respondents that the order contemplated by that Section must be specifically directed to the person who was to exercise the powers mentioned in the section. The opening words of the Section are "the Government may by order direct". It does not say "the Government may by order direct the officer or authority who is to exercise the powers". It will be sufficient to meet the requirements of the section if the Government indicate with sufficient clearness, so as to leave no room for doubt on the subject, that the powers conferred upon it by the Act shall be exercised by some authority specified by it in the said direction. This would be no more than commitment or delegation of the powers conferred upon it by the Act to some other person and the word delegate used in the Government notification appears to me to be a very appropriate expression to indicate the Government decision, see — 'Emperor v. Sibnath Banerji' A.I.R. 1945 P. C. 156, observations on page 162 column 2.

(13) The learned Judge responsible for the decision in —'Dr. Parchure's case', AIR 1951 Madh-B. 108 referred to the following observation made by him in another case. The — 'Madhya Bharat Government v. Shri Dube' 1949 Madh-B. L. R. 258:—

"It may be mentioned here that the process of making an order is something different from the expression of it. — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor' A.I.R. 1947 F. C. 38. The two are not synonymous. Expression of an order is not sine qua non of making an order. It is, in my opinion, only a record that the order has actually been passed and only connotes the fact of making the public in this way aware of the existence of the order. Therefore, too much importance cannot be given to mere forms of expression if the order is actually passed by the authority empowered by a Statute. Forms of expression, however, do assume importance when the original order is not produced and when the order is required to be authenticated, or, is published in the Gazette. Then it becomes necessary that expression of an order should conform in substance to the statutory requirements."

(14) With the greatest respect I am unable to subscribe to the proposition that the process of making an order is 'always' something different from the expression of it. Reference is made by the learned Judge for this dictum to the observations of the learned Chief Justice of the Federal Court in — 'J. K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. Emperor' AIR 1947 F. C. 38. Possibly the learned Judge had in mind the following observations of Spens C. J. at page 42 of the report:

"It appears to imply that the process of making an order precedes, or is something different from the expression of it."

(15) I am clear that the learned Chief Justice did not intend to lay down either a legal proposition or to make a statement of fact which may be universally true. It is easy to conceive of many cases where the making of an order is also the expression thereof and the two processes are simultaneous. This is what is done every day by Judges in making orders in the judicial business transacted by them. The learned Chief Justice made this observation while commenting upon Section 40 (1) of Schedule IX of the Government of India Act which ran as follows:

"All orders and other proceedings of the Governor General-in-Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a Secretary to the Government of India, or otherwise the Governor-General-in-Council may direct, and when so signed, shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General-in-Council."

(16) It was contended with reference to that Section that it was imperative that all orders and proceedings made by the Governor-General-in-Council should fulfil three requirements:

1. That they should be made by the Governor-General-in-Council.

2. That they should be expressed to be so made; and

3. That they should be signed by the proper person therein mentioned.

(17) The order whereof the legality was challenged in that case was said to be bad in as much as it did not purport to be made by the Governor-General-in-Council nor was it expressed to be so made though it was signed by one of the Secre-

taries to the Government. The learned Chief Justice observed:

"In the first place, it must be noticed, dealing with sub-section (1) of Section 40 alone, that the provision that all orders of the Governor-General-in-Council are to be expressed to be made by the Governor-General-in-Council does not define how orders are to be made but only how they are to be expressed. It appears to imply that the process of making an order precedes, or is something different from, the expression of it. It does not say that orders can only be made by "being", or "if", expressed to be made by the Governor-General-in-Council etc."

(18) In my opinion it is an error to read into this any general proposition of law that the process of making an order is always something different from the expression of it. I do not think that it is necessary for me to stress this point further as it is our every day experience that in most cases an order is made and expressed by one single process.

(19) Having thus cleared the ground I will now consider whether the Notification No. 18 dated 22-4-1949 met the requirements of Section 11 and was sufficient in law to clothe the Subas of different districts in Madhya Bharat with the power to make the order under Section 7 (1) of the Maintenance of Public Order Act in appropriate circumstances. The relevant portion of the Notification has already been reproduced earlier in this judgment. It is true that it is not specifically directed to any individual. It purports to be a notification published in the Gazette for information of the public. But that should in my opinion be no reason to hold that it does not fulfil the requirements of S. 11. As already stated all that Section 11 requires is:—

1. That the Government should by order direct;
2. That any power or duty which is conferred or imposed on it shall be exercised or discharged by any officer or authority; and
3. that such authority or officer should specifically be mentioned in that direction.

(20) We know that the Act does not insist upon the order referred to in Section 11 being made or expressed in any particular form. Nor does the Act prescribe any particular language in which the order must be couched. Reference to Section 11 is specifically made in the Notification published in the Gazette. The marginal note of section 11 "delegation of powers and duties of Government" is also noteworthy. The Notification also specifically uses the 'delegate' and says that the Government have also been pleased to delegate to the Subas for their respective districts all powers and duties etc. etc. It cannot be said that this is not an order containing a direction that certain powers of the Government shall be exercised by the Subas in their respective districts. The words "the Government have also been pleased to delegate to the Subas for their respective districts all powers and duties conferred or imposed upon the Government under the said Act" may without straining the language be paraphrased as follows:

The Government have been pleased to direct that all powers and duties conferred or imposed on it under the Maintenance of Public Order Act are committed to (that is these powers shall be exercised by) the Subas in their respective districts.

(21) Thus it is clear that the person or authority to whom the power is delegated is specifically mentioned in the notification. The notification further mentions what powers are delegated to the Subas. This is made abundantly clear by specific reference to Section 11 in the Notification. Two of the three requirements of the section mentioned above are thus met. The third requirement is that it should be an order. Can it be said that because the extract reproduced from the Gazette of 30-4-1949 does not specifically mention the word "order" but uses the word "notification" it is not a command or direction by the Government which it was the duty of the Subas and all other persons concerned to follow? Such an objection if raised would for obvious reasons be unsustainable.

(22) If the Government of Madhya Bharat had published the following in the Gazette:

"The Government have been pleased to delegate to the Subas in their respective districts all powers and duties conferred or imposed upon us under the said Act except the powers of imposing collective fines under Section 6 and the powers under Section 10 of the Act".

I am sure it could not be said that this was not an order by the Government which fulfilled all the requirements of Section 11 of the Maintenance of Public Order Act. Is it then the addition of the words "It is also notified for the public information" which changed its character? I see no reason why this should be so. As already shown by me section 11 does not require that the order contemplated by it should be addressed or directed to any one in particular. This one is addressed to the public in general and because it is so addressed can be no reason to change its character & to make it any the less a direction such as is required by Section 11.

(23) It is true that a cursory reading of the extract reproduced from the Gazette may give one the impression that the Government have already passed a separate order under section 11 and a notification is published in the Gazette informing the public that such an order has been passed. But there is nothing in this extract which would justify us to reject the Deputy Government Advocate's contention that the extract itself should be taken as the order, to which are added a few words informing the public of the same. That it is called a notification and not an order does not in my opinion detract from its value as a command or direction of the Government which it is the duty of all concerned to comply with.

(24) What I have said so far is sufficient to lead to the conclusion that the present appeal must be allowed. Assuming however that the extract reproduced from the Gazette is only a notification (as distinct from the order whereof the existence is necessarily implied in the words "have been pleased to delegate"). It contains a recital that the Government have been pleased to delegate the powers conferred upon them under the Act to the Subas in their respective districts in the State. Still as observed by the Chief Justice of the Federal Court in —'Emperor v. Sibnath Banerji', (AIR 1943 F. C. 75)

"In the normal case the existence of such a recital in a duly authenticated notification will, in the absence of any evidence as to its inaccuracy, be accepted by a court as establishing that the necessary condition was fulfilled. The presence of the recital in the notification will place a difficult burden on the accused to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate.'

(25) The above quoted passage was approved by Lord Thankerton in — 'Emperor v. Sibnath Banerji', AIR 1945 P. C. 156 at p. 161.

(26) A presumption arises that judicial and official acts have been rightly and regularly done. It is no answer to this argument that the Suba who

was examined in this case as a witness did not specifically state that such an order as contemplated by Section 11 was separately passed. The fact that the Suba was not aware of it cannot displace the presumption which arises in favour of the existence of such an order under Section 114 of the Evidence Act. The presumption is not displaced merely because the accused chose to question the existence of the order.

(27) I may state that Mr. Shiv Dayal, Deputy Government Advocate, while maintaining the right of the Government to claim privilege with regard to the proceedings of the Cabinet, offered to show us if we so desired, material which would prove the existence of the order on the basis of which the Notification of 30-4-1949 was published in the Gazette. I will content to base my decision on the grounds already mentioned irrespective of any material which is not on the record.

(28) I am for the reasons given above of the opinion that the view taken in — 'Dr. Parchure's case, Cr. Revn. No. 43 of 1950' (Madh-B.) is not correct.

(29) The appeal is allowed. The order of acquittal passed by the learned Magistrate is set aside and the case is remanded to the trial Court for disposal in accordance with the law.

(30) SHINDE J: I agree.

B/R.G.D. Appeal allowed.

A. I. R. 1952 MADHYA BHARAT 203 (GWALIOR BENCH)

DIXIT J.

Ram Chandra and another, Applicants v. The State.

Criminal Misc. Petn. Nos. 4 and 5 of 1952, D/- 10-3-1952.

(a) Criminal P. C. (1898), Ss. 497 and 498 — Power of High Court under S. 498.

The power to grant bail under section 498 is unfettered by any condition or restriction imposed by S. 497 and High Court can grant bail under Section 498 to an accused person, when the grant of bail to the accused by the trial Court is not permissible under S. 497. AIR 1952 Madh-B 189 (FB), Foll. (Para 5)

Anno: Cr. P. C., S. 498 N. 1.

(b) Criminal P C. (1898), S. 497 — Principles governing grant of bail.

The object of the detention of the accused is to secure his appearance to abide the sentence of law. That being so, except, where a statute specifically requires, the principle which should guide the court in the exercise of its discretion is the probability of the accused appearing to take the trial and not his supposed guilt or innocence. It is an error to suppose that considerations such as the nature of the charge, the nature of the evidence, the severity of the punishment awardable are by themselves material in deciding whether an accused person should or should not be admitted to bail. They are relevant because they affect the likelihood of the accused person's failing to appear for his trial. That likelihood is certainly affected by the gravity of the charge, the cogency of the evidence and the wealth of the accused which renders him more willing to bear the forfeiture of the bail-bond and also less willing to bear the ignonimity of a conviction. The fact that there is also a possibility of the accused tampering or attempting to tamper with the witnesses is also a factor that is relevant to the question of grant of bail. (Para 5)

Anno: Cr. P. C., S. 497 N. 4.

(c) Criminal P. C. (1898), S. 497 — Overwhelming evidence — Presumption.

Presumption about the possibility of the accused absconding cannot be drawn from the solitary circumstance that the evidence against the accused is telling. (Para 6)

Anno: Cr. P. C., S. 497 N. 4.

(d) Criminal P. C. (1898), S. 497 — Refusal of bail as punishment.

Where, there is no material on the record that the applicants are trying to abscond or tamper with the prosecution witnesses the applicants cannot be refused bail solely on the ground that the offence which they are alleged to have committed is highly antisocial in character. A refusal of bail on this ground would amount to prejudging the guilt of the applicant and withholding bail as a measure of punishment. It is an elementary principle of our criminal law that bail cannot be refused as a punishment. (Para 8)

Anno: Cr. P. C., S. 497 N. 4.

(e) Criminal P. C. (1898), S. 498 — Non-bailable offence — Exercise of discretion.

When the offence for which the applicants are being tried is not bailable, but it is not one to which Section 13 A of the Essential Supplies (Temporary Powers) Act applies, the discretion vested in the High Court under Section 498, Criminal Procedure Code is not controlled by the restriction whether there are reasonable grounds for believing that the accused persons are guilty of the contravention of the Cotton Textiles (Control) Order. (Para 5)

Anno: Cr. P. C., S. 498 N. 1.

Puttu Lal Dube, for Applicant, in No. 4; Tara Chand, Patankar, Samvatsar and Anand, for Applicant, in No. 5; Shiv Dayal Deputy Govt. Advocate, for the State.

REFERENCE..... Para.

('50) Case No. 71 of 1950: (AIR 1952 Madh-B 189 FB) 5

ORDER:— The two applicants Ram Chand and Rang Lal Daga are being tried by the Sub Divisional Magistrate, Gwalior, for an offence under section 7 of the Essential Supplies (Temporary Powers) Act, 1946 read with clause 24 of the Cotton Textiles (Control) Order 1946. The prosecution case against them, briefly stated, is that on receiving secret reports that the J. C.. Mills Ltd. Gwalior were selling cloth manufactured by them above the control price through their selling agents Messrs. Ram Chandra Jagannath, Mr. Niranjan Das, Deputy Director, Enforcement, New Delhi came to Gwalior on the afternoon of 27-2-52, with a party consisting of Pyare Lal, Inder Lal and some officers of the Enforcement Department with a view to find out by laying a 'trap' whether the Mills did, or did not, sell cloth above the control price.

It is said that on his arrival at Gwalior Mr. Niranjan Das posing himself as Ram Lal a Munim of a firm Messrs Babu Badan Singh of Pahasu contacted the applicant Ram Chand of the firm Messrs. Ram Chandra Jagannath, the selling agents of the Mills and negotiated with him the purchase of eleven bales of shirting cloth at a price 45 p: c. in excess of the ex-mill price; that on the next day that is on 28-2-52, Niranjandas approached Mr. Pendharkar the City Magis-

trate Lashkar in connection with the proceedings for noting the numbers of the currency notes to be handed over to the applicants in payment of the price, the recovery of notes and the arrest of the applicants and, that, thereafter he again met the applicants Ram Chandra to settle the deal. It is alleged that, when Ram Chandra refused to make a reduction in the price on Niranjan Das's insistence, the applicant Ram Chandra and one Kanhaiya Lal, who is also an accused person in this case took Niranjandas to the applicant Rang Lal Daga, who is the Deputy Secretary and Deputy General Manager of the Sales Department of the J. C. Mills and, that Ranglal Daga also in spite of the request by Niranjandas to reduce the price, demanded a price 45 per cent above the ex-mill price for the sale of the bales of shirting cloth.

The deal was accordingly settled at the excess price and on 29.2.52, Niranjandas again went to the Mill premises for completing the deal and paying the price. The prosecution alleged that on this day also Niranjandas met Rang Lal Daga and he directed Ram Chandra to have the necessary document prepared and receive both the ex-mill price and the black marketing premium'. Soon after the price was paid by Niranjandas in currency notes and while the amount was being counted by Kanhaiyalal, Mr. Pendharker the City Magistrate and other members of the raiding party arrived on the scene, seized the money and prepared a recovery memo. It is said that Rs. 29675/- which had been paid by Niranjandas as the price of the cloth were recovered from the possession of the applicant Ram Chandra. Mr. Niranjandas then lodged a report with the police station Lashkar on 29.2.52 at about 11. a. m. The applicant Rang Lal and Ram Chandra were arrested on 29-2-52.

(2) The petitioners then applied for bail to the Sub-Divisional Magistrate which was refused. They then applied to the Sessions Judge, but as they were unsuccessful also in that Court, they have made the present applications under section 498 Cr. P. C. The applications have been resisted by the State.

(3) Mr. Tara Chand learned counsel appearing for the applicant Rang Lal Daga argues that the grant of bail to the applicant is a matter which under section 498 of the Code is entirely in the discretion of this court and, that in determining whether this discretion should be exercised in favour of the accused, the question for consideration is not whether prima facie there are reasonable grounds for believing that the accused is or is not guilty of the offence charged and whether he has offered any explanation of the allegations made against him; it is whether on a consideration of the nature of the charge, the nature of the evidence and the character and the standing of the accused, there is a probability of the accused person appearing in the court to take the trial.

It is said that the only evidence against Rang Lal is the statement of Niranjandas that Rang Lal refused to accede to a request for the reduction of the price; that there is no evidence that any money was recovered from Ranglal or that he signed any document with regard to the sale and that the prosecution witnesses are mainly Niranjandas and the members of his raiding party which he brought from Delhi and that they are not the type of persons who could be tampered with by the accused and further that the prosecution failed to show in the courts below that there was any likelihood of the accused Rang Lal absconding.

Learned Counsel for the applicant proceeded to argue that in the absence of any danger of the applicants absconding tampering with the prosecution witnesses the applicant is entitled to ask this court to exercise its discretion in his favour and to admit him to bail and that bail cannot be refused to him on the ground that the offence with which the accused is charged is one of highly anti-social character, for to do so would be to prejudge the guilt of the accused and withhold bail merely as a punishment. On behalf of the applicant Ram Chandra Mr. Puttu Lal Dube, while adopting the arguments of Mr. Tara Chand contended that the prosecution has no evidence to show that it was his client, who was legally competent to enter into a contract for the sale of the eleven bales and that he did in fact conclude the contract of the sale or that any money was received by him as the purchase price.

(4) Mr. Shiv Dayal on behalf of the State strongly urges that there is a likelihood of the petitioners' absconding and also of the prosecution witnesses being tampered with by them, that the social position & the status of the applicants cannot be taken into consideration in granting bail. It was further said that the evidence against the applicants is so overwhelming that it should be presumed that there was a likelihood of their absconding. Mr. Shivdayal drew my attention to the fact that Kaul C. J. has held in a case the facts of which were somewhat similar to that of the present case, that where the prosecution evidence against the accused person is overwhelming, the court should presume that there was a danger of the accused not appearing to take the trial.

(5) On a consideration of the arguments of the learned counsel for the parties I am inclined to grant bail to the applicants. There can be no doubt that the offence for which the applicants are being tried is not bailable. But it is not one to which section 13A of the Essential Supplies Act applies; the discretion, therefore, vested in this court under section 498 Cri. P. Code, is not in the present case controlled by the restriction whether, there are reasonable grounds for believing that the accused persons are guilty of the contravention of the Cotton Textiles (Control) Order. It seems to me unnecessary to refer to the large number of cases decided by the various High Courts laying down the principles on which the High Court and the Sessions Court should exercise its discretion under Section 498 Cri. P. Code in the matter of granting bail.

So far as this court is concerned it has been laid down by a Full Bench of the court in — 'Champalal v. The State' No. 71 of 1950 Madh-B. that the power to grant bail under this section is unfettered by any condition or restriction imposed by section 497, and that High Court can grant bail under section 498 to an accused person, when the grant of bail to the accused by the trial court is not permissible under section 497. It is well settled that the discretion of the court to admit the accused to bail is not arbitrary but judicial and is governed by the established principles. It seems to me, however, necessary to emphasise that the object of the detention of the accused is to secure his appearance to abide the sentence of law. That being so, except where a statute specifically requires, the principle which should guide the court in the exercise of its discretion is the probability of the accused appearing to take the trial and not his supposed guilt or innocence.

It is an error to suppose that considerations such as the nature of the charge, the nature of the evidence, the severity of the punishment award-

able are by themselves material in deciding whether an accused person should or should not be admitted to the bail. They are relevant because they affect the likelihood of the accused persons' failing to appear for his trial. That likelihood is certainly affected by the gravity of the charge, the cogency of the evidence and the wealth of the accused which renders him more willing to bear the forfeiture of the bail-bond and also less willing to bear the ignominity of a conviction. The fact that there is also a possibility of the accused tampering or attempting to tamper with the witnesses is also a factor that is relevant to the question of grant of bail.

(6) I do not propose to make any observations on the fact alleged by the prosecution or on the evidence they propose to render. For, in my opinion, the question whether the applicant should or should not be admitted to bail must be decided with reference to the enquiry whether, there is any likelihood of their absconding or tampering with the prosecution witnesses. The trial magistrate refused bail solely on the ground that there was a possibility of the applicant's tampering with the witnesses. I fail to see how Niranjandas and other officers of his department and the members of his raiding party, who appear to be the principal witnesses in this case, could be said to be the witnesses of the type who should be prepared to change their statements under the influence of the applicants. It is said that the applicants are influential and wealthy persons and have contacts with important persons. If that is so, it would appear that even if the accused are not admitted to bail, there would be a number of other persons capable of tampering with the evidence, if they are inclined to do so.

The prosecution did not place in the courts below and have not placed before me also, any material on the basis of which it could be said that there is a probability of the applicant's absconding. In fact, the courts below did not base their refusal to grant bail on this ground. The learned Dy. Government Advocate bases the apprehension of the prosecution with regard to the absconding of the applicants mainly on the ground that the evidence against the accused is overwhelming. I do not think any such presumption about the possibility of the accused absconding can be drawn from the solitary circumstances that the evidence against him is telling. It is the cumulative effect of the circumstances such as the nature of the evidence, the gravity of the charge, the severity of the punishment, the character of the accused that must be taken into consideration in answering the question whether there is a probability of the accused person failing to appear to take his trial.

The decision of Kaul C. J. relied upon by the learned Dy. Government advocate is not before me and I am not in a position to say whether the learned Chief Justice intended to lay down as a rule that the possibility of the accused person absconding should be presumed on the strength of the evidence alone or whether he, in the context of the facts and the circumstances of the case drew such a presumption against the accused persons in that case.

(7) Learned counsel for the State laid some stress on the circumstance that the applicant Ranglal tried to fake illness in order to secure bail from the trial magistrate. Before me the applicant Rangalal is not seeking bail on the ground of sickness. Even assuming that the applicant's illness is faked, I do not take it as a circumstance decisive of the likelihood of the applicant's absconding.

(8) There being thus no material on the record that the applicants are trying to abscond or tamper with the prosecution witnesses the applicants cannot be refused bail solely on the ground as the learned Sessions Judge did, that the offence which they are alleged to have committed is highly antisocial in character. A refusal of bail on this ground would, in my opinion, amount to prejudging the guilt of the applicant and withholding bail as a measure of punishment. It is an elementary principle of our criminal law that bail cannot be refused as a punishment.

(9) For the above reasons I grant bail to the applicants. If the applicant Rangalal Daga executes a personal bond in the sum of Rs. one lac with two sureties of Rs. 50,000/- each to the satisfaction of the Sub Divisional Magistrate, he shall remain on bail until the conclusion of the trial. If the applicant Ramchandra executes a personal bond of Rs. 25,000/- with two sureties of the like amount each to the satisfaction of the Sub-Divisional Magistrate he shall also remain on bail, until the conclusion of the trial.

B./ D. H. Order accordingly.

A. I. R. 1952 MADHYA BHARAT 205
(INDORE BENCH)
CHATURVEDI J.

Kana and others, Applicants v. State.

Criminal Revn. No. 123 of 1951, D/- 12-11-1951.

(a) Penal Code (1860), Ss. 147, 149 and 325 — Charge under, against several accused — Conviction under S. 147 — Sentence — Criminal P. C. (1898), S. 32.

Where the accused are charged under Ss. 325, 147 and 149, Penal Code, but all are convicted under S. 147 only the court would not be justified in imposing a more severe punishment on one of the accused if there is nothing in the evidence to show that he had assaulted anybody or had taken a prominent part in the occurrence. (Para 2)

Anno: Cr. P. C., S. 32 N. 3.

(b) Penal Code (1860), Ss. 141 and 147 — Assembly lawful in its inception — Other party found to be aggressor — Assembly does not become unlawful by repelling attacks by other party — Members of such assembly cannot be convicted of rioting.

The complainant was in possession of a field given to him on lease for a year by the jagirdar of the village. The accused who had obtained a lease from the jagirdar for the subsequent year told the complainant through panchas that he should not plough the field in question as he had obtained a lease and the complainant agreed accordingly. Subsequently when the accused party went to the field for purposes of ploughing, they were obstructed by the complainant's party with the result that there was rioting. The accused were tried and convicted under S. 147, Penal Code.

Held that the complainant having acquiesced in his dispossession by the accused who had the jagirdar's authority to plough the field, had no right to stop the ploughs of the accused. The members of the accused party could not be held to be members of an unlawful assembly, and as such could not be held to be guilty of rioting.

A lawful assembly does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts. AIR 1916 Mad 1062 (2), Ref to.

An assembly of persons lawfully exercising the lawful rights would not become

an unlawful assembly merely by repelling an attack made on them by persons who had first acquiesced in handing over possession to them. (Paras 3, 4)

Anno: Penal Code, S. 141 N. 8; S. 146 N. 4, 7.

Bharucha, for Applicants; Government Advocate, for the State.

REFERENCE..... Para.

('16) AIR 1916 Mad 1062 (2): (16 Cri LJ 743) 4

ORDER: The petitioners are fourteen in number. All are residents of Chohankhedi. They were challaned by Khudel Police under Sections 325, 147 and 149, and were convicted only under Section 147 by the Sub-Divisional Magistrate, Second Class, Paragana Indore. Petitioners Govinda, Mangya, and Budhya were fined Rs. 50/- each. The remaining applicants were sentenced to one month's rigorous imprisonment each and Rs. 50/- fine each. They appealed to the Sessions Judge who dismissed their appeal so far as their conviction was concerned but he allowed the appeal (except in the case of Kana, appellant) so far as the sentence was concerned and set aside the sentence of imprisonment but maintained the fine imposed on each applicant. Kana's appeal was dismissed and his sentence was also maintained. Kana and others have come in revision to this court; and, Mr. Bharucha contends, firstly, that the distinction in the sentence made by the Court in Kana's case and in the case of others cannot be sustained from the legal point of view.

(2) In my opinion, this contention is well founded. The prosecution story in brief is that on 18th August 1949 the applicant Kana along with others, 13 accused and 10 ploughs, went over to the field of the complainant, Saligram, assaulted him, and his servants and took possession of the field unlawfully. The main evidence against the accused is that of P. W. 1 Saligram the complainant. I have gone very carefully through his deposition but he does not say anything against Kana. (After narrating the statement of this witness the judgment proceeds:) There is not a single word indicating that Kana assaulted anybody or abused anybody or did anything even to enforce his right in the field. There is not a single witness who deposes anything against him; and under these circumstances, I agree with Mr. Bharucha that Kana cannot be singled out for imposing a punishment more severe than that imposed on others.

(3) The crucial point in the case is whether there was any unlawful assembly or not. On behalf of the defence, two witnesses, Patel of the Village Chensingh D. W. 1, and Jagirdar Ramchandra Shastri, D. W. 2, have been produced and a document Ex. D/8 has been proved. From this evidence, it transpires that the field in question was formerly in possession of one Shankar Patel. After Shankar's death it was given by the Jagirdar to Shaligram complainant, and after one year the Jagirdar gave it to Kana, applicant, whose son had been adopted by Shankar before his death. It is not disputed that the land belongs to Jagirdar and the Jagirdar had power to give it to anybody for a year. The main question then is whether Kana had the right or not to take his plough to the field in dispute. The Patel Chensingh deposes that as soon as he received Ext. D/8 from the Jagirdar, through Kana, then he sent for four Panchas and in the presence of the Panchas he told Shaligram that after the receipt of Ex. D/8 he should not plough the field in question. According to the Patel's deposition Shaligram had agreed not to plough the land at all. And after that, Kana and others reached the field in dispute with their ploughs. If the deposition of Patel Chensingh is true it will mean that Shaligram had acquiesced in his dispossession of the field in dispute; and, once he had acquiesced in his own dispossession, he had no right to stop the ploughs of Kana and others who had the Jagirdar and Patel's authority with them.

(4) Under the circumstances, I think Mr. Bharucha is right in his contention that Kana and his party cannot be members of an unlawful assembly and cannot be held guilty of rioting. An assembly led by Kana and others was lawful in the circumstances of the case and a lawful assembly does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts — 'In re Mukka Muthrian', AIR 1916 Mad. 1062 (2). An assembly of persons lawfully exercising the lawful rights would not become an unlawful assembly merely by repelling an attack made on them by persons who had first acquiesced in handing over possession to them. Individuals may be liable for particular acts of hurt committed by them, but here the Magistrate himself did not find any of the petitioners guilty of causing hurt, even constructively.

(5) The main difficulty with the trial court in this case has been, that the defence evidence has not been carefully considered by it. I do not understand how the statement of the Jagirdar and the Patel of the village can be brushed aside. Where the defence witnesses have not even been cross-examined and their evidence stands unrebutted, there is no reason why their evidence should not be accepted. The courts below have not held that the two witnesses produced by the defence are unreliable and it does not appear why a Jagirdar and a Patel of village will tell lies before a court. There is neither the evidence of friendship with the accused, nor of enmity towards the complainant. The only explanation for ignoring this evidence given by the trial court and the appellate court is that in his statement before the court, Kana applicant had not specifically raised his plea that he had with him the Jagirdar's authority to plough the field. But it has to be borne in mind that Kana was not debarred under any provision of law from raising this plea afterwards; and no inference as to the guilt of any accused person can be necessarily drawn from any erroneous or even a false statement made by him or by omission of a material particular made by the accused.

(6) From the questions put in cross-examination to Shaligram P. W. 1; Deokaran P. W. 2; and Chhotya P. W. 3, it becomes quite clear that the plea of the accused in this case, from its very inception had been that Kana was authorised by Ext. D/8 to plough the field; and then it becomes quite immaterial whether Kana deposed or did not depose anything about it in his statement under Section 342. In my opinion, therefore, the evidence of the two disinterested defence witnesses cannot be brushed aside in this manner. An improbability to prevail against the direct evidence of disinterested witness must be clear and cogent; and the circumstances upon which the two courts below proceeded do not, in my opinion, satisfy this test.

(7) For these reasons I have no hesitation in differing from the two courts below who appear to me to have proceeded upon a wrong

view of the improbabilities of the case set up by the defence. First, it is not suggested that Shaligram had occupancy rights in the field, or, that the Jagirdar was in the habit of running with the hare and hunting with the hound. If the period for which the field was given to Shaligram is not mentioned in Ext. P/8, I do not know if there is any provision in law which debars the Jagirdar from giving the field to any other tenant after one year, or from treating Ext. P/8 as creating a tenancy either from year to year or a tenancy at will.

This question has not at all been touched by the courts below. Secondly, it is suggested by the trial court that the land for which the possession was given to Kana and others has not been specifically mentioned in Ext. D/8. When the Jagirdar and the Patel of the village come and depose in the trial court that this 'Chhithi' was meant for the field in dispute the point raised by the trial court loses its importance. Where the facts are stated by the witnesses with sufficient correctness and precision the legal effects which flow from them are a matter for determination by the court which conducts the trial. The court ought not to have expected a better standard of proof than that which has been laid down in the Indian Evidence Act; for, legal proof is neither more nor less than what is indicated by the definition of the word "proved" in section 3 of the Evidence Act.

(8) I would not repeat the views of the trial court that Shaligram, Chhotya, Ramnarayan and Rajaram and others have told a lie, before the court on the material point in the case; and it is difficult to believe them on the question how the scuffle, assault and quarrel originated in the field and which party actually was the aggressor and how the rioting took place. It appears that Shaligram had first agreed in the presence of the Patel that Kana and others should take possession of the field, but exactly when this party came with the ploughs and took possession of the field Shaligram suddenly changed his mind and obstructed them. This was not a case of "maintaining his right" and was not justifiable. In my opinion under these circumstances the conviction of the applicants cannot be sustained.

(9) I would, therefore, allow the revision, set aside the conviction and sentence of all the applicants and acquit them. Kana applicant is on bail and he need not surrender. His bail bonds are cancelled.

B/K.S. Accused acquitted.

A. I. R. 1952 MADHYA BHARAT 207
(GWALIOR BENCH)

SHINDE C. J.

Yeshwantrao Sabnis, Applicant v. Bhalchandrarao and others, Opponents.

Civil Revn. No. 154 of 1951, D/- 17-4-1952.

Civil P. C. (1908), O. 22 R. 4 (2) — What pleas may be taken by legal representatives.

A legal representative must continue the litigation on the cause of action sued upon and cannot set up a new and individual right. He can take up any plea which may be appropriate to his character as legal representative. But he cannot take up a new and inconsistent plea or a plea contrary to the one taken by the deceased. Nor can he take any plea which was not open to the deceased defendant himself. (Para 2)

If the legal representatives want to raise any new point which deceased could not have raised they must get themselves impleaded in their personal capacity or they must challenge the decree in a separate suit. AIR 1924 Lah 45; AIR 1924 Mad 245; AIR 1943 Pat 433 and AIR 1947 Bom 307, Rel. on. (Para 3)

Anno: C. P. C., O. 22 R. 4 N. 15.

Mungre, for Applicant; Shejwalkar, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

('40) ILR (1940) All 153: (AIR 1940 All 99 FB) 2
('47) AIR 1947 Bom 307: (49 Bom LR 174) 2, 3
('21) AIR 1921 Cal 343: (63 Ind Cas 92) 2
('24) AIR 1924 Lah 45: 4 Lah 72 2
('24) AIR 1924 Mad 245: (73 Ind Cas 376) 2
('35) AIR 1935 Mad 52: (154 Ind Cas 659) 2
('43) AIR 1943 Pat 433: (217 Ind Cas 49) 2

ORDER: This is plaintiff's revision. Plaintiff filed a suit for the recovery of mortgage money against Ganpatrao defendant. Ganpatrao filed written statement on 28-10-1950, wherein he admitted the claim except for compound interest and costs. During the pendency of the suit Ganpatrao died. His legal representatives Bhalchandrarao, Madhavrao and Sadashivrao were brought on the record. They filed written statements on 10-5-1951 and took several pleas. Plaintiff filed an application dated 24-5-51 and objected to some of the pleas taken by the legal representatives. This objection was overruled by the trial court. Hence the plaintiff has filed this revision.

(2) The trial court in dismissing the application of the plaintiff has made the following observations:

"Vakil vadine — AIR 1924 Mad 245; — AIR 1921 Cal 343 ityadi ka hawala deeya hai, jinme karar deeya hai ki: 'Legal representatives cannot plead contrary to what deceased has pleaded'. Kayam mukaman is mamle me koi bat 'contrary plead' nahi keeya hai balki sabika jabab dave ke alawa jaweed majeed ujarat kiye hai jo sabika daweke 'contrary' nahi hai. Pus najayaj gair mutaalik hai, aur darkhwast na manjoor kee jati hai."

Application of the plaintiff dated 24-5-51 states as follows:

"Kanoon kayam mukaman pratiwadi aisi koi jabab dehi nahi kar sakte hai ki jo mutwafi pratiwadi ne na kee ho.

Pus aise kul jadeed ujrat kayam mukaman namanjoor kiye jawe, wa prakaran ko wajaye tankeehat waramdagi ke karwai us stage se chalu kee jawe kee gis stage par mutwafi pratiwadi ke intakal ke wakta thi."

Before proceeding to determine what pleas can be taken by the legal representatives of the deceased in this case, it is necessary to review the position of law on the subject. Order 22 Rule 4, Civil Procedure Code runs as follows:

"(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to this character as legal representative of the deceased defendant....."

It is clear from sub-r. 2 of R. 4, that a legal representative can make only such defence as

is appropriate to his character as legal representative. A legal representative must continue the litigation on the cause of action sued upon and cannot set up a new and individual right. He can take up any plea which may be appropriate to his character as legal representative. But he cannot take up a new and inconsistent plea or a plea contrary to the one taken by the deceased. In — 'Ghulli v. Sawan', AIR 1924 Lah 45, their Lordships of the Lahore High Court observed as follows:

"When a party to a suit dies, a legal representative is appointed, merely in order that, the suit might proceed, and a decision be arrived at. It is the rights and disabilities that have to be considered and the mere fact that Gulli could not have brought a suit to set aside these alienations on the ground of limitation is not, in our opinion, sufficient to render the suit by Nigahia liable to dismissal."

In — 'Thambatti v. Sankara Menon', AIR 1924 Mad 245 their Lordships of the Madras High Court observed as follows:

"We are not able to understand how the present legal representative of the third plaintiff has any different legal character from the third plaintiff himself or any, which would enable him to abandon the third plaintiff's contentions in the present proceedings, with which alone we are concerned."

In — 'Kameshwar Singh v. Rajbansi Singh', AIR 1943 Pat 433, Chatterji J. made the following observations.

"The widow has been impleaded in this appeal as the legal representative of her deceased husband, and as such she can raise only such objections as could have been taken by her husband himself."

In — 'Darappa v. Mallappa', AIR 1947 Bom 307 Lokur J. observed as follows:

"As observed in — '4 Lah 72', when a party to a suit dies, his legal representatives are appointed merely in order that the suit might proceed, and a decision be arrived at. It is the rights and disabilities of the original parties that have to be considered and not those of the legal representatives themselves. All that the legal representatives can, therefore, do is to take up the suit at the stage at which it was left when the original party died and to continue it. It is not open to them to assert their own individual or hostile title to the suit. It follows, therefore that, if any defence to the suit was not open to the deceased defendant, his legal representative would not be at liberty to plead that defence. If for instance, the deceased defendant was estopped from putting forward any defence, his legal representatives, though not themselves similarly estopped, would not be at liberty to put forward that defence. That would be allowing the legal representatives to set up or agitate a new or individual right, and it is not open to them to put forward any personal defence. As held in — 'Thavazhi Karnavan v. Sankunni', AIR 1935 Mad 52, if a legal representative wants to raise any new point which the deceased party could not have raised, he must get himself impleaded in his personal capacity, or he must challenge the decree in a separate suit. The same view was taken by a Full Bench of the Allahabad High Court in — 'Ramugrah Ojha v. Ganesh Singh', ILR (1940) All 153 (FB)."

These decisions have now crystallized the position of law on the subject. It is not open to a legal representative to set up his own individual or hostile title to the suit. Nor can he take any plea which was not open to the deceased defendant himself.

(3) This being the position in law let us examine the pleas taken by the legal representative in this case. Ganpatrao deceased admitted the fact of mortgage. He only contended that the plaintiff is not entitled to charge compound interest, and that the plaintiff was not entitled to costs. In the written statements filed by the legal representatives, they have taken four pleas which are as follows:

1. That the mortgage house being ancestral joint family property, Ganpatrao alone had no right to mortgage it.

2. The debt was not taken for any legal necessity, nor did the legal representatives benefit by it. Consequently that debt is not binding on the mortgaged house.

3. There has been no partition between Ganpatrao and his sons. Hence Ganpatrao had no right to mortgage any particular share in the property.

4. That the rent note not being registered, the mortgaged house is not liable for the payment of the amount of that rent.

It is clear that all these four pleas were not open to the deceased, in so far as he had admitted the fact of mortgage and the amount of rent due to the plaintiff. Consequently his legal representatives cannot raise these pleas which were inconsistent with the ones taken by the deceased himself. As laid down in — 'Dareppa v. Mallappa', AIR 1947 Bom 307, if the legal representatives want to raise any new point which deceased could not have raised, they must get themselves impleaded in their personal capacity or they must challenge the decree in a separate suit. The result is that this revision petition must succeed.

(4) Accordingly the revision is allowed and the order of the lower court is set aside. Applicant to get his costs from the opposite parties.

B/K.S. Revision allowed.

END

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MADRAS HIGH COURT

1952

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PUISNE JUDGES :

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ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR		
1	1950	M	504	215	1950	M	652	419	1951	M	227	620	1951	M	256	821	1951	M	765
8	"	"	742	219	"	"	740	433	"	"	311	626	1950	"	827	826	"	"	640
21	"	"	725	227	"	"	561	442	"	"	231	636	"	"	814	835	"	"	883(1)
30	"	"	654	228	1951	"	406	449	1950	"	770	645	1951	"	67	838	"	"	659
37	"	"	704	233	1950	"	690	458	"	"	779	661	"	"	34	842	"	"	1
56	"	"	538	237	"	"	800	463	"	"	665	701	"	"	358	859	"	"	591
65	"	"	462	241	"	"	479	473	1951	"	12	709	"	"	262	867	"	"	698
68	1951	"	280	246	"	"	696	535	"	"	350	712	"	"	258	883	"	"	425
70	"	"	267	257	"	"	521	544	"	"	331	729	"	"	107	893	"	"	55
77	1950	"	492	305	1951	"	48	549	1950	"	823	751	"	"	793	897	"	"	807
111	1951	"	209	330	"	"	222	555	1951	"	63	763	"	"	676	907	"	"	725
119	1950	"	738	342	"	"	333	571	"	"	419	770	"	"	399	932	1952	"	510
125	1951	"	261	366	1950	"	634	581	"	"	314	782	"	"	353	951	1951	"	500
135	"	"	269	375	"	"	582	593	"	"	291	792	"	"	529	969	"	"	610
149	"	"	120	387	1951	"	721	607	"	"	213	799	"	"	7	973	"	"	760
209	1950	"	480	393	"	"	56					815	"	"	204	986	"	"	707

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1951	M	466	145	1951	M	656(2)	281	1951	M	807	449	1951	M	831(1)	556	1951	SC	193
5	"	"	542	150	"	"	491	285	"	"	775	450	"	"	855	560	"	"	189
11	"	"	611	153	"	"	107	289	"	"	732	453	1952	"	608	565	"	M	897
13	"	"	759	164	"	"	710	290	1952	"	607	454	"	"	510	569	"	"	851
14	"	"	607	165	"	"	718	291	"	"	175	463	"	"	502	570	"	"	900
15	"	"	591	167	"	"	704	292	"	"	675	466	1951	"	206	573	"	"	903
18	"	"	520	168	"	"	713	296	1951	"	721	468	"	"	814	577	"	"	853
21	"	"	606	169	"	"	115	298	"	"	844	472	1952	"	178	580	"	"	910(1)
28	"	"	56	174	"	"	583	310	"	SC	101	474	1951	"	883(1)	581	1952	"	500
35	"	"	63	183	"	"	663(1)	314	"	"	144	475	1952	"	684	588	"	"	650
42	"	"	67	184	"	"	707	328	"	"	111	476	1951	"	879(1)	596	1951	"	917
49	"	"	608	187	"	"	660	333	"	"	103	477	"	"	885(2)	612	"	SC	204
51	"	"	674	188	"	"	752	340	"	M	783	478	1952	"	165	617	"	"	207
55	"	"	640	189	"	"	659	347	"	"	813	481	"	"	509	621	"	"	226
59	"	"	822	191	"	"	773	353	1952	"	564	483	"	"	160	625	"	"	229
62	"	"	706	192	"	"	661	355	1951	"	824	486	"	"	685	628	"	M	147
64	"	"	612	194	"	"	715	364	"	"	809	488	1951	"	890	673	"	"	852(2)
69	"	"	601	196	"	"	711	366	"	SC	108	493	"	"	810	674	1952	"	170
73	"	"	698	200	"	"	687	370	"	"	128	497	"	"	187	676	1951	"	895
81	"	"	672	207	"	"	772(1)	384	"	"	97	502	1952	"	495	679	1952	"	172
83	"	"	667	210	"	"	723	389	"	"	157	507	"	"	704	682	1951	"	877
84	"	"	658(2)	213	"	"	141	410	1952	M	491	510	"	"	504(1)	684	"	"	905
87	"	"	665	220	"	"	725	417	1951	"	204	511	1951	"	886(1)	690	1952	"	163
91	"	"	719	231	"	"	765	420	"	"	816	513	1952	"	173	691	1951	"	894
92	"	"	705	234	"	"	774	422	"	"	766	514	1951	"	864(2)	693	"	"	852(1)
93	"	"	658(1)	236	"	"	865	423	"	"	208	515	"	"	756	694	"	"	888
94	"	"	703	244	"	"	796	426	"	"	812	518	"	"	870	698	"	"	883(2)
95	"	"	656(1)	248	"	"	693	429	"	"	722	526	"	"	864(1)	700	"	"	885(1)
97	"	"	676	254	"	"	829	431	"	SC	174	527	"	"	191	701	1952	"	602
101	"	"	610	258	"	"	777	435	"	M	1011	548	"	"	875	704	1951	"	876(1)
102	"	"	500	265	"	"	817	436	"	"	793	549	"	"	902	706	"	"	876(2)
110	"	"	760	274	"	"	182	442	"	"	733	551	"	"	879(2)	707	"	"	605
115	"	"	70					446	"	"	841	554	1952	"	183	709	"	"	882

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MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
1	1951	M	930	49	1951	M	843	93	1951	M	1012	172	1951	M	952	202	1952	M	92
9	"	"	910(2)	53	1952	"	322	96	"	"	1003	175	1952	"	161	205	"	"	263
19	"	"	927	56	1951	"	997	101	"	"	950	176	1951	"	938	209	"	"	1
23	"	"	880	63	1952	"	81	105	"	SC	301	182	1952	"	91	222	1951	"	969
25	"	"	717	72	"	"	88	121	"	M	93	183	1951	"	994	229	1952	"	184
30	"	"	764	74	"	"	86	139	"	SC	315	185	"	"	987	231	"	"	283
32	1952	"	504(2)	76	1951	"	943	141	"	"	318	191	1952	"	265	232	"	"	257
39	1951	"	753	84	"	"	1013	163	1952	M	90	194	"	"	124	235	"	"	101
43	1952	"	559	86	1952	"	53	165	1951	"	995	195	1951	"	996	241	"	"	95
45	"	"	498	87	1951	"	935	167	"	"	1007	197	1952	"	94	245	1951	"	962
48	1951	"	713	92	"	"	1002	171	1952	"	112	199	"	"	162	259	1952	"	98

MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR			MLJ	AIR		
264	1952	M	579	358	1952	M	74	456	1952	M	169	526	1952	M	32	593	1952	M	289
269	"	"	266	366	"	"	11	459	"	"	293	527	"	"	176	597	"	"	300
270	1953	"	259	374	"	"	61	464	"	"	384	530	"	"	126	605	"	"	586
271	1952	"	256	382	1951	"	974	471	1951	"	1056	531	"	"	159	609	"	"	394
272	"	"	224	389	1952	"	125	477	"	"	1044	532	"	"	66	619	"	"	297
277	1951	"	979	391	"	"	171	479	"	"	1051	535	"	"	136	623	"	"	582
288	"	SC	316	395	"	"	114	485	1952	"	258	558	"	"	49	625	"	"	255
291	"	"	441	397	"	"	113	486	"	"	40	559	"	"	79	627	"	"	158
299	"	M	1010	399	"	"	59	487	1951	"	1047	560	"	"	44	630	"	"	411
302	1952	"	107	402	"	"	45	492	1952	"	185	561	"	"	150	637	"	"	23
303	"	"	238	406	"	"	39	494	"	"	19	564	"	"	115	638	1951	SC	464
314	1951	"	934	409	"	"	70	496	"	"	33	568	"	"	151	641	"	"	481
325	1952	"	68	411	"	"	276	499	"	"	58	577	"	"	542	645	1952	"	12
333	"	"	106	418	"	"	600	501	1951	"	1060	582	"	"	43	649	"	M	193
335	"	"	271	419	"	"	597	506	1952	"	51	583	"	"	180	656	"	"	605
340	"	"	273	421	"	"	599	511	"	"	20	585	"	"	179	658	"	"	409
343	1951	"	459	423	"	"	177	517	"	"	120	586	"	"	60	661	"	"	149
345	1952	"	182	424	"	"	127	523	"	"	25	588	"	"	18	663	"	"	590
346	"	"	35	438	"	"	27	524	"	"	80	589	"	"	292	664	"	"	166
353	1951	"	986	446	"	"	267	525	"	"	197	591	"	"	181	668	"	"	186
356	1952	"	174	452	"	"	74									683	1951	SC	458

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MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR			MLW	AIR		
1	1950	PC	105	291	1951	M	733	465	1951	M	900	679	1952	M	162	872	1952	M	596
4	"	SC	218	296	"	"	814	468	"	"	910(1)	681	"	"	90	874	"	"	61
10	1951	M	56	299	"	"	855	469	"	"	888	683	1951	"	890	882	"	"	276
18	"	"	12	301	"	"	813	473	1952	"	163	689	1952	"	1	889	1951	"	824
45	"	"	610	303	"	"	772(1)	474	"	"	322	702	"	"	124	898	"	"	994
47	"	SC	41	305	"	"	208	475	1951	"	851	703	"	"	182	900	1952	"	125
82	"	M	70	307	1952	"	160	476	1952	"	170	705	1951	"	987	902	"	"	184
110	"	"	107	311	1951	"	182	477	1951	"	883(2)	711 (1)	"	"	879(1)	904	"	"	40
116	"	"	115	318	"	"	810	479	"	"	903	711 (2)	"	"	969	905	1951	"	1044
121	"	"	640	321	"	"	809	482	"	"	910(2)	716	1952	"	510	906	1952	"	27
125	"	"	659	323	1952	"	502	491	"	"	877	725	"	"	68	915	1951	"	1047
127 (1)	"	"	663(1)	326	1951	"	831(1)	493	"	SC	204	729	"	"	608	920	1952	"	293
127 (2)	"	"	660	327	"	"	807	497	"	M	917	730	1951	"	766	925	"	"	23
128	"	"	63	331	1952	"	684	513	"	SC	201	731	1952	"	175	926	"	"	25
137	"	"	672	333	"	"	178	516	"	"	207	732	"	"	224	927	1951	"	459
139	"	"	676	335	"	"	491	520	"	"	189	737	"	"	98	929	"	"	1060
142	"	"	583	341	1951	SC	1	525	"	"	214	742	1951	"	962	934	"	"	1051
151	1952	"	675	346	"	M	883(1)	531	"	"	186	752	"	"	1012	940	1952	"	257
154	1951	"	693	347	"	SC	9	535	"	"	184	755(2)	1952	"	53	943	1951	SC	315
160	"	"	698	350	"	"	11	537	"	"	193	756(1)	"	"	161	945	"	"	301
168	"	"	606	353	"	"	16	541	"	"	196	756(2)	1951	"	992	960	"	"	293
169	"	"	520	361	"	M	187	544	"	"	177	759	1952	"	265	971	(1)1952	M	177
172	"	"	542	366	"	SC	115	547	"	"	139	762	"	"	266	971	(2)1951	SC	280
178	"	"	707	370	"	"	118	554	"	"	14	763	1953	"	259	977	"	"	285
181	"	"	687	373	"	"	120	557	"	"	144	764(2)	1952	"	256	982	1952	M	20
189	"	"	466	378	"	"	124	571	"	M	927	768	1951	"	1002	987	1951	SC	247
193	"	"	777	382	"	"	128	574	1952	"	650	770	1952	"	579	996	"	"	441
200	"	"	667	396	"	M	864(2)	583	1951	"	905	774	"	"	559	1005	"	"	458
202	"	"	611	397 (1)	1952	"	173	589	1952	"	81	776	1951	"	954	1012	1952	M	49
204	"	"	723	397 (2)	"	"	500	598	"	"	86	786	1952	"	108	1013	"	"	181
207	"	"	206	402	1951	SC	97	600	1951	"	997	792	"	"	101	1015	"	"	54
210	"	"	141	406	"	"	217	608	"	"	943	798	"	"	106	1016	"	"	43
217	"	"	865	418	"	M	876(2)	616	"	"	935	800	"	"	273	1017	"	"	72
225	"	"	706	422	"	SC	111	620	"	"	191	803	"	"	498	1021	"	"	300
227	"	"	736	426	"	"	108	639	"	"	952	807	1951	SC	316	1029	"	"	150
229	"	"	725	430	"	"	226	643	"	"	1003	809	"	M	1042	1031	"	"	117
239	"	"	756	434	"	"	229	648	"	"	753	812	1952	"	11	1037	1951	"	843
242	"	"	500	436	"	M	882	652	1952	"	88	820	"	"	174	1040	"	"	34
249	"	"	793	438	1952	"	504(2)	654	1951	"	875	821	1951	"	986	1057	"	"	311
254	"	"	491	445	1951	"	894	657	"	"	902	824	"	"	844	1061	1952	"	159
257	"	"	705	446	"	"	895	659	"	"	880	838	1952	"	59	1062	"	"	180
258	"	"	591	450	"	"	852(2)	661	"	"	879(2)	841	"	"	171	1063	"	"	176
261	"	"	710	451	1952	"	679	663	"	"	996	845	"	"	114	1066	"	"	120
262	"	"	822	454	1951	"	876(1)	665	1952	"	112	846	"	"	113	1072	"	"	515
265	"	"	760	455	"	"	897	666	1951	"	950	848	"	"	45	1089	"	"	126
270	"	"	204	458	"	"	885(1)	669	"	"	988	851	1951	"	974	1090	"	"	79
273	"	"	608	459	"	"	852(1)	675	1952	"	91	858	1952	"	597	1091	"	"	60
281	"	"	796	460	1952	"	172	676	"	"	283	860	"	"	99	1092	"	"	297
286	"	"	765	462	1951	"	886(2)	677	1951	"	995	863	"	"	384	1096	"	"	58
289 (2)	"	"	721													1097	"	"	179

MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR			MWN	AIR		
1	1951	M	63	205	1951	M	765	353	1951	M	875	508	1951	M	910(2)	724 (1)	1952	M	171
7	,,	,,	67	206	,,	,,	783	354	1952	,,	500	515	1952	,,	88	724 (2)	1951	,,	986
12	,,	,,	56	213	,,	,,	793	358	1951	SC	101	516	1951	,,	943	729 (1)	1952	,,	256
22	,,	,,	12	218	,,	,,	810	361	,,	,,	1	523	,,	,,	992	729 (2)	,,	,,	114
44	,,	,,	640	220	,,	,,	756	365 (1)	,,	M	864(1)	526	1952	,,	86	731	,,	,,	113
48	,,	,,	665	223	,,	,,	807	365 (2)	,,	,,	886(1)	527	,,	,,	94	732	,,	,,	59
50	,,	,,	672	227 (1)	,,	,,	766	367	1952	,,	175	529	1951	SC	196	733	,,	,,	74
52	,,	,,	663(1)	227 (2)	1952	,,	684	368	1951	,,	902	532	,,	,,	157	740	,,	,,	70
53	,,	,,	500	229 (1)	1951	,,	722	369	1950	,,	450	549	,,	,,	174	741	,,	,,	125
59	,,	,,	717	229 (2)	1950	,,	778	370	1951	SC	201	552 (1)	,,	M	852(1)	743	,,	,,	293
60	,,	,,	760	231 (1)	1952	,,	607	374	,,	,,	204	552 (2)	,,	,,	935	749	,,	,,	61
65 (1)	,,	,,	607	231 (2)	1951	,,	764	378	,,	,,	207	556	1952	,,	53	755 (1)	1953	,,	259
65 (2)	,,	,,	212	232	,,	SC	128	381	,,	M	883(2)	557	1951	,,	1010	755 (2)	1952	,,	174
67 (1)	,,	,,	716	248	,,	M	182	383	1952	,,	170	558	,,	,,	952	757	1951	SC	441
67 (2)	,,	,,	685	255	,,	,,	812	384	1951	,,	894	561	1952	,,	81	763	,,	,,	315
68 (1)	,,	,,	398	257	,,	,,	204	385	1952	,,	183	569	1951	,,	994	765	,,	,,	270
68 (2)	,,	,,	611	259	1952	,,	160	387	1951	,,	900	570	1952	,,	90	773	1952	M	599
69	,,	,,	714	261	,,	,,	491	389	,,	,,	897	572	1951	,,	1002	775	,,	,,	107
70	,,	,,	469	266	1951	,,	890	391	,,	,,	880	574	1952	,,	257	776 (1)	,,	,,	177
71 (1)	,,	,,	759	270	,,	,,	843	393	,,	,,	851	576	1951	,,	938	776 (2)	,,	,,	39
73 (1)	,,	,,	667	273	1952	,,	178	394	,,	,,	876(1)	584	1952	,,	91	779	,,	,,	11
73 (2)	,,	,,	658(2)	274	1951	,,	831(1)	395	,,	,,	852(2)	585	1951	,,	1007	787 (1)	,,	,,	49
74	,,	,,	656(1)	275	,,	,,	208	396	,,	,,	917	588	1952	,,	108	787 (2)	,,	,,	44
75	,,	,,	659	276	,,	,,	813	408	,,	,,	886(2)	593	1951	,,	950	788	1951	,,	1044
76	,,	,,	656(2)	277	1952	,,	608	410	,,	,,	882	595	,,	,,	996	790	1952	,,	600
80	,,	,,	658(1)	278	,,	,,	564	412	,,	,,	879(2)	597	1952	,,	184	791 (1)	,,	,,	40
81	,,	,,	583	279	1951	,,	816	414 (1)	,,	,,	713	598	,,	,,	162	791 (2)	,,	,,	51
88	,,	,,	115	280	,,	,,	855	414 (2)	,,	,,	879(1)	600	,,	,,	164	795	,,	,,	384
93	,,	,,	107	282	,,	,,	841	415	,,	SC	111	613 (1)	1951	,,	772(2)	801	1951	,,	1047
101	,,	,,	660	284	,,	SC	9	418	1952	M	602	613 (2)	,,	SC	217	805	1952	,,	33
102 (2)	,,	,,	466	286	,,	,,	16	421	,,	,,	163	623	1952	M	283	807	,,	,,	169
106	,,	,,	670	293	1952	M	509	422	1951	,,	905	624	,,	,,	182	809	,,	,,	25
108	,,	,,	495	294	1950	,,	713	427	1952	,,	498	625	1951	,,	1042	810	,,	,,	80
111	,,	SC	41	296 (2)	1951	,,	885(2)	430	1951	,,	903	627	1952	,,	265	811	1951	,,	1051
137	,,	M	687	297	1952	,,	165	432	,,	,,	927	629	,,	,,	161	818	1952	,,	258
143	,,	,,	676	300	,,	,,	504(1)	435	,,	,,	877	630	1951	,,	969	819	,,	,,	58
146	,,	,,	753	301 (1)	,,	,,	173	440	,,	,,	888	636	,,	,,	962	820	,,	,,	23
149	,,	,,	707	301 (2)	1951	,,	824	445	,,	,,	191	647	,,	,,	995	821	,,	,,	115
152	,,	,,	610	309 (1)	,,	,,	883(1)	462	1952	,,	172	649	1952	,,	266	823	,,	,,	60
153	,,	,,	755	309 (2)	,,	,,	870	464	1951	,,	885(1)	650	,,	,,	224	825	1951	,,	1060
154 (1)	,,	,,	686(1)	315	,,	,,	206	465	,,	,,	910(1)	653	,,	,,	579	829	1952	,,	267
156	,,	,,	777	316	,,	,,	809	466	1952	,,	679	658	1951	,,	1003	834	,,	,,	72
162	,,	,,	772(1)	318 (1)	,,	,,	864(2)	467	,,	,,	704	662	,,	,,	954	837	,,	,,	54
164 (1)	,,	,,	719	318 (2)	,,	,,	814	470	1951	SC	226	671	1952	,,	273	838	,,	,,	117
164 (2)	,,	,,	141	321	,,	,,	605	473	,,	,,	229	674	,,	,,	263	843	,,	,,	289
170	,,	,,	725	323	,,	,,	187	475	,,	M	732	677	1951	,,	979	846	,,	,,	193
179	,,	,,	693	327	,,	,,	796	476	,,	,,	706	686	1952	,,	1	851	,,	,,	158
184	,,	,,	601	330	,,	,,	733	477	,,	,,	930	697	,,	,,	95	852	,,	,,	604
187	,,	,,	674	334	,,	SC	184	484	,,	,,	704	700	,,	,,	101	854	,,	,,	586
190	,,	,,	865	337	,,	,,	177	485	,,	,,	718	705	,,	,,	98	857	,,	,,	411
197 (1)	,,	,,	705	340	,,	,,	193	487	,,	,,	715	709	1951	SC	124	865	1951	SC	481
197 (2)	,,	,,	703	343	,,	,,	189	488	1952	,,	502	712	1952	M	106	875	1952	M	151
198	,,	,,	721	346	,,	M	853	491	1951	SC	103	714	,,	,,	68	882	,,	,,	276
200	,,	,,	773	350	1952	,,	559	501	,,	M	997	721	,,	,,	45	888	1951	,,	477
201	,,	,,	774	352	1951	,,	876(2)												

(1951) 19 Income-Tax Reports=All India Reporter

ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR		
1	1951	C	349	108	1951	SC	14	227	1951	B	297	406	1951	C	151	522	1951	P	187
21	,,	A	582	114	1952	A	325	254	1950	A	613	425	,,	,,	149	538	,,	C	430
30	1952	Ori	112	122	1950	EP	364	261	1952	M	305	430	,,	,,	191	550	,,	P	379
33	,,	C	148	132	1951	SC	23	314	1950	A	620	435	,,	,,	162	553	,,	,,	186
42	1951	A	556	168	,,	,,	101	331	1951	B	299	444	1952	,,	540	558	,,	M	905
58	1952	,,	143	174	,,	,,	97	342	,,	A	652	451	,,	,,	403	571	1952	C	40
63	,,	,,	249	182	,,	,,	111	349	,,	P	624	472	1951	P	151	596	1951	P	565
70	1951	,,	512	191	,,	,,	108	353	,,	Ori	48	476	1952	,,	163	600	,,	,,	174
83	1952	,,	119	193	1950	A	648	361	,,	N	174	487	,,	M	259	616	,,	M	897
96	1951	N	224	219	1951	Ori	16	379	,,	Ass	2	500	1951	P	199	623	1952	C	194
102	1952	Ori	94					402	,,	M	204	518	,,	,,	402				

ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR			ITR	AIR		
1	1951	SC	278	160	1951	B	438	274	1951	B	416(2)	412	1952	M	542	546	1952	M	198
8	"	P	165	170	1952	M	92	280	"	"	428	451	1951	SC	454	562	"	Punj	46
31	"	A	461	189	"	B	63	307	1952	"	201	460	1953	A	271	579	"	M	227
62	"	P	564	201	1951	"	421	331	1951	N	351	472	1952	"	271	588	"	"	255
77	"	Punj	74	208	"	M	994	337	1952	M	127	475	1951	SC	464	601	1951	Punj	120
91	1952	A	548	214	"	Raj	94(2)	363	"	"	238	480	"	Ass	121	605	1952	M	231
95	"	Pat	106	238	1952	M	271	385	"	"	47	504	1952	M	55	610	"	"	296
143	1951	M	952	247	"	"	35	393	"	"	70	516	1951	N	407	614	1950	PC	53
151	"	"	1007	260	1951	B	420	400	"	C	601	530	1952	C	677	621	1952	Punj	203

NOTE

For Comparative Table of 1952 Other Journals=All India Reporter *See* next year's Index.

LIST OF CASES OVERRULED IN A. I. R. (39) 1952 MADRAS.

('99) 22 Mad. 519 = 9 Mad. L. J. 127, Krishnaswami v. Ramaswami	Overruled in A. I. R. (39) 1952 S. C. 170.
(1900) 23 Mad. 89, Marappa Goundan v. Rangaswami Goundan	Overruled in A. I. R. (39) 1952 Mad. 419 (F.B.).
('19) A. I. R. (6) 1919 Mad. 1175=41 Mad. 136=33 Mad. L. J. 519=1918 Mad. W. N. 55=43 Ind. Cas. 225= 22 Mad. L. J. 334=65 Mad. L. W. 649, Venkanna v. Deekshatulu	Overruled in A. I. R. (39) 1952 S. C. 170.
('22) A. I. R. (9) 1922 Mad. 268 = 45 Mad. 785=70 I. C. 396 = 43 M. L. J. 168 = 16 M. L. W. 68 = 1922 M. W. N. 424 = 31 M. L. T. 140, Subbarayan v. Natarajan	Overruled in A. I. R. (39) 1952 Mad. 186 (F.B.).
('28) A. I. R. (15) 1928 Mad. 788 = 51 Mad. 824 = 1928 Mad. W. N. 410=28 Mad. L. W. 228=55 Mad. L. J. 489=113 Ind. Cas. 158, Venkata Pathi v. Pappiah	Overruled in A. I. R. (39) 1952 Mad. 419 (F.B.).
('28) A. I. R. (15) 1928 Mad. 1154=113 I. C. 260, Thandavamurthi v. Durgamba	Overruled in A. I. R. (39) 1952 Mad. 186 (F.B.).
('41) A. I. R. (28) 1941 Mad. 227=1940-2 M. L. J. 645= 52 M. L. W. 509=1940 M. W. N. 878, Chokkalingam Chetti v. Official Assignee, Madras	Held overruled in A. I. R. (39) 1952 Mad. 81 (F.B.).
('42) C. R. P. Nos. 1007 to 1014 of 1942 (Mad)	Overruled in A. I. R. (39) 1952 Mad 224.
('45) A. I. R. (32) 1945 Mad. 70=1944-2 Mad. L. J. 403= 1944 M. W. N. 707 = 57 M. L. W. 602, Manickam Chettiar v. Ramasami Chettiar :	Overruled in A. I. R. (39) 1952 Mad. 186 (F.B.).
('47) C. M. A. Nos. 316 and 391 of 1947 (Mad.)	Overruled in A. I. R. (39) 1952 Mad. 591 (F.B.).

THE

ALL INDIA REPORTER

1952

Madras High Court

A. I. R. (39) 1952 Madras 1 *[C. N. 1.]*

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

Govindarajulu alias Jayaraman—Appellant
v. *Batu Ammal and others—Respondents.*

Letters Patent Appeal No. 50 of 1949, D/- 30-1-1951.

†(a) Hindu law — Succession — Illegitimate son of predeceased legitimate son of Sudra — Principle of representation—Applicability.

An illegitimate son of a predeceased legitimate son of a Sudra by an exclusively kept mistress is not entitled to succeed to the estate of the propositus on the ground of representation. The principle of representation recognised under Hindu law of the son, grandson and great grandson taking the self-acquired or the separate property of the father together cannot be extended to the case of an illegitimate son of a legitimate son: *Case law discussed*; 25 Mad. 519, *Expl. and Commented on*; *Observations in* A. I. R. (25) 1938 Nag. 1 *criticised and not approved.* [Paras 5, 6, 7, 14 & 17]

(b) Precedents — Extent of authority.

Per *Raghava Rao J.* — No case is binding authority except for what it actually decides. In considering the binding force of the judgment in a decided case sought to be used as precedent, regard must be had to what is called the *ratio decidendi*. The *ratio decidendi* which ought to be neither unduly whittled down nor unduly extended consists of the enunciation of the reason or principle upon which the question before the Court has been actually determined. [Para 16]

T. S. Kuppuswami Iyer and R. Swaminatha Iyer — for Appellant; *R. Ramamurthi Iyer, T. R Venkataraman and A. Bala Subramaniam—for Respondents.*

Cases referred to :—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('15) 37 All 607 : (A. I. R. (2) 1915 P. C. 70). [Pr. 22]
('32) 55 Mad 1 : (A. I. R. (18) 1931 P. C 294). [Prs. 3, 4, 5, 6, 7, 15. 29]
('42) I. L. R. (1942) Mad. 419:(A. I. R. (29) 1942 P. C. 3) [Prs. 6, 15]
('79) 4 Bom. 37 (F. B.). [Pr. 4]
('21) 45 Bom. 557 : (A. I. R. (8) 1921 Bom. 137). [Pr. 28]
('91) 18 Cal. 161 : (17 Ind. App. 128 P. C.) [Prs. 4 7. 20]
('84) 7 Mad. 407. [Pr. 20]
('85) 8 Mad. 557. [Pr. 20]
('87) 10 Mad. 334. [Pr. 20]
('93) 16 Mad. 11 : (2 Mad. L. Jour 265). [Prs. 6, 21]
('02) 25 Mad. 519:11 Mad. L Jour. 493). [Prs. 5, 7, 9, 14, 15, 16, 17, 18, 20]
('04) 27 Mad. 32. [Pr 20]
('07) 30 Mad. 348 : (17 Mad. L. Jour. 275). [Pr. 21]
('15) 38 Mad. 1144 : (A. I. R. (2) 1915 Mad. 63). [Pr. 26]
('18) 41 Mad. 44 : (A. I. R. (5) 1918 Mad. 1346 (F. B.)). [Prs. 4, 15, 28]
('25) 48 Mad. 1 : (A. I. R. (12) 1925 Mad. 497). [Pr. 20]
('32) 55 Mad. 856 : (A. I. R. (19) 1932 Mad. 440). [Prs. 25, 27]
('37) 1937-1 Mad. L. Jour. 28 : (A. I. R. (24) 1937 Mad. 640) [Prs. 6, 28]
('40) 1940-2 Mad. L. Jour. 288 : (A. I. R. (27) 1940 Mad. 463). [Prs. 6, 28, 29]
('45) 1945-1 Mad. L. Jour. 288 : (A. I. R. (32) 945 Mad. 231). [Prs. 6, 28, 29]
('47) I. L. R. (1947) Mad. 334 : (A. I. R. (34) 1947 Mad. 38). [Prs. 24, 28]
('38) I. L. R. (1938) Nag. 255 : (A. I. R. (25) 1938 Nag. 1.) [Pr. 8, 25, 27]
(1901) A. C. 495 : (70 L. J. P. C. 76). [Pr. 16]

Satyanarayana Rao J. — This appeal raises an interesting question of Hindu law. The facts are not now in dispute. The properties in suit belonged to one Kandaswami. He had a son Nataraja, but this son predeceased Kandaswami. Kandaswami died on 28-1-1945 leaving behind him three daughters the plaintiff and defendants 1 and 2. The fourth defendant who is the appellant in this Letters Patent Appeal, it has now been definitely found, is the illegitimate son of Nataraja by his permanently kept concubine. The suit was laid by one of the daughters of Kandaswami for recovery of possession of a third share of the properties which were admittedly the self-acquired properties of Kandaswami, defendants 1 and 2, the other daughters, practically supported the claim of the plaintiff. Defendant 4 claimed that he was entitled to the properties in the right of his father, Nataraja, on the ground that he was entitled to represent the father and share the inheritance. The District Munsif and the Subordinate Judge on appeal held that the fourth defendant was entitled to a half share in the properties, and a preliminary decree for partition of the properties was passed declaring the right of the plaintiff and defendants 1 and 2 to 1/6th share each, and that defendant 4 was entitled to a half share in the properties. The properties were directed to be divided by metes and bounds.

Against the decision of the Subordinate Judge there was a second appeal to this Court by the plaintiff claiming that she was entitled to 1/3rd share and not to 1/6th share. There was a memorandum of cross objections by defendant 4 who claimed that he was entitled to all the properties and not merely to a half share. The second appeal was heard by Rajagopalan J. who held that defendant 4 was not entitled to any share at all as he was not entitled to represent his father, Nataraja, and allowed the appeal of the plaintiff and dismissed the cross-objections filed by defendant 4.

[2] In this Letters Patent Appeal by defendant 4, the fourth defendant claimed that he was entitled to the entirety of the properties on the ground of representation. He claims this right on the analogy of the legitimate son, grandson, and great grandson to take the inheritance in respect of self-acquired or separate properties of the father on the principle of representation.

[3] The rights of a *dasiputra* or son by a female slave in the case of Sudras are based on a special text of Hindu law contained in S. 12 of Chap. I of Mitakshara. This section occurs in Mitakshara after the rights of the sons by birth and by adoption have been stated in S. 2 of the same chapter in which the rights of the principal and secondary sons have been discussed by Vignaneswara, and it precedes Chap. II where in S. 1 of that chapter the order of succession to the property of a person dying sonless is enumerated. It begins by stating:

"That sons, principal and secondary, take the heritage as has been shown. The order of succession among all on failure of them is next declared."

The rights of sons enumerated in S. 2 of Chap. I and the order of succession laid down in S 1 of Chap. II apply to both regenerate classes as well as Sudras. But S. 12 has application only to a son by a female slave of a Sudra, for in the case of regenerate classes *dasiputras* are not entitled to any share in the inheritance but are entitled only to maintenance. The text itself has been quoted in the Privy Council decision in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 at p. 6 and it is unnecessary to extract the same in this judgment.

[4] It has now been settled that this text applies to the estate of a separated householder; in other words, if a person who is a Sudra becomes separated from his other coparceners and leaves a separate estate or leaves his self-acquired estate, then the text would apply, but not otherwise. It has also been settled, and the text expressly states so that during the father's lifetime the illegitimate son has no claim against the father's estate, unless the father chooses to give a share in the property. but it is different if the father dies. In that event, the illegitimate son is entitled to a half share in competition with the legitimate sons. If there are no legitimate sons, the illegitimate son takes the whole estate provided there are no legitimate daughters or sons of daughters. If there are daughters or daughters' sons, the illegitimate son takes only a half share. If the father dies leaving a legitimate son and an illegitimate son, though the shares are unequal, the legitimate son and the illegitimate son take the property in coparcenary with a right of survivorship inter se. This has been settled by the Privy Council in *Jogendro* v. *Nityanand*, 18 Cal. 151 approving the view of Nanabhai Haridas J. in *Sadu* v. *Baiza*, 4 Bom. 37 (F. B). Though the learned Judge applied the principle of survivorship applicable to property held in coparcenary to property which devolved under the text on legitimate and illegitimate sons, it was held that they do not take the property in severalty as tenants-in-common but as joint tenants with a right of survivorship. The Privy Council in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 pointed out that the share allotted to a Sudra's son under the text was not in lieu of maintenance as was once thought in this Court, but that an illegitimate son had the status of a son and that he was a member of the family though with limited rights in the property in competition with a legitimate son. If the property left is neither the separate nor the self-acquired property of the father, but is joint family property held by the father in coparcenary with others, it is decided in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 (P. C.) that the illegitimate son of even a Sudra by a continuously kept concubine would be entitled only to maintenance. There is undoubtedly, as has been held by the Full Bench in *Subramania Aiyar* v *Ratnavelu Chetti*, 41 Mad. 44 a mutual right of inheritance between the putative father and the illegitimate son, and in the Full Bench judgment a plea was passionately put forward by the learned Judges to liberalise the rights of a *dasiputra* as far as possible.

[5] The above principles of law are well settled, and the problem that arises for consideration is whether the principle of representation recognised under Hindu Law of the son, grandson and great grandson taking the self-acquired or the separate property of the father together can be extended to the case of an illegitimate son of a legitimate son. The converse of the proposition that the legitimate son of an illegitimate son is entitled to succeed to the share of the illegitimate son even if he had predeceased the father has been established by the decision in *Ramalinga Mupan* v. *Pavadai Goundan* 25 Mad. 519 which was approved in later cases including the decision of the Privy Council in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 On behalf of the appellant strong reliance was placed upon this decision, and he pressed that the doctrine therein enunciated should be extended to the present case, and a right of representation as in the case of legitimate issue should be recognised.

[6] I had occasion to examine the basis of the doctrine of representation of the son, grandson,

and great grandson to succeed to the self-acquired property of the father in A. S. No. 243 of 1947. From the discussion in that case it will be seen that the property is taken by the three compact issues as one unit and they take it as *aprathibandha* or unobstructed heritage, or according to the strict theory of Mitakshara even in the self-acquired property of the father, the son, the grandson and the great grandson acquire a right of representation. They do not succeed to the property as *sapratibandha* or obstructed heritage. It was pointed out by Muthuswami Aiyar J. in *Muthuvaduganatha Thevar* v. *Periasami*, 16 Mad. 11 that to the rule of Manu that to the nearest sapinda the inheritance belongs, the case of sons, grandsons and great grandsons is an exception, and sapinda relationship also confers equal spiritual benefit on the propositus, though the propinquity or the blood relationship is not the same. The right of representation therefore is founded on the right by birth, on propinquity and also on the efficacy to confer spiritual benefit upon the propositus. This right has never been recognised in the case of an illegitimate son to any degree, and it is settled law that during the lifetime of the father an illegitimate son acquires not a scintilla of interest, notional or otherwise, in the property of the father. During the lifetime of the father by his choice and pleasure any property may be given by him to the illegitimate son. The right of the illegitimate son under the text does not crystallise and does not take definite shape until the death of the father. The blood relationship contemplated by Mitakshara is the legitimate blood relationship which also carries with it the consequence of conferring spiritual benefit upon the propositus. It is difficult to hold that an illegitimate son occupies a similar position like a legitimate son. No doubt the Privy Council in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 treated the illegitimate son as member of the family and as having the status of son. It does not mean that but for the text the illegitimate son would have legitimate blood relationship like that of an aurasa son and would be capable of conferring spiritual benefit upon the propositus. All that their Lordships of the Judicial Committee were laying down in that case was that the right of the illegitimate son to a share in the property was not in recognition of a right to maintenance from and out of the property but by virtue of his peculiar status as a son recognised under the text. It may be that Yajnavalkya and Vijnaneswara thought that at that time the marriage tie in the case of Sudras was not so strict and was very often difficult of proof, and it may be for that reason that a definite share in the property was given in the case of a *dasiputra* of a Sudra. In *Krishna Yachendra* v. *Rajeswara Rao*, I. L. R. (1942) Mad. 419 the Judicial Committee definitely ruled that an illegitimate son is not an aurasa son, as that word is used in Hindu law, and this their Lordships observed, was elementary. Their Lordships pointed out :

"Aurasa has always been used to import the highest class of son—the son begotten by the man himself on his lawful wife; of lower kinds once recognised, several were not sons in any physical sense e. g. the *putrika putra* or son of an appointed daughter."

This *dasiputra* is not included among the 12 sons enumerated in S. 2 of Chap. II of Mitakshara. The position of *dasiputra* therefore is a peculiar one, and but for the special text he would not be entitled to any share in the property. The general principle of Hindu law is always to confer heirship upon the legitimate issue and not upon the illegitimate issue. The only exception is the one created in favour of *dasiputra* in the case of Sudras, which is a special exception made and recognised by the text. On principle therefore it seems to be difficult to extend the principle of representation to the case of illegitimate sons and elevate them to the status of an aurasa son with all the rights incidental to that status as aurasa son. Courts have always held against the extension of the doctrine of Hindu law as in the case of sapindaship. See *Meenakshi Ammal* v. *Ramaswami Josier*, 1937-1 Mad. L. Jour 28, a decision of Varadachariar J. affirmed on appeal in *Meenakshi Ammal* v. *Murugayya Mooppanar*, 1940-1 Mad. L. Jour. 283. The illegitimate son has no right to succeed to any property by collateral succession, and this is consistent only with the view that he is not a son for all purposes. See *Veeraraghavayya* v. *Srinivasa Rao*, 1945-1 Mad. L. Jour. 288.

[7] It now remains to consider the decision of *Ramalinga Mupan* v. *Pavadai Goundan*. 25 Mad. 519 on which strong reliance was placed by the learned advocate for the appellant. In that case the plaintiff and one Ranga Muppna were divided brothers of Sudra caste. Ranga Muppna had two illegitimate sons by a permanently kept concubine. The illegitimate sons, however, predeceased Ranga Muppan leaving legitimate sons. Ranga Muppan then died, and the divided brother of Ranga Muppan, the plaintiff, sued to recover the property of Ranga Muppan as his heir from the grandsons of Ranga Muppan. It was held that the legitimate sons of the illegitimate sons of Ranga Muppan were entitled to succeed to the property. Bhashyam Aiyangar J. who delivered the judgment of the Court examined the cases before the decision of the Privy Council in *Jogendra Bupati's case*, 18 Cal. 151 (P. C.) and thereafter, and held that the grandsons of Ranga Muppan were entitled to succeed. One thing may be observed that in that case the right of representation was claimed by a legitimate son of an illegitimate son. If the illegitimate son owned property, and he became the propositus, his legitimate sons and grandsons and great grandsons would ordinarily under Hindu law be entitled to take as one unit, as the right of representation of legitimate sons, grandsons and great grandsons is recognised under Hindu law.

It may therefore, be conceded that the principle of representation is rightly applied in that case. But the real difficulty in understanding that judgment is when the learned Judge says that "an illegitimate son's right of inheritance to his father's property, or at least to a part of it is not contingent but absolute, as in the case of a legitimate son, since if he has legitimate half brothers or other heirs of his father down to a daughter's son, he gets a half share and in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz. that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died."

If the illegitimate son as in that case predeceased the father and during the father's lifetime, according to the texts, he had no right in the property, it is difficult to agree with the learned Judge that the right of the illegitimate son is absolute and is not contingent. If he predeceased the father, he gets nothing in the property, and he left nothing for the illegitimate sons of his to succeed to. Even in the case of a legitimate son, if he predeceased the father without leaving a son or grandson his widow would succeed to nothing. As a legitimate son, though in theory, has a right by birth even in the self-acquired property of the father, in effect if he does not survive the father he succeeds to nothing. One need not quarrel therefore when the learned Judge applied the principle of representation in the case of a legitimate son of an illegitimate son, but serious exception has to be taken to the statement of the learned Judge when he observed that the illegitimate son's right was not contingent but absolute Further, it is unnecessary to canvass the correctness of that decision, as it has been accepted as laying down good law in subsequent decisions including that of the Privy Council in *Vellayyappa Chetti* v. *Nataraian*, 55 Mad. 1. There is no question of logically extending the principle of that case to the present case, as we are not dealing with a claim of a legitimate son in respect of an illegitimate son's property, but we are dealing with a case of an illegitimate son claiming to succeed a legitimate son who predeceased the father and basing his right under the text of Hindu law. The illegitimate grandson of Kandaswami, i. e., defendant, 4 cannot be considered as coming within the purview of the text which speaks of an illegitimate son and not an illegitimate grandson. There is no principle nor is there any authority in support of the extension for which the appellant contends.

[8] Our attention was drawn to the case of the Nagpur High Court in *Bhagwant Rao* v. *Punjaram*, I. L R. (1938) Nag 255, which seems to lay down that the method of approach in the case of the rights of a *dasiputra* is first to assume that the *dasiputra* has got rights in the property and then to see whether there is any express text of Hindu law which cuts down those rights. In my opinion, this is putting the cart before the horse, and the *dasiputra* is nowhere but for the special text of Mitakshara. It is not as if that under ordinary Hindu law he has got a right, and that this text attempt to restrict or define such a right.

[9] In the present case the property of Kandaswami is the self-acquired property, and Nataraja had no interest in that property during Kandaswami's lifetime, though Nataraja and Kandaswami were undivided. It cannot be said that because of the death of Nataraja the illegitimate son of Nataraja lost rights in the property as was held by Rajagopalan J. However, it is unnecessary to rest the decision on that aspect of the matter as I am satisfied that there is no scope for applying the principle of *Ramalinga Mupan.* v. *Pavadai Gounian*, 25 Mad 519 to the present case. The decision of the learned Judge is therefore correct, and the Letters Patent Appeal fails and is dismissed with costs.

[10] There is a memorandum of objections, which relates to the rights of defendants 1 and 2. The first Court granted a decree in their favour for 1/6th share each. They did not appeal, nor did they file any cross objections at any stage, and even before the learned Judge who disposed of the second appeal, the appeal was by the plaintiff alone and was restricted to her one-third share. The power of this Court to act under O. 41, R. 33 Civil P. C. was not invoked. It is now claimed in the memorandum of objections that in view of the conclusion reached that the fourth defendant has no right in the property the share of defendants 1 and 2 should be increased by amending the decree and substituting one third for one-sixth even in their case Defendants 1 and 2 remained *ex parte* throughout, and they did not move their little finger to have the decree modified It is therefore difficult now at this stage of the Letters Patent Appeal to invoke the power under O 41, R. 33 and modify the decree. The decree cannot therefore be modified.

[11] The memorandum of objections is dismissed, but there will be no order as to costs.

[12] **Raghava Rao J** — I agree in the judgment just delivered and the decree proposed by my learned brother. I wish to add a separate judgment of my own in view of the consideration that the main question raised by this appeal is one of some importance in Hindu law which is bare of direct authority and involves examination of principle as well as of analogous authority which is by no means clear or consistent. The question is whether the appellant, defendant 4 in the original suit by name one Govindaraju is entitled as the *dasiputra* or illegitimate son of a legitimate son of one Kandaswami, a Sudra, by name Natarajan, who predeceased his father,

Kandaswami, to succeed to the separate estate of Kandaswami as against the daughters of Kandaswami, plaintiff and defendants 1 and 2. The question has been answered by the learned District Munsif of Mayuram who tried the original cause and by the learned Subordinate Judge of Mayuram in first appeal by awarding to defendant 4 a half of the estate and leaving the other half to the plaintiff and defendants 1 and 2. In second appeal to this Court, the question has been answered by Rajagopalan J.. by denying defendant 4's right to succeed altogether.

[13] It is common ground between counsel before us in this Letters Patent Appeal that defendant 4 has either the whole right to the exclusion of the plaintiff and defendants 1 and 2 or none at all by way of inheritance to Kandaswami.

[14] Mr. Kuppuswami Aiyar in his well-prepared and well presented argument for the appellant relies on *jus representationis* and the analogy of *Ramalinga Muppan* v. *Pavadai Goundan*, 25 Mad. 519 in which it has been given effect to. That ruling is that of a Bench consisting of Benson and Bhashyam Aiyangar JJ. of whom the latter delivered the judgment of the Court. It is contended by counsel before us that as in that case the legitimate son of an illegitimate son of the propositus who predeceased the propositus was held entitled to succeed as against the divided brother of the propositus on the ground of representation of the illegitimate son by his legitimate son, so here the illegitimate son of the legitimate son of the propositus who predeceased the propositus must be held entitled to succeed as against the daughters of the propositus on the ground of representation of the legitimate son by his illegitimate son.

[15] The passage from the decision cited which is relied upon is at p. 524 of the report and may so far as material be reproduced here. It consists of three sentences:

1. "An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute as in the case of a legitimate son . . . . .

2. The Sudra's illegitimate son is in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction.

3. The principles *therefore* applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz. that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died."

As to the first of the sentences quoted, it seems to me pertinent to observe that no right of inheritance, be it of the legitimate son or illegitimate, can be anything but a *spes successionis*. It is not a contingent, much less an absolute right. With reference to the second sentence it may, generally speaking, be accepted as correct in view of the Privy Council ruling in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad. 1 holding that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and in view of their Lordships' observations at p 14 explicitly approving the sentence in question in *Ramalinga Muppan* v. *Pavadai Goundan*, 25 Mad 519 as well as Kumaraswami Sastri J.'s opinion to a similar effect expressed in *Subramania Iyer* v. *Ratnavelu Chetti*, 41 Mad. 44 (F. B.). At the same time I cannot by any means regard an illegitimate son as one kind of *aurasa* son in the classification of the Hindu law-givers as contended by Mr. Kuppuswami Aiyar. The gulf of distinction between the two, which is by no means narrow, has been emphasised by the Privy Council in *Rajavelugoti Sarvajne Kumara Krishnamachendra* v. *Rajeswara Rao*, I. L. R. (1942) Mad. 419 and cannot in this connection be ignored or overlooked. As regards the last sentence of the *locus citatus* from *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519, I can only say, as a matter of strict logic, *non sequitur* from the previous two sentences. Nor is there any approval of this observation as such in the Privy Council decision in *Vellaiyappa Chetty* v. *Natarajana*, 55 Mad. 1. At the same time there is nothing opposed to first principle in the view expressed by the learned Judges, and in the absence of any precedent covering the situation, the analogical reasoning resorted to by them may well stand justified. The question, however, is whether that analogical reasoning applied by the learned Judges to the case before them should be extended by further analogy to the case before us which is different in its facts from that case. There, it was the legitimate son of an illegitimate son, whose right of succession was in question. Here, it is the case of the illegitimate son of a legitimate son, whose right of succession is in question. My sentiment, frankly speaking, is against the exclusion of the daughter by the illegitimate son of the legitimate son of the propositus, and I am not prepared to extend the ruling in *Ramalinga Mupan* v. *Pavadai Gound n*, 25 Mad. 519 to a case not covered by its facts. I am of course bound so long as that ruling stands unreversed, to follow it in a case *ad idem* with it on facts. Indeed I may say I find nothing in the actual decision itself which offends my sentiment or reason.

[16] No case is binding authority after all except for what it actually decides, as observed by Lord Halsbury in *Quinn* v. *Leatham*. (1901) A. C. 495. It is true that in considering the binding force of the judgment in a decided case sought to be used as precedent, regard must be had to what is called the *ratio decidendi*. The *ratio decidendi* which ought to be neither unduly whittled down nor unduly extended consists of the enunciation of the reason or principle upon which the question before the Court has been actually determined. All that *Ramalinga Mupan* v. *Pavadai*

Goundan, 25 Mad. 519, lays down in the sentence of the judgment now under discussion is nothing more than that the principles applicable to the succession of *sons and grandsons of legitimate sons* may by analogy be applied to the *sons and grandsons of an illegitimate son*, viz , that they should be considered capable of representing the illegitimate son, and in case he dies before his father, of taking the share which would have fallen to him, if he had not so died. The question before the Court in *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519, is not the same as the question before us, and that question which related to the succession of *sons and grandsons of an illegitimate son* was decided by means of the reason or principle derived by the Court by analogy from rules applicable to the succession of *sons and grandsons of legitimate sons*. It is to my mind perfectly clear on the facts of that case that Bhashyam Aiyangar J. in referring to the sons and grandsons of an illegitimate son in relation to the question before the Court there, was thinking of the *legitimate sons and grandsons* of an illegitimate son. It is to my mind, to say the least, extremely doubtful, applying the rule of construction that the same words in the same sentence or in the same context occurring in two different places must bear the same meaning unless an intention to the contrary is made out, whether in referring to the sons and grandsons of legitimate sons by way of analogy. His Lordship was ever thinking of illegitimate sons and grandsons of legitimate sons. His Lordship was evidently rather having in mind only the legitimate sons and grandsons of legitimate sons, and the *ratio decidendi* of that case cannot, in my opinion, by reasonably clear or certain implication, cover the case, such as the present one, of the illegitimate son of a legitimate son. As observed in foot-note (1) at p. 252 of Halsbury's Laws of England, 2nd Edn., Vol. 19.

"The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law (Salmond's Jurisprudence, 2nd Edn. Sec. 67) and which, when it is clear what it was, is binding; but if it is not clear, it is not part of a tribunal's duty to spell out with difficulty a *ratio decidendi* in order to be bound by it.

[17] I am not at all satisfied that had the present question arisen before His Lordship, His Lordship would have necessarily, if at all, decided it in the manner contended for by the appellant. I am not in the circumstances prepared to accept the argument of Mr. Kuppuswami Aiyar so far as it is founded on *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519.

[18] I may also observe that while upholding the right of the legitimate son of an illegitimate son of the propositus to exclude the divided brother of the propositus, Bhashyam Aiyangar J. in *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 expresses a doubt at the end of the judgment whether the illegitimate son of an illegitimate son of the propositus could do so. His Lordship remarks :

"The expression 'legitimate son' (i. e. son of a wedded wife) in the text of Mitakshara which entitles an illegitimate son to a half share when there are legitimate sons, evidently, includes a grandson and greatgrandson and similarly the expression 'illegitimate son' (i. e., a son begotten by a Sudra on a female slave) occurring in the same text, applies not only to the illegitimate son, but also to the grandson and great grandson by the illegitimate son, at any rate when they are his legitimate descendants. It may be doubtful whether the illegitimate issue of the illegitimate son can, on the principle of *jus representationis*, represent the illegitimate son, if before the inheritance opened, the latter predeceased his father."

By parity of reasoning may not one feel doubtful whether the illegitimate son of a legitimate son can avail himself of *jus representationis* where the latter predeceased the propositus ? Does it not look as if Bhashyam Aiyangar J. in referring to the grandson and great grandson included in the expression "legitimate son" occurring in the text of Mitakshara is thinking of the legitimate grandson and legitimate great grandson ?

[19] It will be seen too from the foregoing quotation that the analogical reasoning employed by Bhashyam Aiyangar J. is not by any means arbitrarily *a priori*. It is founded on what the learned Judge considers to be the correct interpretation of the expression "illegitimate son" occurring in the text of Mitakshara referred to, that expression must in the view of the learned Judge, be construed in the same manner as the expression "legitimate son" occurring in the same text. If "son" in the context of the compound "legitimate son" includes "grand son" and "great grandson" there is no reason, according to the learned Judge, why it should not do so, in the context of the compound "illegitimate son" whatever the doubt about the illegitimate son or grandson of the illegitimate son.

[20] I may observe too that the application of *jus representationis* to the illegitimate son of a legitimate son lands us in an anomaly if not an absurdity. Supposing an illegitimate son of X had to share the latter's property with the latter's legitimate son, he could only get a half of what he would have got, had he been a legitimate son. If, on the other hand, the illegitimate son of X is to share with another legitimate son, he would by the theory of representation get as much as his father would have got, had he not predeceased X. The anomaly thus results that a remoter illegitimate lineal male descendant of X would get more than a nearer illegitimate lineal male descendant in such a situation. Mr. Kuppuswami Aiyar next relies on a later decision of the same Bench which has decided *Ramalinga Mupan* v. *Pavadaai Goundan*, 25 Mad. 519 which is reported as *Gopalasami Chetti* v. *Arunachellam Chetti*, 27 Mad. 32 as emphasising the applicability of the doctrine of representation to a case of the illegitimate son of a legitimate son like the present. In this later case the property of which a share was sought by the illegitimate son of the legitimate

son of a certain X was the joint property subject to the incident of survivorship, which belonged to X, and his two legitimate sons of whom the father of the plaintiff who had predeceased X was one. The defendants in the suit for partition were X, his surviving son and an adopted son of the plaintiff's putative father. The suit having been dismissed by the trial Court, it was contended on behalf of the plaintiff in appeal, placing reliance on *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad 519 that the *jus representationis* given effect to in that case could be applied to the case before the Court. The learned Judges first clear the ground by declaring their adherence to the law as laid down in *Krishnayyan* v. *Muttuswami*, 7 Mad. 407, *Ranoji* v. *Kandoji*, 8 Mad. 557 and *Parvathi* v. *Thirumalai*, 10 Mad. 334 that an illegitimate son could claim no share in the property which had survived to his coparceners inasmuch as he could not claim to represent his putative father in the undivided family, and that it is only when a father dies a separated house-holder that an illegitimate son is entitled to inherit his separte estate. This the learned Judges did, because they had in their earlier decision in *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 made an observation to the effect that it was unnecessary to consider in that case, i.e., *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 whether and if so how far the decisions in *Krishnayyan* v. *Muttuswami*, 7 Mad. 407, *Ranoji* v. *Kandoji*, 8 Mad. 557 and *Parvathi* v. *Thirumalai*, 10 Mad. 334 stood affected in their soundness by the decision of the Privy Council in *Jogendro* v. *Nityanand*, 18 Cal. 151. Then referring to the peculiar feature distinguishing the case before them from the decisions in *Krishnayyan* v. *Muttuswami*, 7 Mad. 407, *Ranoji* v. *Kandoji*, 8 Mad. 557 and *Parvathi* v. *Thirumalai*, 10 Mad. 334 in that unlike in those decisions there existed in the case before the Court along with the illegitimate son the adopted son also of the predeceased son of *X*, the learned Judges proceed to observe thus :

"But that circumstance cannot make any difference in principle inasmuch as the special rule of inheritance in favour of the illegitimate son of a Sudra, along with his legitimate brothers, provided that, in the absence of legitimate brothers, the illegitimate son may inherit the whole property in default of daughter's son of the deceased. This clearly shows that the Sudra father therein contemplated is one that was divided from his ancestors and collaterals (see West and Buhler, 3rd Edn. Vol. I page 72) But if he was not so divided the text cannot, apply, though he may have left legitimate sons along with the illegitimate son."

After so observing the learned Judges wind up the discussion by commenting thus on *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519:

"The only point decided in *Ramalinga Mupan*, v. *Pavadai Goundan*, 25 Mad. 519 is that, if the illegitimate son of a separated Sudra predeceases his father, leaving him surviving his (the illegitimate son's) legitimate son and then the father dies, the illegitimate son's legitimate son will "represent" his father and inherit the whole estate of his grandfather in preference to the divided brothers of the grandfathers; and this does not in any way militate against the above principle."

It will be seen from the elaborate treatment which I have accorded to *Gopalasami Chetti* v. *Arunachellam Chetti*, 27 Mad. 32 that far from supporting the learned counsel for the appellant before us in his attempt to extend the operation of *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 that decision indicates the true scope and effect of the earlier ruling beyond which it ought not to be extended. It is true that, as urged by Mr. Kuppuswami Aiyar, had the learned Judges meant to negative the doctrine of representation of a legitimate son by his illegitimate son altogether, they could have said so *simpliciter* and disposed of the case on that basis. But then, to say, as Mr. Kuppuswami Aiyar seeks to do, that the disability of the illegitimate son to represent his putative father in the undivided family of the latter and his coparceners which *Gopalaswami Chetti* v. *Arunachalam*, 27 Mad. 32 declares, implies a competency on the part of such illegitimate son to represent his putative father in relation to the separate estate of the grandfather is, in my opinion, to read more into the decision in *Gopalasami Chetti* v. *Arunachellam Chetti*, 27 Mad. 32 than is wanted by its peculiar facts which bear no parallel to those of the present case or by the principles of law which it lays down. The case in *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 has certainly given effect to the doctrine of representation in the circumstances of that case. That does not mean that that right should, as claimed by Mr. Kuppuswami Aiyar, be applied to the present case. The extension attempted does not stand established by the principles of the decisions cited by him. Nor does the observation of Spencer Offg. C. J. in the *Maharaja of Kolhapur* v. *Sundaram Aiyar*, 48 Mad. 1 at p. 76 of the report that "the doctrine of representation applies to the illegitimate sons as well as to the legitimate sons" take counsel any further than the decisions in *Gopalasami Chetti* v. *Arunachellam Chetti*, 27 Mad. 32 and *Ramalinga Mupan* v. *Pavadai Goundan*, 25 Mad. 519 cited by His Lordship in support of the observation.

[21] The right of representation in the case of legitimate sons and grandsons of legitimate sons of the propositus is traceable to the unobstructed (apratibandha) character of the heritage, be such heritage the self-acquired and separate or ancestral property of the propositus, the only difference between the two cases being that in the latter there is an interdict on the power of alienation of the father, unlike in the former. Such right involves further that as ruled in *Marudayi* v. *Doraisami*, 30 Mad. 348, following the classical exposition of the doctrine by Muthuswami Aiyar J. in *Muttuvadugunatha Tevar* v. *Periasami*, 16 Mad. 11 at p. 15 a divided son as nearest

sapinda does not exclude but shares with a divided grandson or great grandson of the propositus, the sharing in such a case being *per stripes* by way of an exception to the rule of Hindu law by which the inheritance devolves on the nearest sapinda. To introduce into the scheme of succession of the Mitakshara beyond the limits now recognised an extended right of representation bringing in illegitimate lineal male descendants of the propositus is to further countenance not merely a violation of the spirit of sanctity which the ancient Hindu law-givers and members of the Hindu society generally have always attached to marriage as a sacrament but also a breach of the principle of legitimate blood relationship with the consequent advantage of spiritual benefit to the propositus which underlies such scheme of succession. I do not regret I cannot countenance such a violation and such a breach even amongst the Sudras beyond the limits warranted by binding precedent. A levelling up rather than a levelling down of class distinctions is what the Hindu Society needs today; and I for one cannot, indeed, unless compelled, be a party to interpreting and applying judicial decisions in a manner calculated to widen rather than narrow down existing distinctions.

[22] The property in the present case was the separate property of Kandaswami. His son Nataraja, the putative father of defendant 4 did not survive Kandaswami in order to succeed to it in whole or in part or transmit it to defendant 4. If defendant 4 is to succeed to Kandaswami, he can do so, only if by reason of his having survived Kandaswami, Kandaswami is to be regarded as not having died *aputra* within the meaning of Yajnavalkya's text cited in para. 2 of S. 1 of Chap. II of the Mitakshara. The text which consists of two slokas is, as translated by Colebrooke, as follows:

"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student; on failure of the first among these, the next in order is indeed heir to the estate of one who departs for heaven leaving no male issue. This rule extends to all classes."

Referring to the text this is what the Privy Council says in *Buddha Singh* v. *Laltu Singh*, 37 All. 604 at p 611:

"Mr. Mandlik's rendering of these two slokas of Yajnavalkya is more literal and is as follows: The wife, daughters, both parents, brothers and likewise their sons, Gotrajas (gentiles): Bandhus (cognates); a pupil and a fellow student. Of these, the next following on failure of the preceding in order is heir to the estate of one who has departed for heaven, for leaving no *putra*. This rule extends to all (males whether belonging or not to the four) classes."

"The compound word *aputra* occurring in Yajvalakya text has been rendered by Mr. Colebroke as 'leaving no male issue'; by Mr. Mandlik as 'leaving no putra.' He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term 'son.' The Viramitrodaya says clearly that the word 'sonless' which is the literal equivalent of *aputra* signifies 'in default of son, grandson and great grandson' that, in other words, it comprehends three degree in the direct line of descent."

[23] The question then is whether the existence of defendant 4 at the time of Kandaswami's death did not make of Kandaswami an *aputra*. It is significant to notice in this connection what the Mitakshara says in paras. 1 and 3 respectively preceding and succeeding para. 2 in which Yajnavalkya's text is set forth in para. 1 as found in Setlur's Collection of Hindu law books on inheritance translated into English it is stated thus:

"That sons, principal and secondary, take the heritage, has been shown. The order of succession among all on failure of them is next declared."

In para 3 again, as found in the same work, it is stated thus:

"He, who has no son of any of the twelve descriptions above stated (Chapter I, S. 11) is one having 'no male issue. Of a man, thus leaving no male progeny and departing for another world, the heir or successor, is that person, among such as are found here enumerated, who is next in order, on failure of the first mentioned respectively."

The twelve descriptions of sons set forth in Chap. I, S. 11 of the Mitakshara do not include the son of a Sudra by a female slave as such, whose rights are specially dealt with in S. 12 of Chap I. It is only if a man has a son of any of those twelve descriptions that according to Vijnaneswara he can be said to be one having male issue, so as to exclude the operation of the rule of succession of Yajnavalkya set forth in para. 2 of S 1 of Chap. II. That rule of succession which in terms has application to all classes, i. e, to the three regenerate classes as well as the Sudra class cannot, reasonably speaking, be taken to contemplate and has not therefore been taken by Vijnaneswara, as appears from para. 3 of S. 1 of Chap. II, to contemplate an illegitimate son who as such is not recognised except in the fourth class i. e., of Sudras and that too under special texts contained in a separate section, i. e., S. 12 of Chap. I of the Mitakshara.

[24] In this view of Yajnavalkya's text as interpreted by Vijnaneswara, I am supported by a Bench decision of this Court reported in *Thangavelu* v. *Court of Wards*, I. L. R. (1947) Mad. 334 where at p. 342 of the report, delivering the judgment of the Court consisting of himself and Bell J. Patanjali Sastri J observes thus:

"It is pertinent here to point out that the illegitimate son is not included among the twelve categories of sons enumerated by Yajnavalkya in verses 128-132 but is separately mentioned in a special text. In commenting on verses 135 and 136 which prescribe the order of succession to the estate of a "sonless" person *(aputrasya)* the Mitakshara observes:

'A sonless person is he who has no son of any of the aforesaid twelve categories.'

It will thus be seen that the illegitimate son is not among the principal and secondary sons to whom the heirs enumerated in Chap. II are postponed, but stands apart with his rights, such as they are, defined by a special text."

I may observe further that although twelve kinds of sons are mentioned by the early Smriti writers and dealt with in detail in Chap. I of the Mitakshara there are really only two kinds now recognised the *aurasa* son and the *dattaka* son, in addition to the *kritima* son in Mithila and the son of the appointed daughter among the Nambudiries of Malabar. The rest have long since become obsolete, and as pointed out in the 10th Edn. in Mayne's Treatise on Hindu law and Usage by S. Srinivasa Aiyangar at p. 126,

"In ancient Hindu law, sonship was founded upon marriage or, where a substitute for the son was required, on adoption. A discussion of the marriage law itself will show that from the Vedic times marriage has throughout been a sacrament and a permanent union."

An illegitimate son is not, according to Hindu law, a son at all except in the case of Sudras, and his rights are not by any means those of an *aurasa* son or a *dattaka* son but such as are defined and limited by special texts.

[25] This point of view as to the basis of the rights of an illegitimate son is sought to be assailed by Mr. Kuppuswami Aiyar by relying on a passage in *Bhagwant Rao* v. *Punjaram*, I. L. R. (1939) Nag. 255 at pp. 259 and 260 of the report. Before quoting the observation and dealing with it, it is well that I state that that case is about and what the decision therein is. The question in that case arose with reference to the right of succession of an illegitimate son of a certain Sadasheo and the legitimate sons of other illegitimate sons of Sadasheo in respect of property which at an arrangement between the widow of Sadasheo and his adopted son happened to have been allotted to the widow. There had been, before such allotment, a partition of the estate of Sadasheo between his illegitimate sons and his adopted son. Out of what the adopted son got at the partition, he gave a portion to his adoptive mother by means of the arrangement referred to. The adoptive mother having died, the surviving illegitimate son of Sadasheo and the legitimate sons of the deceased illegitimate sons of Sadasheo claimed along with the sons and a grandson of the adopted son a right of reverter in respect of the property allotted to the widow. The Court (Sir Gilbert Stone C. J. and Bose J) held that the illegitimacy of one of the plaintiffs and of the fathers of the other plaintiffs did not exclude them from succession to the property in suit. Whether this decision is right or wrong does not fall for decision here. In so far as the decision dissents from a ruling of this Court in *Karuppai Ammal* v. *Ramaswami*, 55 Mad. 856 it cannot be good authority for this Court. It has in fact been thus referred to and criticised by late Mr. Srinivasa Aiyangar in his edition of Mayne's Treatise of Hindu law and Usage at p. 651:

"Where a widow who has taker a share of the inheritance dies, her share descends to her daughter or daughter's son as the case may be and an illegitimate son is not entitled to any part of it. This is distinguished, if not doubted, by the Nagpur High Court in *Bhagwant Rao* v. *Punja Rao*, I. L. R. (1938) Nag. 255 where on a partition between the legitimate and illegitimate sons, the widow was allotted a share and on her death, the illegitimate son was held entitled to a share in that property. The decision of the Madras High Court in *Karuppai Ammal* v. *Ramaswami*, 55 Mad. 856 appears to be right upon the express texts of the Mitakshara read with the Dattaka Chandrika (V. 30-31). The illegitimate son, though he inherits on the death of his putative father, along with or in default of male issue, widow or daughter, cannot come in as a reversionary heir on the death of the widow or daughter, as he is undoubtedly neither a sagotra nor a bhinnagotra sapinda of the last male holder within the text of Manu."

[26] I am inclined to think that this criticism is well founded. I may also point out that in the Nagpur decision the learned Judges disapproved of a decision of this Court in *Meenakshi* v. *Muniandi Panikkan*, 38 Mad. 1144. There the plaintiff, a daughter of a certain woman by her paramour claimed to succeed to her stridhanam estate as against her legitimate son. The Court rejected the plaintiff's claim holding that except in the case of Sudras among whom illegitimate sons have a right of succession, illegitimate children are not heirs under the Hindu law established under the Mitakshara system to succeed to the property of any kind left by either of their parents. Here again, we in this Court are bound by the decision in *Meenakshi* v *Muniandi Panikkan*, 38 Mad. 1144 although the same has been criticised in the Nagpur ruling.

[27] The validity of the actual decision in the Nagpur case, I. L. R. (1938) Nag. 255, is not however what matters for the moment. It is the observation therein which counsel relies upon that calls for consideration. It is as follows :

"The defendants argue that illegitimate sons obtain their rights because of a special text and that but for it they would have no right at all. Consequently, once they have been given a share on partition they have obtained all they are entitled to under the special text and so are not entitled to inherit again under the ordinary Hindu law. This view was applied by the Madras High Court in *Karuppai Ammal* v. *Ramaswami*, 55 Mad. 856 where the learned Judges held that the doctrine of reverter did not apply in the case of an illegitimate son.

As against this is the view that they are sons and have always been looked upon as sons, and but for the stricter notions of marriage which gradually crept into the Hindu law would have shared in the patrimony like any other son. The text relating to the illegitimate son is, therefore, a text of curtailment, cutting down what was once his undoubted right and consequently must be strictly construed and cannot be applied beyond its express provisions."

[28] The Nagpur Judges are not in my opinion, justified in this view of the text in the Mitakshara which deals with the rights of an illegitimate son of a Sudra. Whatever the original position of the illegitimate son in the Hindu society of ancient days, the rights which he can at the present day assert in areas governed by the Mitakshara school are only those conferred by the special text of Yajnavalkya understood in the light of Vijnaneswara's commentary as accepted by Courts. Such rights cannot be enlarged by reference to his original position in the Hindu society according

to notions of marriage that may have been possibly prevailed. Apart from the case in *Thangavelu* v. *Court of Wards*, I. L. R. (1947) Mad. 334 to which I have already referred there are other decisions of this Court binding upon us which have dealt with the rights of an illegitimate son as strictly depending upon and limited by special texts. In *Meenakshi Ammal* v. *Ramaswami Josier*, (1937) 1 Mad. L. Jour 28 decided by Varadachariar J. suits were brought by the illegitimate daughters of a daughter for possession of their grand mother's properties which were resisted by the defendants who claimed through *M's* sister's son's son. The question arose whether the plaintiffs could succeed when there were legitimate though more distant heirs in existence. The question was answered in the negative, and it was held that the defendants would exclude the claims of the daughter's illegitimate daughters. The learned Judge observes in his judgment as follows:

"The parties are governed by the ordinary Hindu law and not by any rule of custom as in the case of dancing girls. The general principle of the Hindu law is undoubtedly to limit heirship to legitimate issue but in the case of illegitimate *sons* amongst Sudras a special exception has been made by the texts. One should ordinarily have thought (on the analogy of the principle *ex pressio unius*) that this itself is a clear indication against recognising similar exceptions by way of analogy. The decision in *Subramania Aiyar* v. *Ratnavelu Chetti*, 41 Mad. 44 proceeds on the footing that as the special text relating to the illegitimate son must proceed on the footing of a recognition of sapindaship between the illegitimate son and his putative father, the latter may well be held to be a sapinda of the illegitimate son and as such entitled to inherit his property. There is no scope for the extension of this reasoning by analogy. Similarly the recognition of a right of inheritance as between the mother and the illegitimate daughter (*Dundapp* v. *Bhimawa*, 45 Bom. 557) will not warrant an extension of sapindaship to other relations because in that very case the learned Judges were not prepared to postulate sapindaship between the putative father and the illegitimate daughter. The opening sentence in page 768 of Ghose's Hindu law (3rd Edn.) restricts the illegitimate child's inheritance to the mother s property."

This decision was affirmed on appeal under the Letters Patent by a Bench of this Court consisting of Leach C. J. and Krishnaswami Aiyangar J. The decision on appeal is reported in *Meenakshi Ammal* v. *Murugappa Moopanar*, 1940-1-Mad. L Jour 288. Leach C. J. observes at page 290 of the Report :

"Before the ordinary rules of succession can be departed from in favour of illegitimate offspring there must be express authority to be found in the ancient texts or some statutory provision."

Krishnaswami Aiyangar J. at p. 292 remarks :

"I can find no warrant for holding that as a general rule the system of succession under the Mitakshara law is based on a relationship other than a relationship through valid marriage and legitimate descent. A qualified right in favour of the illegitimate sons amongst Sudras, by choice of the father as it has been described, has been recognised but this is in the nature of an exception and must accordingly be kept within the limits of the exception itself. It is true that an illegitimate daughter has been held to be entitled to inherit to the stridhanam property of her mother. This right will however be found on examination to be based not upon any ancient texts or rule of law but upon custom and analogy."

These decisions afford us a mode of approach to the decision of the case before us much sounder, in my opinion, and at any rate, more binding on us than the perspective afforded by the observations in the Nagpur decision.

[29] I need only add in conclusion that possibly the point of view of the Nagpur High Court may be more apposite to the case of an adopted son than to the case of an illegitimate son. There are special texts in the case of an adopted son which limit his right; but barring such specified instances of curtailed right, in all other respects, an adopted son occupies the same position and has the same rights and privileges in the family of the adopter as the legitimate son. That is because the theory of adoption depends upon the principle of complete severance of the child adopted from the family in which he is born but in respect of the paternal and the maternal line and his complete substitution into the adopter's family as if he were born in it. This view of the adopted son's rights in no way offends the sacramental notions of Hindu marriage and introduces no breach into the foundations of the system of succession under the Mitakshara law which, as observed by Krishnaswami Aiyangar J. in *Meenakshi Ammal* v. *Murugappa Muppanar*, 1940-1 Mad. L Jour 288 is based on relationship through valid marriage and legitimate descent. In the case of the adopted son, there must be special texts to curtail the rights of the natural born son which inhere in him as a result of the adoption. In the case of an illegitimate son on the other hand, there must be special texts to confer upon him any right that may be claimed by him as a son, or some principle recognised by the Hindu law by reference to which the claim can be sustained. In the case in *Vellaiyappa Chetti* v. *Natarajan*, 55 Mad 1 (P. C.) where the status of a son has been recogised by the Privy Council in favour of an illegitimate son of a Sudra, the question arose with reference to a right of maintenance against the ancestral property of the father in the hands of his collaterals as members of an undivided family, which was claimed by the illegitimate son. The Privy Council in decreeing the maintenance claim observes at p. 7 of the report thus :

"The father having died undivided in the present case. and the text being silent as to maintenance, the case stands outside the text. But this, in their Lordships' opinion, is not sufficient to cause the rejection of the plaintiffs' claim if it can be sustained on some principle recognised by the Hindu law. The High Court have held that there is such a principle, that principle being that where under the Hindu law a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property, and that the present is such a case."

The Privy Council here accept the principle on which the High Court acted, and it is clear to my mind that, had they not found that principle

available they could not have decreed the maintenance claim. It follows that there must therefore be either special texts or principles of the kind which the Privy Council applied in *Vellaiyappa Chetti* v. *Natarajana*, 55 Mad. 1 in order to support any claim of an illegitimate son.

[30] There being no such special texts or principles to warrant the claim of the appellant before us in the present case, the appeal must, in my opinion, fail. The only principle relied on is *jus representationis*, which, as shown in the foregoing, is unavailable in the present case.

C.R.K./G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 11 *[C. N. 2.]*

GOVINDA MENON AND RAMASWAMI JJ.

Gorela Krishnamurthy and another — Appellants v. *Kalidindi Venkateswaran (died) and others—Respondents.*

Appeal against order No. 194 of 1948, D/- 24-7-1951.

(a) Debt Laws —Madras Agriculturists' Relief Act (IV [4] of 1938) — Validity — Constitution of India, Art. 14 —Equality before law.

The principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play really in the sphere of its enforcement. The right of equality before law is not offended by any of the provisions of Act IV [4] of 1938 in its sphere of enforcement. It is enforceable against all persons coming within the ambit of the Act without any distinction being made on any ground whatsoever. [Paras 10, 12]

(b) Debt Laws — Madras Agriculturists' Relief Act (IV [4] of 1938), S. 4—Validity-Constitution of India, Art. 14 — Equal protection of laws.

Inclusion of simple mortgagee within the term 'agriculturist' which, by the way, was due to the judicial interpretation of the term "saleable interest in the land", is not a case of discrimination against money-lenders and would not amount to a case of a class of persons being singled out as subject for hostile legislation. On the other hand, it is conferring a benefit on these non-agriculturists and would also take them in for purposes of the benefits of Act IV [4] of 1938. [Para 13]

(c) Debt Laws— Madras Agriculturists' Relief Act (IV [4] of 1938), S. 4—Validity—Constitution of India Art. 14— Equal protection of laws.

Exemptions in Clauses (a) to (i) of S. 4 are based upon reasonable classification and come within the ambit of the principles showing that they have not singled out a person or class of persons for discriminating and for hostile legislation. The burden of showing that this classification rests upon arbitrary and not reasonable basis is upon the person who impeaches. [Para 24]

(d) Debt Laws—Madras Agriculturists' Relief Act (IV [4] of 1938) — Validity — Constitution of India, Art. 19.

Act IV [4] of 1938 has done nothing more than to redress an admittedly serious state of affairs, namely, imminent ruination of the agriculturists, by prices falling down and interest mounting up. There was the great danger of cultivation passing out of the hands of the agriculturists who constituted the back-bone of the State into the hands of the money lending non-agriculturists classes. So the Legislature has stepped in and done nothing more than redressed this balance taking care, however, to see that the creditors were not also put to any hardship, by preserving their capital intact and ensuring reasonable rates of remuneration by way of interest and wiping out of the debts only when the lender has got back more than twice the principal advanced by him and which was in consonance with the ancient Hindu principle of *Damdupat*. Looked at from any point of view it cannot be stated that Act IV [4] of 1938 places arbitrary restrictions on acquisition, holding and disposal of property. A. I. R. (38) 1951 S. C. 118, *Rel. on.* [Para 27]

(e) Transfer of Property Act (1882), S. 58— Sale or mortgage—Tests for determination stated — Deed in question held to be a mortgage by conditional sale and not an outright sale. [Paras 7, 8]

Anno. T. P. Act, S. 58, N. 33.

M. S. Ramachandra Rao and N. Sethumadhawa Rao —for Appellants ; V. Subramanyam—for Respondents.

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) A. I. R. (38) 1951 S. C. 118 : (1950 S. C. R. 759). [Pr. 26]

('51) A. I. R. (38) 1951 Mad 147 : (52 Cri. L. Jour. 515). (F. B.) [Pr. 9]

(1886) 118 U. S. 356 : (30 Law Ed. 220). [Pr. 10]

(1887) 120 U. S. 68: (30 Law Ed. 578). [Pr. 10]

(1888) 125 U. S. 181 : (31 Law Ed. 656). [Pr. 10]

Ramaswami J. — This is an appeal preferred against the order made by the learned District Judge of Krishna in O. P. No. 11 of 1945.

[2] The facts are: The respondent before us and his late undivided brother Narasimha Rao borrowed a sum of Rs. 1500 from the deceased Anjaneyulu father of appellants 1 to 3 and executed a registered mortgage deed in his favour. Subsequently on 9-5-1931 the mortgagors executed Ex. B-1 styled as a deed of sale in respect of the immovable property for a sum of Rs. 1682-8-0 of a portion of the hypotheca plus an additional extent making the total extent sold larger in extent and undoubtedly in value though we have no specific evidence on that point, than the original hypotheca. This deed of sale contained the usual covenants of sale and stipulated the following condition to reconvey :

"You and we have agreed that in case, within three years from now onwards, that is, before 8-5 1934, we pay to you the amount remaining after deducting from out of the amount of principal and interest accruing due on the sale amount of Rs. 1682-8 0 with compound interest from now onwards at the rate of Re. 1 per cent per mensem with annual rests, that net income realised from the lands under sale after excluding the cists, etc., from now onwards till then, you shall, at our cost, reconvey the property to us. Moreover, it is agreed that the said instalment shall be the essence of this agreement."

The property alleged to be sold seems to have been continued in the possession of the vendors because the vendors have neither filed patta in his name nor the kist receipt in his name for these lands. On the other hand, the petitioner in the lower Court has filed kist receipt book Ex. A 5 covering Aswaraopalam lands. It is in these circumstances that the petitioner has filed the O. P. for a declaration of the amount due under this document of 9-5-1931 on the plea that he is an "agriculturist" and that this 1931 document is not an outright sale deed but only a mortgage by conditional sale.

[3] The position taken by the respondents in the lower Court was that the transaction repre-

sented as a mortgage, namely, the 1931 document was a deed of sale with a condition of re-conveyance within the time fixed thereunder and that time was the essence of contract and that condition not having been fulfilled the contract had become null and void and that this document not being a mortgage by conditional sale the question of declaration does not arise and the petition has got to be dismissed.

[4] The learned District Judge of Krishna upheld the contention of the petitioner that the deed of 1931 is a mortgage by conditional sale and that he had jurisdiction under the Act IV of 1938 to give the declaration asked for, and allowed the petition. The defeated respondents in the lower Court appeal.

[5] In appeal two points are taken before us, namely, that first of all on the facts the learned District Judge went wrong in holding that this 1931 document was a mortgage by conditional sale and that it is not really an outright sale and secondly that Act IV of 1938 is *ultra vires* of the Constitution of India by reason of its provisions being repugnant to and offending Arts. 14 and 19 (1) (f) of the Constitution of India.

[6] We shall take up the contention on facts first and deal with the contention based upon Arts. 14 and 19 (1)(f) of the Constitution of India.

[7] The facts of this case clearly show that the deed in question has got all the indicia of a mortgage by conditional sale and cannot be construed as an outright sale. The following tests have been collected in Mulla's Transfer of Property Act, 3rd Edn., 1949, for deciding whether a given document should be construed as an outright sale or a mortgage by conditional sale. (1) Existence of a debt. (2) Period of payment, short period indicating of sale and the long period of mortgage. (3) Continuance of the grantor in possession indicates mortgage. (4) The stipulation for interest on repayment indicates mortgage. (5) The price below the true value indicates mortgage; the contemporaneous deed stipulating for reconveyance indicates a mortgage but one executed after lapse of time points to sale. These tests are not exhaustive and are only illustrative.

[8] In this case the circumstances under which this 1931 deed came into existence show that it could not be an outright sale. It is common ground that there was a dispute between the mortgagor and the mortgagee that insufficient property has been hypothecated and that the mortgagee stood in danger of jeopardising his security. There was also a criminal case about it. This sale-deed was the answer terminating that criminal litigation. Therefore, the probabilities are that the mortgagor executed this document not as a sale deed but merely hypothecating additional properties and giving more security and that the parties to the transaction meant nothing more. This receives corroboration from the fact that the mortgage was for Rs. 1500 and the subsequent sale-deed which has come into existence within one year's time was for an additional sum of Rs. 182 8-0 including interest and conveying a larger extent. It is clear that this additional extent has been included in the 1931 document practically for nothing and, therefore, it is a strong indication of this document being a mortgage by conditional sale. The stamp papers for the 1931 sale-deed have been purchased by the vendor which again is an indication against this being an outright sale-deed. Then the last covenant in the 1931 document which has been reproduced about incorporates two things namely accounting and compound interest. These stipulations for accounting and compound interest are very strong circumstances showing that the document is not an outright sale. We have already mentioned that the respondent before us seems to have been continuing in possession of the property and paying kist. The records before us show that this point is not free from doubt. This has not been clearly ascertained in the evidence of P W. 1 whose deposition has been printed. Therefore, on the facts we are clearly of opinion that the learned District Judge of Krishna was right in construing the document as a mortgage by conditional sale and not as an outright sale. On this conclusion the other findings of the learned District Judge flow and, therefore, on the facts there are no grounds for interference.

[9] Turning to the point of law, namely, that Act IV of 1938 is *ultra vires* of the Constitution of India by reason of its provisions being repugnant to Arts. 14 and 19 (1) (f), the contentions of the learned advocate for the appellant before us are to the following effect: namely that Act IV of 1938 is a negation of the rights of "Equality before the law and equal protection of the laws assured by Art. 14 of the Constitution" and secondly that arbitrary restrictions have been placed by this Act on the fundamental right to acquire, hold and dispose of property assured under Art. 19. We shall proceed to examine these contentions in two parts. First Art. 14 and secondly Art. 19 (1) (f).

[10] So far as Art. 14 of the Constitution is concerned the case for the appellant depends upon the definition of the terms of equality before law and equal protection of the laws. It is unnecessary for us to indulge in any parade of learning and go into an elaborate examination of the American decisions because these two phrases have been the subject matter of deep consideration by this High Court in a leading decision reported in *V. G. Row* v *State of Madras*, A.I R. (38) 1951 Mad. 147. The learned Chief Justice has analysed both these concepts in the following terms:

"The two phrases 'equality before the law' and 'the equal protection of the laws' must be taken to denote two different conceptions because of the disjunctive. Otherwise we would be attributing the sin of tautology to the Constitution makers. These two phrases appear to have been taken from the Constitutional doctrine of the two countries Britain and the United States. It was Dicey

who enunciated the doctrine of equality before the law as a part of the rule of law which according to the learned Professor forms the fundamental principle of the British Constitution. It has three meanings or may be regarded from three different points of view. It means in the first place the supremacy of the regular law of the land as opposed to arbitrary power. A man may be punished for a breach of law but he can be punished for nothing else. It means against equality before the law or the equal subjection of all classes to the ordinary law of land administered by the ordinary law Courts; the rule of law in this sense excluded the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."

This aspect of the rule has been understood to imply that no man however well placed or powerful he be otherwise is above the law; that officials like private citizens are bound to obey the same law and for the same offence are tried by the same judicial tribunals and that for the vindication of their civil rights or to obtain redress for wrongs done to them, they have to pursue the same remedies (see Dicey p 123) "Equality before the law" does not mean that the powers and privileges of a private citizen are the same as the powers of a public officer may be given special powers (sic). What the rule of law requires is that any abuse of such power or any other wrongful act by a public officer should be subject to control by the Courts in the same way as any wrongful act committed by an ordinary citizen. The principle of equality before the law is not violated by the existence of special laws providing for particular groups in the State, e. g., soldiers, doctors, or lawyers. Such laws may not affect the rest of the people, but apply only to the members of a particular calling. But in the enforcement of these laws as well as in the enforcement of the general law, no distinction is made between man and man. To give a concrete illustration of the principle, if the criminal law provides for the punishment of an offence any person who is guilty of the offence irrespective of his position in life or his wealth or influence will be liable to be punished in the same way as any other person guilty of the same offence. No doubt the punishment may vary according to the facts of each particular case, but the same set of facts, if they existed in another case, would also result in the same punishment In my opinion, the principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play really in the sphere of its enforcement. This is obvious from the fact that Professor Dicey who treats it as one of the fundamentals of the British Constitution was well aware of the supremacy of the British Parliament in the making of laws. No question can arise in Britain of an Act of Parliament being invalid because it contravenes the principles of equality before the law. So, when Professor Dicey speaks of the principle being an essential part of the Constitution, it only means that the laws of the land shall be enforced against all persons equally without any distinction being made on any ground whatsoever. In my opinion, it is in this sense that the phrase 'Equality before the law" is used in Art. 14. The impugned Act does not offend this principle. The other concept of "The equal protection of the laws" undoubtedly comes from the 14th Amendment to the United States Constitution. This guarantee was aimed at undue favour and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons even though all enjoyed the protection of due process. Thus the guarantee was intended to secure equality of protection not only for all but against all similarly situated. In short the equal protection clause embodies a prohibition against discrimination, discrimination in favour of any person or class as much as discrimination against any person or class. Equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo* v. *Hopkins* (1886) 118 U. S. 356. It requires that persons subjected to a piece of legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed; *Hayes* v. *State of Missouri*. (1887 120 U S. 68. It prevents any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. *Penbina Consolidated Silver Mining & Milling Co* v. *Commonwealth Pennsylvania* (1888) 125 U. S. 181 It is well established that this clause does not forbid classification for purposes of the exercise by the State of police or taxation rights. It is in this sense I understand the phrase as incorporated in Art. 14.

[11] In other words, equal protection in short means: absence of any arbitrary discrimination by the laws themselves or in their administration. None should be favoured and none should be placed under any disadvantage in circumstances that does not admit of any reasonable justification for a different treatment. Thus it does not mean that every person should be taxed equally but that persons under the same circumstances or property of the same character should be taxed by the same standard. But if there is any reasonable basis for classification, the legislature would be entitled to make a different treatment Thus it may (i) exempt certain classes of property from taxation at all, such as libraries and the like; (ii) impose different specific taxes upon different trades and professions; (iii tax real and personal property in different manners and so on. Similarly property specifically benefited may be subject to special taxation if the taxation is equal within the class benefited. Again, there may be different *modes* of *assessment* for different kinds of properties provided the rule of assessment is the same. "Equal protection" thus means, in short

"that no impediment should be interposed to the pursuits by any one except as applied to the same pursuit by

others under like circumstances; that no greater burdens should be laid upon one than or laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

Nor does equal protection prohibit the granting of special privileges to particular enterprises or employments in the interests of the general welfare, provided there is no discrimination within that class, e. g., in favour of national banks, insurance companies, railways and the like. Similarly, corporations may be treated separately from individuals and foreign corporations may be classified separately from domestic corporations.

"Class legislation discriminating against some and favouring others is prohibited, but legislation which, in carrying out a public purpose is *limited* in its application, is not prohibited, if within the sphere of its operation it affects alike all persons *similarly* situated."

"A classification is reasonable when it is not an *arbitrary selection* but rests on differences pertinent to the subject in respect of which classification is made; thus a particular business may be subjected to a special burden if there is reasonable relation between the burden imposed and the peculiar character of the business. Thus, railways may be made a special class for taxation or safety to the public. Similarly, certain professions may be limited to persons having particular qualifications Again a classification having some reasonable *basis* does not offend against 'equal protection' merely because it is not made with mathematical nicety or because *in practice* it results in some inequality.

• • • •

"The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the law as a violation of the guarantee of equal protection. Further, if any state of facts can be reasonably conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed" (See *Durgadas Babu Constitution of India*, M. L. J. Publication).

[12] Applying these principles, we find that first of all the right of equality before law is not offended by any of the provisions of Act IV [4] of 1938 in its sphere of enforcement. It is enforceable against all persons coming within the ambit of the Act without any distinction being made on any ground whatsoever. The learned advocate was not able to point out any single provision which shows discrimination in the enforcement of this Act. Therefore the impugned Act does not offend this principle.

[13] Turning to the other concept of "equal protection" the learned Advocate contends that this principle is offended by reason of Act IV [4] of 1938 including non agriculturists in its preliminary definition of "agriculturists" and secondly by reason of its excluding agriculturists under various exceptions in clauses A to I of S. 4 of Act IV of 1938.

[14] In so far as the first contention is concerned it is based upon the fact that the term "agriculturist" has now been judicially interpreted as including simple mortgagees who most often happen to be in the case of money lending creditors who are all non-agriculturists. It is, no doubt, true that the definition is reduced into absurdity when a money-lender is made an agriculturist of the Madras State and a tiller of the soil by reason of his being a simple mortgagee but this inclusion, which by the way, was due to the judicial interpretation of the term "saleable interest in the land," is not a case of discrimination against money-lenders and would not amount to a case of a class of persons being singled out as subject for hostile legislation. On the other hand, it is conferring a benefit on these non-agriculturists and would also take them in for purposes of the benefits of Act IV [4] of 1938.

[15] Then turning to the exempted categories set out in (a) to (i) of S. 4 of Act IV [4] of 1938 for this classification we must first of all bear in mind the objects and reasons for which this Act, Act IV [4] of 1938, was enacted which are set out in the objects and reasons published in the Gazette dated 1-12 1937:

"The object of the bill is to rehabilitate agriculture which is the basic industry of this province. Directly or indirectly the prosperity of all sections of the people is dependent upon the economic well being of the agriculturist. His present deplorable plight is well known. While on the one hand his income had diminished, on the other, the interest upon his debt has been steadily accumulating, often at an unconscionable rate. The predominant feature of the distress is due to the burden of the debt. It is the duty of any modern Government which is alive to its responsibilities to the people to relieve the producers of the people's food from such an intolerable burden. It would not be right for the State to permit the hereditary skill of the agriculturist to pass into unemployment allowing land to fall into the hands of people who are strangers to the calling of agriculture. Conciliation and other voluntary methods have failed and the adoption of the principle of compulsion has become necessary.

The bill provides that payment of the outstanding principal should discharge the debt (in cases where high rates of interest are charged). Interest will run from 1-10-1937 at a rate not exceeding six per cent. per annum. In cases where high rates of interest are charged, payment of twice the principal is to have the effect of completely discharging the debtor from further liability. As far as possible persons following occupations other than agriculture have been excluded from the benefit of the bill Dues to Government and local bodies and to co-operative and certain Joint stock banks have also been excluded from its scope. Every endeavour has been made in drafting the bill to simplify the issues and make them easy of decision, thus minimising litigation."

[16] Bearing these objects and reasons if we examine the circumstances under which all these exemptions A to I came to be incorporated the task of our finding out whether these exclusions offend equal protection of law will become easy.

[17] *Clauses (a) to (c)*: These clauses exempt debts due to the Provincial Government to the Central Government and to Local authorities from the operation of the Act. The reason for this has been explained by the Prime Minister as follows :

"If revenues taxes and cesses were written off no object or advantage would be gained for the people by the passing of this Act. If the revenues, taxes and cesses were exempted it was because they were necessary for ordered administrations. The procedure adopted by the Government in granting loans and collecting them was

different from that adopted by private individuals. Further, the writing off loans, or interest thereon was a matter for executive action and that course was available and need not be dealt with by legislation. Government could not afford to nor did they leave interest on loans to get into arrears as private creditors did, thereby leaving a burden, may be an act of charity, too heavy for the debtor to bear (Proceedings of the Council)."

[18] The statement of objects and reasons reproduced just above show that it was the endeavour of the Legislature that as far as possible persons following occupations other than agriculture should be excluded from the benefit of the bill. This explains cl. (d). Under cl. (d) persons living in urban areas and following predominantly non-agricultural occupations either alone or in addition to agriculture have been excluded. It is quite likely that a few genuine agriculturists also come to be excluded under this category but then we have to remember that these persons have only to think themselves for it because they cannot have the best of both worlds, namely, be an agriculturist and at the same time enjoy all the amenities of urban life also. No Legislature can frame definitions which in its practical working would not develop isolated flaws or reveal loop holes; for as the English proverb has it, we cannot make an omelette without breaking some eggs. The exclusion, however, is based upon a sound classification and is certainly not arbitrary.

[19] *Clause (e).* The reason for this exemption is that the credit system of co-operative societies is not less important than the functions of the Government in regard to agriculture and it would be impossible to treate co-operative societies as outside bodies and to place them in the same category as ordinary creditors.

[20] *Clauses (f) and (g).* The reasons for enacting these exemptions were. Liability arising out of a breach of trust (express or implied) and in respect of maintenance are treated differently from ordinary debts. Even agriculturists cannot escape discharging their obligations to the fullest extent possible in respect of these special classes of liabilities. No Court of equity would extend its protection to persons guilty of breach of trust in any form to any extent, and the helpless condition of persons whose sole means of support is a paltry maintenance allowance calls for even a greater measure of protection, than even what an agriculturist is entitled to. Such maintenance may be payable to women, children, aged parents, junior members of a Malabar tarwad or the younger brothers of the holder of an impartible estate. Liability in respect of all classes of maintenance is left untouched by this Act.

[21] *Clause (h).* With reference to this clause, the Select Committee has observed as follows:

"The committee has also exempted from the operation of this Act any debt or debts due to a woman who is entirely dependent on such debt or debts for her maintenance, and has accordingly included the following additional items in clause 4 of the bill. "Any debt or debts due to a woman, who on October 1, 1937 did not own any other property, provided that the principal amount of the debt or debts on such date did not exceed Rs. 3,000 (this amount has been raised to Rs. 6,000 by the amending Act of of 1948) It is provided that in calculating the value of the property owned by the woman on October 1, 1937 the house in which she lived or any furniture therein or her household utensils, wearing apparel, jewellery or such like personal belongings, should not be taken into account."

[22] *Clause (I).* Wages due to agricultural or other rural labourers are also exempted from the operation of this Act. Such debts rarely carry any interests. The words "other rural labourer" would include a village labourer employed for any purpose though not agricultural. Wages due to domestic servants and personal attendants in the rural parts of this province would be saved by this sub-clause. Such labourers in towns and in city factories would not come under the terms "rural labourer."

[23] The case with which these exemptions were framed upon a sound and explicable classification based upon the objects and reasons for which this Act IV of 1938 came to be passed is illustrated by an amendment which was proposed to include within the scope of this exemption debts due to orphans, very aged and disabled persons. The Prime Minister in 'opposing this amendment said that women for whose benefit the protection was devised constituted a distinct class. As for the other categories of persons referred to numerous difficulties would arise in defining them or ascertaining their fitness for relief. He was unable to accept the amendment because it would lead to enquiries whether a person was infirm or not and whether he was capable or not of earning a livelihood and in the case of minors the time that minority should be calculated upto—whether the date of the loan or the date of the legislation. The complications that might enure might be too many to be solved easily. In the case of woman, at least, the tradition was to make a distinction with respect to tenure, estate and other matters. If a similar distinction was to be made in the case of the other persons also it would lead to difficulties. As for orphans what was the criterion? Was it the mere fact of the death of parents? If so, a minor might be driving in a motor car, due perhaps to the absence of parental care and was he to be considered an orphan? The house would be ill-advised in accepting this amendment. He would admit, at the same time there were many cases of an absolutely deserving character but he was afraid these could not be provided for. Let them therefore be content with providing for women, who he added, became a "nightmare" to him because of the amount of literature which appeared in the press in their behalf. It would be very difficult to define a "disabled person" so as to entitle him to be exempt from the provisions of the bill. Regarding minors, there was one great difficulty. In this

country, if they proceeded to differentiate in regard to legal rights of minors, an amount of complication with regard to the rights of the individual members of Hindu families would arise. Such difficulties would not arise in the case of women. (Proceedings in Council).

[24] This analysis shows that these exemptions, are based upon reasonable classification and come within the ambit of the principles mentioned above showing that they have not singled out a person or class of persons for discriminating and for hostile legislation. The burden, as already pointed out, of showing that this classification rests upon arbitrary and not reasonable basis is upon the person who impeaches. This burden has been singularly not discharged by the appellant before us.

[25] Finally coming to Art. 19 (1) of the Constitution the ideology behind this right is that of individualism and private property. It means that a man is free to acquire any property (including means of production) either by inheritance, personal earning or other lawful means to hold it as his own, and to dispose of it, limited only by the exigencies of public welfare. "Dispose of" means (a) to determine the fate of, to exercise the power of control over, to fix the condition, employment etc., or to direct or assign for a use; (b) to exercise finally one's power of control over, to pass over into the control of, someone else by selling, to get rid of.

Clause (5) Restrictions upon the right of property. Clause (5) of Art. 19 authorises the state to impose reasonable restrictions on the exercise of the rights of property. (i) in the interests of the general public; (ii) for the protection of the interests of any scheduled tribe.

Interests of the general public: The expression "interests of the general public" in cls 5 and 6 of Art. 19 differs from the expression 'interests of public order" in cls. (3) and (4). So, the State shall be competent to impose restrictions under cls. (5) and (6) not only on grounds of public order but also on grounds of social and economic policy or on the ground of the "common good" e g. for securing the objects referred to in cls. (b) to (c) of Art. 39.

[26] The point for determination is whether Act IV of 1938 under the guise of protecting public interests places arbitrary restrictions or reasonable restrictiors upon acquiring, holding and disposing of property. In *Chintaman Rao* v. *The State of Madhya Pradesh*, A. I. R. (38) 1951 S. C. 118 the phrase 'reasonable restrictions" has been interpreted. The phrase "reasonable restrictions" connotes, according to the Supreme Court that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation that is the choice of a cause which reason, dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by cl. 6 of Art. 19 it must be held to be wanting in that quality.

[27] In this case the Act IV of 1938 has done nothing more than to redress an admittedly serious state of affairs, namely, imminent ruination of the agriculturists, by prices falling down and interest mounting up. There was the great danger of cultivation passing out of the hands of the agriculturists who constituted the back-bone of the State into the hands of the money lending non-agriculturists classes. So the Legislature has stepped in and done nothing more than redressed this balance taking care, however, to see that the creditors were not also put to any hardship by preserving their capital in tact and ensuring reasonable rates of remuneration by way of interest and wiping out of the debts only when the lender has got back more than twice the principal advanced by him and which was in consonance with the ancient Hindu principle of *Damdupat*. The learned advocate for the appellant was unable to point out any circumstances showing that the reliefs provided for by the Act IV of 1938 were either unnecessary or arbitrary or of an excessive nature or not warranted by public interest In fact the Constitution itself has conferred powers on the State Legislature in sch. 7 *list 11 — State List item No 30 lending and money lenders; relief of agricultural indebtedness* to deal with money lending, money lenders and agricultural indebtedness. This regulation of money lending and money lenders and relief of agricultural indebtedness is considered to be legitimate exercise of the police powers of the State and in these days of the welfare State it is too late in the day to challenge it and in fact in this country such legislation has been enacted for a very long time even during the time of the British Administration. Therefore, looked at from any point of view it cannot be stated that this Act IV of 1938 places arbitrary restrictions on acquisition, holding and disposal of property.

[28] The point of law taken, therefore, fails and the provisions of Act IV of 1938 are not repugnant to any of the provisions of the Constitution of India and are certainly *intra vires* thereof.

[29] In the result this appeal fails and is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 17 (C. N. 3)

KRISHNASWAMI NAYUDU J.

Joshuna B. Powers Incorporated, Plaintiffs-Applicants v. Express Newspapers Ltd. and another Defendants-Respondents.

C. S. No. 236 of 1950 and Applns. Nos. 2183 & 2336 of 1951, D/- 20-9-1951.

Civil P. C. (1908), O. 37, R. 3 — Leave to defend suit — When to be granted — Matters to be considered by Court.

It is not the province of the Court hearing an application for leave to defend to examine the defence, if there is one, and find out the truth or otherwise of the defence, but only to consider whether there is a real defence to the suit, and if it is satisfied that the defence is not imaginary, speculative or fanciful, but real and bona fide, there is no other course open to it except to grant leave to defend. In an application for leave to defend, the applicant has only to satisfy the Court that he has got a real defence to the suit and not that he has got a complete answer to the plaintiff's case. It is not possible to lay down a rule of thumb in what cases leave to defend should be granted, each case has however to be decided on the particular facts and circumstances. (Para 7)

Where in a suit on the promissory note the defendant pleaded an arrangement with a third party under which the plaintiff was to receive the pronote amount from such third party it was held in the circumstances that it was sufficient to constitute a bona fide and real defence so as to grant leave to defend. (Para 7)

Anno: C. P. C. O. 37 R. 3 N. 2.

V. Srinivasan, for Applicants — King and Partridge, for Respondents.

ORDER: These are appeals against the order of the Master dismissing the applications taken out by the 1st and 2nd defendants separately, for leave to defend but on practically the same grounds.

(2) The plaintiffs belong to New York; the 1st defendant is the Express Newspapers Limited, and the 2nd defendant is the Managing Director of the 1st defendant. The plaintiffs were acting as the representatives of the 1st defendant at New York. The defendants entered into a contract with one Ben Shulman of New York for the purchase of a printing press and asked the plaintiffs, their business representatives at New York, to advance a sum of 10,000/- dollars towards the cost of the machinery. Defendants executed a promissory note in favour of the plaintiffs for 10,000/- dollars on 9-4-1947. The present suit is on that promissory note.

(3) The defence as disclosed in the affidavit filed in support of the application for leave to defend is that the suit promissory note was not intended to be acted upon, that the defendants placed an order through the plaintiffs with one Ben Shulman of New York for purchase on behalf of the defendants a printing machinery valued at 1,35,000 dollars and that on hearing from the plaintiffs and the seller Ben Shulman, a letter of credit was sent on 20-11-1947 on the understanding that the machinery was ready for shipment. A sum of 10,000/- dollars had to be paid as advance and the plaintiffs were to pay that amount in the first instance and recover the same from the amount of the letter of credit to be opened by the defendants in favour of Ben Shulman. The defendants accordingly provided the funds to open a letter of credit in favour of Ben Shulman in which the amount of advance by the plaintiffs, namely 10,000/- dollars, was also included. In the meanwhile, there were some disputes after the shipment of the machinery as to an alleged breach on the part of the sellers of the contract of sale. The defendants state that under the arrangement between the parties, the plaintiffs have to receive 10,000/- dollars, in respect of which the suit promissory note was executed, from Ben Shulman, more so especially when the amount has been already paid to Ben Shulman and included in the letter of credit. In effect, they plead discharge by the arrangement alleged. The plaintiffs' case is that the letters of credit should be opened in their name and that the 2nd defendant agreed that all letters of credit would be opened in the plaintiffs' name, but when the time came to open the letters of credit, the 2nd defendant did not do so, but opened them in favour of Ben Shulman. They take up the position that they are not concerned with the arrangement that the defendants may have made with Ben Shulman. They state that they are not parties to any such arrangement. Though it is stated by the defendants in the affidavit that the pronote was not intended to be acted upon, the real defence seems to be, as could be gathered from the allegations in the affidavit, that the pronote was discharged by the opening of the letter of credit in favour of Ben Shulman including the pronote amount. That is in pursuance of an arrangement, which is pleaded by the defendants, to which, it is stated, the plaintiffs were a party, that the plaintiffs would receive this 10,000/- dollars from Ben Shulman, instead of directly from the defendants.

(4) Three letters in the correspondence between the parties may be referred to for the purpose of ascertaining whether there is a real defence to the suit. On the same date as the pronote, that is on 9-4-1947, the 2nd defendant writes to the plaintiffs requesting them to pay 10,000/- dollars to Mr. Ben Shulman and stating that he will reimburse the amount as soon as he could arrange it. There is also mention in that letter that the 2nd defendant has cabled that day to open another letter of credit for 10,000/- dollars in respect of an item of machinery different from the one in respect of which the amount of 10,000/- dollars was advanced. It is also indicated in that letter that the letter of credit would be opened in favour of the plaintiffs. On 8-10-1947, the plaintiffs write to the 2nd defendant in regard to various matters, and while referring to the fees payable in respect of their acting as the representatives of the defendants, there is a demand made as to several items and it is stated within brackets that those items are beside

> "the US 10,000 dollars payment made to Ben Shulman which was to be included in the general letter of credit covering this press."

It is therefore clear from these two letters that the letter of credit to be issued to the plaintiffs should include these 10,000 dollars, but the question is whether in variation of that arrangement, the letter of credit could be issued for these 10,000 dollars to Ben Shulman instead of the plaintiffs. The defendants say that this change was agreed to and acquiesced in by the plaintiffs. In the letter dated 3-11-1947 written by the defendants to the plaintiffs, there is a reference to the Shulman shipment, where the defendants say:

> "We have taken steps to open the credit for Jackson Ville Press and also for the Stero-plant. We have included in this letter of credit 10000 dollars advanced by you to Mr. Shulman for this transaction. We are requesting Mr. Shulman to receive 10000 dollars from the Bank and pay it to you."

(5) There is therefore an intimation at any rate on 3-11-1947 that the amount of the pronote has been paid, though not directly paid to the plaintiffs, with direction to the plaintiffs to receive 10000 dollars from Ben Shulman and a corresponding direction to Shulman to receive the amount from the Bank and pay it over to the plaintiffs.

(6) The question that would arise for determination in this suit is whether the arrangement plead-

ed by the defendants is true. There is some support for the contention and it is not totally without foundation, because subsequent to that in the correspondence, the plaintiffs did not protest to the letter of credit being opened in the name of Ben Shulman and have acquiesced in it. I should consider that, on this material, it should be held that the defence is a real defence to the suit and equally a 'bona fide' defence. There is the pronote; execution and consideration are admitted; practically discharge is pleaded by payment of the amount of the suit pronote to a person in New York, from whom the plaintiffs, who are the representatives of the defendants, were asked to receive the amount as the same had been paid to a person with whom certain transactions were entered into by the defendants, the plaintiffs acting as their representatives.

(7) The learned Master, however, examined the documentary evidence in detail, and, after an elaborate enquiry, has found that there is no basis at all, on the facts, for the suggestion that there could have been any 'novatio' by reason of the entire documentary evidence in this case. The learned Master examined the contentions with reference to the documents and the probabilities of the case and held that the defence had no basis. While he observes that

> "the inclusion of the amount in the letter of credit was obviously intended to be a mode by which the plaintiff was to be paid the money due to him under the note",

he however states that "it was never contemplated that it should automatically discharge the promissory note." I consider these are all matters for consideration not for a Court hearing an application for leave to defend, but really for the trial Judge hearing the suit to examine the defence and decide the case on its merits. It appears to me that the learned Master has missed the mode of approach to an application of this nature. It is not the province of the Court hearing an application for leave to defend to examine the defence, if there is one, and find out the truth or otherwise of the defence, but only to consider whether there is a real defence to the suit, and if it is satisfied that the defence is not imaginary, speculative or fanciful, but real and 'bona fide', there is no other course open to it except to grant leave to defend. In an application for leave to defend, the applicant has only to satisfy the Court that he has got a real defence to the suit and not that he has got a complete answer to the plaintiffs' case. That is legitimately the province of the trial Court and not of the Court hearing an application for leave to defend. It is not for the applicant to satisfy the Court hearing an application for leave to defend that he would in any event succeed in the defence which he has raised. Much of the elaborate enquiry in this application could have been avoided, if the real scope of such an application had been correctly appreciated. I have no doubt that, on the facts placed before me, there is a real defence to the suit. The fact that the pronote amount has been sent to Ben Shulman and an arrangement is pleaded, whereby the plaintiffs have agreed to receive the amount from Ben Shulman, in sufficient to constitute a real and 'bona fide' defence. It is not possible to lay down a rule of thumb in what cases leave to defend should be granted; each case has however to be decided on the particular facts and circumstances. But this must be borne in mind that what the applicant praying for leave to defend should establish is that he has really got a defence, and not that he would succeed in the defence raised by him.

(8) The appeals are allowed. Leave to defend is granted. Costs will be costs in the cause.

C.R.K./K.S. *Appeals allowed.*

A. I. R. (39) 1952 MADRAS 18 (C. N. 4)

PANCHAPAKESA AYYAR J.

S. K. Kuttalalingam Pillai, Petitioner v. S. V. N. Chinnakannu Pillai, Respondent.

Civil Revn. Petn. No. 6 of 1951, D/- 27-8-1951.

Civil P. C. (1908) S. 51, Proviso — Record of reasons for arrest — If essential.

A Court must record its reasons in writing regarding its being satisfied, under S. 51 C. P. C., as amended, that the judgment-debtor had rendered himself liable to be 'arrested and sent to civil jail,' on any one of the grounds mentioned therein, before directing his arrest and detention in Civil jail, and 'reasons must be given every time a man is ordered to be arrested and in every proceeding where he is ordered to be arrested.' An order for arrest without giving any reason whatsoever cannot be sustained. A I R (36) 1949 Mad 470 and AIR (36) 1949 Mad 822 Rel. on. (Para 1)

K. S. Ramabhadra Aiyar, for Petitioner — S. Ramachandra Aiyar, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) 1949 Mad W N 49: (A I R (36) 1949 Mad 470) (Pr 1)

('49) 1949 Mad W N 294: (A I R (36) 1949 Mad 822) (Pr 1)

ORDER: This is a petition to revise the order of the Subordinate Judge of Tuticorin dated 9-12-1950, in E. P. No. 130 of 1950, in S. C. S. No. 408 of 1949, directing arrest of the petitioner for recovering about Rs. 1000 due from him. The learned Subordinate Judge passed an order on 28-9-1950, as follows:

> "P. W. 1. Examined. Ex. A. 1 marked. For payment by 10-11-1950 without deciding about the liability (evidently for arrest)".

On 10th November 1950, the judgment-debtor was absent, and the matter was adjourned to 20th November 1950, and then to 24th November 1950, when we find the note, "Rs. 50 paid. Balance to be paid by 9-12-1950". On 9th December 1950; the only order is: "Judgment-debtor absent. Arrest by 9-1-1951." The judgment-debtor's vakil is said to have been present in Court. The learned Sub-Judge gave 'no reason whatever' for ordering arrest. Nor did he "decide about the liability for arrest" under S. 51, C. P. C. as he was bound to do and as he had originally intended to do (see note on 28th September 1950). 'In Venkatasubba Rao v. Sriramulu', 1949 Mad W N 49, I have held that a Court must record its reasons in writing regarding its being satisfied, under S. 51 C.P.C. as amended, that the judgment-debtor had rendered himself liable to be 'arrested and sent to civil jail', on any one of the grounds mentioned therein, before directing his arrest and detention in civil jail, and that 'reasons must be given every time a man is ordered to be arrested and in every proceeding where he is ordered to be arrested.' The mere fact that Rs. 50 (out of Rs. 1000) were paid by this petitioner on 24th November 1950 cannot, by itself, prove that the man had means to pay the entire Rs. 1000 and was still fraudulently withholding payment. Nor will the absence of the judgment-debtor in Court on 9th December 1950 be any valid reason for not writing out the reasons for ordering his arrest, especially when his vakil was present, and his arguments could have been heard and considered. A Bench of this Court, consisting of Subba Rao J. and myself, has in 'Paramanandaswami v. A. K. Shanmugam Pillai', 1949 Mad W N 294, again emphasised the need for strictly observing the provisions of S. 51 C. P. C. It is really surprising that the learned Sub-Judge should have, after these

rulings, passed his bald order for arrest. The mandatory provisions of law, and the liberty of person of citizens, should not be treated lightly thus. It is obvious that the lower Court's order must be set aside and the matter remanded to the lower Court for hearing the Judgment-debtor, or giving him an opportunity of being heard, and passing a fresh order of arrest, if justified, giving full reasons under S. 51 Civil Procedure Code, and I do accordingly. In the circumstances of this case, all the parties to this civil revision petition will bear their own costs.

C.R.K./K.S. *Order set aside.*

A. I. R. (39) 1952 MADRAS 19 (C. N. 5)

PANCHAPAKESA AYYAR, J.

Kaki Venkatappa, Petitioner v. Toppal Timmappa, Respondent.

Civil Revision Petition No. 728 of 1950, D/- 19-7-1951.

Civil P.C. (1908), O. 37, R. 3 — Grant of leave to defend conditionally — Discretion — Interference by High Court.

The discretion of a Court to order the furnishing of security before giving leave to defend would be regulated by various circumstances in the particular case, and the order of a Court passed on the exercise of that discretion should only be interfered with by the High Court if the discretion is proved to have been arbitrarily or perversely exercised.

'Held' that when the lower Court observed that it was convinced that the defendant had a 'prima facie' case to contest the suit it meant only that he had a plausible case, and not that he had a good case, much less a fool-proof case.

A security will be of far greater value to a plaintiff than an undertaking by the defendant not to alienate his remaining properties. AIR (23) 1936 Mad 246, Rel. on; AIR (11) 1924 Mad 612 explained. (*Para 2*)

Anno: C. P. C., O. 37, R. 3, N. 3, 6

K. Srinivasa Rao, for Petitioner; T. V. Raghunath Rao, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('24) 46 Mad L Jour 255: (AIR (11) 1924 Mad 612) (Prs 2, 3)

('35) 58 Mad 116: (AIR (22) 1935 Mad 43) (Pr 2)

('36) 70 Mad L Jour 241: (AIR (23) 1936 Mad 246) (Prs 2, 3)

('49) 1949-2 Mad L Jour 70: (AIR (37) 1950 Mad 226) (Pr 2)

ORDER: This is a petition to revise the order of the District Munsiff, Bellary, dated 3-11-1949, in I.A. No. 781 of 1949 in O.S. No. 347 of 1949, granting the petitioner leave to defend in a suit on a promissory note, only on condition of his furnishing security of immovable property for Rs. 2,000 even though the learned District Munsiff had, in the course of the very same order, observed that he was convinced that the defendant had a 'prima facie' case to contest the suit. The defendant (petitioner) had admittedly alienated some of his properties shortly before the suit. I have perused the entire records and heard the learned counsel on both sides.

(2) Mr. K. Srinivasa Rao, for the petitioner, urged that the lower Court should have given unconditional leave to defend, in view of its own findings that the defendant had a 'prima facie' case to contest the suit, and that, under the rulings in 'Periya Miyan v. Subramania Iyer', 46 L Jour 255, 'Sundaram Chettiar v. Valliammal', 58 Mad 116 and 'Kesavan v. South Indian Bank Limited', 1949-2 Mad L Jour 70, the Court has no discretion to refuse unconditional leave to defend in a case where it comes to the conclusion that there is a triable issue in the case, as the lower Court did. Mr. Ranganatha Rao, for the plaintiff-respondent, urged that two of the Bench rulings relied on by the learned counsel for the petitioner, namely, 'Sundaram Chettiar v. Valliammal', 58 Mad 116, and 'Kesavan v. South India Bank Limited', 1949-2 Mad L Jour 70, relate to leave on the original side, where the rules regarding this matter are quite different and unconnected with the rules in the Civil Procedure Code. A Bench of this Court, to which I was a party, has also held recently that the rules of the Original Side are independent rules having nothing to do with the rules in the Civil Procedure Code. But the ruling in 'Periya Miyan Marakayar v. Subramania Iyer', 46 Mad L Jour 255, relates to O. 37, Civil Procedure Code and not to the rules of the original side. To this Mr. Ranganatha Rao's answer is that there is a ruling by Varadachariar J., in 'Thyagaraja Mudali v. Vedathunni.'* 70 Mad L J 241, where the learned Judge discusses the ruling in 'Periaya Miyan Marakayar v. Subramania Iyer', 46 Mad L Jour 255, carefully, and comes to the conclusion that even under that ruling the discretion of a Court to order the furnishing of security before giving leave to defend would be regulated by various circumstances in the particular case, and that the order of a Court passed in the exercise of that discretion should only be interfered with by the High Court if the discretion is proved to have been arbitrarily or perversely exercised, and that even if a Court had considered that there was "a plausible defence" it might still grant leave, in the circumstances, only on condition of furnishing security, and that, by itself, would not amount to any arbitrary or perverse exercise of the discretion. Of course, the decision of Varadachariar J., is only by a single Judge, as against the decision of the Bench in 'Periya Miyan Marayakar v. Subramania Iyer', 46 Mad L Jour 255, relied on by Mr. Srinivasa Rao as contended by him. Still, the fact remains that the Bench decision was fully considered by that very eminent Judge and that he came to the above conclusion, which is one to which in my opinion, any Judge will come to on grounds of justice and equity. In his case, the petitioner had also alienated some of his properties, unlike in the case in 'Periya Miyan Marakayar v. Subramania Iyer', 46 Mad L Jour 255. I am satisfied that, where the learned District Munsiff observed that he was convinced that the defendant (petitioner) had a 'prima facie' case to contest the suit, he meant only that he had a "plausible case", the phrase used by Varadachariar J., in Thyagaraja Mudaliar v. Vedathuni.' * 70 Mad L Jour 241, and not that he had a good case, much less a fool-proof case. A reading of the petitioner's defence will also show that that is all he had just a plausible case and nothing more. Besides, the case has now gone many stages further from the stage when leave to defend unconditionally was refused by the lower Court. The petitioner failed to furnish the security ordered, and an ex parte decree was passed against him on 11-11-1949. This petition has only been filed by him in this Court on 31-1-1950 when his petition for unconditional leave had been washed out for all practical purposes and when the real substantial remedy of the petitioner, if he really had a good case, was to apply under O. 37, R. 4, Civil Procedure Code (no such provision exists in the Original Side Rules) which provides for

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*This is a mistake. The correct reference is 'Chittukuri Gopala Rao v. Paruchuri Subba Rao'—Ed.

setting aside decrees already passed. Of course, merely as a matter of law, I cannot say that the petitioner has no right to file a petition like this. It is well-known that even a final decree has been passed in pursuance of a preliminary decree an appeal against the preliminary decree, if within time, can be filed, and if the appellant succeeds therein, the final decree will automatically fall, like a branch after the trunk has been cut. But all this is mere abstract speculation for our purposes. In the present case, not only had the Court a discretion to order security and exercised it judiciously, but the petitioner himself admittedly gave an undertaking in the lower Court not to alienate his remaining properties. Mr. Srinivasa Rao's contention that that undertaking would do and that an order for security was uncalled for, is not convincing. 'Bona fide' purchasers for value without notice— and they will crop up in no time in present day conditions — will not be bound by any such undertaking, of which they are ignorant. So, a security will be of far greater value to a plaintiff than an undertaking of the above nature.

(3) In the end, therefore, this petition deserves to be, and is hereby dismissed, but without costs as it was obviously filed relying on the Bench ruling in 'Periaya Miyan Marakayar v. Subramania Iyer', 46 Mad L Jour 255, which cannot be said to have been overruled, though it has been interpreted in what I consider to be the only reasonable way by a single Judge, Varadachariar, J., in the later ruling in Thyagarja Mudaliar v. Vedathunni' * 70 Mad L Jour 241.

C.R.K./D.H. *Revision dismissed.*

*This is a mistake. The correct reference is 'Chittukuri Gopala Rao v. Paruchuri Subba Rao— Ed

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A. I. R. (39) 1952 MADRAS 20 (C. N. 6)

PANCHAPAKESA AYYAR, J.

Ramaswami Ambalam, Petitioner v. The Madras Hindu Religious Endowments Board through its President Sri T. M. Chinniaya Pillai and others, Respondents.

Civil Miscellaneous Petition No. 5186 of 1951, D/- 30-7-1951.

(a) Constitution of India, Art. 228 — Applicability — Conditions for.

For Art. 228 to apply, three main conditions must exist. They are: (1) A suit or case must be 'actually pending' in a Court subordinate to the High Court. (2) The High Court must be satisfied that it involves 'a substantial question of law as to the interpretation of the Constitution.' It should 'really involve' such a question. A mere frivolous allegaion that such a question is involved will not do. (3) The High Court must be satisfied that 'the determination of that question is necessary for the disposal of the cases. If the suit can be disposed on the other questions raised (like limitation, non-maintainability by a single person when a representative suit has to be filed under the law, etc.) Art. 228 will not apply. Usually, the High Court will not act till this point is clear, and will wait for the other issues to be decided. Of course, where it is clear it will act at once. (Para 6)

(b) Constitution of India Art. 228 — Substantial question of law — Whether Section 57, Madras Religious Endowments Act is void as contravening Arts 15 and 26 of the Constitution of India.

During the pendency of a suit in the District Court the plaintiff applied for amendment of plaint adding a contention that the scheme passed by the Hindu Religious Endowments Board, Madras under S. 57 of the Madras Hindu Religious Endowments Act regarding the suit temple was null and void as the entire Hindu Religious Endowments Act and especially S. 57 thereof was ultra vires of the powers of Legislature as it offended Arts. 15 and 26 of the Constitution of India. The plaint was amended and additional issue was framed on the point without any objection. The plaintiff then applied under Art. 228 of the Constitution of India to the Madras High Court for transfer of suit to its file and either dispose of the suit itself or determine the question of law involved in the additional issue.

'Held' that the question regarding the validity of the Madras Hindu Religious Endowments Act was a substantial question of law regarding the interpretation of the Constitution the determination of which was necessary for the disposal of the suit. Such a question had already been raised in several applications before the High Court and was bound to be raised in future suits. The question should therefore be determined under Art. 228 (b) by a Bench on the appellate side. (Para 10)

R. Gopalaswami Iyengar, for A. Sundaram Aiyar and T. K. Sundararaman, for Petitioner; M. Seshachalapathi, T. R. Srinivasan, S. Gopalaratnam and D. Ramaswami Aiyangar, for Respondents.

ORDER.: This is a petition filed by one Ramaswami Ambalam, the first plaintiff in O.S. No. 18 of 1950, on the file of the District Judge of Ramanathapuram, to withdraw that suit to the file of this Court under Article 228 of the Constitution of India, and either dispose of the suit here itself or determine the question of law covered by the additional issue framed in the suit by the District Judge, Mr. P. N. Ramaswami, as he then was, on 4th April 1951 in I.A. No. 86 of 1951, an application for amendment of the plaint filed by the plaintiffs, adding a contention that the scheme framed by the Hindu Religious Endowments Board, Madras (1st defendant), under S. 57 of the Hindu Religious Endowments Act, regarding the suit temple (Sri Koppudanayagi Amman temple of Karaikudi, with an income of thirty thousand rupees a year), under the orders of the Federal Court in App. Suit No. 7 of 1948, was null and void as the entire Hindu Religious Endowments Act, and especially S. 57 thereof, was 'ultra vires' of the powers of the Legislature, as it offended Articles 15 and 26 and other provisions of the Constitution of India, regarding Fundamental Rights, by discrimination against Hindus alone by subjecting their endowments alone to regulation and control by Government officers and Corporations, leaving Muslims, Christian, Parsi, Jewish and other endowments unaffected, and by interfering with the freedom of the Hindus to manage their own religious institutions in their own way without interference by politicians and legislators and officials not so well acquainted with Hindu beliefs and usages.

(2) This petition is vigorously opposed by the Hindu Religious Endowments Board and two out of the three trustees, representing the two warring groups of Nagarathars and Nattars, on various grounds, like the scheme not having been framed under S. 57 of the Hindu Religious Endowments Act but only under the orders of the Federal Court in Appellate Suit No. 7 of 1948; Article 228 not applying, as there is no substantial question of law involved, as contemplated by it; such question, even if it is involved, not being necessary to be decided for disposing of this suit; the motive of the plaintiffs being only mercenary, and not religious or pious; the appellate side having no jurisdiction to entertain the petition, as it involves the trial of a suit here and can be filed only on the original side; and the need to set aside the direction of Satyanarayana Rao and Raghava Rao, JJ., regarding the non-functioning of the Board of Trustees till the suit is disposed of, in their order dated the 12th February 1951, as the basis of that order was the consent of the parties' in the belief that the orders of the learned Judges to the District

Judge, Ramanathapuram, to dispose of the suit before the summer recess, would be carried out and not frustrated by the selfish and mischievous and dilatory tactics of the plaintiffs, in case Art. 228 is held to be applicable and the suit is withdrawn to this Court.

(3) I have perused the entire records, and heard the learned counsel on all sides. The Federal Court directed the Hindu Religious Endowments Board to frame a scheme giving equal representation to the ARA family of 'Nagarathars' (claiming to be the hereditary trustees) and the 'Nattars' of Karaikudi, held to be vitally interested in the management of this temple, in the Board of management with 'an independent Chairman.' The Hindu Religious Endowments Board framed the scheme, under S. 57 of the Hindu Religious Endowments Act, with a Board of management of three trustees, and an Executive officer to replace the existing receiver. One of the trustees (respondent 4) represented the ARA family, another (respondent 3) represented the Nattars of Karaikudi (though he is alleged by the plaintiffs to be a stooge of the 'Nagarathars', and only nominally a 'Nattar' and to be always sailing with the 'Nagarathars' in this dispute and litigation), and the Chairman was one Perianan Chettiar (respondent 2) appointed as an independent chairman (but alleged by the plaintiffs to be a 'Nagarathar' and a relative of the ARA family, and not an independent chairman' by any means. The scheme was attacked in the suit as liable to be set aside as the 'Nattars' and 'Nagarathars' were really 'not given equal representation', as all the three trustees were really the 'Nagarathar' nominees, that the 'Nagarathar' and 'Nattar' trustees should have been 'elected or selected' by the 'Nagarathars' of ARA family and the Karaikudi 'Nattars,' at their meetings, and 'not selected by the Court, that the independent Chairman should have been a man 'not belonging to the Nagarathar or Nattar communities', which were fighting over this temple, and commanding the confidence of both these communities, that the safe-keys and control over the income and expenditure should have been given to the trustees, and not to the executive officer, and other grounds.

(4) An injunction petition (I.A. No. 151 of 1950) was filed by the plaintiffs for restraining the three trustees from taking charge under the scheme and for restraining the old Receiver from handing over charge to the executive officer appointed under the scheme. The learned District Judge dismissed this petition on 6th January 1951 and dissolved the interim injunction he had granted. Eventually, on the 12th February 1951, in L.P.A. No. 7 of 1951 and C.M.A. No. 21 of 1951, Satyanarayana Rao and Raghava Rao, JJ., on the consent of parties, allowed the executive officer appointed under the scheme to function as a Receiver of Court, subject to the directions of the District Court, and directed the Board of Trustees, 'in a later paragraph', not to function till the disposal of the suit, and directed the District Judge, Ramanathapuram, to dispose of the suit before the summer recess.

(5) But, after the suit went back to the District Court, and after the case was opened and some documents marked, the plaintiffs put in petitions to amend the suit by adding the above constitutional issue and requesting the District Judge to move this Court for withdrawing the suit to its file, under Art. 228. The learned District Judge passed orders on 4th April 1951 in both the petitions. In the amendment petition (I.A. No. 86 of 1951), the order was, "Heard. Amendment petition allowed." In the other petition (I.A. No. 87 of 1951), the order was, "Heard. Rejected" 'without any reasons given for rejecting it.' Hence this petition. I may add that the learned District Judge framed a wide and comprehensive issue about the validity of the Hindu Religious Endowments Act, and especially S. 57 thereof. after the amendment, without the slightest opposition by the respondents.

(6) The law on the point is clear. For Article 228 to apply, three main conditions must exist. They are:

1. A suit or case must be 'actually pending' in Court subordinate to the High Court. No one can move this Court under Article 228 stating that such a suit or case is 'intended to be filed.' It must be actually 'filed' and must be 'pending.' If it has been dismissed or disposed of already, Article 228 will not apply.

2. The High Court must be satisfied that it involves 'a substantial question of law as to the interpretation of the Constitution.' It should 'really involve' such a question. A mere frivolous allegation that such a question is involved will not do.

3. The High Court must be satisfied that 'the determination of that question is necessary for the disposal of the case.' If the suit can be disposed on the other questions raised (like limitation, non-maintainability by a single person when a representative suit has to be filed under the law, etc), Art. 228 will not apply. Usually, the High Court will not act till this point is clear, and will wait for the other issues to be decided. Of course, where it is clear, as in this case, it will act at once.

(7) Here, the suit is pending in the Disrtict Court, Ramanathapuram, a Court subordinate to this Court, whatever the reason be for its pendency, whether mischievous and selfish petitions by the plaintiffs, or petitions filed by them 'bona fide' in the ends of justice. I must add that the amendment petition was not opposed as frivolous and mischievous and that the District Judge's order allowing it was not even challenged in revision. So, the first condition is satisfied.

(8) I hold also that 'the appellate side' has jurisdiction, especially when the matter arises from the mofussal Courts and is an offshot of orders in C.M.A. No. 21 of 1951 and L.P.A No 7 of 1951, all the more so as I propose only to act under Art. 228 (b), and not to try and dispose of the suit 'here itself' under Art. 228 (a), and, so, no trial on the original side, is involved.

(9) I reject also the contention that Article 228 will not apply as the scheme was not framed under Section 57 of the Hindu Religious Endowments Act but under the directions of the Federal Court, as the scheme itself was 'admittedly framed under S. 57 of the Hindu Religious Endowments Act', and it does not matter that the scheme was framed under the directions of the Federal Court in App. Case No. 7 of 1948.

(10) Then it was urged that the contention regarding the validity of the Hindu Religious Endowments Act 'was frivolous' and not seriously meant, and that it is 'not necessary to decide this question for disposing of his suit.' I cannot agree. This objection was never raised in the District Court before the amendment was allowed, or before 'the wide issue was framed by the learned District Judge. Nor can I hold that the contention is obviously 'frivolous', as several eminent Advocates have raised the same contention in 'Writs and 'appeals' now pending in this Court (like the 'Guruvayoor Devaswom case — 'Writ' — several other 'Devaswom' and Mutt cases — Appeals), and 'Benches of this Court have admitted the petitions for those writs and the appeals' on the strength of such contentions. Every contention has to be considered on its own merits. Thus, a man convicted for adultery and sent to jail, leaving the woman with whom he committed it, and without whose co-operation he could never have committed it, scot-free, contended before me that S. 497, Indian P.C., was illegal as it amounted to discrimi-

nation rendered illegal by the Constitution, and this matter has been referred by me to a Bench for decision as involving a real and substantial question of law as to the interpretation of the Constitution the determination of which will be necessary for the disposal of the appeal against the conviction of the men for adultery. So too, S. 494, Indian P.C., has been attacked before me as discriminating against Christians, and now against Hindus also, under the Madras Hindu Bigamy Prevention Act, while leaving the Muslims free to marry four wives. Persons convicted under the Madras Hindu Bigamy Prevention Act have raised this point in their appeals. This matter also has been referred by me to a Bench on the appellate side for decision. Both the Benches referred to above are being constituted by the Honourable the Chief Justice. The right of wives to claim maintenance from husbands, while denying maintenance to husbands from wives — to even poor husbands from rich wives — has been attacked as discriminatory before me, by husbands in appeals and revisions against orders of maintenance passed against them. I have refused to entertain it as a question of substance and have refused to refer it to a Bench for decision, since I am of opinion that Art. 15 (3) of the Constitution to the effect that "Nothing in this article shall prevent the State from making any special provision for women and children" will entitle the award of maintenance to a wife from a husband even though the husband may never recover maintenance from the wife. I did not apply Art. 15 (3) to the case of adultery and bigamy, referred to above, as freedom from punishment for adultery or freedom to share a husband, along with other wives, did not strike me as amounting to making special provision for women under Art. 15 (3). This is not the first time that the validity of the Hindu Religious Endowments Act and particularly S. 57 thereof, has been attacked before me in cases, though this is the first time when a suit pending in the lower Court, with a broad issue on the point, is prayed to be withdrawn to this Court under Art. 228. In my opinion, it is most desirable that this quesion should be decided one way or the other by this Court as soon as possible. This State is said to have no less than four million acres of land covered by religious and charitable endowments, all of which may come under the jurisdiction of the Hindu Religious Endowments Board in one context or other, and, in almost every case hereafter, I am satisfied, any man affected by a scheme framed by the Hindu Religious Endowments Board, under the Hindu Religious Endowments Act, whether his right is good or bad, will raise this constitutional point which will have to be held to be a substantial question of law the determination of which will be necessary for the disposal of the suit, whatever the decision may be 'on merits.' But I see no reason to dispose of the suit itself in this Court, as there are several other issues in it, and it will undoubtedly be far more convenient for the lower Court to hear witnesses and decide those issues, and it will be a waste of high judicial power to bring all these petty cases, with their many issues, important and unimportant, different and indifferent, to this Court and waste its time. This Court should not be made the forum for discussing academic issues, whether of law or of fact, or the forum for deciding common and ordinary issues of fact and law. So I withdraw O. S. No. 18 of 1950 on the file of the District Court, Ramnad to the file of this Court simply for the purpose of determining the said question of law and returning the case to the District Court, Ramanathapuram, under Art. 228(b) of the Constitution. Mr. R. Gopalaswami Aiyangar, for the petitioner, says that he wants nothing more than that, and that he never wanted this Court to try the whole suit her itself. It is obvious that the question of law can be, and should be, settled by a Bench on the appellate side, and that the original side need not be asked to do it as urged by respondents 2 to 4. The case will be returned to the District Court, Ramnad, as soon as the question of law is decided here, with a copy of the judgment on the question.

(11) Now certain incidental provisions have to be made regarding the management of the temple etc. as this suit is likely to be prolonged for 'a year or two' before it is disposed of finally, in this Court and the Court below. Such suits have a way of sticking on for a long time, and cannot be expected to be disposed of in a month or two, as hoped for by Mr. Gopalaswami Aiyangar, for the petitioner. Indeed, in this very suit, Satyanarayana Rao and Raghava Rao JJ., by their order dated 12th February 1951, were glad at some arrangement come to between all the parties on their suggestion; and directed the lower Court to dispose of the suit expeditiously before the closing of the Court for summer recess in April 1951. But, soon after that order was passed, with the consent of all the parties and to the apparent satisfaction of all, the plaintiff filed a petition (I. A. No. 86 of 1951 in O. S. No. 18 of 1950) not only to amend the plaint by adding this attack on the validity of the Hindu Religious Endowments Act and S. 57 in particular, but also filed another petition (I. A. No. 87 of 1951) requesting the District Judge to refer the case to this Court for withdrawing the suit to this Court's file under Art. 228 of the Constitution of India. That shows that whatever the apparent agreement or consent expressed in Courts, a party will surely, by himself or on advice by counsel, exercise every possible right given to him under the law even if it means prolonging the suit for months or years or decades, and the 'use' of law can never be held to be an 'abuse' of law. Here the control over valuable properties was involved, with all the power and influence it connotes. Hence the epic struggle. Of course, Satyanarayana Rao and Raghava Rao JJ. never ordered that the suit should be disposed of before the summer recess ignoring the rights of the parties to get suitable amendments made, where necessary, examining witnesses even if that caused delay, adding legal representatives wherever needed, getting documents, and getting the ruling of this Court on a vital question of law involved in the suit and requiring action under Art. 228. The contention that the plaintiffs are moved only by property considerations, and not by moral or religious or pious considerations, in bringing this suit and the amendment petition and this petition does not impress me. Nobody in this country, whether Hindu or Muslim, Nagarathar or Nattar, seems to fight over a religious institution without property.

(12) It is essential, as this suit is likely to take a year or two before it is finished finally, that I should continue the executive officer appointed by the Board to function as a receiver appointed by the Court and subject to the directions of the District Court and the Hindu Religious Endowments Board till the suit is disposed of, as directed by Satyanarayana Rao and Raghava Rao JJ. in their order dated 12th February 1951 with the consent of all the parties. Mr. R. Gopalaswami Aiyangar, for the petitioner, has no objection whatever to this; nor have any of the rest. So, I pass orders accordingly. Messrs. T. R. Srinivasan and D. Ramswami Aiyangar, appearing for the A. R. A. family and Nattar trustees appointed under the scheme, prayed that the order passed by Satyanarayana Rao and Raghava Rao JJ. on 12th February 1951 to the effect that "the Board of Trustees will not function until the suit is disposed of and the

rights of parties are established should be deleted now, and these trustees allowed to function, as otherwise, they may never function as trustees at all in spite of the order appointing them, as they were appointed in October 1950 and the suit may not be finished by October 1953, and their appointment will be nullified and will only remain as a standing joke all over the country side. They urged before me that they agreed to the above order of Satyanarayana Rao and Raghava Rao JJ. only thinking that the suit would be finished by April 1951, as directed by the learned Judges, and not dreaming of such dilatory tactics and mischievous activities by the plaintiffs, like putting in petitions for amending the plaint, raising a vital constitutional issue and asking for referring the matter to this Court, etc. But 'Court cannot disallow' what the 'law allows'. I have to deal with the matter not on the basis of any agreement between the parties, but independently, as a Judge dealing with a matter now in controversy between the parties. The plaintiffs are attacking the right of any of the trustees to function under the scheme, and Satyanarayana Rao and Raghava Rao JJ. have definitely remarked, "It should not be understood that by this order we have expressed any opinion regarding the merits of the suit", and have further said that their order is 'without prejudice to the contentions and the rights of the parties which should undoubtedly be decided in the suit.' Besides, their order directing the Board of trustees not to function until the suit is disposed of is in a 'separate paragraph' from the paragraph reciting the agreement between the parties, of which the learned Judges were glad. It is clear to me that these trustees should not, in the circumstances, be allowed to function 'till the suit is disposed of', however long a time it takes, as, otherwise, it will be prejudicing the contentions and rights of the plaintiffs and expressing an opinion about the merits of the suit before it is disposed of under the law, and allowing respondents 2 to 4, if they are ultimately declared to be not entitled to be appointed as trustees, to pass orders or express opinions or influence decisions regarding temple properties, as if they are legally appointed and valid trustees. In this view, though I am sorry for these trustees, who were glad at their appointment and are chagrined at this terrible check, the proverb "many a slip exists between the cup and the lip" applies to them, and hardships which 'cannot be remedied by law' have to be 'tolerated by law', however regretfully, and I cannot grant this request. In the circumstances I direct all the parties to this petition to bear their own costs. The counsel appearing for the Hindu Religious Endowments Board will be allowed to take the costs of the Board from the temple properties.

(13) The executive officer, put in charge as Receiver and continued now, will, of course, be free to file suits, take proceedings and institute petitions under the orders of the District Court, Ramnad, on instructions from the Hindu Religious Endowments Board, Madras, or on his own motion as officer of Court, regarding such matters concerning the temple properties or affairs as are necessary, and to spend such amounts as are necessary from the temple funds for those purposes, after obtaining the Court's sanction, general or particular.

(14) The suit, O. S. No. 18 of 1950, is withdrawn to this Court, under Art. 228 (b) of the Constitution, and will be posted before a Bench on the Appellate Side after obtaining the orders of the Honourable the Chief Justice.

C.R.K./K.S. *Petition allowed.*

A. I. R. (39) 1952 MADRAS 23 (C. N. 7)

PANCHAPAGESA SASTRI, J.

T. G. Gopal Pillai, Petitioner v. Viswanatha Iyar and another, Respondents.

Civil Revn. Petn. No. 1896 of 1950, D/- 18-4-1951.

Court Fees Act (1870) S. 7(V) and (IX), Sch. I Art. 1 — Suit for possession with alternative prayer for redemption — Decree for possession conditional on payment of certain amount — Appeal seeking to get rid of condition — Court-fee.

Where in a suit for possession with an alternative prayer for redemption of a mortgage the Court passes a decree for possession conditional on payment of a certain sum of money to discharge a pre-existing mortgage on the property and the plaintiff appeals against the decree seeking to get rid of the liability for payment of the amount decreed, Court-fee will be payable on the ad valorem' scale on the amount decreed which is the subject matter in dispute in appeal. A I R (9)1922 Mad 211 and 3 Ind Cas 459 (Mad) Ref. (Para 2)

Anno: Court-Fees Act S. 7 (Gen) N. 7; S. 7 (V) N. 30; S. 7 (IX) N. 5; Sch. 1 Art. 1 N. 7.

N. R. Govindachari, for Petitioner — Govt. Pleader and A. V. Narayanaswami, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('06) 29 Mad 367: (16 Mad L Jour 287) (Pr 2)
('10) 20 Mad L Jour 121: (3 Ind Cas 459) (Pr 2)
('22) 45 Mad 246: (A I R (9) 1922 Mad 211) (Pr 2)

ORDER: Mr. N. R. Govindachari, learned advocate for the petitioner argues that the court-fee paid is sufficient and the lower appellate Court was not justified in calling upon his client to pay extra court-fee. The suit by the plaintiff, the appellant in the lower appellate Court, was for possession and there was an alternative prayer for redemption of a mortgage. The lower Court passed a decree that he was entitled to possession, but that he was bound to redeem a pre-existing mortgage on the property and found that the amount payable was somewhere about Rs. 18000. The decree therefore was conditional on his payment of Rs. 18000 and odd. It is against this that this appeal was filed. He paid court-fee on the basis of a suit for possession valuing the properties at Rs. 3000 and with regard to the alternative prayer for right of redemption he valued at 1/3 of the principal amount due which came to about Rs. 1600. He paid court-fee on the higher figure. The lower appellate Court however took the view that he should pay court-fee on Rs. 18000, the payment of which was the condition for his obtaining possession.

(2) Reliance was placed upon the decision in 'Sekharan v. Eacharan', 20 Mad L Jour 121. I find, however, that that very judgment at page 128 says that even in the case of an appeal, in suits for redemption if the right to redeem is not the subject matter of dispute in appeal but only the amount which is being disputed in appeal, then court-fee will have to be paid on the 'ad valorem' scale. That follows the decision in 'Reference under Court-fees Act, 1870, 29 Mad 367'. In this case if the appeal is looked at merely as an appeal against a decree for possession conditional on the payment of Rs. 18000 and the appeal is to get rid of the liability for the payment of Rs. 18000, then according to the decision in 'In re Porkodi Achi', 45 Mad 246 court-fee will have to be paid on the 'ad valorem' scale with reference to the amount which is being disputed. But even on the footing that this matter arises in respect of a suit for redemption, as the right to redeem is being asserted by the plaintiff and is not being disputed by the defendant, and the subject-matter of the appeal

is only with reference to the amount, even according to the decision in 'Sekharan v. Eacharan', 20 Mad L Jour 121 it would follow that court-fee will be payable on the 'ad valorem' scale on the amount disputed. From every point of view the order of the lower appellate Court is right.

(3) The petition is dismissed with the costs of the Government.

C.R.K./K.S. *Revision dismissed.*

A. I. R. (39) 1952 MADRAS 24 (C. N. 8)

BASHEER AHMED SAYEED J.

Rajamanickam Pillai and others, Appellants v. Swaminatha Pillai (died) and others, Respondents.

A. A. O. No. 353 of 1948 D/- 9-4-1951.

Arbitration Act (1940), S. 32 — S. 32 whether precludes defendant from pleading existence of award.

The language of S. 32 does not contemplate that any defence set up by any defendant to a claim which ignores the existence of the validity of an award is not competent. That section only lays down the positive rule that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement and does not shut out the possibility of a defence being raised when a suit is brought by one of the parties to the arbitration agreement or award, that there exists an award between the parties which is binding on both and also raising the plea that such an award has been acted upon and accepted by the parties. I. L. R. (1949) Mad 111 Foll. A I R (38) 1951 Mad 525 and A I R (38) 1951 Mad 458 Ref. (*Para 2*)

Anno: Arb. Act, S. 32 N. 1.

M. S. Venkatarama Iyer, for Appellants — K. Srinivasan and S. Krishnaswami, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after Indian Cases).

('46) I L R (1946) Mad 840: (A I R (33) 1946 Mad 346) (Pr 2)

('49) I L R (1949) Mad 111: (A I R (35) 1948 Mad 436) (Prs 2, 4)

('50) 1950-2 Mad L Jour 313: (A I R (38) 1951 Mad 525) (Pr 4)

('50) 1950-2 Mad L Jour 672: (A I R (38) 1951 Mad 458) (Pr 4)

JUDGMENT: This appeal is against the order of remand made by the learned District Judge of South Arcot directing that the appellants before him should apply under the Indian Arbitration Act to obtain relief under the relevant provisions of that Act relating to the award which was set up by them in the Court of first instance. The suit itself was by the uncle of the present first appellant for possession of the suit properties as belonging to him under a certain sale deed executed by the mother of the present first appellant, the 5th defendant in the suit. The defence to the action was that the sale deed by the mother of the first appellant was only a nominal and sham one and no rights passed under that to the respondent. An additional written statement was also filed by the present first appellant in which he contended that the suit by the plaintiff was barred and was not competent for the reasons that there was an award between him and the respondent and in the face of that award the plaintiff respondent was not entitled to file the suit claiming title and possession of the properties. The learned District Munsif while finding in favour of the respondent that he had title to and possession of the properties however held on the issue as to whether the suit was barred and was incompetent by reason of the award set up by the 1st appellant, that the suit was not competent and therefore dismissed it. On appeal by the respondent the learned District Judge holding that it was not open to the Court to give a decision even about the existence and validity of the award, remanded the suit to the lower Court directing that all that could be done was that the 5th defendant should get a determination under the proper provisions of the Arbitration Act about the existence and validity of the award. Against this order of remand the present appeal has been preferred.

(2) The point that arises for consideration is whether in the circumstances of the case as appear from the pleadings it was open to the first appellant to set up in defence to the suit an award and whether it was proper on the part of the trial Court to hold that the existence of the award pleaded by the first appellant was sufficient answer to the claim by the plaintiff respondent. The learned counsel for the first appellant relies upon the decision of a Bench of this Court in 'Suryanarayana Reddi v. Venkatareddi', I L R (1949) Mad 111 where Happell and Govindarajachari JJ. have held that S. 32 of the Arbitration Act does not preclude the defendant from pleading the existence of an award in answer to the claim from the plaintiff for title and possession of properties. S. 32 is as follows:

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act".

After discussing the scope of Ss. 31, 32 and 33 as also the previous sections of the Act, the learned Judges have observed at page 117 that,

"It would therefore seem as if S. 32, notwithstanding its apparently wider language, had to be read only as precluding a suit praying for the reliefs for which an application is provided under S. 33".

They again observe that,

"Apart from this, however, and taking the language of S. 33 as it stands, it is difficult to hold that the words 'no suit shall lie' should be read as prohibiting a defence which involves a decision upon the existence, effect or validity of an award".

The learned Judges have examined the scope of the decision in 'Moolchand Jothajee v. Rashid Jamshed Sons & Co., I L R (1946) Mad 840 and observe that:

"as held in that suit a person who relies on an award may be said to be seeking a decision upon its existence, effect or validity; but the question that arises is whether the inhibition in S. 32 is not confined merely to a plaint by which such decision is sought. We are inclined to think that it is so confined. There is nothing in 'Moolchand Jothajee v. Rashid Jamshed Sons and Co., ILR (1946) Mad 840 inconsistent with this view, that decision, as already stated being concerned with a suit in which the plaintiffs sought to enforce the award".

The learned Judges further observe at page 119 to the following effect:

"However, the point in this case turns entirely on the construction of S. 32. As previously indicated, its language does not, in our opinion, extend to a defence as opposed to the filing of a suit. The argument on behalf of the plaintiff would involve our holding that even in a case where both parties to an award are satisfied with it and it is fully carried out and there is therefore no need for getting a decree passed in its terms and none is passed, one of the parties can subsequently change his mind and enforce the

original cause of action and the defendant cannot resist the suit. It seems to us that the provisions of the Act do not entail such a result".

I must state that the facts of the present case are on all fours with the decision in those authorities cited by the learned Counsel for the appellant and I agree with the principle laid down in the authorities cited. In my opinion, the language of S. 32 which says that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, does not contemplate that any defence set up by any defendant to a claim which ignores the existence of the validity of an award is not competent. This section only lays down the positive rule that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement and does not shut out the possibility of a defence being raised when a suit was brought by one of the parties to the arbitration agreement or award, that there exists an award between the parties which is binding on both and also raising the plea that such an award has been acted upon and accepted by the parties. In the present case under appeal there has been a reference to an arbitration by 19 persons and subsequently the number of arbitrations has been by agreement reduced to 5 and the five arbitrators have given an award. That award is found in Ex. D. 29 and it states that the panchayatdars consider that the sale taken by the plaintiff from the mother of the 5th defendant was not a valid one. It is this award that has been relied on by the first appellant to non-suit the respondent.

(3) The argument in defence by learned counsel for the respondent is that there is no award between the parties and there is no evidence that the award has been acted upon. I do not think that I can agree with this contention. As I have already observed, the award is found in Ex. D. 29 and the findings of the lower Court are that the award had been accepted and that it settled the points in controversy between the parties. It is therefore futile to contend now that there is no award or that the award has not been acted upon in the face of the findings of the trial Court. The learned District Judge on appeal has not considered any of these findings nor has he expressed any opinion for or against these findings. He has confined himself only to the point as to whether S. 32 of the Arbitration Act applied to the facts of the case and has come to the conclusion that the proper thing would be for the first appellant to apply to the Court under the provisions of the Arbitration Act. I do not think that the learned District Judge has acted correctly in having directed that the first appellant should approach the Court and apply under the provisions of the Arbitration Act to get the relief under the award. I do not agree that this was the proper approach or the procedure that should have been followed by the lower appellate Court.

(4) The learned counsel for the respondent has however invited my attention to a decision in 'Venkatasubbayya v. Bapudu', 1950-2 Mad L Jour 672 wherein Raghava Rao J. have tried to explain the decision of the Bench in 'Suryanarayana Reddi v. Venkatareddi', I L R (1949) Mad 111. The judgment of Raghava Rao J. has been read 'in extenso' by both counsel and I do not think that decision helps the respondent to any extent on the facts of this case. It would appear from a reading of the judgment of my learned brother that where there is an award which has been acted upon and the defendant has discharged his duties under the award S. 32 would not preclude the defendant from pleading the existence of an award. In the present case as already observed there is not merely an award existing but the findings are that that award had been accepted and acted upon. It would therefore appear that the decision of Raghava Rao J. relied on by the learned counsel for the respondent is not of much avail. There is also an earlier decision of Raghava Rao J. in 'Surayya v. Anandayya', 1950-2 Mad L Jour 313 which has been brought to my notice by learned counsel for the appellants; learned counsel for the respondent however does not rely on this decision and I do not think that that decision carries the point in controversy any further. On the whole, as I am inclined to agree with the principle enunciated by Happell and Govindarajachari JJ. in 'Suryanarayana Reddi v. Venkatareddi', I L R (1949) Mad 111, I think that this remand order cannot be sustained. The learned District Judge will therefore be directed to restore the appeal to his file and dispose of the same on merits and on the evidence already recorded and the findings given there by the learned District Munsif. In the view I have taken of the matter, I do not think it is necessary for me to consider the further point raised by learned counsel for the respondent that the award is not admissible in evidence for the reason that it has not been registered as required in the amended S. 17 of the Registration Act. This question has been left open by the trial Court and has not been touched upon by the learned District Judge and it will be open to the learned District Judge to go into it as well and come to a decision after hearing the parties. In the result the appeal is allowed and the costs of this appeal would abide the result of the decision by the lower appellate Court. I do not think there is justification for me to grant leave to file a Letters Patent Appeal on the facts of this case. The application is rejected.

C.R.K./V.S.B. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 25 (C. N. 9)

GOVINDA MENON AND RAMASWAMI GOUNDER JJ.

V. Ramaswami Aiyangar and another, Appellants v. A R. S. M. S. Sundaresan Chettiar and others, Respondents.

A. A. O. No. 598 of 1947 D/- 14-8-1951.

Court-fees Act (1870), Sch. I Art. 11 — Will by Hindu outside Madras City — Succession Act (1925) S. 275, 276.

With respect to Wills executed by Hindu outside the City of Madras it is unnecessary to take out a probate in order that the devise under the will should be effective. An order by a Court directing the issue of a probate will not necessarily involve the compulsory deposit of stamps necessary for the issue of the probate by the party in such a case. (*Para 1*)

Anno: Court-Fees Act Sch. I Art. 11 N. 1, 2. Succession Act S. 276 N. 1.

V. Ramaswami Iyer and V. Meenakshisundaram, for Appellants — R. Kesava Iyengar and K. Parasaram, for Respondents.

GOVINDA MENON J.: When once it is conceded that with respect to Wills executed by Hindu outside the City of Madras it is unnecessary to take out a probate in order that the devise under the will should be effective, the question will arise as to whether any order by a Court directing the issue of a probate will necessarily involve the compulsory deposit of stamps necessary for the issue of the probate. It is conceded that no probate has been issued on the strength of the will which has been declared valid by the High Court to the extent of the personal properties of the testator and what the Court has done is to direct that the executors should pay as much of the Court-fee as is necessary on the amount of the legacies

bequeathed under the Will. We are not satisfied that the mere fact that the Court has directed the issue of a probate would necessarily involve the duty on the party to deposit the stamps. It may be that the legatees may settle the matter outside without getting a probate. To take an analogous case, supposing there is a decree for partition among the members of a joint family and if after the preliminary decree is passed and before the final decree is engrossed on stamp papers, the parties settle the matter between themselves it cannot be said that they can be compelled to pay stamp duty for engrossing the final decree on stamp paper. In our view the order of the learned Subordinate Judge directing that the receivers will deposit into Court necessary amount for the issue of a probate on the quantum of the legacies involved under the will cannot be maintained. We therefore set aside the order of the lower Court and direct that it is unnecessary to deposit the stamps for issuing the probate. There will be no order as to costs in this appeal.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 26 (C. N. 10)

KRISHNASWAMI NAYUDU J.

Official Assignee of Madras v. R. Munuswamy Naidu and others, Respondents.

I. P. No. 27 of 1925; Appln. No. 799 of 1950 D/-10-4-1951.

Limitation Act (1908) Art. 120 — After-acquired property of insolvent entrusted to third person — Application by Official Assignee for recovery.

Where property acquired by the insolvent after his adjudication is entrusted by him to a third person, the Official Assignee as representing the general body of creditors is beneficially entitled to the property and is entitled to recover it. The application to the Insolvency Court for its recovery or value being a proceeding to enforce an equitable claim and follow the property in the hands of the third person is governed by Art. 120 and time begins to run when the Official Assignee becomes aware of his rights. A I R (28) 1941 Mad 767 (2) rel. on. (*Para 5*)

Anno: Lim. Act, Art. 120 N. 14.

The Official Assignee in person — B. K. Naidu for I. Chakrapani and S. A. K. Shah, for Respondents.

Case referred to:

('41) Devarajulu Naidu v. Jayalakshmi Ammal, A I R (28) 1941 Mad 767 (2) (Pr 5)

JUDGMENT: The Official Assignee of Madras as assignee of the Estate of T. R. Tawker and Sons, insolvents herein, asks for an order that the respondents may be directed to hand over certain diamonds or pay the value thereof.

(2) T. Bhavani Shanker Tawker, one of the insolvents, was adjudicated on 17th January 1925. He obtained permission of the Insolvency Court which was granted to him by order dated 5th October 1937, to do business as a jewel-valuer and broker on certain conditions as to keeping of proper accounts and paying monthly allocations to the Official Assignee. The Official Assignee was informed by a letter written on behalf of the first respondent, dated 30th June 1950, that T. Bhavani Shankar Tawker, who will be referred to as insolvent, instituted O. S. No. 1219 of 1948 on the file of the City Civil Court, Madras, against the first respondent for recovery of a sum of Rs. 7,965-1-0 being the value of diamonds entrusted by him to the first respondent. The Official Assignee, after obtaining directions of the Insolvency Court, applied to the City Civil Court to be added as a party plaintiff to the said suit, but that application was dismissed. The suit instituted by the insolvent was eventually dismissed on the ground that being an undischarged insolvent, he was not entitled to maintain the suit and that the business transacted by him with reference to the diamonds which was the subject matter of the suit did not come within the purview of the permission granted by this Court for doing business.

(3) The present application has been filed by the Official Assignee for recovery of this property, it being the insolvent's after-acquired property. The Official Assignee's case is that he was kept out of knowledge of the existence of this asset both by the insolvent and the respondents and that it was only by a letter dated 30th June 1950 that the Official Assignee was, for the first time, intimated of the existence of this asset. He therefore has taken out the present application for the benefit of the general body of creditors and he is seeking to cover the diamonds or their value.

(4) When the application came up for hearing, an objection was raised on behalf of the first respondent that this matter cannot be dealt with by the Insolvency Court under S. 7 of the Presidency Towns Insolvency Act and that the Official Assignee may be directed to file a suit. I considered the objection and by order dated 29th January 1951 I held that this application can be proceeded with in this Court, but I directed that two others, who appear to have handled these diamonds, should be added as respondents 2 and 3. They have accordingly been added as parties and notices of this application have also been given to them. The first respondent in his statement of objections raised certain pleas, but confined his objections only on two grounds, namely, that these diamonds were not the after acquired property of the insolvent and secondly that the claim of the Official Assignee was barred by limitation. The first respondent relief upon a custom pleaded in his statement of objections but he did not press it at the time of the trial. The second respondent states that 89 diamonds were entrusted to him by the first respondent for finding out a purchaser, but as he was unable to find a purchaser he handed over the same to the third respondent with the consent and in the presence of the first respondent and that he is not therefore liable.

(His Lordship discussed the evidence, oral and documentary, in the case and held that the diamonds were the after-acquired property of the insolvent and that the first and third respondents alone were liable, the former for having received the diamonds and the latter as being in possession of them and on the question of limitation, continued:)

(5) The entrustments were in December 1945 and January 1946 and this notice of motion was filed on 6th September 1950. If it is a case of goods or money had and received, the claim is obviously barred by limitation. But in this case, the entrustment was not by the Official Assignee and it being the after-acquired property the insolvent is not entitled to it. He must hold it only for the benefit of the general body of creditors represented by the Official Assignee. The insolvent has therefore no beneficial interest in the property and he could therefore only hold it on behalf of the Official Assignee. The Official Assignee as representing the general body of creditors is benefically entitled to the property and in this case where such a property is in the hands of third parties, the Official Assignee is entitled to follow the same and recover it. The Official Assignee has an equitable claim to recover the amount. Neither the insolvent nor the respondents have any beneficial interest in the property and it is the Official Assignee alone that is entitled to it. The present application is therefore a proceeding to enforce an equitable claim and follow the property in the

hands of the respondents and the Articles of Limitation Act which could properly be held to be applicable to this case is Article 120 which relates to a suit for which no period of limitation is provided elsewhere in the First Schedule. The time from which period begins to run, under this Article, is stated to commence when the right to sue accrues, that is, when the person entitled to sue becomes aware of his rights, which, in this case, is 30th June 1950. That article 120 of the Limitation Act is the relevant Article which could be made applicable for enforcing equitable claims has been laid down in a decision reported in 'Devarajulu Naidu v. Jayalakshmi Ammal', A I R (28) 1941 Mad 767(2) in which case decisions relevant to the subject have been referred to. The application is therefore in time.

(6) There will therefore be an order directing the first and third respondents to deliver to the applicant the diamonds referred to in the report of the Official Assignee filed in support of this application or pay their value, Rs. 7,333-9-0 within two weeks from this date. Costs of this application will be paid by the first and the third respondents.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 27 (C. N. 11)

SUBBA RAO AND PANCHAPAKESA AYYAR JJ.

Kolandayammal, Appellant v. Sinnavelappa Goundan and others, Respondents.

Appeal No. 473 of 1946 D/- 17-1-1950.

(a) Interpretation of Statutes — Constitution Statutes — Civil P. C. (1908) Pre.

A. Constitution Act is an organic and fundamental statute and should be interpreted liberally and not technically or in a narrow spirit. The pith and substance of the Act and its reasonable intent must be the guiding factors. If the legislature purports to enact in regard to an item with a wide connotation, the said enactment may be confined to the subject-matter within its legal competence. Where the Act contains valid as well as invalid provisions and the latter are severable from the former, effect should be given to the former. An attempt should be made as far as possible to reconcile the conflicting items. When a power is conferred to legislate on a particular topic, it is important in determining the scope of the power to have regard to what is ordinarily treated as empowering within that topic in the legislative practice and particularly in the legislative practice of the State which has conferred the power. 'Case law discussed.'

(Para 5)

Anno: C. P. C. Pre N. 7.

(b) Provincial Insolvency (Amendment) Act (1948) — Validity—Government of India Act (1935) Sch. VII List I, item 12, List III item 21.

The "pith and substance" of the Amending Act is clearly within the scope of item 12 of List 3: "Bankruptcy and insolvency". The true nature and character of the legislation, the scope and the ambit of it obviously relate to legislation in regard to bankruptcy and insolvency. The fact that it incidentally infringes on some other items such as item 21 in the Provincial List does not affect its validity. Further it will be seen that whenever the Legislature intended to exclude agricultural lands it said so in definite terms. The non-exclusion of agricultural lands from item 12 is an indication that the legislature used the words "Bankruptcy and Insolvency' in a comprehensive sense so as to empower it to enact laws in regard to bankruptcy and insolvency in respect of agricultural lands also. Hence the Amending Act of 1948 is 'intra vires' of the Dominion Legislature. 'Case law discussed.'

(Paras 7, 8)

(c) Provincial Insolvency Act (1920) S. 28A — Powers under, whether vest in receiver.

The power of the manager or the father, as the case may be, under S. 28A can vest in the Official Receiver. As the whole of the property of the insolvent can vest in the Court or in the receiver at the commencement of the insolvency, along with the entire property, his powers mentioned in S. 28A also vest in the receiver. Pending the insolvency the insolvent might get some properties or powers by devolution or otherwise. Such properties or powers also would vest in the receiver. *(Para 9)*

(d) Provincial Insolvency Act (1920) S. 28A proviso — "Final decision by a competent Court".

"Final decision by a competent Court" can only mean the decision of the Court which ultimately disposes of the suit. If an appeal has been filed against the judgment of the subordinate Judge, it is impossible to treat his judgment as final within the meaning of the proviso.

(Para 10)

N. Sivaramakrishna Aiyar, for Appellant — N. R. Raghavachari and H. Rama Rao, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('25) 6 Lah 1: (A I R (12) 1925 P C 18) (Pr 7)
(1933) A C 156: (AIR (20) 1933 P C 16) (Pr 4)
(36) 17 Lah 644: (AIR (23) 1936 P C 277) (Pr 7)
(1937) A C 391: (AIR (24) 1937 P C 91) (Prs 4, 7)
('47) 60 Mad L W 416; 1947 2 Mad L Jour 1: (AIR (34) 1947 PC 72) (Pr 4)
('47) 1947-2 Mad L Jour 6: (AIR (34) 1947 PC 60) (Pr 4)
('48) 62 Mad L W 439: (AIR (36) 1949 P C 190) (Pr 4)
('39) 49 Mad L W 36: (AIR (26) 1939 F C 1) (Pr 4)
('41) 1941-1 Mad L Jour Sup 1: (AIR (28) 1941 F C 47) (Pr 4)
('41) 54 L W 22: (AIR (28) 1941 FC 72) (Pr 4)
('26) 49 Mad 849: (AIR (13) 1926 Mad 994 FB) (Pr 7)
('43) ILR (1943) Mad 83: (AIR (29) 1942 Mad 682 FB) (Pr 7)
(1882) 7 A C 96: (51 L J P C 11) (Pr 4)

SUBBA RAO, J.: The plaintiff-respondent in this case challenges the constitutional validity of the Provincial Insolvency Amendment Act, 1948, in so far as it affected the agricultural land. The facts are in a small compass and may briefly be stated.

(2) The plaintiff and defendants 2 and 6 are the sons of the first defendant. The 14th defendant is the wife of the first defendant. They constituted members of a joint Hindu family of which the first defendant was the manager. He became heavily involved and was adjudged an insolvent in I.P. No. 63 of 1931 on the file of the Court of the Subordinate Judge, Coimbatore. The plaint schedule properties were sold in his insolvency by the Official Receiver. Some items were purchased by one Srinivasa Ayyar on 24th July 1933 under Ex. P-2 and other properties by the fourth defendant under Ex. P-4, dated 12-12-1935. Defendants 4 to 13 are the alienees or their successors-in-interest. Usufructuary mortgage interest in the second item devolved on the 15th defendant and he is in possession of the same. The plaintiff filed O.S. No. 109 of 1944 on the file of the Court of the Subordinate Judge, Coimbatore for partition and possession of his one-fourth share in the plaint schedule properties mainly on the ground that the Official Receiver had no power to sell the shares of the members of the family other than the first defendant. Pending the suit defendants 2, 3, 4, 5, 7, 8,

11, 12, and 10 have entered into a compromise with the plaintiff and a compromise decree was passed in respect of them. The learned Subordinate Judge relying upon the provisions of the Provincial Insolvency Act as it then stood, held that the Official Receiver had no power to sell the son's shares in the family properties. He gave a decree to the plaintiff for the recovery of one-fourth share of the properties in the possession of the 9th defendant and the 15th defendant. The 15th defendant under the decree would be entitled to possession only after depositing a sum of Rs. 2,500 in Court. The 15th defendant has preferred the above appeal, and defendants 2 and 3 have preferred cross-objections in so far as the lower Court did not give them a decree for partition and possession of their share.

(3) Pending the appeal the Provincial Insolvency Amendment Act 1948 was passed by the Dominion Legislature, and, under the amending Act, the power of the father to sell his son's shares was declared to be property within the meaning of Section 28 of the Provincial Insolvency Act. If the Amending Act is valid, the decree of the lower Court would be wrong.

(4) The learned counsel for the plaintiff-respondent contended that the Provincial Insolvency Amendment Act of 1948 is 'ultra vires' of the Dominion Legislature in so far as it encroached upon the forbidden field reserved for the Provincial Legislature under the Constitution Act. He further contended that the said Act should be confined in its operation to the subject-matter within the jurisdiction of the Dominion Legislature, i.e., the property excluding agricultural land which is entirely within the purview of the Provincial Legislature. To apprecite his arguments it will be convenient at this stage to notice the principles of construction laid down by decided cases. Lefroy's Treatise on Constitutional Law contains the following statement:

> "It seems quite possible that a particular Act, regarded from one aspect, might be 'intra vires', of a Provincial Legislature, and yet, regarded from another aspect, might be also 'intra vires' of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act."

The learned author proceeds to say:

> "The cases which illustrate this principle show, by 'aspect' here must be understood the aspect of point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the Legislator rather than objectively of the matter legislated upon."

In the matter of C.P. & Berar Sales of Motor Spirit & Lubricants Taxation Act 1938; 49 Mad LW 36, the question was whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act of 1938 or any provisions thereof were 'ultra vires' the Legislature of the Central Provinces and Berar. The said Act enacted for the levy and collection from every retail dealer a tax on the retail sales of motor spirit and lubricants at a particular rate on the value of such sales. The Legislature invoked the aid of Item 48 of the Provincial Legislative list dealing with taxes on the sale of goods. It was contended that the subject-matter of the Legislation was covered by Item 45 of the Federal Legislative List dealing with "Duties of excise on tobacco and other goods manufactured or produced in India" and therefore the Act was 'ultra vires' of the provincial legislature. Sir Maurice Gwyer, C.J., in holding that the said Act was not 'ultra vires' of the Provincial Legislature, quoted with approval the passage in 'Citizens Insurance Co. v. Parsons', (1882) 7 AC 96:

> "In these cases it is the duty of the Courts however difficult it may be, to ascerain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case, before them to limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Sections, so as to reconcile the respective powers they contain, and to give effect to all of them. In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand.

The learned Chief Justice also pointed out that Courts are entitled to look at the real substance of the Act imposing the tax at what it does and not merely what it says in order to ascertain the true nature of the tax. The case in 'In re Hindu Women's Rights to Property Act, 1937; 54 Mad LW 22, decides that the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, do not operate to regulate succession to agricultural land in the Governor's Provinces, but they operate to regulate devolution by survivorship of property other than agricultural land. Entry No. 21 of List II of the Constitution Act provides for devolution of agricultural land. Wills, intestacy and succession save as regards agricultural land appears as Entry No. 7 of List III of the Concurrent List. By Act XVIII of 1937 certain rights in property by survivorship as well as by succession were conferred on a widow which she did not possess prior to the Act. The learned Judges held that the operation of the Act should be confined only to property other than agricultural land. The two main contentions raised in that case were (1) that the Act was in any view 'ultra vires' the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces, (2) that if the Act should be held to be only in part 'ultra vires' it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces. In dealing with the contentions the learned Chief Justice says (at page 27):

> "No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other."

In the view they have taken of the validity of the Act, the learned Judges held that the question of severability did not arise for consideration. In 'Subrahmanyan Chettiar v. Muthuswami Goundan (1941) 1 Mad L Jour Sup 1, the validity of the Madras Agriculturists' Relief Act (IV of 1938), in so far as it affected promissory notes came in question. Tht Act was challenged as invading the

forbidden field of entry No. 28 of List II of the Constitution Act. The impugned legislation was supported with reference to item 27 of the Provincial List "Money-lending and money-lenders." At page 17 Sir Maurice Gwyer, C. J., says' :

> "It must inevitably happen from time to time that legislation though purporting to deal with subject in one list, touches also on a subject in another list and the different provisions in the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character" for the purpose of determining whether it is legislation with respect to matters in this list or in that."

They held that the pith and substance of the Madras Act, whatever it may be, cannot at any rate be said to be legislation with respect to negotiable instruments or promissory notes. In 'Megh Raj v. Allah Rakiah', 60 Mad LW 416 : (1947) 2 Mad L Jour 1, the question was whether the Punjab Restitution of Mortgaged Lands Act, IV of 1938, the main purpose of which was giving relief to mortgagors by enabling them to obtain restitution of the mortgaged lands on terms less onerous than the mortgage deed required, was 'intra vires', the Punjab Legislature. It was contended that the Legislation offended the existing law such as sections 37, 69 and 70 of the Indian Contract Act and section 4 (1) and (2) and section 59 of the Code of Civil Procedure whereas the opposite party sought to support the validity of the legislation by relying upon item 21 of the Provincial List. The learned Judges gave a wide connotation to the word 'land' used in item 21 and held that the impugned legislation fell within its scope. This decision was relied upon by the appellant's counsel to show that legislation in regard to agricultural land is covered by item 21 of the Provincial List. The judgment of the Judicial Committee in "Prafulla Kumar Mukherjee v. Bank of Commerce Limited, Khulna', (1947) 2 Mad L Jour 6 is very instructive and contains the principles of construction in a sufficient form. The question in dispute was as to the validity of the Bengal Money Lenders' Act 1940. Under that Act the amount recoverable by a money lender on his loans or principal and interest was limited and there was also a prohibition against the payment of sums larger than those permitted by the Act. It was contended that the Act trenches upon items within the federal jurisdiction such as promissory notes, banking, etc., and therefore was 'ultra vires' of the Provincial Legislature. The Judicial Committee approved the statement of law made by Sir Maurice Gwyer, C. J., in 'Subrahmanyam Chettiar v. Muthuswami Goundan', (1941) 1 Mad L Jour Sup 1, already quoted. At page 13 they say :

> "Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficient legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with."

Dealing with the argument of the invasion by the Provincial Legislature to the subjects enumerated in the Federal List they observe :

> "No doubt it is an important matter, not as their Lordships think because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters but the question is not, has it trespassed more or less, but is the trespass whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

In 'A. G. of Saskatchewan v. A. G. of Canada', 62 Mad L W 439 the Judicial Committee had to consider whether section 6 of the Farm Security Act, 1944, enacted by the legislature of the Province of Saskatchewan, was 'intra vires' of the Provincial Legislature. Under that the contractual obligation of the purchaser of farm land, in the event of the yield of grain grown upon the land falling below a prescribed minimum, was affected by reducing the principal. It was argued that the pith and substance of the legislation was property, civil rights and agricultural land in the province a matter in relation to which the Provincial Legislature had exclusive legislative power and that in so far as the section affected interest it did so only incidentally. But the Judicial Committee held that the legislation sought to modify statutorily the contract between the two parties which would have the effect of not only reducing the rate of interest but also postponing the payment of interest. In this view they held that section 6 trenched upon the dominion field and that the dealing with interest of the Provincial Legislature was not incidental but lay at the heart of the matter. They arrived at this result by applying the principle that the true nature and character of the legislation should be considered. In 'Croft v. Dunphy', (1933) AC 156 the question was whether the Parliament of Canada was competent to provide by sections 151 and 207 of the Customs Act that if any vessel registered in Canada was hovering within twelve miles of the Canadian coast, having on board dutiable goods, the vessel and her cargo were to be seized and forfeited. It was held that the authority conferred on parliament to legislate in relation to customs duties extended to enact anti-smuggling provisions. This decision is important not for the facts of the case and its actual decision but for the following statement of law found at page 165 :

> "When a power is given to legislate a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency", it was considered relevant to discuss the usual contents of bankruptcy statutes."

The relevancy of this passage in regard to the facts of the present case will be considered in due course. In 'Attorney-General for British Columbia v. Attorney-General for Canada', (1937) AC 391 the validity of the Farmers' Creditors Arrangement Amendment Act, 1935, came under judicial scrutiny. Under that Act a farmer who was unable to meet his liabilities as they became due might make a proposal for a composition, and if the proposal was not accepted by the creditors, the matter was referred to Board of Review to formulate a proposal. The Board had the power to confirm the proposal which then became binding on the creditors and the debtor. The Judicial Committee held

that the impugned legislation was 'intra vires' of the Dominion Parliament under section 91 of the British North America Act, 1867, which empowered it to enact laws in regard to bankruptcy and insolvency. They held that the words "bankruptcy and insolvency" are wide and comprehensive enough to take in the scheme of composition under the amending Act.

(5) From the aforesaid discussion of case law, the following principles emerge:

(1) A Constitution Act is an organic and fundamental statute and should be interpreted liberally and not technically or in a narrow spirit. The pith and substance of the Act and its reasonable intent must be the guiding factors. (2) If the legislature purports to enact in regard to an item with a wide connotation, the said enactment may be confined to the subject-matter within its legal competence. (3) Where the Act contains valid as invalid provisions and the latter are severable from the former, effect should be given to the former. (4) An attempt should be made as far as possible to reconcile the conflicting items, and (5) When a power is conferred to legislate on a particular topic it is important to determine the scope of the power to have regard to what is ordinarily treated as empowering within that topic in the legislative practice and particularly in the legislative practice of the state which has conferred the power.

(6) Having regard to the aforesaid principles, we shall now proceed to consider the validity of the impugned Act. The Constitution Act provides for a hierarchy of powers. The material sections of the Constitution Act read as follows:

(1) "Notwithstanding anything in the two next succeding sub-sections, the Dominion Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List"). (2) Notwithstanding anything in the next succeeding sub-section, the Dominion Legislature, and, subject to the preceding sub-section, a provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List".) (3) subject to the two preceding sub-sections the provincial Legislature has, and the Dominion Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

"List II Provincial Legislative List. Item 21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

'List III concurrent Legislative List. Item 8. Transfer of property other than agricultural land; registration of deeds and documents. Items 12. Bankruptcy and insolvency; administrator general and official trustees."

In the Provincial Insolvency Act after S. 28, the following section was inserted as S. 28A:

"Insolvent's property to comprise certain capacity. The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge;

Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or receiver or the Collector acting under S. 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent Court."

Learned counsel for the respondent contended that S. 28A should be confined to the property over which the Dominion Legislature has jurisdiction and, as lands are included in the Provincial Legislative List, the Act should be confined to operate only on the property other than the agricultural lands; whereas counsel for the appellant invoked the principle of "pith and substance" and contended that the subject-matter of the Amending Act is covered by item 12 of the Concurrent Legislative List. The two principles relied on by learned counsel are not in conflict. They apply to different set of circumstances. If the "pith and substance" of an impugned Act is directly governed by a particular item the fact that it may incidentally encroach upon a forbidden field does not affect the validity of the Act. In such a case no question of confining the operation of the Act to the subject matter within the jurisdiction of a particular Legislature would arise as the entire subject matter is within its jurisdiction. On the other hand, if part of the subject matter of the impugned Act comes under the purview of one legislature and the other part under the jurisdiction of a different legislature, applying the principle relied on by learned counsel for the respondent, cases have declared the validity of the impugned Act by confining its operation to that part of the subject matter within its jurisdiction. The question therefore is whether the "pith and substance" of the Provincial Insolvency (Amendment) Act, 1948, is covered by item 12 of list 3, 'bankruptcy and insolvency.'

(7) One of the principles extracted above indicates that to determine the scope of the power of the legislature to legislate on a particular topic, it is important to have regard to what is ordinarily treated as embraced within that topic in legislative practice. The policy and object of the bankruptcy law is succinctly stated by Blackstone in the following manner:

"Bankruptcy is a proceeding by which, when a debtor cannot pay his debts or discharge his liabilities or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the State, in certain circumstances, takes possession of his property by an officer appointed for the purpose, and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities."

The fundamental characteristic of insolvency legislation is stated by Lord Thankerton in 'A. G. for British Columbia v. A. G. for Canada', 1937 A C 391 at p. 402.

"In a general sense insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of the creditors."

It is therefore conceived in the interest of the creditors as a class and provides for distribution of the debtor's assets among them. It is an important condition of the proper administration of insolvency law that the entire property of the insolvent should be vested in the Court or

the receiver appointed by the Court for the purposes of equitable distribution of the property among the creditors. In a country like India, where agriculture is the main occupation and where agricultural lands form the bulk of the properties of the majority of the people, it is inconceivable that the Constitution Act conferred on the Central legislature power to make a law in regard to Bankruptcy which cannot operate on agricultural lands. A perusal of the provisions of the Provincial Insolvency Act indicates the scope of the bankruptcy law. Under S. 28 on the making of an order of adjudication, the whole of the property of the insolvent vests in the Court or in a receiver as the case may be. It has been never contended that, under Act V of 1920, agricultural land was excluded from such vesting. Having regard to the scope of the insolvency law, the Constitution Act specifically included the item of bankruptcy in the concurrent list as item 12. The history of the Amending Act also discloses that the said Act was enacted by reason of the power conferred under item 12 of the concurrent List. As aforesaid, under S. 28 of the Provincial Insolvency Act, V of 1920, the whole of the property of the insolvent vests in the Court or the receiver on the making of an order of adjudication. In the Full Bench Case of this Court in 'Balavenkata Seetharama Chettiar v. Official Receiver Tanjore', 49 Mad 849, it has been specifically ruled that on an insolvency of the father, his power to sell the sons' share in the family properties vests in the Official Receiver. But in the year 1943, another Full Bench of this Court, in 'Ramasastrulu v. Balakrishnarao', I L R (1943) Mad 83 relying on the observations of the judicial committee in 'Sat Narain v. Behari Lal', 6 Lah 1 and 'Sat Narain v. Kishen Das', 17 Lah 644 held that such a power is not 'property' within the meaning of S. 28 of the Provincial Insolvency Act and therefore does not vest in the Court or the Official Receiver. This case undoubtedly negatived what had been regarded as settled law till then. The legal consequences of this decision were far-reaching and the creditors were deprived of a large extent of properties which they were accustomed to look to for discharging their liabilities in the case of the debtor's insolvency. Presumbly, the Amending Act was passed to get round the Full Bench decision and to declare the correctness of the pre-existing law. Under the Amending Act the capacity of the Official Receiver to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent are also included in the definition of property. The "pith and substance" of the Amending Act is clearly within the scope of item 12 of List 3: "bankruptcy and insolvency". The true nature and character of the legislation the scope and the ambit of it obviously relate to legislation in regard to bankruptcy and insolvency. The fact that it incidentally infringes on some other items in the Provincial List does not affect its validity.

(8) Looking from a different angle, the same result would follow. A comperative study of list I and list 3 discloses that item 12 of list III is not in conflict with item 21 of List II. The following items may be noticed for comparison:

"Item 7. Wills, intestacy, and succession, save as regards agricultural land.

Item 8. Transfer of property other than agricultural land; registration of deeds and documents.

Item 9. Trusts and trustees.

Item 10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

Item 11. Arbitration.

Item 12. Bankruptcy and insolvency."

It will therefore be seen that whenever the Legislature intended to exclude agricultural lands it said so in definite terms. The non-exclusion of agricultural lands from item 12 is an indication that the legislature used the words 'Bankruptcy and Insolvency' in a compresensive sense so as to empower it to enact laws in regard to bankruptcy and insolvency in respect of agricultural lands also. For the aforesaid reasons, we hold that the Amending Act of 1948 is 'intra vires' of the Dominion Legislature.

(9) The learned counsel for the plaintiff next contended that on a construction of the provisions of S. 28A the power of the manager or the father, as the case may be cannot vest in the Official Receiver. For appreciating this contention the relevant provision may be again extracted:

"28A. The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

The learned counsel for the plaintiff contended that under this provision the powers of the insolvent mentioned therein cannot vest in the Official Receiver as at the commencement of his insolvency or before his discharge such power will not be outstanding in him. Stress is laid on the words "at the commencement of his insolvency or before his discharge." Relying on those words it is argued that as the properties of the insolvent vested in the Official Receiver, the insolvent could not have any power outstanding in him between the dates mentioned in the section. The argument may be ingenious but has no merits. The necessity for introducing this section arose because the Courts have held that the word "property" in S. 28(2) did not comprise the power of the father or the manager, as the case may be, to alienate the other members' shares in the family properties. The Amending Act says that the property of the insolvent shall comprise also such power. Either under S. 28 or under S. 28A the property of the insolvent can vest only after his adjudication i.e. at the commencement of the insolvency. It cannot conceivably vest in the Official Receiver before the adjudication of the insolvent. By reason of S. 28-A that property comprises the said power. If the whole of the property of the insolvent can vest in the Court or in the receiver at the commencement of the insolvency, there is no difficulty in holding that along with the entire property, his powers mentioned in S. 28A also vest in the receiver. The words "or before his discharge" also are emphasised in support of the learned counsel's argument that during that period the insolvent could not have any such power in him as all his properties would have vested in the Court or the receiver. But this ignores the fact that pending the insolvency the insolvent might get some properties or powers by devolution or otherwise. Such properties of powers also would vest in the Court or the receiver. The wording of S. 28A is not new. The material portions of S. 52 of the Presidency-Towns Insolvency Act read as follows:

"52. (1) The property of the insolvent divisible amongst his creditors, and in this Act referred to as the property of the insolvent, shall not comprise the following particulars, namely:

(2) Subject as aforesaid, the property of the insolvent shall comprise the following particulars, namely:

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at

the commencement of his insolvency or before his discharge."

The Judicial Committee held on a construction of that section that on the adjudication of the father of a Hindu joint family governed by the Mitakshara' his power to sell joint family property to pay his antecedent debts not incurred for immoral or illegal purposes vests in the Official Assignee under .S 52(2) of the Presidency Towns Insolvency Act. The decision of the Judicial Committee on the analogous provision is binding on us. Further, we do not also see any insurmountable difficulty in giving effect to the clear intention of the legislature.

(10) The learned counsel for the plaintiff further argued that S. 28A of the Provincial Insolvency Act has no application to the present case as according to him there was a final decision by a competent Court within the meaning of the first proviso. He says that the "final decision by a competent Court" is the decision of the subordinate Judge which is under appeal before us now. We cannot accept this argument. " Final decision by a competent Court" can only mean the decision of the Court which ultimately disposes of the suit. As an appeal has been filed against the judgment of the subordinate Judge, it is impossible to treat his judgment as final within the meaning of the proviso.

(11) The learned counsel for the plaintiff argued finally that under the aforesaid two sale deeds only the interests of the first defendant were conveyed by the Official Receiver Ex. P. 2 is one of the sale deeds and is dated 16th July 1934. Under that document, the right title and interest of the insolvent in all the properties, more particularly described in the schedule together with all rights etc. was conveyed to the purchaser. At the time of the execution of the sale deed, the well-understood legal position was that the father could convey the interests of the sons also for his debts and therefore the receiver in whom the father's interests vested, had also a similar right. There is no reason to assume that he did not purport to convey the undoubted rights he had in the property. Indeed the sale notice Ex. D-6, clearly says that he will sell also the rights over the sons' shares. Further the schedules annexed to the sale deed give the entire extent of the properties sold. In the schedules it is not stated that only the father's share was sold. Even in the plaint the plaintiff understood this transaction as conveying the entire family estate. We therefore hold that under Ex. P-2 not only the father's interest but the interests of the sons also were sold.

(12) The other sale deed is Ex. P-4 dated 12-12-1935. By this sale deed the receiver purported to sell all the right, title and interest of the insolvent including the son's share if any therein. The schedule contains the entire properties. Ex. D-6, the sale notice dated 27-6-1933, clearly mentions that the receiver was selling the disposing power of the father over the son's share, if any, of the insolvent in the properties mentioned therein. As already stated, even in the plaint the plaintiff himself understood the transaction as conveying the entire property. We therefore hold that the entire properties including the son's shares were sold under Ex. P-2 and Ex. P-4.

(13) In the memorandum of objections filed by the defendants 2 and 3, it is contended that the lower Court should have given a decree to them also in regard to their shares in the suit properties. In the view we have taken on the merits these defendants are not entitled to the relief.

(14) In the result the appeal is allowed with costs throughout and the memorandum of objections is dismissed with costs.

(15) In our view a substantial question of law as to the interpretation of the Act arises in this case. Leave granted under S. 205 of the Government of India Act.

C.R.K./D.H. *Appeal allowed, Cross objections dismissed.*

A. I. R. (39) 1952 MADRAS 32 (C. N. 12)

RAJAMANNAR, C. J.

Panattil Narayanan Nair and others, Petitioners v. Palappetti Vatakkepet Vallath Karunakaran Nair and others, Respondents.

Civil Revision Petition No. 1079 of 1949, D/- 23-2-1951.

Madras Hindu Religious Endowments Act, 1926 (2 of 1927), S. 76 — It is duty of Board to consider application for sanction and not of Court.

It is for the Board, as a statutory body specially entrusted with the duty of considering an application for sanction under Section 76, to first consider the matter and the province of the Court is only to examine that order and see if it is necessary to modify or cancel it. It is not open to the Court to consider the materials placed before it and come to a decision on the merits even though the Board has not considered the application on merits. AIR (36) 1949 Mad 851 Foll. (*Para 1*)

N. Sundara Ayyar, for Petitioners. D. A. Krishna Variar, for Seshachalapathi and T. K. Raman Nambisan, for Respondents.

Case referred to:

('49) 1949-1 Mad L Jour 382: (AIR (36) 1949 Mad 851) (Pr 1)

JUDGMENT.: There is no reason for interference with the order of the learned Judge. Clearly the Board had not done its duty which is enjoined on it under Section 76 of Madras Act II of 1927 in passing the order which was sought to be set aside by the contesting respondents under S. 76 (2) of the Act. The order was therefore rightly set aside with the observation made by the learned Judge that the Board would consider afresh the application for sanction on its merits. It was contended by learned counsel for the petitioners here that though the Board might not have considered the application on the merits, it was open to the District Court to have considered the materials placed before it and come to a decision on the merits. I do not agree. I agree with Viswanatha Sastri, J., in Vardhanamma v. Subbarao', 1949-1 Mad L Jour 382, that it is for the Board, as a statutory body specially entrusted with the duty of considering an application for sanction under S. 76, to first consider the matter and the province of the Court is only to examine that order and see if it is necessary to modify or to cancel it. This civil revision petition is, therefore, dismissed with the costs of respondents 1 and 2.

(2) In one respect, however, I think I should interfere with the order of the learned Judge. In setting aside the order of the Board, he directed the respondents 2, 3, 4, 6 and 8 before him to pay the costs of the petitioners, fixing a Vakil's fee of Rs. 250. The costs as determined have come to Rs. 662-12-0. Now it is clear that if any one was to blame for what had happened, it was the Board, and I do not think it proper that the petitioners before me should have been mulcted with such heavy costs in a matter in which the learned Judge did not decide on the merits. I think the proper order which the learned Judge should have passed was an order that parties should bear their own costs. The order so far as costs of the lower Court are concerned is hereby set aside.

C.R.K./V.S.B. *Revision dismissed.*

A. I. R. (39) 1952 MADRAS 33 (C. N. 13)

PANCHAPAKESA AYYAR, J.

Krishna Pillai, Appellant v. Thekke Valia Veetil Parukutty Ammal, Respondent.

Second Appeal No. 1065 of 1948, D/- 20-7-1951.

† (a) *Partition Act (1893), S. 4 — Undivided family — Sisters in Mitakshara family.*

The phrase "dwelling house belonging to an undivided family" should not be confined to the dwelling house of 'a joint Hindu family.' Sisters, even in a 'Mitakshara' family, will be termed by all people as "members of the same family" though not of the same joint Hindu family, and when these sisters have been living for years and years in the undivided house, inherited by them from their mother Section 4 will apply. 'Case law referred.' (*Para 3*)

Anno: Partition Act, S. 4, N. 2.

† (b) *Partition Act (1893), S. 4 — "Transferred to a person who is not a member of such family" — Mother's sister's son.*

A mere mother's sister's son, cannot by purchasing a share in the dwelling house from a member of the undivided family enjoying the dwelling house in common with other members, resist the application of S. 4 to him on the ground that he is also "a member of the family" especially when he never lived in the dwelling house at any time as a member of the family. AIR (26) 1939 All 640 disting. (*Para 5*)

Anno: Partition Act, S. 4. N. 2, 4.

(c) *Evidence Act (1872), S. 114 — Recitals in judgments.*

There may be some exceptional cases of proved accidental slips and statements in judgments, where a challenge is possible. But in the absence of conclusive proof of such erroneous statements creeping in judgments, by affidavits of vakils and parties, the recitals in a judgment of a judicial officer must be taken to be correct as regards the facts said to have been admitted or conceded before him. (*Para 4*)

Anno: Evidence Act, S. 114, N. 29.

(d) *Partition Act (1893) S. 4 — Validity — Constitution of India Art. 14.*

Any discrimination the law allows cannot be illegal or unjust or inequitable. Nor will this come under the term "discrimination" discountenanced by the Constitution of India. There are certain classes and institutions like temples, trusts, charities, orphans, infants, lunatics and family members, which are given special privileges and protection under the law by enacting provisions for their benefit, as it is considered to be in the interests of the country to do so. Such provisions cannot be termed discriminatory or unjust or inequitable, and no Court has got the right to hold them to be void or unenforceable because they amount to giving some discrimination. Hence it will not be illegal discrimination to enable a member of the family to buy the share purchased by a stranger at a valuation by the Court and deny the same right to the stranger. (*Para 6*)

Anno: Partition Act, S. 4, N. 6.

S. Venkatachala Sastry, for Appellant; A. Krishnaswami Iyer and D. H. Nambudripad, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('08) 30 All 324: (1908 All W N 126) (Pr 3)

('39) AIR (26) 1939 All 640: (1939 All L Jour 629) (Pr 3)

('28) 109 Ind Cas 67: (AIR (15) 1928 Cal 539) (Pr 3)

('30) 53 Mad 417: (AIR (17) 1930 Mad 561) (Pr 3)

('38) AIR (25) 1938 Pat 13: (172 Ind Cas 835) (Pr 3)

JUDGMENT.: This second appeal raises an important and interesting point of law regarding the meaning and bearing of Section 4 of the Partition Act. The facts are briefly these.

(2) The appellant, Krishna Pillai, is the mother's sister's son of the first defendant, Parukutty Ammal of Nagaram Amsom, Kozhikode taluk. Parukutty Ammal and her sister, Thangammal, were living in the suit house, as tenants-in-common, having inherited it from their mother, and had not divided it. On 29th August 1940, Krishna Pillai bought the half share of Thangammal in that house and obtained a decree for partition of his half share. Parukutty filed an application under Section 4 of the Partition Act to buy out Krishna Pillai's share. Krishna Pillai contended that the house in question did not belong to "an undivided family", as Parukutty and Thangammal were sisters in a 'Mitakshara' family, and so would belong to 'different families', and not to one joint family or coparcenary, and that he himself, though an alienee, was "a member of the family" and could not be deemed to be "not a member of the family", under S. 4, and that an order under S. 4, giving the right to Parukutty to buy out his share and giving him no right to buy out Parukutty's share would be 'unjust and inequitable.' The principal District Munsiff of Calicut, by his order dated the 28th November 1946, in I.A. No. 6057 of 1946, in O.S. No. 493 of 1943, the application put in by Parukutty under S. 4, held that Parukutty was entitled to the benefit conferred by S. 4, and overruled all the objections of Krishna Pillai. Krishna Pillai took the matter in appeal. The District Judge of South Malabar, who heard the appeal, confirmed the order of the District Munsiff by his judgment and decree dated 29th September 1947 in A. S. No. 108 of 1947, and dismissed the appeal with costs. Hence this second appeal by Krishna Pillai.

(3) I have perused the records and heard the learned counsel on both sides. Mr. Venkatachala Sastri, for the appellant, raised the same three contentions before me. He stated that it was wrong to hold Parukutty and Thangammal, sisters in a Hindu 'Mitakshara' family owning the house in common, to belong to "an undivided family", as they could never be deemed members of the same 'joint Hindu family.' But there are many rulings holding that the phrase "dwelling house belonging to an undivided family" in S. 4 should be construed in 'a liberal and comprehensive way' and should not be confined to the dwelling house of 'a joint Hindu family,' but should include a house where a group of persons related by blood live, and that it is not necessary that they should be descendants from a common ancestor, or that they should constantly reside in the dwelling house, or that they should be joint in mess, and that the fact that the dwelling house has been blown down, either by wind or in War, will not make it any the less a dwelling house of an undivided family so long as the members have not abandoned it or at any rate given up the idea of using it as such. It is enough to quote the rulings in 'Sivaramayya v. Kappa Venkatasubbamma', 53 Mad 417, 'Sultan Begum v. Dehi Prasad', 30 All 324, 'Babulal Tiwari v. Hullah Mullah', AIR (25) 1938 Pat 13, and 'Nilkamal v. Kamakshya Charan', 109 Ind Cas 67 (Cal), where several other rulings also have been referred to and discussed. It is clear in the light of these rulings that the house in question was rightly considered by both the Courts below to be "a dwelling house belonging to an undivided family", even though

Parukutty and Thangammal were undoubtedly not members of a Hindu joint family. These two were closely related by blood and were living in the same house. Such sisters, even in a 'Mitakshara family, will be termed by all people as "members of the same family" though not of the same joint Hindu family, and when these sisters have been living for years and years in that undivided house, inherited by them from their mother, it is obvious that S. 4 will apply.

(4) The next contention of Mr. Venkatachala Sastry was that the appellant, Krishna Pillai, could not be termed to be a person who was "not a member of the family", as he was the mother's sister's son of Parukutty, the first defendant and as, by virtue of his purchase, the undivided house in question belonged to him also along with Parukutty. I cannot agree. The ruling in 'Shafian Begam v. Mt. Kifiato', AIR (26) 1939 All 640, was relied on by Mr. Venkatachala Sastry, and it was urged that when a Muslim widow was held to be "a member of the family" regarding her first husband's family after she had remarried, a mother's sister's son, like Krishna Pillai, would also be "a member of the family." That ruling will not, in my opinion, apply to this case. There, the widow was living for years and years in that house and continued to live there even after remarriage, with her son and two daughters by her first husband. No doubt, her second husband also joined her there, as a second wife may join a Hindu living in his deceased first wife's house with his son and daughters by her. So she was considered to be "a member of the family" regarding her first husband's family, and she was undoubtedly a member of his family, namely, his wife — widow, and continued to live in the same dwelling house even after his death. Here, Krishna Pillai, a mother's sister's son of Parukutty, was 'never' a member of her family, and never lived in this dwelling house. No sane man or woman would have considered him and Parukutty to be members of the 'same family', let alone 'the same undivided family.' It is crystal clear that Krishna Pallai never lived in this dwelling house along with Parukutty as a member of an undivided family. The lower appellate Court has, in paragraph 1 of its judgment, stated as below:

> "It is also not disputed that the first respondent has been residing in the dwelling house and that the appellant has been residing elsewhere."

This recital in the lower appellate Court's judgment has been challenged before me by Mr. Venkatachala Sastry as incorrect. Sri Alladi Krishnaswami Aiyar, on the other side, rightly urged that a recital in the judgment of a judicial officer, like a District Judge, cannot be challenged as incorrect and must be taken to be correct in all events and circumstances, there being an 'absolute and irrebuttable' presumption to that effect. There is no need to discuss that extreme position here. It may be that there may be some exceptional cases, of 'proved' accidental slips and statements in judgments, where a challenge is 'possible.' But, in the absence of 'conclusive proof of such erroneous statements' creeping in judgments, by affidavits of vakils and parties, I am of opinion that the recitals in a judgment of a judicial officer must be taken to be correct as regards the facts said to have been admitted or conceded before him. To hold otherwise will be to prolong the hearing of cases and to drag judicial officers into unnecessary vexatious and undignified controversies. So I take the above recital by the learned District Judge in his judgment to be correct, all the more readily because Krishna Pillai never stepped into the box and spoke to his living in the dwelling house at any time. Nor did he even file an affidavit about any such living there, thus confirming the correctness of the recital in the learned District Judge's judgment.

(5) Now the question remains whether a man like Krishna Pillai, a mere mother's sister's son, can, by purchasing a share in the dwelling house from a member of the undivided family enjoying the dwelling house in common with other members, resist the application of S. 4 to him on the ground that he is also "a member of the family", especially when he never lived in the dwelling house himself at any time as a member of the family. I am of opinion that he cannot. The case may be slightly different where such a relative has been living in the dwelling house for years as a member of the undivided family and has been treated as such, even though he is not a close relative, like a foster-son brought up in the family, or an 'adhimanaputra.' Of course, the term "family" has been variously interpreted in various countries. In England it will not include even the father and the mother of a person, and that is the interpretation also, for most purposes, in the Madras Travelling Allowance Rules. In India, in many places, even distant cousins may form members of the "family" when they are living in the undivided joint family house and are enjoying the properties in common. But nowhere, to my knowledge, has a man like Krishna Pillai, a mother's sister's son who never lived in the dwelling house for any time as a member of the family and has never been treated as a member of the family, been considered to be "a member of the family" simply because he is a distant relative and has subsequently bought the share of a member of the family. If Mr. Venkatachala Sastry's interpretation of S. 4 is correct, even cousins in the 50th degree may purchase a share in an undivided house and resist the application of S. 4 and prevent the object of S. 4, viz., to ensure that other members owning shares in the dwelling house belonging to the undivided family and living there for years should have their privacy and peace of mind ensured without strangers and outsiders, like this individual, thrusting themselves into their midst. It was urged that Krishna Pillai was a relative, and not a utter stranger, but the word "stranger" has been used by Venkatasubba Rao, J., and others, in the judgments relied on by Mr. Venkatachala Sastry, only in the sense that they are not members of the family, within the meaning of S. 4, and not in the sense that they belong to a totally different caste or sect or country.

(6) The last contention was that it will be inequitable, and will be "illegal discrimination', to enable Parukutty to buy the share of Krishna Pallai at a valuation by the Court and deny the same right to Krishna Pillai to buy the share of Parukutty at a valuation by the Court. I cannot agree. Any discrimination the law allows cannot be illegal or unjust or inequitable, and must be taken to be legal, just and equitable. Nor will this come under the term "discrimination" discountenanced by the Constitution of India. There are certain classes and institutions like temples, trusts, charities, orphans, infants, lunatics and family members, which are given 'special privileges and protection under the law' by enacting provisions for their benefit, as it considered to be in the interests of the country to do so. Such provisions cannot, in my opinion, be termed discriminatory or unjust or inequitable, and no Court has got the right to hold them to be void or unenforceable because they amount to giving, in fact, some "discrimination." Courts, which can never represent the will of the people to the same extent as the Legislature elected by the people, will never interfere with the will of the Legislature and the provisions of Acts passed by it unless they are proved to be 'ultra vires' the Constitution, which is not the case here.

(7) All the contentions of the appellant have failed. This second appeal deserves to be and is hereby dismissed with costs.

(Leave refused.)

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 35 (C. N. 14)

SATYANARAYANA RAO AND VISWANATHA SASTRI, JJ.

Commissioner of Income-tax, Excess Profit Tax, Madras, Applicant v. A. S. T. F. Rodrigues and Co., Katpady, Respondent.

Case Referred No. 51 of 1948, D/- 27-3-1951.

Excess Profits Tax Act (1940) S. 5, Third Proviso — Profits wholly arising in Indian State — Income Tax Act (1922) S. 14(2)(c).

The assessee entered into a contract with the military authorities for the supply of live goats and sheep at an agreed price. The assessee deposited a sum of Rs. 10,000 with the military authorities in British India as a guarantee for the due performance of his obligations under the contract under which deliveries had to be effected over a considerable period of time. The contract was entered into in British India. The goats and sheep were purchased by the assessee in large quantities in Mysore. They were transported to Cochin State and put on board a ship provided by the military authorities at Ernakulam, the cost of these operations being borne by the assessee and included in the price contracted to be paid. The assessee maintained an establishment and an office at Ernakulam for attending to the transport and loading of goats and sheep on ships. The assessee sent his bills for the goats and sheep supplied by him, to the military authorities at Poona who paid the price by cheques drawn in favour of the assessee on the Imperial Bank at Vellore. No payment was made to the assessee outside British India in respect of the contract.

'Held' that the purchase of goats and sheep in Mysore, their transport to Cochin and the loading of the goods on board the ship provided by the military authorities at Ernakulam formed a separate section or part of the business of the assessee, a part separable from the rest of the business. These operations together constituted a part of the business and a part which was carried on outside British India in Mysore and Cochin State. The assessee's office at Ernakulam was in charge of these operations. The buying of goats and sheep at Mysore and their sale at Ernakulam might itself produce a profit without reference to the contract entered into in British India. Entering into the contract with the military authorities in British India, supervision of the performance of the contract from British India and the realisation of the price payable for the goods delivered at Katpadi in British India where the head office of the firm was situate, could be treated as constituting a separate part of the business of the assessee. It could not, however, be said that the entire profits of the assessee derived from the military contract accrued or arose in an Indian State. Profits attributable to part of the business of the assessee carried on in Mysore and Cochin States must be apportioned and held to be exempt from excess profits tax, as having accrued in an Indian State within the meaning of the third proviso to S. 5. The rest of the profits alone could be considered to accrue or arise in British India where the income producing contract was entered into, the business was supervised and the price of the goods sold was realised. 'Case law discussed'. (*Paras 4, 9*)

Anno: E. P. T. Act S. 5 N. 1.
Income Tax Act S. 14 N. 7.

C. S. Rama Rao Sahib, for Applicant — V. M. Ramaswami Mudaliar and N. Gopala Menon, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronogically. List of foreign cases referred to comes after the Indian Cases).

('38) I L R (1938) Bom 752: (A I R (25) 1938 P C 232) (Prs 5, 7, 8)
('39) I L R (1939) Mad 178: (A I R (26) 1939 P C 1) (Pr 6)
('50) 1950-18 I T R 472: (A I R (37) 1950 S C 134) (Prs 3, 4, 7, 8)
('38) 1938-6 I T R 584 (Bom) (Pr 6)
('25) 52 Cal 1: (A I R (12) 1925 Cal 34) (Pr 8)
('32) 59 Cal 1226: (A I R (19) 1932 Cal 626 S B) (Pr 8)
('37) I L R (1937) 2 Cal 201: (A I R (25) 1938 Cal 148) (Pr 6)
('50) 1950-18 I T R 33: (A I R (38) 1951 E P 347) (Pr 8)
('29) 10 Lah 657: (A I R (16) 1929 Lah 609 F B) (Pr 8)
('23) 46 Mad 360: (A I R (10) 1923 Mad 422) (Pr 8)
('38) I L R (1938) Mad 25: (A I R (24) 1937 Mad 745 F B) (Prs 6, 7)
('41) 1941-1 Mad L Jour 99: (A I R (28) 1941 Mad 229 S B) (Pr 8)
('50) 1950-18 I T R 302: (A I R (37) 1950 Mad 631) (Prs 3, 8)
('50) 1950-18 I T R 277: (A I R (37) 1950 Mad 773) (Prs 3, 4)
('50) 1950-18 I T R 849: (A I R (38) 1951 Mad 439) (Pr 5)
('50) 1950-18 I T R 888: (A I R (38) 1951 Mad 597) (Pr 8)
('49) 1949-17 I T R 256: (A I R (36) 1949 Orissa 60) (Pr 8)
('42) 1942-10 I T R 13: (A I R (29) 1942 Pat 313) (Pr 8)
('25) 3 Rang 614: (A I R (13) 1926 Rang 97 F B) (Pr 8)
(1921) 2 A C 13 (Pr 9)

JUDGMENT: The question referred for our decision is:

"Whether in the circumstances of the case the whole of the profits from the supply of sheep and goats to the military authorities accrued or arose in an Indian State and hence is exempt from liability to excess profits tax by virtue of the proviso to S. 5 of the Excess Profits Tax Act?"

The facts are these. The assessee is a registered firm carrying on business as manufacturers and sellers of bone-meal with their head office at Katpadi near Vellore and depots in many other places in British India. In May 1942, the assessee entered into a contract with the military authorities for the supply of live goats and sheep in weekly instalments at an agreed price. The assessee deposited a sum of Rs. 10,000 with the military authorities in British India as a guarantee for the due performance of his obligations under the contract under which deliveries had to be effected over a considerable period of time. The contract was entered into in British India. The goats and sheep were purchased by the assessee in large quantities in Mysore. They were transported to Cochin State and put on board a ship provided by the military authorities at Ernakulam, the cost of these operations being borne by the assessee and included in the price contracted to be paid. The Tribunal found, and this finding of fact is binding upon us, that the assessee maintained an establishment and an office at Ernakulam for attending to the transport and loading of goats and sheep on ships. The assessee sent his bills for the goats and sheep supplied by him, to the military authorities at

Poona who paid the price by cheques drawn in favour of the assessee on the Imperial Bank at Vellore. No payment was made to the assessee outside British India in respect of the contract. The income of the assessee computed for the chargeable accounting period included a sum of Rs. 50639 as profits derived from the supply of goats and sheep. The revenue authority assessed this sum to excess profits tax on the ground that the whole of the profits arose or accrued to the assessee in British India. According to the assessee the whole of the profits arose out of British India in the State of Mysore where the goods were bought and in Cochin State where they were delivered. In this Court Mr. Rama Rao Sahib, for the Commissioner of Excess Profits Tax, argued that a portion of the profits attributable to the business operations of the assessee outside British India was not taxable but the rest of the profits was liable to excess profits tax. According to him, the business operations outside British India should be deemed to be a separate business under the third proviso to S. 5 of the Excess Profits Tax Act and its profits alone exempted from tax.

(2) Though under S. 4 of the Income-tax Act, as it stood before the amendment of 1939, the place of accrual of income was of importance it lost its importance in the case of a person resident in British India by reason of the drastic amendment of S. 4 in 1939 making such residents taxable on income, profits and gains accruing or arising to them in any part of the world. Generally speaking, the place of accrual and receipt of business income is now of importance only with reference to non-residents. A limited measure of exemption was, however, granted in 1941 by the enactment of S 14 (2) (C) of the Income-tax Act dealing with income, profits or gains accruing in an Indian State (now Part B State) to residents in British India.) A corresponding amendment of the Excess Profits Tax Act was also made in 1941 by the addition of the third proviso to S. 5 of that Act which ran as follows:

"Provided further that this Act shall not apply to any business, the whole of the profits of which accrue or arise in an Indian State, and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business, the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all purposes of this Act, be deemed to be a separate business."

S. 21 of the Excess Profits Tax Act incorporates by reference the provisions of S. 42(3) of the Income-tax Act which laid down the basis on which the income of a part of a business had to be determined. S. 42 (3) of the Income-tax Act ran thus:

"In the case of a business of which all the operations are not carried out in British India, the profits and gains of the business deemed under this section to accrue or arise in British India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in British India."

These were the relevant statutory provisions governing the liability to tax and the claim for exemption from tax, at the time when the assessment was made in this case.

(3) We had occasion to examine the effect of these provisions in our judgments in 'Commissioner of Excess Profits Tax v. Goculdoss Jamnadass & Co.', 1950-18 ITR 277 and 'Commissioner of Income-tax v. Parasuram Jethanand', 1950-18 ITR 302, but we had not then the benefit of the exposition of the law by the Supreme Court in 'Commissioner of Income-tax v. Ahmedhbhai Umarbhai & Co., 1950-18, ITR 472, which has substantially affirmed our decision. The case before the Supreme Court was comparatively simple on the facts. There the assessee firm, a resident in Bombay, owned an oil mill at Raichur in Hyderabad State where groundnut oil was manufactured. The manufactured oil was despatched to the assessee at Bombay where it was sold for a profit. The manufacturing part of the business was conducted from start to finish in Hyderabad State where the assessee's oil mill was situate, the sale of the oil alone being effected in Bombay. The Supreme Court held that the production and manufacture of groundnut oil in the assessee's mill at Raichur was "a part" of the business of the assessee carried on in an Indian State within the meaning of the third proviso to Section 5 of the Excess Profits Tax Act. The Court negatived the contention of the revenue authority that as the sales of oil were effected and the price was received at Bombay by the assessee, the whole of the profits of the business accrued or arose in Bombay. The receipt of the price of the goods sold at Bombay was distinguishable from the accrual of the profits of the business and a part of the profits of the business must be attributed to the manufacture of oil in Raichur. Acting under Section 42 (3) of the Income-tax Act incorporated by reference into the Excess Profits Tax Act the Court held that the profits of the business should be apportioned between the manufacturing and the trading activities of the assessee, each set of activities constituting a separable part of the business. The profits attributable to the manufacture of oil in Raichur were held not liable to excess profits tax. According to the decision of the Supreme Court, where a resident of British India manufactures goods in an Indian State and sells them and realises their price in British India, the whole of the profits should not be treated as "accruing" or "arising" from the sale, or at the place of sale, though the profits may be treated as "received on sale." Apportioning the profits between the selling and the manufacturing operations, each of which forms a "part of the business," the profits attributable to the manufacturing part of the business carried on in the Indian State must be exempted from liability to excess profits tax.

(4) The question as to what can be styled "a part of the business" of an assessee does not always admit of an easy answer. Patanjali Sastri, J., in 'Commissioner of Income-tax v. Ahmedbhai Umarbhai & Co.', 1950-18 ITR 472 SC, would apparently read "part of the business" in their third proviso to Section 5 of the Excess Profits Tax Act as signifying one or more operations of the business contemplated by Section 42 (3) of the Income-tax Act. His Lordship after adverting to the difficulty of cutting

"business operations arbitrarily into two or more operations, apportioning as between them the profits resulting from one continuous process ending in a sale,"

nevertheless held that the third proviso to S. 5 of the Excess Profits Tax Act demanded such an apportionment. How far is this process of dissection of business operations and the apportionment of profits among the several operations of a business to go? Kania, C. J., was alive to this difficulty when he said:

"It is not contended in the present case that the activities of the assessee as a manufacturer are so spread out as to be incapable of being ascertained as one unit of business in an Indian State. For instance, difficulties may arise if a manufacturer buys groundnuts in one place, has a crushing mill in another place, has a refinery in a third place and packing, etc., in a fourth place. It is not disputed that the assessee's activities as a manufacturer are all in Raichur and if so, that set of activities under the definition of 'business' in the Excess Profits Tax Act is a complete unit. I

have no doubt that on the facts of the present case, the manufacturing operations of the assessee are 'a part of his business in an Indian State.' Those conditions of the proviso are therefore fulfilled."

The opinion of Mukherjea, J., (with whom Das, J., agreed) was also to the effect that though a business might consist of several operations it is not every operation that would constitute "a part of the business" within the meaning of proviso 3 to S. 5 of the Excess Profits Tax Act. His Lordship substantially affirmed the view taken by us in 'Commissioner of Excess Profits Tax v. Goculdass Jamnadass & Co.', 1950-18 ITR 277, that profits can be considered to accrue in respect of a part of the business if the apportionment of the total profits and allocation of a portion of such profits to the part in question was possible on any recognised or intelligible principle of mercantile accountancy. Mahajan, J., (with whom Fazl Ali, J., agreed), no doubt quoted with approval the following observtion of Tendolkar, J., in the judgment appealed against:

"Normally the meaning of the word 'part' is a portion in whatever way carved out and I have no doubt in my mind that any of the portions that go towards a complete business are a part of that business."

The learned Judge, however, was not taking a view different from that of the learned Chief Justice and Mukherjea, J., as appears from the following passage in his judgment:

"The proviso (to Section 2, Clause 5, of the Excess Profits Tax Act) has made an amalgam of the businesses of one individual and it is in view of this amalgam that proviso 3 of S. 5 has to be considered ..... If a number of business carried on by a person are situate in different places, then the effect of the proviso is to again treat them as separate businesses under the description of the phrase 'part of a business.' In other words, if a man is carrying on manufacture in textiles in Bombay, a shop at Mysore, has a distillery in Allahabad and has an oil mill in Gwalior, then for the purposes of S. 5 all these four trades are part of the business within the meaning of proviso 3 to S. 5, one part situate in one place and another part situate at another place and if any of these parts produce profits at the place of the business, that place being in Indian State, then proviso 3 would have application."

In the light of the foregoing statement of the law we hold that the purchase of goats and sheep in Mysore, their transport to Cochin and the loading of the goods on board the ship provided by the military authorities at Ernakulam form a separate section or part of the business of the assessee, a part separable from the rest of the business. These operations together constituted a part of the business and a part which was carried on outside British India in Mysore and Cochin State. The assessee's office at Ernakulam was in charge of these operations. The buying of goats and sheep at Mysore and their sale at Ernakulam might itself produce a profit without reference to the contract entered into in British India. Entering into the contract with the military authorities in British India, supervision of the performance of the contract from British India and the realisation of the price payable for the goods delivered at Katpadi in British India where the head office of the firm was situate, could be treated as constituting a separate part of the business of the assessee.

(5) The further question is whether the whole of the profits of the assessee from the military contracts arose in British India where the contract was entered into and the price realised, or in Indian States where the contractual obligations of the assessee were substantially performed. The criterion under proviso 3 to S. 5 of the Excess Profits Tax Act is the place where the profits accrue or arise and not the place where the profits are received. We have dwelt at length with the question of the place of accrual of profits in a case like the present one in 'Commissioner of 'Income-tax v. Little's Oriental Balm, etc., Co., Ltd.', 1950-18 ITR 849, which, however, was a case relating to the levy of income-tax. We need not again embark on an elaborate examination of the decided cases. Suffice it to refer to a few landmarks. In 'Commissioner of Income-tax v. Chunilal B. Mehta', ILR (1938) Bom 752, the assessee, a resident of Bombay, through brokers in foreign countries, carried on buying and selling operations in foreign markets by entering into forward contracts of a speculative nature. Delivery of goods was never given or taken. Only differences were paid or realised abroad, with the result that a large sum stood to the credit of the assessee with his foreign bankers as a result of these transactions. The money was not sent over to the assessee in British India. The Judicial Committee found that the contracts for sale or purchase were neither framed nor carried out in British India and held that the profits derived from those transactions did not accrue or arise in British India. The words "profits accruing or arising" were interpreted as requiring a place to be assigned as that at which the result of trading operations come, whether gradually or suddenly, into existence. It was observed that there was no necessity arising out of the general conception of a business as an organisation, that profits should arise only at one place and that profits were frequently, if not ordinarily, regarded as arising from many transactions, each of which had a result — not as if the profits needed to be disintegrated with difficulty — but as if they were an aggregate of the particular results. It was also stated that discrimination between different kinds of profits according to the place at which they accrued or arose was a plain dictate of the Income-tax Act. Their Lordships, however, refrained from laying down a general rule applicable to concrete cases and said:

"If such profits have not been received in or brought into British India it becomes or may become necessary to consider on the facts of the case where they accrued or arose. Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be nearly impossible and wholly unwise. They are not saying that the place of formation of the contract prevails against everything else. In some circumstances it may be so, but other matters — acts done under the contract, for example — cannot be ruled out 'a priori.' In the case before the Board, the contracts were neither framed nor carried out in British India; the High Court's conclusion that the profits accrued or arose outside British India is well-founded."

(6) Shortly, after this decision came the 'Commissioner of Income-tax v. Govindram Seksaria', 1938-6 ITR 584 (Bom), where the only differentiating feature was that the assessee, a resident of Bombay, instructed his brokers in Bombay to enter into transactions on his behalf on the New York Exchange for the buying and selling of cotton. The transactions resulted in profits which were realised in New York and kept there without being remitted to the assessee. The Court held that the profits accrued in British India because they were derived from and paid in respect of the contracts entered into at Bombay. This Court in 'Commissioner of Income-tax v. S. L. Mathias', ILR (1938) Mad 25, took the view that by production of coffee

on the assessee's own plantations in Mysore and sale of the coffee in British India, the income of the assessee was really agricultural and it accrued in Mysore. This Court differed from 'Mohanpura Tea Co. v. Commisioner of Income-tax', ILR (1937) 2 Cal 201, which held in similar circumstances that the profits of the assessee accrued or arose only at the place where the produce was sold and the price realised. The Judicial Committee on an appeal from the Madras decision left the question open and the conflict unresolved — See 'Commissioner of Income-tax v. S. L. Mathias', ILR (1939) Mad 178.

(7) In 'Commissioner of Income-tax v. Ahmedbhai Umarbhai & Co., 1950-18 ITR 472, the Supreme Court affirmed the decision of the Bombay High Court which had taken a view in consonance with that taken by this Court in 'Commissioner of Income-tax v. Mathias', ILR (1938) Mad 25, as regards the place of accrual of profits. Referring to the observation of the Judicial Committee in 'Commissioner of Income-tax v. Chunilal B. Mehta', ILR (1938) Bom 752, that the location of the sources of the income or the place where the business is carried on is not the criterion, but the place where the income accrues or arises and that this test itself can be applied distributively to the profits of a single source, Kania, C. J., in 'Commissioner of Income-tax v. Ahmedbhai Umarbhai & Co.', 1950-18 ITR 472 observed;

"While accepting this distinction, I am however, unable to accept the contention that the source of income can never be the place where the income accrues or arises. In my opinion, there is nothing to prevent income accruing or arising at the place of the source. The question where the income accrued has to be determined on the facts of each case. The income may accrue or arise at the place of the source or may accrue or arise elsewhere. But it does not follow that income cannot accrue or arise at the place where the source existed. Therefore, it is necessary to ascertain whether that part of the business which is capable of being treated as one separate unit in the Hyderabad State has given rise to the income or profit sought by the assessee to be exempted from taxation in the present case."

(8) Mahajan, J., (with whom Fazl Ali, J., agreed) also said that it will be doing no violence to the meaning of the words "accrue' 'or "arise" if the profits attributable to the manufacturing business are said to arise or accrue at the place where the manufacture is being done and the profits which arise by reason of the sale are said to arise at the place where the sales are made. This apportionment of profits between a number of businesses which are carried on by the same person at different places determines also the accrual of profits. Patanjali Sastri, J., referred to 'Commissioner of Income-tax v. Chunilal B. Mehta', ILR (1938) Bom 752, and struck a somewhat different note when he said:

"It is with reference to such transactions which individually contribute to the surplus arising in the various places abroad that their Lordships spoke of the profits accruing or arising distributively and not in a single place. That they were not thinking of the profits resulting from a single composite proceeds such as manufacture and sale and their disintegration and apportionment between the different operations is shown by their further observation that 'profits are frequently, if not ordinarily, regarded as arising from many transactions each of which has a result, not as if the profits need be disintegrated with difficulty but as if they were the aggregate of the particular results."

With reference to the business of purchasing and selling goods without any manufacturing process intervening, there are decisions to the effect that profits arise at the place where the contracts of sale are made — See 'Board of Revenue v. Madras Export Co.,' 46 Mad 360, 'Jiwandas v. Commissioner of Income-tax', 10 Lah 657, 'Sudalaimani Nadar v. Commissioner of Income-tax', 1941-1 Mad L Jour 99, 'Sri Hardeo Bengal Salt Co. v. Commissioner of Income-tax, 1942-10 ITR 13 (Pat) In 're Post Said Salt Association Limited', 59 Cal 1226, 'Commissioner of Income-tax v. Chunilal B. Mehta', ILR (1938) Bom 752, and 'Rahim v. Commissioner of Income-tax', 1949 ITR 256 (cri). In 'Commissioner of Income-tax v. Ahmedbhai Umarbhai and Co.' ,1950-18 ITR 472, Kania, C. J., (page 478) and Mahajan, J., (page 499) recognise that a trade consisting merely of purchase and sale of goods without any process of manufacture falls into a separate category and referred to some of the cases above cited, with evident approval. The view has also been taken in some decisions that the operations of buying would be relevant in determining the question whether any part of the income, profits, or gains accrues or arises at the place of buying especially if it is a process of selective buying requiring the exercise of skill and judgment — See, Per Ray, C. J., in 'Rahim v. Commissioner of Income-tax', 1949-17 ITR 256, 'Commissioner of Income-tax Excess Profits Tax Madras v. Parasuram Jethanand', 1950-18 ITR 302, 'Anglo French Textile Ltd. v. Commissioner of Income-tax', Madras No. 2, 1950-18 ITR 888; 'Rogers Pratt Shellac & Co. v. Secretary of State', 52 Cal 1; 'Commissioner of Income-tax v. Steel Bros.', 3 Rang 614 and Webb Sons & Co. v. Commissioner of Income-tax', 1950-18, ITR 33. Some of the judgments above cited were referred to in the judgment of Mukherjea, J., in 'Commissioner of Income-tax v. Ahmedbhai Umarbhai and Co.', 1950-18 ITR 472.

(9) In the present case it cannot be said that the entire profits of the assessee derived from the military contract accrued or arose in an Indian State. The contract for sale was entered into in British India, the business was supervised from British India and the price payable under the contract was also realised in British India. A substantial portion of the business operations such as buying of goats and sheep, their transport and loading on ships had to be conducted in Mysore and Cochin. These operations constitute a separable and separate part or unit of the business of the assessee conducted by a separate establishment maintained at Ernakulam in the Cochin State. Profits attributable to this part of the business of the assessee must be apportioned and held to be exempt from excess profits tax, as having accrued in an Indian State within the meaning of the third proviso to S. 5 of the Excess Profits Tax Act. The rest of the profits alone can be considered to accrue or arise in British India where the income producing contract was entered into, the business was supervised and the price of the goods sold was realised. The facts that the income producing contract was entered into in British India and that the price was paid in British India cannot be brushed aside. An unexecuted contract under which a person is entitled to buy or sell goods at advantageous prices has pecuniary value as a business asset — 'See John Smith and Son v. Moore', (1921) 2 A C 13. The contract made by the assessee firm in British India in the course of its trade or business was a source of the profits made by the assessee, though the performance of the contract in an Indian State also contributed to the accrual of such profits.

(10) Our answer to the questions referred to us is that the profits apportioned and attributed to that part of the business of the assessee carried on in Mysore and Cochin States would alone be exempt from excess profits tax under the third proviso to S. 5 of the Excess Profits Tax Act and that the

rest of the profits would be liable to such tax. As each party has succeeded and failed in part there will be no order as to the costs of this reference.

C.R.K./D.H. *Answer accordingly.*

A. I. R. (39) 1952 MADRAS 39 (C. N. 15)

SUBBA RAO, J.

V. Natesa Pillai, Petitioner v. Central Road Traffic Board, Egmore, Madras, represented by its Secretary, and another, Respondents.

Civil Miscellaneous Petition No. 9968 of 1950, D/- 21-8-1951.

Constitution of India Art. 226 — Motor Vehicles Act (1939) S. 64 — Powers of appellate authority.

A right of appeal can only be conferred by a statute and the scope of that appeal is also confined to the limits prescribed by the statute. The Regional Transport Authority, in exercise of his original jurisdiction, and the Central Road Traffic Board and the Government in discharge of their appellate and revisional jurisdictions are bound to act judicially. The Central Road Traffic Board cannot therefore give a relief to any appellant in respect of a matter not covered by the appeal to the detriment of a person not a party to that appeal. The order made by the Central Road Traffic Board being without jurisdiction, the fact that the Government in revision refused to interfere, could not give it higher sanctity or make it any the less an order pased without jurisdiction. And a writ of certiorari can be issued as fundamental principles of jurisprudence are violated: (1927) 1 KB 491 and (1934) 1 KB 277, Rel. on. (Paras 4, 6)

Anno: M. V. Act, S. 64, N. 1.

N. Natesan, for Petitioner. The Advocate-General for State Counsel, T. R. Srinivasan and S. Gopalaratnam, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1927) 1 K B 491: (96 L J K B 77) (Prs 5, 6)

(1934) 1 K B 277: (103 L J K B 257) (Pr 5)

ORDER.: This is an application for issuing a writ of Certiorari to quash the order of the Central Road Traffic Board, Madras, dated the 16th March 1950 and of the Government of Madras, dated the 14th October 1950.

(2) Sri Rama Vilas Service Limited, Kumbakonam, surrendered four permits in respect of route Pudukottai-Tanjore. The Regional Transport Authority, Tiruchirapalli, called for applications to fill up the four vacancies. The petitioner, along with others, applied for permits. The petitioner filed three applications, one for a permit to run a bus between Puddkottai and Tanjore, and two other applications for the variation of the existing route, Nagarapatti to Pudukottai by extending it to Tanjore. The third respondent L. Narayanamurthy and Company, also applied for a permit on 1st December 1949. The Regional Transport Authority passed a resolution granting two permits to the Pudukottai Co-operative Transport Limited, Pudukottai and one permit to the petitioner in variation of the route, Pudukottai to Nagarapatti, up to Tanjore, and the fourth permit to Messrs. Rajamani Transport Ltd., Pudukottai, in variation of the route, Vendampatti to Pudukottai up to Tanjore. The other applications were rejected. The third respondent and others whose applications were dismissed preferred appeals against the orders of the Regional Transport Authority to the Central Road Traffic Board, Egmore, Madras. The third respondent's appeal was directed only against the grant of two permits to the Pudukottai Co-operative Transports Ltd., and to that appeal the petitioner was not made even a party. The grant of permit to him was not questioned in that appeal. The Central Road Traffic Board disposed of all the appeals together on 16th March 1950. The appeals filed by the applicants other than the third respondent were dismissed. In the appeal filed by the third respondent he was given a pucca permit in place of the petitioner and the appeal was allowed to that extent. The petitioner preferred a revision to the Government of Madras, who by an order dated 14th October 1950, declined to interfere. The petitioner has now filed this petition for the issue of a Writ to quash these two orders of the Central Road Traffic Board and the Government of Madras.

(3) Learned counsel for the petitioner contended that the order of the Central Road Traffic Board was illegal, as they had a relief granted to the third respondent in respect of a permit which was not the subject-matter of the appeal, and against the petitioner, who was not a party to the appeal. The respondents' counsel contended that though to the particular appeal filed by the third respondent the petitioner was not made a party, and though the permit issued to the petitioner was not the subject-matter of the appeal, inasmuch as all the appeals were heard together, and as the petitioner had an opportunity to support the order in his favour, the order of the Central Road Traffic Board was valid. It was further argued that as another remedy by way of a revision to the Government lay and that remedy was availed of, this petition was not maintainable. The main question, therefore, in this application is whether the Central Road Traffic Board can give a relief to an appellant in respect of a matter not covered by that appeal to the detriment of a person not a party to that appeal.

(4) It is settled law that a right of appeal can only be conferred by a statute and the scope of that appeal is also confined to the limits prescribed by the statute. It is also not disputed that the Regional Transport Authority, in exercise of his original jurisdiction, and the Central Road Traffic Board and the Government in discharge of their appellate and revisional jurisdictions, are bound to act judicially. Section 64 confers appellate jurisdiction on the Central Road Traffic Board. The relevant provision of that section reads as follows:

> "Section 64. Any person (a) aggrieved by the refusal of the Provincial or a Regional Transport Authority to grant a permit or by any condition attached to a permit granted to him..... may within the prescribed time and in the prescribed manner appeal to the prescribed authority who shall give such a person and the original authority an opportunity of being heard."

The prescribed authority under the rules is the Central Road Traffic Board. Under this provision, if a permit is refused to an applicant, he is entitled to prefer an appeal to the prescribed authority, if he be aggrieved by such a refusal. The third respondent preferred an appeal as he was not given the two permits issued to the Pudukottai Co-operative Transports Limited. The memorandum of appeal grounds were directed only against that refusal. The only respondent made a party to that appeal was the Pudukottai Co-operative Transports Ltd. A perusal of the appellate grounds discloses that the third respondent had no grievance against the order issuing a permit to the petitioner or against the order refusing that permit to him. The subject-matter of the appeal was the issue of two permits to the Pudukottai Co-operative Transports Ltd. The third respondent was aggrieved only by the issue of the said two permits and his appeal was, therefore, confined to that subject-matter. Section 64 does not in terms or by necessary implication empower an appellate authority to dispose of appeals in contravention of the well-recognised confines of an appellate jurisdiction. The appellate authority, obviously, cannot, therefore, after having dismissed the appeals

filed by the other parties, give a relief to the third respondent in respect of a matter not before it in that appeal and against a party not impleaded therein. The fact that the Central Road Traffic Board heard all the other appeals together for convenience could not empower them to dispose of the appeal in a manner which they could not have done, if the appeal filed by the third respondent was heard separately.

(5) I shall now proceed to consider some of the cases cited, which would throw some light on the question raised before me. The principle that no judgment should be given against a party who had no notice is stated in clear terms in Broom's Legal Maxims, 9th Edition, page 78:

"It has long been a received rule that no one is to be condemned, punished or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard."

That maxim was applied by the Court of Appeal in 'Rex v. North',; Oakey Ex parte (1927)1-KB 491, to the facts of the case before them. There a faculty was granted to a vicar and churchwardens to restore a screen in a church. In the course of the work of restoration damage not authorised by the faculty was done to a fresco. A parishioner interested in the fresco petitioned the consistory Court for a faculty to repair the damage. The petition alleged that the damage was done by the vicar's order, but did not ask that he should pay the costs. Though a general citation was issued, no special citation was issued to the vicar. The Judge of the consistory Court granted the faculty asked for and ordered the vicar to pay expenses of restoration and the costs of the petition. The Court of appeal held that the order made without giving the Vicar an opportunity of being heard in his defence was without jurisdiction. At page 504, Scrutton, L.J., observed:

"..... As I have already said, to order a man to pay what is in the nature of a penalty for an offence without first giving him notice that an application for such an order is going to be made, is both contrary to the general law of the land, and is so vicious as to violate a fundamental principle of justice....."

Atkin, L. J., says at page 506:

"..... But whether that is so or not I think it is quite plain that the fact of there being a remedy by way of appeal is no answer to a writ of prohibition where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice, such as I conceive to have been the case here....."

The next decision cited is more apposite to the question raised in this application. In the 'King v. The Minister of Transport', Ex parte Upminister Services Ltd., (1934) 1 K B 277. the opponents to the grant of a road service licence and backing authorising the running of a service of motor-coaches along a particular route appealed to the Minister against the grant on the ground that the service was not needed in the interest of the public. The only subject-matter of the appeal before him was whether the licence and backing had been properly granted. But the Minister made an order to the effect that the Commissioner should revoke the licence and backing as soon as he was satisfied, after consultation with the Traffic Commissioners for the Eastern Area, that adequate provision has been made for road services between Upminister and London. The Court of Appeal set aside that order on the ground that the order of the Minister was in effect an usurpation of the original jurisdiction conferred upon the Commissioner. When it was argued that the Minister, in an appeal filed before him, could pass any proper order, Romer, L. J., negativing such a broad contention expressed his view in the following words:

"..... No one can suppose that the Legislature intended to create a dictatorship in the person of the Minister of Transport; if and whenever an appeal happened to be brought before him under that section. It is equally incredible that the sub-section should have been intended to give the Minister power to make any order he might think fit relating to road transport in general, or even road transport in the area affected by the matter brought before him on the appeal. The sub-section, after all, is not one dealing with the powers of the Minister of Transport as such. It is dealing with his powers as an appeal tribunal exercising quasi-judicial junctions, and the orders that he may make as such. The most, natural, and, in my opinion, the proper meaning of the sub-section is that the Minister may give such decision on the question raised by any particular appeal as he may think right, and give such directions as may be necessary for giving effect to that decision. But his decision must be confined, as in the case of other judicial or quasi-judicial tribunals, to the questions brought before him on the appeal, and he must not travel outside them....."

I respectively adopt the weighty observations extracted above. The said observations, if applied to the present case would indicate that the Central Road Traffic Board, in setting aside the permit issued to the petitioners, travelled beyond its jurisdiction and passed an order which it had no power to do.

(6) I cannot also agree with the second contention raised by the learned Counsel for the respondents. If the order made by the Central Road Traffic Board, was without jurisdiction, the fact that the Government refused to interfere could not give it higher sanctity or make it any the less an order passed without jurisdiction. Further, the passage extracted from 'Rex v. North',; Oakey Ex parte (1927) 1 KB 491, shows that a writ of certiorari could be issued if fundamental principles of jurisprudence were violated, notwithstanding the fact that an appeal lay against the order sought to be quashed.

(7) I therefore set aside the orders of the Central Road Traffic Board and the Government of Madras issuing a permit to the third respondent. The respondents will pay costs to the petitioner. Advocate's fee Rs. 100.

C.R.K./D.H. *Application allowed.*

A. I. R. (39) 1952 MADRAS 40 (C. N. 16)

RAJAMANNAR C. J. AND SOMASUNDARAM J.

In re A. S. Vijayaraghavalu Chetty, Petitioner.

Civil Misc. Petn. No. 6111 of 1951, D/- 26-4-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 (XV) of 1946) S. 7(2) (IV) — 'Buildings' include parts of same building.

Where parts of the same building are let out separately to different tenants those parts would constitute buildings within the Act and therefore, if one of the tenants is a cause of nuisance and quarrels to other tenants in the other parts of the same building the tenant is liable to be evicted under S. 7(2)(IV) of the Act. (*Para 1*)

A. Subramaniam, for Petitioner.

RAJAMANNAR C. J.: In this case a most extra-ordinary contention has been raised. The petitioner is a tenant in a portion of a building. Other portions of the building have been let to other tenants. The concurrent findings of both the Rent Controller and the Appellate Tribunal are that the petitioner has been the cause of frequent quarrels and has made it impossible for the tenants occupying the other portions of the building to live in the house along with the petitioner. He has therefore been ordered to be evicted under S. 7(2)(iv) of

Madras Act XV of 1946. The contention before us on behalf of the petitioner is that under that provision it is only if the tenant is guilty of acts and conduct which are a nuisance to the occupants of buildings other than the building which the tenant is occupying that the tenant can be evicted; but if one tenant is guilty of similar acts in respect of tenants occupying other portions of the same building, the provision would not apply. We do not agree that the language of the enactment compels us to this absurd conclusion. "Building" has been defined in the Act as meaning "a part of a building let or to be let separately". It is obvious that in this case parts of the same building have been let separately to different tenants. These parts of the same building would constitute "buildings" within the meaning of the Act. It is impossible to contend that one portion of the same building is not in the neighbourhood of another portion of the same building. The result would be that the tenant in this case must be deemed to have been guilty of such acts and conduct which are a nuisance to the occupiers of the buildings in the neighbourhood. The order of eviction was rightly passed against him. The application is dismissed.

C.R.K./K.S. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 41 (C. N. 17)

VENKATARAMA AYYAR, J.

Pappukkannu Anni, Petitioner v. S. Thoppayya Mudaliar and another, Respondents.

Civil Revision Petition No. 786 of 1950, D/- 3-8-1951.

Court-fees Act (1870), S. 7 (iv) (c), (d) (e) — Suits claiming easement rights.

The prayers in the plaint were (1) for a declaration that the defendant had no right to drain their water from their fields into the fields of the plaintiff and (2) for a permanent injunction restraining the defendants from cutting open the bund and draining their surplus water into the fields of the plaintiff. The plaintiff valued the former relief under S. 7 (iv) (c) at Rs. 10 and the later relief under S. 7 (iv) (d) at Rs. 10 and paid Court-fee on Rs. 20.

'Held that easement suits do not fall under S. 7 (iv) (c). Notification dated 1-11-1943 in terms applied only when the relief was asked for on the ground that the title of the plaintiff was disputed and possession was in consequence sought to be disturbed. Here there was a simple case of easement involving no question of title or possession. Therefore even applying S. 7, Clause (iv) (d) the order of the lower Court asking the plaintiff to value the suit as one for possession and pay half the Court-fee payable thereon was clearly erroneous.

Suits in which plaintiff claims right of easement fell under S. 7 (iv) (e) and as no amendment or notification applied thereto, the plaintiff was at liberty to put his own valuation which was final. The plaintiff was within his rights in having fixed the valuation at Rs. 20. He no doubt said in the plaint that the reliefs fell under S. 7 (iv) (c) and 7 Clause (iv) (d). But these reliefs correctly fell under S. 7 (iv) (e). Case law discussed.

(Paras 1, 4, 6, 8)

Anno: Court-fees Act, S. 7 (iv) (c), N. 1, S. 7 (iv) (d), N. 1, S. 7 (iv) (e) N. 1.

R. Sundaralingam, for Petitioner. The Govt. Pleader, for the Government.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('82) 4 All 320: (1882 All W N 44 FB) (Pr 8)
('12) 16 Ind Cas 963: (16 Cal L Jour 375) (Pr 8)
('01) 24 Mad 34 (Pr 4)
('04) 27 Mad 480 (Pr 4)
('13) 24 Mad L Jour 233: (18 Ind Cas 363) (Pr 4)
('15) 38 Mad 922: (AIR (2) 1915 Mad 948 FB) (Pr 4)
('27) 52 Mad L Jour 121: (AIR (14) 1927 Mad 348) (Pr 4)
('36) 59 Mad 962: (AIR (23) 1936 Mad 201) (Prs 4, 8)
('41) ILR (1941) Mad 157: (AIR (28) 1941 Mad 91) (Prs 3, 4)
('46) ILR (1946) Mad 885: (AIR (33) 1946 Mad 235) (Prs 3, 7, 8)

ORDER.: This is a petition to revise the order of the learned District Munsiff of Tiruturaipundi calling upon the plaintiff in O.S. No. 407 of 1949 to pay additional Court-fee. The allegations in the plaint are that the plaintiff and defendants are owners of neighbouring lands, that the defendants whose lands are on a higher level are attempting to pass on the surplus water of their lands to the lands belonging to the plaintiff by cutting the bund and that they have no right to do so. The prayers in the plaint are (1) for a declaration that the defendants 1 and 2 have no right to drain their water from their fields into the fields of the plaintiff and (2) for a permanent injunction restraining the defendants from cutting open the bund and draining their surplus water into the fields of the plaintiff. The plaintiff valued the former relief under S. 7, Clause (iv) (c) at Rs. 10 and the latter relief under S 7 Clause (iv) (d) at Rs. 10 and paid Court-fee on Rs. 20.

(2) The defendants raised an objection to the correctness of the Court-fee paid by the plaintiff. Thereupon the plaintiff filed I.A. No. 189 of 1950 for revising his valuation with reference to the first prayer. Plaintiff offered to pay fixed Court-fee of Rs. 15 on that prayer, treating it as one coming under Art. 17 (B) of the 2nd Schedule. On this application the learned District Munsiff passed the following order:

"The relief relates to an immovable property and the Court-fee has to be paid as per the notification, namely, half the value as under S. 7, Clause (v)."

It is against this order that the present revision petition has been filed.

(3) It will be noticed that the plaintiff himself valued the reliefs on the footing that they fall under S. 7, Clause (iv) (c) and (d) and on that basis put his own valuation on those reliefs and paid Court-fee. Though the application for amendment proceeded on the footing that the prayer for declaration did not fall under S. 7, Clause (iv) (c) the plaint as originally framed with reference to the relief for injunction stood untouched. The case therefore appears to have been presented in the lower Court on the footing that S. 7, Clause (iv) (d) applied and there is, therefore, some justification for the learned District Munsiff applying the notification relating to injunction. I will presently show that even applying that notification the order for payment of additional Court-fee is erroneous. In this Court also arguments proceeded on the same lines. On behalf of the petitioner it was argued that the proviso in S. 7, Clause (iv) (c) applied only to cases in which the plaintiff claims a relief of possession and that even when injunction is prayed for under S. 7, Clause (iv) (d) the same principle would be applicable. Reliance was placed on behalf of the petitioner on the decision of Somayya, J., 'K. J. V. Naidu In re', ILR (1946) Mad 885. In answer to this contention it was argued by Mr. V. V. Raghavan, the learned counsel who appeared on behalf of the Government Pleader that the authority relied on by Somayya, J., in 'K. J. V. Naidu in re', ILR (1946) Mad 885, dealt with S. 7, Clause 4 (c) and that with reference to

injunction the decision of Wadsworth, J., in 'Venkataranga Rao v. Sita Ramachandra Rao', ILR (1941) Mad 157 applied and that in view of the notification which came into force on 1-11-1943 the decisions referred to by Somayya, J., in 'K. J. V. Naidu In re', ILR (1946) Mad 885, were inapplicable and that the judgment in that case though decided after the notification did not deal with it and therefore the matter required reconsideration.

(4) It will be convenient before examining these authorities to refer to the law on the subject before it was amended by the Madras Act V of 1922. Section 7, Clause (iv) of the Court-fees Act enacts that in the six classes of suits mentioned in that Sub-section the plaintiff shall state the amounts at which he values the reliefs sought and the Court-fee shall be payable according to the amount at which the relief is valued in the plaint. Three of the classes of the suits mentioned in that Sub-section may be noticed. Section 7, Clause (iv) (c) refers to suits to obtain a declaratory decree or order where consequential relief is prayed. S. 7, Clause iv (d) deals with suits to obtain an injunction and S. 7, Clause iv (e) applies to suits for a right to some benefit to arise out of land (not herein otherwise provided for). In these classes of suits the plaintiff is free to put his own valuation and it is well settled that that valuation is not open to revision by Court. Vide: 'Ramiah v. Ramaswami', 24 Mad L Jour 233, following the decision in 'Guruvajamma v. Venkatakrishna Chetti', 24 Mad 34 and 'Chinnammal v. Madarsa Rowther', 27 Mad 480 and reaffirmed by the Full Bench in 'Arunachalam Chetti v. Rangaswami Pillai', 38 Mad 922. Whether we regard the present suit as one for a declaration and consequential relief falling under S. 7, Clause (iv) (c) or a suit for an injunction falling under S. 7, Clause (iv) (d) there can be no doubt that under the Court-fees Act of 1870 the plaintiff's valuation would be final and not liable to be questioned. Then we come to the Madras Amendment Act V of 1922. The only change introduced which is relevant for the purpose of this case is the addition of the proviso in S. 7, Clause (iv). The proviso is in these terms:

> "In suits coming under Sub-clause (c) in cases where the relief sought is with reference to any immovable property such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of this section."

The precise meaning of the words "with reference to immovable property" has been considered in several decisions. In 'Venkatakrishna Pattar', In re, 52 Mad L J 121 the plaintiff sued for a declaration that he had a right of way and drainage over the defendant's lands and for injunction. The District Munsiff held that the suit was for a declaration and consequential relief and came under S. 7, Clause (iv) (c) and applying the amendment directed payment of the half the Court-fee payable in a suit for possession under S. 7, Clause v. The plaintiff was content to leave it at that but the defendant took the matter in revision and contended that the suit must be regarded as one for possession and full Court-fee was payable under S. 7, Clause V and not merely half thereof. Jackson, J., rejected this contention. This decision is strongly relied on by V. V. Raghavan on behalf of the respondent. But it is clear that Jackson, J., did not decide that such suits fell within S. 7, Clause (IV) (c). He only decided that it did not fall under S. 7, Clause V. It may be noted that in 'Venkatakrishna Pattar In re', 52 Mad L J 121', as in the present case the plaintiff sought to establish a right of easement and prayed for consequential relief by way of injunction but as the plaintiff himself had submitted to the order of the lower Court this Court had no occasion to decide under which clause it fell. But the words "Where relief was sought with reference to any immovable property" were construed as meaning "involving possession of lands, houses or garden" and as not including easements. This case, therefore, is really some authority for the position that easement suits do .not fall under S. 7 (iv) (c). In 'Gurunatha v. Secretary for State', 59 Mad 962, the plaintiff claimed that he had a right to take water from the river Cauvery without liability to pay any irrigation cess and the suit was for declaration of that right and for refund of cess recovered by the Government. The District Munsiff had held that the suit fell under S. 7, Clause (iv) (c) and that the plaintiff should accordingly value the suit as for possession under S. 7, Clause (v) and pay Court-fee on the basis of half the value of the plaint mentioned properties. In setting aside this order Varadachariar, J., observed that the consequential relief being refund of cess paid it was not one with reference to immovable property and that, therefore, Section 7, Clause (iv) (c) did not apply. The learned Judge added that in substance the suit was one for easement and that it fell under S. 7, Clause (iv) (e). This again is an authority against the position that easement suits fall under S. 7 (iv) (c). In 'Venkataranga Rao v. Sita Ramachandra Rao', ILR (1941) Mad 157 the plaintiff claimed that he had a right to the surplus water overflowing the defendant's tanks and prayed for an injunction restraining him from interfering with the customary flow of water and he fixed his own valuation and filed the suit in the Court of the District Munsiff. The defendant contended that the suit fell under S. 7, Clause (iv) (c) and that on a proper valuation on the basis of S. 7, Clause (v) the suit would be beyond the jurisdiction of the District Munsiff. Wadsworth, J., held that the only prayer in the plaint was for an injunction, that it was not obligatory on the part of the plaintiff to pray for a declaration and that the suit did not fall within S. 7, Clause (iv) (c) but that it came under S. 7, Clause (iv) (d). It may also be noted that at page 163, the learned Judge referred to the suit as one for easement. This might sound as an authority for the position that when injunction is prayed for in suits for easement that relief is within S. 7, Clause (iv) (d) but it may be noticed that prior to the notification which came into force on 1-11-43 it made no difference whether the relief claimed fell under S. 7, Clause (iv) (d) or under S. 7, Clause (iv) (e) either of them being untouched by the Madras Amendment of 1922.

(5) On 1-11-1943 the notification already mentioned came into force and the contention on behalf of the respondent is that the present suit is governed by the new notification and the Court-fee payable is on half of the value for possession. The amendment reads thus:

> "In suits for injunction where the relief is sought with reference to any immovable property on the ground that the defendant denies title of the plaintiff to the property and disturbs or threatens plaintiff's possession thereto the value of the subject-matter of the suit shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v) of Section 7 of the Court-fees Act of 1870."

It is with reference to this notification that the lower Court has passed the order which is now under revision.

(6) I am unable to see how this notification applies to the present case. That in terms applies only when the relief is asked for on the ground that the title of the plaintiff is disputed and possession is in consequence sought to be disturbed. That is not the case here. Here we have got a simple case of easement involving no question of title or possession. Therefore even applying S. 7, Clause (iv) (d) the order of the lower Court asking the

plaintiff to value the suit as one for possession and pay half the Court-fee payable thereon is clearly erroneous.

(7) The petitioner relies upon the decision in 'K. J. V. Naidu', In re, ILR (1946) Mad 885. There the plaintiff claimed a right to graze cattle, to take leaves for manure and cut and take wood for fuel free of charge from the forest belonging to the defendant and for a prohibitory injunction and valued the suit under S. 7, Clause (iv) (e). The defendant contended that the suit fell under S. 7, Clause (iv) (c) and that if the relief is valued with reference to S. 7, Clause (v) the suit would be beyond the jurisdiction of the District Munsiff's Court. The lower Court had held that the suit was properly valued and the defendant took up the matter in revision. Somayya, J., agreed with Varadachariar, J., that the words "with reference to immovable property" must be construed as meaning by way of possession of immovable property and that S. 7, Clause (iv) (c) was, therefore, inapplicable to easement suits. Mr. V. V. Raghavan argues that Somayya, J., does not refer to the notification which had come into existence on 1-11-1943 and its application to the suit which was one for injunction. That is so. But I have already held that the notification does not apply to easement suits and that in such suits the plaintiff is not bound to value the relief as one for possession and pay Court-fee on half of the value thereon. In the result, I agree with the conclusion reached by Somayya, J., in 'K. J. V. Naidu', In re ILR (1946) Mad 885.

(8) So far I have discussed the case on the lines on which it was presented in the lower Court and argued here. But in my opinion there is simple answer to the contentions on behalf of the respondent. S. 7, Clause (iv) (e) provides for suits for a right to some benefit to arise out of land not herein otherwise provided for. The language of this clause will apply to suits to enforce rights of easement. There is ample authority for the position that easement suits should be valued under S. 7, Clause (iv) (e). In 'Jugal Kishore v. Tale Singh', 4 All 320, it has been held that the claim for easement fell under S. 7, Clause (iv) (e) (vide pages 329, 330.) In 'Sundar Mal v. J. C. Murray', 16 Ind Cas 963 (Cal) this is what the learned Judges Mookerjee and Beachcroft JJ., observe with reference to the scope of S. 7, Clause (iv) (e).

> "It has been argued that in as much as the plaintiff seeks to recover possession of a mine the suit may be treated as one for enforcement of a right to some benefit to arise out of land. But this meaning cannot by any stretch of language be attributed to the clause in question which obviously applies to suits for enforcements of a right of easement."

In 'Gurunatha v. Secretary of State', 59 Mad 962, Varadachariar, J., observed at page 965 as follows:

> "if the suit is substantially one for easement it will fall not under Sub-section (c) of S. 7 (iv) but under Sub-clause (e) and the Madras Amendment introduced a proviso only to Sub-clause (c) and not to Sub-clause (e)."

In 'K. J. V. Naidu', In re, ILR (1946) Mad 885, Somayya, J., observed at page 889 "Obviously such cases come under S. 7, Clause (iv) (e)." I respectfully agree. In my opinion suits in which plaintiff claims right of easement fall under S. 7, Clause (iv) (e) and as no amendment or notification applies thereto the plaintiff is at liberty to put his own valuation and that is final. I may observe that elaborate discussions as to the scope of the amendment and notification and the meaning of the words "with reference to immovable property" in S. 7 iv (c) and (d) somewhat tend to obscure the position with reference to suits claiming easement rights." In view of the authorities already mentioned in which it has been held that easement suits fall under S. 7, Clause (iv) (e) the plaintiff is within his rights in having fixed the valuation at Rs. 20. He no doubt said in the plaint that the reliefs fall under S. 7, Clause (iv) (c) and 7 Clause (iv) (d). But the correct position in law is that these reliefs fall under S. 7, Clause (iv) (e). He has therefore not even to amend the plaint and pay Court-fee on the prayer for declaration under Art. 17-B of Schedule II. The Court-fee paid by him is sufficient and this revision is accordingly allowed. There will be no order as to costs.

C.R.K./D.H. *Revision allowed.*

A. I. R. (39) 1952 MADRAS 43 (C. N. 18)

PANCHAPAKESA AYYAR J.

The Public Prosecutor Appellant v. Thangiah Nadar, Respondent.

Criminal Appeal No. 775 of 1950, D/- 27-7-1951.

Madras Shops and Establishments Act (36 (XXXVI) of 1947) S. 32 (1) — Question whether wages were paid as required by S. 32(1) — Day book and ledger — Evidentiary value — Evidence Act (1872) S. 63.

Where the question is whether the employer had not paid the wages before the expiry of the fifth day after the last day of the wages period as required by S. 32(1) of the Madras Shops and Establishments Act, the prosecution should examine some employee to show that he was not paid within the stipulated period. The day book and the ledger are only secondary evidence and cannot prove the fact conclusively. It is only when the prosecution examines some employee that the day book and the ledger can be relevant supplementary evidence. (Para 1)

Anno: Evi. Act S. 63 N. 1.

Appellant in person.

R. Sundaralingam, for Respondent.

JUDGMENT: I have perused the records and heard the learned Public Prosecutor and Mr. Sundaralingam for the employer, Thangiah Nadar, a cloth merchant in Madura district. The learned Public Prosecutor conceded that the wage periods were fixed as required by law. His contention was that the wages were not paid before the expiry of the fifth day after the last day of the wages period as required by S. 32(1) of the Madras Shops and Establishments Act, 1947 and that the respondent's day book and ledger summoned for by the Court and produced in Court would have proved this but that the lower Court wrongly refused to look into them, and, therefore the acquittal must be set aside. Now, a day book and ledger are only secondary evidence. Accounts do not prove themselves, nor are they conclusive. If the prosecution had examined some employee to show that he was not paid within the stipulated period or even some others to prove it, (if all the employees are in such mortal terror of Thangiah Nadar that they would not depose against him even regarding this), then the day book and ledger could have been relevant supplementary evidence. The prosecution failed to do this. It did not examine even Mahalingam, an employee readily available. So I see no reason to interfere with the acquittal. An acquittal is a valuable right and should not be lightly set aside even at the instance of the State. The appeal is accordingly dismissed.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 44 (C. N. 19)

SUBBA RAO, J.

Bomma Mangayya, Appellant v. Kammula Reddayya (dead) and others, Respondents.

A. A. A. O. No. 81 of 1948, D/- 23-4-1951.

(a) Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938), S. 19-A — Application under — Basis of relief.

Under Section 19-A the relief to a creditor or a debtor as the case may be is confined only to the provisions of the Madras Agriculturists' Relief Act, for the basis of the application is that the debtor should be an agriculturist on the crucial dates mentioned therein. If a relief is claimed under the section the applicant cannot club either the reliefs he may otherwise be entitled to under the general law or under the provisions of any other Act. Hence the Court cannot invoke its powers under the Usurious Loans Act to give relief to the debtor under the Madras Agriculturists' Relief Act. (Para 2)

(b) Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938), S. 8, Explanation I — Method of appropriation of payments.

Unappropriated payments should generally be credited against the sum originally advanced but when the debtor paid an amount towards a particular promissory note the creditor must credit the amount towards the principal amount under that promissory note. The Act does not require the Court to disregard the express intention of the parties. Decision in O.S.A. No. 17 of 1948 (Mad) Foll. (Para 2)

N. C. V. Ramanujachariar, for Appellant. S. Venugopala Rao, for Respondents.

Case referred to:

('48) O S A No. 17 of 1948 (Mad) (Pr 2)

JUDGMENT.: This civil miscellaneous second appeal arises out of an application filed by the respondents under S. 19-A of the Madras Agriculturists Relief Act as amended by Act XV of 1943 for determination of the amount payable by the respondents to the appellant under a simple mortgage dated 14-11-1932 executed in favour of the appellant. Ex. P. 1 is the said mortgage deed. It is for a sum of Rs. 2,000 made up of Rs. 1,580-6-0 paid in cash at the time of the execution and the balance Rs. 419-10-0 for the amount due under a prior promissory note, Ex. P. 1 (a). Ex. P. 1 (a) was a renewal of the prior promissory notes the earliest of them being Ex. P. 1 (e), dated 3-7-1926. That promissory note was executed by the respondents in favour of the appellant for a sum of Rs. 500. The learned District Munsiff declared that the amount due by the respondents to the appellant was a sum of Rs. 607-7-9 together with interest thereon at 5 per cent per annum from 15-12-1936 up to 22-3-1938 and thereafter at 6¼ per cent per annum until payment. The respondents preferred an appeal A. S. No. 421 of 1946 to the Court of the District Judge, West Godavari against the order of the District Munsiff of Kovvur. In the view of the District Judge, the amount payable by the respondents to the appellant was only a sum of Rs. 256-7-0. But applying the Madras Usurious Loans Act, he reduced the figure still further to Rs. 192-5-9. The learned District Judge reduced the amount due to the appellant by the application of the provisions of the Madras Agriculturists Relief Act on the ground that the amounts paid by the respondents towards the earlier promissory notes should have been credited towards the original debt. The creditor preferred the above second appeal.

(2) The learned counsel for the appellant raised before me the following points: (1) The lower Court erred in applying the provisions of the Usurious Loans Act in an application filed under S. 19-A of the Madras Agriculturists Relief Act and (2) the learned District Judge should have credited the amounts paid towards the earlier promissory notes towards the principal amounts under the respective promissory notes. S. 19-A of the Madras Agriculturists Relief Act reads:

> "Where any debt incurred before 22nd March 1938, other than a decree debt, is due by any person who claims that he was an agriculturist both on that date and on the 1st October 1937, the debtor or the creditor may apply to the Court, having jurisdiction for a declaration of the amount due by the debtor on the date of the application;
>
> Provided that no such application shall be presented or be maintainable if a suit for the recovery of the debt is pending."

It is clear from the provisions of this section that the relief to a creditor or a debtor as the case may be is confined only to the provisions of the Madras Agriculturists Relief Act, for the basis of that application is that the debtor should be an agriculturists on the crucial dates mentioned therein. If a relief is claimed under that section, it appears to me, that the applicant cannot club either the reliefs he may otherwise be entitled to under the General law or under the provisions of any other Act. I, therefore, hold that the lower appellate Court was wrong in invoking its powers under the Usurious Loans Act to give relief to the respondents under the Madras Agriculturists Relief Act. I also agree with the learned counsel in regard to his contention on the second point. Indeed the self-same question was raised before Horwill and Raghava Rao, JJ., in O. S. A. No. 17 of 1948. It was argued before the learned Judges that by reason of explanation 1 added to Section 8 of the Madras Agriculturists' Relief Act amounts paid by a debtor towards principal should be credited towards the sums originally advanced by the creditor. The learned Judges say:

> "Unappropriated payments have clearly to be set off against the original principal and the advances made from time to time; but when a party makes a payment towards principal and the payment is endorsed on a promissory note, it is clear that the parties intended the payment to be towards the principal of the promissory note and not towards the hypothetical principal calculated as above. We are not satisfied that the Act required us to disregard the express intention of the parties."

When it was argued that the aforesaid explanation had the effect of overruling settlements between the parties and compelling the Court to set aside any appropriations that might have been made even with the consent of the debtor and to set them off against the original sums advanced, the learned Judges pointed out,

> "All that this explanation would seem to do is to re-enunciate what was laid down in all the earlier cases under the Act that open payments not expressed as being in discharge of principal or interest should be credited against the sums originally advanced."

That decision directly applies to the facts of the case. The learned Counsel for the respondents made an attempt to persuade me to differ from or at any rate refer the case to another Bench. But sitting alone I am bound by that judgment.

(3) In the result, the judgment of the lower appellate Court is set aside, and that of the District Munsiff is restored. The appellant will have his costs here and the Courts below. Leave refused.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 45 (C. N. 20)

CHANDRA REDDI, J.

C. Abboy Reddiar, Petitioner v. Collector of Chingleput at Saidapet and others, Respondents.

Civil Revision Petition No. 821 of 1949, D/- 20-7-1951.

Civil P. C. (1908), Section 115 — Decision given by arbitrator appointed under Defence of India Act (1939), S. 19 — Competency of revision to High Court.

No revision can be entertained by the High Court against an order of the arbitrator appointed under S. 19 (2), Defence of India Act, as the arbitrator is appointed to act merely as a 'persona designata' and therefore not as a Court subordinate to the High Court within the meaning of S. 115, Civil P.C.

The conferring of the right of appeal to the High Court on an aggrieved party against the award of a tribunal does not convert the tribunal into a Court. (1931) A C 275; AIR (14) 1927 Mad 93 F B; AIR (11) 1924 Mad 442 FB, Rel. on. AIR (28) 1941 Pat 65 FB; AIR (11) 1924 Mad 561 FB, Disting. (*Paras 5, 6*)

Anno: C. P. C., S. 115, N. 29, Pt. 9.

V. Seshadri and K. S. Ramamurthy, for Petitioner; Srinivasan for Govt. Pleader and M. C. Rajagopalan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('45) AIR (32) 1945 Bom 348: (ILR (1946) Bom 707) (Pr 10)

('24) 47 Mad 357: (AIR (11) 1924 Mad 442 FB) (Pr 8)

('24) 47 Mad 369: (AIR (11) 1924 Mad 561 FB) (Pr 9)

('27) 50 Mad 121: (AIR (14) 1927 Mad 93 FB) (Pr 8)

('47) 1947-1 Mad L Jour 207: (AIR (34) 1947 Mad 400) (Pr 10)

('48) 1948-1 Mad L Jour 314: (AIR (35) 1948 Mad 439) (Pr 10)

('49) 1949-1 Mad L Jour 419: (AIR (36) 1949 Mad 787) (Pr 10)

('41) 20 Pat 373: (AIR (28) 1941 Pat 65 FB) (Pr 7)

(1931) A C 275: (100 L J P C 55) (Pr 6)

JUDGMENT.: A preliminary point is raised by the learned counsel for the respondent that no revision can be entertained by this Court against the order of the arbitrator appointed under Section 19 (2), Defence of India Act, on the ground that the arbitrator is appointed to act merely as a 'persona designata', and therefore not as a Court subordinate to the High Court within the meaning of S. 115, Civil P.C. In reply to this it is argued by the learned counsel for the petitioner that the arbitrator in this case is chosen to act not in his private capacity but in his capacity as a District Judge and therefore a Court coming within the purview of S. 115, C.P.C.

(2) In order to understand this preliminary objection it is necessary to set out a few material facts. Certain lands in the village of Palavanthangal, Chingleput district, belonging to the petitioner were acquired by the Government under the provisions of the Defence of India Act and the Requisitioned Land (Continuance of Powers) Act, 1947. As the claimants were not agreeable to accept the amount of compensation offered by the Collector Sri P. N. Ramaswami, I.C.S., who happened to be the District Judge, Chingleput, then was appointed arbitrator in G. O. No. 223 (Revenue Department), dated 28-1-1949 in pursuance of the provisions of S. 19, Defence of India Act. A preliminary objection was raised on behalf of the petitioners before the arbitrator that the constitution of the arbitration was incompetent there being no valid acquisition within the meaning of S. 5, Requisitioned Land (Continuance of Powers) Act, 1947, and as such he could not proceed with the enquiry as regards the amount of compensation to be paid to the claimants. The learned arbitrator overruled the objection observing that "on the limited records filed" he was "unable to hold that there was no acquisition or that the constitution of the arbitration was incompetent" and that even assuming that there was no such valid acquisition the matter had to be agitated in the appropriate forum by appropriate proceedings. Against this order the present revision petition is filed.

(3) The question for consideration is whether the arbitrator appointed under the provisions of the Defence of India Act is selected to act as a 'persona designata', that is to say, in his private capacity or to act as a Court. I will have to examine this question with reference to the relevant provisions of the Defence of India Act and the rules made thereunder and in the light of the decided cases.

(4) S. 19 (1) of the Defence of India Act enacts that:

"Where under S. 19-A or under any rule made under this Act, any action is taken of the nature described in Sub-section (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out, that is to say:

(a) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement;

(b) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under Subsection (3) of S. 220 of the above-mentioned Act for appointment as a Judge of a High Court.....

(e) The arbitrator in making his award shall have regard to (i) the provisions of Subsection (1) of S. 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and (ii) whether the acquisition is of a permanent or temporary character;

(f) An appeal shall lie to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government;

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

There is also a provision in S. 19 enabling the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. The Central Government seems to have delegated its rule making powers to the various Provincial Government. By virtue of this delegation the Government of Madras made rules. The rules relevant for the purpose of this enquiry are Rules 10 and 11 of the Defence of India (Payment of Compensation and Arbitration), Rules 1943, and are set out hereunder:

"10 (1) The arbitrator shall, not later than three weeks from the date of receipt of the records from the Provincial Government fix a day or days for hearing the claims and shall give notice thereof to the person or persons interested and to the Collector, at least five clear days before such hearing.

(2) On the day or days so fixed the arbitrator shall proceed to enquire into the case, shall take such evidence as may be adduced on behalf of the claimants and on behalf of the Provincial or Central Government as the case may be, and

shall make an award of the amount of compensation which in his opinion should be allowed for the property and of the apportionment of the said compensation among all persons known to be interested in the property.

(3) The arbitrator may adjourn his sitting if he finds it necessary to do so, but the case shall be disposed of as expeditiously as possible.

11. Every award under Rule 10 shall be in writing signed by the arbitrator and shall specify the grounds of the award."

(5) None of the provisions extracted above seems to indicate that a person appointed under Sub-section (b) of S. 19 acts as a Court. On the contrary all the provisions seem to point in the opposite direction. For instance, Sub-section (g) specifically provides that the arbitrator shall be solely guided by the provision of that section and the rules made thereunder and nothing in any law for the time being in force will be applicable to proceedings before him. This means the applicability of even the provisions of the Civil Procedure Code is excluded.

(6) The main basis of the contention of Mr. Ramamurthi, counsel for the petitioner, is the provision for an appeal against the award of the arbitrator contained in S. 19 of the Act. But I am not able to agree with the contention of Mr. Ramamurthi that the conferring of the right of appeal to the High Court on an aggrieved party against the award of a tribunal would convert the tribunal into a Court. For one thing this right seems to be a restricted one. Secondly, it looks to me that this provision by itself would not indicate that the arbitrator was meant to act as a Court. An answer to the argument of Mr. Ramamurthi is contained in a ruling of the Privy Council in 'Shell Co. of Australia v. Federal Commissioners of Taxation', 1931 AC 275. The observations of their Lordships 'at pages 296 and 297' are pertinent:

"The authorities are clear to show that there are tribunals with many of the trappings of the Court, which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court."

In that connection, it may be useful to enumerate some negative propositions on this subject: (1) A tribunal is not necessarily a Court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a Court. (6) Nor because it is a body to which a matter is referred by another body."

It is manifest from this decision that a tribunal would not be construed to be a Court merely because a right of appeal is provided against its award.

(7) Reliance was placed by Mr. Ramamurthi on a Full Bench decision of the Patna High Court in 'Mt. Durgi v. Goalin', 20 Pat 373, in aid of his argument. In that case it is laid down that a Commissioner appointed under the Workmen's Compensation Act, 1923, is a Court. There certain tests are laid down for deciding whether a tribunal is or is not a Court and one of the several tests propounded is the right of appeal to a Court against the decision of the tribunal. It is observed by Fazl Ali, J., who delivered the judgment on behalf of the Full Bench:

"Again the fact that an appeal has been provided to the High Court from certain orders of the Commissioner confirm the view that in passing those orders the Commissioner is acting as a Court and not in any other capacity."

There the learned Judge came to the conclusion that the Commissioner under the Workmen's Compensation Act was a Court on a construction of the relevant provisions of the Workmen's Compensation Act supplemented by certain rules to be read as part of that Act. I must say that that decision is not of much assistance in deciding the question before me because neither the provisions of S. 19 of the Defence of India Act nor the rules framed under the section contained any provision similar to those to be construed in the Patna case. The learned Judges do not seem to have laid down anywhere in that ruling that the provisions regarding the right of appeal is the sole and or main criterion. It is only one of the several considerations. I should, therefore, think that the argument based on the right of appeal granted to a party against the award of the arbitrator cannot be accepted.

(8) I may now refer to some of the decided cases which are of great assistance in the determination of this question. In 'Lakshmanan Chettiar v. Kannappar', 50 Mad 121' it was held by a Full Bench of our Court that the Chief Judge of the Presidency Small Causes Court at Madras, in deciding a revision petition preferred to him under Rule 4 of the rules framed by the Governor in Council under the Madras City Municipal Act, does not function as a Court for purposes of S. 115, Civil P. C., but acts only as a persona designata.' At page 127 it is stated,

"Looking at the Municipal Act, it is clear that the draftsman of that Act was quite alive to the distinction between the Court of Small Causes (vide S. 59) and the Chief Judge of that Court (vide S. 54.). It is difficult to resist the inference that when the Chief Judge is referred to in the Act he was meant to act as a 'persona designata' and not as representing the Court."

Another decision cited to me by Mr. Srinivasan, appearing on behalf of the Government Pleader, is that of the Full Bench in 'Abdul Sattar v. Special Deputy Collector, Vizagapatam', 47 Mad 357, where it is laid down that the order of the Collector refusing to make a reference under S. 18 of the Land Acquisition Act cannot be called in revision in the High Court as he was not acting as a Court or as a Court subordinate to the High Court within the meaning of S. 115, Civil P.C., though he was acting judicially.

(9) In support of his contention that the arbitrator was a Court, Mr. Ramamurthi placed reliance on the ruling in 'Parthasarathi Naidu v. Koteswararao', 47 Mad 369. What was decided there was that a District or Subordinate Judge in deciding an election petition presented under the rules issued by the Local Government under the Local Boards Act was acting not merely as a 'persona designata' but as a Court exercising original civil jurisdiction. This decision does not really help the petitioner. The Full Bench construed the expression "judge" in the revelant provisions of law as a Court in the light of Rule 12 (2) of the rules for election which refers to an election or other competent Court, and, of Rule 4 (3) of the rules for the conduct of enquiries, which gives power to the District or Subordinate Judge in certain cases to direct any Court subordinate to him to hold the enquiry. This case cannot furnish any analogy to the present case. I have to decide the case before me with reference to the relevant provisions of law bearing on the subject. In such cases what we have to see is whether the tribunal has been invested with the powers of the Court or otherwise. Applying this test, the only reasonable inference that can be drawn is that it is only as a 'persona designata' that the arbitrator under S. 19 is appointed.

(10) In this context I may refer to three decisions of this Court placed before me by Mr. Srinivasan. In 'Abdul Wahib Sahib v. Abdul Khader Sahib', 1947-1 Mad L J 207, Yahya Ali, J., laid down that the District and Subordinate Judge appointed under S. 12 of the Madras Buildings (Lease and Rent Control) Act (XV of 1946) to hear appeals against the orders of the Rent Controllers Act as 'persona designata' and not as Courts. This was followed by Clark, J., in 'Chinnaiah Thevar v. Badsha 1948-1 Mad L J 314. To the same effect is the decision of Mack, J., in 'Rajam Iyer v. Pavanambal', 1949-1 Mad L J 419. Lastly, I may refer to the decision of the Bombay High Court in 'Hirji Virji v. Government of Bombay', AIR (32) 1945 Bom 348, which decided that the arbitrator under S. 19 of the Defence of India Act is not a Court and hence an award made by him is not on order within the meaning of S. 8 of the Court-Fees Act.

(11) It is not necessary for me to refer to other decisions cited by the learned counsel for the petitioner as they do not have much relevancy to the question before me. In the light of these authorities and on a construction of the relevant provisions of the law it is difficult to resist the conclusion that the arbitrator is appointed as a 'persona designata' and not as a Court against whose decision a petition in revision lies to the High Court, under S. 115, Civil Procedure Code. It follows that a revision petition against the order of the arbitrator is not competent. In this view of the matter, it is unnecessary for me to go into the merits of the case, i.e., the question whether the arbitrator could entertain an objection as regards the validity of the reference. In these circumstances the civil revision petition is dismissed with costs.

C.R.K./V.S.B. *Revision dismissed.*

A. I. R. (39) 1952 MADRAS 47 (C. N. 21)

SATYANARAYANA RAO AND VISWANATHA SASTRI, JJ.

The Fringford Estates Limited, Calicut, Applicant v. The Commissioner of Income-tax, Madras, Respondent.

Case Referred No. 2 of 1948, D/- 13-3-1951.

Income-tax Act (1922), Section 4 (1), (3) (vii) — Company formed for purchase of estates and for clearing and raising plantation — Purchase of jungle land capable of being made fit for plantation — Income derived from sale of timber of jungle — Whether income or capital or casual or non-recurring receipt.

Profits derived from capital which is consumed or exhausted in the process of realisation are nonethe-less taxable income. (Para 4)

Income derived from the sale of forest trees is not capital receipt and is liable to tax even though there is an exhaustion of capital assets in the shape of valuable and long-standing trees. (Para 4)

Exhaustion of capital by the working of mines, quarries and forests, however it might be treated on strict actuarial principles or on strict principles of economics, may for purposes of the levy of income-tax be treated as profits. (Paras 4, 5)

The assessee was a limited company. Its main business was to cultivate and sell tea, coffee, cardamom, etc., in its estates. It purchased a tract of land part of which had already been cultivated with tea, the rest of it being a jungle capable of being cleared and made fit for plantation. The accounts of the company showed an income received from sales of timber cut down from the jungle and sold. The clearing operations started in 1939 and the trees that were cut were stocked in the estate of the assessee. In 1941, the company entered into an agreement with a timber merchant, for clearing the rest of the jungle of all trees and for the sale of the timber in the market. The trees already cut by the company and stocked as well as those cut by the merchant were transported to a centre of the timber trade and, there sold in open market as timber.

The assessee company claimed that the net realization of the company from the sale of timber including the kuttikanam amount credited to it in the accounts was a capital receipt and therefore not liable to income-tax as profits or gains. Secondly, the company contended that the receipt was a casual and non-recurring receipt and, therefore exempt from income-tax.

'Held that' the profits realised from the sale of timber, including therein the kuttikanam fee credited to the estate in the accounts, were trade profits which were liable to income-tax. They are not exempt from taxation as casual profits. (Para 6)

The purchase of an estate consisting of forest land as well as arable land, the clearing of the forest land of trees and making the land fit for cultivation for tea, coffee, cardamon, rubber, etc., was part of the normal and ordinary line of business of the company. The jungle in the case was purchased by the company with a view to its exploitation. The land was cleared of the trees and the trees were cut and sized so as to be put on sale in the open market. They were sold in the timber market for advantageous prices. A receipt of money which was known, foreseen, anticipated and worked for in the course of carrying on a business was not a casual receipt. This was not a casual profit made on isolated buying or selling of an article not amounting to a trade or business. (Para 6)

When one is considering whether a certain form of enterprise is carrying on business or not it is material to look and see whether it is a company that is doing it. Where a company or a partnership is formed for the purchase of large estates and for clearing and developing the area and raising a plantation, there is a trade or business because you have that from which you would infer continuity. The company is formed for that purpose and for nothing else. In this case the exploitation of the trees in the estate was made by the company in partnership with a timber merchant and the operations of cutting and sizing the timber, transporting it for sale and selling it in the timber market were carried on in the same way as those which were characteristic of ordinary trade in the line of business of a timber merchant. (Para 6)

Anno: I. T. Act S. 4, N. 10, 27.

T. L. Venkatarama Aiyar, for Applicant; C. S. Rama Rao Sahib, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('43) 22 Pat 713: (AIR (30) 1943 P C 153) (Prs 4, 5)
(1946) A C 62: (AIR (33) 1946 P C 25) (Prs 5, 5a)
('31) 54 Mad 21: (AIR (17) 1930 Mad 764 FB) (Pr 4)
('46) 1946-14 ITR 673: (AIR (34) 1947 Pat 115) (Pr 4)
(1881) 6 A C 315: (51 L J Q B 626) (Pr 4)
(1906) A C 18: (75 L J K B 44) (Pr 4)
(1913) A C 771: (83 L J P C 6) (Pr 4)
(1935) A C 431: (104 L J K B 345) (Pr 5)

VISWANATHA SASTRI, J.: The question that has been referred to us is whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 11242 derived by the assessee company on sale of timber was assessable income.

(2) The facts that have led up to this reference are these. The assessee is a limited company. Its

main business is to cultivate and sell tea, coffee, cardamom etc. in its estates. It purchased a tract of land part of which had already been cultivated with tea, the rest of it being a jungle capable of being cleared and made fit for plantation. The company cleared the jungle of trees in order to make the land fit for cultivation and sold the trees in order to make the land fit for cultivation and sold the trees in the open market. The accounts of the company showed an income of Rs. 11242 received from sales of timber cut down from the jungle and sold. The clearing operations started in 1939 and the trees that were cut were stocked in the estate of the assessee. In October 1941 the company entered into an agreement with one Mammu Hajee, a timber merchant, for clearing the rest of the jungle of all trees and for the sale of the timber in the market.

(3) The trees already cut by the company and stocked as well as those cut by Mammu Hajee, were transported to Kallai, which is a centre of the timber trade in Malabar, and, there sold in open market as timber. A profit and loss account in respect of the timber deal was prepared which showed a receipt of Rs. 7473-9-0 as Kattukanam by the assessee company. The expenses of cutting the trees incurred by Mamu Hajee came to Rs. 8866-0-7 and the transport charges came to Rs. 10,956-11-0. There were other expenses incurred in connection with the transport and sale of the timber. The price realised by the sale of timber was Rs. 39,215-0-1 and the resultant net profit of Rs. 8,817 less a deduction for a reserve fund and for bonus to employees, was divided equally between the assessee Company and Mammu Hajee, each getting Rs. 3,877-11-10. The total net realisation of the company from the sale of timber including the Kuttikanam amount credited to it in the accounts was Rs. 11242. It was not and it could not be contended that the income derived from the sale of jungle trees of spontaneous growth was agricultural income. The assessee company claimed that this sum was a capital receipt and therefore not liable to income-tax as profits or gains. Secondly, the company contended that the receipt of Rs. 11242 was a casual and non-recurring receipt and therefore exempt from income-tax. These contentions were negatived by the revenue authorities as well as the Appellate Tribunal. Hence this reference.

(4) In our opinion, these contentions of the assessee company are untenable. Profits derived from capital which is consumed or exhausted in the process of realisation are none-the-less taxable income, and this proposition has been well settled since the decision of the House of Lords in 'Coltness Iron Co. v. Black', (1881) 6 A C 315. This principle has been applied to profits derived from the working of mines and minerals in 'Kamakshya Narain v. Commissioner of Income tax', 22 Pat 713, nitrate deposits in 'Allanza Co. Ltd. v. Bell', (1906) AC 18 and timber bearing forests in 'Kauri Timber Co., Ltd. v. Commissioner of Taxes', (1913) A C 771. In particular, it has been held both in this Court and in the Patna High Court that income derived from the sale of forest trees is not capital receipt and is liable to tax even though there is an exhaustion of capital assets in the shape of valuable and long-standing trees. 'Commr. of Income-tax, Madras v. Manavedan Tirumalpad', 54 Mad 21, 'Kamakshya Narain Singh v. Com. of Income tax', B & O, 1946-14 I T R 673.

(5) Mr. T. L. Venkatarama Aiyar, learned advocate for the assessee referred us to two decisions of the English Courts 'Van Den Berghs Ltd. v. Clark', (1935) A C 431, and 'British South Africa Co. v. Comr. of Income tax', (1946) A C 62. In the first of these two cases two competing companies manufacturing margarine entered into an arrangement to avoid competition between them, the arrangement extending over a considerable period of time. The companies agreed to share their profits and losses in accordance with a very complicated scheme. On account of differences between them the agreement was put an end to, one of the companies paying the other a sum of Rs. £ 450,000 by way of compensation. The House of Lords held that the receipt of £. 450,000 was one of a capital nature and not a revenue receipt. The agreement in that case, so far from being one made in the ordinary course of business, provided a fundamental organisation of the companies' activities and affected the entire conduct of the business of the companies. Therefore, money received for the cancellation of such an agreement which affected the whole structure of the profit-making apparatus was held to be a capital receipt. Lord Macmillan observed:

> "It is important to bear in mind at the outset that the trade of the appellants is to manufacture and deal in margarine, for the nature of the receipt may vary according to the nature of the trade in connection with which it arises. The price of the sale of a factory is ordinarily a capital receipt, but it may be an income receipt in the case of a person whose business it is to buy and sell factories."

Here the business of the company is not to sell the plantations which it acquires, but it is its avowed object and purpose to keep and develop them and sell the produce of the estates. Even though the existence of a large quantity of timber trees — in this case they have realised a sum of Rs. 39215 — might have determined the price paid by the company for the acquisition of the estate, still the profits made by cutting down the timber over a period of three years and making them marketable and selling them in the market are not a realisation of capital. We consider that the argument of the learned advocate is merely an attempt to get round the well-known principle repeatedly laid down in Income-tax cases both in England and here, that exhaustion of capital by the working of mines, quarries and forests, however it might be treated on strict actuarial principles or on strict principles of economics, may for purposes of the levy of income tax be treated as profits. It is sufficient to refer to the decision of the Judicial Committee in 'Kamakshya Narain v. Commr. of Income-tax', 22 Pat 713. Lord Wright in delivering the judgment of Judicial Committee observed:

> "If the receipts are income, it is not material for tax purposes that that for which they are paid comes from a wasting property. If the payment ceases because the source ceases so does the tax. Once it is established that the royalties are income within the meaning of the Act it is not material that the mines are in course of being exhausted unless there is provided in the Act that there should be a deduction from the income on that particular ground."

(5a) The further contention of Mr. Venkatarama Aiyar is that in computing profits arising from the sale of timber the cost of acquisition of the timber must be deducted. Though the company paid a lump sum for the purchase of the entire estate of 2000 acres, still according to him, the cost will have to be apportioned as between the land and the timber trees and the value of the latter should be deducted in arriving at the taxable profits. He claims that the Kuttikanam or stump fee of Rs. 7473 represents the cost of the trees and this should be deducted in arriving at the balance of the profits and gains of the company. In our opinion this is the old argument presented in another form, but it was sought to be supported by a reference to the decision of the Judicial Committee in 'British South Africa Co. v. Commr. of Income tax', (1946) A C 62. In that case a company acquired numerous concessions in respect of minerals and mining

rights in Rhodesia which the company turned to account by effecting sales of mining rights in various plots of land to various persons and companies. The Judicial Committee held that the company was assessable to income-tax under the local income-tax-law on its receipts from the sales of mining rights after deduction of the cost of acquiring such rights. The company did not itself embark on mining operations but merely sold the mining concessions and advantages which it had acquired, to various other persons and companies in return for a price. Therefore, in calculating the profits arising from the trade so carried on the cost price of the properties sold was held to be deductable. In our opinion, this decision has no application to a case like the present where the company is not engaged in the trade of buying and selling estates or plantations but its business is to turn to account the produce of the estate, both of the cultivated portions and of the jungle. The company retains the whole of the estate and sells the trees which are the produce of the jungle, and, tea, coffee and cardamom which are the produce of the plantations. Even though the trees are cut and sold they may grow up again on the stumps left intact and new trees may also spring up in the jungle and these trees can again be sold. This is what happens in Malabar forests. Even if all the timber is sold away beyond the possibility of any replenishment and the timber is considered as part of the original capital asset of the company as suggested by Mr. Venkatarama Aiyar, in our opinion, the true analogy is to be found in cases where the courts have held that where the income of a taxpayer is derived from the exhaustion of a capital asset, it is none-the-less income. In such cases no deduction can be claimed from the income in respect of the diminuation or exhaustion of the capital asset from which that income is derived. The very case cited by Mr. Venkatarama Aiyar recognises the difference between the case of a trader who buys mines and mining concessions and sells them for profit and a trader who retains a mine purchased by him and exploits it for minerals which he sells in the market. In the latter case there is no provision for allowance for amortisation in respect of the minerals which are exhausted by the working of the mines under the Indian Income-tax Act.

(6) The further contention of the assessee is that the profits derived from the sale of timber by the company are of a casual and non-recurring nature and therefore exempt from tax under S. 4(3) (vii) of the Act. But then, that very provision requires that the profits sought to be brought under the exemption must not have arisen from a business, the expression "business" being defined as including any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The receipt in the present case cannot be said to be a casual receipt in the sense in which that expression is used in the Income-tax Act. The expression "casual" is defined in the Oxford Dictionary in these terms:

"1. Subject to, depending on, or produced by chance; accidental, fortuitous.
2. Occurring or coming at uncertain times; not to be calculated on, uncertain, unsettled.
3. Subject to chance or accident."

The Articles of Association of the company, which we have seen, clearly show that the purchasing or taking on lease of estates, the clearing, opening, planting, development and improvement of such estates, the cultivation of tea, coffee, cardamom, pepper and trees, and the selling of the produce of the estates, were all included among the objects of the company. The purchase of an estate consisting of forest land as well as arable land, the clearing of the forest land of trees and making the land fit for cultivation for tea, coffee, cardamom, rubber etc., was part of the normal and ordinary line of business of the company. The jungle in the present case was purchased by the company with a view to its exploitation. The land was cleared of the trees and the trees were cut and sized so as to be put on sale in the open market. They were sold in the timber market for advantageous prices. A receipt of money which is known, foreseen, anticipated and worked for in the course. of carrying on a business is not a casual receipt. This is not a casual profit made on isolated buying or selling of an article not amounting to a trade or business. This is not the case of an individual selling a plantation after holding it for a considerable time at a price greater than what he paid for it. The assessee is a public company whose sole 'raison d'etre' is to have a business, to carry it on for profit and to divide the profit among the shareholders as dividends, 'prima facie', therefore any profit that the company makes otherwise than by sale of its plantations must be the taxable profit of its business. In the case of the assessee company the object of its existence, is, among other things, to turn the forest to .profit and thereby benefit its shareholders. The fact that the operation of cutting the trees and selling timber may not be carried out again, or may not be carried out for a considerable time hereafter does not make any difference. The company was formed to carry on this business of acquiring clearing and developing estates, clearing the land purchased, of trees and selling them as timber. Necessarily the profits arising from these operations must be profits of the business of the company and cannot be considered to be casual profits. When one is considering whether a certain form of enterprise is carrying on business or not it is material to look and see whether it is a company that is doing it. Where a company or a partnership is formed for the purchase of large estates and for clearing and developing the area and raising a plantation, there is a trade or business because you have that from which you would infer continuity. The company is formed for that purpose and for nothing else. In this case the exploitation of the trees in the estate was made by the company in partnership with a timber merchant and the operations of cutting and sizing the timber, transporting it for sale and selling it in the timber market in Kallai were carried on in the same way as those which are characteristic of ordinary trade in the line of business of a timber merchant. Consequently we hold that the profits realised from the sale of timber, including therein the Kuttikanam fee credited to the estate in the accounts, are trade profits which are liable to income-tax. They are not exempt from taxation as casual profits.

(7) We therefore answer the question referred to us in the affirmative and against the assessee. The assessee will pay the costs of the Commissioner of Income-tax on this reference which we fix at Rs. 250/-.

C.R.K./V.B.B. *Answer in the affirmative.*

A. I. R. (39) 1952 MADRAS 49 (C. N. 22)

RAJAMANNAR, C. J., AND VENKATARAMA AIYAR, J.

Peddadu Ramamurthi, Appellant v. Cherukuvada Venkatasubba Rao and others, Respondents.

Letters Patent Appeal No. 60 of 1950, D/- 23-8-1951, against order of Panchapagesa Sastri, J., in C M P No. 2017 of 1950, D/- 30-3-1950.

High Court Rules — Madras High Court (Appellate Side) Rules, R. 4 — Vacation Judge — Power of to admit Letters Patent Appeal.

A single Judge acting as a vacation judge under R. 4 of the Madras High Court Appellate Side Rules has power to admit a Letters Patent Appeal against

the judgment of another Judge though he cannot himself dispose of it as the law requires that it must be disposed of by at least two Judges.

(Para 3)

Y. G. Krishnamurthy, for Appellant, The Govt. Pleader and G. Venkatesan, for Respondents.

RAJAMANNAR, C. J.: This is an appeal under the Letters Patent Appeal against the judgment of Panchapagesa Sastri, J., dismissing an application under Order 44, Rule 1, Civil P. C., for permission to prefer an appeal 'in forma pauperis' against the judgment and decree of the Subordinate Judge of Narsapur in O. S. No. 9 of 1949. The learned Judge dismissed the application because he did not think that the judgment of the Court below was erroneous or unjust so as to justify the grant of leave to file an appeal 'in forma pauperis.'

(2) The Letters Patent Appeal came on for admission during the vacation before Panchapakesa Aiyar, J., on 30th May 1950. The learned Judge apparently felt a doubt whether a single Judge sitting as one of the Vacation Judges had power to admit a Letters Patent Appeal against the judgment of another Judge. He therefore directed notice to the Government Pleader and to the respondents presumably on this preliminary point.

(3) Rule 4 of the Appellate Side rules runs thus:

"Notwithstanding anything hereinbefore contained to the contrary the original and appellate jurisdiction vested in the High Court, may, during the vacation of .the Court, be exercised by a single Judge acting as the Vacation Judge, except in cases in which such jurisdiction must be exercised, under any law or regulation made by the Central Government by more than one Judge."

The learned Judge who was acting as a Vacation Judge had therefore vested in him the appellate jurisdiction vested in the High Court. He could therefore admit a Letters Patent Appeal. If the learned Judge was not inclined to admit the appeal, he could not by himself have disposed of the Letters Patent Appeal, because law requires that a Letters Patent Appeal must be disposed of by at least two Judges.

(4) As notice has gone to the respondents we heard the appeal on the merits. We see no reason to interfere with the order of Panchapagesa Sastri, J. The main issue in the case relates to the genuineness of a Will. The appellant's entire argument was based upon certain circumstances, which, according to him, throw a good deal of suspicion on the Will and which have not been considered by the Court below. These matters may legitimately be urged at the hearing of the appeal, but at this stage when we can only peruse the judgment and come to a conclusion, it is difficult to say that the judgment, as it stands, is erroneous and unjust 'prima facie.' The application to prefer the appeal is 'in forma pauperis' was therefore rightly dismissed.

(5) This Letters Patent Appeal is dismissed. Time for payment of Court-fee till one week after the reopening of the High Court after the Mid-term holidays.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 50 (C. N. 23)

SOMASUNDARAM, J.

In re Yalpanathan alias Govindaswami and others, Petitioners.

Criminal Revision Case No. 1393 and Criminal Revision Petition No. 1318 of 1950, D/- 11-7-1951.

Criminal P. C. (1898), Sections 362 (4), 537 — Failure to frame charge by Presidency Magistrate — Likelihood of failure of justice — Effect.

The accused 15 in number were charge-sheeted under Ss. 147 and 323, Penal Code. Four of them were convicted under Ss. 147 and 323 while the others were discharged. The Presidency Magistrate before whom the case was tried did not frame any charge in view of S. 362 (4).

'Held' that the failure to frame a proper charge in the case was likely to cause a failure of justice and therefore, the accused should be acquitted.

(Para 2)

(Desirability of Legislature amending S. 362, Criminal P. C., by doing away with the distinction in procedure between Magistrates in mofusil and those in the city, pointed out.) *(Para 3)*

J. S. Vedamanickam and C. V. Nilakantan, for Petitioner; The State Prosecutor, for the State.

JUDGMENT.: The petitioners in this case are accused 1 to 3 and 7. They along with 11 others were charge-sheeted by the police but the Magistrate discharged the other 11 accused and convicted the petitioners alone for offences under Sections 147 and 323, Indian Penal Code., and sentenced each of them to a fine of Rs. 25/- on each count.

(2) The main contention of the learned Advocate for the petitioners is that the lower Court having discharged 11 out of 15 persons charged before it, a charge for rioting against the remaining four is unsustainable, because for rioting there must be at least five persons. It is true that a charge for rioting cannot be framed against four persons only. But if the charge is that these petitioners along with others, committed rioting then it would be a proper charge. But on account of the special privilege conferred on the Presidency Magistrates in the City, they need not frame a charge in non-appealable cases., though it be a warrant case, a procedure which is different from that enjoined on the Magistrates in the mofussil. I have already pointed out in another case that it is unnecessary to mention (maintain?) this distinction in the procedure between the Magistrate in the mofussil and the Magistrate in the City. Apart from the needlessness of the distinction the procedure actually works hardship to the accused if he is tried in a case before the Presidency Magistrate in the City of Madras. As the obligation to frame a charge is dispensed with in the city by virtue of Clause 4 of S. 362, the accused does not know what exactly the charge against him is; as for instance in this case, the petitioners do not know whether the charge is that the petitioners and others constituting five and more committed rioting or whether the petitioners alone committed rioting. In the latter case they will have to be acquitted of rioting as four persons cannot in law commit rioting. In the former case if the evidence disclosed that more than four took part and the evidence is that these four along with others (who were not identified satisfactorily, took part) then the four can be convicted of rioting. Now, on account of the failure to frame a proper charge, which procedure is sanctioned by Clause (4) of S. 362, there is likelihood of failure of justice. What applies to the charge of rioting applies in this case for the offence under S. 323 as there is nothing to indicate as to who caused hurt to whom and whose hurt is the subject of the charge, so that the accused may meet it. If the petitioners are to be acquitted in this case, it is solely due to the failure to frame a proper charge which it is the obligation of a Magistrate in the mofussil to do but of which the Magistrate in the city is relieved.

(3) I recommend to the Legislature to do away with this distinction and make the procedure the same for the mofussil and city Magistrates.

(4) On account of the failure to frame proper charges, the petitioners have to be acquitted and they are acquitted. The fines, if paid, will be refunded.

C.R.K./K.S. *Accused acquitted.*

A. I. R. (39) 1952 MADRAS 51 (C. N. 24)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Koypathodi Moidin Kutty (died) and others, Appellants — A. K. Doraiswami Aiyar, Respondent.

A. A. O. No. 106 of 1949, D/- 10-8-1951.

(a) Civil P. C. (1908), S. 48 — Continuation of previous application — Petition closed for statistical purposes.

When an execution application is closed or struck off such an order does not terminate the proceedings. Where the order is "The decree-holder is reported dead. No sale taken place. Petition closed. No L. R. impleaded." the order closing the petition, must be construed as one of disposal for statistical purposes. The order is not a final order amounting to the dismissal of the execution petition and the execution must be deemed to be pending and the subsequent execution petition must be held to be one in continuation of the previous one. A I R (33) 1946 Mad 170. Foll. 35 All. 331; Ref. (Paras 1, 3)

Anno: C. P. C., S. 48 N. 7.

(b) Civil P. C. (1908) S. 146, O. 22 R. 10 — "Any person claiming under him" — Power of receiver to continue execution proceeding taken by decree-holder.

A receiver acting under the authority of the Court is a statutory representative of the real owner. He is entitled to commence proceedings in his own name so as to bind the true owner and he should be entitled to continue all proceedings initiated by him. If it is a suit the application will fall under O. 22 R. 10 and if it is an execution proceeding it will fall under S. 146. 'Case Law discussed.'

(Para 15)

Anno: C. P. C., S. 146 N. 8, O. 22 R. 10 N. 9.

N. R. Sesha Iyer, for Appellants — V. R. Narayana Iyer, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('13) 35 All 331: (40 Ind App 151 P C) (Pr 3)
('06) 30 Bom 250: (6 Bom L R 995) (Pr 10)
('37) A I R (24) 1937 Bom 244: (170 Ind Cas 172) (Pr 7)
('38) A I R (25) 1938 Bom 458: (178 Ind Cas 395) (Pr 14)
('01) 28 Cal 171 (Pr 11)
('07) 34 Cal 305: (5 Cal L J 270) (Pr 7)
('18) 41 Mad 510: (A I R (6) 1919 Mad 755 (2)) (Pr 13)
('21) 44 Mad 919: (AIR (8) 1921 Mad 599 F B) (Pr 14)
('41) 1941-2 Mad L J 631: (A I R (29) 1942 Mad 21) (Pr 13)
('46) I L R (1946) Mad 527: (A I R (33) 1946 Mad 170) (Pr 3)

VENKATARAMA AYYAR J.: This appeal arises out of proceedings in execution of the decree in O. S. No. 6 of 1936 on the file of the Court of the Subordinate Judge of Kozhikode. That was a suit instituted by one Appunni Nayar against the appellant for recovery of amounts due under three promissory notes and it was decreed on 30th March 1936. There were various proceedings in execution of that decree but we are concerned only with the last of them, E. P. No. 71 of 1943. In this execution application the immovable properties of the judgment-debtor were attached but before they could be brought to sale the decree-holder died on 20th May 1945. Thereafter on 6th June 1945 the following order was passed in E. P. No. 71 of 1943:

"The decree-holder is reported dead. No sale taken place. Petition closed. No L. R. impleaded".

Meantime a suit had been instituted for partition of the properties belonging to the tarwad of the decree-holder, O. S. No. 32 of 1941, on the file of the Sub Court, Kozhikode. In that suit a receiver was appointed on 27th March 1945 for the tarwad properties and it is common ground that the decree in O. S. No. 6 of 1936 is one of the properties covered by the receivership order. On 16th June 1948 the receiver filed E. P. No. 192 of 1948 out of which the present appeal has arisen and in that he prayed for attachment and sale of the immovable properties of the judgment-debtor. It may be mentioned that the properties sought to be sold under this execution application are the very properties which were attached in E. P. No. 71 of 1943.

(2) The judgment-debtor resisted the application on the ground that on the date on which it was filed more than 12 years had elapsed from the date of the decree and that it was consequently barred under S. 48, C. P. C. The Subordinate Judge overruled this objection. He held that no final order had been passed in E. P. No. 71 of 1943 and that, therefore, it must be deemed to be pending and that the present application was in substance one to continue those proceedings and that, therefore, it was not barred under S. 48, C. P. C. In this view he directed the execution to proceed. It is against this order that the present appeal has been brought by the judgment-debtor.

(3) Mr. N. R. Sesha Iyer, the learned advocate for the appellant has raised two contentions. Firstly he urged that the order in E. P. No. 71 of 1943 and dated 6th June 1945 is a final one and that it really amounts to one of dismissal and that, therefore, the present application dated 16th June 1948 could not be treated as its continuation. Now it is well settled that when an execution application is closed or struck off such an order does not terminate the proceedings. The decree-holder having died and the legal representatives not having come on record, the order closing the petition must be construed not as one of dismissal but as one of disposal for statistical purposes. In 'Damodara v. Official Receiver, Krishna', I L R (1946) Mad 527, an execution application was closed and it was held that the subsequent application for execution of the decree was one really to continue the previous petition and not a fresh application. The present case is directly governed by this decision. The order dated 6th June 1945 cannot be construed as one of dismissal for any default on the part of the decree-holder because he was dead. The following passages from the judgment of the Privy Council in 'Debi Baksh Singh v. Habis Shah', 35 All 331 are in point:

"It requires no words of their Lordships to show the inapplicability of the rules or orders dealing with cases of the non-appearance of a suitor to the situation which arises when a suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to the cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not seem to be very stateable."

The order dated 6th June 1945 refers expressly to the death of the decree-holder and closes the petition and does not dismiss it. We must accordingly hold that the order dated 6th June 1945 is not a final order amounting to the dismissal of the E. P. No. 71 of 1943 and that the petition must be deemed to be pending and the present E. P. No. 192 of 1948 has rightly been held by the lower Court to be one in continuation of E. P. No. 71 of 1943. We accordingly reject this contention of the appellant.

(4) The second and the more substantial contention of the appellant is that treated as an application for continuation of the prior execution the present application is not maintainable as under S. 146, C. P. C. a receiver is not a person

competent to maintain such an application. S. 146, C. P. Code runs as follows:

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or the application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

The argument on behalf of the appellant is that the words "any person claiming under him" are inappropriate to an application by the receiver who does not claim under any of the parties and that those words can taken in (sic) only heirs and other legal representatives. If this contention is correct it will follow that E. P. No. 192 of 1948 will be incompetent as one to continue E. P. No. 71 of 1943 and as a fresh application it will be barred under S. 48, C. P. C. As the question does not appear in this form to be covered by authority this has to be determined on a consideration of the principles applicable to the case.

(5) What is the legal status of a receiver appointed by Court and what are his powers? The object of appointing a receiver in an action is the preservation of the properties which are the subject-matter of the suit for the benefit of the parties who might be declared entitled to the same in the action. For this purpose the Court takes the properties into its own custody and assumes management thereof through its officer, the receiver. Under Order 40, R. 1(d) the Court can confer upon the receiver all such powers as to bringing and defending suits and for the realisation and management of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the like as the owner himself has. The result of appointing a receiver under O. XL, R. 1, C. P. C. is that the parties to the action are removed from the possession of the properties which pass into 'custodia legis' and that thereafter the only person who can realise the income and conduct proceedings in Court is the receiver:

"The appointment of a receiver operates as an injunction restraining the parties to the action from receiving any part of the property affected by the appointment" (Halsbury Laws, Volume 28, page 48, para. 87).

(6) The exact legal relationship in which the receiver stands to the persons entitled to the estate has been the subject of considerable judicial consideration. The appointment of a receiver has no effect whatever on the title of the real owner. The order appointing the receiver does not operate to divest them of their ownership and vest it in the receiver. The title continues in the owners even after the order of appointment of the receiver precisely as it did prior to such appointment. Nor is the receiver an agent of the parties to the action or the real owner. He does not derive his authority from them but from the Court. He is not liable to be removed by them, nor is he subject to their control.

(7) If a receiver has no title and if he is not an agent of the parties by what right is he entitled to maintain actions in court? It is now well settled that where a Court confers authority on the receiver under O. XL, R. 1, C. P. C. he becomes the representative of the true owners and as such representative he is entitled to conduct all proceedings which the owner can. The leading case on the subject is 'Jagat Tarani Debi v. Nabia Gopal', 34 Cal 305. There the question arose as to whether a receiver can file a suit in his own name. The question was elaborately considered by Mookerjee and Holmwood JJ. with reference to the principles and authorities applicable to the case. At page 316 they observe,

"Although the receiver has not title to the property, and although he. is as custodian to take charge and hold the property during or pending litigation, it does not necessarily follow, that if he is authorised to sue, he cannot sue in his own name though he is in one sense custodian of the property of the person, whom in some respects he is made to supplant. There seems to be no reason why his power should not be held to be coextensive with his functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter committed to him, to enable him to sue in respect thereof by virtue of his office, in his own name".

and again at page 317 their Lordships observe:

"On the whole, we are disposed to take the view that, although the receiver is not an assignee or beneficial owner of the property entrusted to his care, it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. A Receiver is appointed for the benefit of all concerned. Title of the property for the time being, and for purposes of the administration, may, in a sense, be said to be in the Court. The receiver is appointed for the benefit of all concerned and he is the 'representative of the Court, and of all the parties interested in the litigation', wherein he is appointed".

In 'Achut Sitaram v. Shivaji Rao', A I R (24) 1937 Bom 244 the following passage occurs at page 251:

"The objects for which a receiver is appointed are preservation and realisation of the subject-matter of the litigation pending determination of the rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the 'representative of the Court and parties interested in the litigation."

(8) In Alderson on "Receivers" the law is stated in these terms:

"There is no satisfactory reason why a receiver should not in every instance and under all conditions be permitted to sue in his own name as receiver. In his 'representative capacity' he is indeed the real party in interest and as he conducts and controls the suit it is more reasonable and consistent that it should be in his name. Any other doctrine borders on the eccentric and absurd." (S. 562 p. 766)

(9) We are, therefore, of opinion that the true position of the receiver in law is that though he is not the owner or agent of the owner he is nevertheless his representative and as such representative he is entitled to take all such proceedings in Court as are open to the owner and he can do so in his own name.

(10) The learned advocate for the appellant is willing to concede that the receiver has a right to institute proceedings as representative of the person entitled to the property but he contends that he has no power to continue proceedings started by the owner because it is procedural right which must be found within the four corners of the Code. Let us examine the position of the receiver in a pending action. Now what is to happen when a receiver applies to continue a suit instituted by a party or where a party applies to continue a suit instituted by the receiver after the latter has been discharged. The authorities establish that such applications fall under O. XXII, R. 10, C. P. C. Mr. Mullah observes that whenever a suit is brought by or against a person in a representative character it can be continued by the persons entitled, under this provision of law (vide Mulla's C. P. C. 14th Edn. page 946). The case in 'Macleod v. Kisen', 30 Bom 250 is directly in point. In that case a suit had been instituted by the receiver and while that was pending the rights of the owner, Bank of Bombay, had been declared and one Dwarakadoss an assignee of the bank and who was already on record wanted to continue the suit. That was resisted by the defendant on the ground that

no right of the receiver devolved upon the Bank of Bombay or Dwarakadoss and that he was not entitled to continue the suit. But it was held by Chandavarkar J. that as the receiver filed the suit as representing the owner the latter could come on record and continue the action and that S. 372, C.P.C., now O. XXII R. 10 was applicable. The learned Judge observed,

"The industry of Counsel on either side has not enabled them to find any decided case as direct authority on the point thus raised and I am left to decide it by the light of first principles."

The learned Judge then points out that the receiver is acting as the representative of the party who may ultimately be found to be entitled to the property; that a decree obtained by the receiver will enure for the benefit of that party, that any adjudication against the receiver as representing the estate will operate as 'res judicata' as against that party and that on principle, therefore when the receiver is discharged the party should have the right to step into the receiver's place.

(11) Then occurs the following passage at page 257:

"But asked Mr. Kirk Patrick, under what law could the party so ascertained step into the shoes of the receiver in this suit? There is answer to that. Under S. 372, C.P.C."

Reference is then made to 'Sourindramohun v. Siromoni Devi', 28 Cal 171 where the manager of a Chota Nagpur encumbered estate commenced an action but was discharged when the action was pending and the owners applied to come on record and continue the suit and it was held by the learned Judges that the language of S. 372, C.P.C. was wide enough to cover such an application.

(12) In both the above cases suits instituted by receiver or manager were sought to be continued by the owner and in the present case the receiver seeks to continue proceedings started by the owner but in principle that cannot make any difference. If owners can continue actions commenced by receivers under O. XXII, R. 10, C.P.C. it must follow that the receivers also must have the right to continue actions instituted by the owners under that provision of law and that indeed is in consonance with everyday practice.

(13) We can now consider the question as to whether a receiver has a right to continue execution proceedings under S. 146 of the Code. If the language of the section is to be strictly and narrowly interpreted the receiver may not be entitled to apply under that section because he is not a person claiming under the decree-holder. In 'Sitaramasami v. Lakshminarasimham', 41 Mad 510 Seshagiri Aiyar and Napier JJ. make the following observations:

"The expression 'claiming under' is wide enough to cover cases of devolution mentioned in O. XXII, R. 10, C. P. C. As the receiver has been held entitled to apply under O. XXII, R. 10 it will follow that he can apply under S. 146. Moreover, there is ample authority for the view that S. 146 should receive a liberal construction and that if a person is entitled to relief under the law he can apply under this section if there is no prohibition anywhere in the Code against such an application."

In 'Mahanandi Reddi v. Venkatappa', 1941-2 Mad L. J. 631 there was an assignment of the decree before it had been passed. The assignee applied to execute the same under O. XXI, R. 16 and S. 146, C. P. C. It was held that the applicant was not entitled to apply under O. XXI, R. 16 but it was observed that a liberal construction ought to be put upon S. 146 and that the rights of the assignee recognised (sic) under that section. At page 635 the learned Judges observe:

"According to the learned advocate for respondent (1) where the transferee of a decree desires to execute it definite provisions are laid down by R. 16 and he can do so only if his case conforms to those provisions. The learned advocate for the appellant interprets the phrase more liberally as permitting applications under S. 146, C.P.C. which do not conflict with the provisions of the Code. Of these two diverse views we prefer to choose the latter".

(14) Then the learned Judges follow the decision in 'Muthiah Chettiar v. Lodd Govindas Krishnadas', 44 Mad 919 where it was held that the assignment of a portion of a decree was valid under O. XXI, R. 16 C. P. C. and that even if it was not valid, the assignee was entitled to proceed under S. 146 there being nothing in the Code prohibiting it. As there is no prohibition in the Code against the receiver continuing any proceeding in execution he must be declared entitled to apply under S. 146, C. P. C. The learned advocate for the appellant strongly relies on the decision reported in 'Hemanta Narayana v. B. R. Jainapur', AIR (25) 1938 Bom 458. With respect, we are unable to follow the observations in that case. The learned Judges state that a receiver is not the legal representative or assignee of the decree-holder. That is so. But that does not conclude the matter. The right of the receiver to continue proceedings as representative in interest of the decree-holder is not considered. No reference is made to S. 146, C. P. C. and the view that the receivers might continue execution proceedings in the name of the decree-holder reduces them to the position of agents of the decree-holder having no effective control over them. We are unable to agree that the receivers cannot in their own name continue execution proceedings.

(15) To sum up we are of opinion that a receiver acting under the authority of the Court is a statutory representative of the real owner. He is entitled to commence proceedings in his own name so as to bind the true owner and he should be entitled to continue all proceedings initiated by him. If it is a suit the application will fall under O. XXII R. 10 and if it is an execution proceeding it will fall under S. 146, C. P. C. We accordingly hold that the present execution application by the receiver can validly be treated as one to continue E. P. No. 71 of 1943 filed by the decree-holder and that it is, therefore, not barred by S. 48 C. P. C.

(16) In the result the appeal fails and is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 53 (C. N. 25)

PANCHAPAGESA SASTRI, J.

In re Oruganti Appa Rao, Appellant.

Appeal No. 315 of 1950, D/- 29-3-1951.

Court-fees Act (1870), Section 17 — Suit for redemption of different mortgages.

A suit for redemption of four usufructuary mortgages executed by the same set of mortgagors in favour of the same mortgagee on the same day in respect of the same property does not involve four distinct subjects but only one subject within the meaning of S. 17, Court-fees Act where the transaction is intended and is really a single transaction. 41 Mad L W 327, Dist. (Para 2)

Anno: Court-fees Act, S. 17, N. 9.

Y. Suryanarayana and Y. Suryanarayana, for Appellant.

Case referred to:

('35) 41 Mad L W 327 (Pr 2)

ORDER.: This matter has been posted before me for orders with reference to additional Court-fee now claimed by the office. The suit was for re-

demption of four usufructuary mortgages. The mortgages were all executed on the same day, by the same set of mortgagors, in favour of the same mortgagee. They purport to be anomalous (usufructuary) mortgages of the year 1886 for Rs. 8,500, Rs. 2,000, Rs. 2,500 and Rs. 1,500. In the lower Court the Court-fee was made up of the aggregate Court-fee as on four distinct subjects. In the High Court, however, the learned counsel for the appellant totalled up all the amounts due under the four mortgages and paid 'ad valorem' Court-fee on that basis of the total figure. The office had no objection to it in the first instance and the appeal was registered and numbered as A. S. No. 315 of 1950. Sometime later, the office put up a note that the four mortgages must be regarded as four distinct subjects within the meaning of S. 17 of the Court-fees Act, and even in the appeal the Court-fee ought to be paid on that basis. The matter has now been posted before me.

(2) The decision in 'Pollachi Town Bank, Limited v. A. S. Krishna Aiyar', 41 Mad L W 327, is relied on as the authority in favour of the enhanced Court-fee being payable. This is a case which related to a suit by a mortgagee for sale, for recovery of amounts due under the mortgages. The present is a case of redemption of mortgage and whether this makes a difference or not, it is not necessary to consider the case in the special circumstances of this case. I am satisfied that though there are four mortgages, the transaction was intended and was really a single transaction. They are all of the same date, the property mortgaged is the same property, the mortgagors are all common and the mortgagee also is the same bank. In these circumstances, this is an exceptional case where it ought to be held on the facts that there is only one subject and not distinct subjects within the meaning of S. 17 of the Court-fees Act.

(3) The Court-fee paid is sufficient and no further Court-fee is payable.

C.R.K./K.S. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 54 (C. N. 26)

SOMASUNDARAM, J.

In re P. P. Sivarama Pillai and another, Petitioners.

Criminal Revision Cases Nos. 787, 788 and 1327 of 1950 and Criminal Revision Petitions Nos. 725, 726 and 1255 of 1950, D/- 31-8-1951.

Sales Tax — Madras General Sales Tax Act (9 (IX) of 1939), Section 15 (b) — Sales Tax Rules, Rule 31 — Payment of Sales-tax by cheque — Cheque cashed by peon in office and amount misappropriated — Assessee not guilty under Section 15 (b).

Under Rule 31, framed under the General Sales-tax Act when any payment by cheque is permitted by the rules under the Act, the cheques shall be such as under the Madras Treasury Code are receivable by the Government Treasury concerned. According to the rule under the Treasury Code, a cheque received shall be treated as final payment only after it has been met and the amount has been actualy credited to Government. (Para 1)

The accused, assessee was asked by a notice to pay the sales-tax either in cash or by cheque. He sent an uncrossed cheque for the amount in favour of the Assistant Commercial Tax Officer. It was cashed by the peon of the officer and the amount was misappropriated by him with the result that the amount was not credited to the account. The accused was convicted under S. 15 (b), Madras General Sales-tax Act.

'Held' that the accused having sent a cheque in accordance with the notice sent to him and the cheque having been cashed, it amounted to a valid payment and therefore the accused could not be convicted under S. 15 (b), in the absence of any proof that he was a party to the fraud committed by the peon. (Para 1)

V. Sundaresan and K. V. Srinivasa Aiyar, for Petitioners; Asst. Public Prosecutor; for the State.

ORDER.: In this case the petitioner has been convicted under Section 15 (b), of the Madras General Sales-tax Act for not having paid the tax due, viz., a sum of Rs. 643-8-11. In the notice issued he has been asked to pay either in cash or by cheque. The petitioner sent a cheque dated 29th June 1948, drawn on the South India Bank, Mathurai. It was drawn in favour of the Assistant Commercial Tax Officer, Mathurai II. It appears to have been cashed by the peon on 21st July 1948 and the money appears to have been misappropriated. The sum was not therefore credited to the account. Since the accounts do not bear evidence of payment by the petitioner, the petitioner was prosecuted. It was found by both the Courts below that the cheque was sent as mentioned above and that it was cashed by the peon of the Assistant Commercial Tax Officer. There was no question of the cheque not being met without funds being provided for by the party concerned. The only thing that is established is that the amount has not been actually credited to the Government. It is, therefore, contended by the prosecution that the cheque cannot be treated as final payment in view of the specific provision in the Treasury Code. Under Rule 31 framed under the General Sales-tax Act when any payment by cheque is permitted by the rules under the Act, the cheques shall be such as under the Madras Treasury Code are receivable by the Government Treasury concerned. According to the rule under the Treasury Code, a cheque received shall be treated as final payment only after it has been met and the amount has been actually credited to Government. The cheque that was sent was not a crossed cheque and it therefore facilitated the cashing of it by the peon. The cheque bears the stamp of the office receiving it. The contention of the petitioner's advocate is that he having sent a cheque in accordance with the notice sent to him and the cheque having been sent (cashed?) it cannot be said that he has not paid the amount. So far as payment is concerned, in law, in my opinion, it amounts to payment. If in the office of the Assistant Commercial Tax Officer a fraud was committed by some of the subordinate officers or by the menials, the petitioner is certainly not responsible for that. In the absence of any proof that the petitioner was a party to the fraud which is not suggested by the prosecution and on the finding of the lower Court that the cheque was certainly honoured and cash has been paid, I hold that the petitioner paid the amount due and therefore he is not guilty of the offence under S. 15 (b) of the Sales Tax Act. The conviction and sentence are therefore set aside and the amount if it has been paid shall be refunded to the petitioner.

(2) Criminal Revision Case No. 788 of 1950: In this case the amount involved is Rs. 448-8-0/- and it has been paid by cheque dated 24-9-1948 which was cashed on 6-10-1948. For the reasons mentioned in my judgment in Criminal Revision Case No. 787 of 1950, the conviction and sentence of the petitioner are set aside and the amount if it has been paid shall be refunded to him.

(3) Criminal Revision Case No. 1327 of 1950: In this case the amount involved is Rs. 344 and it has been paid by the cheque dated 13-10-1948 which was cashed on 11-11-1948. For the reasons mentioned in my judgment in Crl. R. C. No. 787 of 1950 the conviction and sentence of the petitioner are set aside and the amount if it has been paid, shall be refunded to the petitioner.

C.R.K./K.S. *Conviction and sentence set aside.*

A. I. R. (39) 1952 MADRAS 55 (C. N. 27)

SATYANARAYANA RAO AND VISWANATHA SASTRI JJ.

Parry and Co. Ltd., Madras, Applicant v. The Commissioner of Income-tax Excess Profits Tax Madras, Respondent.

Case Referred No. 15 of 1948, D/- 30-3-1951.

Excess Profits Tax Act (1940), S. 2(5) Provisos Sch. 1 R. 4(4) — Assessee company erecting new building and letting out portions to others — Construction of buildings for letting them out for rent not within the objects of Company — Rental income whether part of profits of business for Excess Profits Tax Act.

The second proviso to S. 2(5) treats as one business all the business of an assessee and it is for that reason in sub-rule 4 of Sch. 1 the word "party" is used. If a business consists of several businesses it will be an apt description to treat one of such businesses 'as part' of the business as all the businesses are treated as one unit. The sub-rule, therefore, cannot be construed as if the requirement of proviso that it should wholly or mainly should be the holding of the property for the purpose of the business has not been adopted in the rule. The word "business" used in sub-rule 4 must be defined and understood in the sense in which it used in the definition read along with the proviso. (Para 6)

The assessee company had an old building in which it was carrying on its business. To meet its growing needs and with a view to expand its business, a new building was constructed. Out of the amount required for the construction of the new building a sum of five lakhs of rupees was raised by debentures. Even before the completion of the building, the directors by a resolution passed by them decided to let portions of the old and new buildings to different persons for an aggregate rent of about Rs. 3000 per mensem. After completing the construction of the building, the assessee company occupied only about a half of the building for its business and used one half of the old building as its godowns. One half of the new building and one half of the old was let out to various persons in pursuance of the resolution of the directors.

The assessee claimed that the rental income should be treated as part of its profits of business for the purpose of the Excess Profits Tax Act and that half the cost of both the buildings formed part of the capital employed in the business of the company.

It was not within the objects of the company and it was not part of its business to construct buildings for the purpose of letting them out for rent.

'Held', that the letting of the property by the assessee company did not constitute a business and that therefore the profits as well as the capital should not enter into the computation either of profits or of capital under the Excess Profits Tax Act. (Para 13)

Anno: Excess Pro. Tax Act, S. 2 (5) N. 1 Sch. 1 R. 4 N. 1.

M. Subbaraya Aiyar, for Applicant — C. S. Rama Rao Sahib, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) 50 Mad 529: (A I R (13) 1926 Mad 1032 FB) (Pr 9)

('40) I L R (1940) Mad 178: (A I R (27) 1940 Mad 366 S B) (Pr 9)

('45) I L R (1945) Mad 693: (A I R (32) 1945 Mad 223) (Pr 10)

('45) I L R (1945) Mad 170: (A I R (31) 1944 Mad 436) (Pr 10)

(1921) 1 A C 1: (89 L J P C 162) (Pr 12)

(1948) 2 All E R 1079 (Pr 11)

SATYANARAYANA RAO J.: The Income-tax Appellate Tribunal has referred to us the following question for decision:

"Whether in the circumstances of the case and under the provisions of the Excess Profits tax Act, a portion of the capital cost of the buildings proportionate to the portion of the business premises leased to others could be excluded from the computation of capital employed in the business of the company."

The chargeable accounting period with which we are now concerned in this reference is the period from 1-1-1944 to 31-12-1944. The relevant facts appear in the statement of the case and are not seriously in dispute. The assessee company had an old building known as "Parrys Old building" in which it was carrying on its business. To meet its growing needs and with a view perhaps to expand its business, the construction of a new building now known as 'Dare House" was commenced in 1938 and was completed in 1941 at a cost of Rs. 6,80,000. Out of the amount required for the construction of the new building a sum of five lakhs of rupees was raised by debentures. Even before the completion of the building, the directors by a resolution passed by them in 1940 decided to let portions of the old and new buildings to different persons for an aggregate rent of about Rs. 3000 per mensem. This resolution was not referred to in the statement of the case; but it was read before us by Mr. Rama Rao Sahib, learned counsel for the commissioner of Income-tax. and was not disputed on behalf of the assessee. After completing the construction of the building the assessee company occupied only about a half of the building for its business and used one half of the old building as its godowns. One half of the new building and one half of the old was let out to various persons in pursuance of the resolution of the directors of the year 1940.

(2) From 1941 till the date of the present dispute, the assessee paid income-tax on the rents realised from both the buildings on the basis of income from house property under S. 9 of the Income-tax Act and did not claim that the rents realised from the two buildings should be included in the computations of the profits of the business for the purpose of Excess Profits Tax Act and the assessee did not claim even that in the computation of capital employed for the purpose of Excess Profits Tax Act the costs of both the buildings should be taken into consideration and should not be excluded. During the present chargeable accounting period, however, it was claimed on behalf of the assessee that the rental income should be treated as part of its profits of business for the purpose of the Excess Profits Tax Act and that half the cost of both the buildings forms part of the capital employed in the business of the company. The object of the assessee in advancing this contention is to increase the amount of the standard profits and to decrease the taxable profits. If there is an increase of capital in the chargeable accounting period, the amount of profits to be added to standard profits in adjusting the standard profits would increase as the amount of profits as to be added has to be calculated at 8 per cent. on the increased capital (the previous capital plus the additional capital). The contention of the assessee, however, was not accepted by the department and also by the appellate tribunal.

(3) The real point therefore for consideration is whether the exclusion by the Excess Profits Tax Officer a portion i.e., 50 per cent of the cost of the buildings owned by the company in computing the capital is justified.

(4) It has been urged before us by Mr. Subbaraya Aiyar learned counsel for the assessee that the erec-

tion of the new building and letting it out should be considered as part of the business activities of the assessee company as the building was essential for the expansion of its business. In anticipation therefore of the future needs of the company and for the purpose of its business, it was urged the building was constructed. The entire building could not be occupied by the assessee company, it is stated for two reasons. One was the requisition by the military authorities of a portion of the building and the other was that owing to the conditions of war during the period the business of the assessee could not be expanded. It is not necessary to dispute the correctness of the reasons which prevailed with the assessee company in not occupyping the entire buildings for the purpose of their business. If the assessee is able to establish that really the erection of the building and the letting of the portion of the buildings not occupied by it, was part of the "business" of the assessee company within the meaning of the Excess Profits Tax Act he would succeed.

(5) The definition of business in the Excess Profits Tax Act is different from that contained in the Income-tax Act. S. 2 (5) of the Excess Profits Tax Act contains the definition of "business." The two provisos in the definition are relevant and they alone are set out below:

They are:

"Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments, or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society.

Provided further that all businesses to which this Act applies carried on by the same persons shall be treated as one business for the purposes of this Act."

The first proviso, it will be seen, applies only to a company or a society incorporated under an enactment and has no application to individuals. If the functions of a company consist wholly or mainly in the holding of property, the holding of property shall be deemed for the purpose of the definition to be a business carried on by such company and the income earned thereby would be its profits. It would, therefore, be seen from the first proviso that it expands the scope of the main definition by including in the definition of business of a company the functions of holding property and earning income or profits by the utilisation of such property. The second proviso treats as one unit several businesses of a company. For the purposes of the Act, therefore, all the businesses of a company should be treated as one single unit. This proviso will have a bearing in interpreting the Rule 4 (4) of Schedule I. It must be remembered in this connection that under S. 9 of the Income-tax Act, provision is made in respect of income from buildings or lands appurtenant. to the buildings other than such portion of the property which may be occupied by the assessee for the purpose of his business, profession or vocation; but for the proviso income from property would not to any extent form part of the profits of a business of a company for the purposes of Excess Profits Tax Act. The scope of the proviso is to allow the income from property to be taken into consideration in a case where the property is owned by a company as part of its business and which is utilised to earn profits.

(6) Schedule I, Rule 4, Sub-clause (4) provides that in the case of a 'business' which consists 'wholly' or 'partly' in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income tax under S. 9 of the Income-tax Act or under any other section of that Act. Here again it will be noticed that the business consists wholly or partly in letting out of property on hire and in such a case the income is treated as part of the profits of a business for the purposes of Excess Profits Tax Act. On a cursory reading the proviso to S. 2, Sub-clause (5) and Sub-clause (4) of Rule 4 of schedule 1 at first sight, it might appear that there is a conflict between the proviso and the Sub-rule, for in the proviso it is stated that the function of a company should consist 'wholly' or 'mainly' in the holding of the property whereas in Sub-clause 4 the business consists wholly or partly in the letting out of property. That the main purpose should be the holding of the property is not emphasised in Sub-rule 4 of Rule 4. As pointed out by Mr. Ramarao Sahib learned counsel for the Commissioner of Income-tax, there is a way, and I think a very reasonable way, of reconciling the two provisions, if the second proviso to Sub-clause (5) of S. 2 is kept in mind. The second proviso treats as one business all the businesses of an assessee and it is for that reason in Sub-rule 4, the word "partly" is used. If a business consists of several businesses it will be an apt description to treat one of such businesses 'as part' of the business as all the businesses are treated as one unit. The Sub-rule, therefore, cannot be construed as if the requirement of proviso that it should wholly or mainly should be the holding of the property for the purpose of the business has not been adopted in the rule. The word "business" used in Sub-rule 4 must be defined and understood in the sense in which it is used in the definition read along with the proviso. These are the relevant provisions upon the application of which to the facts of the present case the answer to the question referred to us depends.

(7) The main argument of Mr. Subbaraya Aiyar learned advocate for the assessee is that the memorandum of association of the company authorises the company to acquire real or personal property and to sell, dispose of or otherwise deal with the undertaking of the company or any part thereof upon such terms as the company may think fit and to sell, improve, manage, develop, exchange, lease, dispose of, turn to account, or otherwise deal with all or any part of the property and that therefore the construction of the buildings, and the letting of the buildings for rent is part of the business of the company and therefore the capital invested for the construction of the building and the income derived therefrom must be taken into consideration for the purpose of arriving at the capital and the profits under the Excess Profits Tax Act. It is rather difficult to accept this contention in view of the language of the memorandum of association. The right to purchase, take on lease or in exchange or on. hire or otherwise acquire any real or personal property is restricted by Clause (k) of the Memorandum of Association only 'for the purpose of its business" and therefore it cannot be said that the acquisition of the property constitutes a business of the company within the meaning of the memorandum of association. Acquisition of property for the purposes of the business is different from acquiring property as the business of a company. The power in Clause (e) to sell, dispose of or otherwise deal with etc. relates to the undertaking of the company as well as dealing with any part of the property and rights of the company; that is to say, it is open to the company to lease out as part of their business any of their undertaking or any portion of their business or any of the property which it is using for the purpose of and as part of its business such as machinery, plant, etc. The mere construction of a building for the purpose of their own occupation which was not intended to be let to others as its business is not

within the articles of the memorandum of association and is not within the objects for which the company was incorporated. The object of the company was to do other kinds of business and the acquisition of property to deal in it or earn profits by it is not within the objects. It is rather difficult to read into these clauses of the memorandum of association a power in favour of the assessee company to construct houses for the purpose of letting them out as part of its business. It is open to them to construct buildings for purpose of their own business and for their own occupation and as incidental to such business. It is not within the objects of the company and it is not part of its business to construct buildings for the purpose of letting them out for rent.

(8) In the course of the arguments, certain decisions were referred as throwing light on the question when exactly the letting of property such as houses can be treated as constituting business within the meaning of S. 10 of the Income-tax Act or within the meaning of the Excess Profits Tax Act.

(9) In the Commr. of Income-tax, Madras v. Gin and Rice Factory, Guntur', 50 Mad 529, a Special Bench consisting of Sir Murray Coutts-Trotter, C.J., Krishnan and Beasley, JJ., had to consider the question whether the leasing of a factory along with its machinery and plant for rent is a business within the meaning of S. 10 of the Income-tax Act and whether the assessee was entitled to claim certain deductions for loss due to depreciation. If it is treated as property and the income is assessed to tax as such, the assessee would not be entitled to the benefit of the deduction. If, on the other hand, it is "business" within the meaning of S. 10 of the Income-tax Act he would be entitled to the benefits of that section and the claim for deductions would be permissible. It was found in that case that it was within the powers of the company to lease the rice mill which they owned as part of their business. As pointed out by the learned Chief Justice at page 531, the lessors were carrying on the business of letting a rice mill and that therefore they were entitled to claim the deduction. The existence of a provision in the memorandum of association of that company authorising the directors to lease out the mill and their business for rent is referred to in the judgment of Krishnan, J., at page 532. It was in pursuance of that authority that the mill was leased to certain lessees for a fixed annual rent for a period of three years. The learned Judges therefore had no difficulty in coming to the conclusion that it was really part of the business of the company and within the objects for which it was formed to lease the rice mill as a working concern to a third party and that therefore the deduction claimed for depreciation under S. 10 (2) (vi) of the Income-tax Act could be allowed. The Commr. of Income-tax, Madras v. Bosotto Bros.', ILR (1940) Mad 178 (SB), is a case where a company which was running a hotel at Ootacamund and at Madras rented out the hotel at Ootacamund. There again the question whether the leasing of the hotel was a business of the assessee or the income earned from the property was the income of property became material for the purpose of the deductions which the assessee claimed under S. 10 (2) (vi) of the Act. The assessee in that case was undoubtedly carrying on a hotel business at Madras and when he later decided to extend his business to Ootacamund, he constructed a hotel there. Subsequently he found that the business at Ootacamund was not profitable and therefore the company decided to lease the premises along with its furniture and fittings to another firm. During the assessment year, 1937-38 the assessee company claimed that it was entitled to deduct from its income a sum for depreciation of the buildings and furniture at Ootacamund which was leased by the assessee company. Leach, C. J., at page 180 adverted to the fact that under Clause 3 (j) of the memorandum of association of the assessee company, the assessee was authorised to let for rent the undertaking, viz., the business of carrying on the hotel or any part of it and therefore the letting of the Ootacamund hotel was part of the business of the company. The principle of the decision in 'Commr. of Income-tax v. Rice and Gin Factory, Guntur', 50 Mad 529 already referred to was applied. It will be seen that that case was analogous to the case before the learned Judges except that in the one case the lease related to a rice mill and in the other to a hotel business. Of the other learned Judges, Mockett, J., agreed with the view of Leach, C.J., and Krishnaswami Aiyangar, J., differed. The principle of these two decisions is that if by its memorandum of association a company is empowered to erect buildings, in which plant and machinery was fixed or furniture and other articles useful for business were brought in and to let them for rent as part of its business, then the erection of the buildings and the letting them out for rent would constitute business within the meaning of S. 10 of the Income-tax Act. The decision of the question depends upon a proper interpretation of the object clause of the memorandum of association of the company. If it is "business" within the meaning of the Income-tax Act as the definition of business in the Excess Profits Tax Act is wider, it would 'a fortiori' follow that it would certainly be a business under the Excess Profits Tax Act. The principle of these decisions therefore is of assistance in deciding the question raised by the assessee in the present case. As has been observed already the memorandum of association of the assessee company excluded any possibility of treating the erection of the new and the letting out of the old and the new buildings as the business of the company.

(10) There is another case of this Court in 'Valliappa v. Commr. of Income-tax, Madras', ILR (1945) Mad 693, which was decided under the Excess Profits Tax Act. The assessee in that case derived income from house properties situate in a place outside British India which property he acquired in the course of his money lending business carried on outside India. He also derived income from certain rubber gardens belonging to him in foreign places. The contention urged on behalf of the assessee was that the income from house property was not profits of the business within the meaning of the Excess Profits Tax Act and that he would be liable only to pay property tax under S. 9 of the Income-tax Act and that the profits could not be taken into consideration for levying excess profits tax. It was held that as the assets were acquired during the course of the money-lending business, as its stock in trade the income from such property was undoubtedly profits of the business of the assessee, viz., the money lending business. The learned Chief Justice distinguished an earlier case decided by him in 'Annamalai Chettiar v. Commr. of Income-tax, Madras', ILR (1945) Mad 170 on the ground that in that case they were concerned only with the income from house property abroad, which could be assessed only under S. 9 of the Income-tax Act and not under S. 10 as profits of the business. It is difficult to accept the distinction thus sought to be made by the learned Chief Justice in the latter case. If as part of the money-lending business an asset like house property was acquired, there is no reason to treat income from it as assessable only as income of house property under S. 9 and not as income of the business, such assets form the stock in trade of the money lending business. The distinction seems to have been recognised in some cases that

if from the house property only income is realised it would be taxable for the purpose of income-tax under S. 9 of the Act; but if the asset so acquired is sold and profit was made such profit would be profit of business within the meaning of S. 10 of the Income-tax Act. The distinction made in 'Valliappa v. Commissioner of Income-tax, Madras', ILR (1945) Mad 693 at p. 696 between the decision of the learned Judges in 'Annamalai v. Commissioner of Income-tax, Madras', ILR (1945) Mad 170 and the case which they were called upon to decide may not be, if I may say so with respect, a logical distinction; but however it is unnecessary to deal with that question in this case and express any final opinion. The decision, however, does not help the assessee in the present case, as the assets in that case were acquired during the course of the money-lending business and the income therefore continued to be part of the business and the profits of such business could be assessed under the Excess Profits Tax Act.

(11) There is one decision of the Court of Appeal 'Reed and Co. Ltd. v. Inland Revenue Commrs', 1948-2-All E R 1079, which considered the question whether income obtained by a company whose business was that of manufacturing paper by letting some of the stock rooms temporarily was an income from "investment" within the meaning of the Excess Profits Tax Act or was a business income. The Commissioners were of opinion having regard to the temporary nature of the letting and the probability of the return of the rooms for the use of business in the future that it was not income from investments which had to be excluded from computation of profits under the Excess Profits Tax Act but was profits of the business which should be included in the computation of the profits. The decision, however, does not throw any light on the question now under consideration as ultimately the Court of Appeal decided that the Commissioners were entitled as a question of fact to come to the conclusion that it was not an investment having regard to the circumstances adverted to by them in their order and that the interference with that order by the Judge against whose decision the appeal was preferred was not justified. No doubt, there are certain observations in the judgment throwing light on the question as to what constitutes an investment but they are not material for the purpose of the present discussion. The decision affords no help in deciding the question that arises for decision in the present case.

(12) It is sometimes difficult to draw the line when a letting of property amounts to a trade and when it does not. It has been held by the House of Lords in 'Comen v. Governors of the Retunda Hospital, Dublin', (1921) 1 AC 1 at page 13, that when certain rooms were let by Governors of a hospital for entertainments, the fact that there was provision for sitting and heating in those rooms was treated as a crucial circumstance justifying the inference that it was a trade or a business and not a mere letting of the property. Of course, as it often happens in cases under the Income-tax Act, no hard and fast rule can be laid down and it is not possible to draw a line of distinction and formulate a certain test. Each case has therefore to be decided on its own facts.

(13) We have adverted to this case only to show that the refinements in the law have been carried to a very large extent and it is difficult always to decide the question when and under what circumstances letting of property may be treated as constituting business. The present case, however, in view of the provisions of the memorandum of association of the company does not present any difficulty and the view taken by the Tribunal that the letting of the property by the assessee company did not constitute a business and that therefore the profits as well as the capital should not enter into the computation either of profits or of capital under the Excess Profits Tax Act, seems to us to be correct. The question referred to us must be answered against the assessee.

(14) As the assessee has failed he must pay the costs of the Commissioner of Income-tax, which we fix at Rs. 250/-.

C.R.K./V.B.B. *Answer against the assessee.*

A. I. R. (39) 1952 MADRAS 58 (C. N. 28)

RAJAMANNAR, C. J., AND SOMASUNDARAM, J.

R. G. N. Price, Official Liquidator, Andhra Paper Mills Company, Limited., (in liquidation), Appellant v. The State of Madras.

O. S. Appeal No. 57 of 1950, D/- 17-4-1951.

(a) Companies Act (1913), Section 179 — Application for leave to sue under S. 179 (1) — Court if can decide case on merits.

It is true that Section 179 was intended to prevent frivolous and wasteful litigation by an Official Liquidator. At the same time, the Court, when approached by the Official Liquidator for sanction to institute a suit, cannot decide on the merits of the case. **(Para 1)**

Anno: Comp. Act, S. 179, N. 1.

(b) Companies Act (1913), Section 179 — Application by Official Liquidator for leave after preparing his case.

While leave of the Court under Section 179 is not a mere formality, there is nothing improper in the Official Liquidator, if he bona fide believed that there was a fair claim which he could put forward on behalf of the Company, making every preparation (like issuing suit notices and preparing a plaint) for the institution of the suit. There is no reason why the Official Liquidator should first apply and obtain the sanction of the Court and thereafter begin to prepare his case. **(Para 1)**

Section 179 does not contemplate a formal application which has to be decided after notice to the opposite party. An application under that section is strictly between the Official Liquidator and the Court. It is unreasonable that the party against whom a suit is proposed to be filed should be given an opportunity to oppose an application by the Official Liquidator to institute the suit. **(Para 2)**

Anno: Comp. Act, S. 179, N. 1.

K. Narasimha Ayyar, for Short Bewes and Co., for Appellant; The State Counsel, for the State.

RAJAMANNAR, C. J.: It is very unfortunate that the learned Judge should have embarked on considerations which, in our opinion, are not germane to the disposal of the application made by the Official Liquidator under Section 179 (1) of the Indian Companies Act for leave to file a suit. We agree with the learned Judge that the said provision in the Indian Companies Act was intended to prevent frivolous and wasteful litigation by an Official Liquidator. At the same time, it is obvious that the Court, when approached by the Official Liquidator for sanction to institute a suit cannot decide on the merits of the case. No doubt in one part of the judgment, the learned Judge definitely refrained from dealing with the strict legal merits of the claim, but later on he expressed a definite opinion that he should not allow the suit to be filed to recover a large sum of interest on the basis of Section 55 of the Transfer of Property Act in the absence of a specific agreement to pay interest. It looks as though the learned Judge was much influenced by what he apparently considered to be improper on the part of the Official Liquidator, namely, to have issued suit notices and prepared a plaint and thereafter filed an application for sanction to institute the suit. While we agree with him that leave of the Court under S. 179 is not a mere formality, we cannot see

anything improper in the Official Liquidator, if he bona fide believed that there was a fair claim which he could put forward on behalf of the company making every preparation for the institution of the suit. We do not see why the Official Liquidator should first apply and obtain the sanction of the Court and thereafter begin to prepare his case. We do not think that the Liquidator demurred in any way to what is undoubtedly proper, namely, that the final responsibility should rest on a liquidation Court in the matter of embarking on litigation on behalf of the company.

(2) We see no justification for issuing notice to the Province of Madras, the defendant in the proposed suit. In our opinion S. 179 does not contemplate a formal application which has to be decided after notice to the opposite party. An application under that section is strictly between the Official Liquidator and the Court. It appears to us to be unreasonable that the party against whom a suit is proposed to be filed should be given an opportunity to oppose an application by the Official Liquidator to institute the suit.

(3) We have no hesitation in holding that sanction should be accorded to the Official Liquidator to institute the proposed suit. We do not understand what the learned Judge meant when he said that he would not allow the suit to be filed solely on the basis of S. 55 of the Transfer of Property Act. That section, among other things, declares that in the absence of a contract to the contrary, the seller is entitled, where the ownership of the property has passed to the buyer, before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid and for interest on such amount or part from the date on which possession has been delivered. We are not now concerned with what defence the Province may have to the claim for interest. But the provision in S. 55 to which we have referred certainly shows that the claim put forward by the Official Liquidator cannot be frivolous or vexatious.

(4) We, therefore, allow the appeal and set aside the order of the learned Judge dismissing the appellant's application. We give sanction to the Official Liquidator to institute the proposed suit. There will be no order as to costs; but the Official Liquidator will get his costs of the appeals from the funds of the company.

C.R.K./V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 59 (C. N. 29)

BALAKRISHNA AYYAR, J.

Avalath Kunhikoya Thangal and another, Appellants. v. Dappoyil Ahmad Kutty and others, Respondents.

A. A. A. O. No. 30 of 1949, D/- 18-4-1951.

(*a*) *Civil P. C. (1908), Section 47 — 'Question relating to execution, discharge or satisfaction.' — Decree for redemption of Kanom — Judgment-debtor cutting and selling teak trees standing on property — Decree-holder's application to restrain waste by judgment-debtor — S. 47 does not apply.*

'A' a 'kanomdar', who continued in possession inspite of the passing of a decree for redemption of the Kanom, cut down certain teak trees standing on the property and sold them to 'B.' When the trees were in transit the decree-holder applied to the Court and the logs were seized by the officer of the Court. A claim preferred by 'B' under Order 21, Rule 58, was allowed but in appeal, the case was remanded for being disposed of under Section 47, Civil P. C.

'Held' that the action of the judgment-debtor in cutting and selling the trees might amount to acts of waste in regard to which the decree-holder has his recognised remedies but the attempt to defeat or restrain the acts of waste by the judgment-debtor could in no way be described as a matter relating to the execution, discharge or satisfaction of the decree. (*Para 2*)

Anno: Civil P. C., S. 47, N. 28; 71-A.

(*b*) *Transfer of Property Act (1882), Sections 52 and 3 — Section 52 only applies to immovable property — Standing timber is not immovable property as defined in S. 3 — Scope of S. 52 cannot be enlarged by introducing into it in an indirect manner the definition of 'immovable property' in the General Clauses Act.* (*Para 2*)

Anno: T. P. Act, S. 52, N. 15; S. 3, N. 2, 3

D. A. Krishna Wariar and Ravi Verma, for Appellants; B. Pocker, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('32) 54 All 437: (AIR (20) 1933 All 50) (Pr 3)
('26) AIR (13) 1926 Pat 125: (90 Ind Cas 769) (Pr 3)

JUDGMENT.: In O. S. No. 1193 of 1944 on the file of the Court of the District Munsiff, Calicut, there was a decree for the redemption of a 'kanom.' Subsequent to the decree the 'Kanamdar' who continued in possession, cut down certain teak trees standing on the property and sold them to Kunhikoya Thangal and Imbichikoya Thangal. When the trees were in transit, the decree-holder applied to the Court and the logs were seized by an officer of the Court. The two Thangals who had purchased the trees then preferred a claim petition under Order XXI, Rule 58, Civil P. C. Their claim was allowed by the District Munsiff. The decree-holder thereon filed an appeal in the Court of the Subordinate Judge, Calicut. A preliminary objection was taken before him that the appeal was not competent and that the decree-holder, if he felt aggrieved by the order of the learned District Munsiff, should file a separate suit. The learned Subordinate Judge overruled the objection, held that an apeal lay, set aside the order of the learned District Munsiff and remanded the petition for fresh disposal under Section 47, Civil Procedure Code. Against that order a civil revision petition and a civil miscellaneous second appeal have been filed.

(2) I am unable to agree with the view of the lower appellate Court. For one thing, I fail to see how this matter can be regarded as one arising under S. 47, Civil P. C., at all. That section deals only with proceedings relating to the execution, discharge or satisfaction of a decree. The action of the judgment-debtor in cutting and selling the trees might amount to acts of waste in regard to which the decree-holder has his recognised remedies. But how any attempt to defeat or restrain the acts of waste of the judgment-debtor can be described as a matter relating to the execution, discharge or satisfaction of the decree is what I find it hard to see. The learned Subordinate Judge seems to have considered that the case fell within the scope of S. 52 of the Transfer of Property Act and that therefore S. 47, Civil P. C., was attracted. Even supposing for the moment that the latter part of his reasoning is sound, I do not agree that S. 52, Transfer of Property Act can be applied to the present case. S. 52 deals only with immovable property and S. 3 is explicit that standing timber is not immovable property. The definition reads:

> "Immovable property does not include standing timber, growing crops or grass."

Mr. Pocker argued that for purposes of determining whether an appeal lies or not, we must have regard to the Civil Procedure Code and as the expression "immovable property" is not defined in the Civil

Procedure Code, we should look into the definition of the expression given in the General Clauses Act. That is no doubt so. But then it is an error to assume that the scope of S. 52 can be enlarged by introducing into it in this indirect manner the definition of the expression "immovable property" as it appears in the General Clauses Act.

(3) The learned Subordinate Judge basing himself on the decisions in 'Ashloke v. Bodha Ganderi', AIR (13) 1926 Pat 125 and 'Shiva Dayal v. Puttulal', 54 All 437 appears to have considered that in certain cases standing trees may be treated as immovable property, depending upon the intention of the owner thereof. Neither of those two decisions has however any application to the facts of the present case. In both those cases the trees in question were also fruit bearing trees and in respect of such trees intention may decide whether they are to be regarded as fruit-bearing trees or standing timber. But in the present case, we are concerned with teak trees and nobody has so far suggested that they should be described as fruit-bearing trees. I am of opinion that the decision of the lower appellate Court is erroneous and accordingly set it aside with costs throughout in the civil revision petition.

C.R.K./K.S. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 60 (C. N. 30)

RAJAMANNAR, C. J., AND PANCHAPAKESA AIYAR, J.

Mrs. A. Ananthalakshmi Ammal, Appellant v. Tiffin's Barytes, Asbestos and Paints Limited, Respondent.

O. S. Appeal No. 118 of 1950, D/- 11-1-1951.

Companies Act (1913), Sections 76, 79 (3) — General meeting of share-holders — Election of director — Whether formal subject — Appointing independent Chairman — Power of Court.

Though an election of directors is ordinarily a non-controversial subject in respect of a Company whose affairs are running smoothly, it cannot be called a formal subject where there are factions in the shareholders. It is an important item of business and the Court may appoint an independent Chairman to preside over the general meeting of the shareholders. Such an appointment cannot be objected to as an interference by the Court with the internal management of the company as Ss. 76 and 79 (3) expressly empower the Court to call a general meeting which also includes a power to appoint a person to preside over it. (*Para 3*)

G. Vasantha Pai, for Appellant; C. A. Vaidhyalingam and O. Radhakrishnan, for Respondent.

RAJAMANNAR, C. J.: This is an appeal against an order of Krishnaswami Nayudu, J., directing the directors of Tiffin's Barytes Asbestos & Paints Limited., to convene and hold the annual general meeting of the company on Sunday the 28th January 1951 after giving due notice to the shareholders as provided under the articles to consider certain subjects. This order was made on an application filed by the appellant who is a shareholder on the allegation that the last annual general meeting of the company had been held on 30th December 1948 and there had been no annual meeting for over 15 months. There is no appeal by the company or the directors against the order directing the holding of the meeting. But the share-holder who applied to the Court and who is the appellant before us seeks in this appeal the appointment of an independent person to preside over the meeting as Chairman. Such a request was made to the learned Judge, but he thought that no case had been made out for appointing an independent Chairman.

(2) It is true that, under Article 35, the Chairman of the Board of Directors shall be entitled to take the Chair. Under Article 64, the Directors may make regulations as to the election of the Chairman. It was conceded before us by learned counsel appearing for the company that no regulations had been made as contemplated by this Article. But he mentioned that at a meeting of the Directors on 12th August 1950 one Mr. Veeramani was elected Chairman. It is obvious that it cannot be said in this case that there is a validly elected Chairman of the Board of Directors whose right to that office is not challenged by any one. It is not necessary for us to decide whether he could lawfully function as Chairman. It is sufficient to say that there is room for dispute. There is also another objection into which we have not gone on the ground that at the time of the alleged election, there were only few directors functioning; that is to say, less than the minimum number required to make a 'quorum.' Be that as it may, it is obvious that it cannot be said that there is a permanent chairman chosen in the normal course of the business of the company.

(3) Under an order of this Court there was an extraordinary meeting of the general body on 23rd October 1950. It is represented to us that the report of the Advocate who was appointed to conduct the meeting is the subject-matter of certain objections by the respondent. We shall therefore refrain from saying anything as to the correctness or otherwise of any of his decisions. But it is clear that the person who is put forward by the company as the permanent Chairman rejected all the 73 proxies submitted by one Mr. E. R. Krishnan on the ground that they did not conform to the form under regulation No. 66 of the Act. There is besides this enough on the record to convince us that there are factions among the share-holders of the company. Though the learned Judge thought that at the meeting only formal subjects would come up for consideration, we think that the election of directors cannot be said to be such a formal or non-controversial subject as would ordinarily be the case in respect of a company whose affairs are running smoothly. As this is one of the important items of business to be transacted at that meeting, we consider it desirable that the meeting should be presided over by an independent chairman appointed by the Court. Mr. Radhakrishnan, learned counsel for the respondent, objected to .the appointment of a chairman by the Court on the ground that thereby the Court would be interfering with the internal management of the Company which it had no jurisdiction to do. But we find that Section 79 (3) itself contemplates the giving of directions by the Court as to the manner in which a meeting of the company can be called, held and conducted. Section 76 expressly confers on the Court the power to call or direct the calling of a general meeting of the company. If the Court can call for a meeting, we presume the Court can also appoint a person to conduct that meeting, who will be the chairman to preside over it.

(4) We, therefore, modify the order of the learned Judge and direct that the meeting may be conducted by the Advocate to be appointed by us in this order who will preside at the meeting as its chairman. He shall also scrutinise the proxies which had been duly deposited in time under Article 42 of the Articles of Association.

(5) There was a prior meeting of the general body of this very company in respect of which this Court appointed Mr. K. Sanjeevi Naidu as Chairman. We think that the same Advocate may be appointed to preside at the meeting to be held on the 28th instant. There will be no order as to costs.

C.R.K./D.R. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 61 (C. N. 31)

PANCHAPAKESA AYYAR J.

In re Bandi Butchaiah, Petitioner.

Criminal Revn. Case No. 653 and Cr. Revn. Petn. No. 647 of 1951, D/- 17-8-1951.

(a) *Criminal P. C. (1898), S. 144 — "Annoyance" — Meaning of.*

The word "annoyance" in S. 144 need not necessarily mean physical annoyance and may include mental annoyance also. A I R (18) 1931 Bom 135, Rel. on. (*Para 2*)

Anno : Cr. P. C., S. 144, N. 1.

(b) *Criminal P. C. (1898), S. 144 — Defamatory attacks on Government officials in newspaper — No likelihood of breach of peace etc. — Order under S. 144, not proper — Defamation.*

Orders under S. 144 are passed only in the general interests of society and not in the interests of particular officers etc. Section 144 can be used even against newspapers in proper cases of incitements to breaches of the peace or to commit nuisances, dangerous to life or health or to annoy officers lawfully employed. But mere "annoyance" caused to Government officials, when not actually employed in their task, by reckless or defamatory attacks on them not involving a breach of the peace or danger to life or health will not do for invoking the powers under S. 144. Where in a attempt to curb unjust attacks on officers, all attacks on officers and even comments on the public acts of all officers of all departments were prohibited in the order under S. 144 while pretending to leave the privileges of the newspaper editor and his newspaper intact. That is a clear abuse of the powers given under S. 144. Section 144 has the vital phrase "to abstain from a certain act", and if the order directed the editor to abstain from an untold number of acts of a very vague and uncertain nature, called "excessive publication" this vital clause is violated. A I R (29) 1942 Pat 414, A I R (29) 1942 Lah 171, 53 C W N 344, Rel. on. A I R (18) 1931 Bom 135, Dist. (*Paras 2, 3*)

Anno : Cr. P. C., S. 144, N. 1, 3, 5, 6.

V. Rajagopalachari and K. Suryanarayana, for Petitioner; The Advocate General and Public Prosecutor, for the State.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('31) 55 Bom 322 : (A I R (18) 1931 Bom 135 : 32 Cri L J 507) (Prs 2, 4)

('49) 53 Cal W N 344 (Pr 2)

('42) I L R (1942) Lah 510 : (A I R (29) 1942 Lah 171 : 43 Cri L J 747 F B) (Prs 2, 5)

('42) A I R (29) 1942 Pat 414 : (43 Cri L J 722) (Pr 2)

ORDER : This is an important case from the point of view of Newspapers' Editors' public criticism of Government officers and their conduct relating to their discharge of their duties, and the propriety of stopping such criticism in newspapers by issuing a multifarious and omnibus order under S. 144, Criminal P. C., and an 'ex parte' order too, when there is no likelihood of a disturbance of the public tranquillity, or of a riot or affray, or of obstruction, annoyance or injury to any person lawfully employed, or of danger to human life, health, or safety, as contemplated in S. 144 itself as a condition precedent for issuing an order under that section. The case has been argued ably, soberly and moderately by Mr. V. Rajagopalachari, the learned counsel for the petitioner, and by the learned Advocate General for the State. To understand the case, it will be necessary to quote the extracts from the annexure to the order under S. 144, Criminal P. C., passed by the Sub-Divisional Magistrate, Vijayawada, from the articles published by the petitioner, Bandi Butchiah, in his weekly paper called "Mulukolu" published at Vijayawada.

'Mulukola dated 22-2-1951' : The Anti-smuggling Sub-Inspector 'hushed up the misappropriation of 40 bags of rice in' Bezwada rice pool, is 'corrupt ever since his appointment' as Anti smuggling Sub-Inspector. He 'conspired with the Civil Supplies department' and the rice pool authorities and arrived at 'an agreement for future misappropriations'. He threatened the lorry driver who carried the 40 bags of rice not to speak the truth. He behaved in a high-handed manner by abusing one Pachipulusu Subba Rao after dashing a car in front of his shop.

'Mulukola dated 1-3-1951' : The anti smuggling Sub-Inspector, Narasayya, is carrying on unlawful and unauthorised acts. The Anti Smuggling Sub-Inspector is 'making illegal arrests' and behaving in a highhanded manner. The following are the instances :

(1) he has been checking the rice mills and premises of ryots unlawfully;
(2) His duties do not warrant detection of smuggling within the district of Krishna,
(3) He 'misappropriated the amount due to Nettaji Hotel', he has been associating with a rowdy gang. He approached the Deputy Collector, Narasayya Naidu to give a statement.

The Anti Smuggling Sub-Inspector drove a car without a licence, he sent reports direct to the D.S.O. against the discipline of the department. He interviewed the Deputy Collector without the permission of superiors. He arrested one Pacha Venkiah unlawfully.

'Mulukola dated 8-3-1951' : In the article under the caption "Violation of police discipline" reiterated the allegations of corruption, against the Anti Smuggling Sub-Inspector 'The Dy. S.P. was indifferent and gave evasive replies' to me when I reported against the transport of rice in the bus.

'Mulukola dated 15-3-1951' : Reiteration of the allegations against the Anti Smuggling Sub-Inspector. The Deputy Superintendent of Police went to the scene to enquire into the dashing of the car of Pachipulusu Subba Rao with the Anti Smuggling Sub-Inspector at Vijayawada, but the Deputy Superintendent of Police went there for inspection even though the offence was proved against the A.S.S.I.; this is questionable. The Dy. S. of Police went with the record of enquiry to the house of the Special Duty Dy. S. P. Palaniappan, for scrutiny. 'The Special Duty Police officers are ruling the Krishna police'.

'Mulukola dated 1-4-1951': The A.S.S.I. is transferred. The officers of the Police Department down below the D.S.P. tried their best to save this man even against the departmental discipline. 'The fate of this district at the hands of such police officers can be very well imagined'. Narasayya, smuggling Sub-Inspector, is 'a cruel and dishonest person'; In the interests of the public he should not be in the department. "In Kri-

shna district Pidikiti Ramakotayya and Krishna district police officers are working together for mutual benefit, as thieves divide villages for thefts".

Especially, Special Duty Dy. S. of Police Palaniappan, is a friend of Ramakotayya. It is learnt that 'both work for mutual benefit etc, etc. The A.S.S.I. has misappropriated about Rs. 450 due to Nethaji Hotel', and, as a result of the investigation into this he will be dismissed from service. E. X.X.P. Ramakotayya against whom a case was being investigated into by the police absconded from Vijayawada on 24-6-1951. C. J. Pinto, D.S.P. Krishna, was seen on the Vijayawada Railway platform talking with Pidikiti Ramakotayya. A gentleman told me (the editor) that he saw Ramakotayya coming from D.S.P.'s bungalow that afternoon. The D.S.P. through his subordinates, could have got Ramakotayya arrested. The Bezwada police 'will not investigate this case properly as they have already created many things in favour of Pidikiti' Ramakotayya etc. etc'. Further, when a constable charged an overloaded bus belonging to this Ramakotayya six times, the D.S.P. has let off unlicensed rickshaws. "Why should not the Dy. S.P. and the D.S.P. learn a sense of duty from this constable?"

"Mulukola dated 8-7-1951' : The public who want to expose Ramakotayya are hesitating to give evidence against him for two reasons. Unless the D.S.P. and Dy. S.P. are at least transferred from Bezwada and pardons to purchasers of iron and steel from P. Ramakotayya are given, free evidence will not come. We shall now ascertain the relationship between Ramakotayya and Bezwada police officers.

1. 'Anti communist front' : Bezwada police are blindly guided by Ramakotayya to decide who is a communist and who is not.
2. 'Bus route' : Bezwada police got Ramakotayya a bus route between Gudiwada and Bezwada. 'Gratitude must be like this'.
3. 'Cycle rickshaws : The police, for the sake of Ramakotayya, removed restriction imposed on the number of rickshaws,
4. 'Over-load' : Bezwada police did not think it proper to cancel the bus route of Ramakotayya though the bus was found overloaded six times.
5. 'Unlicensed rickshaws' : When unlicensed rickshaws of Pidikoti Ramakotayya were detected by Vijayawada town police, they were released by phone instructions, and no cases were put up against the owners. I told Dy. S.P. Narayanaswami not to cooperate with such an anti-social man as Ramakotayya, but my advice was not cared for. That is why even unlicensed rickshaws are left free.
6. 'Iron black marketing' : "I produced Bhupat Mall before the Dy. Superintendent of Police, B. N. Narayanaswami, as he purchased iron in black market from Ramakotayya but there was no use. I told the Dt. Supdt of Police, Mr. Pinto. That was also of no use. 'Bezwada police engrossed in the service of Pidikiti Ramakotayya, have forgotten about the prestige of the police department'. What is it that we are able to know from this? Considering from the duties of the police department, it nas been established that 'Mr. Pinto, the Head of the Krishna District Police, is unfit to be the D.S.P.' The existence of such officers who sympathise with such unsocial elements in the department is a slur to the reputation of the department. Hence the Government and the police department 'should immediately give adequate punishment to the Krishna Dt. Superintendent of Police etc. etc."

(2) It is obvious, even on the first reading of these extracted documents, that the news and comments of Bandi Buchiah, the petitioner on various police and other officers in Krishna district, have been exceedingly pungent, and even vitriolic and violent, and that they may reasonably be termed "excessive" unless he can adduce sufficient evidence in support of his allegations. Thus, for instance, his comment in the issue of 15-4-1951 :

"In Krishna district, Pidikoti Ramakotayya and Krishna District police officers are working together for mutual benefit 'as thieves divide villages for thefts."

will require the fullest proof before any sane man will accept it as true regarding the present day police administration there. So too his terrible remarks on Anti-Smuggling Sub-Inspector Narasayya, D.S.P. Pinto, etc. Mr. Rajagopalachariar for the petitioner submitted that, though the comments appear at first sight to be extraordinarily wild and reckless, we are living in extraordinary times of corruption, irregularity and high handed action, and, so, the comments need not necessarily be 'false or malicious', and, that, in any event, the petitioner is willing to stand a prosecution and prove his comments to be true to the hilt. The learned Advocate General submitted that he would have agreed that an order under S. 144, Criminal P. C., in the circumstances disclosed in this case, was a most extraordinary step to take against a newspaper and its 'future articles', especially when the acts prohibited are not merely attacks on the above officers, or even police officers in general, but 'all acts' termed "excessive publications" against all gazetted and non-gazetted officers of the police department, and, indeed, of 'all other departments of the Government' regarding acts committed or purported to have been committed in the discharge of their public functions or capacity as public servants. There is a rather curious clause in the order of the Sub-Divisional Magistrate evidently intended to cover the illegal nature of the order, that Bandi Buchaiah is permitted to edit, print and publish news which is 'not excessive', and which would not be unlawful, as the order did not want to take away his rights and privileges as editor, printer and publisher of the weekly! The learned Advocate General submitted that the order would never have been passed but for the threat of Buchiah, the petitioner, in his issue dated 8-7-1951, that he would continue the half-finished article in the issue of 15-7-1951, and he assured me that the order will not be renewed after its lapse after two months. He frankly conceded that there was no prior instance in this state of an order under S. 144, Criminal P. C., having been passed to prevent a newspaper from publishing such articles in future. But he relied on a ruling of a Bench of the Bombay High Court, reported in 'Emperor v. Ganesh Vasudev', 55 Bom 322 for the position

that the word "annoyance" in S. 144. Criminal P. C., need not necessarily mean 'physical' annoyance and may include 'mental' annoyance also. That is so, and has always been so. Thus, for instance, if a full grown sane adult, in a fit of exhibitionism, goes along a crowded public street 'stark naked' in broad day light, causing annoyance to people living in the street, it will certainly amount to "annoyance" within the meaning of S. 144, Criminal P. C., though no 'physical' annoyance may be caused by the act. So too, if a man harasses any people by calling them on the phone constantly and abusing them, or calls a young woman on the phone constantly and makes improper overtures to her, it will be "annoyance" within the meaning of S. 144, even though there is only 'mental' annoyance. But the Bombay ruling will not help the learned Advocate General in his contention regarding the validity of the order under S. 144, Criminal P. C., in this case. It has been held by the High Courts over and over again that S. 144, Criminal P. C., provides for temporary orders in urgent cases of 'nuisance involving a danger' to public health or life, or 'apprehended danger of a breach of the peace', like a riot or affray, and that the urgency of a case of dangerous nuisance or apprehended danger of a breach of the peace is essential to the application of S. 144, and that orders under S. 144 are passed 'only in the general interests of society' (and 'not' in the interests of 'particular officers etc') and can interfere, within the limitations laid down, with private rights of enjoyment, of properties, and, that, therefore, the powers have to be exercised very carefully, and interference with private and public rights 'reduced to a minimum', and regulated by a full observance of the limitations imposed by the section itself. (See for example, 'Ramnarain Sah v Parameswar Prasad', AIR (29) 1942 Pat 414). Even where an order under S. 144 deals with a 'nuisance" there must be a danger to life or health involved, or of an affray or riot or breach of the peace. Mere defamatory tatements, and even highly objectionable abusive articles against prominent officials, cannot be dealt with under S. 144, Criminal P. C, unless they are likely to lead to a breach of the peace or to a nuisance endangering life or health. Section 144 should not be abused by using it for dealing with abusive articles and defamation not likely to lead to a breach of the peace, for which there are other appropriate remedies under the law, as that will be making the 'medicine' the 'daily food'. A Bench of the Calcutta High Court, consisting of Harries C. J. and Das Gupta J. has held, in 'Hulasmulla v. Tulsi Shaw', 53 Cal W N 344 that the powers given to a Magistrate under S. 144 are very wide, and that, for that very reason, they should be exercised with discretion and discrimination, and that Magistrates ought to remember that arbitrary use of these powers is not only unfair to the parties concerned but is very often calculated to defeat the purpose for which the orders are passed, and that an order under S. 144 should not be made without a searching investigation of the facts of the case and a strict compliance of the requirements of the section itself. The present case is an instance of the violation of those salutary directions. In an attempt to curb unjust attacks on officers, all attacks on officers, and even comments on the public acts of 'all' officers of all departments were prohibited in this order, while pretending to leave the privileges of this newspaper editor and his newspaper intact! That is a clear abuse of the powers given under S. 144. While S. 144 has the vital phrase 'to abstain from 'a certain act'" the order here directed Buchiah to abstain from 'an untold number of acts of a very vague and uncertain nature', called "excessive publication" violating this vital clause and the great safeguard it contains against such whimsical and arbitrary acts of magistrates. A Full Bench of the Lahore High Court consisting of Young C. J., and Bhide and Mahomed Munir JJ. has held in 'P. T. Chandra, Editor, Tribune v. Emperor', I L R (1942) Lah 510, that the right of the public to have news published is common to all countries where there is liberty of the press, and that it is the right of 'all newspapers equally' to publish news, provided it does not offend against any existing law, and that it is obvious, therefore, that the powers given to a magistrate under S. 144, Criminal P. C., to interfere with the liberty of the press should be used very sparingly and only for good cause shown and that it is for that reason that S. 144, Criminal P. C., itself makes it obligatory for the Magistrate in any such order to indicate the material facts which justify such an order. It was held there further that not only is it necessary to state the material facts but there must also be urgency in the matter. It was also held that though the opinion of a magistrate, expressed in an order under S. 144, is entitled to great weight, as the man on the spot and the officer responsible for the maintenance of peace and order in the locality, it is not to be accepted as absolutely correct in all circumstances, and that the High Court has, in proper cases, got full power to interfere with such orders. It was also held that 'there must be a causal connection' between the act prohibited and the danger apprehended to prevent which the order is passed. That decision, with which I wholly agree, 'shows clearly that an order under S. 144, Criminal P. C., can be passed against newspaper editors and newspapers also in' suitable cases warranting such an order. But it shows this order to be wrong in five 'ways', namely, in resorting to S. 144 lightly and in violation of its terms and in the absence of any nuisance involving danger to health or life or of a breach of the peace; interfering with the right of a newspaper and its editor to publish news and comments without any real need to take to such action, instead of resorting to other and appropriate sections of law to deal with the alleged offences; failing to establish a causal connection between the news and comments published by the petitioner in his newspaper and the alleged insubordination of subordinate officials, the alleged recrudescence of anti-social activity by communist and other turbulent elements, and the alleged creation of prejudice in the minds of the superior officers against the officers attacked by the petitioner in his paper; the failure to hold an investigation and satisfy himself that the news and comments 'offended against any existing law'; and the passing of an 'ex parte' order without any real urgency or justification. Merely annexing extracts from the vitriolic comments of the petitioner to the order under S. 144 will not cure these five grave defects. I shall now examine the reasons given in the Sub-Divisional Magistrate's order in detail.

(3) The learned Sub-Divisional Magistrate has given 'seven' main reasons for passing this order under S. 144 : (1) That the comments of the petitioner in his paper tend to make the officers attacked, namely, the D.S.P. Mr. Pinto, Special Dy. S. P. Mr. Palaniappan, Anti smuggling Sub-Inspector, Mr. Narasiah, and others, depressed and apathetic in the discharge of their duties, instead of enthusiastic as before. This is no reason for passing an order under S. 144. There is no reason also why these officers should take notice of the comments of this man in his weekly paper, of no great influence or standing, and take them to heart to such an extent as to get detailed and depressed and apathetic and unmindful of their duties, especially when the comments are alleged to have been false and malicious and fabricated and of a most frivolous and vexatious nature. Besides, S. 144 is not intended to be used in the case of such depression in Government servants when there is no danger of a breach of the peace or of a nuisance involving danger to life or health, and when there was no obstruction, annoyance or injury to any of these officers when they were lawfully employed in their duties. It was not alleged that this petitioner went to any of those officers while they were engaged in their legitimate duties and annoyed them by levelling such accusations against them, or even sent his newsboys to them with the issues containing these comments of his in order to cause them annoyance, or that he asked his readers to obstruct, annoy or injure these officers in the course of their lawful employment, when, of course, an order under S. 144 could have been lawfully passed against him, 'editor or no editor', as that would certainly have led to a breach of the peace or to a nuisance involving a disturbance to the public tranquillity; (2) The superior officers of the officers attacked by this petitioner in his paper were said to be likely to become prejudiced against those officers by reason of these comments. I cannot see how the superior officers were likely to get prejudiced against the victims of these attacks, especially when the order itself says that the superior officers enquired into the allegations in the comments and found them to be false and malicious. Further, it is not one of the legitimate uses of S. 144, Criminal P. C., even if these superior officers are likely to gulp down these wild comments as gospel truth and get prejudiced against the victims of these attacks; (3) It is said further that the subordinates of the D.S.P. Special Deputy S. P. etc., the officers attacked might become disgruntled, indisciplined and insubordinate by reading these comments and taking them to be true! I cannot see why these subordinates should become disgruntled and insubordinate or indisciplined by reading that a constable was behaving better than the D.S.P., or Dy. S.P., and asking the D.S.P. and Dy. S.P. to learn a sense of duty from that constable. I do not consider that they will become so, merely by reading these comments and without even enquiring into their truth or otherwise. I think few subordinates will be influenced by such vitriolic news and comments upon the officers in question. Nor can the fact, even if true be a reason for using S. 144, Criminal P. C., for such a purpose against a newspaper when there is no danger to life or health or of a nuisance or a breach of the peace or of an annoyance while discharging duty; (4) It is stated that the Krishna district is in a disturbed state now, owing to Communist trouble, that it has not yet come to normal, and that the anti social elements, which were about to settle down, owing to the efficient working of the Special Police staff under the direct control of the District Superintendent of Police, were becoming ready to restart their activities should the police get depressed and relax on account of the comments upon themselves. This is an extraordinary statement. I do not think that the police officers care two hoots for this man's comments. Nor is the alleged fact, even if true, a reason for using 'S. 144, Criminal P. C.' against a newspaper in the absence of the danger of a breach of the peace, etc. The particular difficulty of a district must be met by adopting the proper procedure laid down by law, and by booking the alleged offenders under the appropriate sections, and not by using S. 144, Criminal P. C., for a purpose for which it was never intended. The 'procedure' is as important as the 'booking of an offence'. Government officers cannot get a remedy not given to non-officials; (5) It is stated further in the order that hatred and disaffection is being created among the public against the Government servants in general, and some State officials in particular, by reason of these comments in this weekly. I cannot bring myself to believe it. Tigers may create a panic among people, but rarely scorpions! Even if it is true, the remedy is to take appropriate proceedings. Prosecutions under the Penal Code and other substantive laws must be taken against individuals committing such acts, and not an order under S. 144, Criminal P. C., which can be applied only within the strict limits mentioned there.; (6) The sixth reason given is that Butchiah, in making these comments, was not actuated by any 'public good or public benefit', and was not acting in good faith, but was requesting favours from the Government officers concerned, and money payments from merchants, and that, when such favours were refused or such money payments were refused, he was attacking them by way of intimidation or blackmail. Even if that is so, the proper course is to put up Butchiah for attempted intimidation or blackmail or extortion or threatening Government servants, or others, under the Penal Code or any other appropriate section of law, but certainly not to pass an order under S. 144, Criminal P. C., when there was no danger of a breach of the peace or nuisance as contemplated under that section, or of annoyance to officers when lawfully employed; (7) Finally, it was said that Buchiah was, by his false and malicious comments, aiming to achieve 'cheap popularity amongst the public' in view of the forthcoming adult suffrage elections and was making such comments wildly and recklessly as the public are always excited by such comments and mistake persons making such comments to be patriots and friends of the people. No doubt, election times see wild and reckless allegations and counter allegations made. And, of course, it is true that there are persons in India who want to become popular with the public in view of the forthcoming general elections on the basis of adult suffrage, and make all kinds of objectionable gestures, either by threatening to fast unto death, sometimes even for petty reasons, or by attacking Government servants or officers

of companies or corporations falsely, or by shouting offensive slogans or by creating a disturbance in Courts when being tried, or by claiming to be friends of the poor and leading them on foolish hunger marches or looting of shops. All these evils exist not only in this country and at this time but have existed to some extent in every country and at every time. Extreme caution is required in dealing with these symptoms of election fever and hysteria. Before using the provisions of S. 144 Crl. P. C. such vague allegations, as aiming at cheap notoriety, will not do, and it must be proved that S. 144 Crl. P. C. can be applied to this case within the strict limits prescribed in the section itself. The learned Advocate General quoted the instance of Lakshmikantam and his obscene news and comments on respectable people in his papers called the 'Hindu Nesan and Cinema Thoothu,' but he did not say that any order under S. 144 Crl. P. C. was passed against Lakshmikantam or that it was upheld by any Court. That extreme example itself takes the ground away from under his feet in this case. Indeed, in any stable and orderly society, such wild attacks and outbursts, even if false and malicious, will be allowed for the time being, and a long rope will be given to persons indulging in them, as the society is strong enough to book them in the end, and there is no need to short circuit such news and comments by illegal methods like passing an order under S. 144, Cr. P. C. against the newspapers and gag criticism even before it is made known. Of course, S. 144 Crl. P. C. can be used even against newspapers in proper cases of incitements to breaches of the peace or to commit nuisances, dangerous to life or health or to annoy officers lawfully employed. But, in the present case, there was admittedly no incitement to commit a breach of the peace or to commit nuisances constituting a danger to life or health, or to annoy officers lawfully employed, in anything this man actually wrote. Mere "annoyance" caused to Government officials, when not actually employed in their task, by reckless or defamatory attacks on them not involving a breach of the peace or danger to life or health will, in my opinion, not do for invoking the powers under S. 144. It is impossible even to guess what the petitioner would have written them in the threatened issue of the 15th. He has only gained cheap notoriety by the Sub Divisional Magistrate's passing on order against him under S. 144 Crl. P. C., and preventing his publishing that much boosted "continuation article". I do not believe the heavens would have fallen if this boosted continuation article was allowed to be published, and he prosecuted later.

(4) In the interests of the purity of public administration, and frank and free criticism of the activities of one and all, including Government servants, vested in all citizens and especially in the newspapers and their editors, I must set aside this order passed under S. 144 Crl. P. C., as it is in the circumstances disclosed, illegal and passed without jurisdiction, and entirely misconceived to meet a situation like this, though articles like these, if false and malicious, deserved to be booked in other and permissible ways. Admittedly, there was no danger of a disturbance of public tranquillity in this case, as in the Bombay case, 'Emperor v. Ganesh Vasudev Mavlankar', 55 Bom 322, where the order was held to be valid finally only because there was the likelihood of a disturbance of public tranquillity; nor is there any danger of an affray in this case, as the police and other officers attacked are not likely to fight Bandi Buchiah in the public streets and create an affray; nor is there any danger to human life or health or safety involved in these attacks to Buchiah. Nor is there any real obstruction, annoyance or injury, to any officer, when lawfully employed in the discharge of his duty, by Bandi Buchiah. I would have certainly upheld the order under S. 144, Criminal P. C. if Bandi Buchiah had not merely published such news and comments, but had also gone and annoyed the officers when engaged in their lawful duties, or had asked the public to go and attack the District Superintendent of Police, and other officers or to resist or obstruct them in the searches, etc. I am not concerned here with the submission of Mr. Rajagopalachariar, counsel for the petitioner, that actually the Madras Government itself has instituted enquiries against the Anti-smuggling Sub-Inspector Narasayya, and P. Ramakotayya, and that Bandi Buchiah's attacks and comments are thus proved to have had a kernal of truth in them, and were not merely 'false and malicious' as the learned Sub Divisional Magistrate alleged in his order.

(5) The order was also passed 'ex parte' without any proper enquiry or real urgency. There was, in my opinion, no need or justification for its being passed 'ex parte'. I am not satisfied with the contention that Bandi Butchiah could not be found before the 'ex parte' order was passed, though he was diligently searched for. He strikes me as a person who would have welcomed any chance for publicity and would have been only too willing to appear and support his statements, and who could have been found very easily if really searched for. Such persons rarely hide their lights under a bushel. Further there was no danger to public tranquillity or human life or safety, to justify an urgent 'ex parte' order. The Sub Divisional Magistrate could have waited and heard this man before passing an 'ex parte' order under S. 144, Criminal P. C. against him and his newspaper. It may be that the newspaper 'Mulukola' may not be a first class newspaper following the high ethical codes of well established newspapers, like 'The Hindu', the 'Statesman', the 'Mail', the 'Indian Express' etc., but even an obscure paper, like 'Mulukola', is entitled to the enjoyment of rights and privileges conferred on newspapers in general, just as even Harijans must have their rights, and not merely the upper classes. The phrase "it is the right of all newspapers equally" in the Full Bench decision in 'I L R (1942) Lah 510' is significant.

(6) I must add before closing that this petition has been filed in this Court because the District Magistrate of Krishna, admittedly said at a Press conference, on July 15th, 1951, that he fully agreed with this prohibitory order under S. 144, Criminal P. C. passed by the Sub Divisional Magistrate: that being so, the petitioner's learned counsel said that he saw no use in putting in an application before the District Magistrate, Krishna. I may also add that three prosecutions for substantive offences have been launched against Bandi Butchiah regarding his allegations and comments in his newspaper, and are pending trial, and that he has also applied to this Court for the transfer of the cases outside the Krishna District owing to the District Magistrate of Krishna having spoken at the Press Conference, as stated above, though he is willing to be tried by the Assistant Sessions

Judge, Vijayawada. Needless to say, such prosecutions for substantive offences are the correct steps to take in such cases, and not orders under S. 144, Criminal Procedure Code. I may add that, as elections are approaching, such comments are likely to become more and more numerous, and that it is advisable for Magistrates to know what particular sections of law they should apply, and what not, to stop irresponsible or malicious or false criticisms. Of course, an item of a news or comment must be held to be false or malicious or irresponsible only after an enquiry including a questioning of the person making it, and getting his explanation for the news or comments and not merely 'ex parte' after hearing only the persons attacked, as in this case. It may be desirable for Parliament to amend S. 500, I. P. C. and make the offence of defamation punishable also with rigorous imprisonment if attacks of a very grievous nature, as here, are made against responsible officials or non-officials and are found to be false, defamatory and contrary to the public interests and deserving of rigorous imprisonment. At present only simple imprisonment can be awarded for defamation, under S. 500, I. P. C. and people can make any allegations, however grave or irresponsible and can, if convicted and sent to jail, peacefully eat the bread of idleness at public expense.

(7) In the end, therefore, I set aside the order under S. 144, Criminal P. C., passed by the learned Sub-Divisional Magistrate of Vijayawada, as I consider that an order under S. 144, Criminal P. C. was not warranted or called for or justified in the circumstances proved in this case.

C.R.K./D.H. *Revision allowed.*

A. I. R. (39) 1952 MADRAS 66 (C. N. 32)

CHANDRA REDDI, J.

Thirumalaiswamy Mudali, Appellant v. Periasami Mudali and another, Respondents.

A. A. O. No. 346 of 1949, D/- 11-7-1951.

Civil P. C. (1908) O. 41 R. 23 (Mad) — Power to remand case — Conditions for — No inherent power apart from O. 41 R. 23.

It is open to the appellate Court to remand the case to the trial Court in the interests of justice only when it finds it necessary to reverse the decree for justifiable reasons on the materials placed before it. A I R (36) 1949 Mad 394 and 1950-2 Mad L J 370 Rel. on. (*Para 5*)

Where the order of remand is made not because the appellate Judge was of opinion that the decision of the trial Court is wrong on merits and ought to be set aside and the interests of justice required that the suit should be re-heard, but because it was his view that it was better to send the case back to the trial Court for the purpose of taking full evidence as there was lacuna in the evidence with reference to a portion of the case for which there was no basis either in the pleadings or in evidence the order is wrong and illegal as not being permitted by O. 41 R. 23 Civil P. C. (*Para 6*)

The appellate Court has no inherent powers to remand a case apart from the provisions of O. 41 R. 23 as amended in Madras. Even assuming that it has such inherent power it cannot be exercised arbitrarily. (*Para 9*)

Anno: C. P. C., O. 41 R. 23 N. 7, 10.

S. Ramachandra Iyer, for Appellant — A. Sundaram Iyer, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('05) 28 Mad 437: (15 Mad L J 236) (Pr 10)

('22) 16 Mad L W 515: (A I R (8) 1921 Mad 716) (Pr 9)

('25) 48 Mad 713: (A I R (12) 1925 Mad 229) (Pr 8)

('48) 1948-2 Mad L J 413: (A I R (36) 1949 Mad 394) (Prs 5, 7)

('50) 1950-2 Mad L J 370 (Prs 5, 7)

JUDGMENT: This appeal is against the order of the Subordinate Judge of Vellore remanding the case to the trial Court. The suit which has given rise to this appeal was instituted by the appellant herein for ejecting the respondents from the suit properties which were purchased by him at a Court auction sale on 7-12-1944. A few material facts may usefully be stated here: One Varadarajan filed O.S. No. 71 of 1927 in the Sub Court, Vellore for partition of the family properties and for separate possession of his share against two persons Veerasami and Kaniappan. A preliminary decree was passed by the trial Court and in appeal against that decree a stay of final decree proceedings was obtained on condition that the judgment debtors should furnish security for a sum of Rs. 12000. In pursuance of that order the judgment-debtors, that is, Kaniappan and Veerasami furnished the suit properties as security in addition to a third party security. Ultimately the appeal was dismissed and stay dissolved. On taking accounts it was found that the judgment-debtors were liable to pay the decree-holder a sum of Rs. 25000 and a decree followed for this amount, besides the decree for partition. In execution of this decree, the suit properties along with other properties were brought to sale and in the Court auction the appellant purchased properties covered by lot No. 2 for a sum of Rs. 4500 on 7-12-1944 and took delivery of those properties.

(2) The present suit which has given rise to this appeal was instituted by the Court auction purchaser, i.e., the appellant herein on the allegation that subsequent to his taking possession of the suit properties the respondents herein trespassed on them. The main defence to the suit was that title to these properties vested in the defendants by virtue of a sale deed dated 6-7-1932 from Kaniappan whose separate properties they were and that in any event the defendants perfected their title thereto by adverse possession. Rejecting the defence the trial Court decreed the suit.

(3) On appeal against this decree and judgment of the trial Court the learned Subordinate Judge remanded the case to the trial Court for the purpose of taking full evidence in the case.

(4) In the words of the learned Subordinate Judge the reasons for the remand are:

"There is no clear proof before me of the manner in which the suit properties came to be sold or the manner in which full satisfaction of the decree came to be entered. It has been mentioned to me at the Bar that the surety's son paid Rs. 12000 and got his properties released. If that is true, the entire amount secured under Ex. P4 having been paid, the B schedule properties should not have been sold and even if the sale had been held before the payment the sale should not have been confirmed. As there is lacuna in the evidence with reference to this portion of the case, in my opinion, it is better to send back the case to the trial Court for the purpose of taking full evidence on this matter".

(5) The plaintiff who is aggrieved by this order has come up in appeal to this Court. Mr. Ramachandra Iyer for the appellant contends in support of the appeal that the order of remand passed by the lower appellate Court is illegal as it is contrary

to the provisions of Or. 41 R. 23 C. P. C. He argues the lower Court acted without jurisdiction in remanding the case without coming to the conclusion that the decision of the trial Court is wrong and that it ought to be set aside. In support of his contention he relies upon two decisions of this Court reported in 'Agneswaraswami Devastanam v. Govinda Pandithan', 1948-2 Mad L J 413 and 'Ariangavu Pillai v. Nallamangai Ammal', 1950-2 Mad L J 370. There seems to be considerable force in the argument of Mr. Ramachandra Iyer. The power of an appellate Court to remand is contained in Or. 41 R. 23 as amended in Madras.

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case the Appellate Court may by order remand the case and may further direct what issue or issues shall be tried in the case so remanded and shall send copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit and the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand".

It is seen that this rule lays down the circumstances under which an appellate Court can remand a case to the trial Court. So, to justify an order of remand, the conditions specified therein should be fulfilled. It is open to the appellate Court to remand the case to the trial Court in the interests of justice only when it finds it necessary to reverse the decree for justifiable reasons.

(6) In the present case the order of remand is made not because the Subordinate Judge, was of opinion that the decision of the trial Court is wrong on merits and ought to be set aside and the interests of justice required that the suit should be re-heard but because it was his view that it was better to send the case back to the trial Court for the purpose of taking full evidence "as there is lacuna in the evidence with reference to this portion of the case". I do not think this is permissible under the provisions of Or. 41 R. 23 of the Civil Procedure Code. It may also be noted that there is no basis either in the pleadings or in evidence for the case which, the learned Judge thought required elucidation. The plea that a sale of the judgment-debtor's property in enforcing the security could not be validly held after the third party surety had deposited the amount of the security bond was deposited was not put forward in the written statement, nor was any issue raised about it, nor any evidence bearing on that question let in. No attempt seems to have been made even in the lower appellate Court to put forward that contention and substantiate it.

(7) In this context, two rulings of this Court were cited by Mr. Ramachandra Iyer for the appellant. It has been laid down by Horwill J. both in 'Agneswaraswami Devastanam v. Govinda Pandithan', 1948-2 Mad L J 413 and 'Ariangavu Pillai v. Nallamangaiammal', 1950-2- M. L. J. 370 that the Court of appeal can remand a case to the trial Court only when it finds it necessary to set aside the decree on the material placed before it. I express my agreement with the view taken by the learned Judge in both the decisions. It follows that an order of remand made without coming to the conclusion that the decision of the trial Cout is wrong and is illegal and has to be set aside.

(8) Mr. Sundara Iyer the learned counsel for the respondent maintained that an appellate Court has got inherent jurisdiction to remand a case even apart from the provisions of Or. 41 R. 23 C. P. C. and in support of this he has referred me to a decision of a Bench of this Court reported in 'Radhakrishna Rao v. Venkat Rao', 48 Mad 713. There the question that arose for consideration was whether the order under appeal was made under O. 41 R. 23 C. P. C., or under S. 151 C. P. C. and whether the appeal was competent. The learned Judges held that no appeal lay against that order as it was one made under S. 151 C. P. C.

(9) Another decision of this Court relied upon by Mr. Sundara Iyer is 'Mohammad Maracayar v. Rangaswami Naidu', 16 Mad L W 515 where Odgers J. observed that the power to remand inhered permanently in an appellate Court though it ought to be very cautiously exercised. Mr. Ramachandra Iyer has invited my attention to cases which have taken a contrary view but it is unnecessary for me to consider this question any further having regard to the Madras amendment to Or. 41 R. 23 C. P. C. I do not think that after this amendment it could be said that there is any residuary power in the Appellate Court to remand a case apart from the provisions of Or. 41 R. 23. In my view the inherent power of the Court to remand a case is embodied in Or. 41 R. 23 and that power is prescribed with certain limits namely that the Court can remand a case in the interests of justice only when it comes to the conclusion that it is necessary to set aside the decree. It is well settled that a Court cannot exercise inherent jurisdiction in any case for which another procedure is laid down specifically in the Code. Assuming this contention of Mr. Sundara Iyer to be correct an appellate Court cannot exercise that inherent jurisdiction arbitrarily. For the aforesaid reasons the order of the lower appellate Court remanding the suit cannot be sustained.

(10) Mr. Sundaram Iyer next attempted to support the order of the lower Court on the ground that the consent of the advocate for the appellant herein was obtained for the course adopted by the lower appellate Court. He maintained that even if the lower appellate Court has violated the mandatory provisions of Or. 41 R. 23 C. P. C., still the consent of the parties would cure it as it cannot be said to be an order without jurisdiction but that at the worst it is only an illegality. In support of the contention that the order of remand though illegal can be cured by the consent of the parties he relied on the 'Manager of the Court of Wards, Kalahasti Estate v. Ramasami Reddi', 28 Mad 437. It is not necessary for me to go into this question in view of the fact that the learned Judge does not purport to act on the consent of the parties. As I have already stated the learned Judge thought, that as there was a lacuna, in the case in the interests of justice the case should be remanded to the trial Court for the purpose of taking full evidence on the matter. In these circumstances I think the order of the lower Court remanding the case to the trial Court must be set aside. But it does not preclude the defendant-respondent herein from applying for such amendment of the written statement as he thinks necessary which will be considered by the lower appellate Court on the merits of that application. The order of the lower appellate court is set aside and A. S. No. 46 of 1948 is sent back to the lower appellate Court for disposal on the merits. Having regard to the circumstances of the case I direct each party to bear his own costs.

C.R.K./K.S. ***Order set aside.***

A. I. R. (39) 1952 Madras 68 *[C. N. 33.]*

RAJAMANNAR C. J. AND SOMASUNDARAM J.

Sri Sri Sri Krishna Chandra Gajapathi Narayana Deo — Appellant v. *Pragada Ramamurthy Pantulu and others—Respondents.*

Appeal No. 278 of 1944, D/ 23 4-1951.

Madras Survey and Boundaries Act (VIII [8] of 1923) Ss 13, 14—Determination of boundary when affects title to land.

The question as to whether the determination of the boundary of a village (whether a boundary dispute exists or not) under S. 13, Madras Survey and Boundaries Act of 1923 affects title to a piece of land lying within the said boundary depends very much on the nature of the claim to that land and the questions that fall for decision before the survey officer. For instance, if the claim to a particular piece of land is itself based on the ground that it lies in a particular village belonging to one of the parties and the survey officer while determining the boundary holds that the plot lies in the adjacent village, such determination of the boundary unless set aside by a suit under S. 14 of that Act, undoubtedly concludes title in respect of that plot. But where the rival claim regarding title to a plot has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village, the determination of the boundary under S. 13 does not affect title. A. I. R. (38) 1951 Orissa 268, *Foll.*; A. I. R. (30) 1943 Mad. 420 and A. I. R. (30) 1943 Mad. 727, *Ref.* [Para 4]

(*Note.*—This was not a case of a general survey of all lands within a district or other specified division that was ordered by the Government. The notification purported to be under S. 17 (a) of the Act; that is to say, it was a survey of a portion of an estate made on the application in writing of the proprietor of such estate. There was no question of the survey of any boundary between any village or villages of the estate and villages not forming part of the estate.) [Para 3]

L. S. Veeraraghava Aiyar — for Appellant; C. V. Dhikshitalu — for Respondent.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('43) A. I. R. (30) 1943 Mad. 420 : 1943 Mad. W. N. 106 : (210 Ind. Cas. 282) [Pr. 3]

('43) A. I. R. (30) 1943 Mad. 727 : 1943-2 Mad. L. Jour. 311: (211 Ind. Cas. 124) [Pr. 3]

('49) I. L. R. (1949) 1 Cut. 165: (A.I.R. (38) 1951 Orissa 268) [Pr. 4]

Rajamannar C. J. — The appeal was heard fully by Panchapagesa Sastri J. who recorded his findings on the several questions of fact which were necessary for disposal of the appeal and the memorandum of objections. He however thought it was desirable that the appeal should be finally disposed of by a Division Bench, because there were conflicting decisions of single Judges of this Court on a question of law which was very material for the disposal of the appeal. The appeal and the memorandum of cross objections have therefore been placed before this Bench for final disposal. Before us counsel very properly did not attack the correctness of the findings of fact arrived at by the learned Judge on a discussion of the relevant evidence relating to them. The arguments were confined to the question of law which arises in the following circumstances. The plaintiff (the appellant) is the Maharajah of Parlakimedi. The contesting defendants are Inamdars who have been held to be entitled to an inam of the extent of 451 acres 94 cents in the village of Maradikottah. On 24-1-1933, Government issued a notification in exercise of the powers conferred on them by S. 17 (a), Madras Survey and Boundaries Act of 1923 directing the survey of certain unsurveyed plots in villages specified in the list set out in the notification which were part of the estate of Parlakimedi. The Government also directed under S. 164 (1), Madras Estates Land Act, the preparation of a record of rights for the same. In continuation of this notification, another notification was issued (Ex. p. 22) on 1-3 1933 intimating that the survey operations of the unreserved waste blocks in certain villages in the estate would commence in the month of March 1933. The notification contained the following further provision,

"Every person claiming to be interested in such lands as registered holder or otherwise should attend either in person or by agent at the time and place specified and from time to time thereafter when called upon for the purpose of pointing out boundaries and supplying information in connection therewith."

Kuddaba was one of the villages mentioned in the notification. It is common ground that areas comprised in certain block numbers originally forming part of the village of Maradikottah which adjoined the village of Kuddaba were included in and surveyed as part of the village of Kuddaba, admittedly a village in the estate. Maradikotta was itself an unenfranchised inam village within the ambit of Parlakimedi estate, but certainly not forming part of the estate. The block numbers which were so included in Kuddaba, though they were according to the block survey surveyed as within the geographical limits of Maradikotta, were Nos. 66, 68, 72, 73, 74, 78, 79, 81 and 83. On 15-8-1936, there was a notification under S. 13, Madras Survey and Boundaries Act of 1923 giving notice that the survey of the jeroyati blocks in the villages of the Parlakimedi estate mentioned in the notification was completed. It is useful to set out the exact language of the notice which follows the language of Ss. 13 and 14 of the Act,

"1. Notice is hereby given under S. 13, Madras Survey and Boundaries Act, VIII [8] of 1923, that the survey of jerayati block in the undermentioned villages of the Parlakimedi estate, Parlakimedi taluk is now complete.

2. Unless the survey hereby notified is modified by a decree of a civil Court under the provisions of S. 14 of the same Act, the record of the survey shall be conclusive proof that the boundaries determined and recorded therein, have been correctly determined and recorded."

Kuddaba is one of the villages mentioned.

[2] The Inamdars did not file any suit such as is contemplated under S. 14 of the Act. They, however, filed a petition before the Special Revenue Officer who was conducting the record of rights operations pointing out the mistakes which had occurred and claiming the lands which had been surveyed as part of the village of Kuddaba to be really included in their inam. The Special Revenue officer after comparison of the old survey plans and the new plans arrived at the con-

clusion that except the lands covered by block No. 74 which was hill poromboke and block No. 82 which was a village site, the other blocks, namely, Nos 66, 67, 68, 72, 79, 80 and 81 were included in the inam and therefore the corresponding survey numbers should be registered as agraharam lands in the Maradikota Agraharam. The plaintiff appellant filed a revision petition to the Board of Revenue against this order of the special officer, but the Board saw no reason to interfere with this order. One of the points raised in the revision petition filed on behalf of the respondents was whether the special revenue officer was competent to change the tenure of the lands from estate jeryoti to inam when once the boundaries and classification of the two classes of land had been finally determined under S. 13, Madras Survey and Boundaries Act. On this point the Board observed that survey decides only the boundaries between two parcels of land and that it was not final on the question of the title to or the tenure of the lands. They held therefore that the special Revenue officer had jurisdiction to modify the determination made at the survey regarding the tenure of the lands. This order was passed on 21 5-1941 and on 7 4-1942 the Raja filed the suit out of which the appeal arises for a declaration that the suit lands and hill described in the schedule are not inam lands forming part of the Agraharam of Maradikottah but were the jeroyti lands and hill forming part of the estate village of Kuddaba.

[3] The decision of the question which falls to be considered turns on a construction of Ss. 13 and 14, Madras Survey and Boundaries Act, VIII [8] of 1923, and the effect of the provisions of those sections. Before we deal with them we think it is necessary to point out one fact which shows the nature of the survey which was directed by the Government. It was not a general survey of all lands within a district or other specified division that was ordered by the Government. The notification already referred to purported to be under S. 17 (a) of the Act; that is to say, it was a survey of a portion of an estate made on the application in writing of the proprietor of such estate. There was no question of the survey of any boundary between any village or villages of the estate and villages not forming part of the estate. Section 5 of the Act specifically provides for such survey. It says:

"The Provincial Government or subject to the control of the Provincial Government, any officer or authority to whom this power may be delegated by it may by notification order a survey of any Government land or of any boundary of such land or of the boundary forming the common limit of Government land and land that is not Government land."

It is, therefore, clear that the determination of boundaries in the survey could only be of boundaries within the villages specified like for instance, between different holdings and parcels of land within them. There was no question of determination of the boundary for instance, between Kuddaba and Maradikota. This fact will have a material bearing in discussing the effect of the two material sections to which we shall immediately refer. These sections run as follows:

"13. When the survey of any land or boundary which has been notified under S. 5 has been completed in accordance with the orders passed under S. 9, 10 or 11, the survey officer shall notify the fact in the District Gazette and a copy of such notification shall be posted in the village chavadi, if any, of the village to which the survey relates; unless the survey so notified is modified by a decree of a civil Court under the provisions of S. 14, the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded.

14. Any person deeming himself aggrieved by the determination of any boundary under S. 9, 10, or 11 may, subject to the provisions of parts II and III, Limitation Act, 1908, institute a suit within three years from the date of the notification under S. 13 to set aside or modify the said determination and the survey shall, if necessary, be altered in accordance with the final decree in the suit and the alteration, if any, shall be noted in the record."

There are only two reported decisions of this Court dealing with these sections. There are other decisions dealing with the previous Survey and Boundaries Act of 1897 wherein the corresponding provisions are materially different. In *Nagaratnam Pillai* v. *Guruswami Pillai*, A. I. R. (30) 1943 Mad. 727=1943 2 M. L. J. 311, Byers J. took the view that Ss. 13 and 14 cannot have the effect of giving any jurisdiction to the survey officer to determine a question of title. The proceedings under the Survey and Boundaries Act are concerned really with the survey and boundary and any question of title cannot be decided by the Survey officer under the provisions of that Act. In *Ponnuswami* v. *Mariappa Servai*, A. I. R. (30) 1943 Mad 420 : 1943 M. W. N. 106, Abdur Rahman J. came to a conclusion which cannot be said to completely differ from the view expressed by Byers J. though prima facie the impression left on us is that he was taking quite a different view. Abdur Rahman J. points out that there may be cases when a decision of a Survey officer in a boundary dispute may have the effect of affecting title. Where as a result of the Survey officer's order the limit of a person's boundary has been determined and recorded the question of title to the area falling within that boundary must according to the learned Judge be held to have been equally determined as being implicit in that order. In such cases, at the expiry of the period described in S. 14 of the Act the survey would become conclusive under S. 13 with the result that there may be an adverse effect on the title of the property where land has been wrongly included within the boundary of the property of another person. But even the learned Judge recognised that there may be cases in which the dispute may not really relate to the boundary and in such cases it cannot be said that the order passed by the survey officer would become final on a question of title which might incidentally be raised. He observed:

"It may be that if the dispute merely related to the title of the plot in dispute as distinguished from a dispute as to its boundary, the order passed by the survey officer would not have become final".

We agree with Abdur Rahman J. that there may be a case in which the result of a boundary fixed by the survey officer becoming conclusive under S. 13 of the Act may have an indirect effect on the title to an area covered by the boundary. To take a concrete example, if adjacent survey numbers, say 1 and 2, belong to two persons A and B and either after dispute or without any dispute the survey officer proceeds to fix the boundary between these two survey numbers 1 and 2 and on doing so, he marks the boundary in such a way as to include a portion of what is really survey No. 2 as a part of survey No. 1, it may be that after the lapse of the period specified in S. 14 of the Act, B the owner of the survey No. 2 would be precluded from challenging the correctness of the boundary and would virtually lose his title to that part of the survey number belonging to him which had been wrongly included in survey No. 1 on account of the wrong boundary fixed by the survey officer. It is obvious, however, that strictly speaking, this is not because the survey officer has any jurisdiction to determine a question of title. It is the indirect result of the fixing of the boundary.

[4] In our opinion, a correct construction of these two sections was placed by the learned Judges of Orissa High Court in *Krishnachandra* v. *Rokkam Venkatappa Rao Dora*, I. L. R (1949) 1 Cut. 165. The learned Judges there held that,

"The question as to whether the determination of the boundary of a village (whether a boundary dispute exists or not) under S. 13 of the Madras Survey and Boundaries Act of 1923 will affect title to a piece of land lying within the said boundary would depend very much on the nature of the claim to that land and the questions that fell for decision before the survey officer. For instance, if the claim to a particular piece of land is itself based on the ground that it lies in a particular village belonging to one of the parties and the survey officer while determining the boundary holds that the plot lies in the adjacent village, such determination of the boundary unless set aside by a suit under S. 14 of that Act, would undoubtedly conclude title in respect of that plot. But where the rival claim regarding title to a plot has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village, how can it be said that the determination of the boundary under S. 13 would affect title?"

We agree with respect with these observations. In the present case, it is obvious that the survey officer was not concerned with fixing the boundary between the villages of Kuddaba and Maradikota. As we have already pointed out earlier in this judgment there was only a limited survey of the unsurveyed blocks of the villages in the estate. There was no notification under S. 5 of the Act which must be invoked for directing a survey between estate villages and villages not forming part of the estate. Maradikota, as admitted by the plaintiff himself in his plaint, is an enfranchised inam village and though it may be within the geographical ambit of Parlakimedi zamindari, it must be deemed to be a non-estate land for the purpose of the Madras Survey and Boundaries Act. There was, therefore, no question of any boundary between the two villages. There is no question of any survey of Maradikota village itself. In such circumstances, it cannot be held that any order of the survey officer can affect the rights of the defendants in the case. The real question, as pointed out by the learned Judge, Panchapagesa Sastri J. is whether the particular extents of land form part of the inam of the defendants or are they part of the jeroyati lands of the zamindar. If the finding which we accept is that these extents form part of the defendants' inam, it really does not matter to the defendants whether the lands are shown in any survey as lying within one village or the other village. We agree with the learned Judge that the plaintiff cannot rely upon the provisions of Ss. 13 and 14 of the Survey and Boundaries Act in support of his claim to the properties which have now been found to belong to the defendants.

[5] The appeal is therefore dismissed with costs. Accepting the finding arrived at by the learned Judge which was the same as that arrived at by the trial Judge, we dismiss the memorandum of objections also with costs.

C.R.K./V.S.B. *Appeal and memo. of objections dismissed.*

A. I. R. (39) 1952 Madras 70 *[C. N. 34.]*

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

The Commissioner of Income-tax, Madras — Applicant v. *S. Rm. Sathappa Chettiar, Pollachi — Respondent.*

Case Referred No. 22 of 1948, D/- 2-4-1951.

Income tax Act (1922), S. 12—Amount received as compensation for use of machinery whether is income falling under S. 12.

A, the assessee, and *B* entered into a partnership to erect and establish a spinning mill at Pollachi. A building was erected at the expense of *A*, and *B* purchased machinery for installing it in the factory which was then under construction. After the factory was constructed, it became difficult for the partners to start the business as they could not get supply for electricity. *B* thereafter took part of machinery to the Somasundaram Mills at Coimbatore with which he was connected and utilised this machinery for the purpose of the business of that mill. The rest of the machinery was lying unused at Pollachi. As no business could be carried on by the partners, they wanted to settle their disputes and differences regarding the ownership of the machinery and also the right of the assessee to compensation for the use of the machinery by *B* in the Somasundaram Mills. Both the parties entered into a muchilika whereunder they referred their disputes to a single arbitrator. In due course the arbitrator passed his award under which Somasundaram Mills Ltd. was to get the exclusive ownership in the entire property of the partnership, viz. the building and the machinery on condition of the mills paying to *A* a sum of Rs. 75 000 towards his share of the value of the properties. The award also further provided that *A* should receive from Somasundaram Mills Ltd. a sum of Rs. 75,000 in full settlement of his claims for compensation for the use of the machinery by the Somasundaram Mills Ltd. Coimbatore. This amount was

received from Somasundaram Mills by the assessee during the accounting year. The question was whether the sum of Rs. 75 000 received by *A* from Somasundaram Mills Ltd. as compensation for the use of the machinery by Somasundaram Mills was income assessable to income-tax under the provisions of the Income tax Act.

Held, whether the relationship between *A* and *B* was that of co owners or co partners, it made no difference so long as *B* utilised the asset belonging to them in common to earn profits by allowing its user by Somasundaram Mills; that the amount received by *A* was income and not merely a casual receipt and as the claim of *A* was not one for damages for retention of the machinery by the Somasundaram Mills but his claim was for compensation for the use of the machinery, the amount of Rs. 75,000 was to be treated as income from profits derived by *A* from other sources under S. 12 and therefore liable to income-tax. A.I.R. (19) 1932 P. C 138 and A.I.R (17) 1930 Cal. 625 (F.B.), *Disting* [Paras 2, 3]

Anno. I. T. Act, S. 12, N. 2.

C. S. Rama Rao Sahib—for Applicant; M. Subbaraya Ayyar—for respondent.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) 57 Cal. 1330 : (A. I. R. (17) 1930 Cal. 625 F. B.) [Pr. 3]

('32) 59 Cal. 1313 : (A. I. R. (19) 1932 P. C. 138). [Pr. 3]

Satyanarayana Rao J. — Under S. 66 (1), Income-tax Act, at the instance of the Commissioner of Income-tax, the Income tax Appellate Tribunal has referred to us the following question:

"Whether on the facts and in the circumstances of the case, the sum of Rs. 75,000 received by the respondent from the Somasundaram Mills Ltd., in pursuance of Para. 5 of the Arbitrator's award, dated 9-7-1948, in full settlement of all his claim for compensation for the use of machinery, was income liable to income-tax?"

[2] The assessee, S. Rm. Sathappa Chettiar, and another one P. S. Sathappa Chettiar, entered into a partnership to erect and establish a spinning mill at Pollachi. A building was erected, it is stated, at the expense of the assessee, and P. S. Sathappa Chettiar, the other partner, purchased machinery of the value of Rs. 79,155 for installing it in the factory which was then under construction. The machinery seems to have been imported by the year 1941. P. S. Sathappa Chettiar was connected with a mill known as the Somasundaram Mills Ltd., Coimbatore. After the factory was constructed, it became difficult for the partners to start the business as they could not get supply of electricity. P. S. Sathappa Chettiar thereafter took machinery of the value of Rs. 55,817 to the Somasundaram Mills at Coimbatore and utilised this machinery for the purpose of the business of that mill. The rest of the machinery was lying unused at Pollachi. As no business could be carried on by the partners, they presumably wanted to settle their disputes and differences regarding the ownership of the machinery and also the right of the assessee to compensation for the use of the machinery by P. S. Sathappa Chettiar in the Somasundaram Mills. Both the parties entered into a muchilika whereunder they referred their disputes to a single arbitrator. In due course the arbitrator passed his award dated 9-7-1943. By this award Somasundaram Mills Ltd., was to get the exclusive ownership in the entire property of the partnership, viz., the building and the machinery on condition of the mills paying to the assessee a sum of Rs. 75,000 towards his share of the value of the properties. The award also further provided that the assessee should receive from Somasundaram Mills Ltd. a sum of Rs. 75,000 in full settlement of his claims for compensation for the use of the machinery by the Somasundaram Mills Ltd. Coimbatore. This amount was received from Somasundaran Mills by the assessee during the accounting year ending 12-4-1944. The Income-tax Officer, during the assessment year 1944-45, levied tax on this sum also as part of the income of the assessee but exonerated the assessee from liability to pay tax on the sum of Rs. 75,000 received by him as value of his share of the properties on the ground that it was capital and not income. The decision of the Income-tax Officer was upheld on appeal by the Appellate Assistant Commissioner but was reversed by the Appellate Tribunal. The simple question for consideration, therefore, is whether the sum of Rs. 75,000 received by the assessee from Somasundaram Mills Ltd. as compensation for the use of the machinery by Somasundaram Mills is income assessable to income-tax under the provisions of the Indian Income-tax Act.

[3] It would be seen that this amount was directed to be paid by Somasundaram Mills by the arbitrator as part of the assessee's share of profits to which he was entitled by reason of the use of the machinery by the mills. The Appellate Tribunal reversed the decision of the department on the sole ground that this amount was not obtained by the assessee during the course of the business of the partnership as the partnership did not at all, at any time, carry on any business, and presumably on the footing that his claim to impose the tax could be sustained only if this amount was obtained by the assessee as profits during the course of the partnership business. Even if the partnership did not start and carry on its business, this amount may be treated as and would legitimately be income from profits derived by the assessee from other sources under S. 12, Income tax Act. Whether the relationship between the assessee and P. S. Sathappa Chettiar was that of co-owners or co-partners, it makes no difference so long as the other partner P. S. Sathappa utilised the asset belonging to them in common to earn profits by allowing its user by Somasundaram Mills. He is liable to account to the other partner, the assessee to the extent of his share of profits earned by him by utilising a partnership asset or an asset which they owned in common. The argument which was strongly pressed on behalf of the assessee by Mr. Subbaraya Ayyar is that this amount really re-

presents the value of the property which was paid to the assessee to make up depreciation in its value. That is not the basis however on which the award proceeded and we are not able to find in the whole course of these proceedings any justification in support of that view. It is definitely stated both in the reference to the Arbitrator and in the award that the claim made by the assessee was that he was entitled to compensation for the use of the machinery by Somasundaram Mills. This contention of his was upheld and Somasundaram Mills was directed to pay to the assessee this sum of Rs. 75,000, which represents compensation for the use of the machinery not merely in the year of account but also for a period prior to it. The decision in 'In re N. S. Mundy', 57 Cal. 1330 does not at all support the argument of the learned counsel for the assessee, as in that case the claim made by the assessee was that he was entitled to a quarter share in the partnership and in full settlement of his claim a sum of Rs. 60,000 was paid. It was pointed out at p. 1333 that this sum of Rs. 60,000 really represented the assessee's share in the capital of the business and that therefore it was not liable to tax as it was not income. The decision of the Judicial Committee in 'Commissioner of Income-tax, Bengal v. Shaw, Wallace and Co., 59 Cal 1343 was concerned with the question whether the amount of compensation paid to the agent was "income" or not and the answer given was that it was not as there was no definite source from which it would be said that money paid accrued as income within the meaning of the Indian Income-tax Act. In the present case, however, the profits arose and accrued by the utilisation of the machinery by the Somasundaram Mills during a period of more than one year. It cannot be seriously contended therefore that the amount received by the assessee is not income; nor can it be contended that it is merely a casual receipt not taxable under the provisions of the Indian Income-tax Act. It may also be pointed out that the claim of the assessee was not one for damages for retention of the machinery by the Somasundaram Mills but his claim was for compensation for the use of the machinery. The view taken therefore by the Appellate Tribunal, in our opinion, is erroneous and the answer to the question referred to us must be in the affirmative and against the assessee. As the Commissioner of Income-tax has succeeded, the respondent must pay him a sum of Rs. 250 as costs.

C.R.K./V.S.B. *Answer against assessee.*

A. I. R. (39) 1952 MADRAS 72 (C. N. 35)

PANCHAPAKESA AYYAR J.

In re Mariyala Venkateswara Rao, Petitioner.

Criminal Revision Case No. 1370 of 1950 and Criminal Revn. Petn. No. 1296 of 1950, D/- 29-8-1951.

Sales Tax — Madras General Sales Tax Act (9 (IX) of 1939) Ss. 14 (2) and 15 (c) — Power to inspect registers, goods etc. 'at all reasonable times' — Inspection on holiday — Legality — Madras General Sales Tax Rules, R. 24.

Section 14 (2), Madras General Sales Tax Act must be construed strictly. Under S. 14 (2) the Assistant Commercial Tax Officer is only empowered to inspect the accounts and registers maintained by dealers in the ordinary course of their business, and also the goods in their possession, and their offices and shops etc., 'at all reasonable times' but he is not empowered to compel the production of private papers and cash. The dealer is not however, bound to allow any inspection of his goods or accounts or registers during lunch hour or on a closed holiday. The use of the phrase 'at all reasonable times' in S. 14 (2) is significant. (*Prs 6, 7*)

It is highly objectionable for officers, like the Assistant Commercial Tax Officer, to prepare statements themselves and request for signatures from the parties whom they want to charge-sheet later on relying on such statements as evidence. Even Magistrates authorised to record confessions have to observe many formalities and administer many warnings and have to record what the party states and cannot prepare statements themselves and ask the parties to sign them. R. 24 of the Madras General Sales Tax Rules which empowers an officer to summon persons to give evidence before him do not confer any such power. (*Para 5*)

Where a dealer allowed the A. C. T. O. to inspect his registers accounts and goods on a holiday but refused to show certain private papers and cash and also refused to sign an incriminating statement written by the officer.

Held that the dealer had committed no offence under S. 15 (c) of the Act. (*Pr 8*)

K. S. Jayarama Iyer, for C. K. Venkatanarasimham, for Petitioner; The Assistant Public Prosecutor, for The State.

ORDER: This is a petition by one Miriyala Venkateswara Rao against his conviction, under S. 15. (c) of the Madras General Sales tax Act, by the Additional First Class Magistrate, Gannavaram at Vijayawada, and sentence of fine of Rs. 50, for alleged prevention or obstruction of the Assistant Commercial Tax Officer, Nuzvid, from checking his registers and goods under S. 14 (2) of the Madras General Sales-tax Act.

(2) The facts are briefly these: On 13-1-1950, a Friday and admittedly a shop-closing day for the petitioner's shop, under the Shops and Establishments Act, the petitioner was said to have sold a shawl (not controlled article) for Rs. 22-5-6 to P. W. 4 and refused to give him a bill. Thereupon, at the instigation of P. W. 2, an enemy of the petitioner, P. W. 4 gave a report, Ex. P-1, to the Assistant Commercial Tax Officer, Nuzvid. On receipt of the report, P. W. 1 went to the shop of the petitioner at about 2-30 p.m. 'that very day' with a view to examine the accounts and registers maintained by the petitioner and verify his cash and stock, presumably under S. 14 (2) of the Madras General Sales Tax Act and in order to see if the petitioner was evading any sales tax by not entering this sale in his bills, book and other accounts, day book and ledger. The petitioner placed his bill books before the Assistant Commercial Tax Officer for scrutiny. P. W. 1 perused them and initialled in them. When asked to produce the cash for the sales made that day (P. W. 1 admitted that money was not 'goods' which could be inspected by him), the petitioner stated that there were no sales that day, as it was a 'holiday'. Then the petitioner took out some currency notes and red papers from a small wooden box 'by the side of the cash box' (it will be noted that he did 'not' take them from the cash box) and put them in his pocket. The Assistant Commercial Tax Officer demanded the production of those papers, and cash, but the petitioner said that they related to his 'personal matters' and private affairs, and had nothing to do with the business, and refused to produce them. The Assistant Commercial Tax Officer's repeated requests to the petitioner to produce them were in vain. So, P. W. 1 said that he wrote in one of the shop books that the petitioner refused to produce the cash and some papers which he had removed from the wooden box. He then wrote out himself a statement,

Ex. P. 2, narrating that the petitioner took out some money and notes from a small box and put them in his pocket as they related to promissory notes and miscellaneous accounts of his. P. W. 1 gave Ex. P. 2 to the petitioner for signing. The petitioner refused to sign that statement in spite of repeated requests by P. W. 1 to him to do so. At that time P. W. 2, with whom the petitioner had enmity and misunderstandings, went there and suggested to the Assistant Commercial Tax Officer to search the pocket of the petitioner and seize the papers and cash for verification, but the Assistant Commercial Tax Officer did not fall in with this perverse suggestion of an enemy. The petitioner and P. W. 2 had a "scuffle" in the presence of P. W. 1 for fifteen minutes. After that, P. W. 1 requested the petitioner again to sign the statement given to him. The petitioner again refused to do so, even though he wrote in it that P. W. 1 had told him that Government had exempted that day from being a holiday. P. W. 1 took back the statement and wrote therein that the petitioner refused to sign it. He did not say that the day was 'not' a holiday. After that, he asked the petitioner to show him the stock of shawls in his shop, and the petitioner is stated to have refused to show the stock and to have asked him to get out of the shop. The Assistant Commercial Tax Officer, apprehending that the situation might get worse, left the shop peacefully and returned to his own office where he took statements from three witnesses (Anjayya, who was not examined on the ground that he had turned hostile; P. W. 3, P. W. 1's own clerk, who admitted that he had bought cloth on credit from the petitioner for Rs. 10-14-9 and paid only Rs. 10 after some delay and claimed to have been excused Rs. 0-14-9 though expressing readiness to pay it also; if demanded; and P. W. 5). These statements are Exs. P. 3, P. 4 and P. 5, and they contain not a word about any request of the Assistant Commercial Tax Officer to the petitioner to show his stock of shawls and his refusal to do so and his asking the Assistant Commercial Tax Officer to clear out of the shop. The Assistant Commercial Tax Officer made a complaint to the Commercial Tax Officer who, after some enquiry, was responsible for laying this complaint against the petitioner under S. 14 (2) read with S. 15 (c) of the Madras General Sales Tax Act, for preventing or obstructing the inspection by the Assistant Commercial Tax Officer of the accounts and registers maintained by the petitioner in the ordinary course of his business and goods in his possession.

(3) The learned Additional First Class Magistrate found that there was an omission in the statements, Exs. P. 3 to P. 5, regarding the Assistant Commercial Tax Officer's request to the petitioner for showing the stock of shawls and the petitioner's refusal and direction to him to clear out of the shop. But he stated that that was only a 'minor incident', while the 'main offence' was the refusal of the petitioner to produce the cash and papers, which he had put into his pocket, from the wooden box, and which the Assistant Commercial Tax Officer suspected would contain the sale proceeds of the shawl sold to P. W. 4. I may add that P. W. 4, the man who started the whole enquiry by the Assistant Commercial Tax Officer, swore in cross-examination that the petitioner showed the stock of shawls to the Assistant Commercial Tax Officer and did not refuse to allow him to verify the stock and that four shawls were found in the show case in the petitioner's shop, and the Assistant Commercial Tax Officer saw them all. His clumsy attempt, in re-examination and examination by Court, to back out of these admissions, sounded thin and unconvincing especially in view of the omission in the Exs. P. 3 and P. 5.

(4) I have perused the records, and heard the learned counsel for the petitioner and the learned Assistant Public Prosecutor 'contra'. This is a very curious case. The main grievance of the Assistant Commercial Tax Officer has become submerged in the course of the case and some collateral matters have been relied on and have assumed great importance. The Assistant Commercial Tax Officer's main object in going to the shop was to enquire as to why the petitioner did not give a bill for the shawl alleged to have been bought by P. W. 4 that day from him for Rs. 22-5-6, and to book an omission of sale and evasion of sales tax. But that is not the subject of the charge and the learned Assistant Public Prosecutor frankly conceded that there is no proof that P. W. 4 bought that shawl that day from the petitioner or was refused a bill for it, or that the petitioner had omitted to enter a sale of shawl in his accounts or bill books or evaded any sales tax. Indeed, the evidence showed that P. W. 4 probably bought the shawl in question from D. W. 3 a dealer in the same premises!

(5) The next grievance of the Assistant Commercial Tax Officer was that the petitioner would not sign the statement 'prepared by him' and said to contain what the petitioner had told him. That statement is Ex. P. 2. I have looked into this statement. The lower Court was wrong in holding that Rule 24 of the Madras General Sales Tax Rules, giving P. W. 1 a power to summon persons to 'give evidence before him', empowered him to go to the petitioner's premises and prepare a statement himself incriminating the petitioner and compel him to sign it. The learned Assistant Public Prosecutor did not contend that the Assistant Commercial Tax Officer was given power 'under any law', to prepare such a statement himself and 'compel' a party to 'sign' such a statement incriminating him, however slightly, 'against his will'. In my opinion, it is 'highly objectionable' for officers, like the Assistant Commercial Tax Officer, to 'prepare statements themselves' and request for signatures from the parties whom they want to charge-sheet later on relying on such statements as evidence. Even Magistrates authorised to record confessions have to observe many formalities and administer many warnings and have to 'record what the party states' and cannot prepare 'statements themselves and ask the parties to sign them'. So far as I know, no such power is given to any 'officer in this country', under our law, least of all to Assistant Commercial Tax Officers. It will be highly dangerous to the liberty of property of citizens if such statements prepared on the spot by Assistant Commercial Tax Officers and others have to be signed by them. The misunderstanding that day between the Assistant Commercial Tax Officer and the petitioner arose from the petitioner's refusing to sign that statement in spite of repeated (and 'illegal') requests by the Assistant Commercial Tax Officer. In my opinion, that was probably even one of the causes for

instituting this prosecution, let alone the encouragement of it by P. W. 2, the petitioner's enemy. This is the only prosecution under S. 15 (c) instituted by P. W. 1 according to him. Even that is not sustainable in the circumstances.

(6) Now I come to the third point, namely, the Assistant Commercial Tax Officer's requesting the petitioner to produce the cash and currency notes and stray papers he took out from the wooden box by the side of the cash box (and having nothing to do with the cash box) and put in his pocket in spite of the petitioner's assurance that they related to his 'private' affairs. Ex. P. 2 does not mention any such refusal. Nor would the refusal, even if true, be culpable. The learned Assistant Public Prosecutor concedes that under S. 14 (2) of the Madras General Sales Tax Act, the Assistant Commercial Tax Officer was only empowered to inspect 'the accounts and registers maintained by dealers like the petitioner in the ordinary course of their business', and 'also the goods' in their possession, and their offices and shops etc. 'at all reasonable times', and that they are 'not empowered to compel the production of private papers and cash' thus confirming P. W. 1's own admission in his deposition, "Money is not goods which can be inspecttd by me". This is not an accidental slip, in S. 14 (2), but a deliberate omission by the legilature, so that the privacy of the subject may not be infringed unnecessarily by the myrmidons of Government, under the pretence of examining registers and accounts and goods and shop premises. A man may have private papers which he may not like to show to all and sundry and especially to Government officials. Thus, letters written by his sweet-heart to him, or some private information of great use to him, like likely names of winning horses or about likely appreciation or depreciation of shares etc., or even defamatory allegations about him made by some one, which he keeps for reading at leisure and for consideration, for future action, need not be shown to Assistant Commercial Tax Officers under S. 14 (2); nor need promissory notes or private accounts (which may sometimes show disbursements to concubines or illegitimate children) or currency notes be shown to Assistant Commercial Tax Officers against the will of the person. Suppose, for instance, a man has got a thousand rupee currency note, which has been demonetised and for which he cannot account, he is not forced, under S. 14 (2), to show that currency note to the Assistant Commercial Tax Officer and bring himself to trouble. Nor, if he has got, let us take an extreme example, one or two counterfeit currency notes of five rupees or one rupee denominations is he bound to reveal them to the Assistant Commercial Tax Officer. Section 14 (2) must be construed 'strictly'. Even a businessman is not bound to reveal all his private secrets, much less incriminating secrets, to people who are not authorised under the law to pry into them. It is not alleged by the Assistant Commercial Tax Officer or his witnesses that the papers were proved to contain a bill about the alleged sale of this shawl or indeed any accounts relating to the petitioner's 'business'.

(7) I may even say also that under S. 14 (2) the petitioner was 'not bound' to allow any inspection of his goods or accounts or registers 'at that hour' and 'on that day' ('lunch interval' or a 'holiday') because S. 14 (2) contains a significant phrase "'at all' reasonable 'times'" which was misconstrued by the lower Court, relying on a contention of the petitioner, in Ex. P-2 that P.W. 1 told him that the Government had exempted that day from being a holiday. P.W. 1 swore, in his deposition, that the day was a holiday. He never alleged that Government had cancelled the holiday. So, the lower Court was wrong in relying on the note of the petitioner in Ex. P-2 'against him' when the note was not held to be true. Nor can the fact that the petitioner was actually found in his shop then empower P.W. 1 to rush there for 'his inspection'. No sales were going on admittedly then. Nor will the alleged eagerness of P.W. 1 to discover an omitted entry about a sale and suspected evasion of tax empower him to insist on inspection during 'lunch hour' or a 'holiday'. The absurdity becomes all the more ludicrous when P.W. 1 watched the scuffle between P.W. 2, the enemy of the petitioner, and the petitioner for fifteen minutes there, and even after such wakening of undesirable forces working underground, proceeded with his fussy business.

(8) For all these reasons, it is clear to me that the petitioner ought to have been acquitted of this offence; as there was no proof whatever that he had prevented or obstructed any inspection by the Assistant Commercial Tax Officer 'authorised under S. 14 (2),' as S. 15 (c) clearly stipulates. The allegation that the Assistant Commercial Tax Officer was asked peremptorily by the petitioner to clear out of the shop, with an implied threat of being forcibly pushed out, if he did not clear out by himself, is 'not proved', and is not found in Exs. P-3 to P-5; and even if it is taken to be true, will not amount to an offence in the circumstances of this case where the Assistant Commercial Tax Officer went to the petitioner's shop on a holiday and during the lunch interval, which he had no right to do under S. 14 (2), and also illegally insisted on the petitioner's showing him some private papers and cash and signing in an unauthorised statement prepared by himself. Of course, actual use of physical force is not necessary for obstruction or prevention under S. 14 (2). Words causing an apprehension of violence, or acts preventing or obstructing the inspection, like locking the premises to prevent inspection, or running away with the goods and registers, will do, in a proper case where there is a right of inspection under S. 14 (2).

(9) In the end therefore, the conviction and sentence of the petitioner are set aside, and the petitioner is acquitted. The fine, if paid, will be refunded.

C.R.K./K.S. Conviction and sentence set aside.

A. I. R. (39) 1952 MADRAS 74 (C. N. 36)

KRISHNASWAMI NAYUDU, J.

The Free Press Labour Union, representing the workers in the Printing and Despatching Departments of the Establishment of the Express Newspapers, Limited., Mount Road, Madras, by its President S. C. C. Anthony Pillai and others, Petitioners v. The State of Madras, represented by the Secretary to Government, Development Department, and another, Respondents.

Civil Misc. Petns. Nos. 6930, 6931, 6934 and 6935 of 1951 and Writ Petns. Nos. 41 and 42 of 1951, D/- 4-7-1951.

† *(a) Industrial Disputes Act (1947), S. 10 (1) — Scope — Section whether imposes a duty on*

Government to make a reference — Refusal to make reference under Section 12 (5) without recording reasons — Writ of mandamus can be issued — Constitution of India Art. 226.

Though the use of the word "may" in Section 10 (1), Industrial Disputes Act would lend support to the argument that a power is given to the Government, the other provisions of the Act, in particular Ss. 12 and 13, rule out the contention that the Government are under no legal obligation under any circumstances to make a reference if an industrial dispute exists. S. 10 (1), Industrial Disputes Act confers a general power on the Government to act 'suo motu', but it does not exclude the obligation of the Government to act under certain circumstances. If an industrial dispute exists and is brought to the notice of the Government by either of the parties or by any other persons interested, there is a duty under the Act on the Government not to ignore but to adopt the procedure laid down under the Act, primarily to explore possibilities of settlement through conciliation officers and Boards and then decide as to the course to be adopted as to whether a reference should be made to a Tribunal for adjudication and if the Government are satisfied that there is no case for reference, they should record the reasons for not making a reference and intimate to the parties about the same. (Para 11)

Taking the general scheme and the substantial object of the Act, the persons in whose interests and for whose benefits it was promulgated though the Government has been conferred this power, the circumstances are such that they create a duty in the Government, the duty consisting in either making a reference under certain circumstances, or declining to make a reference, in which case, they are obliged to give reasons for such refusal. The use of the word "may" and not "shall' in such matters is in no way conclusive. (Para 15)

The question of reference by Government may be in the discretion of the Government; but there is an imperative obligation on the Government to exercise that discretion and not to refuse to exercise it, and a refusal to refer could only be for cogent and justifiable reasons, reasons which would stand the scrutiny of any reasonable mind, reasons which are not fanciful, unjust or frivolous, or based on extraneous considerations. (Para 16)

Hence, where after the receipt of a report under Section 12 (4) of the conciliation Officer that a settlement of an industrial dispute cannot be arrived at, the Government refuses to make a reference under S. 10 (5) without recording any reasons, the action of the Government amounts to a declining of jurisdiction and, therefore, a writ of mandamus will be issued against the Government. (Para 18)

(b) *Industrial Disputes Act (1947), Section 10 (2) — Who can apply for reference.*

Under Sub-clause (2) of Section 10, Industrial Disputes Act it is only on the application of all the parties to the dispute that the Government is bound to refer the dispute. S. 10 (2) does not entitle anyone of the parties to an industrial dispute to compel the Government to make a reference. (Para 20)

(c) *Industrial Disputes Act (1947), Section 10 (3) — Relief under — When can be granted — Constitution of India Art. 226.*

Under Section 10 (3), Industrial Disputes Act, the continuance of any strike or lockout, has to be prohibited by the appropriate Government only when an industrial dispute has been referred to a Board or Tribunal. Hence, in an application for the issue of a writ of mandamus against the Government directing it to make a reference under S. 10 of the Act, no relief can be granted under S. 10 (3) to the petitioner. (Para 22)

M. K. Nambiar for N. Nagaraja Rao, for Petitioners; Advocate-General instructed by State Counsel, T. T. Srinivasan and A. N. Rangaswami, K. S. Varadachari and T. M. Krishnaswami Aiyar for King and Partridge, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) AIR (37) 1950 Pat 387: (51 Cri L Jour 1509 FB) (Pr 14)
(1880) 5 A C 214: (49 L J Q B 577) (Pr 12)
(1891) A C 173: (60 L J M C 73) (Pr 16)
(1853) 1 El & Bl 858: (118 E R 657) (Pr 13)
(1920) 1 K B 155: (89 L J K B 116) (Pr 15)
(1848-49) 14 Q B 459: (19 L J Q B 177) (Pr 12)

ORDER.: There are three petitions by the workers' union of Spencer and Company, Limited, Express Newspapers Limited and the Swadesamitran Limited against the State of Madras under Article 226 of the Constitution of India for issue of a Writ of Mandamus directing the State of Madras to refer the dispute between the workers and the managements to a Tribunal under S. 10 (1) (c) or 10 (2) of the Industrial Disputes Act and prohibit under S. 10 (3) the lock out of the employees effected by the management.

(2) The point for determination in all the writs is the same and it is not necessary to recount in detail the facts relating to each of these petitions. It is sufficient if some of the relevant facts are referred to with reference to one of these cases, since the outstanding features in each case are practically common. I would therefore deal with the petition which was argued first that is writ petition No. 41 of 1951, filed by the Spencer Workers' Union.

(3) Regarding certain grievances of the workers mainly relating to wages, dearness allowance and bonus, the Union convened a meeting of the workers on 22nd September 1950 and formulated their demands to the company. On the 27 September 1950 they addressed a letter to the Secretary of the Spencer and Company, Limited, formulating their demands and intimating to the company that the office-bearers of the Union were authorised to conduct negotiations with the company with a view to arrive at an amicable settlement, a copy of which communication was sent to the Labour Officer, Madras. The company refused to concede any of the demands. On 16th January 1951 the Labour Officer issued a notice under S. 10 (1) of the Industrial Disputes Act informing the Union that as an industrial dispute existed between the workers and the management of the company, the presence of the Union representative was necessary for effecting a speedy and amicable settlement of the same. The Labour Officer submitted his report on 25th January 1951 to the Secretary to Government development department, of the result of the Conciliation proceedings. The report discloses that agreement was reached on all the points except on three points, namely, wages, dearness allowance and leave facilities and that no decision was reached on the question of bonus. With reference to wages and scales of pay, the union offered to accept a minimum wage of Rs. 1-4-0 to all unskilled labourers, the maximum wages of the various categories being proportionately worked out by the management. But the management was not agreeable to concede this and the Labour Officer suggested whether the management would pay a minimum wage of Re. 1-0-0 per day, which has been accepted as the living wage of the day; but the management could not consider any more enhancement. Similarly there was no agreement as regards dearness allowance and bonus. On 22nd February 1951, the Union made an application to the Government that the disputes may be referred for adjudication by a Tribunal under S. 10 (2) of the Industrial Disputes

Act. On the same day, the Union informed the company of the resolutions of the Union inviting the company for making a reference jointly with the Union to the Government to which the company replied by their letter of the 6th March 1951 stating that they are unable to make a joint application in respect of the matters, which, according to them, have been settled during the conciliation proceedings, and that as regards the three outstanding items, they will consider making a joint reference after a discussion with the representatives of the Union. The Commissioner of Labour intimated the Union by his letter dated 10th April 1951 that the company have offered to increase the dearness allowance of the workers at Rs. 30 per month and of the Clerical Staff at Rs. 35 per month, and that he would advise the Union to be satisfied with the enhanced dearness allowances and to drop the other demands. Apparently, the Union did not agree and gave notice of strike on 9th May 1951. The company by its letter of the 6th June 1951 intimated that no increase can be granted in respect of the basic wages, dearness allowance and bonus and all workers who were absent without leave since 30th May 1951 were asked to show cause why an order of dismissal should not be passed against them. There is a further application by the Union to the Government dated 8th June 1951 asking for reference of the disputes to a tribunal under S. 10 (2) of the Act. On 11th June 1951 the President of the Labour Union wrote to the company that at a meeting of the members of the Union, the advice of the Honourable the Chief Minister that the workers should return to work was accepted, since they were assured that the Government will ensure that there will be no victimisation of the employees and that they will take immediate steps to resolve the disputes between the workers and the management of the company and that the workers who are on strike will return for work on 12th June 1951. But the company put up a notice regretting its inability to re-engage all persons for duty on 12th June 1951 and stating that the workers should confirm that the strike was withdrawn unconditionally and the company will then put up a notice as to the names of the persons who would be re-engaged. With reference to the alleged assurance given by the Hon'ble the Chief Minister to the Government of Madras it is stated on behalf of the Government that the allegation regarding the assurances given by the Hon'ble Chief Minister is not correct, but that Hon'ble Chief Minister only advised the workers to call off the strike and informed them that if they wanted it, the matter would be looked into by the Labour Commissioner, and that so far as the question of victimisation is concerned, the Hon'ble the Chief Minister assured them that he would see that justice is done. The present petition was filed on 12th June 1951 and an order directing notice was made on the same day. On 13th June 1951 the Government informed the President of the Union that, under S. 10 (2) of the Industrial Disputes Act, 1947, both the parties to the dispute will have to apply either jointly or separately for a reference of the dispute for adjudication and the Government cannot therefore take any action on the application made only by the Union.

(4) The facts relating to the other two petitions are similar, though the formulation of the demands was made later than September 1950. In regard to the Express Newspapers Limited, the company was informed by the Commissioner of Labour by his communication dated 2nd June 1951 that the Government have asked him to see that the management of the Indian Express takes steps to increase the basic wages to Rs. 26 per mensem from July 1951 and in particular to see that the wages of 3 or 4 occupations, which are lower than those in other presses, are brought to the general salary level; and time was given till 15th July 1951 to inform him of the steps the company took to implement the recommendations. As regards the Swadesamitran Limited, the Government appear to have sent a similar communication with reference to the increase in wages.

(5) The answer of the Government to these applications is mainly that the Government were not obliged to take any action on the application made by the petitioners' unions, since there has been no application jointly or separately from both the parties, and that the petitions are also otherwise not maintainable. In regard to the petition by the workers of the Express Newspapers Limited and the Swadesamitran Limited, the Government, in their counter-affidavits, stated that there was no case to refer the disputes to adjudication at that stage, referring to the state of affairs in April 1951, when the Commissioner of Labour was asked to inform these two managements that steps must be taken for increase of the wages.

(6) It is argued on behalf of the Government that there is no legal duty cast on them to refer an industrial dispute, if one exists or is apprehended under S. 10 (1), but it is a power given to the Government, which it is open to them to exercise or not to exercise and the exercise or non-exercise of the power cannot be questioned in any Court. S 10 (1) states that if any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing, refer the dispute to a Board for promoting settlement, or to a Court for inquiry, or to a Tribunal for adjudication; provided that where a dispute relates to a public utility service and a notice of strike under S. 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced.

(7) It was sought to be contended on behalf of the petitioners that the disputes in these cases relate to public utility services; but I am not satisfied that the services concerned in these establishments come within the scope of the definition of "public utility service" under the Act.

(8) The difference in the use of the words "may" in Clause (1) and "shall" in the proviso, is relied upon in support of the contention on behalf of the Government that whereas there is a duty cast upon the Government, if the dispute relates to a public utility services, to make a reference under S. 10 (1) unless they consider that the notice of strike has been frivolously or vexatiously given or that it would be inexpedient so to do, in cases where there is an apprehension of "industrial dispute" or where an industrial dispute exists, the Government are not obliged to take notice of every such dispute or apprehension of such disputes and bound to make a reference. It is therefore for consideration whether in all cases where the existence of an industrial dispute is brought to the notice of the Government it is open to the Govt. to keep silent and not to take any action as to whether they would refer the dispute or not. It therefore becomes necessary to consider the scope of the power or duty of the Government conferred under S. 10 (1), since the issue of a writ of mandamus would depend upon whether the Government under the Act are under an obligation to make a reference, when an industrial dispute exists, or whether it is only a power vested in the Government to refer or not at their will and pleasure.

(9) To arrive at a satisfactory conclusion as to the position of the Government in the matter of making references under the Act, it is necessary to

consider the scope and purpose of the Act. It will be seen that the Act was brought into existence, as the preamble makes it clear for the purpose of investigation and settlement of industrial disputes, and it cannot, therefore, be suggested that when an industrial dispute exists, no duty is cast upon the Government to investigate and effect a settlement of that dispute. The object of the Act, that is to investigate and settle disputes, is sought to be achieved by different means, by referring the dispute to a Board of Conciliation for promoting a settlement, by referring the matter relating to the dispute to a Court for inquiry, or placing the dispute before a tribunal for its adjudication. There are four authorities that are constituted under the Act, which are to be entrusted with the investigation and settlement of these disputes, they being conciliation officers, Boards of Conciliation, Courts of inquiry and tribunals. S. 12 (1) provides for the intervention of the conciliation officers, the conciliation officer here being the Commissioner of Labour. When any industrial dispute exists or is apprehended, the conciliation officer may hold conciliation proceedings in the prescribed manner. He has to investigate the dispute without delay and if a settlement is arrived at he has to send a report to the appropriate Government together with a memorandum of settlement signed by the parties to the dispute. Under S. 12 (4) if no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation send to the Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at. Under S. 12 (5) if, on a consideration of the report referred to in sub-section (4) where the conciliation officer has failed to effect a settlement, the Government is satisfied that there is a case for reference to a Board of Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor. A period of 14 days is also provided for submission of the report by the conciliation officer. S. 13 deals with references to a Board of Conciliation. Under that provision, if a dispute had been referred to a Board, it shall proceed with the investigation, and settlement just like a conciliation officer, and if no such settlement is arrived at, the Board also has to submit a report together with reasons on account of which a settlement could not be arrived at. It is provided under S. 13 (4) that, if on the receipt of such a report in respect of a dispute relating to public utility service, the Government does not make a reference to a tribunal under S. 10, it shall record and communicate to the parties concerned its reasons therefor.

(10) It will be seen from an examination of Ss. 12 and 13 that when it comes to the notice of the Government that an industrial dispute exists, after a certain stage, during which efforts at conciliation are provided and gone through, there is a point of time at which the Government have to act by exercising the power or authority vested in them under S. 10 (1) as to making a reference of the Industrial dispute. On the report of the conciliation officer of the failure of the conciliation proceedings, under S. 12 (5), the Government, if satisfied that there is a case for reference, have to make such reference. If they are not so satisfied, a duty is cast on the Government to record and communicate to the parties concerned their reasons for not making the reference. Similarly under S. 13 (4) with reference to a public utility service, on the receipt of a report from the Board of Conciliation that conciliation has failed, the Government have to record and communicate to the parties the reasons for not referring to adjudication by a tribunal under S. 10.

(11) Taking the scheme of the Act and the policy behind it, the object of the Act being to investigate and settle disputes, initially conciliation proceedings are tried either by the conciliation officer himself taking notice of an industrial dispute or on apprehension of it, or the Government referring the dispute to a Board of conciliation, and it is only after attempts at conciliation have proved abortive, that further steps as to the resolution of the differences have to be considered, such steps being referring to a Court for enquiry, or referring the dispute for adjudication by a tribunal. It is at that stage that Government should exercise the authority or power, by whatever term it may be called, which is vested in them under S. 10 (1). The very circumstance that the Government in case they do not make a reference should record and communicate their reasons, as provided for in Ss. 12 and 13, is inconsistent with any idea of absolute direction or power vested in the Government to either make a reference or not but on the other hand, implies an obligation to exercise the power. But the Government in exercising the power have a discretion to either refer or refuse to refer, when in the latter case reasons must be recorded and given. If the argument of the learned Advocate-General is to be accepted that the Government are the absolute arbiters as to whether an industrial dispute, if one exists, has to be referred or not, the Government would not be called upon to give any reasons for not making a reference, which the Government are bound to do under the circumstances stated in Ss. 12 and 13. I therefore consider that, though the use of the word "may" in S. 10 (1), would lend support to the argument on behalf of the Government, that a power is given to the Government, the other provisions of the Act, in particular Ss. 12 and 13, rule out the contention that the Government are under no legal obligation under any circumstances to make a reference if an industrial dispute exists. S. 10 (1) confers a general power on the Government to act 'suo motu', but it does not exclude the obligation of the Government to act under certain circumstances. If an industrial dispute exists and is brought to the notice of the Government by either of the parties or by any other persons interested, there is a duty under the Act on Government not to ignore but to adopt the procedure laid down under the Act, primarily to explore possibilities of settlement through conciliation officers and Boards and then decide as to the course to be adopted as to whether a reference should be made to a Tribunal for adjudication and if the Government are satisfied that there is no case for reference, they should record the reasons for not making a reference and intimate to the parties about the same.

(12) Reliance is placed on behalf of the respondents on the decision of the House of Lords in 'Julius v. Lord Bishop of Oxford', 1880-5-A C 214, and it is argued that under S. 10 (1) the power that is conferred is permissive and enabling and no legal duty is imposed on the Government to make a reference. This decision considered the 3rd section of the Church Discipline Act (3 and 4 Vict. Ch 86) which provided that in every case of any clerk in holy orders who may be charged with any offence against the Laws Ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit, of his

own mere motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report, and it was held that this section gave the bishop complete discretion to issue or decline to issue such commission. The words which were considered in that case were "it shall be lawful" and Earl Cairns, L. C., in considering those words observes as follows:

"The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

The cases bearing on the subject are referred to and in dealing with the decision in 'Rwg. v. Tithe Commissioners', (1848-49) 14 Q B 459, the opinion of the Court given by Coleridge, J., is extracted and it is as follows:

"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom; that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice".

It may therefore be that even though the words, as in this case "may" may be enabling or discretionary, under certain circumstances, might have a compulsory force.

(13) Lord Penzance in his judgment says as follows:

"The words 'it shall be lawful' are distinctly words of permission only — they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether regard being had to the person so enabled to the subject matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred they do, or do not, create a duty in the person on whom it is conferred, to exercise it".

Lord Penzance cites with approval the meaning to be attached to the words "it shall be lawful" given by Lord Chief Justice Jervis in 'Reg. v. York and North Midland Railway', (1853) 1 El. and Bl. 858 at p. 861,

"that such words as 'it shall be lawful' were to be understood as permissive only, unless some 'absurdity or injustice' would follow from giving them that, their natural meaning".

Lord Penzance, after referring the decisions on the subject, observes as follows at page 231:

"In all these instances the Courts decided that the power conferred was one which was intended by the legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty. In other words, the conclusion arrived at by the Courts in these cases was this — that regard being had to the subject-matter — to the position and character of the person empowered — to the general objects of the statute — and above all, to the position and rights of the person, or class of persons for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended."

Having regard to these principles, it has to be considered whether by the use of the word "may" in S. 10(1), the Government were given only an enabling and permissive power and not coupled with a duty to exercise it. The object of the Act is to resolve industrial disputes. It is intended for the benefit of the persons, who are parties to the dispute, either the workers or the management to have their grievances redressed and differences resolved in order that there may be smooth and successful working of the particular industry in which they are engaged with profit both to the employer and employees. The class of persons that are to be benefited by the statute are the workers and the management, and indirectly it may also be said that the public will be benefited by the smooth relations that should exist in any industry between labour and capital, which will tend to increase the economic prosperity of the country. In that way it may be said that the public will also be benefited by a proper, timely and effective settlement of an industrial dispute. It cannot therefore be contended that this power is conferred for the sole and exclusive benefit of the Government.

(14) Reliance was placed on the Full Bench decision of the Patna High Court in 'Bagaram v. State of Bihar', A I R (37) 1950 Pat 387, where with reference to a decision of the Government not to refer a dispute to a Board or Tribunal in respect of a public utility service as the Government considered it was inexpedient to do so, it was held that a writ of mandamus would not lie. Unlike in the present case, the conciliation officer having attempted at a settlement and failed, he intimated the failure to the Government and the Government informed the union that they had decided not to refer to a Board or Tribunal as they considered it inexpedient to do so. It was only necessary in that case to confine attention to the proviso to S. 10(1), where in respect of public utility companies, unless the Government consider it among others inexpedient to refer, they will be obliged to make a reference, and it was held that where the Government have been given a discretion and have exercised that discretion, it is not open to the Court to interfere.

(15) The result is taking the general scheme and the substantial object of the Act, the persons in whose interests and for whose benefits it was promulgated, though the Government has been conferred this power, the circumstances are such that they create a duty in the Government, the duty consisting in either making a reference under certain circumstances, or declining to make a reference, in which case, they are obliged to give reasons for such refusal. The use of the word "may" and not "shall" in such matters is in no way conclusive, as observed by McCardie J. in 'Rex. v. Marshland Smeeth and Fen District Commrs.', 1920-1 K.B. 155.

(16) The question of reference by Government may be in discretion of the Government; but there is an imperative obligation on the Government to exercise that discretion and not to refuse to exercise it, and a refusal to refer could only be for cogent and justifiable reasons, reasons which would stand the scrutiny of any reasonable mind, reasons which are not fanciful, unjust or frivolous, or based on extraneous considerations, and such discretion means, as pointed out by Lord Halsbury L. C. in 'Sharpe v. Wakefield', (1891) A C 173 at p. 179:

"When it is said that something is to be done within the discretion of the authorities that that something is to be done according to rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit

to which an honest man competent to the discharge of his office ought to confine himself".

(17) There is nothing in this imposition of the imperative obligation to exercise the discretion suggestive of any injustice or hardship or prejudice to the State, since they are not required to do anything except to refer to a Tribunal for its decision the industrial dispute and not called upon to decide it themselves in any particular manner. It is therefore not possible to concede to the arguments on behalf of the State and the respondents that what is conferred on the Government is a power and not even a discretion, and according to Mr. T. M. Krishnaswami Iyer, learned counsel for the company, a permissive power, not even a discretionary power and that in any view, no duty is cast on the State and the exercise or non-exercise of that power could not be the subject for directions by any judicial authority. In view of what I have already stated, I consider the contentions of the respondents to be untenable.

(18) In these cases, after the conciliation officer has made his report under S. 12(4) that a settlement could not be arrived at, the Government have not acted under Cl. (5) by making a reference to a Board or tribunal; nor have they recorded their reasons and communicated the same for not referring. It is therefore a case where the Government which are invested with the duty to either refer, or record and give reasons for not referring, have failed to discharge that duty. It cannot be accepted that the Labour Commissioner's intimation to the Express Newspapers Ltd. and the Swadesamitran Ltd. that they may consider the increase of wages would be a compliance with the statutory requirement of S. 12(5). There is inaction on the part of the Government after the conciliation officer has submitted his report, when there is a duty cast on them to act. Apart from the reasons already stated as to the duty of the Government generally under the provisions of the Act, in any event, on the facts and circumstances of these cases, there can be no doubt that a duty has arisen in the Government after the report of the conciliation officer, to proceed under S. 12(5) and they have failed to exercise their discretion. In such circumstances, the petitioners had no other course but to apply for issue of a writ, which they have now asked for. The Government have not acted and their action amounts to a declining of jurisdiction, in which case a writ of mandamus will issue. As the Government have not exercised that discretion and refused to refer, the question whether such an exercise of discretion was exercised bona fide and not arbitrarily, or illegally and with reference to extraneous considerations will not arise. It is suggested on behalf of the petitioners that the Government have not given any reasons as there could be no valid reasons for not referring and there is force in this contention. The existence of an industrial dispute has been admitted and the fact of conciliation having failed is accepted. The petitioners are entitled to a writ.

(19) In the view which I have taken of the position of the Government under the Act, it will not however be necessary to decide the other point raised by the petitioners that under S. 10 (2) of the Act, an application to the Government to refer the dispute to a tribunal would be sufficient, if made by one of the parties to the dispute and it need not be by both parties as is contended by the Government. But on the language of S. 10(1), (2), (2-A) it appears to me that the parties in S. 10(2) must refer to both or all parties and could not be any party, since the sub-section requires an application from the parties jointly or separately and also that the persons applying represent the majority of each party. The use of the words "jointly or separately" and "each" could only be appropriate if an application from all the parties was intended. This conclusion is further strengthened by S. 10(2 A) introduced by the Amending Act XII of 1949, which states that

"where a Tribunal has been constituted under this Act for the adjudication of disputes in any specified industry or industries and a dispute exists or is apprehended in any such industry, the employer or a majority of the workmen concerned may refer the dispute to that Tribunal."

If an industrial tribunal had been constituted then it will be open to either of the parties to apply and call upon the Government to refer the dispute to a Board, Court or tribunal. Under S. 10(2) the Government must have an application from all the parties to the dispute. It is only then the Government is bound to make a reference under S.10(2).

(20) Mr. Nambiar, learned counsel for the petitioners referred me to the proviso of S. 3 of Act VII of 1929 which is repealed by the Industrial Disputes Act (XIV of 1947) and which is as follows:

"Provided that, where both parties to the dispute apply, whether separately or conjointly, for a reference to a Court, or where both parties, apply, whether separately or conjointly, for a reference to a Board, and the authority having the power to appoint is satisfied that the persons applying represent the majority of each party, a Court or a Board, as the case may be, shall be appointed accordingly".

It was strenuously argued that where under the repealed enactment, the word "both" was there and was omitted in the repealing Act, it must be understood that the later enactment intended that the reference need not be by both. If that was the intention, it did not prevent the introduction of the words "any party" instead of "parties". The plausible explanation is that to an industrial dispute, there may be more than two parties and hence the word "both" was deleted. A perusal of the debates of the Assembly on the Industrial Disputes Bill will show that on an amendment moved for restricting the power of the Government to make a reference even under S. 10(1) (c) only on the joint application of the parties to an industrial dispute, it was pointed out that the method of application laid down in sub-clause (2) is joint or separate application and that the Government was not bound to refer to a Tribunal, if one party applies. That is accepted to be the correct position by the Hon'ble Minister in charge (vide page 565, Legislative Assembly Debates, Vols. 1 and 2, 1947). I have no doubt in holding that under sub-cl. (2), it is only on the application of all the parties to the dispute that the Government is bound to refer the dispute. I consider that S. 10(2) does not entitle anyone of the parties to an industrial dispute to compel the Government to make a reference.

(21) There will be an order directing the issue of a writ of mandamus against the State of Madras, the 1st respondent in those petitions, directing them to refer the disputes between the petitioners and the 2nd respondent for adjudication to an Industrial Tribunal.

(22) As regards the other prayer, the continuance of any strike or lockout, has to be prohibited by the appropriate Government only when an industrial dispute has been referred to a Board or Tribunal, and I therefore consider that the petitioners are not entitled to a relief under S. 10 (3) at this stage. There will be no order as to costs.

C.R.K./K.S. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 79 (C. N. 37)

RAJAMANNAR C. J. AND SOMASUNDARAM J.

A. Rajagopal Mudaliar, Appellant v. The Official Trustee, High Court, Madras, Respondent.

O. S. Appeal No. 111 of 1950, D/- 22-2-1951.

Guardians and Wards Act (1890), S. 33 — Property with strangers — Order for delivery of possession.

Where in an application by the Official trustee for directions regarding delivery of possession of certain immoveable properties the opposite party denied the title of the minor to the properties and pleaded that they were joint family properties which survived to him on the death of the minor's father, the Court has no power, under any section of the Guardians and Wards Act, to direct delivery of possession of properties even if the Court is prima facie satisfied with the title of the minor. Nor is there any provision for adjudication of competing claims to the property. (Para 1)

Anno: G. W. Act S. 33 N. 1.

C. R. Krishna Rao, for Appellant — A. Sahasranamam, for Respondent.

RAJAMANNAR, C. J.: The order of the learned Judge cannot be sustained and in fact no serious attempt was made by the learned counsel for the respondent to sustain it. By his order the learned Judge directed the present appellant, who was the contesting respondent before him, to deliver possession of certain items of immovable property to the Official Trustee, who filed an application for directions regarding delivery of possession of them as the properties of the minor. The appellant before us denied the title of the minor to the properties and pleaded that they were joint family properties which survived to him on the death of the minor's father. In these circumstances the Court has no power, under any section of the Guardians and Wards Act, to direct delivery of possession of properties which are not admitted to be the properties of the minor. There is no provision in the Guardians and Wards Act which enables the Court to make such an order for delivery of possession even if the Court is prima facie satisfied with the title of the minor. Nor is there any provision for adjudication of competing claims to the property. No authority has been cited to us in which S. 33 of the Guardians and Wards Act, on which the learned Judge relies has been construed to confer a power on the Court to direct delivery of possession of property in the possession of strangers, simply on a prima facie satisfaction of the title of the minor to such property. The appeal is allowed and the application of the Official Trustee will be dismissed. The appellant will get the costs of the appeal and the application from the estate of the minor. The Official Trustee will also be entitled to take his costs from out of the estate as he apparently filed the application on account of certain observations made by the learned Judge earlier in the proceedings.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 80 (C. N. 38)

CHANDRA REDDI J.

M. A. Mohamed Thambi Maricayar, Appellant v. M. O. Shaik Farid Maricayar and another, Respondents.

A. A. O. No. 531 of 1949, D/- 1-8-1951.

Lunacy Act (1912), Ss. 41, 42 and 64 — Exemption from personal appearance of gosha lunatic lady. — Civil P. C. (1908), S. 132 (1).

Under Ss. 41, 42 and 64, Lunacy Act read with S. 132 (1), Civil P. C., a Court cannot insist on the production of the alleged lunatic who is a gosha lady, in Court. The person responsible for the production of the alleged lunatic is entitled to request the Court to examine her in a place other than a public Court. If the Court refuses such a prayer and dismisses the application for appointment of guardian for non-production of the lunatic in Court the order will be set aside in revision. (Para 2)

Anno: Lunacy Act, S. 42 N. 1.

Mohammed Ismail, for Appellant — S. Ranganswami Iyengar, for Respondents.

JUDGMENT: The petitioner in O. P. No. 3 of 1949 on the file of the District Court, East Tanjore, is the appellant. He filed a petition under S. 71 of the Indian Lunacy Act and under S. 151, Civil P. C. for appointing him as the guardian of the person and manager of the property of one Jainambu Gani, his wife, who is alleged to be a lunatic. On this application the District Judge directed production of the alleged lunatic. Thereupon the petitioner applied under S. 151, Civil P. C. and Ss. 61 to 64 of the Lunacy Act to have the inquisition regarding the alleged lunatic conducted in any place except in Court or such other similar public places, as the alleged lunatic is a gosha lady not accustomed to attend Courts. The learned District Judge rejected this request as being an extraordinary one. However the appellant failed to produce the alleged lunatic in Court because the alleged lunatic is a gosha lady. Ultimately on 2nd April 1949 the District Judge dismissed the petition for appointment of a guardian on the ground that the alleged lunatic was not produced in Court. It is against this order that the present appeal has been filed.

(2) In support of the appeal it was contended that the appellant was entitled to request the Court to examine the alleged lunatic in any place except in public, and that the learned Judge in rejecting that request overlooked the provisions of S. 132, Civil P. C. and Ss. 41, 42, 61 and 64 of the Indian Lunacy Act. Under S. 132 (1), Civil P. C.

> "Women, who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court".

There is a similar provision in the Indian Lunacy Act. S. 42 of the Lunacy Act is in the following terms:

> "The attendance and examination of the alleged lunatic under the provisions of S. 41 shall, if the alleged lunatic be a woman who, according to the manners and customs of the country, ought not to be compelled to appear in public, be regulated by the law and practice for the examination of such persons in other civil cases."

S. 64 of the Act says that,

> "The provisions of Ss. 40, 41 and 42 shall regulate the proceedings of the District Court with regard to the matters to which they relate".

Reading the relevant provisions of law the only conclusion I can reach is that the Court cannot insist upon the production of an alleged lunatic in an open Court. It is now well settled that gosha ladies are exempt from personal appearance and are as a matter of right, entitled to have a commission issued for their examination. In my opinion the same principle applies to the case of production of a lunatic also and a Court cannot insist on the production of the alleged lunatic in Court. The person responsible for the production of the alleged lunatic is entitled to request the Court to examine her in a place other than the public Court. Hence the order of the learned District Judge rejecting the application of the appellant to examine the alleged lunatic in any place other than in open Court and the consequential order dismissing the original petition for appointment of a guardian are not correct and should be set aside.

(3) The petition is remanded to the trial Court for disposal on the merits. The District Judge will examine the alleged lunatic either in his chambers or in open Court after excluding the general public from it altogether. The costs of this appeal will abide the result of the main petition.

C.R.K./K.S. *Case remanded.*

✠ A. I. R. (39) 1952 MADRAS 81 (C. N. 39)

(FULL BENCH)

RAJAMANNAR, C. J., VISWANATHA SASTRI, AND PANCHAPAKESA AYYAR, JJ.

Saraswathi Ammal and another, Petitioners v. Rajagopal Ammal, Respondent.

Civil Misc. Petn. No. 7933 of 1949, D/- 5-1-1951.

✠ (a) *Civil P.C. (1908) Ss. 109 and 110— Appeal and cross-appeal preferred to High Court — Disposal of appeals by one decree by High Court — Application for leave to appeal to Supreme Court, when can be allowed.*

When several appeals are preferred in the High Court against the decree of the lower Court in the same suit by different parties, they should be heard together and there can be only one decree of the High Court as an appellate Court embodying the decisions in the several appeals, which decree will supersede the decree of the lower Court. Such a decree is the only one formal expression of an adjudication conclusively determining the rights of the parties with regard to the matter in controversy. The net result of the decision in the appeal and cross-appeal is to be taken as conclusive in the matter of an appeal to the Supreme Court in determining whether the requirements of Ss. 109 and 110 are satisfied. And if such a decree embodies the decision of the High Court on the only one subject-matter in dispute varying the decision of the lower Court in that respect and the subject-matter fulfils the condition with respect to its value then the petitioner is entitled to a certificate under Ss. 109 and 110. 26 Mad. 91; A.I.R. (33) 1946 Mad. 539 (FB), Rel. on. A.I.R. (19) 1932 All. 65 (FB), AIR (22) 1935 All 374 (FB), Expl.; AIR (17) 1930 Lah 554, AIR (24) 1937 Lah 916: Not Appr.; AIR (28) 1941 Mad 227 held overruled. (*Paras 6, 7, 16*)

Anno: C. P. C. S. 110 N. 14.

(b) *Civil P. C. (1908), Ss. 109 and 110 — Application for leave to appeal filed before coming into force of Constitution of India.*

An application for leave to appeal if filed before the coming into force of the Constitution is governed by Ss. 109 and 110 as they stood on the date of the application. A.I.R. (38) 1951 Mad. 251. Rel. on. (*Para 2*)

(c) *Civil P. C. (1908), O. 41 R. 35 — Rule whether prevents one decree being passed in appeal and cross appeal.*

O. XLIX R. 3 expressly declares that R. 35 of O. XLI shall not apply to any Chartered High Court in the exercise of its appellate jurisdiction. Further O. 41, R. 35 does not prevent one decree being made by the appellate Court following one common judgment disposing of an appeal and cross-appeal. (*Paras 5, 12*)

T. V. Muthukrishna Aiyar, P. N. Appuswami Aiyar, S. V. Gopalakrishna Aiyar and K. Vaitheeswaran, for Petitioners — S. Ramachandra Aiyar for Respondent.

Cases referred to:

('48) 1948-2 MLJ 25: (AIR (35) 1948 P C 97) (Pr 15)
('07) 29 All 730: (4 A L J 587) (Pr 6)
('18) 16 A L J 864: (A I R (5) 1918 All 245) (Pr 10)
('32) 54 All 146: (A I R (19) 1932 All 65 S B) (Pr 11)
('35) 57 All 873: (A I R (22) 1935 All 374 F B) (Pr 12)
('37) I L R (1937) All 105: (A I R (23) 1936 All 832) (Pr 12)
('30) 11 Lah 465: (A I R (17) 1930 Lah 554) (Pr 13)
('37) AIR (24) 1937 Lah 916: (176 I C 314) (Pr 13)
('03) 26 Mad 91 (FB) (Pr 6)
('06) 16 M L J 411 (Pr 6)
('19) 42 Mad 228: (AIR (6) 1919 Mad 275 (1)) (Pr 15)
('26) 51 M L J 295: (A I R (13) 1926 Mad 1024) (Prs 7, 10, 14)
('29) 52 Mad 521: (A I R (16) 1929 Mad 429) (Pr 7)
('32) 35 M L W 206: (A I R (19) 1932 Mad 46) (Pr 7)
('32) 35 M L W 444: (A I R (19) 1932 Mad 689) (Prs 6, 7)
('38) CMP No. 4066 of 1938 (Mad) (Pr 9)
('40) 1940-2 MLJ 645: (AIR (28) 1941 Mad 227) (Pr 14)
('47) I L R (1947) Mad 6: (A I R (33) 1946 Mad 539 (F B)) (Prs 7, 10, 11, 14)
('49) CMP No. 3990 of 1949 (Mad) (Pr 2)
('50) 1950-2 MLJ 400: (AIR (38) 1951 Mad 251) (Pr 2)
('30) 9 Pat 558: (A I R (16) 1929 Pat 561) (Pr 8)

ORDER: This application was originally filed for leave to appeal to the Federal Court against the decree & judgment in A.S. No. 625 of 1945 & A. S. 200 of 1946 on the file of this Court, & has now to be treated as an application for leave to appeal to the Supreme Court. These two appeals arose out of a suit O. S. 35 of 1944 filed in the Subordinate Judge's Court, Tirunelveli, in the following circumstances. One Kanakasabapathi Pillai died intestate on 24-8-1942 leaving behind him his wife Gomathi & two daughters Rajagopala Ammal & Saraswathi Ammal. After Kanakasabapathi's death his widow succeeded to all his properties, movable & immovable, including a flourishing bus transport business. On 4-11-1943 Gomathi purported to execute a sale deed of 32 buses, their accessories & a charcoal shed which formed part of the Bus business to K. Ramaswami Dass, the husband of Saraswathi Ammal. On the same day, she executed a deed of settlement under which she dedicated about 25 items of immovable property for the maintenance & performance of 'Guru pooja' every day at the 'Samadhi' of her husband & for conducting 'Annadhanam' on his death anniversary every year. Out of these items seventeen had been inherited by her from her husband, while eight of them were purchased by her. Gomathi died on 7-3-1944 & her two daughters became entitled to the properties left by Kanakasabapathi as well as Gomathi. Soon after her death Rajagopala Ammal filed the suit for partition of properties movable & immovable, described in several schedules to the plaint. We are concerned only with Schs. I, II & III-c. There were two defts. Her sister Saraswathi Ammal was the first & the second deft. was Saraswathi Ammal's husband. Sch. I comprised the buses, etc., which had been sold by Gomathi to deft. 2 in 1943 & the plff. attacked the sale as a sham & nominal transaction & brought about by fraud & undue influence practised upon Gomathi by the defts. In respect of Sch. II her case was that all the 25 items belonged to & formed part of Kanakasabapathi's estate & the endowment in favour of the 'Samadhi' & 'Annadanam' was totally illegal & invalid. Five items described in Sch. III-c (items 1 to 5) were claimed by her though the sale deeds in respect of these properties stood in the name of her sister, deft. 1 on the ground that they were purchased with the moneys belonging to the estate of her deceased father. The suit was tried by the learned Subordinate Judge of Tirunelveli who passed a preliminary decree on 5-11-1945. He held that the sale of Sch. I properties to deft. 2 was sham, nominal & brought about by fraud & undue influence & therefore the pro-

perties were partible. With reference to Sch. II he held that all the 25 items covered by the settlement deed formed part of the estate of Kanakasabapathi. He held that the dedication to the 'Samadhi' was unlawful, but the dedication for 'Annadanam' was valid. He therefore confirmed the settlement deed in respect of items 1 to 17 & item 25 & declared that items 18 to 24 were available for partition. With regard to Sch. III-c, the learned Judge held that the consideration for the sales proceeded from the estate of Kanakasabapathi & hence they were partible. The defts. 1 & 2 filed an appeal to the High Court, A. S. No. 625 of 1945. The plff. also filed an appeal A. S. No. 200 of 1946. Both the appeals were heard together by a Division Bench of this Court & disposed of by a common judgment on 12-4-1949. This Court confirmed the finding of the learned Judge as regards Sch. I properties. So far as the properties in Sch. II were concerned, this Court held that the dedication completely failed in respect of all the items covered by the settlement deed & therefore held that all the 25 items of Sch. II were partible. This Court agreed with the lower Court as regards Sch. III-c properties. In pursuance of this judgment a decree was made, the material part of which runs thus:

"1. That for the first para of the lower Court's decree declaring the properties available for partition & directing division of the properties including the properties in Sch. I & the income from the bus concern, & for Cls. 1 to 3 of the decretal portion of the lower Court's decree regarding moneys payable to the plff. & deft. 1, the following clauses be & hereby are substituted, namely:

"This Court doth order & declare that the properties available for partition are those mentioned in plaint I Sch. all the properties set out in plaint Sch. II & items 1 to 5 in plaint Sch. III-c & this Court doth order & decree that the aforesaid properties except the properties in plaint I Sch. be divided in two equal shares & one such share be allotted to the plff. & the other allotted to deft. 1 & that as regards the properties in plaint I Sch., if, before the final decree is passed, the plff. & deft. 1 come to an agreement which would enable the bus service to be operated as a going concern for the benefit of both of them, if otherwise lawful, be given effect to, but that otherwise the business be disposed of in accordance with the provisions of the Partition Act & the plff. be given half share of its value & deft. 1 be given the other half share.

II. That the decree of the lower Court in other respects, that is, Cls. 4 to 10 of the decretal portion do stand & be & hereby is confirmed & these appeals to that extent be & hereby are dismissed." It is against this decree that the petitioners in the application desire to file an appeal to the Supreme Court. They confined their appeal to the properties in Sch. II & items 1 to 5 of Sch. III-c.

(2) As the appeals in this Court were disposed of & the application for leave to appeal was filed before the coming into force of the Constitution, the provisions of Ss. 109 & 110, Civ. P. C., as they stood on the date of the application would apply to this case; vide 'Ramaswami Chettiar v. Ramanatha Chettiar, 1950-2-MLJ 400 & 'Palani Goundan v. Rama Goundan, CMP 3990 of 1949.

(3) 'Prima facie' it appears to us that all the conditions laid down in the two sections are satisfied & the petitioners are entitled to a certificate that the case fulfils the requirements of these sections. The appeal proposed to be filed is from a decree passed in appeal by a High Court. The amount or value of the subject-matter of the suit in the Court of the first instance is admittedly over Rs. 10,000. The amount or value of the subject-matter in dispute on appeal to the Supreme Court, that is to say, the value of the properties in Sch. II & items 1 to 5 of Sch. III-c, even taking a half share therein as the subject-matter in dispute is over Rs. 10,000. The decree appealed from i.e., the decree of this Court does not affirm the decision of the Court immediately below because it has varied the decision of the Court below as regards the properties divisible between the plff. & deft. 1. So far as Sch. II properties are concerned the appeal also involves a substantial question of law, namely, whether a dedication for the performance of 'guru pooja' at a 'Samadhi' & for conduct of 'Annadanam' on the death anniversary of a person is illegal & invalid.

(4) The application is, however, opposed. The contention of Mr. S. Ramachandra Aiyar is that one single appeal is not maintainable in this case as there were two appeals to this Court, that if two applications are made for leave to appeal & considered separately, the decree in A.S. No. 625 of 1945 the appeal preferred by the petitioner, which was dismissed, affirmed the decision of the Court below & there was no substantial question of law, whereas the value of the items covered by A. S. No. 200 of 1946 is far below Rs. 10,000 & therefore the petitioners would not be entitled to leave to appeal against either of the decrees in the two appeals. In support of his contention that there should be two applications for leave, Mr. Ramachandra Aiyar relied on certain statutory provisions, namely, Ss. 109, 110, O. XLI, R. 35 & O. XLV R. 2 of the Civ. P. C., Art. 133 of the Constitution & Rr. 1, 6 & 7 of O. XII of the Supreme Court Rules.

(5) Or. XLV, R. 2 of the Code has no bearing whatever on the question in issue; nor have the rules of the Supreme Court mentioned above, & this was practically conceded by learned counsel. In Art. 133 of the Constitution, an attempt was made to rely on the words "in a civil proceeding". These words, however, have no special significance & are used in contradistinction to the words 'in a criminal proceeding" in the next Art. 134. The argument that each appeal to this Court is a separate civil proceeding & therefore an appeal would lie against the decree in each one of the several appeals though they may all be from the same decree in a suit appears to us to be far fetched & unsound. O. XLI, R. 35 provides that the decree of the appellate court shall bear date of the day on which the judgment was pronounced & shall contain the number of the appeal, the names & descriptions of the appellant & respondent, their addresses for service & a clear specification of the relief granted or other adjudication made & other particulars. In the first place O. XLIX R. 3 expressly declares that R. 35 of O. XLI shall not apply to any chartered High Court in the exercise of its appellate jurisdiction. Further, there is nothing in this provision which throws any light on the question whether two applications for leave to file two appeals to the Supreme Court are necessary against the same decree of a subordinate court when two appeals are preferred to the High Court by the two opposing parties & those appeals are disposed of together by a common judgment.

(6) On principle & on authority we are of opinion that when several appeals are preferred against the decree in the same suit by different parties, they should be heard together & there can be only one decree of this court as an appellate court embodying the decisions in the several

appeals, which decree would supersede the decree of the trial court. To take a simple case, if A sues to recover Rs. 10,000 from B but obtains a decree only for Rs. 4,000 & his claim is dismissed as regards the remainder, & both the plff. & the deft. file appeals, in so far as each is aggrieved by the decree, & the appellate court, be it this court or a court below, accepts one of the appeals & dismisses the other appeal, with the result that the suit is decreed or dismissed in its entirety then obviously both principle & common sense require that there should be one decree drafted as the decree of the appellate court. In an early case in 'Krishnamachariar v. Mangammal', 26 Mad 91 Bhashyam Ayyangar J. observed:

"When an appeal is preferred from a decree of a court of first instance, the suit is continued in the court of appeal & re-heard either in whole or in part, according as the whole suit is litigated again in the court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the court of first instance. The mere fact that a matter is litigated both in the court of first instance & again though only in part, in the court of appeal, cannot convert or split the suit into two & there can be only one final decree in that suit, viz., the decree of the court of appeal.

In my opinion, when there are different appeals from one & the same suit, they should all be disposed of together which, as far as I know, is the practice— & only one decree passed in appeal." It is well established that for purposes of appeal it is such final decree of the appellate court from the date of which time would run for filing application for execution though the appeal may be only from a part of the decree. This rule has been applied to appeals preferred to the lower appellate court. In 'Sanyasi Lingam v. 'Midugonda Gavaramma' 16 M L J 411, Boddam & Sankaran Nair, JJ., held that where from a decree in a suit two appeals were preferred to the lower appellate court but only one decree was passed by it it was sufficient if one second appeal was preferred to this court. The learned Judges held that the Dist. J. very properly heard the two appeals together & passed one judgment & one decree upon both the appeals Referring to the single second appeal filed in this court, they say:

"Here there is only one appeal entered, & we think that the course adopted is right & that there was no necessity to enter two appeals & even if two appeals had been entered the proper course would have been to hear them together & to pass one decree".

This ruling was followed by Jackson & Ananthakrishna Aiyar JJ. in 'Appa v. Kachai Bayyan Kutti', 35 M L W 444, where two appeals were preferred in the lower appellate court by two sets of defts. against a decree in favour of the plff. in one & the same suit & the result of the appeals was that the suit was dismissed by the lower appellate court. It was held that the plffs. need not file two second appeals against the decree of the lower appellate court dismissing the suit & only one second appeal preferred against that decree was maintainable. In 'Damodar Das v. Sheoram Das', 29 All. 730 there was a suit for adjustment of accounts between the plff. & the defts. Against the decree made by the court of first instance, both parties appealed. The lower appellate court disposed of both the appeals by one judgment & found in favour of the defts. for a particular sum. Two decrees appear to have been drawn in the two appeals, though the decrees were 'mutatis mutandis' exactly similar. The plff. appealed from one only of the two decrees. It was objected 'in limine' that the appeal was barred by the principle of 'res judicata' as there was no appeal as against the other decree. The objection was overruled because "There was in fact but one decree settling the accounts between the parties", though no doubt the decree was written out in duplicate in both the appeals to the lower appellate court. We are of opinion that only one decree properly should have been drawn as it was done in this case embodying the judgment in the two appeals which were heard together. The question whether the settlement deed was valid or not was as much a question in the plff.'s appeal as in the deft.'s appeal & it was as a result of the decision of this court on this question that the plff.'s appeal succeeded & the deft.'s appeal failed as regards Sch. II properties. The decree of this Court was the only one formal expression of an adjudication conclusively determining the rights of the parties with regard to the matter in controversy (vide definition of 'decree' in S. 2(2) of the Code).

(7) The same principle, we think, underlies the decisions of this court to which we shall presently refer in which the net result of the decision in the main appeal & the memo. of cross-objections therein was taken to be conclusive in the matter of an appeal to the Privy Council in determining whether the requirements of Ss. 109 & 110 of the Code were satisfied. In 'Sundara Mudaliar v. Ratnavelu Mudalier', 52 Mad 521 in a suit for general account against the trustees which charged them also with specific items of malversation, the trial court decreed only some of them. There was an appeal by the trustees in respect of the items allowed against them, while the plffs. filed a memorandum of cross-objections relating to the items disallowed. This court heard the appeal & the memo of cross-objections together & dismissed the suit 'in toto'. The plffs. thereupon filed an application under Ss. 109 & 110 praying for the grant of a certificate to enable them to appeal to the Privy Council in respect of the whole of the subject-matter of the original suit. The application was opposed on the ground that the appeal & the memorandum of objections must be treated as separate appeals & that so far as the decree in respect of the memo. of objections was concerned, no appeal would lie to the Privy Council as the judgment of the lower Court was affirmed & that so far as the decree in the appeal itself was concerned, the value of the subject-matter was less than Rs. 10,000, & therefore no appeal would lie. The contention of the applicants was that the appeal & the memo. of objections must be considered to constitute one appeal & therefore the total value of the subject-matter was over Rs. 10,000, & the decree of this Court was a reversing decree. The learned Judges, Phillips & Odgers, JJ., repelled the contention of the respondents. According to them the question that had to be decided was whether the decree of this Court in the appeal & the memo. of objections really consisted of two separate decrees in respect of separate subject-matters or whether it was really one decree dealing with one subject-matter only. In their view in the case before them it was not possible to split the decree into two parts & hold that one part was an affirming decree & the other part a reversing decree. The petitioners in the circumstances had a right to appeal. The learned Judges distinguished their decision in an earlier case 'Ramanathan Chetti v. Subramanian Chetti', 51 M L J 295, on the ground that in that

case the memo. of cross-objections related to a matter entirely distinct from the subject-matter of the appeal. In 'Perichiappa Chettiar v. Nachiappa', 35 M.L.W. 206, the suit was for account by a principal against as agent. The plff. valued the claim at Rs. 40,000. The trial Court passed a decree in favour of the plff. for Rs. 5,682. Against this the deft. appealed to the High Court & the plff. preferred a memo. of cross-objections claiming a decree for a further amount of Rs. 20,000. The High Court allowed the deft's. appeal in part & reduced the amount decreed by the trial court by about Rs. 4,000, allowed the cross-objections preferred by the plff. to a small extent of Rs. 150 & dismissed it in respect of the remainder. The plff. applied for leave to appeal to the Privy Council & it was held that he was entitled to a certificate as a mater of right. The reasoning of the learned Judges was this. A decree for the payment of a certain amount which is the result of taking an account is one decree & not a series of decrees merely because it is the result of decisions in respect of a number of items. If the High Court's decree in such a case does not entirely affirm the decision of the Court immediately below it, then it is not an affirming decree within the meaning of S. 110, Civ. P. C. The learned Judges distinguished the case before them from a case where a decree may be really a composite decree or a series of decrees dealing with what should strictly be the subject-matter of separate suits, e.g., a decree dealing with alienations in favour of different defts. which by long established practice are allowed to be made the subject-matter of one suit. In such cases it may be proper to separate each decree of the series for the purpose of the appeal to His Majesty in Council. The learned Judges dealt with the memorandum of cross-objections as if it was really a cross-appeal. The apparent conflict between the decision in 'Ramanathan Chetti v. Subramanian Chetti' 51 M L J 295, and the two decisions mentioned above was resolved by the Full Bench in 'Gangadhara v. Subramania, I.L.R. 1947 Mad. 6. One 'S' filed a suit against 'G' & others for a declaration that eleven items of property described in the schedules to the plaint belonged to the estate of a certain person & that the deed of settlement executed by the mother of that person in respect of those properties was void. The suit was filed by 'S' as the reversioner of the original owner. The trial Court gave him a declaration in respect of six of the eleven items of property, but dismissed the rest of his claim. 'G' & others appealed to the High Court in respect of the six items while 'S' filed a memo. of cross-objections in which he prayed for a declaration in respect of four out of the remaining five items. The appeal was dismissed & the memo. of cross-objections was allowed by this Court. 'G' & others sought a certificate for an appeal to His Majesty in Council. The application was opposed on the ground that there were concurrent findings of fact so far as the six items which were concerned in the appeal & the value of the four items concerned in the memo. of objections was below Rs. 10,000. The Full Bench held that 'G' & others were entitled to the certificate, because the subject-matter of the appeal to the Privy Council comprised ten items of property & the High Court's decree had varied the decree of the trial Court in respect of four of the items. The High Court's decree being one of variation & not of affirmance & as the value of the ten items exceeded Rs. 10,000, the petitioners were entitled to leave as of right. The learned Judges in effect overruled the decision in 'Ramanathan Chettiar v. Subramania Chetti, 51 M.L.J. 295. After pointing out that the judgment in that case is in conflict with the judgment of the same learned Judges in 'Sundara Mudaliar v. Ratnavelu Mudaliar', 52 Mad. 521, they go on to say:

"In the second place, we consider that they erred in separating the appeal from the memo. of objections & treating the orders of this Court thereon as embodying two separate decrees. Only one decree was drawn up & it certainly varied the decree of the trial Court. In these circumstances the appellant was entitled to a certificate granting leave to appeal & we must hold that case was wrongly decided."

We are clearly of opinion that the reasoning of the learned Judges of the Full Bench would equally apply to a case where instead of a memo. of cross-objections there had been a cross-appeal. In fact neither the learned Judges who decided 'Ramanathan Chettiar v. Subramania Chetti 51 M.L.J. 295, in the way they did, nor the same Judges in 'Sundara Mudaliar v. Ratnavelu Mudaliar, 52 Mad. 521, nor the Judges in Appa v. Kachai Bayyan Kutti, 35 MLW 444 and 'Perichiappa Chettiar v. Nachiappa' 35 MLW 206, and the Judges who constituted the Full Bench appear to make any distinction between a memo. of cross-objections & a cross-appeal.

(8) In 'Jamuna Prasad v. Jagarnath Prasad' 9 Pat. 558 there were cross-appeals. The plffs. obtained a mortgage decree in the Court of first instance but the claim to interest 'pendente lite' was disallowed. The defts. appealed to the High Court & the plffs. preferred a cross-appeal in respect of the interest. The deft.'s. appeal was dismissed & the plff.s' cross-appeal was allowed. There was only one decree of the High Court in the following terms:

"It is ordered & decreed that this appeal be & the same hereby is dismissed with costs & the cross-appeal be allowed, the decree of the Court below be modified to this extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace."

The defts. applied for leave to appeal to the Privy Council. The value of the subject-matter of the suit & the appeal which related to the entire claim was above Rs. 10,000. It was held by Jwala Prasad & Rowland, JJ., that the decree of the High Court was not one affirming the decision of the Court below & they refused to accept the contention of the respondents' counsel that inasmuch as the defts'. appeal was dismissed & the decree of the Court below was affirmed so far as their appeal was concerned, the decree passed by the High Court was a decree of affirmance. They treated the decree as a whole & held that the decree was not a decree of affirmance.

(9) Mr. Muthukrishna Aiyar drew our attention to an extract from the judicial index of 1938 at page 135 which gives a summary of a ruling of Leach, C.J., & Krishnaswami Aiyangar, J., in C. M. P. No. 4066 of 1938. A suit for property worth Rs. 10,000 was decreed in part & there were appeals by both the plff. & the deft. The plff.'s appeal was dismissed & the deft's. appeal was allowed by a common judgment. There was an application by the plff. for leave to appeal to the Privy Council against the dismissal of his suit by the High Court. The learned Judges held that as a result of the common judgment of the High Court, the plff's. suit for property of the value of Rs. 10,000 was dismissed & leave to appeal should be granted.

(10) All these decisions are in favour of the petitioners. Mr. S. Ramachandra Aiyar for the

respondent relied, however, on certain decisions of this & other Courts in support of his contention that the petitioners were not entitled as of right to the grant of a certificate that the case fulfils the requirements of S. 110 of the Code. The earliest of such decisions is 'Chiranjilal v. Behari Lal', 16 ALJ 864. A suit was decided partly in favour of the plff. & partly against him. Both plff. & defts. filed separate appeals. The High Court set aside the decree of the Court of first instance & dismissed the plff's. suit. The plff. filed an application for leave to appeal to His Majesty in Council against the decree in the deft's. appeal which was allowed & that application was granted. He filed a second application for leave to appeal against the decree in his appeal which had been dismissed. The learned Judges (Richards & Tudball, JJ.) rejected the application. The judgment is short & proceeded on the simple fact that inasmuch as the decree which it was sought to appeal against confirmed the decision of the Court immediately below, a certificate could not be granted unless the appeal involved some substantial question of law which was absent. In the first place we must remark that the question which is now before us was not raised before the learned Judges. Two separate decrees appear to have been drawn up in the two appeals though they both arose out of the same suit. There was the further complication that the plff. filed two separate applications one of which had already been granted. It was not argued before them that there was only one decree of the High Court as the decree of the appellate court, & that decree was not an affirming one. In our opinion, this decision cannot be taken as an authority that when there are two appeals by two parties in the same suit & relating to the same matter in controversy, two decrees should follow & there should be two applications for leave to appeal to a superior tribunal. It may be mentioned that the decision in 'Ramanathan Chetti v. Subramania Chetti' 51 M.L.J. 295, followed this decision applied it to the case of an appeal & a memo. of objections. The learned Judges of our Court were apparently of the view that it made no difference in principle whether it was an appeal & a cross-appeal or it was an appeal with a memo. of objections. The decision in 'Ramanathan Chetti v. Subramania Chetti', 51 M.L.J. 295, is certainly not now law after the decision of the Full Bench in 'Gangadhara v. Subramania',ILR (1947) Mad 6.

(11) The next decision relied on by Mr. Ramachandra Aiyar is that in 'Nathulal v. Raghubir Singh', 54 All. 146. That decision itself, a decision of a Full Bench, takes the same view as the Full Bench of our Court in 'Gangadhara v. Subramania', I.L.R. (1947) Mad. 6, as regards an appeal & a memo. of cross-objections. As in the result there was only one decree disposing of both by which the decree of the first Court had been varied, the unsuccessful party had a right of appeal to His Majesty in Council against the decree of the First Court which had not been affirmed. But counsel relies upon certain observations which Sulaiman, A.C.J., made during the course of his judgment. He was inclined to think that separate appeals, that is to say, cross-appeals might stand on a different footing, because the appeals are separately numbered and ordinarily separate decrees are passed & prepared in them. But it was not necessary for him to express any definite opinion on this question. Mukerji, J., also considered it unnecessary to express any opinion in the case where there are two independent appeals & consequently there are two decrees in appeal. The other learned Judge, Boys, J. was obviously inclined to take the view that it should not make a difference in the case of cross-appeals. He said:

".....I desire to point out that there is, in my view, a glaring anomaly in the law as it at present stands. There having been appeal with a cross-objection, we have decided the law in one way. If, in this very case, instead of an appeal with a cross-objection there had been two so-called cross appeals, it would, as the decisions at present stand, have had to be decided in exactly the opposite way. I cannot, therefore, refrain from expressing the hope that the question may very shortly be raised in reference to two so-called cross-appeals & be further considered by a Full Bench."

(12) In 'Benares Bank Ltd. v. Rajnath Kunzru', 57 All. 873, the question of cross-appeals did arise. A suit for money claimed in respect of two distinct items was decreed in part, namely, fully as regards the first item & partially as regards the second. Both the parties filed cross-appeals in the High Court. They were heard together & disposed of by one judgment, but two separate decrees were prepared in the two appeals, the deft's. appeal being allowed & the plff's. appeal being dismissed. There were two separate applications & the application which came up before the Full Bench was the application in the appeal of the plff. which had been dismissed. There was no dispute as to valuation the requirement as to which was satisfied, but it was conceded that no substantial question of law arose. It was held that the plff. was not entitled to appeal as of right. The 'ratio decidendi' is contained in the following passage in the judgment of Sulaiman, C.J., at page 877:

"The case of two cross-appeals is not exactly identical with an appeal & a cross-objection. In the case of an appeal & a cross-objection there is only one judgment delivered & only one decree is prepared by the Court which embodies the adjudication in both the appeal & the cross-objection. On the other hand, under O. XLI, R. 35 the decree of the appellate court has to contain the number of the appeal, the names & descriptions of the appellant & the respondent & a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court two decrees have to be prepared giving all these particulars."

Niamatullah J., rested his conclusion on the fact that one document described as a decree may contain several adjudications on several distinct matters in controversy & may amount to several decrees. He found that there were two such different controversies in the case before the Full Bench & as regards one of them the decree of the High Court had affirmed the decision of the Court below. We are not concerned with the actual conclusion arrived at by the learned Judges. Possibly it was right on the facts of the case. But we must respectfully dissent from the observations of Sulaiman, C.J., that O. 41, R. 35 prevents one decree being made by the appellate court following one common judgment disposing of two appeals. As we have pointed out earlier in this judgment, even if there are two cross-appeals, there should only be one decree of this Court which would supersede the decree of the Court below. Even assuming that this decision is correct, it would not help the respondent, because it was conceded by her counsel that both the appeals in so far as they related to the items covered by the settlement deed involve the same matter in controversy. Equally the respondent will derive little assistance from the decision in

'Mukundilal v. Hashmatun-nissa', I.L.R. (1937) All. 105. A suit was brought for recovery of possession of property on the ground that the plff. was the next reversioner of the last male owner. The defts. were transferees from a person who was claiming to have been the adopted son of the deceased. The trial court held that the adoption was not proved & decreed the claim. Two sets of defts. (transferees) filed separate appeals to the High Court which were heard together. The High Court held that the adoption had been proved & dismissed the entire suit. The plff. filed two applications for leave to appeal to His Majesty in Council. In one of the appeals the valuation was above Rs. 10,000, but in the other it was less. Objection was taken that no leave could be granted in the latter case. But the learned Judges thought that it was a fit case for the grant of a certificate under S. 109 (c) of the Code. We agree that leave should have been granted, but with respect certainly not under S. 109 (c) which has never been considered to apply to such circumstances. Leave should have been granted really because though there were two separate appeals, in essence there was only one decree of the High Court, a decree dismissing the suit in its entirety.

(13) We think that 'Asaram v. Kishen Chand', 11 Lah. 465, on which Mr. Ramachandra Aiyar relied was wrongly decided, as also the case in 'Banarsidas & Sons v. Delhi Iron Syndicate.' AIR (24) 1937 Lah 916. In these two cases though there were cross-appeals, not only were they heard together but a composite decree was prepared in both the appeals & rightly. Nevertheless the learned Judges take the view that there should be a splitting up of the decree of the appellate court because there were two appeals.

(14) A decision of this Court on which strong reliance was placed by Mr. Ramachandra Aiyar for the respondent was that in 'Chokkalingam Chetti v. Official Assignee, Madras', 1940-2-MLJ 645. In that case one 'C' filed an application in insolvency claiming a sum from the Official Assignee & also claiming priority therefor. The Court upheld his claim but denied priority. Thereupon both the Official Assignee & the claimant filed two appeals, the claimant in so far as it disallowed his claim to priority & the Official Assignee in so far as it allowed 'C' to prove in the insolvency. Both the appeals were in the main dismissed, but in the appeal by the Official Assignee a modification was made as to interest. The claimant applied for leave to appeal to the Privy Council treating the decree as a varying decree. It was held that so far as the claimant was concerned, the decree was one of affirmance. It was contended for the petitioner in that case that there was one decree issued & his claim was one composite claim, but the learned Judges were not inclined to agree with the contention. They thought that "though one decree was issued in this case, it is in essence a document which embodies two decrees." In refusing leave the learned Judges were largely influenced by the ruling in 'Ramanathan Chetti v. Subramania Chetti', 51 MLJ 295. As 'Ramanathan Chetti v. Subramania Chetti', 51 MLJ 295 has been held by the Full Bench in 'Gangadhara v. Subramania, I.L.R. (1947) Mad. 6 to have been wrongly decided, it must follow that the basis of the decision in 'Chokkalingam Chetti v. Official Assignee, Madras', 1940-2-MLJ 645, also goes.

(15) It must be mentioned that we are not concerned in this case with several reliefs based on different causes of action being clubbed together following an established rule of practice such as that dealt with in 'Vaithialinga Mudaliar v. Somasundaram Chettiar'. 42 Mad. 228. Even when there are several defts. each one of whom is interested in items which may not be of the required value, it will be sometimes permissible to take the aggregate value of all the items in dispute, for which position we have the authority of the Judicial Committee in 'Pethu Reddiar v. Rajambu Ammal', (1948) 2 MLJ 25.

(16) As we have said before, so far as items covered by the settlement deed are concerned, there is only one subject-matter in dispute & in respect of that the decree of this Court certainly did not affirm the decision of the Court below. The value of the items covered by the settlement deed admittedly exceeds Rs. 10,000 even if a half share is taken. The petitioners will therefore be entitled to a certificate that the case fulfils the requirements of Ss. 109 & 110, Civ. P. C.

(17) Mr. T. V. Muthukrishna Aiyar, learned counsel for the petitioners has represented to us that the appeal would be confined to the items in Sch. II.

C.R.K./V.S.B. *Application allowed.*

A. I. R. (39) 1952 MADRAS 86 (C. N. 40)

FULL BENCH

RAJAMANNAR C. J., VISWANATHA SASTRI AND PANCHAPAKESA AYYAR JJ.

Paruchuru Thirumala Satyanarayanacharyulu and another, Petitioners v. Vannava Ramalingam and others, Respondents.

Civil Revn. Petn. No. 1630 of 1947 D/- 8-1-1951.

† *Civil P. C. (1908), O. 7, R. 11. Ss. 2 (2), 115 — Court-fees Act (1870), S. 12—Order rejecting plaint for non-payment of deficit court-fee — Proper remedy against.*

Where an order directing payment of additional court-fee is not complied with and it is followed by an order rejecting the plaint, a revision petition is not maintainable against the latter. The proper remedy is only by way of an appeal against the order rejecting plaint which is a decree under S. 2(2) and is appealable as such. Once an appealable order in the form of an order rejecting the plaint is passed, a revision petition cannot also be filed against the earlier order demanding additional court-fee. Such a petition is against the well-established principles of procedural law. A I R (31) 1944 Mad 315 (FB) and obiter remarks in AIR (29) 1942 Mad. 585 Relied on. (Para 2)

Anno: C. P. C. S. 2(2) N. 13, S. 115 N. 8, O. 7 R. 11 N. 11, 12, Court-fees Act S. 12 N. 13.

G. Venkatarama Sastry, for Petitioners — The Govt. Pleader for the State.

Cases referred to:

('42) 1942-1 MLJ 569: (AIR (29) 1942 Mad 585) (Prs 2, 4)

('44) ILR (1944) Mad 626: (AIR (31) 1944 Mad 315 FB) (Prs 2, 4)

RAJAMANNAR, C.J.: The petitioners filed a suit in the court of the Subordinate Judge of Guntur for a declaration that they were, or, in the alternative, plff. 2 was the hereditary archaka of a temple. They paid a fixed court-fee of Rs. 100 under Art. 17-A of Sch. II, court-fees Act valuing the suit for the purposes of jurisdiction at Rs. 3600. On an objection taken to the correctness of the valuation, the learned Subordinate Judge, after enquiry, found that the suit had been grossly undervalued, that the valuation of the property in suit exceeded Rs. 10,000 & directed the petitioners to pay an additional court-fee of Rs. 400. This order was passed on 14-3-1947 & ten days' time was given for payment of the deficit court-fee. The suit stood ad-

journed to 24-3-1947. On that day the suit was called & as the petitioners had not paid the deficit court-fee, the plaint was rejected. The revision petition before us is against the order dated 24-3-1947 rejecting the plaint. Under S. 2 (2), Civ. P.C., an order rejecting a plaint shall be deemed to be a decree. It was therefore open to the petitioners to file a regular appeal against that order. As an appeal was competent, it follows that the revision petition is not maintainable & must therefore be dismissed on this ground.

(2) Mr. Venkatarama Sastri argued that though the revision petition as filed purported to be against the order of 24th March rejecting the plaint, it must be deemed to have been really filed to revise the earlier order of the 14th March directing payment of additional court-fee. He relied on the ruling of the Full Bench in 'Murthiraju v. Subbaraju', I. L. R. (1944) Mad 626 which held that a revision petition would lie to the High Court when a subordinate court has held that a plaint has been inadequately stamped. In that case, however, there was no order formally rejecting the plaint before the revision petition was filed against the order directing the plff. to pay an additional court-fee. It was urged before the learned Judges in that case that the petitioner before them could have waited till a consequential order was passed by the lower court rejecting the plaint on non-payment of the additional court-fee demanded & then filed an appeal. But the learned Judges observed:

"The mere fact that an appeal would lie later from the consequential order passed by the Subordinate Judge if the stamp fee were not paid was no ground for refusing to entertain the petition."

The decision of the Full Bench is therefore no authority in support of the position that a revision petition would lie against an order demanding an additional court-fee even after a consequential order has been passed by the court rejecting the plaint. because the additional court-fee demanded had not been paid. Learned counsel was unable to cite any decided case in which it has been held that even after an order had been passed rejecting a plaint, an appealable order, the party aggrieved could prefer a revision petition against the earlier order demanding the additional court-fee. In our opinion, to allow a civil revision petition to be preferred in such circumstances would be against the well established principles of procedural law. In 'Ratnavelu Pillai v. Varadaraja Pillai', 1942-1 M. L. J. 569, Chandrashekhara Aiyar J. made an observation that if the order directing payment of additional court-fee was not complied with & it was followed by an order dismissing the suit, a revision petition would not be maintainable, but the remedy was only by way of an appeal against the decree. We agree with this observation which no doubt was made 'obiter' in that case.

(3) The civil revision petition is therefore dismissed with costs.

(4) VISWANATHA SASTRI J.: I respectfully agree. An erroneous order of the lower Court demanding additional court-fee is revisable by the High Court at the instance of the plff. on the ground that there is a refusal to exercise the jurisdiction vested in the lower Court to proceed with the trial & decide the suit unless the condition imposed by the Court is fulfilled & the court-fee demanded is paid by the plff. Therefore a plff. against whom an adverse order has been passed with reference to the court-fee payable by him on the plaint has been held entitled to move this Court in revision without waiting for the rejection of the plaint under O. 7, R. 11, Civ. P. C. This is what the Full Bench held in 'Murtiraju v. Subbaraju', I L R (1944) Mad 626. If no such revision petition is filed & the order directing payment of additional court-fee not having been complied with, is followed up by an order rejecting the plaint, then the proper remedy of the plff. is to appeal against the order rejecting the plaint. This is what Chandarshekhara Aiyar J. observed though 'obiter' in 'Ratnavelu Pillai v. Varadaraja Pillai', 1942-1 M.L.J. 569. There is no inconsistency between these two decisions. An order rejecting a plaint does not conclusively determine the rights of the parties; nor is it a formal expression of an adjudication determining the rights of any party with reference to any matter in controversy in the suit. O. 7, R. 13, Civ. P. C. provides that the rejection of the plaint on any of the grounds mentioned in that order is no bar to a fresh suit on the same cause of action. Nevertheless, S. 2(2) enacts that an order rejecting a plaint under O. 7 R. 12, Civ. P.C. shall be deemed to be a decree, apparently because the rejection of the plaint conclusively determines that the plff. is not entitled to bring his suit on a court-fee stamp of a value less than what has been found by the court, & to this extent there is a final decision. An appeal lies against an order rejecting the plaint, but not against an order demanding payment of additional court fee. The latter order is open only to a revision. If no revision petition has been filed against the order demanding additional Court-fee before the plaint is rejected for non-compliance with it, the remedy of the plff. is to appeal against the order rejecting the plaint. It is for this reason that O. 7, R. 12 requires the court to pass a formal order rejecting the plaint giving the reasons for its conclusion. Though neither the order calling for payment of additional court-fee, nor the order rejecting the plaint for non-compliance with the order determines the rights of the parties, the Civil Procedure Code prescribes different remedies in the two cases, in the former case by a revision petition to this Court & in the latter case by an appeal to that Court to which an appeal from the decree passed in the suit would have been preferred. I therefore agree that the remedy of the plff. in this case was to have appealed against the order rejecting the plaint.

(5) PANCHAPAKESA AYYAR J.: I agree with the observations of my Lord the Chief Justice & Viswanatha Sastri J. In my opinion, any arty who is aggrieved by an order calling for an additional court fee should at once take a copy of that order & file a revision petition to this court, & get a stay, if he does not want to pay the additional court fee & only wants time to file a revision petition. If he waits till the time granted for paying the additional court fee expires & the plaint is rejected, & does not even request the court before the plaint is rejected to grant him time for getting copies to file a revision petition, in which case the court will certainly grant a reasonable time, he cannot afterwards file a revision petition as his remedy then is only an appeal. In this case, it seems to me that the petitioners hoped to pay the additional court-fee, &, having failed to collect the amount & pay it, allowed the plaint also to be rejected, &, then, as an afterthought, filed this revision petition which accordingly deserves to be rejected.

C.R.K./D.R. *Revision dismissed.*

A. I. R. (39) 1952 MADRAS 88 (C. N. 41)

PANCHAPAKESA AYYAR J.

Chandrala Seshayya and others, Petitioners v. Chandrala Lakshmamma and others, Respondents.

Civil Revn. Petn. No. 150 of 1948, D/- 1-2-1951.

Court-fees Act (1870), S. 7 (V) (d) — Suit for specific portion of land.

A specific property that is claimed can never be an unspecified fractional share of the property, though, of course, it will be, like any portion of land, 'some fraction of the entire land'. Where the plaintiff is claiming not a partition of an unspecified fractional share of undivided land but is claiming a specific portion of that undivided land, namely, the 'northern half' of the land, court-fee is payable under S. 7, Clause 5 (d) on the 'market value' of the property. A I R (34) 1947 Mad 297 F B, Foll; A I R (38) 1951 Mad 698, Ref. (*Para 1*)

Anno: Court Fees Act, S. 7 (V) N. 19.

M. Appa Rao, for Petitioners — Government Pleader, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('47) 1947-1 M L J 201: (A I R (34) 1947 Mad 297 F B) (Pr 1)

('51) 1951-1 Mad L Jour 73: (A I R (38) 1951 Mad 698) (Prs 1, 2)

ORDER: The only point for determination in this civil revision petition is whether the learned District Judge, Krishna, erred in law in holding that the Full Bench decision in 'Kesanna v. Boya Bala Gangappa', 1947-1 M L J 201, would apply to the petitioners' case and make court-fee payable under S. 7, clause 5 (d) of the Court-fees Act on the 'market value' of the property, as the petitioner was, claiming not a partition of a fractional share of undivided land but was claiming a specific portion of that undivided land, namely, the 'northern half' of the suit land. After perusing the entire records, and hearing Mr. M. V. Srinivasa Rao for Mr. M. Appa Rao, the learned counsel for the petitioner, and Mr. Ch. Ramakrishna Rao, for the Government Pleader, I have absolutely no hesitation in holding that the lower Court's view is correct and is not vitiated by any error. The Full Bench ruling has laid down that when a person is suing for a decree for possession of 'specific immoveable property' the court-fee must be paid on the 'market value' of the lands. That position is not disputed by the learned counsel for the petitioner, as, indeed, it cannot be before this Court. What he contends is that the petitioner was only asking for an 'unspecified fractional share' of an undivided land, namely, a half share. If that had been so, his argument would have been correct and court-fee would have been payable only under S. 7 (6) (b) (sic.). But the petitioner has really asked for a 'specific portion' of the land, namely, the 'northern half' of the land, and not for a mere unspecified half of the land, with reference to good and bad qualities. It is obvious that a man claiming the 'northern half', or the 'eastern half', or, a half 'to be carved out in the middle of a 'land' leaving only the margins for the other half, is asking for a 'specific portion' of the land, and not just 'an unspecified half' wherever it is allotted. A specific property that is claimed can never be an unspecified fractional share of the property, though, of course, it will be, like any portion of land, 'some fraction of the entire land'. The matter is not merely academic or technical, but will have important practical consequences. For instance, a man asking for and getting the 'western half' of Rajasthan will get only a desert whereas a man asking for and getting the 'eastern half' of Rajasthan will get fertile lands of great value. A mere suit for a half of Rajasthan, with reference to good and bad qualities, will give the plaintiff half the desert and half the good lands where a suit for only the 'eastern half' will give him very valuable lands worth very much more than the half value of the whole. The rule is thus laid down by a Bench decision, to which I was also a party in 'Venkatasubba Rao v. Venkata Rao', 1951-1 Mad L Jour 73:

> "A fractional share predicates that the owner of that share is entitled to every bit of the total extent of the land till a partition is held and specific part is allotted to him."

In other words, he has a half share, in a case like this, in every blade of grass or other property 'all over the land', and his right will not be confined to, nor will he be allotted, the whole of the crops or properties in the northern half of the land, giving him no right whatever in the southern half of the land. So, this case is one where the petitioner was suing for a 'specific share of the land', namely, the 'northern half' of the land in question, and 'not for a fractional half' of an undivided land where nobody has been given any specific share in any portion. The learned counsel for the petitioner made his position even worse by saying that the petitioner could not claim any share in the 'southern half' of the land as he has been 'gifted only the northern half of the land'. In other words, he admitted that a 'specific portion' of this land was gifted to him and was claimable by him, and he was bound, to pay court-fee under S. 7 (5) (d) of the Court-fees Act.

(2) No doubt, the learned counsel for the petitioners was right in urging that the Full Bench decision holding that court-fee under S. 7 (5) (d) had to be paid on such specific portions of land leads to some anomalies. That is so. In the decision in 'Venkatasubba Rao v. Venkata Rao', 1951-1 Mad L Jour 73, referred to above, we observed, at page 80, as follows:

> "We may point out that by reason of the Full Bench decision many anomalies are introduced in the application of S. 7 (v) (d) and the notification issued by the Government. In a suit for possession of a specified plot a larger court-fee may be payable, whereas for partition and possession of a fractional share in regard to a larger extent, a smaller court-fee may suffice. In the case of a fractional share, a suit for its recovery may be filed in a District Munsif's Court whereas for a smaller extent, if the property is a specified one with boundaries, it will have to be filed in the Subordinate Judge's Court. This situation is not only illogical but sometimes makes the members of the litigant public feel its oppressiveness by contrast. Though this decision was made as early as 6th January 1947, no attempt has yet been made by the Legislatures to remove the anomalies, without at the same time overburdening the litigant public."

But those observations of ours will not affect the position in law, and it is for the Legislature, which is now busy with more important matters, like food, yarn, religious endowments, adult suffrage prohibition etc., to move in the matter and remove the anomalies. This petition deserves to be, and is hereby, dismissed with costs.

C.R.K./D.H. *Revision dismissed.*

A. I. R .(39) 1952 MADRAS 89 (C. N. 42)

KRISHNASWAMI NAYUDU, J.

S. K. Rajalingam Chetty and others, Applicants v. Official Assignee, Respondent.

Appln. No. 213 of 1951 in I. P. No. 23 of 1892, D/- 23-7-1951.

Indian Insolvency Act, 1848 (11 and 12, Vict Ch 21), S. 87 — Unclaimed amount with Official Assignee — Insolvent not finally discharged — Claim by his heir for payment — Whether can be allowed — Presidency Towns Insolvency Act (1909), S. 127.

The right of an insolvent or his heirs to be entitled to any surplus in the hands of the Official Assignee arises only when there is a surplus after payment in full with interest the claims of the creditors either under the Indian Insolvency Act of 1848, or under S. 76 of Act (III (3) of 1909). Where therefore certain amount is standing to the credit of an insolvent's estate who had died without obtaining a final discharge as provided by the Act of 1848 and the proceedings are still pending without any payment to the creditors, neither the insolvent nor his heirs are entitled to the amount and as such, an application by the heir of the insolvent for payment of the amount under S. 87 of the Act of 1848 cannot be entertained.

In such circumstances, under the Act of 1848, the assignee should seek the directions of Court under S. 44 (or under O. 11 R. 13 if the Insolvency Rules framed under the Act 3 of 1909) and act according to the directions of the Court as to the disposal of the money due to such creditors. (*Paras 4, 5*)

N. S. Raghavan, for Applicant.

Official Assignee in person.

ORDER: The heirs of a deceased insolvent, who was adjudicated in I. P. No. 23 of 1892, apply for payment out of Rs. 1400/- standing to the credit of the estate with the Official Assignee.

(2) The insolvent in this case died without obtaining final discharge as provided for under the Act, i.e., Insolvent Debtors Act, Ch. XXI of 1848. It was found long after his death that he was entitled to 1/3rd share in premises No. 6, Vaikunta Vadhyar Street, G. T., Madras. That property was sold in execution of the mortgage decree in O. S. No. 177 of 1943 on the file of the City Civil Court. The insolvent's share was vested in the Official Assignee and the present sum represents the net sale proceeds of the insolvent's share in the said property.

(3) The present application is based on the ground that no creditors are available for payment and that the applicants being the heirs of the insolvent have become entitled to the amount. Section 127 of the Presidency Towns Insolvency Act (Act III of 1909) is as follows :

"The proceedings under an insolvency petition under the Indian Insolvency Act, 1848, pending at the commencement of this Act shall, except so far as any provisions of this Act is expressly applied to pending proceedings, continue, and all the provisions of the said Indian Insolvency Act shall, except as aforesaid, apply thereto, as if this Act had not been passed."

The relevant provision therefore under which payment out can be asked for by the insolvent or his legal representatives under the Act of 1848 is Section 87. Section 87 provides that when the debts or demands in respect of a judgment had been entered under Section 86 of the said Act shall have been discharged and satisfied, it shall be lawful for the Court, upon application of the insolvent, his heirs, executors, or administrators, to direct satisfaction to be entered, and if after such discharge and satisfaction, there shall remain in the possession, or subject to the control of his assignee, any property which has come to such assignee by virtue of the order made in that behalf, then the Court would be entitled to order that such property will be vested either in the insolvent, or his heirs, or executors whomsoever may apply. The Act of 1848 contemplates a final discharge, before which under Section 86 the Court, for the relief of the insolvent debtors, may direct a judgment to be entered up against the insolvent for the amount of the debts or demands mentioned in the schedule. It is in the nature of a decree against the insolvent, which decree must be shown to have been satisfied in order to entitle the heirs to claim the property remaining in the hands of the assignee.

(4) The position in this estate is that the insolvent obtained only an order of personal discharge on the opposition of some of the creditors; but there was no final discharge or certificate granted to him as provided in the Act of 1848. It was therefore contended by the Deputy Official Assignee that the one-third share continued to vest in the Official Assignee and the claim to the sale proceeds representing one-third share could not therefore be sustained. The right of an insolvent or his heirs to be entitled to any surplus in the hands of the Official Assignee arises only when there is a surplus after payment in full with interest the claims of the creditors either under the Indian Insolvency Act of 1848, or under Section 76 of the present Act (Act III of 1909). In this case, the proceedings in insolvency are still pending. The creditors have not been paid. In such circumstances, under the Act of 1848, the assignee should seek the directions of Court under Section 44 and act according to the directions of the Court as to the disposal of the money due to such creditors. Under the present Act, in respect of unclaimed dividends the rule framed under the Insolvency rules is Order 11, Rule 13. If the creditors have not applied for dividends within six months after the declaration thereof, the Court may issue directions to the Official Assignee to transfer such dividends to the Provincial Government or make such order as it thinks fit.

(5) In this case, in any view, neither the insolvent nor his heirs have become entitled to the amount, since the amount cannot be said to have re-vested in the insolvent. The applicants are therefore not entitled to recover the sum. The application is dismissed.

C.R.K./D.R. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 90 (C. N. 43)

CHANDRA REDDI J.

Meenakshiammal, Petitioner v. K. G. Krishnaswami Iyer and others, Respondents.

Civil Revn. Petn. Nos. 1228 to 1230 of 1948, D/- 9-2-1951.

Limitation Act (1908), Art. 182 (5) — In accordance with law — Application by assignee decree-holder for execution — Not accompanied by transfer deed — Date of transfer not mentioned — Effect — Civil P. C. (1908), O. 21, Rr. 11 and 16.

An application for execution by an assignee decree-holder cannot be held to be one not in accordance with law merely because the application is not accompanied by the assignment deed which is not so required under O. 21, R. 11, C. P. C. Similarly, the failure to mentoin the date of transfer in the application though amounts to a defect within O. 21, R. 11 (ff) (Mad) Civil P. C. will not make the application not in accordance with law for purposes of Art. 182 (5), Limitation Act. Case law Ref. (Paras 4, 5, 6, 7)

Anno : Lim. Act, Art. 182, N. 78.

T. S. Vaidhyanatha Iyer, for Petitioner; B. Lakshminarayana as Amicus curiae, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('83) 6 Mad 250 (Pr 8)
('93) 16 Mad 142 (Pr 8)
('29) 52 Mad 760 : (A I R (16) 1929 Mad 703 F B) (Pr 8)
('37) 1937-2 Mad L Jour 881 : (A I R (25) 1938 Mad 144) (Pr 6)
('49) 60 Mad L W 815 : (A I R (36) 1949 Mad 43) (Pr 6)
('50) 62 Mad L W 804 : (A I R (37) 1950 Mad 261) (Pr 6)

JUDGMENT : These three revision petitions raise the same question relating to limitation and the petitioner is the same in all the three petitions. They arise out of the three execution petitions filed by the petitioner in S. C. Nos. 1926 of 1937,899 of 1938 and 900 of 1938 on the file of the District Munsif's Court of Madhurai. They were dismissed by the trial Court as being barred by limitation under the following circumstances.

(2) These execution petitions were filed by the present petitioner as an assignee of the decrees obtained by one K. G. Krishnaswami Iyer. The original decree-holder was adjudged an insolvent in I. P. No. 20 of 1943 and all his properties became vested in the Official Receiver of Madhurai. In the course of the administration of the estate the Official Receiver sold the properties in a public auction and they were purchased by the present petitioner. Subsequently the Official Receiver assigned these decrees to her by a document. Thereafter the assignee-decree-holder filed applications for recognition of the assignment and for transmission of the decrees to the Court of the District Munsif of Devakottah for execution. As the execution petitions were not accompanied by the assignment deeds and as the dates of the transfer of the decrees in favour of the petitioner were not mentioned in the execution petitions they were dismissed in December 1944. Within three years of this dismissal the present execution petitions, which have given rise to these revision petitions, were filed by the assignee decree-holder.

(3) The District Munsif dismissed these applications being of opinion that the applications filed in 1944 did not serve as steps-in-aid of execution as the latter, according to him were not in accordance with law within the meaning of Art. 182 (5) of the Limitation Act and therefore could not keep the decrees alive. The aggrieved assignee decree-holder has filed the present revision petitions against those orders.

(4) The question, therefore, to be considered in these revision petitions is whether the view of the trial Court that the execution petitions filed in 1944 were not in accordance with law is correct or not. The chief ground of decision of the lower Court is as the failure to file an assignment deed in favour of the assignee decree-holder along with the execution application would give rise to a great deal of fraud, an application not accompanied by an assignment deed should not be considered to be one in accordance with law. I am not able to see how such an execution petition can give rise to any fraud. It appears to me that the difficulties envisaged by the trial Court are not real. The assignment of a decree can be recognised only after giving notice to the decree-holder under O. 21, R. 16, Civil P. C., and it is only when it is satisfactorily established that the assignment was as a matter of fact made by the original decree-holder that it is recognised by the Court.

(5) Further the omission to file the assignment deed would not amount to such a defect as to render the E. P. not one in accordance with law because the filing of an assignment deed along with an execution application is not required under O. 21 R. 11. It is only when the statutory provisions of O. 21 R. 11 are disregarded it may be said that the execution petition is not one in accordance with law. Therefore although the application was not accompanied by an assignment deed, the execution petitions filed in 1944 would still come under Art. 182 (5) of the Limitation Act if the other relevant provisions of law were complied with.

(6) It has been held in a number of cases that failure to furnish a copy of the decree would not make an execution petition one not in accordance with law. In 'Arunachala Reddiar v. Muthusadasiva Mudaliar', 62 M L W 804 it has been laid down by a Bench of this Court that an execution petition filed without a copy of the decree cannot be considered to be one not in accordance with law within the meaning of Art. 182 (5) of the Limitation Act, even though R. 142 of the Civil Rules of Practice does require that the execution petition should be accompanied by a certified copy of the decree. I may also refer to another decision of the Bench of this Court in 'Seetharama Chettiar v. Muthukrishna Chettiar', 60 Mad L W 815 where it was held that failure to furnish certain particulars not required under O. 21, R. 11, though they may be necessary to make an effective execution petition, could not render an application a defective one so as to make it one not in accordance with law, following the earlier decision in 'Venkatarama Sastri v. Venkatanarasimham', 1937-2 Mad L Jour 881. Applying the principle underlying these decisions it must be held that failure to furnish a copy of the assignment deed does not

render an execution application one not in accordance with law. Hence an execution petition even if not accompanied by an assignment deed, saves limitation as being a step-in-aid of the execution of the decree.

(7) Another reason for which the execution petitions were dismissed in 1944 was the failure of the assignee decree-holder to mention the date of the transfer in her name. O. 21, R. 11 (ff) requires that the date of the transfer must be mentioned in the execution application. It follows that the non-compliance with the requirements of O. 21 R. 11 (ff) amounts to a defect. But the question to be considered is whether the defect is one which would not make the application filed in 1944 a step-in-aid of execution. Though non-compliance with the requirements of O. 21 rule 11 would make the execution application not one in accordance with law yet if there is substantial compliance with the requirements of that provision of law, it would serve as a legal and proper execution petition. The mere failure to furnish one or two particulars would not take it out of the scope of Art. 182 (5) of the Limitation Act.

(8) In 'Rama v. Varada', 16 Mad 142 it was laid down that in spite of the defect in the previous application in omitting to state the earlier of the two previous applications and its result, the preceding application would still serve as a step-in-aid of the execution and as such, it would an application in accordance with law. The same principle is recognised 'Ramanandan v. Periathambi', 6 Mad 250. In 'Abdul Salam v. Veerabadra Raju', 52 Mad 760 the question arose whether in spite of the omission to furnish certain particulars as required under O. 21 R. 11, the execution petition could be considered to be valid one for purposes of claiming rateables under S. 73, Civil Procedure Code. It was laid down by the Full Bench that despite the failure of the decree-holder to mention some of the particulars necessary under O. 21 R. 11, Civil P. C. for a formal execution application, it was sufficiently an application within the meaning of S. 73, C. P. C.

(9) On these authorities, I must hold that when there is substantial compliance with the requirements of the provisions of O. 21 R. 11 C. P. C. the previous execution application will serve as a step-in-aid of execution under Art. 182 (5) of the Limitation Act. It therefore follows that the present execution applications filed by the assignee-decree-holder within 3 years of the dismissal of the previous execution petitions are in time and the orders of the trial Court dismissing these execution petitions as being barred by limitation are erroneous and ought to be set aside.

(10) The execution petitions will be restored to file and will be disposed of by the trial Court according to law. In the result the civil revision petitions are allowed but I make no order as to costs.

C.R.K./K.S. *Revision petitions allowed.*

A. I. R. (39) 1952 MADRAS 91 (C. N. 44)

SATYANARAYANA RAO J.

Ambika Palayakat Company, Petitioner v. N. Kannappa Pillai, Respondent.

Civil Revn. Petn. No. 164 of 1951, D/- 13-4-1951.

Court-fees Act (1870), S. 7 (i) and Sch. I, Art. 1 — Suit for recovery of price of goods sold to defendant — Claim of defendant for damages for breach of warranty and loss of reputation — Court-fee payable by defendant.

In a suit for recovery of the price of goods sold by the plaintiff to the defendant, the defendant claimed damages under two heads: a sum of Rs. 2274-3-0 as damages for breach of warranty, namely, that the goods did not answer the description of the goods in respect of which the contract of sale was entered into; and a sum of Rs. 3000 as damages for loss of reputation:

Held, that the defendant was entitled to claim the sum of Rs. 2274-3-0 without paying court-fee as an amount which could be considered in diminution of the price that was claimed, but not the sum of Rs. 3000, as these damages were not the direct result of the breach of warranty. If the defendant wished to prosecute the claim, he must pay court-fee on the sum of Rs. 3000. (*Para 1*)

Anno: Court-fees Act, S. 7 (i), N. 14, Sch. 1, Art. 1, N. 3.

M. K. Harihara Iyer, for Petitioner — The Government Pleader and K. Venkataraman, for Respondent.

ORDER: I think the view taken by the lower Court regarding the payment of court-fee is correct. The suit was for recovery of the price of goods sold by the plaintiff to the defendant, and the defendant claimed damages under two heads: a sum of Rs. 2274-3-0 as damages for breach of warranty, namely, that the goods did not answer the description of the goods in respect of which the contract of sale was entered into; and a sum of Rs. 3000 as damages for loss of reputation. The lower Court held that the defendant was entitled to claim the sum of Rs. 2274-3-0 without paying court-fee as an amount which could be considered in diminution of the price that was claimed, but not the sum of Rs. 3000, and therefore it directed that the defendant should pay court-fee on Rs. 3000 if it intended to prosecute the claim as a set-off. It is contended that this sum of Rs. 3000 is also loss which has directly resulted by the breach of warranty. It is difficult to accept this contention in support of which no authority has been cited. The direct loss by reason of the breach of warranty is the loss in the value of the goods, as inferior goods were supplied according to the defendant's contention in place of superior goods for which it bargained with the plaintiff. The damages for reputation may be further damages which it had suffered, but it cannot claim the amount to be taken into consideration in diminution of the price for which the plaintiff instituted the suit. These damages are not the direct result of the breach of warranty and they may be further damages within the meaning of S. 59, sub-s. (2) of the Sale of Goods Act. The view taken therefore by the lower Court that if the defendant wishes to prosecute the claim, it must pay court-fee on the sum of Rs. 3000 is correct.

(2) The civil revision petition fails and is dismissed with costs payable to the Government Pleader. The petitioner is granted two weeks' time from this date for payment of the court-fee on the sum of Rs. 3000.

C.R.K./G.M.J. *Petition dismissed,*

A. I. R. (39) 1952 **MADRAS 92** (C. N. 45)

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

The Commissioner of Income-tax, Madras, Applicant v. S. V. R. N. Palaniappa Chettiar (died) and others, Respondents.

Case Referred No. 30 of 1946, D/- 2-1-1951.

Income-tax Act (1922), S. 25 (4) — Business on which tax was charged.

The tax clearly should be charged on the business as such under the Act of 1918 to claim and avail the benefit under sub-s. 4 to S. 25. When a Hindu undivided family on a partition is succeeded to by one or more of its members in respect of the family's share in the business of a foreign firm and the family was assessed in respect of that share under the Act of 1918, the firm not having been assessed, the family is not entitled to relief under S. 25 (4) of the Income-tax Act as amended by the Amendment Act of 1939 because it cannot be said that because tax was payable by the assessee on the profits received from a business in a foreign territory such assessment is an assessment of the business. (*Paras 1, 3*)

Anno : Income-tax Act, S. 25, N. 1.

C. S. Rama Rao Sahib, for Applicant; K. Rajah Aiyar and K. Srinivasan, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('23) 1 I T C 189 : (A I R (10) 1923 Lah 14 F B) (Pr 3)

('23) 1 I T C 202 : (A I R (10) 1923 Mad 574) (Pr 3)

(1857) 6 H L C 61 : (10 E R 1216) (Pr 7)

SATYANARAYANA RAO J. : In pursuance of the direction of this Court under S. 66 (2) of the Income-tax Act, the Income-tax Appellate Tribunal referred the following question of law to this Court :

> "Whether when a Hindu undivided family on a partition is succeeded to by one or more of its members in respect of the family's share in the business of a foreign firm and the family was assessed in respect of that share under the Act of 1918, the firm not having been assessed, is the family entitled to relief under S. 25 (4) of the Income-tax Act as amended by the Amendment Act of 1939".

The facts are not in dispute. The assessee was an undivided Hindu family and as a partner carried on a money lending business at Muar in the Federated Malay States. The profits of the money lending business received by the joint family in British India were assessed to income-tax under the Act of 1918 and subsequently. There was a partition in the family and at that partition, the share of the family in the said business at Muar was allotted to two of the members of the family. It was claimed that as a result of the partition and the allotment of the share of the business to two of the members of the family there was a succession within the meaning of S. 25 (4) of the Income-tax Act to the share of the profits and that therefore the Hindu undivided family was entitled to relief under S. 25 (4). The Tribunal accepted the contention of the assessee and granted relief under S. 25 (4). The short question is whether the Tribunal was right in applying S. 25 (4) to the facts of the case.

(2) That the partition brought about succession to the business within the meaning of subclause (4) of S. 25 is now common ground and it is not open to us to canvass the soundness of that view, as that question is not before us. One of the requirements, therefore, of S. 25 (4) is undoubtedly satisfied on the facts of the case. The only point on which there is controversy is whether the assessee is a person who, at the commencement of the Indian Income-tax (Amendment) Act, VII of 1939, carried on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918. The question referred to us makes it clear that the foreign firm at Muar which carried on money lending business and in which the joint family was a partner was not assessed to income-tax. The share in the profits of the joint family which were received in British India were alone subject to the charge and not the business. The Income-tax Act of 1918 applied as provided by S. 3 to the income of an assessee from whatever source it is derived if it accrued or arose or was received in British India. The definition of assessee in S. 2 (2) of that Act included a firm and the firm as such was treated as a unit for assessment of its business provided its income accrued or arose in British India. A foreign firm could not be assessed in respect of its business to any extent under that Act. S. 5 of the Act of 1918 which defined the classes of income chargeable to income-tax analogous to the present section 6 included among the classes income derived from the business and also income derived from other sources. S. 9 of the same Act enumerated the permissible allowances in computing the profits of the business under the head "income derived from business". These deductions could not apply to a foreign business and the income of such foreign business could not be brought and could not be charged to income-tax to any extent under the Act of 1918. The only extent to which the profits or gains of such business could be assessed to tax was only if the profits were received in British India. S. 4 of the present Act, of course, altered the position to a large extent. Even under the Act of 1918 it was held that there could be no second receipt of the profits in British India when once the profits were received in the foreign territory from the foreign business and the assessment to tax of such profits received in British India was not justified under the provisions of the Act. See 'Sundardas v. Collector of Gujarat', 1 I T C 189 (Lah); and 'Secretary, Board of Revenue (Income-tax) Madras v. Ripon Press Sugar Mills Co., Ltd:', 1 I T C 202 (Mad).

(3) The relief under sub-clause 4 is permissible only if the tax on the business was charged under the provisions of the Indian Income-tax Act, 1918. If the foreign business at Muar was not and could not have been charged under the Act and the share in the profits of the family from that foreign business was charged under S. 3 only on the receipt in British India, can it be said that the charge so made was a charge of a tax on the foreign business. The income received by the joint family could not have been charged under the head "income derived from business" but only as a receipt under S. 3. The argument, however, on behalf of the assessee by his learned advocate, Mr.

Rajah Iyer was that the words "on which tax was at any time charged" should be construed as meaning "with reference to which" tax was at any time charged. In other words, the contention is that the income derived by the assessee was in relation to a business and therefore the assessment of the income must be treated as an assessment of the business. No doubt, under the provisions of the Income-tax Act, the tax is payable by an assessee but the assessment of the tax is on the basis of various heads of income derived by the assessee one of which is business. It cannot, therefore, be said that because tax was payable by the assessee on the profits received from a business in a foreign territory such assessment is an assessment of the business. The meaning of the words "on which" is clear and it will be impossible to interpret those words as meaning "with reference to which". The tax clearly should be charged on the business as such under the Act of 1918 to claim and avail the benefit under sub-s. 4 to S. 25.

(4) The Appellate Tribunal which accepted the contention of the assessee proceeded on the basis that the assessment of the appellant's share of the income from the foreign business tantamounts to assessment of the business itself. The Tribunal observed as follows :

"This position would be quite clear if it is only remembered that what the appellant was assessed was his share of income of the foreign firm, as if it is a business carried on by him. The firm itself being a foreign one, was not assessable as being 'non-resident' and what was determined as liable to income-tax was the appellant's share in the income of the foreign firm and which share was always ascertainable definitely in this foreign business and which was transferred to another and therefore succeeded to by that other person. It should be obvious that the appellant has been assessed in the past in respect of the business carried on by him and that the ownership of that business has passed to another by succession within the meaning of the Income-tax Act and as such he is entitled to claim by virtue of S. 25 (4) that the business carried on by him of which he was the owner on the 1st April 1939 has been discontinued by him because of the disruption and in the ownership of the business another person has succeeded to the family. The requirements of S. 25 (4) are fully met and he is entitled to this relief".

This argument in my opinion proceeds on an erroneous assumption that the profits when received by the assessee in British India were assessed as if it was a business carried on by him. This is obviously wrong as under the Act of 1918, the business as such, which is carried on in a foreign territory could not be assessed to income-tax and the profits could be assessed under S. 3 only as a receipt of income in British India. Of course, if the assessee succeeded in establishing that in fact, though wrongly such profits were taxed on the basis of a business carried on by the assessee though in foreign territory, the fact of such assessment might possibly enable the assessee to claim the benefit of S. 25 (4). But of this there is no proof. It is possible to interpret S. 25 (4) as meaning that if in fact there was an assessment of the business carried on in a foreign territory, though legally, such assessment was not permissible, the requirement of the section is satisfied and it would not be now open to us to question the legality of such assessment made under the provisions of the Act of 1918. It is unnecessary, however, to express any final opinion on this aspect though the language of S. 25 (4) "on which tax was at any time charged", seems to indicate that such argument is possible. I am therefore of opinion that the view taken by the Appellate Tribunal is wrong and the question referred to us must be answered in favour of the Commissioner of Income-tax and against the assessee. The Commissioner is entitled to his costs which we fix at Rs. 250.

(5) RAGHAVA RAO J. : I agree.

(6) Mr. Rajah Iyer is in my opinion perfectly right in his contention that this joint family must be taken to have carried on a business, none the less because it carried it on in co-partnership with strangers. On the bare language of the relevant enactment let it be assumed too that it is immaterial that the business is a foreign business in which this family had only a right to a share of the profits. The trouble in the way of learned counsel, however, is that in order to succeed he has still to show—and that he has failed to do—that on the business as such tax was at one time or another charged under the provisions of the Indian Income-tax Act, 1918. It may be a question whether the word under here means only "in purported accordance with" or something more, viz., ' 'in actual accordance with". It may therefore be a question whether the assessment of the foreign business in British India, if a fact, however wrongful, brings into operation S. 25 (iv) of the Act. That question however does not arise here. What arises is this: Where all that we know is that rightly or wrongly it is only the share of the profits of the foreign business received by this joint family in British India that was actually taxed, although under the head of "income derived from business" within S. 5 of the Act of 1918 and as if business within that section included foreign business, can it be said that on the business as such tax was charged under that Act as required by S. 25 (iv)? The answer must on first thought be No.

(7) Mr. Rajah Iyer submits in order to get over this difficulty that "on which" in S. 25 (iv) must be read as meaning "with reference to which". I have carefully considered the submission but must repel it. It involves a re-writing of the statute, however trivial the re-writing may seem. True, the rule of literal construction should not be adhered to, where the context of the word or phrase to be interpreted renders it plain that such a construction is inappropriate (Vide Halsbury's Laws of England II Edn. Vol 31 page 481, Art. 597). But is that the position here? I can only say that it has not been shown how it is. All that can be urged is that otherwise the joint family assessee would stand denied the benefit of relief against double taxation for one year which the replacement of the Act of 1918 with its basis of taxation as the income of the current year, by the Act of 1922 with its basis if taxation for the assessment year as the income of the immediately preceding year, the accounting year, necessarily involved. A beneficial enactment must no doubt as is sometimes said be liberally interpreted; but as I had occasion to remark in my judgment in A. S.

No. 138 of 1948 this rule of liberal interpretation of such an enactment, does not sanction a construction founded upon the equity of the statute, as it is sometimes called, in disregard of the actual language employed therein. The "golden" rule of literal construction—as Lord Wesleydal described it in the House of Lords in an early English case, 'Grey v. Pearson', (1857) 6 H L C 61 at p. 106 affords in my judgment the safest course to adopt, on the whole, in this rather difficult case; and applying that rule I would concur with my learned brother in answering the reference against the assessee.

C.R.K./D.H. *Answer accordingly.*

A. I. R. (39) 1952 MADRAS 94 (C. N. 46)

SUBBA RAO AND PANCHAPAKESA AYYAR JJ.

Chinnasami alias Samba Goundan, Petitioner v. A. L. Vr. St. Veerappa Chettiar and others, Respondents.

Civil Misc. Petn. No. 1819 of 1951, D/- 20-3-1951.

Supreme Court Rules, O. 12, R. 3 —Failure to deposit printing costs — Power of High Court to cancel certificate — Civil P. C. (1908), O. 45 R. 7.

Under the Supreme Court Rules the provisions of O. 45, Civil P. C., have been made applicable to appeals preferred under Art. 132 (1), 133 (1) and 135 of the Constitution and under O. 12, R. 3 of those rules the High Court has power to cancel a certificate for the appellant's failure to comply with provisions of O. 45, R. 7.

(Para 6)

D. Ramaswami Iyengar, for Petitioner; R. Kesava Iyengar, for Respondents.

ORDER :—This is an application by the respondent in S. A. No. 2195 of 1946 to cancel the certificate granted to the appellant on 5th April 1950 under Art. 132 of the Constitution of India.

(2) On a representation made by the appellant in S. A. No. 2195 of 1946, we passed the following order :

"In our view the judgment just delivered involves a substantial question of law within the meaning of Art. 132 of the Constitution of India. Leave granted".

The respondent did not furnish security for the costs before the Supreme Court and did not deposit the necessary amount for defraying the expenses of printing etc., of the records. He took out an application in the Supreme Court of India for an order dispensing with the furnishing of the security and the printing deposit, and the same was dismissed by that Court. Mr. Kesava Aiyangar appearing for the appellant, contended that there is no obligation on his client to furnish security or to make the requisite deposit, as Order XLV of the Civil Procedure Code was not amended suitably by the High Court. To put in other words, his argument is that, as the rules now stand, he is entitled to prefer an appeal to the Supreme Court without furnishing the security and also without depositing the requisite charges towards printing etc.

(3) On the same day on which the Constitution of India came into force, the President of the Republic of India made the Adaptation of Laws Order, 1950. Section 4 of the said order reads as follows :

"As from the appointed day, the existing central laws mentioned in the schedules to this order shall, until repealed or amended by a competent legislature or competent authority, have effect subject to the adaptation and modification directed by those schedules or, if it is so directed, shall stand repealed".

(4) The following amendment was made to Ss. 109 and 110 of the Civil Procedure Code,

Section 109. For 'subject to such rules' substitute 'subject to the provisions in Chapter IV of Part V of the Constitution and such rules', for 'His Majesty in Council' substitute 'the Supreme Court' and for 'decree or final order' substitute 'judgment, decree or final order' ".

Section 110. For 'ten thousand' substitute 'twenty thousand' for 'His Majesty in Council' substitute 'the Supreme Court' and for 'decree or final order' substitute 'judgment, decree or final order".

Order XLV of the Civil Procedure Code was also suitably amended by substituting the words "The Supreme Court" for the words "His Majesty in Council".

(5) Article 145 (1) (b) of the Constitution of India empowers the Supreme Court to make rules as to the procedure for hearing of the appeals and other matters pertaining to the appeals including the time within which appeals to the Court are entered. Presumably under the said power the Supreme Court framed Rules. Under Order XII (1) of the Supreme Court Rules, subject to any special direction which the Court may give in any particular case, the provisions of Order XLV of the Code, so far as may be applicable and of any rules made for the purpose by the High Court, shall apply in relation to appeals preferred under Art. 132 (1), 133 (1) and 135 of the Constitution. Rule 3 says that where an appellant, having obtained a certificate from the High Court, fails to furnish security or makes the deposit required, that Court may, in its own motion or on an application made in that behalf by the respondent, cancel the certificate and may give such directions as to costs of the appeals and the security entered into by the appellant as it shall think fit or make such further or other orders as the justice of the case requires.

(6) It will be clear from the aforesaid provisions that the Adaptation of Laws Order, 1950 made suitable amendments to Ss. 109 and 110 and Order XLV of the Civil Procedure Code and that the Supreme Court, by virtue of the rule making power conferred upon it by the Constitution, in regard to matters pertaining to appeals, have made the rules applying the provisions of Order XLV of the Civil Procedure Code to appeals preferred under Art. 132 (1), 133 (1) and 135 of the Constitution. We cannot, therefore, accept the argument of the learned counsel that Order XLV of the Civil Procedure Code not having been amended by the High Court of Madras has no application to appeals preferred to the Supreme Court of India. As the appellant failed to comply with the provisions of that Order, we hereby cancel the certificate granted to him. The respondent will pay the costs of the application to the petitioner.

C.R.K./K.S. *Certificate cancelled.*

A. I. R. (39) 1952 Madras 95 *[C. N. 47.]*

MACK J.

In re V. Vengan and others—Petitioners.

Criminal Revn. Cases Nos. 442 etc. and Cri. Revn. Petns. Nos. 437 etc. of 1951, D/- 26 6-1951.

† Constitution of India, Art. 19 — Right of person to dissuade customers from purchasing from a shop —Interpretation of statutes — Criminal Law Amendment Act (1932), S. 7.

A shop-keeper, who is a citizen of India, has a fundamental right to carry on his trade in any part of the Indian Union subject to the controls, licenses and restrictions orders legitimately imposed by the State. A citizen has therefore a right to expect from the State protection in the exercise of his business from persons, who assemble outside his shop and seek to dissuade customers from purchasing goods from him on the ground that he is a North Indian. Under Art. 19 (2) the right to freedom of speech and expression would not affect the operation of any existing law so far as it relates to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security or tends to overthrow the State. The conduct of such persons would if carried to logical and extreme conclusions come within the category of something, which would tend to undermine the security of the State, the objective being to create disaffection which may ultimately lead to hatred and strife in the south between South Indians and North Indians residing in and doing business in the south. This is also a case in which one fundamental right claimed of freedom of speech and expression comes into conflict with other fundamental rights of all citizens viz., to reside and settle in any part of the Indian Union and to carry on their occupation, trade or business. When two fundamental rights come into conflict and one is sought to be extended to extreme and logical conclusions at the expense of the other, a Court will be slow to recognise and uphold such an extension of a fundamental right which infringes and violates another fundamental right. The conduct of such persons therefore cannot be justified under Art. 19 (1) (a) of the Constitution nor can S. 7, Criminal Law Amendment Act in such context be declared *ultra vires*. [Paras. 5, 6, 8, 10]

Anno. Cri. Law Amendment Act, S. 7 N. 1.

V. Venkataraman for Row and Reddy — for Petitioners; T. V. Narayana Nair for State Prosecutor —for the State.

Cases referred to :—

310 U. S. 1093. [Pr. 9]
310 U. S. 1104. [Pr. 9]

Order. — *Cri. R. C. Nos. 442, 484, 485, 487 to 493/51* :—All these petitioners have been convicted under S. 7 (1) (a) and (b), Criminal Law Amendment Act, 1932, by the learned Third and Seventh Presidency Magistrates. They have all been tried in pairs and sentenced to six months' rigorous imprisonment, except petitioners in Cri. R. C. Nos. 442 and 489 of 1951 who have been sentenced to three months' rigorous imprisonment. The case against them is that on dates between 10th March 1951 and 4th April 1951 they went in pairs near the shop of Kishinchand Chellaram in Mount Road with placards and black flags and sought to dissuade intending customers from purchasing in this North Indian shop.

[2] On the first of these petitions filed Cri. R. C. No. 442 of 1951, I directed the release of the petitioners on bail. Then on a batch of petitions filed Cri. R. C. Nos. 484, 485, 487 and 488 to 493 of 1951 instead of granting bail I directed the production of the petitioners in this Court from the Penitentiary. The learned Magistrate as would appear from his judgments was quite prepared to deal leniently with them but in view of their insistence that they would report the offence if released after admonition thought it fit to pass the sentences he did.

[3] These petitioners all come from Tanjore district and were admittedly brought to Madras by lorry by picketting committee of a political organization known as the Dravida Kazhagam. Some of them said they were cultivators of Tanjore who were anxious to return to their district. I directed their release on the day they were produced, i. e, 5th June 1951 holding that in any case they had been sufficiently punished by the sentences they had undergone pending a finding on the constitutional contentions raised that petitioners were acting within the scope of their fundamental right of freedom of speech and expression under Art. 19 (1) (a) of the Constitution and that they had committed no offence at all. It is conceded that they went in pairs with placards and flags in front of Kishinchand Chellaram's shop and attempted peacefully to dissuade by mere speech persons from buying in this North Indian shop. Mr. Ramchandran and Mr. Venkataraman who appeared for the petitioners and made contributions to the arguments contended further that S. 7, Criminal Law Amendment Act, 1932 has been rendered *ultra vires* as being in breach of this fundamental right under Art. 19 (1) (a). Arguments could not be finished on the date these petitioners were produced before me, and I directed their release with advice to them to return to Tanjore and occupy themselves in the production of more food, agricultural labourers as most of them claimed to be. There can be no doubt that the attitude they took before the Magistrate was the result of instructions from their political organization on legal advice that what they were doing was within the scope of their fundamental rights under the Constitution.

[4] Another batch of petitions Cri. R. C. Nos. 514 to 519 of 1951 (Cri. R. P. Nos. 509 to 514 of 1951) was filed on 19th June 1951 the date on which arguments were taken to a conclusion on behalf of 12 accused similarly convicted and sentenced, their advocate explaining that he had received no earlier instructions to file petitions for them. These petitioners are exactly in the same category. I directed their immediate release from prison. This order will cover their cases also.

[5] The constitution guarantees to all citizens of the Indian Union of States other important fundamental rights, under Art. 19 (1) (d) to move freely throughout the territory of India, under Art. 19 (1) (e) to reside and settle in any part of

the territory of India and under Art. 19 (1) (g) to practise any profession or to carry on any occupation, trade or business. All these fundamental rights are subject to reasonable restrictions prescribed by the State as laid down in Art. 19 Cls. (2), (5) and (6). Under Cl. (6) the fundamental right to carry on a trade or business does not affect the operation of any existing law which imposes in the interests of the general public restrictions on the exercise of this right; in other words, a shopkeeper, who is a citizen of India, has a fundamental right to carry on his trade in any part of the Indian Union subject to the controls, licenses and restrictions orders legitimately imposed by the State. A citizen has therefore a right to expect from the State protection in the exercise of his business from persons, who assemble outside his shop and seek to dissuade customers from purchasing goods from him on the ground that he is a North Indian.

[6] Mr. Venkataraman urges that petitioners have committed no offence as they resorted to no violence or active obstruction and as I understand his arguments that they were perfectly entitled to spread propaganda sponsored by the Dravida Kazhagam who regard North Indians amongst whom are included Brahmins as exploiters of the Dravidians in the south. He has repeatedly urged that Art. 19 (1) (a) gives a fundamental right to a citizen to free a minority from a tyrannical majority or a majority from a tyrannical minority. He further contends that the right to freedom of speech and expression under Art. 19 (1) (a) can only be restricted within the limits of Art. 19 (2). Under this clause, the right to freedom of speech and expression would not affect the operation of any existing law so far as it relates to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security or tends to overthrow the State. The conduct of the petitioners up to the restrained limits they exercised the right they claim has been really innocuous, but taken to extremes and logical conclusions, such as those to which the learned advocate would take the right to freedom of speech and expression, the right claimed, if upheld would justify not merely two persons but several persons assembling in front of a North Indian shop and seeking to practise peaceful persuasion on intending customers not to buy from it in furtherance of the propaganda of the Dravida Kazhagam. Article 15 (1) lays down another fundamental rights for all citizens viz., that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, *place of birth* or any of them. I am not prepared to say any that the conduct of the petitioners comparatively innocuous though it has been would not if carried to logical and extreme conclusions come within the category of something, which would tend to undermine the security of the State, the objective being to create disaffection which may ultimately lead to hatred and strife in the south between South Indians and North Indians residing in and doing business in the south.

[7] Mr. Venkataraman has readily conceded that if the Dravida Kazhagam as a political party was returned to power at the next elections in the State and endeavoured to pass an Act forbidding South Indians to purchase from North Indian shops, such an Act would be clearly *ultra vires* of the Constitution. Whatever doubt may attach to legislation to implement propaganda on political platforms being held to be ultra vires, this item of propaganda sponsored by the Dravida Kazhagam, if ever it is sought to be implemented by legislation, would immediately be held by the Courts to be ultra vires of the Constitution as Mr. Venkataraman himself agrees. As the Constitution has been invoked to justify the conduct of these petitioners in the name of freedom of speech and expression I have from the Constitution itself placed a constitutional position before Mr. Venkataraman to which he has not been able to find an appropriate answer. I am therefore in the first place quite unable to see how he can invoke Art. 19 (1) (a) of the Constitution to justify the conduct of the petitioners as being within their fundamental right of freedom, of speech and expression as it appears, to me there is embodied in this propaganda of the Dravida Kazhagam an unconstitutional germ which the constitution itself cannot be invoked for the purpose of fostering and nourishing.

[8] This is also a case in which one fundamental right claimed of freedom of speech and expression comes, as it appears to me, into conflict with other fundamental rights of all citizens viz., to reside and settle in any part of the Indian Union and to carry on their occupation, trade or business. I am not impressed by the arguments of Mr. Venkataraman that every exercise of a fundamental right may result in some injury or infringement of another fundamental right. When two fundamental rights come into conflict and one is sought to be extended to extreme and logical conclusions at the expense of the other, a Court will be slow to recognise and uphold such an extension of a fundamental right which infringes and violates another fundamental right.

[9] Mr. Venkataraman has also eloquently argued that the present petitioners have merely adopted the technique of the national leaders of the Congress movement, who were active than themselves, prostrated before people in their attempts to stop from entering liquor shops and buying from foreign cloth shops. The circumstances of those days were entirely different. There was then a deliberate disobedience of some existing laws and a courting of imprisonment. The analogy does not also stand constitutional scrutiny. Picketting of toddy shops, illegal

though it was under S. 7, Criminal Law Amendment Act, was in pursuance of the policy of prohibition and all liquor shops have been closed at any rate in this State by a law implementing this policy and such law has not been held to be ultra vires. There can however be no doubt that a law forbidding South Indians from buying in North Indian shops can never be legally and validly passed under the Constitution on which the case for the petitioners is founded.

[9a] My attention has been drawn to two American decisions *Byron Thornhill* v. *State of Alabama, United States Supreme Court Reports* 310 U. S. (Book 84 page Lawyer's Edition page 1093) and *Carlson* v. *California*, U.S.S.C Rep. (Lawyer's Edition Book 84) 310 U.S 1104. It was held by a Full Bench that State Ordinances forbidding loitering or picketting and making it a criminal offence were invalid. Under those Ordinances workers were arrested, convicted and imprisoned for carrying placards near the place of their employment after a strike had been declared. Thornhill was sentenced for speaking to a non-Union member and telling him without any threat or intimidation that they were on strike and that they did not want him to go to work. The learned Judges held that in such labour disputes the workers had a fundamental right to give publicity to the facts of a labour dispute. As I read those decisions, freedom of the employer to conduct his economic affairs came into conflict with what the Judges held to be freedom of the employees to conduct their economic affairs through their Unions. It was recognised that the rights are subject to modification or qualification by the State in the interests of society but the Judges held that the State in dealing with evils from industrial disputes cannot impair the effective exercise of the right to discuss freely industrial relations, which are matters of public concern.

[10] The background of those decisions is quite dissimilar and they are inapplicable to the facts in the present case. The American Constitution does not contain an enunciation of all the fundamental rights laid down in our Constitution. It is only necessary to refer to the fundamental right laid down in Art. 15 (2) that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops public restaurants, and hotels. The American Constitution does not contain any such fundamental right. Finally in the American decisions the objective of the picketting or loitering was held to be the giving of publicity to the facts of a labour dispute, a legitimate object whereas in the present case the objective is publicity in furtherance of propoganda of an unconstitutional nature. The petitioners' conduct, therefore, cannot be justified under Art. 19 (1) (a) of the Constitution nor can I see any ground on which S. 7, Criminal Law Amendment Act, which has been on the Statute book since 1932 should in the present content be declared *ultra vires*.

[11] Section 7 (1) (b) of this Act makes it an offence for a person to loiter or do any similar act at or near the place where a person carries on business in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place. On their own admissions petitioners are guilty of this offence. Under S. 7 (2) no Court shall take cognizance of an offence under this section except upon a report in writing made by a police officer not below the rank of officer in charge of a police station. There was no necessity for the intending customers accosted to have been examined as witnesses as the learned advocate contends. It is quite clear from the record that the petitioners knew quite clearly the offence with which they were charged and which they admitted. The learned Magistrate has convicted the petitioners under S. 7 (1) (a) and (b). The convictions should have been only under S. 7 (1) (b) and will be modified accordingly.

[12] The Magistrate can scarcely be criticised for passing on the petitioners the sentences he did in view of their general attitude that if released after admonition, they would repeat the offence. Petitioners are persons ignorant of the law and most of them appear to be illiterate. They have merely acted throughout on instructions from the political organisation which employed them. I have endeavoured to set out in simple language conscious as I am of the linguistic barrier between the Court and the petitioners and also probably several members of the Dravida Kazhagam itself the reasons why under the Constitution itself this propaganda against North Indian shops cannot possibly be justified. Petitioners will have suffered in a good cause if these cases result in the Dravida Kazhagam abandoning propaganda, which is so clearly unconstitutional and directing its organisation and talents to propaganda of a type more in harmony with the ideals, the letter and the spirit of the Constitution. The convictions of the petitioners are confirmed under S. 7 (1) (b), Criminal Law Amendment Act and the sentences reduced to the period they had undergone until I released them from jail.

[13] On the day I delivered this judgment another batch of similar petitions Cri. R. C. Nos. 529, 530, 531, 532, 533, 534 and 535 of 1951 has been placed before me for admission filed by Mr. Venkataraman in respect of petitioners similarly convicted in pairs for precisely the same offences between 9th March 1951 and 4th April 1951 and sentenced to six months imprisonment. Mr. Venkataraman has no further arguments to address on those petitions which are all covered by the order I have just pronounced. These cases

are also admitted. The petitioners in them are all directed to be immediately released from jail. Their convictions are similarly confirmed and the sentences reduced to the periods they have already undergone.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 Madras 98 *[C. N. 48.]*

MACK AND KRISHNASWAMI NAYUDU JJ.

D. P. Sampath—Petitioner v. *Govindammal and others — Respondents.*

Criminal Misc. Petn. No. 979 of 1951, D/- 26-6-1951.

† Criminal P. C. (1898), S. 491—Application to recover custody of minor — Guardians and Wards Act (1890), S. 25.

The prerogative writ of Habeas Corpus is an extraordinary remedy and generally sought for upon sufficient cause shown only in cases where the ordinary remedy provided by law is not available or is inadequate or ineffective in the circumstances of a particular case. It is therefore always open to the High Court to refuse that remedy when there is an effective and specially provided for remedy, which should be the ordinary remedy which an aggrieved person, should seek. It cannot be said that an application by a guardian for recovery of the custody of the minor from a person, who is not his legal or natural guardian, is not maintainable under S. 491. Unless however there is an imminent danger to the health or safety of the minor or to his morals, when an interim order of production would become necessary, parties should be directed to proceed by way of an application under the provisions of the Guardians and Wards Act. The Guardians and Wards Act gives sufficient powers to deal with cases of this nature as well. Questions such as whether it would be for the welfare of the minor to restore the custody of the minor to the guardian and the taking into account the minor's wishes, if she is of sufficient age and is able to give an intelligent preference, are matters which should legitimately be considered in proceedings under the Guardians and Wards Act and they could not be gone into thoroughly in a summary proceeding under S. 491. *Case law discussed.* [Paras 6, 8, 9]

Anno. Cr. P. C., S. 491 N. 8; G. W. Act S. 25, N. 3.

V. Devarajan — for Petitioner; S. B. Satyanathan and N. C. Rangaswami — for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('89) 16 Cal. 487. [Pr. 7]

('86) 9 Mad. 391. [Prs. 5, 7]

('30) 53 Mad. 72 : (A. I. R. (16) 1929 Mad. 834 : 31 Cri. L. Jour 187.) [Prs. 1, 4, 5, 7, 8]

('47) 1947-2 Mad. L. Jour 153 : 1947 Mad. W. N. 527 : (A. I. R. (35) 1948 Mad. 103 : 49 Cri. L. Jour 60.) [Prs. 4, 5, 7]

('48) A. I. R. (35) 1948 Mad. 294 : (49 Cri. L. Jour 369). [Pr 5]

(1878) 10 Ch. D. 153 : (48 L. J. Ch. 325). [Pr. 4]

Mack J. — Petitioner, a student aged 20, has applied under S. 491, Criminal P. C. to recover the custody of his wife, Padmavathi Ammal, aged 17, by the issue of a writ of habeas corpus, alleging that she was illegally and improperly detained by her mother, respondent 1 and her brothers, respondents 2 and 3. I am very doubtful as to the admissibility of this petition which I was inclined to dismiss *in limine* but for reliance placed on the Bench decision *Subbaswami Goundan* v. *Kamakshiammal*, 53 Mad. 72 by Beasley C. J. and Ananthakrishna Aiyar J. I admitted the petition with notice to the respondents and the petition has been heard by us as a Vacation Bench.

[2] Padmavathi Ammal readily appeared before us accompanied by her mother and she says she left her husband of her own accord owing to ill-treatment by his mother and grandmother, who both live in his house. She fully bears out the affidavit, filed on behalf of the respondents that they have nothing whatsoever to do with her leaving her husband and their not keeping her from him against her will.

[3] We have carefully considered whether this is a fit case in which we should exercise the discretion conferred on us by S. 491, Criminal P. C. and pass an order which we think should more properly be passed by a Guardian and Wards Court under S. 25 of the Guardians and Wards Act where considerations of the welfare of the minor as prescribed by the statute can and should be taken into consideration. Section 25 of the Guardians and Wards Act runs thus :

"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

[4] We have no hesitation in holding that this minor on the threshold of majority is not in the circumstances improperly detained by her mother. In strict law, her husband is her legal guardian but this by itself would not be sufficient to support a finding, except in a strictly technical sense that solely on this ground, she is being "illegally detained" in her mother's custody. We do not think that S. 491, Criminal P. C., was intended to confer on a husband an absolute right to recover the custody of his minor wife, no matter how he may illtreat her, from the custody of her mother. Section 491, Criminal P. C., is also discretionary and not mandatory. We have carefully considered the decision *Subbaswami Goundan* v. *Kamakshiammal*, 53 Mad. 72, in which the facts were different. There the girl was much younger and the learned Bench found that she had been specifically tutored by her mother and her family to express determined unwillingness to return to the house of her husband. It is true that objection was taken there that the petitioner had not chosen his correct remedy and that he should have sought relief under the Guardians and Wards Act. The learned Judges negatived that view and held that the remedy under S. 491, Criminal P. C., was one open to the petitioner. Reliance was placed on *Bryant* v. *Bull*, (1878) 10 Ch. D. 153 and the dictum of Bacon V. C., that it did not matter how many remedies were open to a person, who was entitled to avail himself of one of them. With great respect, we are in agreement and do not think that in every case a husband, who seeks to recover the custody of his wife,

should proceed by way of S. 25 of the Guardians and Wards Act and has no remedy under S. 491, Criminal P. C. For instance, if the petitioner had been able to satisfy us that his minor wife was being detained against her wishes by her mother and her family or that she was being used for improper purposes, we should not have had the slightest hesitation in affording the petitioner relief under S. 491, Criminal P. C. The decision in *Subbaswami Goundan* v. *Kamakshiammal* 53 Mad. 72 was followed by Rajamannar J. as he then was, in *Venkatarammiah Chetti* v. *Papammal*, 1947-2 Mad. L. Jour. 153. In that case, the facts were somewhat peculiar. There was an allegation that the mother was contemplating departure for Rangoon with the girl wife who was only 13 years old. Her objection was that the child was not in a fit condition for consummation. There the order of the Court was that the minor girl should be kept in the custody of a public institution for a period of one year at the expense of the husband and on this condition her husband was given custody. We are satisfied that in these two decisions relied on by the petitioner there were special circumstances for an order of custody. In the present case, we are quite satisfied that this young woman, with the threshold of majority, has left her husband, entirely of her own accord dissatisfied with the treatment she was receiving from his mother and grandmother. Though the custody in which she now is may be technically illegal in the sense that her husband as legal guardian is prima facie entitled to custody, we do not consider that the facts of this case would justify our passing any order under S. 491, Criminal P. C. The petitioner is seeking really to exercise his legal right as guardian of his minor wife. This is eminently a fit case in which we would refer him for his relief to the Guardians and Wards Act, S. 25 of which is specifically intended to give relief in such cases. Though the remedy under S. 491, Criminal P.C., is open to any legal guardian who claims custody of a ward, there must be satisfactory evidence that the ward is in illegal or improper custody of such a kind as to justify an emergent order by a Criminal Court under this section. To take any other view would be to constitute a Criminal Court under S. 491, Criminal P. C., a Guardian and Wards Court acting under S. 25, Guardians and Wards Act, which lays down certain considerations for the guidance of the Court in such matters. We refer petitioner to this remedy and dismiss his petition.

[5] **Krishnaswami Nayudu J.**—This petition raises an important question as to what is the proper remedy in a case where a legal guardian of a minor seeks to recover the custody of the minor from a person who is not the guardian, and whether in such cases, an application under S. 491 (1) (b), Criminal P. C., is preferable to an application under S. 25, Guardians and Wards Act. Such applications, by persons, who are by virtue of their being guardians in law entitled to the custody of the minor, have till now been made under S. 491 (1) (b) and relief has been given by way of directing the minors to be restored to the custody of the applicants, the applicant being either a father of a minor child or the husband of his minor wife or of the legal guardian. That such an application is maintainable there is no doubt and the decisions of this Court in *Reade* v. *Krishna*, 9 Mad. 391, *Subbaswami Goundan* v. *Kamakshiamal*, 53 Mad. 72, *Venkatarammiah* v. *Papammal*, 1947-2 Mad. L. Jour. 153: 1947 Mad. W. N. 527 and *Rama Iyer* v. *Nataraja Iyer*, A.I.R. (35) 1948 Mad. 294 make it clear that it is open to a guardian, who is entitled to the custody of his ward, to sustain an application under S. 491 (1) (a), Criminal P. C.

[6] Section 491 empowers the High Court, whenever it thinks fit, to direct among others that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction to be set at liberty. This is the common law writ of Habeas Corpus, which the High Court has power to issue, and this common law writ is substituted by the said statutory provision in the Criminal Procedure Code. This writ of Habeas Corpus is a prerogative writ for securing the liberty of the subject in all cases of wrongful deprivation of liberty of the subject, or unlawful detention of the subject against his will, and recourse is had by the aggrieved party for issue of a writ and the High Court is entitled, on such application, to direct the production of the subject and inquire into the cause of his detention, and if it is satisfied that such a detention is illegal or improper, it can direct the person to be set at liberty. In cases similar to the present one, where the subject is a minor, the question naturally arises whether the minor has got a will of his own, and whether it could be stated there is a detention against his consent and therefore the detention is illegal and improper. But it has been uniformly held that where a minor is kept out from the custody of his legal or natural guardian against the wishes of the natural guardian, such detention is considered to be illegal, the illegality arising from the circumstance that the detention is without the consent of the person, who is legally entitled to the custody of the minor. It is beyond controversy that in this case, the husband, who is the guardian in law of his minor wife, is entitled to have an order that the minor shall be set at liberty so that the applicant may take her into his custody, if 'illegal detention' means that the detention against the wishes of the natural or legal guardian. But there is always the discretion vested in the High Court to pass an order, only if the High Court should think it fit to make such an order, and in the exercise of that discretion, the Court ought to take certain factors into con-

sideration and such factors are those that are generally considered in an application taken out for the appointment or removal of a guardian, or for the custody of the ward by the natural guardian under the provisions of the Guardians and Wards Act, such factors, being among others, the welfare of the minor and the wishes of the minor, if the minor is able to give an intelligent preference. The result is an application under S. 491 (1) (b) is virtually converted into one under the Guardians and Wards Act. It is well known that this prerogative writ of Habeas Corpus is an extraordinary remedy and generally sought for upon sufficient cause shown only in cases where the ordinary remedy provided by law is not available or is inadequate or ineffective in the circumstances of a particular case. It is therefore always open to the High Court to refuse that remedy when there is an effective and specially provided for remedy, which should be the ordinary remedy which an aggrieved person, as in this case who asks for the custody of the minor, should seek.

[7] In the cases cited above, the objection that an application under S. 491 was not maintainable was considered and has been uniformly negatived. But though there were applications purported to be under S. 491 Criminal P. C. they were dealt with by the Courts as being practically applications under the Guardians and Wards Act. In *Reade* v. *Krishna*, 9 Mad. 391 and *Abraham* v. *Mahtabo*, 16 Cal. 487 the minors were alleged to have been detained by Christian missionaries and the natural guardians had to prefer applications for the issue of a writ under S. 491. In *Subbaswami Goundan* v. *Kamakshi Ammal*, 53 Mad. 72 the husband sought to recover the custody of his minor wife and the learned Judges, after examining the girl-wife, who was about 13 years of age and who refused to join the husband, held that she was tutored to say so by her mother, and her wishes therefore were not given any weight. In that case an order directing the restoration of the minor wife to the husband was passed which the learned Judges considered to be for the welfare of the minor wife With reference to the argument addressed in that case that proceedings under S. 491 were not the appropriate ones, it was observed as follows :

"We are very far from saying that in a case such as this the remedy of the husband could be under the provisions of the Guardians and Wards Act, but it is not necessary for us to express an opinion beyond saying that we think it is very doubtful. Even assuming that that remedy was open to the petitioner, it is clear that the remedy under S. 491, Criminal P. C. is one which is open to the petitioner and the respondents cannot be heard to say that when there is a remedy provided by law, that remedy should not be resorted to, because there is another remedy less expensive and less threatening."

The learned Judges finally held that the petitioner was entitled to come by way of an application under S. 491, Criminal Procedure Code. This decision was followed in *Venkataramiah* v. *Papammal*, 1947 M.W.N. 527 : 1947-2 Mad. L. Jour. 153 which was also a case of a husband seeking to recover the custody of his wife. In *Rama Iyer* v. *Nataraja Iyer* A. I. R. 1948 Mad. 294, where a father applied under S. 491 for the custody of his minor son against the maternal grandfather with whom the minor was staying and the learned Judges adopted the same view as in *Subbaswami Goundan* v. *Kamakshiammal*, 53 Mad. 72 as to the maintainability of the application.

[8] As already observed, it cannot be said that an application by a guardian for recovery of the custody of the minor from a person, who is not his legal or natural guardian, is not maintainable under S. 491. But the point for determination is whether that is a proper remedy and whether an application under S. 25 of the Guardians and Wards Act would not be the better course to be taken. Section 25, Guardians and Wards Act, in any view so, is the appropriate provision of law under which applications of this nature ought to be taken for the relief which is sought. The Court is empowered under that section, to direct the restoration of the ward to the guardian of the person of the ward if the ward is removed from the custody of such guardian. The terms of the section are so wide that such applications need not necessarily be by a person who is declared or appointed by Court as the guardian. The natural guardian according to the personal law of the minor can apply and a person who though not the guardian is entitled to the custody of the minor, as in the case of a Muslim mother, who is entitled to hizanat in preference to the father, the natural guardian, can also make such an application. If the Court considers that it is for the welfare of the ward to return to the custody of the guardian, the Court can make such an order, and for the purpose of enforcing the order the Court can order the arrest of the ward and exercise the power conferred on a Magistrate of the first class by S. 100, Criminal Procedure Code. In view of S. 25, Guardians and Wards Act, I am unable to agree with the observations with respect to the learned Judges in *Subbaswami Goundan* v. *Kamakshiammal*, 53 Mad. 72 that in a case such as this the remedy of the husband could not properly be under the provisions of the Guardians and Wards Act, though the learned Judges do not consider it necessary to express an opinion beyond saying that it is very doubtful. There can however be no doubt that there is an adequate remedy under the Guardians and Wards Act under S. 25.

[9] It may be there may be cases where an order for the production of the minor may have to be obtained urgently and with expedition and in such cases it may be argued that an application for issue of a writ of habeas corpus would be more effective and speedy remedy, as for instance, where a minor girl is taken away from the custody of the father by a relation for the purpose

of marrying her to a person quite against the wishes of the natural guardian, or where a minor girl is taken away from the custody of the natural guardian for immoral purposes or with ulterior motives, or where a minor is sought to be removed from the jurisdiction of the Court against the wishes of the natural guardian, or where it is apprehended that a minor who is not in the custody of the natural guardian, is subject to illtreatment and there is some danger to his health and safety. Such cases can be contemplated, when the minor may be directed to be brought into Court before any harm is done to the minor or a writ may issue from the High Court for the production of such minor before final orders can be passed. In that way it may be argued that the remedy provided under S. 491, may be availed of. But, even in such cases, I do not consider that an effective, speedy and adequate remedy could be obtained only by means of an application under S. 491. The Guardians and Wards Act gives sufficient powers to deal with cases of this nature as well. It is always open to the Court in an application under S. 25, Guardians and Wards Act, to issue interim orders for the custody of the minor and to direct the arrest of the ward. The Court has also got power under S. 12 (1) to direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced and may also make orders for temporary custody and protection of the minor as it thinks proper. When the Act provides complete and adequate remedy to a person, who is deprived of the custody of his ward, the proper course for such an aggrieved person is to proceed by way of an application under the provisions of the Guardians and and Wards Act and not seek the general and extraordinary remedy of applying for a writ of habeas corpus. An application under S 491 being in the nature of a summary proceeding, it will not be possible for instance to go into the question of the right of guardianship of the applicant in cases where it may be disputed. Questions such as whether it would be for the welfare of the minor to restore the custody of the minor to the guardian and the taking into account the minor's wishes, if she is of sufficient age and is able to give an intelligent preference are matters which should legitimately be considered in proceedings under the Guardians and Wards Act and they could not be gone into thoroughly in a summary proceeding. Courts should be reluctant to pass orders in applications under S. 491, when such applications are taken by persons, who claim to be the natural guardians and require their wards to be restored to their custody. Unless there is an imminent danger to the health or safety of the minor or to his morals, when an interim order of production would become necessary, parties should be directed to proceed by way of application under the provisions of the Guardians and Wards Act. The more appropriate, effective and legitimate course to be adopted by an aggrieved person, who seeks to get the custody of his ward, is under the Guardians and Wards Act. I agree with my learned brother that it is not necessary to pass an order in favour of the petitioner, and the petitioner is referred to seek his remedy under the Guardians and Wards Act.

C.R.K./D.H. *Petition dismissed.*

A. I. R. (39) 1952 Madras 101 *[C. N. 49.]*

SOMASUNDARAM J.

In re Illuru Lakshmiah and another—Petitioners.

Criminal Revn. Cases Nos. 1379 etc. and Cri. R. P. Nos. 1301 etc. of 1949, D/- 27 4 1951.

Criminal P. C. (1898), S. 423 (1) (b) (2)—"Alter the find ng maintaining the sentence."—Power of appellate Court.

In an appeal by the accused, the Sessions Judge acquitted all the appellants of the first charge and altered the finding and convicted the accused under the second charge of which they were acquitted by the trial Court on the ground of their having been convicted under the first charge. The Judge while altering the finding maintained the sentence. In revision before the High Court it was contended that the appellate Court erred in finding the accused guilty under the second charge when they were acquitted of the same by the trial Court and the lower appellate Court had no jurisdiction to convert the acquittal into a conviction under S. 423 (1) (b) (2):

Held, that the appellate Court can alter the finding maintaining the sentence. So long as the sentence is maintained, it is of little importance and it causes no prejudice whatsoever to the accused if the appellate Court alters the finding. Alteration implies a change. A change must necessarily, therefore, be to some other offence of which the accused was either being charged in the lower Court and acquitted or of which he could be charged under the provisions of Ss. 236 and 238 and an acquittal is implied though no definite finding in respect of it is given by the first Court : 34 Mad. 545 ; 35 Mad. 243 and A.I.R. (1) 1941 Mad 258, *foll.*; A.I.R. (15) 1928 P. C. 254, *Explns.* and *Disting.*; 23 Cal. 975, *Ref.* [Para 6]

Anno. Cr. P. C., S. 423, N. 31.

A. Bhujanga Rao, A. Krishna Rao and R. Ramalinga Reddi — for Petitioners ; Public Prosecutor — for the State.

Cases referred to—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('28) 50 All. 722 : (A. I. R. (15) 1928 P. C. 254: 29 Cri. L. Jour. 828). [Prs. 5, 6]

('22) 44 All. 332 : (A. I. R. (9) 1922 All. 487 : 23 Cri. L. Jour. 202). [Pr. 5]

('37) A. I. R. (24) 1937 All. 240 : (38 Cri. L. Jour. 521). [Pr. 5]

('44) I. L. R. (1944) All. 403 : (A. I. R. (31) 1944 All. 137: 46 Cri L. Jour. 38 F. B.). [Prs. 4, 6]

('74) 11 Bom. H. C. R. 240. [Pr. 4]

('96) 23 Cal. 975. [Prs. 4, 5]

('42) I. L R. (1942) 23 Lah. 129: (A. I. R. (28) 1941 Lah. 465 : 43 Cr. L. Jour. 268 F. B.) [Prs. 4, 5]

('03) 26 Mad. 473 : (13 Mad. L. Jour. 263). [Pr. 4]

('10) 33 Mad. 264 : (11 Cri. L. Jour. 49). [Prs. 4, 5]

('11) 34 Mad. 545 : (7 Ind. Cas. 861). [Prs. 4, 5, 6]

('12) 35 Mad. 243 : (10 Ind. Cas. 372). [Prs. 4, 5, 6]

('14) 37 Mad. 119 : (A. I. R. (1) 1914 Mad. 258 : 15 Cri. L. Jour. 180). [Prs. 4, 5, 6]

('48) A. I. R. (35) 1948 Pat. 435 : (49 Cr. L. Jour. 589). [Pr. 5]

Order. — Cr. R. C. Nos. 1379 and 1395/1949. These two revision petitions arise out of C. C. No 25 of 1948 on the file of the Sub Divisional Magistrate, Adoni. The petitioners in Cr. R. C. No. 1379 are the first and second accused in the case and the petitioners in Cr. R. C. No. 1395 are the third and fourth accused in the case. There were nine accused in all in that case and excepting the four accused the rest were acquitted. They were all tried on three charges, the first charge being an attempt to transport millets without a permit from a village called Halaharvi in Bellary District to Kurnool District in violation of the notification mentioned in that charge. The second charge is for the same transport without a permit from the same village which is said to be in Alur taluk to Asparti village in the same taluk and this is said to be in contravention of the notification mentioned in that charge. The third charge is causing the lorry in which these millets were taken to carry the foodgrains from Bellary District to Kurnool to be driven during night which is said to be contrary to the G. O. mentioned in the charge. The first Court convicted all the four accused on the first charge and sentenced them, the first and second accused to six months rigorous imprisonment and third and fourth accused to four months rigorous imprisonment. It may be stated that the third and fourth accused are the driver and conductor of the lorry whereas the first and second accused are the persons who are said to be taking these foodgrains. The trial Court acquitted accused 3 and 4 on the second charge which was for taking the commodity from one village to another without a permit as the petitioners are convicted on the first charge. So far as the first and second accused are concerned, they were acquitted of the third charge, i. e., taking during night. The third and fourth accused, the driver and the conductor were convicted of the third charge and given the same sentence, the sentences to run concurrently. All the four accused preferred appeals to the Sessions Court, the appeal preferred by the first and second accused being C. A. No 73 of 1949 while C. A. No. 66 of 1949 was preferred by the third and fourth accused. In appeal, the learned Sessions Judge acquitted all the appellants of the first charge and following certain rulings of this Court altered the finding and convicted the accused under the second charge of which, as already stated, they were acquitted by the trial Court on the ground of their having been convicted under the first charge. So far the third and fourth accused are concerned, the Sessions Judge confirmed the conviction on the third charge also. The learned Judge while altering the finding, maintained the sentence of six months passed on the first and second accused and the sentence of four months passed on the third and fourth accused. These revisions are against the judgments in the two appeals.

[2] On the merits, there is very little to be said in favour of the first and second accused and the only question that was argued so far as they are concerned is that the appellate Court erred in finding the petitioners guilty under the second charge when they were acquitted of the same by the trial Court and the lower appellate Court has no jurisdiction to convert the acquittal into a conviction under S. 423 (1) (b) (2), Criminal P. C. So far as accused 3 and 4 are concerned, the same point is raised so far as their conviction on the second charge is concerned.

[3] Before I deal with this point, it is better I dispose of the case of accused 3 and 4 so far as the conviction under the third charge is concerned which is already stated, driving the lorry having foodgrains from Bellary District during the night. It is said to be a violation of G. O. No. 393 dated 3-4-1947. As a matter of fact, it is in pursuance of this G. O. that the Collector and District Magistrate of Bellary passed an order on 15-7 1947 prohibiting the carrying of foodgrains during night, i. e., between 7 P. M. and 6 A. M. on certain roads which included the road on which the petitioners were driving. This notification was published in the District Gazette Extraordinary on 30-7-1947. The occurrence was on 23 7-1947. It is obvious therefore, that the notification itself was long after the occurrence and therefore accused 3 and 4 could not be said to have violated the provisions of the notification which was not in force on the date on which the occurrence took place. Accused 3 and 4 must therefore be acquitted of this charge i.e., the third charge framed against them.

[4] Now I will take up the contention that the lower appellate Court under S. 423 (1) (b) (2) cannot alter the finding of acquittal into one of conviction. It must be mentioned that cl. (b) of S. 423 (1) deals with appeals against convictions while cl. (a) deals with appeals against acquittals preferred by the State. Under S. 423 (1) (b) (1) the appellate Court can reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or commit him for trial. It is under sub-cl. (2) that the lower appellate Court is given power to alter the finding, maintaining the sentence or with or without altering the finding, reduce the sentence. We are not concerned with sub-cl. (3) and therefore it is unnecessary to refer to it. The question for consideration now is what is meant by "alter the finding, maintaining the sentence" and in what cases and under what circumstances can this power be exercised by the appellate Court. Section 423 Criminal P. C. deals with the powers of the appellate Court, not only with the powers of the High Court hearing the appeals but also with the powers of subordinate Courts which hear the appeals. This question came up for consideration in several cases both in our High Court as well as

in the High Courts of other states. The earliest decision and perhaps the leading decision which is referred to in subsequent decisions, is *Queen Empress* v. *Jabanulla*, 23 Cal. 975. In the above decision Banerjee J. had to concede that the interpretation of the words "alter the finding, maintaining the sentence" is not free from limitation but is subject to some restrictions in particular cases. At page 979, the learned Judge states as follows :

"Section 423, cl. (b) has no restriction imposed upon it. There is under that clause, only one restriction to the power of the appellate Court on an appeal from a conviction and that is that it cannot enhance the sentence. It is possible to imagine cases in which this restriction may stand in the way of the appellate Court's altering the finding. Thus, if an accused person is charged with having murdered *A*, and also with having caused grievous hurt to him and is acquitted of the former offence but convicted of the latter and sentenced to seven years rigorous imprisonment by the first Court, the appellate Court cannot, on the appeal of the accused, alter the finding into one of guilty of murder, because as it cannot enhance, the sentence, the result will be that a person convicted of murder, for which the only punishment is either death or transportation for life, will be punished merely with imprisonment for seven years a sentence which is not in accordance with law. That, however, is not the case here and so we need not consider it further. But in a case like this, in which no such difficulty arises, I think the appellate Court can, in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of any offence of which he may have been acquitted by the Court."

This was cited before Sir Arnold White C. J. in *Sami Aiyar* v. *Emperor*, 26 Mad. 478 but was simply distinguished on the ground that the appellate tribunal in that case, the High Court, was a tribunal which had jurisdiction to set aside an acquittal. He held that the words "reverse the finding and sentence" in S. 423 (1) (b) (1) mean reverse the finding upon which a conviction is based and do not empower the appellate tribunal to reverse and set aside an order of acquittal. Apart from the fact that this judgment does not refer to the words "alter the finding" there is no discussion of the points and it cannot therefore be of sufficient authority for the contention that alteration of the finding cannot mean alteration of the finding of acquittal into one of conviction. In *Padmanabha Panji Kannayya* v. *Emperor*, 38 Mad. 264, Munro and Abdur Rahim JJ. were considering a case where the accused were charged under Ss. 467 and 468, Penal Code. The Sessions Judge convicted the accused of those offences but the learned Judges held that the offences under those sections were not made out but the evidence disclosed at best that they were guilty only of abetment of those offences. It was contended before them that they could convict the accused of abetment of the offences. But they held that under S. 423, Criminal P. C. the appellate Court has power to alter a finding and that that power cannot be used arbitrarily but only in accordance with other provisions of the Code, and they say that those provisions are to be found in Ss. 237 and 238, Criminal P. C. and that neither of those two sections cover a case like the one before them. They held following the ruling in *Reg.* v. *Chandnur*, 11 Bom. H. C. R. 240, that it was not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. But subsequently there were several cases which held that if the facts relied on could support a charge for that offence, there is no objection to an accused being convicted for an abetment of an offence even if he is charged with the substantive offence. Vide decisions cited under Note 8 to S. 236, Criminal P. C. in the A. I. R. Commentaries pages 1416 of Vol. II, 1946 edition. In *Appanna* v. *Mahalakshmi*, 34 Mad. 545 Munro and Krishnaswami Aiyar JJ. expressed their agreement with the decision in *Queen-Empress* v. *Jabanulla*, 23 Cal. 975 and also observed that the Calcutta case cannot be distinguished in the manner in which it is sought to be distinguished in *Sami Aiyar* v. *Emperor*, 26 Mad. 478. As pointed out above, they also refer to the fact that in *Sami Aiyar* v. *Emperor*, 26 Mad. 478 there is no reference to the wording of the S. 423 (1) (b) (2). In *Appanna* v. *Mahalakshmi*, 34 Mad. 545 the Court framed two charges under Ss. 148 and 325, I. P. C. acquitted the accused under S. 148 but convicted them under S. 325. The accused then appealed to the Sessions Judge who was of the opinion that the accused could have been convicted under S. 147 but thought he could not interfere with the acquittal. The learned Judges held that the view of the Sessions Judge is clearly wrong and the appellate Court may "alter the finding, maintaining the sentence" and that there is nothing to restrict the finding which could be altered to a finding of conviction. They therefore set aside the acquittal and directed a rehearing of the appeal. In *Hanumappa* v. *Emperor*, 35 Mad. 243 the accused were charged under Ss. 148, 302, 326 and 149, I. P. C. The trial Court acquitted all the accused of murder and of rioting and convicted all the accused of murder and of rioting and convicted the accused of hurt and grievous hurt. An appeal was preferred by some of the convicted accused to the High Court. Sundara Aiyar and Ayling JJ. after reviewing the evidence found that the evidence showed that all the accused were members of an unlawful assembly and were guilty of rioting and that they were all responsible for the injuries inflicted on several prosecution witnesses in the course of the fight. They found specific acts were not proved and after acquitting one accused, they altered the conviction of the other accused by finding them guilty of offences under Ss. 147, 325 and 326 read with S. 149, I. P. C. Dealing with the contention of the counsel for the appellants that it was not competent for them to convict the accused of being members of an unlawful assembly or of rioting and hold them constructively guilty of the offence of causing grievous hurt as they were acquitted of those offences by the lower Court, they say

that under S. 423 (1) (b) (2) the appellate Court has the power to alter the finding of the lower Court maintaining the sentence. A further contention that this provision entitles the Court to convict an accused of an offence of which he is acquitted is restricted only to cases falling under Ss. 237 and 238, Criminal P. C. was also repelled. They say:

"The finding which an appellate Court may alter under S. 423 (b) may relate either to an offence with which the accused was apparently charged in the lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under Ss. 237 and 238, Criminal P. C. no doubt the appellate Court cannot convict a person of an offence with which he was not charged in the first Court but where he has been charged and the first Court has recorded a finding on the charge, there is no reason for holding that the appellate Court cannot alter the finding. There is obviously no injustice in doing so."

The learned Judges expressed their views in accordance with *Queen-Empress* v *Jabanulla*, 23 Cal. 975. The next decision is In re *Balireddi*, 37 Mad. 119. In that case, five accused were charged with rioting and murder. The Sessions Judge found them guilty of simple rioting and culpable homicide not amounting to murder and convicted them under Ss. 147 and 304, I. P. C. The accused preferred an appeal to the High Court and the Court as a Court of revisional jurisdiction gave notice to show cause why they should not be convicted of murder and be sentenced for that offence. The Bench, consisting of Benson and Sundara Aiyar JJ. followed the ruling in *Appanna* v. *Mahalakshmi*, 34 Mad. 541 and *Queen Empress* v. *Jabanulla*, 23 Cal. 975. Referring to the contention that under S. 439, Criminal P. C., the Court cannot convert a finding of acquittal into one of conviction, they say that S. 423 (b) has no restriction and the only restriction under that clause is that the Court of appeal cannot enhance the sentence. They state at p. 123 as follows:

"The effect of the two sections (meaning 423 and 439, Criminal P. C.) read together is that the High Court when hearing an appeal against a conviction may, under S. 423 (b) alter the finding and then as a Court of revision may, under S. 439 enhance the sentence so as to make it appropriate to the altered finding."

Dealing with S. 439 (4) they say it applies only to a complete acquittal and not a partial acquittal. To the same effect is the decision of the Full Bench of the Lahore High Court in *Bava Singh* v. *The Crown*, 23 Lah. 129. In Allahabad also, a Full Bench consisting of five Judges held by a majority, Mulla and Hamilton JJ. dissenting that the Court of appeal is empowered under S. 423 (1) (b) (2) to alter the finding of acquittal into one of conviction—See *Emperor* v. *Zamir Quasim*, I. L. R. (1944) ALL. 403.

[5] The main decision on which the learned counsel for the petitioners relies in support of his contention is a decision of the Privy Council in *Kishan Singh* v. *Emperor*, 50 ALL. 722. That is a case where the Sessions Judge tried an accused on a charge of murder but convicted him only under S. 304, Penal Code. On behalf of the Local Government an application for revision of the judgment of the learned Sessions Judge was filed and in that it was sought to enhance the sentence passed on the accused by converting the finding into one under S. 302, Penal Code. The High Court converted the finding to one under S. 302 and sentenced the accused to death. Their Lordships of the Privy Council held that the conviction under S. 304, Penal Code, amounted to an acquittal under S. 302 and that

"In view of the provision contained in S. 439 (4) that nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction, the learned Judges of the High Court who were dealing *only with the application for revision* (underlining (here in italics) is mine) had no jurisdiction to convert the learned Judge's finding of acquittal on the charge of murder into one of conviction of murder".

The decision in *In Re Bali Reddi*, 37 Mad. 119 was cited before their Lordships and referring to that, their Lordships state as follows:

"It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in S. 439 (4) refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide and not amounting to murder, their Lordships are unable to agree with that part of the decision. The words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to this sub-section".

From this observation of their Lordships of the Privy Council it is contended that the decisions of the Madras High Court holding that under S. 423 (1) (b) (2), the appellate Court can alter the finding of acquittal, are no longer good law and he relies on a decision of Sulaiman C. J. and Bennett J. in *Sarda Prasad* v. *Emperor*, A. I. R. (24) 1937 ALL. 240 and *Panu Nayak* v. *Chintai Malik*, A. I. R. (35) 1948 Pat. 435. The other decisions *Padmanabha Panji Kannayya* v. *Emperor*, 33 Mad. 264 and *Emperor* v. *Sheodarsahan Singh*, 44 ALL. 332 which are in support of his view are earlier than the Privy Council decision in *Kishan Singh* v. *Emperor*, 50 ALL. 722 whereas subsequent to the Privy Council decision in *Bawa Singh* v. *The Crown*, I. L. R. (1942) 23 Lah. 129 the learned Judges held following the view expressed earlier by our High Court and in *Queen Empress* v. *Jabonullah*, 23 Cal 975 that the appellate Court has such power. The question now is whether on account of the decisions of the Privy Council, the earlier decisions of our High Court in *Appanna* v. *Mahalakshmi*, 34 Mad. 545, *Hanumappa* v. *Emperor*, 35 Mad. 243 and *In Re Balireddi*, 37 Mad. 119 are no longer good law.

[6] The decision of the Privy Council in *Kishan Singh* v *Emperor*, 50 ALL. 722, is clearly a case wherein S. 423 (1) (b) (2) did not come in for con-

sideration at all. It was a case where the accused who was convicted under S. 304, Penal Code, did not appeal and the State Government too did not prefer an appeal against acquittal of the accused for the offence under S. 302. The State, on the other hand, chose to move the High Court in its revisional jurisdiction and sought to enhance the sentence by getting an alteration also in the finding of acquittal of the offence under S. 302. The Privy Council, therefore, was dealing only with the powers of the High Court under 439. They were not dealing with the powers of an appellate Court. The two powers are distinct and separate. The appellate Court under S. 423 cannot enhance the sentence whereas the revisional Court can enhance the sentence. The revisional Court cannot alter the finding of acquittal into one of conviction except where it exercises the power of an appellate Court, whereas to an appellate Court an express power was given "to alter the finding maintaining the sentence". Now what is the meaning to be given to this phrase "alter the finding". It is stated that the alteration of finding means only the finding from one conviction to another conviction in cases where such a change is permissible. Such a course will be legally sustainable only in cases which fall within the purview of Ss. 236 and 238, Criminal P. C., though of course *Hanumappa* v. *Emperor*, 35 Mad. 243, has held that it need not be restricted to these provisions. Even assuming such a course is permissible only in a case which falls under the above sections, when the trial Court convicts an accused of a certain offence, it means an implied acqittal of the other offences of which he could be tried or convicted under the provisions of those sections. Once it is an acquittal, either express or implied by the trial Court, if it is said that it cannot be altered except by an appeal against acquittal, there is no case or class of cases to which the alteration of finding can apply The phrase will be merely a dead letter in the section. As pointed out by Iqbal Ahmed C. J. in *Emperor* v. *Zamir Quasim*, I. L R. (1944) ALL. 403.'

"It is the sentence passed against the accused which alone matters. The law no doubt attaches sanctity to acquittals but there is no invasion of that sanctity if, within the framework of the sentence, a finding of acquittal is converted into one of conviction".

Therefore so long as the sentence is maintained, it is of little importance and it causes no prejudice whatsoever to the accused if the appellate Court alters the finding. Alteration implies a change. According to the dictionary it means "a change in character" or "to make different". A change must necessarily therefore be to some other offence of which he was either being charged in the lower Court and acquitted or of which he could be charged under the provisions of Ss. 236 and 238, Criminal P. C. and an acquittal is implied though no definite finding in respect of it is given by the first Court. Their Lordships of the Privy Council in *Kishansingh* v. *Emperor*, 50 ALL. 722 were dealing only with the revisional jurisdiction of the High Court and not with the appellate jurisdiction of Courts. In my view the decision of the Privy Council has not affected the law which prevailed before that decision with regard to the interpretation of S. 423 (1) (b) (2) and as these decisions particularly those in *Appanna* v. *Mahalakshmi*, 34 Mad. 545; *Hanumappa* v. *Emperor*, 35 Mad 243 and *Re Basireddi*, 37 Mad. 119 are decisions by a Bench of this Court they are binding on me. I have indicated my view also which is in accord with the view taken in the above decisions. I do not therefore think it necessary to post this case before a Bench. As already stated, accused 3 and 4 are acquitted of the third charge only. The conviction of the four accused on the second charge is confirmed. The sentence of Accused 2 is by no means excessive. Their petition is therefore dismissed. As regards A-3 and A-4 their sentence is reduced to period undergone.

[7] *Crl. R. C. No. 1380 of 1949:* — This petition is preferred by accused 1 and 2 in C. C. No. 26 of 1948. The petitioners are the same as the petitioners in Crl. R. C. No. 1379, though the charge is different, viz., that in this case the charge is for having purchased millets without a permit. On the merits there is nothing to be said and no illegality has been pointed out with regard to the conviction. The conviction and sentence are confirmed and the petition is dismissed.

[8] *Crl. R C. Nos. 1381 and 1388 of 1949:*— These two revision petitions are preferred by the first and second accused in C. C. No. 33 on the file of the Sub-divisional Magistrate of Adoni who convicted them of offences under Food Control Orders. The only point is about the alteration of the finding by the appellate Court. As I have held in Crl. R. C. Nos. 1379 and 1385 that it is permissible to alter the finding, the conviction and sentence of the petitioner in Crl. R. C. No. 1381 is confirmed. The conviction of the two accused is confirmed but their sentence is reduced to the period already undergone.

[9] *Crl. R. C. No 1382 of 1949:* — This revision arises out of C. C. No. 34. I find no reason to interfere either with the conviction. But the sentence is reduced to period undergone.

[10] *Crl. R. C. No. 1389 of 1949:*—This revision arises out of C. C. No. 31. The only question in this case is one of sentence. The conviction is confirmed and the sentence is reduced to the period already undergone.

[11] *Crl. R. C. No. 1390 of 1949:*—This revision is by the second accused and the third accused in C. C. No. 23 on the file of the Sub Divisional Magistrate of Adoni. The question in this case is one of sentence. The conviction of accused 2 and 3 are confirmed but the sentences are reduced to the period already undergone.

C.R.K/V.S.B. *Order accordingly.*

A. I. R. (39) 1952 Madras 106 *[C. N. 50.]*

SATYANARAYANA RAO J.

Gadhavajhala Satyanarayanamurthi—Appellant v. *Rao Saheb Y. Narayanamurthi and others—Respondents.*

Second Appeal No. 150 of 1948, D/- 9-8-1951.

Civil P. C. (1908), S. 9—Bar of jurisdiction —Rule framed under powers conferred by scheme decree.

The legislature is entitled to enact provisions depriving the civil Court of its ordinary jurisdiction. It cannot however be said that a Committee or a General-Committee like the General Committee of the Taylor High School, Narasapur, stands in the same position as the legislature of the Province. The right of suit under S. 9 cannot be taken away by a rule made under the power conferred by the scheme framed for the administration of the High School. It has no statutory force and cannot affect the provisions of the Civil Procedure Code. Further it is not obligatory upto the aggrieved person even under R. 9 of the Rules framed by the General Committee under Cl. 25 of the scheme framed by the Court to prefer an appeal to the General Committee, as it states that it shall be open to a person aggrieved to prefer an appeal to the General Committee and not that it is incumbent upon him to prefer an appeal : A. I. R. (24) 1937 P. C. 31, A. I. R. (25) 1938 Mad. 972, A. I. R. (27) 1940 Mad. 493 and A. I. R. (29) 1942 Mad. 127. *Ref.*

[Paras 1, 3, 4, 5]

Anno. Civil P. C., S. 9, N. 50.

V. Parthasarathy —for Appellant; S. Venugopal Rao and M. Venkateswarlu —for Respondents.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('37) I. L. R. (1937) Mad. 532: (A.I.R. (24) 1937 P. C. 31). [Pr. 4]

('38) 1938-2 Mad. L. Jour 516: (A.I.R. (25) 1938 Mad. 972). [Pr. 4]

('40) 1940-1 Mad. L. Jour 352: (A.I.R. (27) 1940 Mad. 493). [Pr. 4]

('41) 1941-2 Mad. L. Jour 577 : (A. I. R. (29) 1942 Mad. 127). [Pr. 4]

Judgment.—The plaintiff is the appellant in this second appeal. He was the Head Clerk in the Taylor High School, Narasapur. He was suspended by the management of the Institution on 12-10-1943 and was ultimately dismissed from service on 19-11-1943. He instituted the suit out of which this second appeal arises, for a declaration that the orders of suspension and dismissal were *ultra vires* and void and that he continued to be an employee of the Taylor High School, Narasapur, and for an injunction directing the defendants to allow him to work in his post in the school. The suit was contested by the management on various grounds. They maintained that the dismissal was justified and was proper, that the plaintiff's only remedy if he was aggrieved by the decision of the Executive Committee was to have preferred an appeal to the General Committee under R 9 of the Rules framed by the General Committee under cl. 25 of the scheme framed by the Court in O. S. No. 19 of 1922 on the file of the Sub Court, Narasapur, and that, therefore, the suit was not maintainable. The trial Court found practically on almost all the points against the plaintiff and dismissed the suit. On appeal the learned Subordinate Judge found that the order of dismissal was wrongful, as there was no proper enquiry by the Committee, that the procedure adopted by them was not proper and that the rule of natural justice that a man should not be condemned without giving him an opportunity to prove his innocence was not observed. He however dismissed the suit on the sole ground that R. 9 excluded the jurisdiction of the civil Court from entertaining the suit and that the remedy of the appellant was to have preferred an appeal to the General Committee under R. 9.

[2] In this second appeal the entire ground was covered by the learned advocate appearing on both sides. In the first place the respondent's advocate attempted to argue that the finding of the learned Judge that the dismissal of the plaintiff was wrongful was not justified. It is not disputed that the plaintiff was a permanent employee of the Institution and that his tenure of office was not terminable at pleasure. The learned Subordinate Judge has found that no opportunity was given to the appellant to establish his innocence, and that the committee were not prepared to accept the explanation offered by the plaintiff in answer to the charges framed against him. He also found that the charges of bribery levelled against the appellant were not proved and that the appellant was not given an opportunity to show that charges 1 and 4 were not true. On these findings the conclusion is irresistible that the dismissal of the plaintiff from service was wrongful and cannot be upheld.

[3] The next question that falls to be considered is whether the jurisdiction of the civil Court to entertain the suit is excluded by R 9. Rule 9 is as follows:

"It shall be open to any person aggrieved by any decision or order or resolution of the Executive Committee to appeal to the General Committee against the said decisions, order or resolution within 15 days of the passing thereof, and the decision, or order or resolution of the General Committee passed in the said appeal shall be final."

It is contended on behalf of the respondents that as a remedy is provided by the rule by way of appeal against the decision of the Committee, it is the duty of the appellant who claims that he is aggrieved by that order to have preferred an appeal to the General Committee. Not having done so, he is precluded from instituting the present suit. I am not prepared to agree with this contention. In the first place, it is not obligatory upto the aggrieved person even under the rule to prefer an appeal to the General Committee, as it states that it shall be open to a person aggrieved to prefer an appeal to the General Committee and not that it is incumbent upon him to prefer an appeal.

[4] The jurisdiction of the civil Court under S. 9, Civil P. C., can be barred either expressly or by implication. The decisions referred to in the judgment of the learned Subordinate Judge for the

view that the jurisdiction of the civil Courts is excluded by R. 9, in my opinion, have no relevancy. In *R. Venkata Rao* v. *Secretary of State*, I. L. R. (1937) Mad. 532 (P. C.) the tenure was a tenure at pleasure, and it was held by the Privy Council that the only remedy of the aggrieved person was to have followed the procedure laid down by the rules, and that even if those rules were not observed the dismissed person had no right of action. In the other decision in *Ramanatha Gurukkal* v. *Arunachalam Chettiar*, 1938-2 Mad. L. Jour 516 which was affirmed on Letters Patent Appeal in *Ramanatha Gurukkal* v. *Arunachalam Chettiar*, 1940-1 Mad. L. Jour 352 the jurisdiction was impliedly barred by the statutory provisions of the Madras Hindu Religious Endowments Act. The legislature is entitled to enact provisions depriving the civil Court of its ordinary jurisdiction It cannot be said that a Committee or a General Committe like the General Committee of the Taylor High School, Narasapur, stands in the same position as the legislature of the Province. The decision in *Sasala Raminaidu* v. *Secretary of State*, 1941-2 Mad. L. Jour 577 is also of no assistance, as the provisions therein considered were also statutory provisions.

[5] The present is not a case of a right for the first time created by a statute along with a remedy to enforce that right and, therefore, the person claiming that right or deprived of that right should pursue the remedy provided by the statute, as that is his only exclusive remedy. The right of suit under S. 9 cannot be taken away by a rule made under the power conferred by the scheme framed for the administration of the school. It has no statutory force and cannot affect the provisions of the Civil Procedure Code. My attention has not been drawn to any authority which holds that in such circumstances by the existence of a rule which provides an optional remedy by way of appeal to the General Committee the aggrieved party has no right to go to a civil Court to have an adjudication on the right which he claims in the suit. The view taken, therefore, by the learned Subordinate Judge in this aspect of the case cannot be upheld. The plaintiff on the findings of the learned Subordinate Judge is entitled to no higher relief than that of a mere declaration that his dismissal was wrongful.

[6] The decree, therefore, of the Courts below must be reversed, and there should be a declaration granted in favour of the plaintiff that his dismissal from service was wrongful. As the parties have partly succeeded and partly failed it will be just, I think, in the circumstances of the case, to direct each party to bear his costs throughout. No leave.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 Madras 107 *[C. N. 51.]*

BASHEER AHMED SAYEED J.

In re M. Velu Konar and others--*Petitioners.*

Criminal Revn. Cases Nos. 254 etc. and Cri. Revn. Petns. Nos. 239 etc. of 1950, D/- 19-4-1951.

Sales Tax—Madras General Sales Tax Act (IX [9] of 1939), S. 8—Burden of proof.

Section 8 of the General Sales-tax Act lays the burden on the petitioners to prove that they were commission agents and not dealers. And if the petitioners succeed in proving that they are not dealers but are only commission agents, then the tax is not legitimately leviable against them. A. I. R. (35) 1948 Mad. 102 (1); A. I. R. (37) 1950 Mad 521 and A. I. R. (36) 1949 Mad 843, *Ref.* [Paras 1, 2]

K. V. Srinivasa Aiyar—for Petitioners. The Public Prosecutor—for the State.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('47) 1947-2 Mad. L. Jour 220: (A. I. R. (35) 1948 Mad. 102 (1)): 49 Cri. L. Jour 45. [Pr. 2]

('50) 1950-1 Mad. L. Jour. 564: (A. I. R. (37) 1950 Mad. 521.) [Pr. 2]

('49) 1949-1 Mad. L. Jour. 530: (A. I. R. (36) 1949 Mad. 843.) [Pr. 2]

Order.—In these batch of cases the point raised is that the petitioners are not dealers but are only commission agents and that the Courts below have proceeded on the basis that the petitioners are dealers and are not commission agents. Section 8, General Sales-tax Act, clearly lays the burden on the petitioners to prove that they were commission agents and not dealers. A perusal of the judgments of the Courts below does not disclose that the petitioners have taken care to prove to the satisfaction of the Courts below that they were commission agents and not dealers. When they have not proved according to the requirements of S. 8, General Sales-tax Act, that they were commission agents, then it cannot be contended that the lower Courts have gone wrong in holding that the petitioners have been merely dealers and applying the law that was then understood to be a correct one.

[2] I find that the decision in the *Public Prosecutor* v. *Narasimha Reddi*, 1947-2 M. L. Jour. 220 has been referred to by the learned District Judge. After this decision there was another decision in the *Provincial Government of Madras* v. *Veerabadrappa*, 1950-1 Mad. L. Jour. 564 in which the earlier view of another Bench reported in *Province of Madras* v. *Firm of Kanigolla Sivalakshminarayana* 1949-1 Mad. L. Jour. 530 has not been agreed to by the Bench. I am inclined to hold the view that if the petitioners had succeeded in proving that they were not dealers but were only commission agents, then certainly the tax was not legitimately leviable against them and the claim of the assessing authorities would not be tenable. But, unfortunately for the petitioners in this case, they have not succeeded in proving that they were

commission agents and not dealers. To prove that they were commission agents they would have had to satisfy many requirements that are prescribed in S. 8. I do not find anywhere in the judgments or in the evidence that has been read out to me that the petitioners come within the scope of S. 8, General Sales-tax Act, notwithstanding the fact that they did not obtain licence from the Government for the purpose of carrying on the agency business. If at least there was evidence to the effect that they were acting as commission agents for a fixed remuneration and were at least maintaining accounts of the transactions, then certainly there would have been some material for the Courts below to go upon and decide that the petitioners were not really dealers but were merely commission agents. In the absence of any such evidence, I do not think that there is any case made out against the judgments of the Courts below. I therefore hold that what the Courts below have decided is correct and there are no merits in these petitions. The petitions are therefore dismissed.

C.R.K./V.S.B. *Petitions dismissed.*

A. I. R. (39) 1952 Madras 108 *[C. N. 52.]*

GOVINDA MENON AND CHANDRA REDDI JJ.

Chadalavada Seetharamayya — Appellant v. *Vetivolu Kesavayya — Respondent.*

A. A. O No 339 of 1948 and A. A. A. O. Nos. 249 and 250 of 1947, D/- 26-2-1951.

Provincial Insolvency Act (1920), S. 44 (2) and (3) — Father's debt — Decree passed against father and son — Father declared insolvent — Release of father under S. 44 (2) whether extinguishes liability of son under decree — Hindu Law—Debt.

The fact that sub s. (3) of S. 44 provides for the continuance of the liability of persons jointly liable along with the insolvent indicates that the debt as such is not extinguished but it only releases the insolvent from all liability keeping alive the liability of the other debtors jointly liable with him. It, therefore, follows that the liability of a person jointly bound with the insolvent is not extinguished despite the discharge of the insolvent. [Para 15]

The effect of decree against the son against whom a decree has been passed along with his father is to make the son jointly liable along with his father to discharge the debt. Whatever might be the position prior to the decree, when the obligation of a Hindu son to pay his father's debts fructifies into a decree It imposes a joint liability on the son along with the father and the former is jointly bound along with the latter within the meaning of sub-s. (3) of S. 44. [Para 16]

Hence, the release of an insolvent father under S. 44 (2) from all debts does not extinguish the liability of the son who is liable under a decree along with the father in respect of his father's debts. A.I.R. (28) 1941 Mad. 440 and A. I R. (13) 1926 Mad 1106, *Rel. on*; A. I. R. (36) 1949 Mad. 790 (F. B.), *Expl.*; A I.R. (38) 1951 Mad. 48 (F B.), *Not Applied*; A. I. R. (4) 1917 Mad, 989 and A. I. R. (26) 1949 Mad. 228, *Disting.* [Paras 1, 8]

Anno. Pro. Ins. Act, S. 44 N. 4.

D. Narasaraju and T. V. R. Tatachari — for Appellant; M. S. Ramachandra Rao, L. Bundaram Aiyar, Ch. Suryanarayana Rao and Ch. Ramakrishna Rao — for Respondent.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('38) 1938-1 Mad. L. Jour 41: (A. I. R. (25) 1938 P. C. 7). [Pr. 12]
('04) 27 Mad. 243 : (14 Mad. L. Jour 84 F. B.). [Pr. 9]
('17) 40 Mad. 581 : (A. I. R. (4) 1917 Mad. 989). [Pr. 8]
('26) A. I. R. (13) 1926 Mad. 1106 : (97 Ind. Cas. 981) [Pr. 16]
('38) 1938-2 Mad. L. Jour 287 : (A. I. R. (26) 1939 Mad. 228). [Pr. 10]
('41) 1941-1 Mad. L. Jour 270 : (A. I. R. (28) 1941 Mad. 440). [Prs. 11a, 12]
('41) 1941-2 Mad. L. Jour 751 : (A. I. R. (29) 1942 Mad. 145). [Pr. 13]
('47) C. M. A. No. 103 of 1947, (Madras). [Pr. 17]
('47) 1947-1 Mad. L. Jour 85:(A.I.R. (34) 1947 Mad. 271). [Pr. 12]
('49) 1949-2 Mad. L. Jour 217 : (A. I. R. (36) 1949 Mad. 790 F. B). [Prs. 11, 12]
('50) 1950-2 Mad. L. Jour 674 : (A. I. R. (38) 1951 Mad. 48 F. B). [Prs. 13, 14]

Chandra Reddi J. — These appeals raise an interesting question of law, namely, whether the release of an insolvent father under S. 44, Provincial Insolvency Act from all debts extinguishes the liability of the son who is liable under a decree along with the father in respect of his father's debts. The son of the quondam insolvent is the appellant in all the appeals while the decree-holders are the respondents in these appeals The questions arising in these appeals are common and so they can be disposed of together.

[2] In order to appreciate the points at issue, it is necessary to set out a few material facts. Garikipati Sitharamiah, the first respondent in C. M. S. A. No. 250 of 1947, obtained a decree in O. S. No. 467 of 1933, on the file of the District Munsif's Court, Repalli against the appellant and his father on a promissory note executed by the father. It is the execution of that decree which has led upto C. M. S. A. No. 250 of 1947. There was another decree obtained against the appellant and the Official Receiver, Guntur, as representing his father's estate, by one Kesavayya who instituted a suit in the Sub-Court, Bapatla, O. S. No. 44 of 1934 on a debt contracted by the father. E. P. No. 150 of 1946. which has given rise to C. M. A. No. 339 of 1948 was filed by the decree-holder in execution of this decree. The decree-holder in O. S. No. 467 of 1933 obtained another decree against the appellant in O. S. No. 206 of 1936 on the file of the District Munsif's Court of Repalli in respect of a debt contracted by the father who had by the time of the decree become an insolvent. C. M. S. A. No. 249 of 1947 arises out of this decree.

[3] The appellant's father was adjudged an insolvent in a petition in I. P. No 73 of 1934, and his properties were vested in the Official Receiver of Guntur. While the administration of the insolvent's estate was pending, there was a reference to arbitration by the insolvent and his creditors as evidenced by Ex. D-2 dated 12-8 1937. The

purpose of this reference was to fix the proportion of the debts due by the insolvent by the payment of which the debts should be discharged. In pursuance of this reference the arbitrators passed an award on 17-3-1938 under which a payment of three annas in the rupee, would extinguish the debts not only as against the father insolvent but as against the son as well and thereby exonerating the son (appellant) completely. In accordance with the terms of this award, the insolvent deposited a sum sufficient to meet all the debts on the basis of the proportion fixed by the arbitrators.

[4] As soon as this was done, the insolvent filed an application in the Sub-Court of Bapatla I. A. No. 927 of 1940 for accepting the award and treating it as a composition. This was opposed by several of the creditors of the insolvent some of whom were parties to the arbitration agreement on grounds of fraud and misrepresentation. Overruling the objections raised on behalf of the creditors, the Court approved the proposal for compensation as embodied in the said award. Two of the creditors, who were aggrieved by this order, filed an appeal against that order in the Court of the District Judge, Guntur. While the appeal was pending an agreement was reached between the insolvent and the appellants therein whereby the clause affecting the rights and obligations of third parties in the scheme was to be omitted. Embodying this agreement, the District Court passed a decree approving the scheme of composition based on the award and confirming the decree of the Subordinate Judge to that extent but deleting the clause which operated to release the third parties from all obligations in respect of the decrees mentioned above. Thereafter, the amount in Court deposit was distributed amongst the creditors of the insolvent and the adjudication of the appellant's father was annulled. Subsequently, the insolvent applied to grant him an absolute discharge and this was granted.

[5] After receiving the dividends from the insolvent's estate, the decree holders mentioned above sought execution against the son, the appellant herein, in respect of sons's liability. The execution petitions were resisted by the appellant on the grounds that his liability under the several decrees was wiped out by reason of the award and secondly as a result of the extinction of the debts of his father by the operation of S. 44, Provincial Insolvency Act.

[6] The trial Court which heard the execution petitions in O. S. No. 467 of 1933 and 206 of 1936 accepted the contentions put forward on behalf of the appellant and dismissed the execution petitions as not maintainable. On appeal the Subordinate Judge of Tenali who also heard E.P. No. 150 of 1946 in O. S. No. 44 of 1934 on the file of the Sub-Court, Bapatla took the view that the son was not released from his obligation consequent on release of the father from all the debts under S. 44, Provincial Insolvency Act. In the result he directed that execution might issue in all the three decrees mentioned above. It is these orders that are under appeal now.

[7] In support of these appeals Mr. Narasaraju the learned counsel for the appellant raised two contentions. Firstly he maintained that the award not having been found to be vitiated by fraud or misrepresentation as alleged by some of the creditors, its efficacy was not destroyed though merged in the scheme of composition and the legal consequence resulting in wiping out the debts completely not only against the father but the son as well must flow. The short answer to this is that even assuming that the appellant could take advantage of the award which, according to the appellant's counsel, still retains its independent character, in spite of his not being a party thereto, the award, as it emerged from the appellate Court judgment, did not confer any benefit on the third parties including the appellant. We, therefore, reject this contention as lacking in force.

[8] It was next argued by Mr. Narasaraju that the liability having been fastened on the son in respect of a debt contracted by the father by the operation of the theory of picus obligation the son's liability had ceased to exist the moment the father's liability was extinguished by virtue of the provision of S. 44, Provincial Insolvency Act. The various steps in his argument are as follows: The liability of the son which was imposed on him by the doctrine of pious obligation under the Hindu Law is co-extensive with that of the father the liability not being either joint or several and it subsists only so long as the father's liability continues. The fact that this liability has fructified into a decree would not in any way alter the nature of the liability. When the father's liability was wiped out, it discharges *pro tanto* the liability of the son. In other words, when the debt itself is extinguished, there is no more liability attaching to the son who is only under an obligation to discharge an existing debt of his father. To substantiate his contentions, he relied on a passage of Mayne's *Hindu law*, 11th Edn. at page 410 which is in the following words:

> "The pious obligation of the son lasts only so long as the liability of the father subsists. The son's liability is neither joint nor joint and several as those terms are ordinarily understood in English law."

The learned counsel also referred us to a decision of a Bench of this Court in *Narayana Chettiar* v. *Veerappa Chettiar*, 40 Mad. 881. The facts in that case were that a creditor who proved a debt and received a dividend in the insolvency of a Hindu domiciled in India but carrying on business in Singapore and adjudicated a bankrupt for debts incurred by him at Singapore, filed a suit against his son for the balance of debt due to him seeking to make the son liable under the theory of pious

obligation. It was decided by the Bench that the extinction of the liability of the father operated as the extinguishment of the debt as against the son also and, therefore, a suit could not be maintained for the recovery of the balance. It was observed there that under the Hindu law a son is not jointly bound with his father to pay the debts contracted by the latter. This case is not of much help in deciding the point in this appeal because the pious obligation had not fructified into a decree as in the present case.

[9] To show that the son's liability for the father's debts is not independent and does not exist apart from the liability of the father, a ruling in *Periasami Mudaliar* v. *Seetharama Chettiar*, 27 Mad. 243 (F.B.). was cited to us. There it was observed by the learned Judge, Bhashyam Aiyangar J. that during the father's lifetime a suit could not be brought against the son alone for the recovery of a debt due by the father though he might be impleaded as a party to a suit against the latter.

[10] Next reliance was placed on *Chockalingam Chettiar* v. *Meyyappa Chettiar*, 1938-2 Mad. L. Jour 287 for the proposition that the existence of a decree against the son does not in any way alter the situation so far as the liability of a Hindu son under the doctrine of pious obligation is concerned. But an examination of the facts of the case shows that no such proposition is laid down in that decision. In that case one of the partners who was obliged to pay a decree debt due by the partnership instituted a suit for contribution against another partner and his sons. By the time the suit was instituted the remedy available as against the partners was barred. One of the contentions put forward on behalf of the plaintiff in order to get over the bar of limitation was that the liability of the sons not having anything to do with the contract or partnership liability but resting only on the theory of pious obligation the sons were liable even if the suit was barred against the father. This contention was repelled on the ground that the liability of the sons was not an independent one and it was an obligation co-extensive with that of the father. It was observed further in that case that the obligation came into existence because of the father's liability and whatever defences were open to the father were available to the son and the fact that the debt due by the partnership had become a decree debt did not alter the situation. That was not a case where a decree was obtained against, the sons and the nature of the liability under the decree against the sons was considered.

[11] Our attention was next drawn to the decision of the Full Bench in *Hanumanthappa* v. *Seethayya and Co.*, 1949-2 Mad. L. Jour 217 (F.B.) as substantiating Mr. Narasaraju's contention. According to the learned counsel this case laid down the law that despite a decree the parties were governed by the general law applicable before the decree and the intervention of the decree did not make any difference so far as the rights and liabilities of the parties are concerned. But we do not think that it adumbrates any such principle. The quession that arose for consideration in that case was whether a payment made to one of the partner decree-holders in respect of a decree passed in favour of the partnership would bind the other partner decree-holders. The majority of the Full Bench took the view that such a payment did operate as a discharge of the decree debt; but it was open to the other partner decree-holders to show that the partner to whom the payment was made was not authorised to receive the payment. The following observations of the learned Chief Justice at page 226 would show that that decision did not lend any support to the contention put forward on behalf of the appellant:

"If it is sufficient that the agency is expressly declared in the decree itself I am prepared to hold that the fact that the decree expressed to be in favour of a firm amounts to a declaration that each partner is an agent of the other partners one can realise that when the decree is merely in favour of two or more decree-holders without anything more appearing on the face, it is necessary to insist upon proof of special agency conferring the right to receive the decree amount on one of them. But when on the face of the decree it appears that the decree is in favour of the firm that is in favour of all the partners as such, I think it is reasonable to imply that the decree itself declares the rights which the partners would have under the general law."

It is manifest this ruling is not an authority for the proposition that no legal consequences from a decree flow and the rights and obligations of the parties are governed by the general law as before the decree.

[11a] On the other hand, it was contended by Mr. Ramchandra Rao, that whatever might be the position before the decree was passed the moment the liability of the sons for the father's debt by reason of the pious obligation fructified into a decree, the parties thereafter were governed by the decree. In support of this contention he cited to us a decision of a Bench of this Court in *Venkataranga Reddi* v. *Chinna Sithamma*, 1941-1 Mad. L. Jour 270. The facts of that were these: A decree was obtained against father and sons for delivery of possession of some immovable properties and for mesne profits. In pursuance of the terms of the decree possession of the properties was delivered. When the decree was put into execution for mesne profits, the decree-holder was met with a plea of limitation raised on behalf of the sons. In answer to that the decree-holder relied on the circumstance that the decree was in time as against the father which according to him made the son's share also liable by reason of the pious obligation. This theory found favour with the trial Court which directed execution to proceed against the sons also. In the appeal against the decree a Bench of

this Court held that when the pious obligation merged into a decree, it was the decree that governed the rights and obligations of the parties and the mere fact that the decree was not barred against the father would not keep it alive so far as the sons were concerned.

[12] With regard to this decision Mr. Narasaraju made a submission that the view taken in this case is opposed to the Full Bench ruling in *Hanumanthappa* v. *Seethayya and Co.*, 1949-2 Mad. L. Jour 217 (F. B.) and is therefore no longer good law. As already observed the decision in *Hanumanthappa* v. *Seethayya and Co.*, 1949-2 Mad. L. Jour 217 (F. B.) has not adumbrated any rule of law which is opposed to the view taken in this case. This ruling was followed in *Balayya* v. *Parvatheeswara Rao.*, 1947-1 Mad. L. Jour 85. The statement of law contained in *Venkataranga Reddi* v. *Chinna Seethamma*, 1941-1 Mad. L. Jour 270 is in consonance with the principle laid down by the Judicial Committee of the Privy Council in *Rajaram* v. *Raja Baksh Singh* 1938-1 Mad. L. Jour 41 (P. C.) There a suit was filed by a creditor against a Hindu, his sons and his grandsons. While the suit was decreed against the father and the sons, it was dismissed as against the grandsons who were exonerated from all liability. The decree-holder sought to execute the decree against the grandsons also on the basis of their pious obligation to discharge the debt of their grand father. When the matter came up ultimately before the Judicial Committee, their Lordships upheld the objection of the grandsons regarding the executability of the decree as against them on the ground that since a decree was passed exonerating them from liability and that decree having become final the creditor could not proceed against their interests in the joint family properties. So we think that the statement of law contained in *Venkataranga Reddi* v. *Chinna Sithamma* 1941-1 M. L. J. 270 represents the correct view and we express our respectful agreement with it.

[13] It was then urged on behalf of the appellant that his case was governed more by the ruling in *Subramania Chettiar* v. *Narayanaswami Gounder*, 1950-2 M. L. J, 674 which held that when a debt due by a principal debtor had been scaled down under the provisions of the Madras Agriculturists' Relief Act, the non-agricultural surety would not be liable for the entire debt but only to the amount of the principal debt as scaled down. It was observed in this case that *Subramanian Chettiar* v. *Batcha Rowther*, 1941-1 M. L. J. 751 which laid down that where the debt of a principal debtor was discharged by operation of a statute subsequently passed and not by voluntary act of parties the surety could not claim *pro tanto* discharge was wrongly decided. It was further stated there that the liability of the surety being co extensive with that of the principal debtor when the principal debtor was extinguished either by the voluntary act of the parties or by operation of the provisions of a Statute the liability of the surety was *pro tanto* reduced or extinguished. According to Mr. Narasaraju on the analogy of the principle laid down in this case when the debt against the father is extinguished, the liability of the sons which is extensive with that of the father is *pro tanto* wiped out. We must say that the principle laid down in this case under reference can have no application to the present case.

[14] The present case has to be considered with reference to S. 44, Provincial Insolvency Act. Section 44 (2), Provincial Insolvency Act lays down:

"Save as otherwise provided by sub-s. (1) an order of discharge shall release the insolvent from all debts provable under this Act."

Sub-sec. (3) of S. 44 provides that:

"An order of discharge shall not release any person who at the date of the presentation of the petition was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him."

It is seen that under sub-s. (3) of S. 44, Provincial Insolvency Act a person who is jointly bound or had made any contract with the insolvent or a partner on the date of the presentation of the petition is liable in spite of the insolvent's discharge under sub-s. (2). If the contention of Mr. Narasaraju that the appellant's case is governed by the principle stated in *Subramania Chettiar* v. *Narayanaswami Gounder*, 1950-2 M. L. J. 674 is to prevail, a surety who gets *pro tanto* discharge when the principal debt is extinguished should also be released from all liability and his case will not attract the provisions of sub s. (3). But the wording of this sub-section makes it clear that a surety comes within the meaning of sub-s. (3) because obviously a surety is one who is jointly liable with the insolvent. Mr. Narasaraju had to concede that a surety's case is not saved from the operation of sub-s. (3) and his liability would continue despite the release of the principal debtor from all debts under S. 44 (2). So different considerations prevail in the case of a debtor jointly bound along with an insolvent who gets relief under S. 44 (2), Provincial Insolvency Act. Hence the rulings relied on by Mr. Narasaraju are not of any help to him.

[15] It was next argued by Mr. Narasaraju the effect of S. 44 (2), Provincial Insolvency Act, is to extinguish the debt as such and, therefore, there is nothing for which the sons could be made liable. To give effect to this argument is to ignore sub-s. (3). If under sub-s. (2) the release of the insolvent from all debts provable under the Act operates as a complete extinction of the debt which the insolvent is jointly bound along with others to pay, then sub-s. (3) has no meaning at all. On the other hand the fact that sub-s. (3) provides for the continuance of the liability of persons jointly liable along with the insolvent

indicates that the debt as such is not extinguished but it only releases the insolvent from all liability keeping alive the liability of the other debtors jointly liable with him. It, therefore, follows that the liability of a person jointly bound is not extinguished despite the discharge of the insolvent.

[16] The next question to be considered is whether the son against whom the decree has been passed along with the father can be said to be jointly bound with the insolvent to discharge the debt. We have no doubt that the effect of a decree against the son is to make him jointly liable along with his father to discharge the debt. Whatever might be the position prior to the decree, when the obligation of a Hindu son to pay his father's debts fructifies into a decree it imposes a joint liability on the son along with the father and the former is jointly bound along with the latter within the meaning of sub-s. (3). Our conclusion receives support from the observations made by Ramesam J. in *Mayanadan and Brothers* v. *Arunachalam*, A. I. R. (13) 1926 Mad. 1106. In dealing with the question whether the son's liability goes with the disappearance of the father's obligation to pay the debts, the learned Judge after answering it in the affirmative observed that it would have been different if a decree had been obtained against the son. Though this observation is *obiter*, with respect we agree with it.

[17] Mr. Narasaraju referred us to the decision of Panchapakesa Aiyar J. in an unreported decision in *Tummula Brahmayya* v. *Devambhotla Krishnamurthi*, C. M. A. No. 103 of 1947, where the learned Judge observed that though the right of the decree-holder as against one of the sons did not rest on the mere theory of pious obligation but there was a decree *eo nomine* against him, it did not make any difference as the decree was passed on the pious obligation. No doubt these observations of the learned Judge support the argument of Mr. Narasaraju. But for the reasons already mentioned we regret we cannot agree with the view taken by the learned Judge in this case.

[18] For the foregoing reasons we think that the discharge of the appellant's father from liability under S. 44, Provincial Insolvency Act, has not the effect of extinguishing the appellant's liability. The appellant continues to be liable and the decree-holders are entitled to enforce the liability against the sons in execution of the decree or decrees. We, therefore, think that the decision of the lower appellate Court is correct and ought to be affimed. The appeals are dismissed with costs. (one set).

C.R.K./V.S.B. *Appeals dismissed.*

A. I. R. (39) 1952 MADRAS 112 (C. N. 53)

RAJAMANNAR, C. J.
AND BALAKRISHNA AYYAR, J.

In re Kallumattam Thippaswami minor by next friend and father Rudrayya, Petitioner.

Civil Misc. Petn. No. 5771 of 1951, D/- 20-4-1951.

(a) *Constitution of India, Art. 226 — Other remedy open.*

Art. 226 should not be construed so as to replace the ordinary remedies available to the litigant under the general law of the land. Directions in the nature of a writ of mandamus should not issue under this Article except to a public a quasi public body or officer which is under an obligation, statutory or otherwise, to do or refrain from doing anything which is likely to interfere with the rights of persons. Where the remedy of the petitioner would be by way of a suit and an application for injunction in the suit the fact that the Court in which the suit should have been filed is closed for the summer recess would not render Art. 226 applicable. (Para 1)

(b) *Constitution of India, Art. 226 — Scope.*

Art. 226 does not confer a new remedy where there was no remedy before the Constitution. (Para 1)

(c) *Letters Patent (Mad.), Cl. 17 — Orders against third parties.*

Clause 17 does not enable the High Court to pass any order against a third party which should ordinarily be passed only in a regular suit or other proceeding instituted in a competent Court. (Para 2)

Anno: L. T. (Cal), Cl. 17 N. 1.

C. Chinnappa Reddi and P. Ramakrishna, for Petitioner.

RAJAMANNAR, C. J.: This is an application purporting to be under Art. 226 of the Constitution at the instance of a minor by his guardian for directions in the nature of a writ of mandamus directing the respondents to forbear from cutting the trees standing on certain survey numbers in a village and from removing the timber from the said lands. In our opinion, Art. 226 of the Constitution should not be construed so as to replace the ordinary remedies by way of a suit and application available to the litigant under the general law of the land. Directions in the nature of a writ of mandamus should not, in our opinion, issue under this Article except to a public a quasi public body or officer which is under an obligation, statutory or otherwise, to do or refrain from doing anything which is likely to interfere with the rights of persons. In this case, it is admitted that ordinarily the remedy of the petitioner would be by way of a suit and an application for injunction in the suit. The fact that the District Court of Anantapur in which the suit should have been filed is closed for the summer recess would not render Art. 226 applicable. It was admitted by learned counsel for the petitioner that before the Constitution, the petitioner would have had no remedy. We are clearly of the view that Art. 226 does not confer a new remedy in cases like this where there was no remedy before the Constitution. If the petitioner is aggrieved by the action of the respondents, he may have now no remedy by way of injunction but he will certainly have his remedy by way of damages for any unlawful action that may be done by the respondents. We think the application is not maintainable under Art. 226.

(2) Our jurisdiction under Clause 17 of the Letters Patent was also invoked. But that clause does not enable us to pass any order against a third party which should ordinarily be passed only in a regular suit or other proceeding instituted in a competent Court.

(3) The application is therefore dismissed.

C.R.K./D.H. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 113 (C. N. 54)

GOVINDA MENON J.

Appa Naicken, Appellant v. Nagammal, Respondent.

Appeal Against Appellate Order No. 135 of 1949, D/- 20-4-1951.

Registration Act (1908), S. 77 (1) — Document not presented within 30 days of decree — Effect.

Section 77 (1) positively postulates that the document should be presented for registration within 30 days of the decree directing the registration. If the document is not presented within 30 days the party cannot by the application of S. 77 (1) get any relief.

It is better and more convenient that the decree should state that the document should be presented for registration within 30 days. A I R (9) 1922 Pat 408 (2), Rel. on.; 33 Cal 1020, not foll: A I R (22) 1935 Pat 497 and A I R (36) 1949 Mad 775, Disting. (*Paras 3, 4*)

Anno: Reg. Act, S. 77 N. 12.

K. G. Srinivasa Iyer, for Appellant; T. A Ananta Iyer and M. Ramachandra Iyer, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('06) 33 Cal 1020 (Pr 3)

('49) 1949-1 Mad L J 479: (A I R (36) 1949 Mad 775) (Pr 3)

('22) 1 Pat 146: (A I R (9) 1922 Pat 408 (2)) (Prs 3, 4)

('35) A I R (22) 1935 Pat 497: (158 Ind Cas 395) (Pr 3)

JUDGMENT: The appellant had a sale deed executed in his favour by the respondent on 9-4-1943; but since the respondent did not register it, the appellant was compelled to apply for compulsory registration on 9-8-1943. The Sub Registrar did not register it and on appeal to the District Registrar the order of the Sub Registrar was confirmed. Then a suit was filed under S. 77 of the Indian Registration Act for directing registration of the document and a decree was passed directing that the document be registered on 8-7-1946. But it transpired that the decree was signed by the presiding officer of the Court only on 18-7-1946. The decree did not fix any time within which the document should be duly presented for registration as mentioned in S. 77 (1) of the Registration Act. The next day after the passing of the decree, an application for copy of the same was filed before the District Munsif and the copy was delivered over to the appellant on 26-7-1946. But the document which was sought to be registered remained in Court and no application for return of the same was made until 13-8-1946 on which date the appellant requested the Court for return of the document filed in the case. That application was refused by the Court on the ground that the respondent had applied for copies of the judgment and decree with the object of filing an appeal and since such an application was pending, under the Rules of Practice prevalent in Courts the documents filed in the case could not be returned until the appeal time had expired. Therefore the documents were not returned to the appellant.

(2) The application out of which the present civil miscellaneous second appeal arises was filed under O. 21, R. 34 (6), C. P. C., requesting the Court to send the document to the Sub Registrar for registration. It was filed on 10-7-1947, that is more than a year after the decree was passed by the Court. Both the lower Courts have held that the remedy sought for by the appellant cannot be granted and dismissed the application.

(3) Mr. K. G. Srinivasa Aiyar, for the appellant, relies upon the observations of Sir Francis Maclean Chief Justice in 'Gopinath v. Gadadhar Das', 33 Cal 1020. The learned Chief Justice had expressed the opinion that S. 77 (1) of the Act did not postulate the necessity of presenting the document for registration within 30 days of the decree. This decision was animadverted upon by a Bench of the Patna High Court in 'Muhamad Ismail v. Sricharandas', 1 Pat 146, where Das J. in delivering the judgment of the Bench dissented from the views expressed in 'Gopinath v. Gadadhar Das', 33 Cal 1020 and stated that if the learned Chief Justice's opinion is correct then sub-s. (2) of S. 77 would be otiose and unnecessary. I am inclined to agree with the Patna case because the section positively postulates that the document should be presented for registration within 30 days of the decree directing the registration. Mr. Srinivasa Aiyar further relied upon two other cases, 'Keshwar Mehra v. Rajeswari Pershad', A I R (22) 1935 Pat 497 and 'Bapanayya v. Bangaraju', 1949-1 Mad L J 479. Both these cases are not 'ad idem' with the facts of the present case because in both of them what has been held is that if the trial Court refuses an order directing registration but the appellate Court or the second appellate Court reverses that decree and passes an order directing registration, then the 30 days should be computed from the date of the appellate or second appellate decree which is the final decree in the case. I fail to see how these two cases can be of any help to the appellant. Since the document was not presented within 30 days of the decree directing its registration, the appellant herein cannot by the application of S. 77 (1) get any relief.

(4) The question then arises as to whether the decree itself should direct that the document should be presented for registration within 30 days of its passing. The facts in 'Mirza Muhammad Ismail Beg v. Sricharan Das', 1 Pat 146, show that in that case the decree did not make such direction; and the document was presented for registration about five months after the decree. The learned Judges held that even though the decree does not necessarily make any such direction, still it is implicit in a decree that the document should be presented for registration within 30 days. Mr. Ananta Aiyar relies upon that and contends that on a true and proper construction of the latter part of sub-s. (1) of S. 77, namely

"A suit for a decree directing the document to be registered in such office if it be duly pre-

sented for registration within 30 days after passing of such decree"

the only inference that is possible is that if the decree is passed, then the document should be presented for registration within 30 days and not that there should be any direction in the decree that the document should be so presented. According to Mr. Ananta Aiyar sub-s. (2) is the enactment which provides for the presentation. Sub-sections (2) and (3) of S. 75 would apply 'mutatis mutandis' to all documents presented for registration in pursuance of the directions under S. 77 (1) of the Act. Therefore, it would be unnecessary that the decree should state that the document should be before the Sub Registrar within 30 days of the decree. The provision regarding the presentation within 30 days in sub-s. (1) is intended only to be included as a prayer in the plaint and not as a positive direction in the decree. There is much to be said for this argument but I do not wish to express any opinion on this matter. But it is better and more convenient in such circumstances that the decree should state that the document should be presented for registration within 30 days. Since the appellant was negligent in the proceedings he has taken he has to thank himself. If he is so advised and if the law permits it is up to him to have the decree amended and take such further steps as he is advised.

(5) The second appeal is dismissed with costs. No leave.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 114 (C. N. 55)

RAGHAVA RAO, J.

Karunambal Ammal, Appellant v. Chellaya Gurukkal alias Subramania Appukutti and others, Respondents.

A. A. A. O. No. 94 and Civil Revn. Petn. No. 638 of 1948, D/- 15-3-1951.

Civil P. C. (1908), S. 52 — "Out of the property of the deceased" —Hereditary office — Earnings by personal service of heir.

The earnings of the heirs in a temple which are in the shape of presents by devotees for archakathwam service rendered by them are not liable to be attached as assets of the deceased in their hands under a decree passed against them with reference to such assets, because although the fact of inheritance to the office of the deceased may have been the means by which the earnings of the judgment-debtors are taking place, they are earnings really for services which they themselves are performing, and cannot be regarded as assets of the deceased in their hands which are liable to be attached and sold in execution of the decree in question. AIR (23) 1936 All 131 and AIR (11) 1924 Mad 530 (F. B.) disting. (*Paras 1, 2*)

Anno: C. P. C., S. 52 N. 9.

K. S. Ramamurthy and K. Vaitheeswaran, for Appellant; V. C. Viraraghavan and E. R. Krishnan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) 58 All 457: (A I R (23) 1936 All 131) (Pr 2)
('24) 47 Mad 411: (A I R (11) 1924 Mad 530 F B) (Pr 3)

JUDGMENT: The question in this civil miscellaneous second appeal and this civil revision petition is whether the earnings of the heirs of a certain gurukkal in a temple which are in the shape of presents by devotees for archakathwam service rendered by them are liable to be attached as assets of the deceased gurukkal in their hands under a decree passed against them with reference to such assets. The Courts below have held that the earnings are not so liable.

(2) Mr. Ramamurti contends before me that this decision is wrong. His point is that but for the fact that the right of archakathwam service devolved upon the judgment-debtors as heirs of the deceased gurukkal, they would not be entitled to earn the emoluments and that therefore the emoluments should be treated as assets liable to be attached. The fact, however, which this argument overlooks is that even after the devolution of the archakathwam service by inheritance upon the judgment-debtors, there can be no question of the earning of the emoluments sought to be attached except by reason of personal services which are liable to be rendered by the judgment-debtors in the temple. Mr. Ramamurti relies upon a judgment of the Allahabad High Court reported in 'Nandkumar Dutt v. Ganesh Das', 58 All 457. As the head note rightly bears, what we get as the decision in that case is, that in execution of a decree against the assets of a deceased person in the hands of his heir, the right to receive the offerings periodically in future can be attached and sold, as being such an asset, and not only the collections which have actually been made by the heir. With reference to the incident of the office there in question, the Court (Sulaiman C. J. and Bennett J.) observes in its judgment at page 463 of the report thus,

"We consider therefore that in the present case it has not been proved that there is any connexion between the receipt of this share of the offerings and the performance of the service in the temples.....Learned counsel for the appellant has argued a point of law which is not in the grounds of appeal and was not in his written statement. The point is that although the respondent can have the right of collections which had been received during the lifetime of Kameshwar and which might be attachable in execution of the decree against his assets, still the share of the offerings could not be attached as those offerings were future income to accrue. We do not think that this argument can be accepted for various reasons. For one reason the execution is sought against the assets of Kameshwar Panda in the hands of his daughter, defendant 2. What was in the hands of defendant 2, the daughter of Kameshwar, was by inheritance his share, and as the share produced a certain annual income that income may be attached as it is one of the assets of the deceased."

I am not satisfied that this decision is, even if sound, applicable to the facts of the case before me, where the connection between the performance of service by the judgment-debtors and the receipt of the offerings is something undisputed. In my opinion although the fact of inheritance to the gurukkal's office may have been the means by which the earnings of the judgment-debtors are taking place, they are earnings really for services which they themselves are performing. These cannot therefore be regarded as assets of the deceased in their hands which are liable to be attached and sold in execution of the decree in question.

(3) A Madras case has also been brought to my notice which is reported in 'Kadirvelusami Nayagar v. Eastern Development Corporation', 47 Mad 411 (F. B.). That is a simple case uncomplicated by any question of earnings for service in any institution and all that is decided by the case, as the headnote shows, is that on the death of a debtor the income

accruing to his heir from landed property, of which the debtor died possessed, is assets of the debtor in the hands of the heir, liable to satisfy his debts within the meaning of S. 52 of the Civil P. C. Another Madras case which has been cited to me is a similarly uncomplicated case and takes the appellant no further than the one which I have discussed.

(4) I am satisfied that none of the decisions cited concludes the point which I am called upon to decide in the present case. I am clearly and unhesitatingly of opinion that the view taken by the Courts below in both the civil miscellaneous second appeal and the revision petition is perfectly correct. Both the cases are therefore dismissed with costs of both the first and second respondents in the civil miscellaneous second appeal (one set) and of the only respondent in the civil revision petition.

(5) Leave to appeal in the civil miscellaneous second appeal is refused.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 115 (C. N. 56)

CHANDRA REDDI J.

Arumugha Naicker and others, Petitioners v. A. Kuppuswami Pillai, Respondent.

Civil Revn. Petn. No. 452 of 1949, D/- 20-7-1951.

Civil P. C. (1908), O. 1, R. 8 — Matters in respect of which representative suit can be brought — Money claims.

Though the procedure prescribed for a representative action cannot be utilised for filing a suit against some persons on their own behalf and as representing other persons for the recovery of debts or in respect of liability on contract or tort, for the reason that there is no community of interest amongst the defendants so far as such an action is concerned, the same will not hold good when the suit is brought by some members of an unregistered society in a representative capacity. 'Case law discussed.' (Para 5)

Hence, a representative suit under O. 1, R. 8, Civil P. C. can be brought for rendition of accounts by certain members of an unregistered society on their own behalf and on behalf of the other members of the society. (Para 13)

Anno: C. P. C., O. 1 R. 8 N. 8a.

S. Balasinga Satya Nadar and N. C. Rangaswami, for Petitioners — D. Narasaraju and T. Govindarajulu Mudaliar, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('84) 6 All 284: (1884 All W N 76) (Prs 10, 12)
('98) 22 Bom 729 (Prs 9, 12)
('18) 42 Bom 556: (AIR (4) 1917 Bom 141) (Pr 8)
('38) 1938-2 Mad L J 148: (AIR (25) 1938 Mad 755) (Prs 1, 2, 6)
('43) AIR (30) 1943 Mad 530: (209 Ind Cas 392) (Prs 1, 5)
(1902) 86 L T 759: (18 T L R 565) (Pr 8)
(1914) 2 K B 930: (83 L J K B 1188) (Prs 2, 4, 6)
(1928) 1 K B 663: (96 L J K B 1040) (Prs 2, 3)

ORDER.: The question that falls to be decided in this revision petition is whether a representative action under O. 1, Rule 8, C. P. C., can be brought for rendition of accounts by certain members of an unregistered society on their own behalf and on behalf of the other members of the society. In this case, a suit was filed under O. 1, Rule 8 by six members of an unregistered Sabha on their own behalf and of the members of the Sabha for account of the monies collected and spent by the first defendant on behalf of all of them for prosecuting a litigation. One of the defences was that the suit as framed was not maintainable as the procedure laid down under O. 1, Rule 8 is not available in respect of actions for recovery of money or in respect of liability on contract or tort. The trial Court decreed the suit overruling this objection. The matter was taken to the Full Bench of the Court of Small Causes by new trial application. The learned Judges upholding the preliminary objection as regards the maintainability of the suit reversed the decree and the judgment of the trial Court and dismissed the suit. The ground of this decision was that the provisions of O. 1, Rule 8 did not govern a suit for the recovery of a debt or to money claims or to liability on contract or tort. In support of the view taken by them they placed reliance on two rulings of this Court, one in 'Ratnasami Nadar v. Prince of Arcot Endowments', 1938-2 Mad L J 148 and the other in 'Travancore National Bank v. Trana Bank Union', AIR (30) 1943 Mad 530. But a careful reading of these decisions shows that they do not lend any support to the view taken by the lower Court.

(2) In 'Ratnasami Nadar v. Prince of Arcot Endowments', 1938-2 Mad L J 148, a few of the villagers were sued under O. 1, Rule 8, as representing all the villagers for various reliefs including a relief for mesne profits. One of the questions that arose for consideration before the Bench who heard the appeal was whether a decree could be granted for a consolidated sum as representing the mesne profits in a suit under O. 1, Rule 8. The learned Judges while holding that there was sufficient community of interest amongst the defendants to attract the provisions O. 1, Rule 8, observed that a decree for mesne profits could not be granted against the defendants sued in a representative capacity for the reason that the procedure prescribed under O. 1, Rule 8 does not apply to money claims or liabilities on contract or tort. The observations of the learned Judges at page 151 would show that they did not mean to lay down that the provisions of O. 1, Rule 8 could not be availed of even by the plaintiffs to bring a suit in a representative capacity for laying an action to recover a debt or for rendition of accounts. They remarked:

"In the present case, the Judge has granted a decree for a consolidated sum as representing the mesne profits. It is to be held that each individual of the 150 odd villages is liable for mesne profits in respect of the entire land, although under the karaiyedu form of enjoyment no ryot is in occupation of more than a fractional share of the whole land. The injustice of such a decree is obvious and the principle of the English decision already quoted clearly applies."

The learned Judges followed the principle enunciated in two English decisions in 'Hardie and Lane Limited v. Chilton', (1928) 1 K B 663 and 'Walker v. Sur', 1914-2 K B 930.

(3) In 'Hardie and Lane Limited v. Chilton', (1928) 1 K B 663, the plaintiffs who were members of an association of motor dealers and manufacturers which was an unregistered trade union brought a suit against some of the members on their own behalf and on behalf of all the other members of the association for damages under O. 16, Rule 9 of the Rules of the Supreme Court which is similar to O. 1, Rule 8, C. P. C. It was held that the defendants could not be sued in a representative capacity as there was no ground for holding that the members of the association had community of interest either in the action or in the defence to it.

(4) In 'Walker v. Sur', 1914-2-K B 930, the plaintiff sued four members of an unincorporated religious society on their own behalf and on behalf of other members for recovering money for professional services, etc., rendered to the society. It was decided there that the provisions of O. 16, Rule 9 of the Supreme Court rules would not govern it as an action for a debt against the defendants would not come within the provisions of O. 16, Rule 9. The observations contained in the speech of Buckley, L. J., at page 935 are pertinent. He observed:

"If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons. It is said that these four persons together with many others, making up about 1,800 in all, are members of the society called "The Brotherhood of St. John of God", and that that body of persons or a smaller number — say 1,000 persons — own property in Yorkshire, and that most or all of the other members of the brotherhood are abroad and, being outside the jurisdiction, cannot be reached. The plaintiff says 'I want to have execution against the property in Yorkshire. But when he had obtained his judgment he could have had execution only against the share of these four persons in that property. There is nothing representative about that."

The same Law Lord remarked again:

"If all can effectually be sued, it would be strange if all could not effectually defend. Can the rule mean that while all may be sued by representatives they cannot defend unless the Court gives authority so to do?"

(5) It is abundantly clear from these decisions that the procedure prescribed for a representative action cannot be utilised for filing a suit against some persons on their own behalf and as representing other persons for the recovery of debts or in respect of liability on contract or tort, for the reason that there is no community of interest amongst the defendants so far as such an action is concerned. The difficulties envisaged in those decisions would not arise in a suit brought in a representative capacity by a few of the members of an unregistered body on their own behalf and on behalf of others.

(6) The 'Travancore National Bank v. Trana Bank Union', AIR (30) 1943 Mad 530, was a case where an unregistered union of employees was sued on an agreement signed for and on behalf of the members by one of the members along with the member who signed the agreement. It was held by Somayya, J., adopting the reasoning in 'Ratnasami Nadar v. Price of Arcot Endowments', 1938-1 Mad L J 148, that under the law an unincorporated body which cannot be sued as such for the recovery of a debt or on contract cannot be sued by resorting to the procedure under O. 1, Rule 8. The learned Judge also referred to the decision in 'Walker v. Sur', 1914-2 K B 930. It is clear that this ruling does not in any way support the conclusion reached by the lower Court.

(7) In my opinion, the considerations that weighed with the learned Judges in the case cited above in reaching those conclusions have no relevancy in a case of representative action by the plaintiffs. The reason which induced the learned Judges of the Court of Small Causes to apply the rule of law stated in those cases to suits by plaintiffs suing in a representative capacity was that the difficulties pointed out in those cases would apply equally to cases like the present one. According to the learned Judges, the insurmountable difficulty will be the one to be experienced by the defendants in the execution of the decree for costs when the suit is dismissed with costs. I must say that this reasoning does not commend itself to me. Such difficulties can be avoided by granting a decree for costs against the plaintiffs who actually filed the suit. Further, circumspection may also be exercised by Courts in granting leave to file such representative suits under O. 1 Rule 8. On the other hand, if members of an unregistered society or union are not permitted to file representative actions for recovering monies due to unregistered societies or unions under the provisions of O. 1, Rule 8, there will be great hardship to such a body. Dishonest members of unregistered societies or unions can walk away with impunity with funds belonging to such societies or unions.

(8) Further no case has been brought to my notice where a suit filed in a representative character for the recovery of money or in respect of liability based on contract or tort has been thrown out on the ground that the provisions of O. 1, Rule 8 are not applicable to such suits. On the other hand some decisions, both English and Indian, in which the procedure prescribed under O. 1, Rule 8 was followed without exception being taken to have been brought to my notice — for instance See 'Marrs v. Thompson', (1902) 86 L T 759 and 'Bhicoobai v. Hariba Raghuji', 42 Bom 556. The cases bearing on this question have been collected in the Annual Practice 1949, volume 1, page 268. The two undermentioned cases throw a flood of light on the point for determination here.

(9) In 'Mohamed Nathubhai v. Husen', 22 Bom 729, a Bench of the Bombay High Court directed the plaintiffs to amend the plaint in a suit against the defendant for the recovery of money had and received by suing with the permission of the Court on behalf of the community which authorised the plaintiff to file the suit under S. 30, C.P.C., corresponding to O. 1, Rule 8 of the present Civil Procedure Code, so that the suit could be maintained in the Court of the Subordinate Judge. No doubt, the question was not specifically raised as to whether in such a suit the provisions of O. 1, Rule 8 could be resorted to. But it shows that the learned Judges thought that the provisions relating to representative suits could be availed of by the plaintiffs in suits based on money claims.

(10) In 'Muhammadan Association, Meerat v. Bakshiram', 6 All 284, a suit by the Muhammadan Association of Meerut in its own name by the Secretary was held to be not competent as it had not 'per se' any status in law to sue. But it was observed that had its members empowered one or more of its number to act for it in the manner provided in S. 30, C.P.C., it may be that the Court would have accorded the permission therein mentioned.

(11) These rulings show that a doubt could not be entertained as regards the applicability of the provisions of O. 1, Rule 8, C.P.C., to suits brought in a representative capacity for recovery of debts or for rendition of accounts.

(12) Mulla at page 507 of his commentary on the Civil Procedure Code, Edn., 1941 says:

"The secretary of a club or other association cannot sue alone in respect of a matter in which the association is interested even if he is authorised so to do by a resolution of the members of the association. The suit must be brought by all the members of the association or by the secretary on his own behalf and on behalf of the other members under this rule. Therefore, if the treasurer of an association misappropriates the funds of the association no one member can

sue alone to recover the amounts misappropriated though he may be authorised to do so by a resolution of the association. The suit must be brought by all the members or by any one member on his own behalf and on behalf of the other members."

In support of this proposition 'Mahammad Nathubhai v. Husen', 22 Bom 729 and 'Muhammadan Association of Meerat v. Bakshiram', 6 All 284 have been cited. I entirely agree with this statement of law.

(13) In my opinion, a suit can be brought for rendition of accounts in a representative capacity under the provisions of O. 1, Rule 8. It follows, therefore, that the order of the Court of Small Causes with whom the preliminary objection as regards the maintainability of the suit prevailed is set aside. The other points raised before the lower Court were not pressed before me, and as no other question arises for consideration, the decree and judgment of the trial Judge are restored and the civil revision petition allowed. The petitioners will get their costs throughout.

C.R.K./K.S. *Revision allowed.*

A. I. R. (39) 1952 MADRAS 117 (C. N. 57)

MACK AND SOMASUNDARAM, JJ.

In re K. Anandan Nambiar, Petitioner.

Criminal Misc. Petn. No. 1767 of 1951, D/- 11-9-1951.

† *(a) Constitution of India, Article 194 — Preventive Detention — Right to attend sittings of House.*

A member of the Legislative Assembly can claim no privilege from arrest and the detention under Preventive Detention legislation. Once a member of a Legislative Assembly is arrested and lawfully detained, though without actual trial under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. A declaration by the High Court that he is entitled to do so, even under armed escort is entirely out of the question. If, however, a party in power detains a political opponent or continues his detention with the mala fide object of stifling opposition and prejudicing the party to which he belongs in a forthcoming election, there would be an undermining of the basis of the Constitution. AIR (38) 1951 Mad 269, Ref. (Paras 4, 7)

(b) Constitution of India, Article 194 (3) — Right of detenu member to correspond with legislature.

As long as a detenu continues to be a member of a Legislature, drawing the emoluments of his office, receiving summons to attend, he is entitled to the right of correspondence with the Legislature, and to make representations to the Speaker and the Chairman of the Committee of Privileges and no executive authority has any right to withhold such correspondence. This right flows not merely from principles of natural justice, which will be violated by such correspondence being withheld, but as a continuing member of the House, he would also appear to be entitled to this privilege under Art. 194 (3) of the Constitution under which English Parliamentary practice has to be followed until a law is enacted by the Legislature defining the powers, privileges and immunities of the House, its committees and its members. (Para 8)

(c) Constitution of India, Articles 194, 226 — Privileges of member — Determination — Jurisdiction of High Court.

('Per Somasundaram, J.':) The obligation to ascertain and determine the privileges of a member of the House rests primarily and in the first instance with the House and House only and jurisdiction of the High Court comes in only later, i.e., when the House fails to perform its duties or refuses to perform its duties or performs it contrary to Clause 3 of Art. 194. (Para 10)

(d) Constitution of India, Article 226 — Powers under — Extent.

('Per Mack, J.':) Article 226 confers on the High Court extremely wide powers of interference and a corresponding extremely heavy burden of responsibility. The framers of the Constitution could never have contemplated High Courts constituting themselves on applications by all sorts of aggrieved persons into inquisitorial tribunals supervising, criticising, modifying or cancelling the actions and orders of different departments of executive authority, institutions, public bodies and last but not least of the Legislatures as regards their internal affairs which are controlled by the Speaker and the House and its committees. It it only in exceptional cases that writs under these wide powers "for any other purposes" can be issued, such as for instance when there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been mala fide discrimination against an individual to the detriment of his rights. It is impossible to define with exactitude the cases in which Art. 226 of the Constitution can be rightly invoked. They should be comparatively exceptional and very few. (Para 5)

S. Mohan Kumaramangalam, for Petitioner; The Advocate-General and the Public Prosecutor, for the State.

Case referred to:

('51) ILR (1951) Mad 135: (AIR (38) 1951 Mad 269) (Pr 4)

MACK, J.: This is a petition under Article 226 of the Constitution by K. Anandan Nambiar a Member of the Madras Legislative Assembly. He was arrested on 4th May 1949 and detained under the Maintenance of Public Order Act. He has since been continuously under detention. He has applied to us for the issue of a writ by way of mandamus or other appropriate writ to declare and enforce his right to attend the present sittings of the Legislative Assembly now in progress either freely or with such restrictions as may be reasonably imposed. He also complains that his letters to the Legislature addressed to the Chairman of the Committee of Privileges have been withheld by the Superintendent, Central Jail and seeks a declaration of his right to communicate with the Legislature in his capacity as a member without let or hindrance from prison.

(2) Petitioner was elected from the Railway Trade Union Labour Constituency at the general elections in 1946 on the Communist party ticket. He still retains his seat and received the usual summons sent to all members dated 6th August 1951 with a message from H. E. The Governor requiring his attendance on Monday the 20th of August 1951 on the occasion of his special address to both Houses.

(3) Petitioner filed a Habeas Corpus petition, Criminal M.P. No. 1490 of 1949 under S. 561-A, Criminal P.C., to set him at liberty so as to enable him to attend the Legislative Assembly sittings. This was dismissed by Govinda Menon and Rajagopalan, JJ. He filed another Habeas Corpus petition Criminal M. P. No. 3022 of 1949 for his release inter alia, on the ground that he was, as a member of the Legislative Assembly, immune from arrest. That petition was dismissed by another Bench, Govinda Menon and Basheer Ahmed Sayeed, JJ. He now applies to us for a similar but slightly different relief invoking Art. 226 of the Constitution contending that on the basis that his con-

tinued detention is lawful, he has a right to attend the sittings of the Legislative Assembly even from prison under prison escort.

(4) The petition raises substantially a very short and simple point for determination though we have heard a long and elaborate argument both from Mr. Kumaramangalam for the petitioner and the learned Advocate-General. Petitioner does not now press any position before us that he, as a Member of the Legislative Assembly, has a privilege of immunity from preventive detention. This position was fully canvassed before a learned Bench Govinda Menon and Krishnaswami Nayudu, JJ., in the case of 'P. Venkataswarlu another member of the Legislative Assembly in Criminal M. P. No. 2059 of 1949, a decision reported in ILR 1951 Mad p. 135. They held in their decision dated 27-3-1950 following the decision in the 'Ramsay case', that a Member of the Legislative Assembly could claim no privilege from arrest and the detention under Preventive Detention Legislation. Petitioner has filed along with his petition copy of a letter from the Secretary of the Madras Legislature dated 29th August 1950 in reply to a letter from him dated 12th August 1950 and a telegram to the Chief Secretary dated 22nd July 1950 referring him to the Ramsay case in which the Committee of Privileges of the House of Commons held that preventive arrest under statutory authority by executive order was not within the principle of the case to which the privilege from arrest could be extended. It is not necessary to elaborate the law in England relating to privileges of Members of Parliament regarding freedom from arrest and only sufficient to say that while they were entitled to immunity from arrest by a process of civil law 40 days before and 40 days after and also during the sittings of the House, there was no privilege of arrest when charged or convicted of an indictable offence. Preventive detention not being an indictable offence, the question whether a member of Parliament could claim immunity from such detention was considered by the Committee of Privileges after an elaborate enquiry at which Captain Ramsay, who was at the time detained under Regulation 18 (b) of the Defence (General) Regulations, 1939, was heard and the Home Secretary Sir John Anderson and other eminent witnesses examined. The enquiry was held on representation made by Captain Ramsay that the privilege of a Member of Parliament from arrest and detention had been infringed to the Speaker, who referred the matter to the Committee of Privileges. These facts are necessary, Art. 226 of the Constitution being invoked, in view of the powers, privileges and immunities of the Legislature of a State, its members and committees being defined under Art. 194 (3) of the Constitution according to which they

> "shall be such as may from time to time be defined by Legislature by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution."

(5) We have to examine this petition in the light of Article 226 of the Constitution, unlike the English Courts who have no such heavy burden imposed upon them. It is conceded for the petitioner that no fundamental right set out in part III of the Constitution is violated, all freedoms and rights of an ordinary citizen being restricted by lawful preventive detention. There remains only the responsibility of interference on our part "for any other purpose" and whether this petition can be brought within this very wide and extensive discretion. Art. 226 confers on us extremely wide powers of interference and a corresponding extremely heavy burden of responsibility. The framers of the Constitution could never have contemplated High Courts constituting themselves on applications by all sorts of aggrieved persons into inquisitorial tribunals supervising, criticising, modifying or cancelling the actions and orders of different departments of executive authority, institutions, public bodies and last but not least of the Legislatures as regards their internal affairs which are controlled by the Speaker and the House and its committees. It is only in exceptional cases that writs under these wide powers "for any other purpose" can in our opinion be issued, such as for instance when there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been mala fide discrimination against an individual to the detriment of his rights. It is impossible to define with exactitude the cases in which Art. 226 of the Constitution can be rightly invoked. They should be comparatively exceptional and very few. But we view with showing apprehension and alarm the very large number of petitions under this Article seeking our intervention and to make it an avenue for redress. This may be partly due to a tendency to exploit this avenue with legal ingenuity seeking fresh avenues for the invocation of this Article. A contributory reason may also be the growing tendency to depart from standards of justice and fair play in day to day administration. It is in the light of this approach to Art. 226 that we shall consider this petition.

(6) Mr. Kumaramangalam, though he concedes no violation of any fundamental right, would base petitioner's right to attend the sittings of the Legislature even from the confines of preventive detention on something more fundamental than the fundamental rights set out in Part III of the Constitution. He urges that the very basis of the sovereignty of the people will be undermined and imperilled if a member of a Legislature is deprived of his right to sit in it and if the electorate are to be for years deprived of any representation in the House. He points out that petitioner still continues to be a member, that he draws his salary as a Legislator, that though a detenu he has been under S. 64 (b) of the Representation of Peoples Act, 1951 accorded the right of vote by postal ballot and finally urges that he is even entitled under this Act to stand for and contest an election though a detenu. We do not propose to canvass the correctness of this last contention, which does not fall for our determination. The position both for the petitioner and his electorate has no doubt been most unfortunate but that by itself can give petitioner no legal right to the relief he now seeks to attend the Legislature while under detention.

(7) We have tried to follow Mr. Kumaramangalam in his underground exploration of the foundations of the Constitution. But we cannot see how they could be placed in jeopardy by MLAs under the lawful preventive detention being (not?) permitted while under such detention, to attend the sittings of the House. We are able to discern two main massive and indispensable pillars underground on which the Constitution is founded. The first pillar is unswerving loyalty by each and every citizen to the Constitution and to the flag of the Indian Union, the Constitution be changed only by Constitutional means eschewing any form of violence. The second pillar we may describe as honesty, character and integrity in the component organs of the Constitution, viz., the Legislature and the Executive and judiciary. We are called upon to consider the legal position with regard to all forms of preventive detention, whether for action prejudicial to the security of the State itself or the maintenance of public order which

threatens to undermine the first pillar or for action prejudicial to the maintenance of essential services particularly those affecting the supply of food, such as black-marketing and hoarding and cornering operations by which fortunes can be accumulated at the expense of the suffering poor, which threatens to undermine the second pillar. If a case should ever arise of a Member of a Legislative Assembly being preventively detained for black marketing operations prejudicial to such essential services, involving as it does social and moral turpitude, really worse than that of many criminals imprisoned under ordinary law, can it possibly be said that his being restricted from attending the House while under such detention in the slightest degree puts in jeopardy any basis of the Constitution? On the contrary, both justice and law require that he should be restrained from further legislative activity and further misuse of his position till the electorate call upon him to account at the next election. We are unable to differentiate in law any treatment of cases of preventive detention. Once a member of a Legislative Assembly is arrested and lawfully detained, though without actual trial under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. A declaration by us that he is entitled to do so, even under armed escort is entirely out of the question. We however readily concede the contention of Mr. Kumaramangalam that if a party in power detains a political opponent or continues his detention with the mala fide object of stifling opposition and prejudicing the party to which he belongs in a forthcoming election, there would be an undermining of the basis of the Constitution, putting in jeopardy the second pillar to which we have adverted. That contention is wholly irrelevant for the purposes of this petition, which proceeds on the basis that detention is lawful bona fide and for proper grounds.

(8) There remains the subsidiary prayer by the petitioner for a declaration that he is entitled to correspond with the Legislature of which he still continues to be a member without let or hindrance. This is in our opinion well founded. As long as a detenu continues to be a member of a Legislature, drawing the emoluments of his office, receiving summons to attend, he is entitled to the right of correspondence with the Legislature, and to make representations to the Speaker and the Chairman of the Committee of Privileges and no executive authority has any right to withhold such correspondence. It is conceded in the affidavit of the Superintendent of the Jail who is impleaded as the 2nd respondent, that under the orders of the Inspector General of Prisons, he withheld a petition to the Chief Secretary to Government, who is the first respondent, and a copy thereof to the Speaker of the Legislative Assembly. Government appear to have acted under R. 11 of the Madras Security Prisoners' Rules 1950 passed under S. 4 of the Preventive Detention Act regulating correspondence permissible to detenue. We see no grounds for any differentiation in treatment as between a member of a Legislative Assembly detenu and any other ordinary detenu in the application of these rules, but in this one respect we hold that during the period of his detention, a detenu, who continues to be a member of the Legislative Assembly, has a right to correspond with the House. This right, as it appears to us, flows not merely from principles of natural justice, which will be violated by such letters being withheld, but as a continuing member of the House, he would also appear to be entitled to this privilege under Art. 194(3) of the Constitution under which English Parliamentary practice has to be followed until a law is enacted by the Legislature defining the powers, privileges and immunities of the House, its committees and its members. Capt. Ramsay was permitted to correspond with the House of Parliament while under detention and was also given a personal hearing in an elaborate enquiry conducted by the Committee of Privileges. It is true that some early letters of the petitioner were forwarded to the House who sent him a reply but he is entitled to continue making further representations.

(9) We accordingly declare the right of the petitioner as a Member of the Legislative Assembly to correspond without let or hindrance with the Speaker and the Chairman of the Committee of Privileges through the Secretary of the Legislature during his period of detention and issue a writ by way of mandamus directing the Chief Secretary to Government and the Superintendent of the Central Jail to forward to the House any letters from the petitioner held up on executive orders so that the Legislative Assembly may deal with them in accordance with Parliamentary law and practice prevailing in England by which the Legislature is bound. In other respects we dismiss this petition.

(10) SOMASUNDARAM, J.: I have perused the judgment of my learned brother and I agree with the orders proposed by him. As regards the case of P. Venkateswarlu, referred to by my learned brother, I think that the judgment in Cri. M. P. No. 2059 of 1949 was premature as in my opinion the obligation to ascertain and determine the privileges of a member of the House rests primarily and in the first instance with the House and House only and our jurisdiction, comes in only later, i.e., when the House fails to perform its duties or refused to perform its duties or performs it contrary to Cl. 3 of Art. 194 of the Constitution. I do not think that the House can be found fault with for anything done or not done as the letter dated 10th August 1951 written by the petitioner to the Chief Secretary (copy of which was sent to the Speaker) has not even been placed before them for their consideration.

(11) The question raised in this petition is whether the petitioner who is a member of the Madras Legislative Assembly and who has been detained under the Preventive Detention Act, 1950 has a right to participate in the deliberations of the Assembly "without let or hindrance". If he has no right, can it be said that preventing him from attending the Assembly constitutes a breach of the privilege of a member of the House? Finally can the letter written by the petitioner to the Chief Secretary (copy of which was sent to the Speaker) be withheld from being placed before the House or the Committee of Privileges, if there was one constituted. Mr. Mohan Kumaramangalam appearing for the petitioner has ably put forth his arguments from all aspects, i.e., from the point of view of right as well as from the point of view of the privileges. I refrain from dealing with all his contentions as they may have to be dealt with by another and more appropriate body elsewhere, and any opinion I may express is likely to prejudice or prejudge the issue before that body. But in the light of the order proposed, I would deal only with one of the points raised, viz., the validity of the withholding of the letter dated 10th August 1951 sent by the petitioner to the Chief Secretary, (a copy of which as already stated was also sent to the Speaker).

(12) Under Cl. (3) of Art. 194 of the Constitution the powers, privileges, and immunities of a House of the Legislature of a State, and of the members and the Committees of a House of such legislature, shall till they are defined by the Legislature by law be those of the House of Commons of the Parliament of the United Kingdom and of its members

and Committees at the commencement of the Constitution. The privilege of a member of the House of Commons when detained under the provisions of an Act somewhat similar to but not altogether similar to those of the Preventive Detention Act in India has been determined. I have used the words "somewhat similar but not altogether similar" advisedly because there was no provision in the English Act similar to S. 14 of the Preventive Detention Act and this, in my opinion, makes a lot of difference, in its bearing on the question of privileges of a member detained and on the principle governing these privileges. In England the question arose when Captain Ramsay was detained under S. 18 B of the Defence (General) Regulations 1939 made under the Emergency Powers (Defence Acts), 1939 and 1940. I find from Sir T Erskine May's Parliamentary Practice, 1950 Edn. p 81 that the detention led to the Committee of Privileges being directed to consider whether such detention constituted a breach of the privilege of the House. The Committee of Privileges then went into the whole question and made a report to the House of Commons stating that there was no breach of privilege involved. A copy of the report has been made available to us by the kindness of the learned Advocate General who appeared for the State. A perusal of the report shows that the Committee examined the Home Secretary and the clerk of the House of Commons Sir Gilbert Champion and after obtaining necessary authority from the House of Commons gave opportunity to Ramsay also, to make his representations with the aid of a Solicitor and he was fully heard. The question thus was gone into fully as in a judicial enquiry.

(13) Paragraph 15 of the report shows how the Committee was satisfied that the grounds on which the Home Secretary acted did not arise from anything said by Captain Ramsay from his place in Parliament as any action taken by the Home Secretary from anything said in the Parliament would constitute a breach of the privilege. The Committee says that they attach great importance to this point and they were satisfied that the action of the Home Secretary did not arise from anything said by Captain Ramsay from his place in Parliament.

(14) A perusal of the report shows how carefully the question was gone into and what great attention was bestowed upon it by the Committee. The regulations under which the member was detained, the history of the privilege claimed, the existence or the extent of the privilege were all gone into fully and thoroughly and in a manner which was not only satisfactory to all concerned but which is the pride and glory of the British Nation. I am referring to this aspect because I think that our House, i.e., the Madras Legislative Assembly in this case is the proper and primary authority to decide what the privileges of the House or its members or the Committees are and they should therefore follow the example of the House of Commons as the Privileges of the member of our House are the same as the members of the House of Commons in England, in the absence of their being defined by law.

(15) In this case the petitioner has written a letter to the Chief Secretary (copy of which was sent to the Speaker) asking that he should be permitted to attend the Assembly. This in substance raises the question of his right or privileges whatever it may be. This letter should not have been withheld, as has been done in this case. It should have been placed before the Committee of Privileges if there is one (we are told that there is one) and if there is no Committee before the House who should constitute a committee and direct it to consider this and report to the House. This course in my opinion is necessary to establish good, sound and healthy traditions which the House must develop.

(16) I therefore agree with the order proposed by my learned brother that the letter of the petitioner be placed before the Madras Legislative Assembly which may deal with it in accordance with the practice prevailing in the House of Commons in England.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 120 (C. N. 58)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR, J.

R. M. Seshadri, Petitioner v. The District Magistrate, Tanjore and another, Respondents.

Civil Misc. Petn. No. 5744 of 1951, D/- 24-8-1951.

(a) Cinematograph Act (1918) S. 5 (3) — Authority of Government to grant licensing authority power to impose conditions.

S. 5(3) circumscribes the power of the licensing authority, and clearly lays down that such power is subject to the provisions of the section and the control of the Provincial Government. The control of the Provincial Government must have reference to the grant of the licences. It cannot therefore be said that under S. 5(3) of the Act the authority to impose conditions in the licence is only the licensing authority, namely the District Magistrate and the Government has no authority in law to grant the licensing authority power to impose such conditions. (Para 4)

(b) Cinematograph Act (1918) S. 8 — Rule relating to kind of film to be exhibited and its effect.

The power under S. 8 to make rules has been conferred in the widest sense and the fact that there is no special mention of the purposes of cinematograph exhibitions does not imply that no rules can be made relating to the kind of films to be exhibited and their effects on the audience. Any rule providing for the kind of films to be exhibited or prohibited from being exhibited will be a rule lawfully made in exercise of the powers conferred by S. 8. (Para 5)

(c) Constitution of India Art. 19 (1) (a) — Prohibition from or direction for exhibiting certain films — Cinematograph Act (1918), S. 8 — Notifications dated 20-3-1948, 15-9-1948.

It cannot be said that a licencee of a cinema theatre who exhibits films is exercising a right of freedom of speech and expression in exhibiting films which he desired to exhibit. He is not exhibiting them either as the expression of his thoughts and ideas or of those borrowed from some one else and adopted by him. He is doing nothing but carrying on a business. His right to freedom and expression is no more infringed by his being prohibited from exhibiting certain films or by being directed to exhibit certain films than in the case of a book seller who is prohibited from selling certain books or is directed to sell certain other books. A I R (38) 1951 Mad 70 (S B) referred. (Para 13)

(d) Constitution of India Art. 19 (1) (g), (6) — Provision in licence for exhibition of films of educative and cultural value — Cinematograph Act (1918) S. 8 — Notifications dated 20-3-1948, 15-9-1948.

The provision for exhibition of films of educative and cultural value is in the interests of the general public. The advantage of visual methods of instruction combined with a certain amount of entertainment cannot be sufficiently emphasised in a country like India where the masses are practically illiterate. If at the most, the time taken for exhibiting the approved films does not exceed about 15 or 20 minutes, there is no unreasonable restriction on the exercise of the licensee's right to carry

on his business. The fact that the licencee has to pay rent for the use of such films is immaterial. (*Paras 15, 16*)

(e) Cinematograph Act (1918), S. 8—Notifications dated 20-3-1948 and 15-9-1948 — Conditions 4 (a) and (b) and special condition No. 3 in the licensee's licence held not invalid on the ground that they were not within the powers of the licensing authority. (*Para 12*)

(f) Cinematograph Act (1918) S. 8 — Notifications dated 20-3-1948 and 15-9-1948 — Conditions 4 (a) and (b) and special condition No. 3 in licensee's licence held valid and constitutional. (*Para 19*)

Petitioner in Person; Advocate-General and the State Counsel, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) 1951-1 Mad L J 115: (A I R (38) 1951 Mad 70 S B) (Pr 13)
(1911) 1 K. B. 445: (80 L J K B 141) (Prs 8, 10, 11, 12)
(1915) 2 K B 49: (84 LJKB 649) (Prs 6, 12)
(1915) 2 K B 466: (84 L J K B 1787) (Pr 10)
(1915) 2 K B 61: (84 L J K B 1077) (Pr 12)
(1916) 2 K B 504: (85 L J K B 1750) (Pr 11)
(1925) 1 K B 213: (94 L J K B 216) (Pr 12)

RAJAMANNAR, C. J.: The petitioner seeks directions from this Court in the exercise of our jurisdiction and power under Art. 226 of the Constitution of India in the following circumstances. The petitioner is the owner of a permanent cinema theatre called Sri Brahnnayaki Talkies in Thiruthuraipundi, Tanjore district. In accordance with the provisions of the Cinematograph Act, 1918, he applied for and obtained a licence from the District Magistrate, Tanjore, in respect of his theatre. The period for which the licence was so obtained is from 5th September 1950 to 4th September 1951. The licence was granted subject to certain conditions which were mentioned in the licence. We are concerned in this application with condition 4(a) and (b) and the special condition No. 3. They run as follows:

"4(a). The licensee shall exhibit at each performance one or more approved films of such length and for such length of time, as the Provincial Government or the Central Government may, by general or special order, direct.

(b) The licensee shall comply with such directions as the Provincial Government may by general or special order give as to the manner in which approved films shall be exhibited in the course of any performance".

Explanation: 'Approved film' means a cinematograph film approved for the purpose of this condition by the Provincial Government or the Central Government.

Special condition 3. The licensee should exhibit at the commencement of each performance not less than 2000 feet of one or more approved films."

These conditions were imposed in pursuance of two notifications issued by the Government of Madras purporting to act in exercise of the powers conferred by S. 8 of the Act. One of these notifications dated 20th March 1948 amended the Madras Cinematograph rules 1933 by substituting the conditions 4(a) and (b) above set out in the place of the condition 4 in force previously. The second notification is dated 15th September 1948 and ran as follows:

"In pursuance of condition 4 of the conditions of licence in form A annexed to the Madras Cinematograph rules, 1933, His Excellency the Governor of Madras hereby directs that every licencee shall exhibit at the commencement of each performance not less than two thousand feet of one or more approved films."

The petitioner's case is that the conditions imposed by the said two notifications are 'ultra vires', void and of no effect for several reasons. To appreciate these reasons and the contentions of the petitioner it will be useful to make a brief reference to the material provisions of the Act.

(2) The preamble of the Act (The Cinematograph Act, 1918) gives the object of the Act, namely, "Whereas it is expedient for regulating exhibitions by means of cinematographs". Sec. 3 runs thus,

"Save as otherwise provided in this Act, no person shall give an exhibition by means of cinematograph elsewhere than in a place licenced under this Act, or otherwise than in compliance with any conditions and restrictions imposed by such licence."

(3) S. 4 prescribes the authority to grant licences, namely, the District Magistrate in the moffusil and the Commissioner of Police in Presidency town. S. 5 provides that a licensing authority shall not grant a license unless it is satisfied (a) that the rules made under the Act have been substantially complied with, and (b) that adequate precautions have been taken in the place in respect of which the licence is to be given for the safety of persons attending exhibitions therein. Under sub-s. (3) of S. 5, subject to the provisions of that section and to the control of the Provincial Government, the licensing authority may grant licenses under the Act to such persons as it thinks fit and on such terms and conditions and subject to such restrictions as it may determine. S. 8(1) empowered the Provincial Government to make rules for the purpose of carrying into effect the provisions of the Act, and in particular, to provide for the regulation of cinematograph exhibitions for securing the public safety; the procedure of the authorities constituted for examining and certifying films as suitable for public exhibition and all matters ancillary thereto and the fees to be levied by those authorities. There were two subsequent Acts amending some of the provisions of the original Act. In the latter Act, LXII of 1949, there were several amendments of which we are concerned with the amendments to S 5. Inter alia power was granted to the Central Government to make rules providing for the delegation of any of the powers of the authority to such person or persons nominated by it, the procedure of the authority for examining and certifying films as suitable for public exhibition and all matters ancillary thereto and the fees to be levied by such authority and the conditions subject to which any certificate may be granted under the Act and the circumstances in which any certificate shall be refused. A new section (S. 10) which was inserted by the amending Act empowers the Central Government to give directions to any Provincial Government as to the carrying into execution the rules and orders made thereunder.

(4) The first contention of Mr. Seshadri who argued the case ably appearing for himself is that under S. 5(3) of the Act the authority to impose conditions in the licence is only the licensing authority, namely, the District Magistrate and the Government had no authority in law to grant the licensing authority power to impose such conditions. There is no substance in this contention. S. 5(3) circumscribes the power of the licensing authority, and clearly lays down that such power is subject to the provisions of the section and the control of the Provincial Government. The control of the Provincial Government must have reference to the grant of the licences.

(5) Nor is there any substance in the next contention, namely, that under S. 8 of the Act rules can be made only for the purpose of carrying into effect the provisions of the Act and there is no provision relating to the kind of films to be exhibited and the policy of using the cinematograph for educational purposes. The power to make rules has been conferred in the widest sense and the fact that there is no special mention of the purposes of cinematograph exhibitions does not imply that no rules can be made relating to the kind of films to be exhibited and their effects on the audience. The Act itself was passed with the avowed object of regulating exhibitions by means of cinematographs. Any rule providing for the kind of films to be exhibited or prohibited from being exhibited will be a rule lawfully made in exercise of the powers conferred by S. 8 of the Act.

(6) It was contended with great ingenuity that the licence can deal only with the place and therefore any condition which had no connection with the safety or other requirements of the place as such is 'ultra vires'. The ruling in 'Theatre De Lux (Halifax) Ltd. v. Geldhill', (1915) 2 K B 49 was relied on in support of this contention. Before referring to that and other English decisions dealing with the legality of certain conditions imposed on a licencee, it will be useful to refer to the relevant statutory provisions of the English Cinematograph Act, 1909.

(7) The Act was entitled "An Act to make better provision for securing safety at Cinematograph and other exhibitions". S. 1 provided that no exhibition of pictures by means of a cinematograph or other similar apparatus for the purpose of which inflammable films are used shall be given elsewhere than in premises licensed for the purpose in accordance with the provisions of the Act. S. 2, sub-s. (1) ran as follows:

> "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine".

S. 3 imposed a penal liability for contravening any of the conditions or restrictions imposed by the licence.

(8) The first case in which the legality of conditions attached to a licence for exhibition of cinematograph films came up for discussion is the 'London County Council v. Bermondsey Bioscope Co., Ltd.', (1911) 1 K B 445. A licence was granted to use certain premises for exhibition of pictures by means of cinematograph apparatus and one of the terms and conditions on which it was granted was that the premises be not opened on Sundays, Good Friday or Christmas day. Contrary to this condition, one Sunday there was an exhibition of pictures. A prosecution ensued for contravention of the condition. The Magistrate agreed with the contention of the licensee that the condition in question was 'ultra vires' having regard to the scope and purposes of the Cinematograph Act. The case then came up before the Division Court of the King's Bench. It was contended on behalf of the licencee that the Cinematograph Act, as its title showed, was intended to provide against the danger which may arise from the use of inflammable films of cinematograph and other similar exhibitions and the words "on such terms and conditions and under such restrictions" in S. 2(1) of the Act must have reference either to securing safety at the exhibition or to the user of the premises while they were being kept open for the purposes of the exhibition; and the condition that the premises shall be closed on particular days was not a condition for securing safety; nor did it have reference to the user of the premises. It was held that the condition was valid. Dealing with the argument that the conditions which the County Council had power to impose were conditions for securing safety and with the scope of the title of the Act which was referred to as indicating the nature of the conditions which may be lawfully imposed, Lord Alverstone C. J. observed thus,

> "I quite recognise that the title of an Act is part of the Act, and that it is of importance as shewing the purview of the Act;.....It has never yet, however, been laid down that, if the language of an Act is clear, full effect is not to be given to it because it goes beyond the title. The language of S. 2, sub-s. (1) seems to me to be quite clear and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable."

Pickford and Avory JJ. agreed with the learned Chief Justice.

(9) This case has always been cited as the leading authority on the power of the Council to impose conditions in a cinematograph licence which may not have a direct relation to the safety of the premises.

(10) In 'Rex. v. London County Council', (1915) 2 K B 466, a Division Bench consisting of Lord Reading C. J. and Bray and Shearman JJ. accepted the law as laid down in the 'London County Council v. Bermondsey Bioscope Co., Ltd.', (1911) 1 K B 445, namely, that the powers given to the council are not confined to securing the safety of the public and the Court of Appeal approved of it. Buckley L. J. said,

> "It is clear to my mind that the terms and conditions may cover a large field than that covered by the regulations of the Secretary of State for securing safety. It seems to me that upon the true construction of the Act the discretion to grant licences to such persons as the licensing authority thinks fit enables them to go beyond requiring provisions for safety and to impose other terms and conditions. This was decided by a Divisional Court in 1910 in the 'London County Council v. Bermondsey Bioscope Co., Ltd., (1911) 1 K B 445."

(11) In 'Stott. v. Gamble', (1916) 2 K B 504 the validity of the following condition in a licence came up for consideration,

> "No film shall be shown that is objectionable or indecent or anything likely to tending to educate the young in the wrong direction, or likely to produce riot, tumult, or breach of the peace, and no offensive representations of living persons shall be shown. Provided also that no film shall be exhibited if notice that the Justices i.e., the licensing authority, object to such film has been given to the licensee."

The learned Judge who decided the case cited the dictum of Pickford J. in the 'London County Council v. Bermondsey Bioscope Co., Ltd., (1911) 1 K B 445, namely,

> "The County Council might impose such restrictions so long as they were not unreasonable, as they thought right,"

and held that the condition was valid.

(12) The question to be considered was whether the condition was unreasonable having regard to the subject-matter of the licence, and in his opinion it was most desirable that Justices should when granting a licence put in a condition retaining to themselves power to stop the exhibition of any film which they thought was objectionable upon the grounds mentioned in the condition. It is

sufficient to cite the case in 'Mills. v. London County Council', (1925) 1 K B 213 as illustrative of the same principle. There the condition was,

> "that no film other than the photographs of current events which has not been passed for universal exhibition by the British Board of Films Censors shall be exhibited in the premises without the express consent of the Council during the time that any child under or appearing to be under the age of 16 years is therein; Provided that this condition shall not apply in the case of any child who is accompanied by a parent or bona fide adult guardian of such child."

It was held that the condition was not invalid, because it was not unreasonable. Lord Hewart C. J. followed the construction placed on S. 2(1) of the Cinematograph Act by the learned Judges in the 'London County Council v. Bermondsey Biscope Co., Ltd., (1911) 1 K B 445. We may now refer to 'Theatre De Lux (Halifax) Ltd. v. Gladhill', (1915) 2 K B 49. The correctness of the decision in this case was apparently doubted in later decisions, but it was always understood that it did not run counter to what was laid down in the 'London County Council v. Bermondsey Biscope Co., Ltd., (1911) 1 K B 445. In this case the impugned condition was,

> "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p. m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p. m."

Lush and Rowlatt JJ. held that the condition was 'ultra vires' inasmuch as there was no connection between the ground on which the condition was imposed, namely, regard for the health and welfare of young children generally and the subject-matter of the licence, namely, the use of the premises for giving of cinematograph exhibitions. Atkin J. dissented. He held that the only restriction upon the power of the licensing authority to impose conditions on the grant of licenses was that the conditions must be (1) reasonable, (2) in respect of the user of the licenced premises, and (3) in the public interest. They were entitled to take into account the public interest so far as children are affected and the condition was not 'ultra vires'. So far as we are able to analyse the reasoning of the majority Judges, we find that the 'ratio decidendi' of their decision was that the condition had no connection with the subject matter of the licence. Lush J. said:

> "The condition is reasonable, if at all, not because it is connected with cinematograph exhibitions but because it is desirable for the health and welfare of small children that they should not be in any place of public entertainment in certain circumstances and unless accompanied by a parent or guardian."

The learned Judge thought that there was no connection between the condition and the subject-matter of the licence because it was desirable that young children should not be even in other places of public entertainment after certain hours. In a subsequent case reported in the same volume, 'Ellis. v. North Metropolitan Theatres', (1915) 2 K B 61 Bray J. justified the decision thus:

> "The ground upon which the Court there proceeded was that S. 3, which makes it an offence in the occupier of the licenced premises to allow them to be used in contravention of the conditions on which the licence was granted was dealing with conditions which affect the user of the premises by the licensee, and that a condition which restricted their use not by the licensee but by visitors of a tender age was not within the Act and was invalid. Whether the majority of the Court in that case were right in so deciding it is not for us to say, for we are bound by their decision, but here there is no question that the condition is one which affects the user by the licensee. Therefore that case does not touch the present one."

The law on the point is briefly summed up by Halsbury, 2nd Edn., volume 32, S. 90 (page 72) thus:

> "The conditions which may be imposed are not limited to matters of safety, but may deal with the suitability of the films to be exhibited or the admission of children to the licensed premises."

We are therefore of opinion that the conditions in the petitioner's licence to which objection has been taken are not invalid for the reason that they are not within the powers of the licensing authority.

(13) Mr. Seshadri next contended that the conditions infringe his fundamental right to freedom of speech and expression conferred on him by Art. 19(1)(a) of the Constitution. We must confess that we have not been able to follow this contention. Reliance was placed on observations in a recent Full Bench decision in 'Srinivasa Bhat v. The State of Madras', 1951-1 Mad L J 115 (S B). In that case the constitutional validity of S. 4(1)(a) and (b) of the Press (Emergency) Powers Act fell to be determined. Security had been demanded from a printing press under the provisions of that Act. In dealing with an argument based on Art. 19(1)(a) the learned Judges interpreted the term "freedom of speech and expression" widely as including the liberty to propogate not only one's own views but also the right to print matters which are not one's own but either have been borrowed from some one else or are printed under the direction of that person. We are unable to see how it can be said that the right to freedom of speech and expression of the petitioner has in any way been violated. It is impossible for us to accept the position that a licencee of a cinema theatre who exhibits films is exercising a right of freedom of speech and expression in exhibiting films which he desired to exhibit. He is not exhibiting them either as the expression of his thoughts and ideas or of those borrowed from some one else and adopted by him. In our opinion, the petitioner is doing nothing but carrying on a business, and even remotely it cannot be suggested that these films represent his speech or expression. His right to freedom and expression is no more infringed by his being prohibited from exhibiting certain films or by being directed to exhibit certain films than in the case of a book seller who is prohibited from selling certain books or is directed to sell certain other books. There is no substance in this contention.

(14) The next contention of Mr. Seshadri was based on Art. 19(1)(g). The imposition of films not of his choice and on condition that he should pay for their exhibition infringed on his right to the free exercise of his business. The Government in effect requisition the use of his theatre to exhibit their own films and far from paying compensation for it, make him pay for their hire. As he is compelled to exhibit not less than 2000 feet of such approved films, there is a necessary shortage of the time during which he can exhibit films of his own choice. All this constitute a serious and substantial interference with his business. So the argument ran. Anticipating that the action of the Government may be sought to be supported by the provisions of Art. 19(6), Mr. Seshadri contended firstly that the condition in question was not a restriction so much as an imposition, secondly that the restriction if it be such, is not reasonable, and thirdly, that the restriction is not in the interests of the general public. Obviously there is nothing in the first part of the argument. The imposition of the condition in question would certainly amount to a restriction in that it prevents the full and free exercise of the petitioner's right to exhibit

such films as he wants. Then, is the restriction reasonable and is it in the interests of the general public? On behalf of the State, the Superintendent in the Home Department filed an affidavit in which the condition was justified in the following manner:

"As far as the compulsory exhibition of approved films is concerned, the State have thought that it is necessary to inform and educate the public in various matters through the medium of films, and that the most effective way of doing this is to direct the exhibitors to set aside a certain amount of screening time which is less than 10 minutes in the public cinemas by adding a condition in the licenses granted to the exhibitors.... ....To ensure a regular supply of approved films of a sufficiently high standard and without duplication and wastage a Govt. organisation named Films Division has also been set up for the production and distribution of approved films..... .....The Government's organisation distributes not only its own films but also suitable films purchased from private producers. It will be seen therefore that the condition has been imposed in the interests of the general public".

(15) In our opinion, the provision for exhibition of films of educative and cultural value is in the interests of the general public. The advantage of visual methods of instruction combined with a certain amount of entertainment cannot be sufficiently emphasised in a country like India where the masses are practically illiterate. As it is certainly one of the meritorious objects of a State to educate the masses, this attempt for that purpose must be held to be in the interests of the general public. If that be so, we think that the provision is otherwise reasonable. If at the most, the time taken for exhibiting these approved films does not exceed about 15 or 20 minutes, we think there is no unreasonable restriction on the exercise of the petitioner's right to carry on his business.

(16) Once it is held that the condition in question is a reasonable restriction in the interests of the general public on the exercise of the right conferred under Art. 19(1)(g) then the fact that the petitioner has to pay rent for the use of such films is immaterial for a decision of the validity of the condition. If the petitioner could be compelled to exhibit films of educative value, then he must obtain such films only on hire. If he obtains for use such films from private producers, he will have to pay for them. If he gets them from the Government, he likewise pays them. Actually the rental represents only about one per cent. of the average box office collections of the cinema.

(17) The learned Advocate General attempted to rely on a provision inserted in the Act by the Amending Act, LXII of 1949, namely, S. 5(2-A) which runs as follows:

"The Central Government may from time to time issue directions to licensees generally, or to any licensee, in particular, for the purpose of regulating the exhibition of any film or class of films so that scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenuous films secure an adequate opportunity of being exhibited."

(18) It was however pointed out that this Act came into force only on and from 15th January 1951 long after the grant of the licence to the petitioner and further, it does not appear that the Central Government has issued directions to licensees under that provisoin. So reliance cannot be placed on this provision for justifying the condition in question.

(19) In our opinion, the conditions impugned by the petitioner as being invalid and 'ultra vires' are valid and constitutional. The application is therefore dismissed with costs.

C.R.K./D.H. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 124 (C. N. 59)

RAJAMANNAR C. J. AND SOMASUNDARAM J.

M. G. Murugesam Chetty, Appellant v. E. Kanniappa Mudaliar, Respondent.

O. S. App. No. 5 of 1950, D/- 31-1-1951.

Limitation Act (1908), Art. 183 — "Revivor" — Meaning of — Decree against two persons — Order of revivor on application for execution against one does not operate as revivor against other.

An order bringing on record legal representatives of decree-holder and allowing them to execute the decree is an order of revivor within the meaning of Art. 183. But in the case of a decree against two persons an order of revivor made on an application for excution against only one of them does not operate as a revivor against the other. A I R (5) 1918 Mad 513 Rel. on. (Para 1)

Anno: Lim. Act, Art. 183. N. 10.

T. A. Vijayaraghavachari, for Appellant; N. R. Sesha Ayyar, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('15) 38 Mad 1102: (A I R (3) 1916 Mad 1038 (2)) (Pr 1)

('17) 40 Mad 1127: (AIR (5) 1918 Mad 513) (Pr 1)

('29) 52 Mad 590: (A I R (16) 1929 Mad 252 (2)) (Pr 1)

RAJAMANNAR, C. J.: We are in entire agreement with the judgment of Rajagopalan J. As the facts have been stated fully and accurately in his judgment, we shall not repeat them. There were two judgment-debtors and in this appeal we are only concerned with the second judgment-debtor. The decree-holder after obtaining the transmission of the decree to the Court of District Munsif of Poonamallee filed an execution application in that Court for execution against the first defendant only. It was during the pendency of the petition that the decree-holder died and his legal representatives who are the appellants before us filed an application in this Court '(No. '313 of 1938)'. In that application, they prayed that an order may be made bringing them on record as the legal representatives of the decree-holder and to grant them leave to execute the decree by continuing the execution proceedings started by the deceased in the District Munsif's Court of Poonamallee. Notice of this application went to both the judgment-debtors and the Master passed an order on 28th September 1938 recognising the appellants as the legal representatives of the deceased decree-holder and giving them leave to continue the execution proceedings therein. We agree with Rajagopalan J. that the reference in this order is to the execution proceedings pending in the District Munsif's Court of Poonamallee against the first defendant. This order can therefore be taken as a judicial determination of the liability of the first defendant to be proceeded in execution at the instance of the legal representatives in the Court of the District Munsif. Such judicial determination would amount to a revivor, see 'Palaniappa Chettiar v. Valliammal Achi', 52 Mad 590. In the application i.e. 'No. 313 of 1938' there was no prayer for granting the appellants leave to execute the decree against the second defendant in any manner. There was therefore no judicial determination therein

of the right of the appellant's legal representatives to execute the decree against the second judgment-debtor. It is well established law that an order of revivor of a decree on the Original Side of the High Court against two persons when made on an application for execution against only one of them does not keep the decree alive as against the other, see 'Krishniaya v. Gajendra Naidu', 40 Mad 1127 affirming the decision of Bakewell J. in 'Mc Laen v. Veeriah Naidu', 38 Mad 1102. Mr. T. A. Vijiaraghavachari who appeared for the appellants did not contend that this was not sound law. If so, the decision in 'Palaniappa Chettiar v. Valliammai Achi', 52 Mad 590 cannot be of any assistance to him. All that was decided in that case was that an order recognising the transfer of a decree or an order bringing on record legal representatives and allowing the assignee or the legal representatives to execute the decree would be an order of revivor within the meaning of Art. 183, of the Indian Limitation Act. That may be so, but the question is whether the order operates as a revivor against judgment-debtors in respect of whom no relief by way of execution was prayed for in the application on which there was an order of revivor. In this case there can be no doubt that the Master by his order dated 28th September 1948 did not purport to judicially determine the liability of the second judgment-debtor to be proceeded in execution. Therefore, it could not be viewed as a revivor of the decree against the judgment-debtor within the meaning of Art. 183. This is the view taken by the Master and by Rajagopalan J. and the same view commends itself to us.

(2) The appeal is therefore dismissed with costs.

C.R.K./G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 125 (C. N. 60)

BALAKRISHNA AYYAR J.

Pusapati Ramabhadra Raju, Appellant v. Ayitha Ramanna and others, Respondents.

A. A. A. O. Nos. 98 and 99 of 1949, D/- 20-3-1951.

Civil P. C. (1908) S. 47 — Power of executing Court to take notice of subsequent events.

An executing Court can certainly take note of the altered circumstances but whether or not in a particular case it should allow execution to proceed and leave the party who considers himself aggrieved to file a separate suit should depend upon the circumstances of that case. (Para 3)

A lessee obtained a decree for possession under S. 9, Specific Relief Act, on the ground that he was wrongly dispossessed by the landlord. Subsequent to this decree the landlord issued a notice to quit to the lessee which was returned as refused. In execution of the decree the landlord raised an objection that the decree could not be executed as the jural basis on which the decree had been passed had ceased to exist by reason of a valid notice to quit.

Held, that the objection should not be entertained in execution but should be decided by way of a separate suit as it involved an enquiry into the validity of the notice to quit. The landlord could not by his own unilateral act avert execution of the decree. A I R (28) 1941 Mad 126 and A I R (20) 1933 Lah 41 disting. (Para 4)

Anno: C. P. C. S. 47 N. 33 pt. 10.

B. V. Subramaniam, for Appellant; B. V. Ramanarasu, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('33) 14 Lah 230: (A I R (20) 1933 Lah 41) (Pr 4)

('38) A I R (25) 1938 Mad 293: (178 Ind Cas 595) (Pr 3)

('40) 1940-2 Mad L J 881: (A I R (28) 1941 Mad 126) (Pr 4)

JUDGMENT: One Ramanna is the first respondent before me. He was in possession of certain lands under a lease. He also claimed that he was entitled to occupancy rights over those lands. Alleging that he had been wrongfully and forcibly dispossessed of the lands by defendants 1 to 3 and others, he filed a suit O. S. No. 310 of 1944 on the file of the Court of the District Munsif, Vizianagaram to recover possession of the lands under S. 9 of the Specific Relief Act. The District Munsif decreed the suit. Thereupon the lessors filed a suit, O. S. No. 24 of 1945 on the file of the Sub Court Visakhapatnam, praying for a declaration that Ramanna had no occupancy rights in the suit lands and for possession.

(2) During the pendency of the suit, the original lessors sold the property to Ramabhadra Raju, the appellant before me and he was subsequently added as a plaintiff in the suit. The Sub Court pronounced its judgment on 30th September 1947, holding that Ramanna had no occupancy rights but that he was nevertheless entitled to remain in possession as he was a lessee and there had been no valid notice to quit. From the decision of the Subordinate Judge, there were two appeals, one by Ramanna and the other by the plaintiffs, but both of them failed being dismissed on 14th February 1949. On 29th December 1947, that is to say, while the appeals were still pending the plaintiffs purported to issue a notice to quit to Ramanna. That is said to have been returned as refused to by Ramanna. Ramanna then applied for execution of the decree he had obtained in O. S. No. 310 of 1944. The plaitiffs obstructed the delivery of possession and thereupon Ramanna applied to have obstruction removed. The basis of the objection was that since the Courts had found that Ramanna was entitled to be in possession only as a lessee and since that lease had been terminated by a valid notice to quit his right to recover possession ceased to exist and that, therefore, the decree in O. S. No. 310 of 1944 could not be executed. The learned District Munsif overruled the objection and directed that delivery should be effected. An appeal to the District Judge having filed Ramabhadra Raju the purchaser has come to this Court.

(3) Mr. B. V. Subramaniam, the learned advocate for the appellant, argued that the decision of the Courts below was wrong because an executing Court just like a trial Court must take notice of facts that have happened subsequent to the passing of the decree or the institution of the suit as the case may be and that where the jural basis on which the decree was passed has since the date of the decree ceased to exist the executing Court should refuse to execute the decree. In support of this argument he referred me to the decision of Venkataramana Rao J. in 'Annamalai v. Srinivasaraghava', A I R (25) 1938 Mad 293. Towards the end of the judgment the learned Judge remarked:

> "No doubt ordinarily a Court should deal with the rights of the parties as they stood at the institution of the suit but where the continued existence of those rights is an essential requisite for according the relief asked for and such rights have been lost before the relief could be granted, the Court cannot but take notice of the altered circumstances and decline to give the petitioners that relief to which they by their own act in bringing the property to sale before filing the petition, they have disentitled themselves."

As a general proposition this is undoubtedly correct enough. But I do not think that the learned

Judge intended to lay down any inflexible rule. An executing Court can certainly take note of the altered circumstances but whether or not in a particular case it should allow execution to proceed and leave the party who considers himself aggrieved to file a separate suit should, it seems to me, depend upon the circumstances of that case. In certain situations for instance the executing Court would stultify itself by trying to execute the decree. Suppose for example, a Court were to grant a decree for restitution of conjugal rights: now, if before the decree in that suit is being executed another competent Court were to grant a divorce to the parties it will be ridiculous to attempt to execute the earlier decree. That would be an obvious case at one end of the series. On the other hand, the events that have transpired might be of such a character that to ascertain the truth of what happened and their true legal import might require a very protracted enquiry. In such a case it may be more appropriate for the executing Court to refer the parties to a separate suit.

(4) Mr. Subramaniam read a number of decisions in support of his argument that this decree should not be executed; but I do not think that any of them is in point. Two of them 'Chinna Goundan v. Kalyanasundaram Aiyar', 1940-2 Mad L J 881 and 'Bukkan Singh v. District Board, Ludhiana', 14 Lah 230 refer to cases where legislation enacted after the passing of the decree, made the decree abortive; some others refer to cases where there had been an agreement of the parties relating to the manner in which the decree should be executed and some others refer to cases where subsequent decrees had destroyed the right granted under the decree sought to be executed. The present case does not fall within any of these categories. What the appellant says is this: the respondent is holding as the Courts have found under a lease. A lease can be terminated by a valid notice to quit; such a notice has been issued in the present case; the lease has therefore been terminated and the lessee cannot therefore execute the decree that he has obtained for possession on the strength of the lease. It will thus be seen that in the present case what the appellant pleads in bar of execution is an unilateral act of his and no decision has so far held that a party to a litigation can by his own unilateral act avert execution of the decree. No doubt there is force in the argument of Mr. Subramaniam that if the notice to quit is valid it would terminate the lease and thus put an end to the jural basis on which Ramanna obtained his decree. But then it has not been found that the notice was a valid notice. And we do not know what other answer the lessee may have. These are matters which have still to be investigated. It may be that the investigation would be simple; but that I do not know. It is easy to conceive of cases where examination of questions falling under S. 111 of the T. P. Act might be protracted and complicated; and in those cases it will certainly be competent for an executing Court to refer the parties concerned to a regular suit. In the present case both the Courts below have considered that the executing Court was right in directing that execution should proceed. Though this may mean that in the result the petitioner will have to file a separate suit, that does not appear to my mind to be a sufficient justification for interfering with the decision of the Courts below.

(5) In the result the appeals are dismissed with costs. No leave.

C.R.K./K.S. *Appeals dismissed.*

A. I. R. (39) 1952 MADRAS 126 (C. N. 61)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

V. Venkatanarayana Rao, Appellant v. Champalal Savansukha, Respondent.

O. S. Appeal No. 24 of 1951, D/- 12-7-1951.

Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938) Ss. 3(ii), 13A, 19A — "Agriculturist".

It is not accurate to say that the definition of an "agriculturist" is only contained in Cls. (a) (b), (c) and (d) of S. 3(ii) excluding the provisos. The provisos are as much an integral part of the definition as the main clauses which precede the provisos. There is nothing in S. 13-A which has the effect of repealing by implication provisos (B) and (C). That section 'ex facie' deals only with one subject-matter, namely, the rate of interest payable by certain persons. It gives the benefit of a reduced rate of interest to persons who would not be agriculturists within the definition contained in S. 3(ii) read with the provisos. S. 13A does not deal with any other matter. It certainly does not confer any new procedural right on persons who did not have that right before the insertion of that section. Hence a person who is not an agriculturist within the meaning of S. 3(ii) read with provisos (B) and (C) on the material date cannot maintain an application under S. 19A. (*Para 1*)

N. Sivaramakrishna Aiyar and V. S. Mayllerumperumal, for Appellant; A. Viswanatha Aiyar and D. C. Krishnamurthi, for Respondent.

RAJAMANNAR, C. J.: The appellant filed an application purporting to be under S. 19-A of the Madras Agriculturists Relief Act as amended by Madras Act XXIII of 1948 for the determination of the debt due by him. Admittedly on the material date the appellant would not be an agriculturist within the meaning of the definition in S. 3(ii) of the Act read with provisos (B) and (C). It was contended on his behalf before Rajagopalan J. on the Original Side that nevertheless the appellant was entitled to maintain the application because of the insertion to S. 13-A into the Act by the amending Act XXIII of 1948. S. 13-A runs thus

> "Where a debt is incurred by a person who would be an agriculturist as defined in S. 3(ii) but for the operation of proviso (B) or proviso (C) to that section, the rate of interest applicable to the debt shall be the rate applicable to it under the law, custom, contract or decree of Court under which the debt arises or the rate applicable to an agriculturist under S. 13, whichever rate is less."

The contention on behalf of the appellant as developed by his learned Counsel, Mr. Sivaramakrishna Aiyar practically amounted to this, namely, that the effect of the new S. 13-A is to repeal by implication provisos (B) and (C) in S. 3(ii) of the Act. It is true no doubt that the definition starts by saying that "Agriculturist" means a person who has a certain interest in particular types of land, but the definition does not end there and it must be deemed to include the provisions by way of limitation declared in and by the different provisos (A), (B), (C) and (D). It is not accurate to say that the definition of an "agriculturist" is only contained in Cls. (a), (b), (c) and (d) of S. 3(ii) excluding the provisos. The provisos are as much an integral part of the definition as the main clauses which precede the provisos. If that be so, we fail to see, anything in S. 13-A which has the effect of repealing by implication provisos (B) and (C). That section 'ex facie' deals only with one subject-matter, namely, the rate of interest payable by certain persons. It gives the benefit of a reduced rate of interest to persons who would not be agriculturists within the

definition contained in S. 3(ii) read with the provisos, because it expressly says that even persons who would not be agriculturists because of the operation of proviso (B) or proviso (C) would, if they be otherwise agriculturists, be entitled to the benefit of the reduced rate of interest. S. 13-A does not deal with any other matter. It certainly does not confer any new procedural right on persons who did not have that right before the insertion of that section. We cannot attribute to the legislature the intention of repealing portions of the statute by implication, when the Legislature could have expressly and simply obtained the same effect by direct repeal. Apart from this well accepted canon of construction, our conclusion is also based on an interpretation of the language of S. 13-A itself which does not lend any support to the contention of the appellant's counsel. It may be that the appellant is entitled to relief in so far as the rate of interest is concerned. That does not fall to be considered now. All that Rajagopalan J. decided — and we agree with his decision — is that the appellant was not entitled to maintain an application under S. 19-A. Before Rajagopalan J. the appellant sought permission to convert this petition into a suit by paying the necessary Court-fee. The learned Judge saw no reason to grant that request. The same request was repeated to us, but we see no reason why this cumbrous procedure of converting an original petition into a suit should be resorted to when a suit can be filed in the usual course.

(2) The appeal therefore fails and is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 127 (C. N. 62)

SATYANARAYANA RAO AND VISWANATHA SASTRI, JJ.

Revula Subba Rao and another, Applicants v. The Commissioner of Income-tax, Madras, Respondent.

Cases Referred Nos. 32 of 1948 and 31 of 1950, D/-28-3-1951.

Income-tax Act (1922), Sections 26-A, 59 — Income-tax Rules, Rules 2 and 6 — Authorised agent of partner cannot file application for renewal of registration of partnership — Rules to this effect not 'ultra vires', though in conflict with Powers of Attorney Act (VII of 1882), Section 2 — Legislation by delegation authority — Principles of —Constitutional law — Delegated legislation.

'Per Viswanatha Sastri, J.: (Whose judgment prevails in view of S. 66-A, Income-tax Act. 'Satyanarayan Rao, J.: Contra.) Rules 2 and 6 of the Income-tax Rules, framed by the Central Board of Revenue under Section 59, read with S. 26-A (2) of the Income Tax Act, preclude an authorised agent of a partner from signing an application on his behalf for the registration of a firm or for the renewal of a certificate of registration under S. 25-A. A firm seeking the statutory privileges conferred upon it by registration must strictly comply with the requirements of S. 26-A and Rules 2 and 6 exclude the common law rule "qui facit per alium facit per se" in the matter of the signature of the partners to an application for registration of the firm or renewal of a certificate of registration. AIR (33) 1946 Mad 411; 1940-8 I T R 121 (Mad) Relied. (Paras 15, 30)

The rules have effect as if enacted by the Act itself. There is no conflict between the rules and the provisions of the Act. There is no repugnancy or inconsistency. In framing rules 2 and 6, the Central Board of Revenue did not exceed the limits of the authority delegated by Sections 26-A and 59. Since they are to be effective "as if enacted in the Act" itself, the question of their reasonableness, fairness or propriety is not a matter for the Courts to investigate. The rules are not like bylaws of a corporation whose fairness or reasonableness is open to question. (Paras 24, 25)

(General law as to legislation by delegated authority discussed.) (Paras 16, 24)

The right to have a partnership registered under the Act is a special statutory right conferred by Section 26-A, introduced in 1930 and this can be availed of only on strict compliance with the provisions of that section and the rules authorised to be made thereunder. The Powers of Attorney Act was a general enactment passed in 1882. In an apparent conflict between general and special legislation, the rule of construction to be adopted is that the special enactment overrides the general enactment in those particular cases to which the special enactment applies. The earlier general legislation is indirectly derogated from by the later special legislation. In cases coming within the latter, the special or particular provision must be deemed to be an exception to the general provision. S. 2 of the Powers of Attorney Act proceeds on the assumption that there is a power of delegation available or exercisable under the existing law and provides that the donee of a power might act for and in the name of the principal. It does not empower an agency to be created or employed in every case. 'Case law Ref. (Para 26)

Section 2 of the Powers of Attorney Act must yield to Rules 2 and 6 of the Income-tax Rules. AIR (33) 1946 Mad 411, Relied. (Para 28)

It is true that the Central Board of Revenue cannot, under the guise of its rule-making power, abrogate a special enactment like the Limitation Act, or the Transfer of Property Act, or the Stamp Act. That is because no section of the Income-tax Act authorises the Board to frame rules affecting or relating to the subjects legislated upon in the several enactments above referred to. Rules framed under the Income-tax Act must conform to the legislative mandate contained in that Act. S. 26-A (2) expressly authorises the framing of rules as regards the person or persons who shall be entitled to make an application and also as regards the form, particulars and the verification of the application. Rules 2 and 6 which prescribe that the application shall be made personally by the partners seeking the registration of a firm or a renewal of the certificate of registration, are strictly within the bounds of the authority conferred by Ss. 26-A and 59. If these rules are to be condemned as 'ultra vires' it must be shown that they are repugnant to the provisions of the Income-tax Act or that they are clearly in excess of the rule-making power conferred by the Act. (Para 27)

Thus Rules 2 and 6 are intra vires the rule-making authority. (Para 30)

Anno: Income-tax Act, S. 26-A, N. 1; S. 59, N. 1.

K. Bhimasankaram, for Applicants; C. S. Rama Rao Sahib; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('76-77) 4 Cal 172: (5 Ind App 178 P C) (Prs 16, 19, 20)

('19) 1919 A C 935: (AIR (6) 1919 P C 145) (Pr 21)

('33) 5 Rang 7: (AIR (14) 1927 P C 22) (Pr 16)

('38) 1938 A C 708: (AIR (26) 1939 P C 36) (Pr 19)

('45) 1945-1 Mad L J 76: (AIR (32) 1945 P C 48: 48 Cri L J 589) (Pr 16)

('49) 1949-2 Mad L J 356: (AIR (36) 1949 P C 175: 50 Cri L J 897) (Pr 17)

('50) 1950-18 ITR 569: (AIR (37) 1950 S C 265) (Prs 10, 28)
('51) AIR (38) 1951 S C 69: (1951 S C R 51) (Pr 17)
('19) 42 Mad 69: (AIR (6) 1919 Mad 24: 20 Cri L J 129) (Pr 24)
('40) 1940-8 ITR 121 (Mad) (Pr 15)
('47) ILR (1947) Mad 167: (AIR (33) 1946 Mad 411) (Prs 4, 10, 11, 15, 28)
('49) 1949-2 Mad L J 663: (AIR (37) 1950 Mad 243: 51 Cri L J 615) (Pr 6)
(1882) 7 A C 829: (51 L J P C 77) (Pr 16)
(1884) 9 A C 117: (53 L J P C 1) (Prs 18, 19, 21)
(1885) 10 A C 282: (54 L J P C 7) (Pr 19)
(1894) A C 347: (63 L J P C 74) (Pr 24)
(1923) A C 695: (93 L J P C 101) (Pr 19)
(1931) 1931 A C 494: (100 L J K B 306) (Pr 24)
(1937) A C 139: (105 L J K B 563) (Prs 8, 28)
(1872) 8 Q B 305: (42 L J M C 112) (Pr 10)
(1898) 2 Q B 91: (67 L J Q B 782) (Pr 24)

SATYANARAYANA RAO, J.: In R. C. Nos. 32 of 1948 and 31 of 1950, the Appellate Tribunal referred to the decision of this Court two questions:

1. Whether the word "personally" in Rule 6 of the Income-tax Rules, as framed under Section 59 of the Income-tax Act, would exclude a duly authorised agent of a partner from signing an application on behalf of the partner under Section 26-A of the Income-tax Act?

2. If the answer to the above question is in the affirmative, whether Rules 2 and 6 are not ultra vires the rule making authority?

The reference in both the cases arises out of the same facts and relates to the validity of the order made by the Income-tax authorities refusing the application of the assessee firm for renewal of registration of the firm under Section 26-A of the Income-tax Act. The applications were made in different years and were refused. Hence these references.

(2) The assessee firm consisted of two partners, Rao Bahadur Revula Subba Rao and Hariprasada Rao, Chirala, who are brothers. The partnership was formed under a deed of partnership of the 10th February 1941. Prior to that, Subba Rao, was carrying on business as sole proprietor and he later took in his brother as a partner. On 1st July 1940, he executed a general power of attorney in favour of Hariprasada Rao as he then intended to go on a pilgrimage. The power-of-attorney authorised Hariprasada Rao, 'inter alia':

"to carry on my business, viz., Burmah Shell Agency at Chirala, Bezwada, Guntur and Chilakalurpet, Parry & Co., (Madras) Agency, etc., and other businesses to conduct and manage the affairs of all of my movable and immovable properties, including buying and selling thereof, to collect the outstandings and pay liabilities of the above-said business to sign on my behalf vakalathnamas, petitions and plaints for filing suits against the defaulting debtors, to sign and present on my behalf all papers to be filed in Courts in connection with suits pending at present ..to sign and file on my behalf all papers to be filed by me in any of the Courts and offices.... to carry and conduct on my behalf all my businesses and other affairs."

(3) After the formation of the partnership, however, Subba Rao left the place on a long pilgrimage. The partnership was registered in the first instance on 29th July 1946, and applications for renewal of the registration were made thereafter by Hariprasada Rao both in his individual capacity as well as in his capacity as the power-of-attorney agent of his brother. The applications were rejected by the Income-tax Officer on the ground that all the partners did not sign personally the renewal applications as required by Rule 6 of the Income-tax rules.

(4) The question whether the word "personally" occurring in Rule 6 of the Income-tax Rules precluded the power-of-attorney agent from signing on behalf of the partner an application for renewal of registration of the firm under S. 26-A of the Act came up for consideration with reference to this very assessee firm on a prior occasion on a reference to the High Court by the Income-tax Appellate Tribunal under S. 66 (1) of the Income-tax Act, 1922, as amended by later Acts. The point then considered and the question referred was restricted to the interpretation of the word "personally" occurring in Rule 6 of the Income-tax Rules. The question was answered against the assessee on the ground that the word "personally" used in Rule 6 necessarily excluded acting by an authorised agent and that the special provision in the rule overrides the provision in S. 2 of the Power-of-Attorney Act, 1882 (Act VII of 1882.) An attempt was made then to raise the question that Rules 2 and 6 were 'ultra vires' the rule-making authority, viz., the Central Board of Revenue; but as that question was not referred to the High Court, this Court declined to express any opinion on it. The same assessee, therefore,, raises now in this reference the question which this Court on that occasion declined to consider and answer. The decision of the High Court is 'Commissioner of Income-tax, Madras v. Subba Rao, ILR (1947) Mad 167.

(4-a) Sub-section 2 of Section 26-A of the Indian Income-tax Act, 1922, provides that:

"the application shall be made by such person or persons, and at such time and shall contain such particulars and shall be in such form, and be verified in such manner as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

Section 59 of the Act empowers the Central Board of Revenue, subject to the control of the Central Government, to make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income. Sub-section 2 of that section enacts:

"without prejudice to the generality of the foregoing power, such rules may:

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(e) provide for any matter which by this Act is to be prescribed."

Section 2 (10) defines the word "prescribed" as meaning "prescribed by rules made under this Act." Sub-section (2) of Section 26-A, it will be seen, empowers the rule-making authority to prescribe by rules the conditions to be complied with for making an application under S. 26-A of the Act. In pursuance of the authority vested under S. 59 of the Act, the Central Board of Revenue made among others two rules in that behalf, viz., Rules 2 and 6. Rule 2 provides that:

"any firm constituted under an Instrument of Partnership specifying the individual shares of the partners may, under the provisions of S. 26-A of the Indian Income-tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income-tax Officer the particulars contained in the said Instrument on application made in this behalf.

Such application shall be signed by all the partners (not being minors) personally....."

Rule 6 states:

"Any firm to whom a certificate of registration has been granted under Rule 4 may apply to the Income-tax Officer to have the certificate of registration renewed for a subsequent year. Such application shall be signed personally by all the partners (not being minors) of the firm, or where the application is made after dissolution of the

firm, by all persons (not being minors), who were partners in the firm immediately before dissolution and by the legal representative of any such person who is deceased, and accompanied by a certificate in the form set out below. The application shall be made within the time and subject to the conditions, if any, which are specified in Clause (a), Clause (b), Clause (c), Clause (d), or Clause (e) as the case may be, of Rule 2."

It prescribes also the form in which an application for renewal of registration of a firm under Section 26-A of the Act is to be made. The Powers-of-Attorney Act was enacted for the purpose of amending the law relating to powers-of-attorney and came into force on 1st May 1882. Section 2 of the Act provides:

"The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

This section applies to powers-of-attorney created by instrument executed either before or after this Act comes into force."

Section 3 validates payments made under a power-of-attorney by an agent without notice of the death of the donor of the power. Section 5 relates to powers-of-attorney of married woman and enables her to appoint an attorney on her behalf for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do. The power to appoint an agent is conferred upon a person who has attained the age of majority by S. 183 of the Indian Contract Act 1872 Section 2 of the Powers-of-Attorney Act recognises and confers upon the donee of a power of attorney power to execute or do any assurance, instrument or thing in and with his own name and signature by virtue of the authority, of the donor of the power and the effect of such execution is to make such execution and the act done in exercise of the power as effectual in law as if it was executed or done by the donor himself. The section proceeds on the assumption that the donor is a person who is competent under law to act through an agent. If the substantive law prohibits by a specific provision or otherwise a person from acting through an agent in any particular matter, S 2 of the Powers-of-Attorney Act does not validate such acts by the agent and does not treat them as the acts of the principal. The validity of the act in question is a matter to be determined entirely by the substantive law relating to the particular matter. All that S. 2 intends to lay down is that in matters in which the law permits a principal to act through an agent, an execution of an instrument or the doing of any act on behalf of a principal by an agent duly authorised under a power-of-attorney, is as effective in law as if the principal himself executed the instrument or did the act.

(5) Section 59 of the Income-tax Act confers on the Central Board of Revenue the power to make rules within the limits prescribed by the section in order to carry out the purposes of the Act and for the ascertainment and determination of any class of income. In respect of matters on which it is open to the authority concerned to provide by rules if rules are made under the section they should be published in the official gazette and thereupon the rules will have effect as if enacted in the Act; in other words the rules will be read as part of the main provisions of the Act itself. Sections 20 to 24 of the General Clauses Act, 1897 (Act X of 1897) lay down certain provisions relating to orders, rules, etc., made under various enactments. These provisions confer power upon the rule-making authority to add, to amend or vary or even rescind such rules and also for the procedure for the publication of the rules framed under the various Acts.

(6) The grounds urged by Mr. Bhimasankaram learned Advocate for the assessee is that Rules 2 and 6 are ultra vires the rule-making authority as the power conferred on it by S. 59 of the Act does not extend the scope of that power so as to abrogate or alter or affect other statutory provisions. A rule-making power, according to him, must always be exercised within the limits laid down by law but so as not to entrench upon other enactments. A power to make rules is in the nature of a subordinate legislation and does not stand on the same footing as the power of the Legislature to enact laws so as to affect other statutory provisions. He does not dispute the power of the Legislature to delegate a power to make rules for the purpose of effectuating the objects of the Act. It is a common feature of modern legislative enactments to lay down in the sections of the Act, the principles and the policy of the Legislature leaving out details to be filled in and worked out by regulations or rules made either by the executive Government or by some other authority. This kind of legislation is described very often as subordinate legislation and is justified on the ground that the Legislature has neither the time nor the material to consider and enact rules relating to various details as they may not be acquainted fully with the facts and circumstances relating to the subject-matter and may have no time even to consider such details. In my judgment in 'Kalyanam Veerabadrayya In re', 1949-2 Mad L J 663 at p. 668, I have adverted to this form of legislation and attempt to draw the line of demarcation between a legislative power, which cannot be delegated and a non-legislative power, though it cannot be said that it is always easy to fix the boundary between the two. However, as there is no dispute regarding the validity of the delegation it does not require further consideration.

(7) The short point, therefore, is whether a subordinate legislative power of this nature can be exercised so as to alter or affect or abrogate a legislative provision in other statutes. If such a power is recognised, it would lead to very serious and perhaps disastrous consequences. An executive government or some other authority upon whom the power of making rules is conferred may under the guise of the exercise of such a power repeal or affect or alter the provisions of any other statute. In other words, it would claim to exercise not a power of subordinate legislation which is really non-legislative in character but clothe itself with a power to legislate which legitimately and under the Constitution belongs to the Legislature and to no other authority. If, for example, by virtue of the exercise of this power provisions of the Contract Act or Sale of Goods Act or Partnership Act are attempted to be altered by the rule-making authority, it would undoubtedly be the exercise of a legislative power and cannot be upheld.

(8) The very essence of subordinate legislation of the description now under consideration is that the body of the Act has laid down the general provisions and the policy of the legislature leaving out the details of the provisions of the Act to be carried out by the rule-making authority by making rules. The rule-making authority can only make rules with a view to effectuate the object of the Act and if the Legislature in its wisdom did not think it fit

to modify any of the statutory provisions relating to other branches of law, the subordinate legislative authority cannot claim to exercise such power. It would be contrary to the very spirit and the basis of subordinate legislation to recognise a power of that kind. This limitation on the rule-making is recognised both in England and in America. Maxwell on Interpretation of Statutes, 9th Edn., at page 302, says:

"Rules and by-laws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity be clear and definite and free from ambiguity, and should not make unlawful things that are otherwise incorrect. They must not be in excess of the statutory power authorising them, 'nor repugnant to that statute or to the general principles of law.' If the subject is deprived of his right to resort to the Courts of law of his country, it must be by express enactment and not by by-law" (The italics are mine.)

Craies on Statute Law at page 272 enumerates five main grounds on which by-laws may be treated as ultra vires:

(a) That they are not made, sanctioned and published in the manner prescribed by the statute which authorise the making.
(b) That they are repugnant to the laws of England.
(c) That they are repugnant to the statute under which they are made.
(d) That they are uncertain.
(e) That they are unreasonable.

He also recognises, like Maxwell, that rules and by-laws should not be repugnant to the laws of England and should not be repugnant to the statute under which they are made. There is a further requirement with reference to the invalidity of by-laws made by public bodies in exercise of statutory powers such as municipalities, local boards, etc., viz., that the by-laws should not be unreasonable but such a restriction is not recognised in the case of rules framed by virtue of a statutory power by an authority on which such a power is conferred by the statute. Of the cases cited by Maxwell at page 303 in foot-note (n) most of them seem to relate to by-laws made by public bodies and are not therefore of much assistance. The decision cited by him in foot-note (c) 'Paul Co. v. The Wheat Commission', (1937) A C 139 is of assistance. In that case, the Wheat Act of 1932 empowered by S. 5, Sub-section (i), the Wheat Commission to make by-laws for giving effect to the provisions of the Act and Sub-section (ii) of that section inter alia empowered the Wheat Commission to make by-laws for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws. The Wheat Commission, the authority making the bylaws in exercise of the power therein contained, made a bylaw providing that any dispute arising between the Wheat Commission and other person as to whether any substance is flour shall be referred to arbitration and that the decision of the referee as to the matter in dispute shall be final and conclusive. The application of the Arbitration Act, 1889, was also excluded. The validity of the byelaw made by the Wheat Commission in the matter of arbitration was the subject-matter of consideration by the House of Lords who held the by-law to be 'ultra vires' the rule making authority as it has the effect of ousting the jurisdiction of the Court. At page 154, Lord MacMillan in his speech observes:

"The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words. I am accordingly of opinion that the Wheat Commission exceeded their powers when they made a byelaw that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply. I have only to add that the by-law must, in my opinion, be condemned as a whole and that it cannot be solved by the excision of the objectionable provision, which is not a severable but a vital part of the byelaw."

(9) Crawford on Statutory Construction deals at page 29, paragraph 17, with the power to promulgate rules and regulations under a statutory power. He states as follows:

"The Legislature can, as we have already indicated, under certain circumstances, delegate to executive officers and administrative boards, the authority to adopt and promulgate rules and regulations. Before such a delegation is lawful, however, the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases; that is, a definite or primary standard must be provided to guide those empowered to execute the law. So long as a policy is laid down and a proper standard established by statute, there is no unconstitutional delegation of legislative power when the Legislature leaves to selected instrumentalities, the duty of making subordinate rules, within the prescribed limits, even though there is conferred upon the officer or board a large measure of discretion. As can be readily seen, there is a distinction between the delegation of power to make a law and the conferring of an authority or discretion to be exercised under and in pursuance of the law as the power to make law necessarily involves a discretion as to what it shall be. The authority to make rules and regulations in order to carry out an express legislative purpose, or to effect the operation and enforcement of a law, is not a power exclusively legislative in character but is rather administrative in its nature. The rules and regulations adopted and promulgated, however, must be 'subvert nor be contrary to existing statutes'." (Italics are mine).

These principles stated by him in the aforesaid paragraph are in consonance with the principles recognised in England and are not in any manner affected by the consideration that under the American Constitution, the executive, judicial and legislative functions are more or less in the nature of watertight compartments.

(10) The Supreme Court in the recent decision in 'Commissioner of Agricultural, Income-tax v. Keshab Chandra', 1950-18 ITR 569 (SC), considered the question of the validity of a signature by an agent of the assessee in the form of a return of an individual assessee under the Bengal Agricultural Income-tax Act of 1944. The common law rule in 'The Queen v. The Justices of Kent', (1872) 8 Q B 305 at p. 307 that:

"where a person authorises another to sign for him, the signature of the person so signing is the

signature of the person authorising it; nevertheless, there may be cases in which a statute may require personal signature"

was considered by the Supreme Court. After an elaborate examination of the Act and the decisions, English and Indian, bearing on the question to what extent it is permissible for a person to act through an agent in the matter of signing on his behalf, at page 580, Das, J., states his conclusion in these words:

"In all these cases the common law rule was not applied, evidently because the particular statutes were held to indicate that the intention was to exclude that rule. This intention was gathered from the use of the word "himself" or "by him" or "under his hand" or "personally." It is needless to say that such an intention may also be gathered from the nature of the particular statute or inferred from the different provisions of the statute and the rules framed thereunder. As already stated, there are many indications in the Bengal Agricultural Income-tax Act, 1944, and the rules made thereunder evidencing an intention to exclude the common law rule in the matter of the signature of the assessee, appellant or applicant on the return, appeal or application."

The decision in 'Commissioner of Income-tax v. Subbarao', ILR (1947) Mad 167, was also noticed. The question whether a rule-making authority could abrogate by a rule made in pursuance of that authority the statute law or a common law rule did not arise directly for consideration before their Lordships. The examination of the provisions of the statute itself in that case disclosed an intention on the part of the Legislature to exclude the intention of treating the signature of an agent as equivalent to the signature of the principal and the rule was in consonance with that intention. It was, therefore, not necessary for the Supreme Court to consider the question where the Act does not so indicate whether under a rule-making power a rule could be made so as to affect a statutory provision as under the Powers-of-Attorney Act. Though the decision in 'Commissioner of Income-tax, Madras v. Subba Rao', ILR (1947) Mad 167, was referred to, the effect of the rules on the provisions of that Act was not considered and no contention seems to have been raised based on the Powers-of-Attorney Act. Impliedly, however, the decision, it has been pressed before us and we are inclined to agree with that view — though we express no final opinion on the point — lays down that it is permissible to abrogate the common law rule. It is, however, not an express decision on that question even. But so far as statutory law is concerned, it is not an authority for holding that a rule-making authority under the Income-tax Act or any other Act has the power to alter the statute law. Rule 6 by using the word "personally" excludes the right to appoint an agent, a power conferred by the Contract Act, and to sign through a power of attorney agent as recognised by the Powers-of-Attorney Act. The rule which has such a far reaching effect cannot be upheld. For these reasons, I think that Rules 2 and 6 of the Income-tax Rules are ultra vires the rule-making authority and cannot be enforced. The result may be as pointed out by Sri Rama Rao Sahib, learned counsel for the Commissioner of Income-tax, inconvenient from the point of view of the Income-tax Department; but this defect can be rectified by enacting a provision in S. 26-A itself that the application must be signed personally by the partner himself and not by an agent.

(11) None of the provisions in the Act so far as I am able to see — and my attention was not drawn to any — by implication excludes the power of a person to act through an agent. S. 26-A does not by implication exclude the power to sign through duly constituted power of attorney agent. It does not restrict the making of an application to a partner or partners only but it would be open under that section to permit the making of an application to such person or persons as may be prescribed. In other words any other person other than the partner may also be authorised to make the application under the rule-making power. It gives the liberty to the rule-making authority to prescribe by rules the conditions subject to which an application should be made for registration. It follows that the second question referred to us in R. C. No. 32 of 1948 must be answered in the affirmative. The two questions in R. C. No. 32 of 1948 and R. C. No. 31 of 1950 relating to the construction of Rule 6 no doubt must be answered in view of the decision of the Supreme Court and of the decision of this Court in 'Commissioner of Income-tax Madras v. Subba Rao', ILR (1947) Mad 167 against the assessee and in favour of the department; but as the rule itself is ultra vires, the application made by the assessee for renewal of registration are valid. This is my answer to the questions referred to us.

(12) I regret I have to differ from my learned brother whose judgment I had the privilege of reading. Under S. 66-A of the Income-tax Act his judgment prevails and the questions referred to us have to be answered in the manner proposed by my learned brother in his judgment.

(13) VISWANATHA SASTRI, J.: The facts have been set out in the judgment now delivered. I regret to have to differ from my learned brother and I do so with great diffidence.

(14) The two questions that have been referred to us are:

(1) Whether Rules 2 and 6 of the Income-tax Rules preclude an agent of a partner or one of the partners acting as agent for the others, from signing an application for registration of a firm or for renewal of a certificate of registration; and

(2) Whether in the event of the first question being answered in the affirmative, Rules 2 and 6 are 'ultra vires' and inoperative by reason of their repugnancy to the provisions of S. 2 of the Powers-of-Attorney Act (VII of 1882).

(15) Section 26-A (1) of the Income-tax Act (hereinafter referred to as "the Act") confers a special privilege on partners by way of registration of their firm if it is constituted under an instrument specifying the individual shares of the partners. Registration enables the firm to get the benefit of lower rates of assessment to income-tax. No tax is levied on a registered firm as such, but each individual partner of the firm is taxed in respect of his share of the firm's profits. An unregistered firm is charged as a unit of assessment and the levy is made on the firm itself. S. 26-A (1) of the Act allows an application for registration of a firm to be made on behalf of the firm and S. 26-A (2) provides that the application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form and be verified in such manner, as may be prescribed; meaning thereby "prescribed by rules made under the Act." See S. 2 (10). S. 59 empowers the Central Board of Revenue to make rules, subject to the control of the Central Government, for carrying out the purposes of the Act and for providing for any matter which by the Act "is to be prescribed." S. 59, sub-section (4) requires the previous publication of the rules proposed to be made and Sub-section (5) provides that:

"rules made under this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in the Act."

The Central Board of Revenue observed the statutory formalities and framed Rules 2 and 6 dealing with registration of firms. Rule 2 provides that an application for the registration of a firm shall be signed by all the partners "personally." Rule 6 provides that an application for renewal of the certificate of registration of a firm should be signed personally by all the partners of the firm. S. 2 of the Powers-of-Attorney Act (Act VII of 1882), so far as is now material, runs thus:

"The donee may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature ..... by the authority of the donor of the power; and every assurance, instrument or thing so executed and done shall be as effectual in law as if it had been executed or done by the donee of the power in the name and with the signature ..... of the donor thereof."

I am clearly of opinion that Rules 2 and 6 of the Income-tax Rules are explicit and mandatory and require all the partners, other than minors, personally to sign their application for registration of the firm or for renewal of a certificate of registration and that an application cannot be validly signed by a duly authorised agent on behalf of a partner. It was so held by this Court in 'Commissioner of Income-tax v. Subba Rao', ILR (1947) Mad 167. See also 'Commr. of Income-tax v. Gelli Krishnamurthi', 1940 8 I T R 121 (Mad.) A firm seeking the statutory privileges conferred upon it by registration must strictly comply with the requirements of S. 26-A and Rules 2 and 6 exclude the common law rule "qui facit per alium facit per se" in the matter of the signature of the partners to an application for registration of the firm or renewal of a certificate of registration.

(16) Mr. Bhimasankaram, the learned Advocate for the assessee, argued that it was not competent to the Legislature to delegate to an outside body the power to make rules which might have the effect of abrogating 'pro tanto' the existing law, whether it was the common law or the statute law of the land. According to him, an essential legislative power like the power to frame rules qualifying or modifying an existing law cannot be validly delegated by the Legislature to an outside body. The practice has become increasingly common both here and in England for the Legislature overburdened with work and incapable of dealing adequately with the details of the subject on which it legislates, to delegate to departments of Government, public bodies or designated officials more or less wide powers "for determining some facts or state of things upon which a law makes, or intends to make, its own action depend." This has been styled conditional legislation. As early as "Empress v. Burah', 4 Cal 172 (PC), the Judicial Committee upheld the validity of an Act empowering the Lieut.-Governor of Bengal to determine by notification when and whether the Act, or any part of it, should be applied to certain districts so as to remove them from the jurisdiction of the ordinary Courts of the land. Lord Selborne, L. C., said:

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieut.-Governor (large as they undoubtedly are) as if when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General-in-Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII of 1869), itself. The proper Legislature has exercised its judgment as to place, person, laws, powers, and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence is no uncommon thing and in many circumstances, it may be highly convenient."

In 'Russell v. Reg', (1882) 7 A C 829, the Judicial Committee upheld the validity of a provision in the Temperance Act of Canada empowering the Governor-General to bring the Act into operation in any State or Province by the issue of a notification on a petition by the majority of electors. The contention that the provision in question was 'ultra vires' the Legislature as constituting a delegation of legislative power was overruled in these words:

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certains parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled.

Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency."

In 'Ma Mi v. Kallander Ammal', 5 Rang 7 (PC), the Judicial Committee recognised that Section 1 of the Transfer of Property Act empowering the Provincial Government to extend the provisions of the Act to Provinces to which the Act was not initially made applicable was validly enacted and that the Provincial Government could, by notification, validly extend the operation of the Act to the Provinces originally exempted from it. In 'King Emperor v. Benoari Lal Sarma', 1945-1 Mad L J 76 PC the Judicial Committee upheld the validity of an Ordinance of the Governor-General providing for the setting up of special Courts in supersession of the ordinary Courts at the time and within the territorial limits judged to be necessary by the Provincial Government. Viscount Simon, L. C., observed:

"This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity. The power to extend the territorial operation of an Act or to extend an Act to persons and objects not specified in the Act or to put the Act in motion and operation would be instances of conditional legislation."

(17) In 'State of Bombay v. Narottamdas', AIR (38) 1951 S C 69, the Supreme Court accepted and acted upon the principles enunciated by the Judicial Committee and distinguished a prior decision of the Federal Court in 'Jatindranath Gupta v. Province of Bihar', (1949) 2 Mad L J 356, where the majority of the Judges had held that a grant of power to extend the life of a self-expiring enactment with such modifications to the enactment as might be thought fit was not "conditional" legislation but an invalid delegation of legislative power. Whether the same view would be taken of similar legislation under the present Constitution is not clear. Two of the learned Judges of the

Supreme Court have reserved their right to consider this point as if it were 'res integra' and sooner or later the whole question will have to be considered by that tribunal.

(18) There is another type of cases where the Legislature passes an Act expressing its intention in general terms leaving the mode of carrying out that intention to be settled by rules and regulations made by a public body or department charged with the administration of the matter legislated upon. This has been called "departmental legislation" or "subordinate legislation." In 'Hodge v. The Queen', (1884) 9 A C 117, the Judicial Committee upheld the validity of an Act of the Ontario Legislature which entrusted to a local authority the power of enacting regulations with respect to the Liquor Licence Act, 1877, by creating offences for breach of these regulations and annexing penalties thereto. The argument based on the incapacity of local Legislatures to delegate legislative power to extraneous bodies was thus met:

"When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 of the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subjects and area, the local Legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail."

(19) In 'Powell v. Appollo Candle Co.', (1885) 10 A C 282, the same tribunal upheld the validity of an Act of the Legislature of New South Wales empowering the Governor-in-Council to levy a duty on certain articles, the nature of which was left to him to determine. After referring to their earlier decisions in 'Empress v. Burah', 4 Cal 172 (P C) and 'Hodge v. The Queen', (1884) 9 A C 117, the Judicial Committee observed:

"These two cases have put an end to a doctrine which appears at one time to have had currency that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers; but within that area unrestricted and not acting as an agent or a delegate."

In 'Fort Frances Pulp and Power Co. v. Manitoba Free Press Co., Ltd.', (1923) A C 695, the Judicial Committee upheld the validity of a Colonial Act empowering an officer styled the "Paper Controller" to regulate the supply of newsprint and fix its price. In 'G. W. Shannon v. Lower Mainland Dairy Products Board', (1938) A C 708 (PC), while upholding the validity of the British Columbia Act empowering the Lieut.-Governor-in-Council to set up Boards to control and regulate the transportation and marketing of natural products and to vest in those Boards powers considered necessary to exercise those functions, Lord Atkin observed:

"The .....objection is that it is not within the powers of the Provincial Legislature to delegate the so-called legislative powers to the Lieutenant-Governor-in-Council or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, haye entrusted various persons and bodies with similar powers to those contained in this Act."

(20) The principle behind the cases above referred to is the same. Within the prescribed limits, the Indian Legislature has plenary powers of legislation as large and of the same nature as those of the British Parliament. Within the area of powers entrusted to it, the Legislature has unrestricted authority. There is no objection, therefore, in principle to a delegation of legislative powers to a public body under an Act of the Legislature. There is no need for any alaim at the sight of "delegated legislation." According to English Constitutional Law, delegation of legislative power under an enactment of the Legislature would be unconstitutional if, and only if, a parallel Legislature is set up by the side of the Legislature erected by the Constitution, or if there is abdication or surrender of legislative power in favour of an outside body. Instances of such objectionable delegation have been very rare indeed. The only limitation suggested to the extent of the power of delegation is found in the following observation of Lord Selborne, L. C., in 'The Empress v. Burah', 4 Cal 172 at p. 181:

"Their Lordships agree that the Governor-General-in-Council could not, by any form of enactment, create in India, and arm with general legislative authority a new legislative power not created or authorised by the Councils Act."

(21) Lord Haldane in 'In re the Initiative and Referendum Act (1919) A C 935 (PC) at p. 945 observed:

"No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by the Provincial Legislature of Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done in 'Hodge v. The Queen', (1884) 9 A C 117; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence. There Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."

(22) The actual decision of the Judicial Committee in the last case rested on the simple principle that where the Constitution provides a particular machinery for its amendment another method cannot be substituted for the original constitutional mandate. The observation above cited means and can only mean that the Legislature cannot divest itself of its entire legislative power in favour of a parallel legislature sought to be created by it.

(23) During the pre-independence days in India, there was a tendency on the part of the lawyers and Courts to look askance at a delegation of legislative power to the executive head of a Province or to a department of Government in spite of the decisions of the Judicial Committee to which reference has been made. The inspiration came from the United States of America. It was an American doctrine that legislative power cannot be delegated either to other branches of the Government or to an independent body or commission. It was said that the American Constitution, in distributing the powers of Government, created three distinct and

separate departments — legislative, executive and judicial — and that the separation was not merely a matter of convenience but its object was basic and vital, namely, to prevent the concentration of these different powers of Government in the same hands. It was also said that the Legislature was an agent of the people and therefore under a disability to delegate power entrusted to it to another body. 'Delegata potestas non potest delegari.' This doctrine or dogma had so many exceptions engrafted on it by later day decisions in America that it is now difficult to say whether the dogma or the exceptions embody the American rule today. Without disgressing into an examination of the American cases, it is enough to say that recent decisions show a marked tendency to regard constitutional power as implying a power of delegation of authority under it sufficient to effectuate its purposes. In Crawford on "Statutory Construction" it is observed at page 13:

> "It is therefore apparent that the division of Governmental departments into legislative, executive and the judicial is an abstract and general division and probably was never intended to be strictly adhered to in actual operation."

The result of the foregoing discussion is that delegation of legislative authority has been a feature of the Indian Constitution and Government in the present form cannot go on without delegation of wide legislative authority. According to English constitutional doctrines on which lawyers and judges in India have been nurtured for more than a century, short of divesting itself of its entire legislative power, there is nothing to preclude a Legislature acting within the ambit of its legislative powers, from delegating functions of various kinds to the departments of Government for implementing the main or parent legislation. The authority that is confided to the departments in such cases is of a legislative character. I am not aware that the view emphasised in the several decisions of the Judicial Committee already cited, that within the sphere allotted to it, the legislative power of the Indian Legislature is "as wide and plenary as that of the British Parliament" and that acting within such limits it has "plenary powers of legislation as large and of the same nature as those of Parliament itself" has been modified or qualified by any compelling or competent authority. The Indian Legislature is now to the fullest extent sovereign within the ambit of its powers and it rests with that Legislature to decide by its judgment what powers should be entrusted to subordinate bodies in order to effect its ends. The creation of a subordinate form of legislation is perfectly legitimate and constitutional. I, therefore, hold that the Indian Legislature may delegate power to determine the conditions or contingencies under which an enactment shall come into operation. It may delegate power to make rules and regulations consistent with the parent enactment, and for carrying out its objects and purposes, to heads of departments or public bodies. It may also confer power to other bodies to ascertain facts and to apply the provisions of an enactment, if the facts called for its application.

(24)) Section 26-A read with Section 59 of the Act invests the Central Board of Revenue with power to make rules prescribing the person or persons by whom an application for registration of a firm should be signed and made and the form, verification and other particulars of such application. The validity of the rules framed by the Central Board of Revenue depends of course, on the terms of Ss. 26-A and 59 which give the power to make them and from which their force is derived. If the rules are not within the powers entrusted by the Legislature to the Central Board of Revenue, they are liable to be challenged as 'ultra vires' in Courts. In order, therefore, to ascertain whether the particular statutory rules now in question are 'intra vires' or 'ultra vires', it is necessary to look at the terms of the authorising statutory provisions and find out whether the subsidiary or subordinate legislation in the shape of rules is within the limits of the mandate given to the rule-making authority. Ignoring, for the moment, the Powers-of-Attorney Act VII of 1882, it cannot be suggested that Rules 2 and 6 of the Income-tax Rules requiring an application for the registration of a firm or for renewal of a certificate of registration to be signed personally by all the partners (other than minors) transgresses the limits of subordinate legislation delegated to the Central Board of Revenue by Ss. 26-A and 59 of the Act. The rules made in accordance with these provisions are, to quote the language of S. 59 (5), 'to have effect as if enacted in this Act." The result is that a statutory rule, if validly made, has precisely the same effect as if it were part of the Income-tax Act itself. Every person must conform himself to the provisions of the rule. If a rule framed under Ss. 26-A and 59 of the Income-tax Act is challenged as 'ultra vires' all that the Court has to do is to put the rule beside Ss. 26-A and 59 of the Income-tax Act and find out whether the former squares with the latter. It goes without saying that delegated authority of this kind must be exercised in accordance with the powers creating it and after complying with the conditions precedent for its exercise. If there is irreconcilable conflict between the rule and a provision of the Act, the Act must prevail and the rule which is subordinate to the Act must give way. There is no such repugnancy or inconsistency between the Act and the rules now in question. It is equally impossible, in my opinion, to contend that in framing Rules 2 and 6, the Central Board of Revenue exceeded the limits of the authority delegated to it by Ss. 26-A and 59 of the Act. The words of S. 59 (5) that rules made under the section "shall have effect as if enacted in this Act" mean exactly what they say. It is well established law that rules authorised to be made by an enactment, are as effectual as if they were a part of the Act itself, the question of their reasonableness, fairness or propriety not being a matter for the Courts to investigate; see 'Kandaswami Pillai v. Emperor', 42 Mad 69, 'Institute of Patent Agents v. Lockwood', (1894) A C 347 and 'Minister of Health v. The King', (on the prosecution of) Yafee, (1931) A C 494 at p. 502. Rules framed under the Income-tax Act are not like by-laws of a corporation whose fairness or reasonableness is open to examination by Courts in judging their validity. Decisions like 'Kruse v. Johnson', (1898) 2 Q B 91 at p. 100 illustrating the wide diversity of judicial opinion on questions of reasonableness or fairness of byelaws are not now in point.

(25) I hold that Rules 2 and 6 of the Income-tax Rules have been framed in pursuance of the express power conferred by Ss. 26-A (2) and 59 of this Act in order to effectuate the object of S. 26-A and to fill in details directed by that section to be filled up by rules framed by the Central Board of Revenue. These rules have, therefore, the same force as if they were part of the Act itself.

(26) If it were a question of a conflict between these Rules and Section 2 of the Powers-of-Attorney Act, recourse might be had to the maxim 'leges posterioris priores contraria abrogant.' Later laws repeal earlier laws inconsistent therewith if the two cannot be reconciled. The doctrine, however, is resorted to only when the provisions of the later enactment are so inconsistent or repugnant to those of the earlier that the two cannot stand together. The right to have a partnership registered under the Act is a special statutory right

conferred by S. 26-A, introduced in 1930 and this can be availed of only on strict compliance with the provisions of that section and the rules authorised to be made thereunder. The Powers-of-Attorney Act was a general enactment passed in 1882. In an apparent conflict between general and special legislation, the rule of construction to be adopted is that the special enactment overrides the general enactment in those particular cases to which the special enactment applies. The earlier general legislation is indirectly derogated from by the later special legislation. In cases coming within the the latter, the special or particular provision must be deemed to be an exception to the general provision. Section 2 of the Powers-of-Attorney Act proceeds on the assumption that there is a power of delegation available or exercisable under the existing law and provides that the donee of a power might act for and in the name of the principal. It does not empower an agency to be created or employed in every case. For instance, fiduciary duties cannot be delegated in spite of S. 2 of the Powers-of-Attorney Act. Statutory duties cast upon public bodies or officers cannot be delegated unless authorised by the statute creating or appointing them. The rules of the Civil Procedure Code provide that an applicant for leave to sue or appeal in 'forma pauperis' must present his application in person unlike other litigants paying court-fee who can present their plaints and appeals through duly empowered advocates. Many other rules of the Civil Procedure Code empower the Court to require the personal appearance of a suitor. To this extent they override the Powers-of-Attorney Act and the Act is displaced 'pro tanto' by rules made by the Rule Committee empowered under S. 122, Civil Procedure Code. S. 26-A of the Act read with Rules 2 and 6 prohibits delegation of the authority of a partner in the matter of applying for registration of the firm and thereby securing the privileges conferred by the Income-tax Act.

(27) It is true that the Central Board of Revenue cannot, under the guise of its rule-making power, abrogate a special enactment like the Limitation Act, or the Transfer of Property Act, or the Stamp Act. That is because no section of the Income-tax Act authorises the Board to frame rules affecting or relating to the subjects legislated upon in the several enactments above referred to. Rules framed under the Income-tax Act must conform to the legislative mandate contained in that Act. S. 26-A (2) expressly authorises the framing of rules as regards the person or persons who shall be entitled to make an application and also as regards the form, particulars and the verification of the application. Rules 2 and 6 which prescribe that the application shall be made personally by the parties seeking the registration of a firm or a renewal of the certificate of registration are strictly within the bounds of the authority conferred by Ss. 26-A and 59. If these rules are to be condemned as 'ultra vires' it must be shown that they are repugnant to the provisions of the Income-tax Act or that they are clearly in excess of the rule-making power conferred by the Act. In my opinion that has not been done in the present case.

(28) Reference has been made to a few decisions touching this point. In 'Commissioner of Agricultural Income-tax, West Bengal v. Keshab Chandra', AIR (37) 1950 S C 265, Das, J., speaking for the majority of the Supreme Court, observed that there were many indications in the Bengal Agricultural Income-tax Act, 1944, and the rules framed thereunder, excluding the common law rule that "where a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it." It was held in that case that the personal signature of the assessee was required on his return of income or petition of appeal from an assessment under that Act. An examination of the decision shows that Rules 11, 13, 15 and 17 relating to returns, appeals and applications for refund were all framed under S. 57 of the Bengal Agricultural Income-tax Act. There was no provision either in the Act or in the rules specifically enjoining the personal signature of the assessee in returns, appeals or applications for refund. Nevertheless on an examination of the scheme of the rules, the Supreme Court held that the personal signature of the assessee was essential to their validity. I am unable to say, however, whether the argument now advanced by Mr. Bhimasankaran was missed by the counsel and the learned Judges of the Supreme Court, or dismissed as untenable. In 'Commissioner of Income-tax v. Subba Rao', ILR (1947) Mad 167, a Bench of this Court overruled the contention that Section 2 of the Powers-of-Attorney Act prevailed over Rule 6 of the Income-tax Rules in these words:

> "The section merely states the general principle of agency and it cannot override the specific provisions of a rule made under a different statute which required that a particular act should be done by a person 'personally', i.e., by himself."

In my opinion, it is implicit in this decision that Section 2 of the Powers-of-Attorney Act must yield to the rules requiring an application for registration of a firm or renewal of a certificate of registration, to be signed in person by the partners. The decision of the House of Lords in 'Paul Co. v. The Wheat Commision', (1937) A C 139 turned on the interpretation of S. 5 (i) and (ii) of the Wheat Act of 1932 empowering the Wheat Commission to make by-laws for the final determination by arbitration of disputes arising as to such matters as might be specified in the bylaws. Purporting to act under this section, the Wheat Commission made a by-law excluding the applicability of the Arbitration Act, 1889, to reference to arbitration made under the Act and the bylaws. The bylaw excluding the application of the Arbitration Act to the arbitration of disputes specified in the bylaws, was held 'ultra vires' and outside the ambit of the delegated power of legislation conferred on the Wheat Commission. The House of Lords held that it was the intention of S. 5 (i) and (ii) of the Wheat Act to authorise a reference to arbitration in accordance with the procedure prescribed by the Arbitration Act which was a public general statute embodying the general law as to arbitrations. Lord MacMillan who delivered the leading judgment held that the bylaw transgressed the legislative mandate and was therefore 'ultra vires.' He observed:

> "The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words."

(29) I consider that the Legislature in enacting Section 26-A conferred a special right to get a firm registered subject to such conditions and limitations, as were contemplated by that Section and left

to be provided for by rules framed by the Central Board of Revenue under the powers expressly conferred.

(30) I am, therefore, of opinion that Rules 2 and 6 preclude an authorised agent of a partner from signing an application on his behalf for the registration of a firm or for the renewal of a certificate of registration and that these rules are 'intra vires' the rule-making authority. I would, therefore, answer the question referred to us in R. C. No. 31 of 1950 in the affirmative and the first of the questions referred to us in R. C. No. 32 of 1948 in the affirmative and the second of the questions in the negative. As the questions are answered in both cases against the assessee and in favour of the Commissioner of Income-tax, the former shall pay the latter a sum of Rs. 250 as costs one set for both the cases.

C.R.K./R.G.D. *Answers accordingly.*

A. I. R. (39) 1952 MADRAS 136 (C. N. 63)

GOVINDA MENON AND CHANDRA REDDI, JJ.

Rajah of Vizianagaram, Appellant v. The Official Liquidator, Vizianagaram Mining Company, Limited, Vizagapatam, Respondent.

A. A. O. Nos. 80 of 1948 and 249 to 252 of 1949 and 103 of 1950, D/- 9-2-1951.

(a) Companies Act (1913), Ss. 228, 271 (3) — Winding up under Part IX — Right of foreign creditors to prove their debts.

In cases where a foreign company is carrying on business in India, though its principal place of incorporation is elsewhere, there is only one legal entity and no separate company as such and the creditors all over the world of such a company are creditors in so far as it carries on business in India. No distinction can be made in the matter of the distribution of assets between a creditor resident in the place where the winding up is going on and a creditor resident abroad. It cannot be said that equal treatment can be meted out only if the company is wound up in the place where it has its principal seat and not where an ancillary liquidation is being conducted as under Part IX of the Companies Act. Thus even where there is a winding up under Part IX of the Companies Act, the liquidator appointed has to find out the entire body of creditors wherever they may be resident and the foreign creditors are to be allowed to prove their claims in the winding up proceedings in India. As all the creditors of the company have to be recognised as being entitled to be paid out of its assets, the location or the place where the debts were incurred cannot be considered as a prime factor. The situs of the debt becomes important only with regard to administration and succession. 'Case law discussed. *(Paras 8, 15, 21, 22, 23)*

Anno: Companies Act, S. 228, N. 1, S. 271, N. 1.

(b) Limitation Act (1908), S. 19 — "Before the expiry of the period prescribed."

If a claim is barred the fact that there was an acknowledgment of liability later on will not resuscitate a barred claim because under the law an acknowledgment can be only of a subsisting liability. *(Para 25)*

Anno: Lim. Act. S. 19, N. 12.

(c) Civil P. C. (1908), S. 34 — Liability to pay interest.

Debtor in India though willing not being able to pay amount to creditor, latter being in enemy occupied country — Debtor cannot be mulcted with liability of interest running against him. *(Para 26)*

Anno: C. P. C., S. 34, N. 6, 7.

(d) Companies Act (1913), S. 109 (1), (e), (f) — Stock-in-trade — Floating charge — Registration.

What Clause (e) contemplates is that where there is a mortgage or a charge on the stock-in-trade of a company, which is moveable property of the company, such mortgage or charge requires registration. But what is exempted from registration is a pledge of moveable property of the company other than the stock-in-trade. A floating charge would necessarily require registration under S. 109 (1). AIR (36) 1949 Bom 262, dissent. *(Para 28)*

Anno: Companies Act, S. 109, N. 5.

(e) Companies Act (1913), S. 109 (1), (e) — Stock-in-trade — Meaning of — Company incorporated for mining purposes and doing mining business — Mineral ore would come within meaning of term "Stock-in-trade." *(Para 28)*

Anno: Companies Act, S. 109, N. 5.

(f) Companies Act (1913), S. 230 — Building leased out by creditor to Company where liquidator functions — Liquidator must pay rent of building to landlord — Creditor till possession is surrendered cannot refuse to pay rent after date of winding up order. *(Para 31)*

Anno: Companies Act S. 230, N. 1.

(g) Limitation Act (1908), S. 19 — Debt due to certain creditor included in the item relating to sundry creditors as contained in the balance-sheet of the Company — Balance sheet contains an acknowledgment to the particular creditor. (1949) 2 KBD 700, Rel. on. *(Para 33)*

Anno: Lim. Act S. 19, N. 18.

V. K. Thiruvenkatachari, P. Rama Reddi and V. Venkatarama Reddi, for Appellant; The Govt. Pleader, E. Venkatesam, E. L. Bhagiratha Rao, King and Partridge and C. V. Dhikshitalu, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('06) 33 Cal 1047: (33 Ind App 165 PC) (Pr 33)
('42) 1942-2 Mad L J 256: (AIR (29) 1942 P C 6) (Pr 24)
('49) AIR (36) 1949 All 778: (ILR (1950) All 590) (Pr 20)
('37) AIR (24) 1937 Bom 15: (167 Ind Cas 85) (Pr 24)
('49) AIR (36) 1949 Bom 262: (51 Bom L R 271) (Pr 28)
('80) 5 Cal 888 (Pr 24)
('33) 56 Mad 490: (AIR (20) 1933 Mad 418 FB) (Pr 25)
('38) Appln No 1847 in O P No 158/1938 (Mad) (Prs 24, 52)
('39) Appln No 1897 of 1939 (Mad) (Pr 52)
('39) AIR (26) 1939 Mad 318: (183 Ind Cas 353) (Prs 20, 53)
('51) AIR (38) 1951 Simla 145: (52 Pun L R 349) (Pr 20)
(1880) 5 A C 161: (49 L J Bk 33) (Prs 19, 59)
(1898) A C 349: (67 L J P C 10) (Prs 13, 20, 47)
(1899) A C 431 (Prs 16, 56)
(1912) A C 212: (81 L J P C 140) (Pr 23)
(1927) A C 95: (95 L J K B 1015) (Pr 22)
(1932) 1932 A C 238 (Pr 23)
(1936) A C 405: (105 L J Ch 174) (Prs 14, 50)
(1946) 1946 A C 527 (Pr 23)
(1943) 1 All E R 480 (Pr 51)
(1947) 2 All E R 104 (Pr 22)
(1950) 2 All E R 920 (Prs 14, 52)
(1893) 3 Ch 385: (62 L J Ch 825) (Prs 13, 14, 45)
(1924) 2 Ch 101: (93 L J Ch 449) (Pr 23)
(1932) 2 Ch 196: (48 T L R 525) (Prs 14, 48)
(1934) 1 Ch 720: (103 L J Ch 336) (Prs 22, 23)

(1937) 1 Ch 513: (106 L J Ch 279) (Pr 22)
(1872) 7 Ch A 490: (41 L J Bk 46) (Prs 19, 59)
(1883) 28 Ch D 175: (54 L J Ch 297) (Pr 19)
(1884) 27 Ch D 225: (51 L T 111) (Prs 11, 44)
(1886) 33 Ch D 174: (55 L J Ch 670) (Prs 12, 13, 44)
(1918) 1 K B 459: (87 L J K B 628) (Pr 19)
(1938) 2 K B 176: (107 L J K B 681) (Pr 22)
(1949) 2 K B 700: (1949-2 All E R 198) (Prs 25, 33)
(1923) 92 L J Ch 349: (1923 B & C R 28) (Prs 19, 59)
(1890) 61 L T 716 (Prs 13, 46)
(1893) 68 L T 728: (62 L J Ch 561) (Prs 13, 46)
(1850) 2 Mac & G 169: (42 E R 65) (Pr 11)

GOVINDA MENON, J.: All these appeals arise out of the winding up proceedings of the Vizianagaram Mining Company, Limited, which had been incorporated and registered under the Companies Act then in force in England on 8-12-1894. The main location of its business was in the Vizagapatam District of the then Presidency of Madras, where various minerals were mined by the Company. Its principal place of business for the address to be given under Section 277 of the Companies Act was Kodur. In that company, the Rajah of Vizianagaram was a share-holder and he had also leased out to the company the lands on which the mining was going on under three separate leases. While matters were in this state, O. P. No. 25 of 1946 was filed on the Original Side of this Court by the Rajah on 29-1-1946, for winding up the company, which was ordered on 6-3-1946. Thereafter, further proceedings relating to the winding up were transferred to the District Court of Vizagapatam and the petitions out of which the above appeals have arisen were taken in the said District Court. On 11-7-1950, in Application No. 732 of 1950, the proceedings have been re-transferred to the Original Side of this Court and we are informed that the Official Receiver, Madras is now in charge of the liquidation proceedings. C.M.A. No. 80 of 1948 and C.M.A. No. 251 of 1949 go together, and the other appeals viz., C.M.As. 249, 250 and 252 of 1949 can also be considered together.

(2) We will first of all consider the main appeal, viz., C.M.A. No. 249 of 1949. This arises out of I.A. 135 of 1948, in which the petitioner, the Rajah of Vizianagaram, was the third creditor and the respondents 2 to 9 were the foreign creditors. The Rajah of Vizianagaram applied to the lower Court for an order that the proof of the foreign creditors be expunged and that their names be deleted from the certificate of the Official Receiver filed under Rule 90 of the Indian Companies Rules. The learned District Judge, on a consideration of Section 271 of the Indian Companies Act as well as the arguments addressed to him, came to the conclusion that the foreign creditors are entitled to prove their claims in liquidation proceedings under Part IX of the Indian Companies Act and therefore dismissed the application. C.M.A. No. 249 of 1949 is by the Rajah of Vizianagaram against the order dismissing I.A. No. 135 of 1948.

(3) C.M.A. No. 250 of 1949 arises out of an application by one of the foreign creditors, viz., S. A. Belgi Menare Et. Commerceale filed under Section 183 (5) of the Act and Rule 85 of the rules framed thereunder, praying that the order of the Official Liquidator rejecting their claim be set aside and the claim be allowed in full. After setting aside the order of the Official Liquidator the learned District Judge allowed the claim of this creditor to the extent of the principal loan subsisting, viz., £9,500. The Rajah of Vizianagaram appeals in C.M.A. 250 of 1949, against the allowance by the District Judge of this claim.

(4) C.M.A. 252 of 1949 arises out of I.A. No. 124 of 1948 in which the petitioner was one Arthur Stanley Lindley, who applied under Section 183 (5) of the Indian Companies Act against the order of the Official Liquidator rejecting his claim for a sum of £746-1-2 on the ground that it was time-barred. The learned District Judge found that the sum of £746-1-2 was included in the sum of £4,897-7-7 mentioned in the balance sheet Ex. P-1, and that the sum was admitted in the affidavit submitted by Mr. John Hawkins in support of the application. He, therefore, held that there was no bar of limitation. The Rajah of Vizianagaram appeals against this order by C.M.A. 252 of 1949.

(5) C.M.A. 80 of 1948 arises out of I.A. No. 225 of 1946 by which the Rajah of Vizianagaram applied for an order of delivery of certain lease-hold properties; for the sale of certain machinery, etc., and for permission to levy distraint. The learned District Judge found that the Rajah as the lessor, was entitled to re-enter, that is to say the Official Liquidator should not sell any lease-hold right as being as asset of the company; but that the actual re-entry will be postponed for a period of 6 months or until further orders till the Official Liquidator completes the liquidation. It was also held that the Rajah was entitled to enforce the right of pre-emption, but only with regard to particular things comprised in the clauses in particular leases for which a Commissioner was appointed. Against the disallowance of the distraint in respect of rents, C.M.A. 80 of 1948 has been preferred.

(6) C.M.A. 251 of 1949 is against the order in I.A. No. 136 of 1948 which was an application by the Rajah under Section 183 (5) of the Act and Rule 85 of the rules framed thereunder praying that the Court may vary an order of the Official Liquidator dated 13-4-1948, by adding back to the proof of the applicant as creditor the sums disallowed by the Official Liquidator. The learned District Judge modified the order of the Official Liquidator by allowing a further sum of Rs. 2,189-6-5, but in other respects the order of the Offical Liquidator was confirmed; but permission was granted to the Rajah to file a suit for a declaration that the acts of the Court of Wards in allowing remissions to the Vizianagaram Mining Company, will not bind him, and if he succeeds in that suit, to prove his claim for those amounts.

(7) C.M.A. 103 of 1950 is connected with C.M.A. 250 of 1949 and is against the disallowance by the District Judge in I.A. No. 126 of 1948 of a sum of £3,358/- claimed by S. A. Belgi Miniere Et. Commerceale as interest on £ 9,500/- allowed by the District Judge as due to them. In this appeal, a further question is also raised as to whether the creditor is entitled to a charge on the mineral ore quarried by the company for the sum of £9,500 due as principal and £3,358/- due as interest. The learned District Judge as mentioned already, has found that the creditor is entitled only to the extent of the principal loan subsisting viz., £9,500 without any kind of charge and disallowed the amount claimed as interest.

(8) It will be useful to set out the amounts due to the various creditors. We are informed that the second respondent in I.A. 135 of 1948, viz., National Bank of India, Limited., London, creditor No. 4 claims a sum of Rs. 1,02,146-8-0; creditor No. 5, S. A. Belge Miniers Et. Commerceale claim a principal of £9,500 and an interest of £3,358, making a total of £12,858, but the amount allowed was only the principal loan of £9,500 which when converted into Indian Currency would be equivalent to Rs. 1,26,666-10-8. The fourth respondent in C.M.A. 249 of 1949, A. S. Lindley, represented by the power-of-attorney-holder, Mr. H. M. Small, Madras, who is creditor No. 8 claims a sum of £746-1-2 which in Indian Currency comes to Rs. 9,947-7-1. The fifth respondent F. J. Hawkins, claims a sum of Rs. 2,266-10-1. The sixth respondent, R. H. Dunn,

creditor No. 11, claims a sum of Rs. 2,833-5-0; and the seventh respondent Gie Belge des Mines Minerais and Mutax, represented by J. S. Williams, Nagpur, claims Rs. 16,284/-. On the whole the total amounts claimed by the foreign creditors come to Rs. 2,60,142/-, and odd. The general question of law common to all the appeals is whether the foreign creditors are to be allowed to prove their claims in the winding up proceedings in India.

(9) This question that has been very elaborately discussed is bereft of direct authority and the learned counsel for the appellants desires the Court to pronounce a verdict on that point by considering the principles deducible from various decisions, English and Indian cited before us. Before discussing the various authorities quoted, it would be useful to refer to the statutory provisions dealing with the winding up of an unregistered company. Section 2 (1) Clause (2) of the Indian Companies Act defines a "company" as a company formed and registered under the Act or an existing company; and an "existing company" is defined in Clause (7) as a company formed and registered under the Indian Companies Act 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882. The winding up of such a company is governed by the provisions of Part V of the Act containing Sections 155 to 247; and Part IX which contains Sections 270 to 276 refers to the winding up of unregistered companies, which expression, according to Section 270, shall not include a railway company incorporated by Act of Parliament or by an Indian Law, nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act of 1882, or under this Act, but shall include any partnership, association or company consisting of more than seven members. It is in accordance with the provisions contained in Part IX that the company under consideration has been ordered to be wound up. Section 271 is important, because that deals with the winding up of unregistered companies and it says that the provisions of the Act relating to winding up of companies (Part V Sections 155 to 247) shall apply to the winding up of an unregistered company, with the exceptions and additions referred to in that section. Section 271 (3) has particular reference to the present proceedings, because it says that where a company incorporated outside the Indian Union, which has been carrying on business in India, ceases to carry on business in India, it may be wound up as an unregistered company under Part IX, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated. Unlike the general law in winding up proceedings, by which during the course of winding up the property of the company does not become vested in the Official Liquidator so far as unregistered companies are concerned, by Section 275 the Court has power to vest the properties of the company in the Official Liquidator by his official name. This is analogous to bankruptcy proceedings where the property of the insolvent becomes vested in the Official Receiver or the Official Assignee as the case may be. The contentions put forward by Mr. V. K. Tiruvenkatachari supported by a wealth or legal learning is in its enunciation, not complex. But the decision is a difficult one. According to him, the winding up proceedings of an unregistered company in India are proceedings of an independent character by which the unregistered company is treated as a separate entity for the purpose of winding up and therefore any foreign creditor of the company has no right to prove his claim in a winding up in India. The various steps in the argument can be briefly detailed as follows:

(1) A true and proper construction of Sections 270 to 276 coupled with the provisions regarding ordinary winding up would show that an unregistered company is for the purpose of an Indian winding up, a separate concern;

(2) In the winding up of such a company, it is not within the powers of the Court, or the liquidator, to get at the assets which are outside the Court's jurisdiction, and it is not possible to settle the contributories also among persons who are not subject to the Court's jurisdiction;

(3) Such being the case, the winding up here is not as ancillary proceeding to the winding up, if there be any, in the country in which the company is registered, and therefore, if the winding up here is an independent proceeding, the creditors of the company who are resident outside India, cannot be recognised as creditors entitled to receive from the assets of the company.

(10) On the other hand, Mr. Rajah Iyer for some of the foreign creditors stresses the fact that even in the case of a foreign company doing business in India, there is only one Company and not as many companies as there are places in which it carries on business, because the company is a single legal entity carrying on business in a number of branches. If that argument is accepted, then Mr. Rajah Ayyar says in finding out the creditors of such a company, the question of the domicile of the creditors is irrelevant. It is open to find out who the creditors of that single company are. In the case of an ordinary creditor, the monies due to him can be realised from the assets of the company, wherever they may be, but the question in what way the creditor can realise it depends upon the law of the country where the assets are situated. If that were so, though the company is registered in England and is carrying on business in India, by the application of Part IX of the Companies Act, when it is wound up, it is open to the creditors resident outside India, to prove, in such liquidation proceedings, what is due to them. But it is pointed out by the learned Counsel for the appellant the Rajah that in the present case there are no liquidation proceedings in the place where the company is registered and therefore a foreign creditor can get his debts proved in India and realise the dividends here, whereas at the same time he is able to file a suit for the entire amount in England and get a decree against the Company's assets there for the whole amount. The short answer to this question, according to the respondents' learned Counsel, is that if it is one and the same company and a creditor has received part of his dues by liquidation proceedings of an unregistered company in one place, he can only sue for the balance amount due to him after crediting what he has received in such liquidation proceedings. Likewise, it is conceded by the learned Counsel for the respondents that it is open to an Indian creditor, after realising a part of his dues in liquidation proceedings in India, to proceed against the company, for the balance sum, if there are no liquidation proceedings, by suing for the balance amount according to the law of the country.

(11) It therefore becomes necessary to decide whether the winding up of an unregistered company which has its place of registration in a foreign country is a proceeding relating to an independent entity in which only the creditors, who are subject to the jurisdiction of the Courts in India, can prove their claim. In the treatise on Foreign Companies and other Corporations by E. Hilton Young, the learned author observes at page 182 that the law of the country in which a company is domestic determines the constitution of a foreign corporation,

the legal relations of its members 'inter se' and towards the corporation, and their liabilities towards third parties. This statement is mainly based upon the decision in 'Ex parte Turner; (1850) 2 Mac & G 169:42 E R 65. In all common law countries, such as England and America, a Corporation lives under the law under which it has been created or "incorporated" the law from which it "derives its existence." In most civil law countries, the personal law of a private law corporation is that of the state in which it has its centre or "domicil", see The Conflict of Laws, a comparative study by Rabel, Volume 2, pages 31 and 33. Are we therefore constrained to hold that on this principle the foreign creditors of the unregistered company which is being liquidated in India are to be denied the right to prove their debts in Indian Courts? For the contention that even if the company is being wound up in the place of its origin when there is a winding up in India under Part IX of the Act, the proceedings here cannot be called ancillary to the winding up in the place of origin, Mr. Tiruvenkatachariar has delved deep in the historical origin of such winding up proceedings and relies upon the dicta contained in various English cases to substantiate his argument that the foreign creditors cannot prove their claim here. 'In Re Matheson' (1884) 27 Ch D 225', was a case where a company registered in New Zealand and having its principal place of business there, but having a branch office, agent, assets, and liabilities in England, was being wound up in New Zealand and the question arose whether the English Courts can make a winding up order. Kay, J., was of opinion that the English Court had the power and in doing so he expressed the opinion that the English Courts, upon principles of International comity, would no doubt have great regard to the winding up order in New Zealand and would be influenced thereby. But the mere existence of a winding up order made by a foreign Court did not take away the right of the Courts in England to make a winding up order, though it would no doubt exercise an influence upon the English Courts in making the order.

(12) North, J., in 'In Re Commercial Bank of South Australia', (1886) 33 Ch D 174 at p. 178', had to consider the case of a company which was registered in Australia and being wound up there. Since it was carrying on business in England also, the question arose whether it could be wound up in England and the learned Judge observed thus:

> "I think, therefore, that the English creditors are entitled to have a winding up order made by this Court. I do not think it would be right to insert any special directions in the order; this is not the proper time for giving such directions. But I will say this, that I think the winding up here will be ancillary to a winding up in Australia, and if I have control of the proceeding here, I will take care that there shall be no conflict between the two Courts, and I shall have regard to the interests of all the creditors and all the contributories, and shall endeavour to keep down the expenses of the winding up so far as is possible. I think it clear that there is jurisdiction to make a winding up order....."

(13) Observations of Kay, J., in 'North Australia Territory Co. v. Goldsbrough Mort, & Co., Ltd.', (1890) 61 L T 716 at p. 717, have been very much sought in aid by the learned Counsel for the appellants. At page 717 of the report Kay, J., states:

> "In Australia an order has been made for a compulsory winding up. According to our law such an order might be done, but in the case of an Australian Company it would be confined to the property existing in this country, and would only be by way of assisting a winding up which either was going on or was contemplated in Australia. It would be only to protect the property in this country, and the creditors in this country. That would be the only purpose of such an order."

In 'Re Federal Bank of Australia, Limited, (1893) 68 L T 728', the judgment of William, J., in the Court of First Instance, following the observations of North, J., in 'In Re Commercial Bank of South Australia, (1886) 33 Ch D 174', contains similar observations. What should be the proper procedure when a company is being liquidated in more than one place, viz., at the place of its origin and its branches outside, has been laid down by Vaughan Williams, J., in 'In re English Scottish and Australian Chartered Bank, (1893) 3 Ch D 385 at p. 394.' At page 394 the learned Judge says that where there is a liquidation of one concern the general principle is, ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil, act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. He further expressed the opinion that the Court dealing with the principal liquidation is bound to make provision for creditors in all parts of the world coming in and being heard if they think fit. Since the learned Judge held that the Court dealing with the principal liquidation should make provision for creditors in all parts of the world, are we to take it that the Courts where ancillary proceedings are going on are not justified in making provision for the entire body of creditors of the Company but only for such of the creditors as are within the jurisdiction of the Court conducting the ancillary liquidation? The foreign cases so far discussed envisage a principal liquidation and ancillary proceedings. But they do not give any definite guidance as to what the powers and duties of a Court conducting ancillary liquidation proceedings are. By the time we come to the case in 'New Zealand Loan and Mercantile Agency Co. v. Morrison', (1898) A C 349. It looks as if, according to the learned Counsel for the appellants there was a change in the approach to the question, as may be seen from the observations of Lord Davey that a scheme of arrangement sanctioned by an English Court with regard to a Joint Stock Company which is being liquidated in England but which has branches in the colonies cannot be pleaded by the company in a colonial Court as a defence to an action by a non-assenting creditor for the full amount of the claim. For the elucidation of the present point it is difficult to find any helpful observation in the judgment. But the difference between bankruptcy proceedings and winding up proceedings is stressed by the Hon'ble Lord when he states that in cases of bankruptcy the whole property of the bankrupt is taken out of him whilst in the case of winding up the property remains vested in title and in fact in the company, subject only to its being administered for the purposes of the winding up under the direction of the English Courts.

(14) We have next to consider the judgment of Maugham, J., in 'In re Vocalion (Foreign) Limited (1932) 2 Ch 196' as well as the speech of Lord Atkin in 'Russian and English Bank v. Baring Brothers & Co', (No. 3) (1936) A C 405, on both of which the learned Counsel for the appellants placed much reliance. After considering the earlier authorities, Maugham, J., stated as follows at page 206:

> "Finally it must be remembered that there may be winding up orders made in the foreign country where the company has carried on business and possesses assets. The view of this Court is that the principal winding up should be in the principal domicil of the Corporation, and that any other winding up order should be ancillary to the principal winding up....The effect of one winding

up being ancillary to the principal winding up has not, I think, been much considered in our Courts. This Court no doubt holds that in the winding up here all creditors, whether British or foreign, who can prove their debts have equal rights; but it would seem that foreign Courts do not always take the same view.....If there are two winding up orders, one here and one abroad, it would seem to be impossible to contend that a foreign creditor is not to be allowed to prove his debt abroad, and, if the 'lex fori' permits it, to bring an action abroad."

It is doubtful whether the following observations of Lord Atkin at page 428 really mean that foreign creditors cannot prove their debts in liquidation proceedings in an English Court:

"But if the corporation does trade here, acquires assets here and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable it may be wound up here so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding up it shall be deemed not to have been dissolved; for that event would defeat our municipal provisions for winding up a corporation."

Some of the learned Law Lords especially Lord Russel of Killowen and Lord Maugham did not see eye to eye with Lord Atkin in most of the conclusions arrived at by him. In this state of conflicting views expressed by the House of Lords, however much one might have respected the great eminence of Lord Atkin, this Court cannot follow preferentially his observations, which are far from being unanimously accepted by the other Law Lords. One finds it difficult to construe the reasoning of Wynn-Parry, J., in 'Re Suidair International Airways Ltd., (1950) 2 All E R 920, at p. 924, relying upon the dictum of Vaughan Williams, J., in 'In re English, Scottish and Australian Chartered Bank (1883) 3 Ch 385', as tending to take a view that in ancillary liquidation proceedings, a foreign creditor cannot prove his debt. If at all, the learned Judge's observations can be understood as justifying the view that foreign creditors will have the right to prove their debts.

(15) I have already referred to the contention advanced on behalf of the respondent that in cases where a foreign company is carrying on business in India, though its principal place of incorporation is elsewhere, there is only one legal entity and no separate company as such and if there is only one company, the creditors all over the world of such a company are creditors in so far as it carries on business in India and the position of an ordinary creditor is that he can realise the amount due from out of the assets of the company wherever they may be, and whether the creditor can realise his debt depends upon the law of the country where the assets are, i.e., the principle of 'lex fori' determines the method of such realisation.

(16) That a foreign company which does business in England in such a way as to be resident there may be sued there and a writ may be served on its officer there is clear from the decision of the House of Lords in 'La Compagnie Generale Trans-Atlantique v. Thomas Law & Co.', (1899) A C 431 and Indian Law as formulated in Section 20 of the Code of Civil Procedure contemplates such a suit. See also Clause 12 of the Letters Patent of the High Court. If a foreign creditor can file a suit for the realisation of the amounts due to him, is there anything which prevents him from applying for liquidation of a foreign company which carries on business in India? In that respect we have to consider Sections 162 and 163 and 166 of the Indian Companies Act read with Section 271. Moreover, Sections 169 and 171 of the Act restrain the further proceedings in any suit, or the filing of a suit, when there are liquidation proceedings, and therefore if a creditor is prevented from filing a suit, it is contended that in liquidation proceedings, by the combined application of Sections 169 and 171, he is unable to apply for the payment of the dividends in such proceedings. The further question as to whether a foreign creditor can be deemed to be a creditor within the meaning of the Companies Act can be determined by a reference to various provisions of the Act. Our attention was invited to very many provisions of the Companies Act, Ss. 58, 59, 60 and 64, 153, 163, 166, 167, 169, 171, 173 and 174 as well as to Section 177-A onwards. The fasciculus of sections beginning with Section 221 may also be referred to. Section 228 mentions all the debts and does not exclude a creditor resident in a foreign country and Section 271 expressly states that all the provisions in Part V shall apply with the exceptions and additions contained in Part IX. One has necessarily to say that if under Part V a foreign creditor can come in and apply for payment of this debt, then there is nothing to prevent the application of the same law even with respect to winding up proceedings under Part IX.

(17) The entire discussion so far has proceeded upon the likeness and similarity between the provisions of the English law as well as those of the Companies Act and both the learned Counsel have conceded that if under the English law it is possible for a foreign creditor to claim payment when a foreign company is wound up in England under the provisions of the English Companies Act, then in India also it is possible. That is why we have taken pains to discuss at some length the various decisions of the English Courts as well as the observations contained therein.

(18) Now let us see how the text-book writers in England as well as in India have dealt with the question. In Palmer's Company Law, nineteenth edition, at page 379, in dealing with the question as to who is a creditor, the learned author does not discriminate between an English creditor and a foreign creditor. At pages 379 and 380 the various categories of persons who can claim to be creditors have been enumerated and there is no discussion there that a creditor resident in a foreign country is excluded from consideration. We may also refer to Indian authors such as Ghosh and Venkoba Rao, who also have discussed this question. At pages 353 and 359 of Indian Company Law by Ghosh and at pages 604 and 605 of Indian Companies Act by Venkoba Rao, the question is discussed and nowhere has any of the learned authors attempted, or even suggested, the discrimination of foreign creditors with regard to the winding up of a company under Part IX. Text book writers on international law such a Cheshire and Dicey have also expressed the opinion from which one can gather the impression that foreign creditors are not excluded.

(19) By way of analogy, it will be useful to refer to the position in case of bankruptcy. Where an individual is declared bankrupt and his assets vest in the Official Receiver or Official Assignee, is it open to a creditor in a foreign country to prove his claims in the insolvency proceedings either in England or in India? In this connection, it may be helpful to refer to a few passages both in Private International Law by Cheshire third edition and Dicey's Conflict of Laws, sixth edition at pages 632 and 647 in the former and at pp. 330, 331, and 809 in the latter. That a foreigner is entitled to prove in an English and an Indian Bankruptcy even though the debt which he claims is contracted abroad, is clear from the above citations. That a foreign creditor will be allowed to prove his claim

in bankruptcy in England with regard to a debt contracted abroad with the sole restriction that he must bring into account the part of the assets which he has got hold of in a foreign country, as only one estate is being administered, is clear from Ex parte Wilson; 'In re Douglas (1872) 7 Ch A 490 at p. 494, 'Banco De Portugal v. Waddell', (1880) 5 A C 161 and 'Wiskemann In re (1923) 92 L J Ch 349. Mellish, L. J., at page 494 of (1872) 7 Ch A 490, observes that it is not a case where there are two distinct Estates, one being administered by the law of Brazil and another administered by the law of England, but that it is a case in which the same estate is being distributed, partly in Brazil and partly in England, but where the Brazilian Law says that a certain class of creditors are to have a preference and where the Law of England says that all creditors should take equally. In those circumstances Mellish, L. J., was of opinion that there was nothing to prevent the application of the common rule that if a creditor comes to take the benefit of the English Law and proves against the English Estate, he cannot take advantage of the preference that he has received under the law of a foreign estate. This decision was approved by the House of Lords in 'Banco De Portugal v. Weddell', (1880) 5 A C 161. To the same effect are the observations of P. O. Lawrence, J., in 'In re Wiskemann (1923) 92 L J Ch 349. See also 'In re Nelson; Ex parte Dare and Delphin, (1918) 1 KB 459 at p. 478. If further authority on this part of the discussion is necessary, one may also refer to Halsbury's Laws of England, Hailsham Edn. Vol. 11, page 278, paragraph 367. It is therefore unmistakably clear that in insolvency or bankruptcy proceedings, a foreign creditor has the right to prove his claim in England or in India, as the case may be, but the only restriction that is imposed upon him is that he should bring into account the assets realised by him in the foreign country. That the principle applicable is the same when the estate of a deceased person is being administered is also clear from authorities. In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with English creditors, vide, In 're Kloebe, Kannreuther v. Geiselbrecht', (1883) 28 Ch D 175.

(20) Section 153 of the Indian Companies Act deals with compositions and power to compromise with creditors and members during the course of the winding up of a company and Indian decisions are to the effect that in such cases it is open to the foreign creditors also to join in such composition. See the observations of Venkataramana Rao, J., in 'In re Travancore National & Quilon Bank Ltd.', A I R (26) 1939 Mad 318 at p. 325 where the learned Judge says that all endeavours should be made, as far as possible, to secure equal distribution for all creditors, British, Indian or foreign. See also 'Mohan Lal v. Chawla Bank Ltd.', A I R (36) 1949 All 778 and a recent judgment in 'In re Frontier Bank', A I R (38) 1951 Simla 145. We find observations akin to the above view point in Buckley on the Companies Act, Twelfth Edition, at pages 404 and 407. The learned author at page 407 refers to 'New Zealand and Mercantile Agency Co. v. Morrison', (1898) A C 349. We may also refer to various statements at pages 731, 736 and 738.

(21) The preponderance of authority therefore is to the effect that no distinction can be made in the matter of the distribution of assets between a creditor resident in the place where the winding up is going on and a creditor resident abroad. But Mr. Tiruvenkatachariar contends that equal treatment can be meted out only if the company is wound up in the place where it has its principal seat and not where an ancillary liquidation, as it were, is being conducted as under Part IX of the Indian Companies Act. Having given the matter our earnest consideration, we find it very difficult to accede to the very ingenious and learned arguments on which Mr. Thiruvenkatachariar sought to rest his contention, as he himself stated that the point raised by him is bereft of direct authority; and while it does credit to his ingenuity, we feel constrained to hold that the argument is unacceptable.

(22) We are pressed with passages occurring at pages 333 and 334 of Dicey's Conflict of Laws, sixth edition, where the learned author in R. 56 concerning the winding up mentions that the winding up of a Company under the Companies Act of 1948 impresses the whole of the property of the company in the United Kingdom with a trust for the application, in the course of the winding up, for the benefit of persons interested in the winding up. The case of a winding up of a company not registered in England, according to the learned author, stands on a different footing. Such a winding up can deal only with the corporate character of the company in England, and it does not appear that in such a case in the distribution of the effects, any regard can be had to matters affecting the company outside the United Kingdom. At page 294 it is also stated that the effect of the winding up of such a company by the Court is merely to terminate its existence as a company so far as England is concerned. A very learned article at page 31 of the journal portion of (1945) 1 M L J relating to Foreign Companies deserves a perusal with profit; but even there, in the very exhaustive discussion of the case law we do not find anything definite regarding the question now raised before us. Our attention was also drawn to passages in 'In re Russo-Asiatic Bank,' 'In re Russian Bank for Foreign Trade', (1934) 1 Ch 720, at pp. 737, and 738 as also to 'Bank of Ethopia v. National Bank of Egypt and Liguori', (1937) 1 Ch 513 and 'Baxnco de Bilbao v. Rey', (1938) 2 K B 176. These authorities recognise that if there is a winding up of the company in the place where it is registered, that is in the place of its origin, such a winding up will be recognised in other parts of the world. But all these cannot help the elucidation of the question under consideration. The underlying principle in some of the other cases referred to viz. 'Red Eastern Telegraph Co. Ltd.', (1947) 2 All E R 104, and 'Employers' Liability Assurance Co. v. Sedgwick Collins & Co.', (1927) A C 95 is to the effect that it is the duty of the liquidator to ascertain all the creditors of the company. That being so, it seems to us that even where there is a winding up under Part IX of the Indian Companies Act, the liquidator appointed has to find out the entire body of creditors wherever they may be resident.

(23) We have further to consider another branch of the argument relating to the situs of the debt. It is the contention of the learned counsel for the appellant that even if in proceedings for winding up under Part IX creditors resident in foreign countries can be recognised, still their debts should have some relation to the business of the company in India where it is being wound up. In other words, what he contends is that the situs of the debt should not be outside the jurisdiction of the Indian Courts. That means that if the debt was incurred by the company for purposes outside India, such a debt cannot be recognised in the winding up proceedings here. Para 779 in Halsbury's Laws of England, Hailsham Edition, Vol. 4, dealing with the caption "where company is debtor" wherein occurs an observation that "the company may, however, have localised its obligation to the creditor by the course of its business." and the cases given in the foot-note were brought to our notice. The arguments of the learned counsel in the case in 'Russo Asiatic Bank, In re; Russian

Bank for Foreign Trade, In re', (1934) 1 Ch 720, at pp. 729, 731, 733 to the effect that in that particular case, the debt must be deemed to be in Russia for the reason (i) the locality of the debt of a bank with several branches is the place where it is to be discharged; (ii) on the true construction of the documents the debt was an obligation of the head office; and (iii) the contract was made in Russia, and no negotiations were ever carried on through the Branch house in London, were sought in aid for the contention regarding the situs of the debt. Though there are stray sentences here and there in the judgment of Eve J., regarding the situs of the debt, it seems to us that there are no explicit declarations which can be considered as a guiding principle in a matter like this in that judgment. Other cases relied upon for this branch of the argument are 'Rex v. Lovitt', (1912) A C 212 at p. 218, 'New York Life Insurance Co. v. Public Trustee', (1924) 2 Ch 101 a well known case, 'English Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners', 1932 AC 238 at p. 242 and 'British Columbia Electric Rly. Co., Ltd. v. The King', (1946) A C 527 at pp. 536 & 537. 'In Rex v. Lovitt', (1912) A C 212, at p. 218 their Lordships of the Judicial Committee were dealing with the actual situs of the property which consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be. Their Lordships observed at page 219 that although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. In the well known case in 'New York Life Insurance Co. v. Public Trustee', (1924) 2 Ch 101 the construction in the Peace Treaty of Versailles regarding property rights and interest of German nationals was the point at issue and in the discussion Pollock M. R. observes at page 111:

> "Then how is the determination to be reached whether they are to be treated as subject to the present jurisdiction, so that it may be said that the debt is due from the plaintiffs as being resident here, inasmuch as the debtors reside both in London and in New York? It seems to me we are entitled, in those circumstances, to look at the terms of the contract, and to determine from them what, for this purpose, is to be the place in which, and at which, the debt would be recoverable."

The case in 'English, Scottish and Australian Bank Ltd. v. Inland Revenue Commissioners', (1932) A C 238 related to the stamp duty leviable on an agreement for sale of simple contract debts owed by debtors resident abroad and it was held that an agreement for sale of simple contract debts owed by debtors resident out of the United Kingdom is exempt from 'ad valorem' stamp duty in respect of such debts upon the ground that they are "property locally situate out of the United Kingdom". The case in 'British Columbia Electric Rly. Co. Ltd. v. The King', (1946 A C 527) also deals with a matter relating to revenue and the question regarding residence as test of a Canadian debtor. The observations of Viscount Simon at page 537 regarding "who is a Canadian debtor" also deal with the case of an incorporated company, and it is there said that in the case of an incorporated company the test was the place of the incorporation of the company and not its place of residence as understood in the law relating to companies, i.e., the place where the company had its "head and seat". A careful reading of all the decisions above referred to does not show that in the matter of winding up the question as to where the debt was incurred has assumed any importance. If, as we have held, all the creditors of the company have to be recognised as being entitled to be paid out of its assets, the location or the place where the debts were incurred cannot be considered as a prime factor. The situs of the debt becomes important only with regard to administration and succession — See Dicey's Conflict of Laws, pages 303 and 307 where the situation of property is discussed. See also Private International Law by Cheshire, third edition at pages 595, 597, 599, 602, 608 and 612.

(24) It was further contended that in fixing contributories of a company that is being wound up, it is only those who are resident in India that can be made to contribute for the debts and conversely with regard to creditors resident outside, they cannot be entitled to prove their claims here. A judgment of this Court in Application No. 1847 in O. P. No. 158 of 1938 as well as the decisions in 'In re Calcutta Jute Mills Co. Ltd.', 5 Cal 888 and 'In re Strauss & Co., Ltd.', A I R (24) 1937 Bom 15 at p. 19, were referred to. We do not think that anything useful can be derived from these authorities for the determination of the present question. It seems to us that the Privy Council in 'State Aided Bank of Travancore Ltd. v. Dhrit Ram', (1942) 2 Mad L J 256 while holding that where a bank was incorporated in Travancore and a fixed deposit was made with that bank by a creditor resident in Bombay by remitting the money in the bank's account in another bank in Bombay, the place where the contract was made as well as where the contract was to be performed was Travancore and the law of that State governs the transaction, did not lay down that in the matter of a winding up the situs of the debt should be taken into consideration in liquidation proceedings under Part IX of the Indian Companies Act.

(25) It is contended by the learned counsel for the Rajah of Vizianagaram that the Belgian Company which is the contesting respondent in C. M. A. 250 of 1949, the appellant in C. M. A. 103 of 1950 cannot claim either the amount of the principal loan or the interest because the whole liability, if it existed, was barred by limitation. On the other hand, counsel for the company asks us to hold that by various letters and proceedings, the bar of limitation is saved and points out that Ex. P-7 dated 23-6-1937, a letter from the Vizianagaram Mining Co. to S. A. Belge Mineral Commerceale, Brussels, Belgium acknowledges the liability and as such for three years thereafter the claim cannot be barred . In that letter a director in the Vizianagaram Mining Co., must be deemed to have admitted the existence of a liability. Therefore we may take it that till 23-6-1940, the creditor's claim will not be barred. Ex. P-14 is a copy of a letter dated 20-4-1946 in which the Vizianagaram Mining Company through its director and Secretary states that a sum of £9500 is still subsisting as a loan in the name of S. A. Balge Minere at Commerciale. But the hiatus between June 1940 and April 1946 has not been explained. If the claim was barred after June 1940, the fact that there was an acknowledgment of liability in April 1946 will not resusciate a barred claim because under the Indian Law an acknowledgment can be only of a subsisting liability. But it is contended by Mr. Dikshitulu that from June 1940 till 1st April 1946, Belgiam was an enemy occupied country and therefore according to the provisions of S. 3 of Ordinance XXXIII of 1945 the period of limitation is suspended and such being the case the claim is not barred by limitation. Though the liquidation was ordered by this Court on 6-3-1946, the application was filed on 29-1-1946 and therefore if at that time the debt was subsisting then there is no difficulty with regard to the proof of it. The learned District Judge refers to Ex. P-16 also where the provisional liquidator is said to have acknowledged the

liability, but neither Ex. P-14 nor Ex. P-15 can revive the liability if it was not subsisting after June 1940. Our attention was drawn to Ex. P 1 filed in I. A. 124 of 1948, dated 6-10-1944, which is a report of directors of the Vizianagaram Mining Company for the year ended 31-12-1943, where among the liabilities there is an entry "Sundry Creditors, London, £17541.". We are told that the sum of £9500 is included in this sum of £17541. That is proved by the affidavit of one of the directors. It is further contended that in accordance with the decisions in 'Jones v. Bellegrove Properties Ltd.', (1949) 2 K B 700 such a statement in a balance sheet would be sufficient to save limitation. The learned Counsel, for the Rajah invites our attention to Mitra's Law of Limitation and Prescription, Volume 1, page 180, seventh edition, as well as to a decision of this Court in 'Tripura Sundaramma v. Abdul Khadar', 56 Mad 490 to the effect that equitable considerations have no place in considering questions of limitation. It was also argued that even though Belgium became an enemy occupied country from May 1940, still, there was a Custodian of Enemy property in England who could have filed a suit for the recovery of the amounts due in England against the Vizianagaram Mining Co., and as such it cannot be said that there was any suspension of limitation by reason of hostilities existing between Germany and England while the former forcibly was in possession of Belgium. The application of S. 3 of Ordinance XXXIII of 1945 as well as the question whether the claim was subsisting after June 1940 had not received consideration at the hands of the learned Judge. We feel that the question of limitation has to be considered more fully and further points have to be elucidated before the claim is allowed. In such circumstances, it seems to us that the order of the learned Judge in I. A. No. 126 of 1948 allowing the claim for the principal of £. 9500 cannot be justified. The order of the Lower Court to the extent of allowing £. 9500 is set aside and I. A. 126 of 1948 is remanded to the lower Court for fresh disposal in the light of the observations contained in this judgment. The parties are at liberty to adduce fresh evidence if necessary.

(26) 'C. M. A. 103 of 1950. Even granting that the claim of £. 9500 is barred by limitation the question still remains whether the appellants are entitled to £. 3358 claimed as interest. There is no document produced evidencing an agreement to pay interest; but Mr. Dikshitulu contends that Para 1 of Ex. P-6 wherein a director of the Vizianagaram Mining Co., states that interest at the rate of 5 per cent per annum is payable on a sum of £. 14000 fixed as due on 1-7-1936 shows that there is an agreement to pay interest. We are not satisfied that the sum of £. 14000 referred to therein has anything to do with £. 9500 claimed now. The learned Counsel has not been able to bring to our notice any other piece of evidence from which it can be inferred that interest at 5 per cent is agreed to be paid and we also observe that the question regarding interest did not seem to have boomed large in the proceedings before the lower Court. Moreover, if during the period when Belgium was under enemy occupation the company could not have sued for the amount due to them as they were detained in any occupied country, in the words of S. 3 of Ordinance XXXIII of 1945, then it stands to reason that the debtor in India could not also have paid the amount to the creditor as the latter was in enemy occupied country. Under such circumstances, it cannot be said that the debtor, who, though he would have been ready and willing to pay the amount still for no fault of his was unable to pay to the creditor, should be mulcted with the liability of interest running against him. This also is a consideration for refusing interest during the intervening period even if there has been an agreement to pay interest.

(27) The other question which Mr. Dikshitulu has argued is that on a proper construction of Ex. P.-12 the agreement between Vizianagaram Mining Co., and the Societe Annonyme Eelge Minere Et. Commerciale, dated 31-12-1930, there is a charge on the ore quarried from the mines for the loans advanced and therefore the company is entitled to a preferential claim on £. 9500. The learned District Judge holds that S. 109 of the Indian Companies Act is quite clear that every mortgage or charge created after the commencement of the Act by a company be void against the liquidator unless it is registered with the Registrar of Joint Stock Companies. Para 8 of the agreement is in the following terms:

> "The agents undertake to make advances to the company by acceptances on London payable ninety days after date after sales have been effected as desired by them as against stocks on ore ready for shipment and awaiting despatch on the basis of seventy five per cent of the approximate free on board value, the property in the ore being thereupon deemed to be transferred to the agents and held in trust for the agents by the company subject to final adjustment of the balance due when shipped."

From this paragraph it is contended that the respondents S. A Belge Miners Et. Commerciale have a lien for all the manganese ore not disposed of at the time of the liquidation proceedings. Our attention was drawn to the various other Exhibits viz., Ex. P-2, where it is stated that with regard to stocks of ore it is clearly on record that they are held on trust on behalf of the creditor. Relevant passages in Exs. P-3, P-4, P-5, P-6 and P 7 were also brought to our notice. We do not think that a true interpretation of these documents can show that there is any such charge as claimed. For one thing the charge under Ex. P-12, is, if at all only against stocks of ore ready for shipment and awaiting despatch. It is not suggested that at the time of liquidation there was any quantity of ore ready for shipment and awaiting despatch. The clause implies that the quantity of ore must be on the verge of being shipped and be stocked in godowns in a port wherefrom it has to be shipped. There is no such evidence and it is not claimed that there was ore of that description anywhere. That itself would be sufficient to disallow the claim for a charge. Moreover, even if there is a charge, it can only be a floating charge and in view of S. 109 of the Act we have to hold that the floating charge was to be registered.

(28) The learned District Judge was of opinion that every mortgage or charge created after the commencement of the Companies Act by a company will be void against the liquidator and any creditor of the company unless the prescribed particulars of the mortgage or charge together with the instrument, if, any, by which the mortgage or charge is created or evidence or a copy thereof verified in the prescribed manner, are filed with the registrar for registration in the manner required by the Act within 21 days after the date of its creation. It is urged before us that on a true and proper construction S. 109(1) (e) and (f) of the Act cannot have any application to the facts of the present case and reliance is placed upon 'In re. East Africa Hardware Co.', A I R (36) 1949 Bom 262 where Tendolkar J. held that if the movable property is stock-in-trade it would not require registration for creating a mortgage or charge. The learned Judge was of opinion that in the punctuation of Cl. (e) one must read after the word "pledge" a comma in order that the clause may be properly understood and reading in that way, the result would be that a pledge would not re-

quire registration, though a mortgage or a charge on movable property would require registration provided the movable property was not stock-in-trade. We feel that the learned Judge's construction of Cl. (e) is one that does not commend to us. The expression stock-in-trade at the end of the clause is intended to govern moveable property of the company referred to earlier. In our opinion what the clause contemplates is that where there is a mortgage or a charge on the stock-in-trade of a company which is moveable property of the company, such mortgage or charge requires registration. But what is exempted from registration is a pledge of moveable property of the company other than the stock-in-trade. We do not agree with the learned Judge that the preposition "on" after the word "pledge" is inapposite. Though in common parlance one speaks of a pledge of property, there is nothing incongruous or ungrammatical in saying that there can be a pledge on property. The word "pledge" connotes possession as well as right and in both cases the preposition "on" cannot be said to be inaccurate. The clause is not so inartistically worded as Tendolkar J. seems to think. In our opinion, where stock-in-trade is made the subject of a mortgage or charge it should be registered. Otherwise the result would be incongruous that a company can create a mortgage or a charge over its stock-in-trade without registration and registration will be necessary if it has to create a charge over the other moveable. In any event the parties, if they intended to create a charge, could not be said to have done so by Ex. P-12 and the correspondence, on any property in existence at the time Ex. P-12 was executed. What was contemplated was that there should be a floating charge on the mineral ore made ready for shipment and awaiting shipment. That substance was to come into existence on a future date and not on the date of Ex. P-12. Such being the case, the charge that was intended to be created was a floating charge and would necessarily require registration under S. 109(1). The meaning of the expression "stock-in-trade" as contained in Stroud's Judicial Dictionary, second edition, Volume III, at page 1940, was referred to for the purposes of showing that the Manganese ore in question cannot come within the term "stock-in-trade". In our opinion if the Vizianagaram Mining Company has any stock-in-trade at all, it can only be the manganese ore or other mineral ore quarried from the mines. It is not suggested that the company was incorporated for any other purpose or, that after incorporation, it was doing any other category of business. We have no hesitation in holding that the mineral ore would come within the meaning of the term "stock-in-trade"

(29) S. 277-D was also relied upon to show that no registration is necessary. In view of our interpretation of S. 109 (1)(e) and (f) we cannot say that S. 277-D takes away the compulsory nature of the registration.

(30) The above discussion proceeded on the footing that Ex. P-12 is a valid and concluded agreement between the parties, but Mr. E. Venkatesan for the Official Liquidator contends that Ex. P.-12 has not been signed by anyone on behalf of the company but that it is a unilateral document to which only the Belgian Company's representative has affixed his signature. The Official Liquidator was of opinion that the agreement cannot be accepted as a concluded contract between the Vizianagaram Mining Co., and the fifth creditor, the appellant in C. M. A. No. 103 of 1950. He has given various reasons for holding that it is not a completed contract. While not disagreeing with the Official Liquidator on his conclusions, we do not wish to rest our decision on the basis that Ex. P-12 was a unilateral transaction to which the Vizianagaram Mining Company was not an assenting party, because the subsequent correspondence between the representatives of both the companies shows that there was an idea of some kind of a charge being created. For the reasons given above, it seems to us that C. M. A. 103 of 1950 has to be dismissed, but in the circumstances without costs.

(31) 'C. M. A. No. 80 of 1948': In this appeal the Rajah of Vizianagaram contends that he is entitled to the payment of rents and royalties preserved by the three lease deeds, Exs. P-1, P-2 and P-3 in full in respect of the charge after 29th January 1946, being the date of the commencement of the winding up, and distraint should be allowed for that purpose. In I. A. 225 of 1946 from out of which this appeal arises, the learned District Judge has held that the lessor is entitled to re-enter i.e., the Official Liquidator will not sell any leasehold right as being an asset of the company but the actual re-entry will be postponed for a period of six months or until further orders till the Official Liquidator completes the liquidation. With regard to the right of pre-emption claimed, that was also allowed. The Official Liquidator has allowed a sum of Rs. 10695/- being the arrears of rent on buildings at Kodur at Rs. 280/- per mensem from January 1943 till 6-3-1946 and this has been confirmed by the District Judge. The Official Liquidator also allowed royalties for the year 1943-44 in the tune of Rs. 3,111-4-3 and Rs. 1,307-6-0 respectively. On this also there is no dispute. The two other amounts, Rs. 6,709-1-0 and Rs. 5,026-2-10 allowed by the Official Liquidator are also not disputed. But what is claimed in this appeal is that the royalties for the year 1945 have not been allowed as well as the rent for the buildings at Kodur at the rate of Rs. 280/- from the date of the liquidation till the date of surrender of these properties The Official Liquidator holds that he is not liable to pay any rents on bungalows subsequent to the winding up order on 6-3-1946. The learned District Judge has not dissented from the view of the Official Liquidator. In our opinion the Rajah of Vizianagaram is entitled to claim the rent for the buildings at Kodur at the rate of Rs. 280/- per mensem from 6-3-1946 till the date of the actual surrender. In this matter the Rajah's claim is that if a landlord of a building in which the winding up process of the company is going on. He is exactly in the same position as the landlord of a building leased out to a company when the liquidator functions. We are therefore of opinion that the Official Liquidator must pay the Rajah of Vizianagaram rent for the building or Rs. 280/- per mensem from 6-3-1946 till the date by surrender. S. 230 of the Act cannot deprive the Rajah of his right to be paid rent upto the date of surrender. Mr. Venkatesam contends that with regard to the royalties for 1945 the books of the company were inspected by the Rajah's agents and they were not able to find out that any minerals were quarried during that period and as such in the absence of any work having been turned out, the Rajah was not entitled to any royalty. Mr. Ram Reddi for the Rajah is not able to convert this statement and therefore we are not in a position to say whether any royalties were due to the Rajah for the year 1945. If the Rajah is able to show hereafter that there was any working during 1945, then he is entitled to claim royalty on that account also. Exs. P-1, P-2, and P-3 do not show that there was any rent reserved for the working of the mines except the royalty. With regard to the claim of the Rajah to distraint, we agree with the learned District Judge that he is not entitled to distraint. The result is that subject to the modifications with regard to the rent on the buildings at Kodur subsequent to 6-3-1946 and the claim for royalty for the year 1945, if it is proved, on the other points

decided by the District Judge, we see no reason to differ from the District Judge. This appeal subject to the above modification, is dismissed. Each party will bear his own costs.

(32) 'C. M. A. No. 251 of 1949': What is contended here is that the District Judge should have allowed the proof in respect of Rs. 1,13,035-3-0 and Rs. 86,673-6-9 which are purported to have been written off by the Court of Wards. The learned District Judge held that the Court of Wards had the power according to S. 35, to make remissions of rent or other dues for the advantage of the wards or for the benefit of the ward and the action of the Court of Wards in writing off these amounts is binding on the Rajah of Vizianagaram. Nothing has been proved to our satisfaction that the action of the Court of Wards is prima facie in derogation of its powers. The learned District Judge has held that it is open to the Rajah to file a suit against the Court of Wards for a declaration that its action will not be binding on him and if he succeeds he may prove his claim for those amounts in the liquidation proceedings. Without establishing that the action of the Court of Wards is ultra vires and not binding on the ward, the Rajah is not entitled to claim the amounts in liquidation proceedings. We agree therefore with the District Judge that the Rajah cannot be allowed to prove the amounts in these proceedings. In our opinion the proper procedure for the Rajah to take is, if so advised, to file a suit for a declaration against the Court of Wards after due and proper notice as laid down by law and implead in such a suit, the Official Liquidator after getting the permission of the Court which has seisin of the liquidation proceedings. If, in such a suit a declaration that the writing off of these amounts was without jurisdiction and was therefore ultra vires is obtained, it would be binding on the Official Liquidator as well; having been made a party to that suit, and in that case the Rajah can prove the amounts and claim them from the Official Liquidator. We do not think that it is possible to do anything more in this appeal which is dismissed. There will be no order as to costs.

(33) 'C. M. A. No. 252 of 1949': In this appeal, Arthur Stanley Lindley, the petitioner in the Lower Court claimed a sum of £ 746-1-2 as being due to him and the question here is one of limitation. The lower Court has held that it is included in the item of £ 4897-7-7 relating to sundry creditors as contained in the balance sheet Ex. P-1. In 'Jones v. Bellgrove Properties Ltd.', (1949) 2 K B D 700 the Court of Appeal held that where a balance sheet presented to the shareholders at annual general meeting of a limited liability company signed by the chartered accountants etc., contained the statement "to sundry creditors £ 76381, 6 s. 10 d." and it was proved by a witness from the firm of chartered accountants which had signed the balance sheet that the debt of £ 1,807 owed by the company to the plaintiff was included in the sum of £ 7638, 8 s. 10 d. stated in the balance sheet to be due to sundry creditors, the balance sheet contained an acknowledgment to the plaintiff in writing signed by the agents of the company that the debt of £ 1807 at the date of the annual general meeting remained unpaid and due to the plaintiff. Therefore by virtue of Ss. 23 and 24 of the Limitation Act, 1939, the debt was held to be recoverable. Mr. Tiruvenkatachari contends that this decision should not be applied and is erroneous. On the other hand Mr. Rajah Ayyar contends that the observations of the Privy Council in 'Maniram Seth v. Seth Rupchand', 33 Cal 1047 at p. 1060 are to the effect that the provisions of the Limitation Act in England regarding acknowledgment are more stringent than what they are in India. We have not been shown any reason why the judgment of the Court of Appeal should not be followed by us. From the affidavit submitted by John Hawkins, it is clear that £ 746-1-2 is included in the debts due to sundry creditors. In these circumstances we feel that the decision of the District Judge is right and this appeal is dismissed with costs.

(34) As we have held that foreign creditors are entitled to prove their claims in proceedings in liquidation under Part IX of the Companies Act, C. M. A. 249 of 1949 has also to be dismissed but in the circumstances without costs. In all these appeals the Official Liquidator is entitled to reimburse himself of all expenses incurred by him out of the estate. The advocate's fee for the Official Liquidator in all the appeals together is fixed at Rs. 1000/-.

(35) CHANDRA REDDI J.: I have had the advantage of perusing the judgment prepared by my learned brother Govinda Menon J. which is through and exhaustive, and I entirely agree with his conclusions. But having regard to the importance of the main question raised in these appeals, I would like to add a few words. The facts leading up to these appeals are contained in the judgments of my learned brother. However, I shall briefly refer to them to appreciate the main question involved in these appeals.

(36) A company called the Vizianagaram Mining Company was incorporated on the 8th of December 1894 in England under the old English Act, the object of the Company being to mine manganese ore and some other minerals in India. For this purpose, the company took on lease large extents of land from the Rajah of Vizianagaram in the Vizagapatam District. As required under Part 10 of the Indian Companies Act, its principal place of business in India was shown as the Kodur Mines, Vizagapatam District. The Rajah of Vizianagaram subsequently took some shares in the company and thus he became not only the lessor of the company but one of the share-holders therein. As the concern does not seem to have turned out to be a profitable one and the company was not in a position to pay either the rents to the lessor or its creditors, the Court of Wards on behalf of the present Rajah of Vizianagaram filed O. P. No. 25 of 1946 in this Court on 29th January 1946 for the winding up of the Company and the same was ordered on 6/3/1946 and the Official Receiver of Vishakapatnam has been appointed the Official Liquidator of the Company. Thereafter it was transferred to the District Court of Visakhapatnam for further proceedings. Subsequently on an application I. A. No. 732/50, it was retransferred to this Court. In the winding up proceedings, all the available assets of the Company in India were sold and a sum of about two lakhs of rupees was realised.

(37) In these proceedings, the foreign creditors of the Company, most of whom are either the respondents or the appellants in these appeals, also filed proof of their claims before the Official Liquidator. The Rajah of Vizianagaram, who is one of the creditors of the Company in respect of the various transactions objected to the claims of the foreign creditors being entertained on the ground that the present liquidation is only for the benefit of Indian creditors and that the foreign creditors are not entitled to prove their debts in this liquidation. The Official Liquidator overruled this objection and allowed the foreign creditors also to prove their claims.

(38) Thereupon, the Rajah of Vizianagaram filed an application under S. 183 of the Indian Companies Act and R. 87 of the Indian Companies Rules, Madras, 1940, in the Court of the District Judge, Visakhapatnam for expunging the proof

of all foreign creditors and for deleting their names from the certificates of the Official Liquidator filed under R. 90 of the Indian Companies Rules in the Court of the District Judge at Vizagapatam. The learned District Judge, agreeing with the view taken by the Official Liquidator that the foreign creditors are entitled to participate in the assets of the Company in India, dismissed the application filed on behalf of the Rajah of Vizianagaram. It is not necessary here to state the extent of the claims of the foreign creditors allowed either by the Official Liquidator or by the District Judge.

(39) It is against that order of the District Judge that the Rajah has filed C. M. A. No. 249 of 1949. He has also filed other appeals against the order of the District Judge disallowing claim for the rents, etc. written off by the Court of Wards during their management and some other sums claimed by him. I will now confine myself in these appeals to the question whether the foreign creditors can prove their debts in this liquidation.

(40) The main argument advanced by Mr. Tiruvenkatachari, learned Counsel for the appellant, is that a winding up of an unregistered Company under part IX of the Indian Companies Act is a winding up only for the benefit of the Indian creditors and that the creditors who are not resident in India are not entitled to share in the assets of the Company. The main grounds on which this contention is rested are that since the provisions of Part IX of the Indian Companies Act have a limited territorial application to foreign companies and are not enforceable beyond the Indian Union, and the Courts in India have no jurisdiction either to realise the assets of the Company outside India or over the foreign Contributories it is but reasonable and equitable that these assets of the Company in India should be limited to the Indian creditors of the Company. According to him, if the foreign creditors are allowed to get a dividend here, that would militate against the principle of equality which underlies the scheme of both the Bankruptcy Act as well as the Companies Act. It is urged by him that while the creditors of the Indian Nationality are precluded from proving their claims in the liquidation of the foreign concern in the country of its domicile or to take any other appropriate proceedings in respect of the balance of amount due to them, the foreign creditors, if allowed to prove their debts here and get a dividend, could proceed against the foreign company and its assets elsewhere which amounts to an invidious distinction between the two sets of creditors. It should therefore be held, argues Mr. Tiruvenkatachari, that the liquidation of the Company in India is for the benefit of the local creditors only.

(41) According to him, Part IX of the Indian Companies Act creates a new statutory entity so far as the Indian branch of the foreign Company is concerned and that the winding up can only be in regard to the working of the Company in India as under Ss. 270 to 276 of the Companies Act it is treated as a separate concern.

(42) The answer given by Mr. Rajah Ayyar, the learned Counsel for some of the respondents, is that for all purpose there is only one Company, that there could not be as many companies as there are branches and that the winding up proceedings of one of the branches would not have the effect of making that branch a separate legal entity. He maintains that the acceptance of the right of the foreign creditors to file proof of their debts would not in any way militate against the principle of equality and that, on the other hand, to deprive them of their right to get back the amounts advanced by them would be inequitable and unjust. He contends that a creditor irrespective of his nationality can realise his debt from the assets of the Company wherever they may be, the mode of his realisation depending upon the LEX FORI of the country in which these assets are situated. There is no disability, according to him, attaching to the Indian creditors to prove for the balance of their debts in the liquidation proceedings of the foreign concern or to file a suit in England for the debt due to him and obtain a decree.

(43) I have now to consider which of the two contentions should prevail. In my opinion, though this question is bereft of authority it does not present much of difficulty. The point that falls to be decided is whether the winding up of an unregistered company which is incorporated in a foreign country is a proceeding relating to an independent entity in which the Indian creditors alone can prove their debts. To substantiate his contention, Mr. Tiruvenkatachari has relied upon some decisions of English Courts and of Indian Courts and upon the provisions of Part IX and Part X of the Indian Companies Act.

(44) It is necessary for me at this stage to examine the decision placed by him before us. The learned counsel submitted that the view that such a winding up creates an independent and a separate legal entity has been gaining ground in England as disclosed in the recent decisions of that Court and that the view that the winding up proceedings of an unregistered company incorporated in a foreign country is ancillary to the liquidation of the parent company taken earlier by English Courts did not meet with approval in the later decisions. 'In re. Matheson Brothers Ltd.', (1884) 27 Ch D 225 the question was whether an English Court had jurisdiction to wind up a concern incorporated in New Zealand and having a branch in England. Kay J. held that though, having regard to the principles of international comity, the English Court would have great regard to the winding up order made in the country of domicile and be mainly influenced thereby, the existence of the winding up of the parent concern did not take away the jurisdiction of the English Court to make a winding up order in England. The observations of the learned Judge at page 231 are apposite:

> ".....I consider that I am justified in taking steps to secure the English assets until I see that proceedings are taken in the New-Zealand liquidation to make the English assets available for the English creditors PARI PASSU with the creditors in New Zealand."

In 'In re. Commercial Bank of South Australia', (1886) 33 Ch D 174 a similar question arose, and there also, it was held that the fact that at the time when the petition for winding up the English branch of the Commercial Bank of South Australia incorporated in Australia was filed, winding up proceedings in respect of the main concern were pending in Australia would not affect the jurisdiction of the English Court within whose jurisdiction the branch is located. But the learned Judge, North, J. expressed the opinion that the winding up in England would be ancillary to a winding up in Australia and that there should be no conflict between the two Courts and that due regard should be had to the interest of all creditors and all contributories.

(45) The procedure to be followed in the case of a winding up of a company, with branches in foreign countries, in the country of its domicile is laid down by Vaughan-Williams J. in 'In re English Scottish and Australian Chartered Bank (1893) 3 Ch D 385 as follows:

> ".....In construing the statute, one must bear in mind the principles upon which liquidations

are conducted in different countries and in different Courts, of one concern. One knows that where there is a liquidation of one concern the general principle is: 'ascertain what is the domicil of the Company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation."

In this case the Australian voters were admitted to vote with other creditors. Mr. Tiruvenkatachari has called into aid the following observations of the learned Judge in that case, in support of his contention:

"It seems to me that the right course to take under the section may vary according as the Court has to deal with the principal or ancillary liquidation. According to my view, I have here to deal with a principal liquidation, and, that being so, I am bound to make provision for creditors in all parts of the world coming in and being heard if they think fit".

I do not think that these observations can be interpreted to mean that in the case of an ancillary liquidation the assets of the branch or the assets in that liquidation should be limited to the creditors of that country.

(46) The principle that the liquidation of the unregistered Company should be treated as ancillary and the Courts dealing with it should act in aid of the liquidation of the company in the country of its incorporation which is the principal liquidation is recognised also in 'North Australian territory Co. v. Goldbrough Mort & Co.', (1890) 61 L T R 716 and also in 'Re Federal Bank of Australia Limited', 68 LT 728.

(47) In 'New Zealand Loan and Mercantile Agency Company, Limited, v. Morrison', (1898) AC 349, the main question that arose was whether an arrangement made under the Joint Stock Companies Arrangement Act and agreed to by the statutory majority of the creditors in the winding up of an English Company having a branch in Victoria would bind a non-assenting creditor who has filed a suit against the company in Victoria to recover a loan advanced in Victoria to the Company and whether such a scheme of arrangement was a bar to his action in Victoria. Dealing with that question, Lord Davey observed that all the creditors of a company are entitled to be summoned to any meeting ordered by the Court and to participate therein and that the words "all creditors' refer to the creditors not only resident in the United Kingdom but in the Colonies or in foreign countries.

(48) The views of Maugham, J., in 'In re Vocalion (Foreign) (1932) 2 Ch 196, may be referred to usefully. There, a company incorporated in England which was carrying on business in Australia also was ordered to be wound up. An English creditor who had a claim against an Australian branch filed a suit in Australia. The question arose whether the creditor should be restrained from proceeding with his suit. In dealing with that point, Maugham, J., at page 207, after stating that it has been the view of the English Courts that the principal winding up should be in the principal domicil of the company, and that any other winding up is ancillary to the principal winding up, states:

"The effect of one winding up being ancillary to the principal winding up has, I think, been much considered in our Courts. This Court no doubt holds that in the winding up here all creditors, whether British or foreign, who can prove their debts have equal rights."

Further down in the same page, it is observed:

"If there are two winding up orders, one here and one abroad, it would seem to be impossible to contend that a foreign creditor is not to be allowed to prove his debt abroad and, if the lex fori permits it, to bring an action abroad."

(49) It looks to me that the principle deducible from these decisions is that, in the winding up of a company, all the creditors have to be treated alike irrespective of their nationality.

(50) I will now examine the rulings cited to us by Mr. Thiruvenkatachari as marking a change in the approach to this question. Reliance was placed by him on the speech of Lord Atkin in 'Russian and English Bank and Florence Montefiore Guedalla v. Baring Brother & Co.', (1936) AC 405. There, their Lordships of the Privy Council had to consider whether a suit could be filed in the name of a foreign company which after carrying on the business in England was dissolved in the country of its domicil and was wound up as an unregistered company in England, to recover a debt due to the company in England, at the time of its dissolution and still unpaid. The majority of the Lords, Lord Blanesburgh, Lord Atkin and Lord MacMillan, took the view that such a suit could be maintained despite its dissolution, while Lord Russel of Kilowen and Lord Maugham held otherwise. The relevant portion of the speech of Lord Atkin relied on by Mr Tiruvenkatachari which is at page 428 is as follows:

"But, if the corporation does trade here, acquires assets here and incurs debts here, we shall not accept its dissolution abroad without a stipulation that, if desirable, it may be wound up here, so that its assets here shall be distributed amongst its creditors (I do not stay to consider whether its English creditors or creditors generally) and for the purpose of the winding up, it shall be deemed not to have been dissolved; for, that event would defeat our municipal provisions for winding up a corporation."

I think these observations cannot lend themselves to the interpretation that the foreign creditors cannot participate in the dividends. They only indicate that the question was left open.

(51) In 'Re Banca Commerciale Italiana', (1943) 1 All E R 480, the Banca Commerciale Italiana which was a bank established under the laws of Italy was carrying on banking business in England also. The English branch of the Bank was directed to be wound up by an order made under the Defence (trading with the Enemy) Regulations, 1940. It was held there that the winding up order under the Regulations created a new entity which can take into consideration its assets and liabilities in England only. But this case does not afford us any help as the liquidation was under the Defence Regulation of 1940 which has specifically provided for such a procedure.

(52) In 'In re Suidair Ltd., (1950) 2 All E R 920, Wynn-Parry, J., laid down that although the Court of the country of domicil acts as the principal Court to govern the liquidation and the other Courts act as ancillary to the principal liquidation, the desire to assist in the main liquidation should not make the Court acting as the ancillary to give up the forensic rules which govern the conduct of its own liquidation. The passage on which reliance was placed by the Counsel for the appellants occurs at page 924:

"It appears to me that the simple principle is that this Court sits to deal with the assets of the South African Company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law — that is, primarily the law as stated in the Companies Act, 1948, looked at in the light, where necessary, of the decided cases. If that principle be adhered to, no confusion will result. If it is departed from, I cannot see how any other

suit would follow than the utmost possible confusion."

We do not think that this statement of law enunciated by Wynn-Parry, J., in any way supports the contention urged by Mr. Tiruvenkatachari. Nor does the decision of Venkataramana Rao, J., in an unreported case in 'Re Liquidation of the Travancore National Bank' Appln. No. 1897 of 1939, lend any support to the argument of Mr. Tiruvenkatachari, where the learned Judge confined the list of contributories to those in British India.

(53) Another decision cited to us by Mr. Tiruvenkatachari in support of his arguments is 'In re Travancore Quilon Bank, Limited', AIR (26) 1939 Mad 318. There, the learned Judge laid down 'inter alia that', though the principal domicile of the Bank was Travancore, the Courts in the State of Madras, which had seisin of the liquidation proceedings of the Madras Branch which is an unregistered company, to which Part IX of the Indian Companies Act was applicable, had complete control over its own liquidation according to its 'lex fori', and could pass an order of winding up which would secure its assets in British India and for the benefit of the British Indian creditors. Mr. Tiruvenkatachari maintained that this statement of law substantiates his contention that the liquidation of an unregistered company should be confined to the assets and liabilities over which the Courts in British India have jurisdiction. We are not able to accede to this. That it was not the intention of the learned Judge that the foreign creditors should be excluded from participation in the assets of an unregistered company is clear from a passage which occurs at page 325:

"A separate order for winding up will be passed in this Court for the purpose of having control over the British Indian assets in the interests of the British Indian creditors and this Court will not permit a foreign Court in any way to interfere with the just rights of the British Indian creditors and the endeavours will be as far as possible to secure equal distribution for all creditors, British Indian or foreign. The underlying principle seems to be one of co-operation based on the essential principles of justice and equity."

(54) A reference to the relevant passages in the standard books on the Companies law has convinced us that there is no basis for a distinction based on the nationality of a creditor as sought to be drawn by the learned Counsel for the appellants; that is, between the creditors of the Company resident within the jurisdiction of the Court over the unregistered Company and its foreign creditors. At page 409 of "Buckley on the Companies Act" 12th Edition, under the topic 'Class of creditors', it is stated that:

"foreign or colonial creditors (in the sense in which these words are used above) may of course come in and prove; and, as against the assets with the jurisdiction, they may, upon the principles above suggested, be bound by the scheme."

Palmer in his book on Company Law, (19th Edition by Topham) says at page 379 that any person to whom money is due by a company is a creditor entitled to present a petition for the winding up of the company. This view seems to be shared by the other writers on the subject.

(55) The passages referred to above seem to negative the contention put forward by Mr. Tiruvenkatachari.

(56) As I have already pointed out, Mr. Rajah Ayyar contended that in the case of a company like the present there is only one legal entity and not as many companies as there are branches in foreign countries and that a creditor who advances money to the Company expects to be paid out of its assets wherever he may be whether the creditor can reach the assets of the company at any particular place depending upon the law of the country where those assets are to be found. As substantiating this proposition he placed reliance upon a decision of the House of Lords in Compagnie Generale Trans-Atlantique v. Thomas Law & Co.', (1889) A C 431. There, a French company formed under the French law with its head office at Paris which was doing part of its business in England in such a way as could be said to be resident in England was sued in England for enforcing a claim for damages. It was held, affirming the decision of the Court of Appeal, that such an action was maintainable in England. No ruling was cited to us which has taken a contrary view.

(57) There can be no doubt that the law is the same in India. The relevant provision of law is enacted in Section 20 of the Civil Procedure Code which provides that:

"a corporation shall be deemed to carry on business at its sole or principal office in British India, or in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

It is clear that under the Civil Procedure Code of India a suit could be filed by a creditor against a foreign company which is carrying on business in the Indian Union.

(58) That being so, can it be said that a person who can enforce his claim against an unregistered company is precluded from proving his debt if the affairs of that company are wound up. That such a creditor can present a petition for winding up an unregistered company is seen from Sections 162, 163 and 166 of the Indian Companies Act. Though these provisions of law are contained in Part V of the Companies Act, by virtue of the provisions of Section 276 of the Companies Act, all these provisions of Part V relating to the liquidation of companies are applicable to an unregistered company also. It could not with any reason be postulated that a creditor who can enforce a claim against an unregistered company and could also apply for its liquidation, is precluded from proving his debt the moment that company's affairs are wound up. It has also to be noted that by reason of Sections 169 and 171, a creditor is prevented either from filing a suit or from continuing it if he has already filed it the moment the company is liquidated. It follows that if a creditor is prevented from pursuing his remedies against the company by the intervention of its liquidation, he would be entitled to prove his claim in liquidation, and the winding up cannot be to his disadvantage. Further an examination of relevant sections of the Companies Act shows that no such distinction between the creditors resident in India and foreign creditors as sought to be made on behalf of the appellant is contemplated under the Act. It is not necessary to refer to them in detail. Suffice it to say that the scheme of the Act seems to be to treat all the creditors alike irrespective of their nationality.

(59) In reaching a conclusion on this question, I think the principle laid down in the following cases with regard to the proof of debts in bankruptcy is a valuable guide; 'Graham v. Campbell', (1872) 7 Ch D 490; Banco De Portugal v. Waddell', (1880) 5 AC 161 and 'Wiskemann In re', (1923) 92 L J Ch 349. The rule of law stated in those decisions is that a foreign creditor can prove his debt in bankruptcy irrespective of his nationality subject to the condition that he must bring into the estate whatever dividend he has received elsewhere (Vide also Halsbury's laws of England, 2nd Edition by Hailsham page 278, paragraph 367). The same statement of law is contained at page 808 of Dicey's Conflict of Laws, 6th edition, where the learned author says that a foreigner proving (e. g. for a foreign debt)

stands in the same position as does an English creditor proving for an English debt. To the same effect is the passage in 'Private International Law' by Cheshire. At page 647, it is stated that a foreigner could prove his debt in an English bankruptcy in spite of the debt having been contracted abroad, and that he is in the same position as the English creditor in all matters concerning the administration of the estate. I think there is no difference between the English law and the Indian law in this respect. I feel that the principle governing the proof of debts by foreign creditors in the bankruptcy proceedings is applicable to that of the winding up proceedings also. I have therefore arrived at the conclusion that a foreign creditor is as much entitled to a share in the assets of an unregistered company in liquidation as a creditor resident in the country where the unregistered company is situated, the nationality of the creditor not making a point of difference.

(60) Alternatively, it was argued by Mr. Tiruvenkatachari that the situs of the debt not being in India, a foreign creditor cannot prove his debt in the liquidation of an unregistered company. According to him, unless the debt has some relation to the business of the unregistered company in India, the foreign creditor cannot claim to participate in the assets of an unregistered company in liquidation.

(61) For the position that a debt is capable of local situation, Mr. Tiruvenkatachari referred us to a number of decisions of English Courts and to passages in Cheshire's 'Private International law' and Dicey's "Conflict of Laws". But I think the question of situs of a debt has not much of a bearing on the point whether a foreign creditor is excluded from participation in the assets of an unregistered company which is wound up. I think it is in connection with administration and succession actions that the situs of a debt has relevancy. In Cheshire's 'Private International law' it is stated at page 593,

> "The fact, however, that a debt possess a definite situation for some purposes does not necessarily imply that its assignment should be governed by the 'lex situs'."

Even apart from that, the provision of law enacted in S. 20 of the Civil P. C. is an answer to the argument based upon the situation of the debt. In this view of the matter, it is not necessary for me to refer to the various decisions cited to us by Mr. Thiruvenkatachari on the question of situs of debt.

(62) For the foregoing reason, the contention urged on behalf of the appellant that proof of debts of the foreign creditors should be expunged is not acceptable to us. I entirely agree with my learned brother in his conclusions in other respects.

C.R.K./D.H. *Order accordingly.*

✠ A. I. R. (39) 1952 MADRAS 149 (C. N. 64)

FULL BENCH

RAJAMANNAR C. J., CHANDRA REDDI AND VENKATARAMA AYYAR JJ.

In the matter of P. Ramanujachari Advocate, High Court, Madras.

N. Krishnaswami Nayudu, Complainant.

Referred case No. 29 of 1951, D/- 24-9-1951.

✠ *Legal Practitioner — Complaint against Advocate by private person — Enquiry by Bar Council — Complaint withdrawn — Report by Bar Council to drop enquiry — On facts, High Court refused to stop enquiry and directed Bar Council to continue it.*

A complaint was made against an Advocate that he induced the complainant to agree to purchase a property of his client, knowing fully that the client had no title to it, that on this misrepresentation the complainant parted with sums of money, some of which amount was not paid by the advocate to the client and that a decree against the advocate was obtained for this sum. On this complaint, an enquiry was started by the Bar Council. After some adjournments the complaint was withdrawn on the ground that the complainant could not substantiate the charges. Upon this the Bar Council reported that the proceedings should be dropped:

'Held' that a mere statement by the complainant that he could not substantiate the charges against the advocate could not be accepted, especially having regard to the considered judgment of the High Court in the suit against the Advocate in which the Judge had an opportunity of examining the entire evidence on the matter and it was common ground that the present proceedings were intimately connected with the proceedings in that suit. (Complaint was directed to be kept on file and if complainant was unwilling to conduct the proceeding, the Bar Council Tribunal was asked to appoint advocate to conduct the same.) (Para 2)

Advocate General, in support of the Notice.

RAJAMANNAR C. J.: There were two charges against the respondent, who is an advocate of this Court; they ran as follows:

> "(1) that you Mr. P. Ramanujachari, being an advocate of the High Court of Judicature at Madras represented to Mr. N. Krishnaswami Nayudu that one Balamukundoss, your client had full title to a property 'Amir Bagh' in Mangadu village, Wallajah Taluk, thereby induced the complainant abovenamed to agree to purchase it and received from him in or about April and May 1947 a sum of Rs. 2,000 first as advance and later another sum of Rs. 2,000 and again another sum of Rs. 250 towards remuneration with full knowledge that the said representations were made by you falsely with fraudulent and dishonest intention; (2) that the sum of Rs. 2,000 received by you on the second occasion for and on behalf of Balamukundoss had not been paid by you to the said Balamukundoss and that you have misappropriated the same dishonestly and fraudulently and that therefore a decree has been obtained against you in C. S. No. 297 of 1947, High Court, Madras."

After the respondent had filed his statement, the enquiry before the Bar Council was being adjourned from time to time and eventually on 19th March 1951, the complainant's advocate represented that he was not ready with his evidence and that his client proposed to withdraw the complaint. The enquiry was then adjourned to 4th April 1951 on which date both the complainant and the respondent were absent and finally on 16th April 1951 the complainant appeared along with his advocate and the advocate stated that the complainant does not desire to proceed with the enquiry as he considered that he could not substantiate the charges made by him. On 26th April 1951 the Tribunal of the Bar Council reported that the proceedings should be dropped against the respondent as the further continuance of the enquiry was likely to be fruitless and as evidence may not be available.

(2) We cannot agree with the Tribunal's view of the matter. It may be that the complainant has chosen to withdraw the complaint made by him for reasons of his own. A mere statement by him that he could not substantiate the charges against the respondent cannot be accepted, especially having regard to the considered judgment of Panchapagesa Sastry J. in 'C. S. No. 297 of 1947' in which the learned Judge had an opportunity of examining the entire evidence on the matter and it is common ground that the present proceedings are intimately connected with the proceedings in that suit. On

the finding of the learned Judge in that case, we find it impossible to agree with the Tribunal that the two charges against the respondent cannot be substantiated. We wish to say no more at this stage which may prejudice the respondent in any manner. All that we propose to say now is that this is not a matter in which the proceedings should be dropped against the respondent merely because the complainant has chosen to withdraw the complaint. We cannot accept the report of the Tribunal and we direct the complaint to be kept on the file and an enquiry to be made by the Tribunal. If the complainant is not willing to conduct the proceedings the Tribunal can appoint an advocate to conduct the proceedings against the respondent.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 150 (C. N. 65)

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Ramachanduruni Purushotham, Petitioner v. Ramachanduruni Venkatappa and another, Respondents.

Civil Misc. Petn. No. 4419 of 1950, D/- 6-9-1951.

(a) *Madras Restoration of Village Officers (Validation) Act (18 (XVIII) of 1939) Ss. 2, 3 — Order of nature referred to in S. 2 — If can be challenged.*

Under S. 3, the declaration of the Government that the order passed by them is of the nature referred to in S. 2 is conclusive proof thereof and cannot be challenged on the ground that it was not justified on facts of the case. A I R (32) 1945 Mad 19 Rel. on. (Para 3)

(b) *Constitution of India, Art. 19 (1) (f) — "Property" — Karnam's office — Madras Restoration of Village Officers (Validation) Act (18 (XVIII) of 1939), whether infringes Art. 19 (1) (f).*

The property which is contemplated by Art. 19 (1) (f) is obviously property which can be acquired held and disposed of. The Karnam's office cannot be acquired and it cannot be disposed of, and so far as holding is concerned, the incumbent holds it so long as he is not lawfully removed from that office. An office held in such circumstances on a precarious tenure cannot be deemed to be "property" as contemplated by Art. 19 (1) (f). A. I. R. (9) 1922 P C 96 Rel. on.

Madras Restoration of Village Officers (Validating) Act, (18 of 1939) does not in any way infringe Art. 19 (1) (f). (Para 4)

(c) *Madras Restoration of Village Officers (Validating) Act (XVIII (18) of 1939)—Whether contravenes Art. 14, Constitution of India.*

The Madras Act 18 of 1939 only purports to restore to persons who were justly entitled to the office what they had lost for political reasons. Such a policy of justice can never be said to be discriminatory. Madras Act XVIII of 1939 cannot be held to be unconstitutional on the ground of discrimination and does not contravene Art. 14 of the Constitution. (Para 5)

A. Sundaram Aiyar, Ch. Suryanarayana Rao and Ch. Ramakrishna Rao, for Petitioner; The Advocate General, for the Govt. Pleader, M. Seshachalapathi and K. Mangachari, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('21) 44 Mad 643: (A I R (9) 1922 P C 96) (Pr 4)

('45) I L R (1945) Mad 398: (A I R (32) 1945 Mad 19) (Pr 3)

RAJAMANNAR C. J.: This application relates to the office of the Karnam of Tangutur village, Ongole taluk, Guntur District. One Ramkrishnayya was the holder of this office till 23rd November 1922 when he died. He left behind him two sons. The first respondent Venkatappa was then a major and the petitioner Purushotham a minor. The first respondent renounced his right to the office by a letter addressed to the Revenue authorities and the petitioner was recognised as the Karnam of the village by an order of the Sub Collector dated 4th February 1923. As he was a minor he was registered as Karnam with his paternal uncle as deputy. He attained majority in due course and took charge of the office in 1927 and ever since that date he has been discharging the duties of his officer. While so, on 6th March 1950 the Government passed an order purporting to be in the exercise of the powers conferred by S. 2(c) of the Madras Restoration of Village Officers (Validation) Act, Madras Act XVIII of 1939 directing that the first respondent be appointed as Karnam in the place of the petitioner, the existing incumbent. The petitioner seeks to have this order of Government quashed.

(2) Madras Act XVIII of 1939 was passed for the purpose of validating the restoration of village officers who had lost their offices by reason of their association or connection with political movements. The Government thought that it was desirable to restore the position which would have obtained if the officers or their heirs had not lost their offices or their right thereto because of their association or connection with political movements. S. 2 of the Act runs thus,

"2. Notwithstanding anything contained in the Madras Proprietary Estates' Village Service Act, 1894, or in the Madras Hereditary Village Offices Act, 1895, or in any decree or order passed in any suit, appeal, application or revision or other proceeding, (whether instituted, made, or taken under the Acts aforesaid or not) every order which has been, or which may hereafter be, passed by or on the direction of, the Provincial Government

(a) restoring a village officer, who, by reason wholly or partly of his association or connection with any political movement had been removed or dismissed from his office, or had resigned therefrom, or had otherwise in any manner whatsoever ceased to hold the same; or

(b) appointing to the office or registering as entitled thereto the heir of any such village Officer or of any person who in the ordinary course of events would have succeeded to the office or been registered as entitled thereto; or

(c) appointing to a village office any person who, by reason wholly or partly of his association or connection with any political movement, had declined to accept the office or had been declared ineligible therefor; or

(d) appointing to a village office or registering as entitled thereto, the heir of any such person or of any other person who in the ordinary course of events, would have succeeded to the office or been registered as entitled thereto; or

(e) directing the removal of any person from a village office in consequence of an order of the nature referred to in clause (a), (b), (c) or (d) above,

shall be valid and be given effect to according to its tenor, and no such order shall be called in question in any Court of law".

S. 3 lays down that if the Provincial Government declare that any order passed by them is of the nature referred to in S. 2, such declaration shall be conclusive proof thereof and all Courts shall take judicial notice of the same. In this case the order

of the Government was passed under S. 2 (c), that is to say, the Government were of the opinion that the first respondent had by reason wholly or partly of his connection with the political movement of the day declined to accept the office to which ordinarily he would have become entitled on the death of his father. The petitioner attempted to challenge the validity of the Government Order firstly on the ground that the order was not justified on the facts and circumstances of the case, and secondly on the ground that the Act itself became void after the Constitution came into force, in asmuch as its main provisions were inconsistent with the fundamental right declared by Art. 19 (1) (f) and also because it was inconsistent with Art. 14 which conferred the right of equal protection of the laws on every person.

(3) In our opinion, the petitioner is not entitled in this case to urge the first ground. We are also of the view that even if he is entitled to attack the order of the Government on the ground that it was vitiated by 'mala fides', we have ample material on which to hold that the order of the Government cannot be impugned as being in any sense 'mala fide'. Under S. 3 the declaration of the Government that the order passed by them is of the nature referred to in S. 2 is conclusive proof thereof. It was decided in 'Lakshminarasimha v. Province of Madras', ILR (1945) Mad 398 that this section was 'intra vires' the Madras Legislature and that it was a valid provision of law and was not in conflict with the provisions of S. 4 or of any other section of the Indian Evidence Act. Leach C. J. observed construing the section

> "If S. 3 had not been inserted in the Provincial Act, it might have been open to the appellant to contend that the case did not fall within the four corners of S. 2."

Even otherwise we consider that the Government was justified in concluding that the case fell within S. 2(c) of the Act. The counter-affidavit of the first respondent sets out the circumstances under which he renounced the office. He had discontinued his studies and was doing Congress work. He was convicted and sentenced to undergo imprisonment for a period of five months, and he served his sentence from 17th February 1922 to 15th July 1922. His father died a few months later in November 1922. After his renunciation he has been on active Congress work, was a touring secretary of the Andhra Provincial Congress Committee and had suffered six convictions from 1922 to 1942 and was in prison for an aggregate period of more than six years. All these facts are not denied. In view of these facts it is highly probable that the first respondent did not wish to accept the office of Karnam because of his connection with the Congress. It is also highly probable that the members of his family should have compelled him not to assign the true reason for his refusal to accept the office, because thereby the family as a whole would lose the benefit of the emoluments of the office. His conduct in voluntarily relinquishing his office is then easy to follow. On these facts, the Government rightly thought that the first respondent will be entitled to the benefit of the provisions of the new Act. It cannot be said that the Government acted 'mala fide' in restoring the first respondent to the office.

(4) Mr. Sundaram Aiyar's contentions as regards the invalidity of the Act were based on the assumption that the petitioner was entitled to a kind of property by reason of his appointment to the office in 1923; because obviously if the petitioner was not entitled to the office as property or as a right in and to property, Art. 19(1)(f) of the Constitution could not have any application. We do not think it necessary to spend much time over this point in view of the definite pronouncement of the Judicial Committee as regards the nature of the karnam's office in Madras in 'Venkata Jagannadha v. Veerabadrayya', 44 Mad 643 Lord Shaw summed up the law on the point in the following manner;

> "It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible".

Earlier on in his judgment the reasons for that conclusion are fully and elaborately set out. The provisions of Madras Act III of 1895 and Madras Act II of 1894 are clearly inconsistent with the appointee for the time being treated as possessed of the office as property. The person in office can be dismissed from his office for proper reason and by virtue of that dismissal, he will lose all right to the office. This position is wholly incompatible with all juristic notions of a right to property. The property which is contemplated by Art. 19(1)(f) is obviously property which can be acquired, held and disposed of. The Karnam's office cannot be acquired and it cannot be disposed of, and so far as holding is concerned, the incumbent holds it so long as he is not lawfully removed from that office. The rights which Mr. Sundaram Aiyar could call in aid of the petitioner are all rights which can be traced to the statutory provisions or to other Government regulations. Such rights must needs be subject to amendments and repeals. Madras Act XVIII of 1939 must be deemed to have amended the original provisions of Madras Act III of 1895 and if the petitioner can invoke the provisions of the earlier Act in his support, he would be equally bound by the provisions of the later enactments which might curtail the rights which he had before. Mr. Sundaram Aiyar was not able to cite any authority to convince us that an office held in such circumstances as set out above on a precarious tenure can be deemed to be "property" as contemplated by Art. 19(1)(f). We are, therefore, of opinion that this article has not been in any manner infringed.

(5) There is very little substance in the contention based on Art. 14 of the Constitution. It was urged that there was discrimination in favour of political sufferers. This we think is not the correct way of looking at the purpose of the enactment, Madras Act XVIII of 1939. It is not as if persons in office are removed and political sufferers are appointed to those posts. The persons to whom the offices are restored under the Act are persons who would not have lost their offices or their right thereto but for their association with the political struggle in this country. The Act only purports to restore to persons who were justly entitled to the office what they had lost for political reasons. Such a policy of justice can never be said to be discriminatory. Madras Act XVIII of 1939 cannot be held to be unconstitutional on any of the grounds urged by Mr. Sundaram Aiyar.

(6) In the result the application fails and is dismissed with costs.

C.R.K./R.G.D. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 151 (C. N. 66)

SUBBA RAO J.

C. D. Sekkilar, Petitioner v. R. Krishnamoorthy, Respondent.

Writ Petition No. 224 of 1951, D/- 21-8-1951.

† *Constitution of India, Art. 226 — Writ of Mandamus when can be issued against college principal directing reinstatement of dismissed student.*

Though the provisions of Art. 226 of the Constitution of India are apparently wide, directions in the nature of a writ of mandamus should not issue except to a public or 'quasi' public body or officer which is under an obligation, statutory or otherwise to do or refrain from doing anything and which is likely to interfere with the rights of persons. The writ can issue even if the petitioner has his remedy by way of a suit for declaration of his rights when such an alternative remedy cannot be adequate as when the relief granted would be infructuous when it is given by lapse of time. A student studying in a College has a personal right to continue to study therein till the course is completed or he has otherwise been removed or expelled in strict compliance with the rules governing the institution. The Principal of an institution maintained from the funds of a public trust contributed from public funds, affiliated to the University and governed by the rules of the University, and the scheme framed by the High Court is certainly a person holding a 'quasi' public office; (Principal of the Pachiappa's College, Madras was held to be such a person.) The maintenance of discipline, the upkeep of the necessary tone and standards of behaviours in a body of students in such a College is primarily entrusted to the Principal or other officers of the institution. The High Court will not interfere with the discretion of such an authority unless it is clearly established that the authority concerned has not honestly exercised the discretion, actuated by some motive extraneous to the purpose committed to its discretion. The principle of natural justice is an elastic conception especially when applied to educational institutions. It is wrong to import the conception of "lis" in the dealings of a Principal with his students. The Court will interfere, only if it be satisfied on a consideration of the entire material placed before it that the action of the authority concerned is arbitrary, is due to a mala fide exercise of discretion actuated by extraneous circumstances. 'Case law reviewed.

(*Paras 16, 18*)

'Held' on facts that the action of the Principal in dismissing the petitioner student from the College on disciplinary grounds was not arbitrary. If so he had disciplinary jurisdiction to ask the student to leave the college. (*Para 7*)

Though it was not within the province of the Court to dictate what the principal should or should not do to meet a particular contingency. his Lordship observed, that the object or discipline might have been better served if the principal had accepted the unconditional apology agreed to be tendered by the student and the undertaking by the father guaranteeing the future good conduct of his son, and magnanimously pardoned him as a father would do his son rather than puting a seal of finality on the punishment inflicted by him. That would have enhanced the prestige of the principal and of his college in the eyes of not only his students present and future but also the public.

(*Para 19*)

T. S. Venkataraman and S. Vaidhyanathan, for Petitioner; K. Sanjeevi Naidu, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('39) A I R (26) 1939 Bom 35: (40 Bom L R 1213) (Pr 13)
('47) A I R (34) 1947 Bom 193: (48 Bom L R 655) (Pr 14)
('48) I L R (1946) 2 Cal 88 (Pr 13)
('51) 64 Mad L W 665: (A I R (39) 1952 Mad 112) (Pr 6)
39 American L R 1016 (Pr 13)
92 E R 818: (8 Mod 148) (Pr 13)
(1825) 107 E R 1277: (4 B & C 855) (Pr 12)
(1916) 32 T L R 479 (Pr 12)

ORDER: This is an application for issuing a Writ of Mandamus directing the Principal of the Pachiappa's College to readmit the petitioner to the Final Year Economics Honours Class.

(2) The petitioner was a student of the final year Economics Honours Class in the Pachiappa's College, Madras. In 1949 he had been expelled from the hostel attached to the Pachiappa's College on 24 hours notice. The Principal says that he had to be expelled because of his improper behaviour. The petitioner affirms that he was wrongfully expelled from the hostel because he complained to one of the trustees about the scarcity of water in the bath room and the enhancement of the mess rate. On 19th July 1950, the Principal wrote a letter to the petitioner's father informing him that his son's behaviour had not shown any improvement even at the beginning of the year. He complained to him of a specific instance, namely, that when he was getting up the stair case, the petitioner in the presence of about 50 students mentioned in the most contemptuous language "What does it matter if the Principal comes". To this letter, the petitioner's father replied on 21-7-1950 wherein he complained that his son was expelled from the hostel for a small mistake and that consequently he had to spend large amounts. He appealed to him to treat his son as his son and to permit him to continue his studies. On 12-7-1951 about 4 p. m. an incident took place at the office room of the College. As to what happened at that place, there are conflicting versions. The petitioner's version is: On 12-7-1951 at about 4 p. m. he asked the clerk of the College to give him a railway concession form for students to obtain his season pass to travel by electric train to reach the college. The clerk concerned informed him that forms could be issued only between 1-30 p. m. and 3 p. m. At 4-30 p. m. the petitioner saw the clerk issuing the said forms to other students. He went into the office room and asked the clerk why he made this discrimination. The clerk assumed a haughty attitude and indulged in threatening and abusive language and said that he could do what he wanted and might even take the matter to the President of the Trust Board. He replied that he was not so childish as to report this silly matter to the President. Just then the Principal stepped in and the position was eased with the result that the Principal himself got a form for him the next day with which he purchased the ticket. The Principal gives an entirely different version of what took place that day. According to him what happened was this. On 12-7-1951 at 3.15 p. m. the petitioner went to the College to apply for South Indian Railway concession form from the clerk concerned. He asked the petitioner to come for the forms in the hours stipulated therefor. On hearing this, the petitioner flared up at once and abused the clerk and created a scene. The Head clerk then asked the petitioner not to create any scene but to bring the matter to the notice of the Principal and thereupon the petitioner had talked disparagingly about the Principal. When the Head clerk asked the petitioner to report the matter to the President of the Trust Board, he abused in vulgar language the President of the Trust Board, the principal and the other members of the management. When he returned to his room at 3.30 p.m. he found the petitioner coming into the office room shouting. Then he took him to his office room and asked him the rea-

son for his unseemly behaviour. He complained about the partiality of the office staff and talked in disrespectful and contemptuous language against the management and he had to ask him to go away. In the reply affidavit the petitioner denied that he called the respondent and the members of the management all sorts of names in indecent language or that he indulged in behaviour not worthy of a standard (Sic. Student). The version given by the Principal is supported by the affidavits filed by Gopala Chetty, despatching clerk, Chengalvaroyan, Librarian, Pattabhiraman, Head Clerk, Venkatarao, one of the clerks, Krishnamachary, Assistant Professor in Telgu and Bhujangaraya Sarma, another Assistant Professor in Telugu. On enquiry, the Principal found that the behaviour of the student was such as to deserve disciplinary action. On 12-7-1951, he had taken statements from Chockalingam, Bhashyaramanujam, Seethapathi, Venkatarao, Krishnamachari, Bhujangaraya Sarma, Pattabhiraman and Ramachandran, who all described in detail what had all taken place in the office. The Principal called for an urgent meeting on 17-7-1951 of the members of the College Council. The College Council in their proceedings dated 17th July 1951 after having listened to the report of the Principal and the evidence of the office staff and the Assistant Professors unanimously resolved that the petitioner be sent out of the college for his grave misconduct.

(3) The Principal says in his counter that on 18-7-1951 at about 11-15 a.m. he sent for the petitioner, who was in his class room but did not turn up and that at 11-45 a.m. he went to the class room of the petitioner and brought him to his chambers. When he put before him all the facts as stated by the clerk and the other members of the staff and asked him why he behaved in such a manner and used such indecent and insulting language, the Principal says the petitioner totally denied that he abused anybody or created any scene and turned round and called the Head clerk a liar and also the Principal a liar. The Principal then instructed his head clerk to get his Transfer Certificate ready and as soon as it was brought to him he signed it and handed it over to him. The petitioner refused to receive the certificate and proceeded straight to his class. As the petitioner refused to leave the class, the Principal requested the Professor to disperse the class for that day and the Transfer Certificate was thereafter sent to him by post on 20-7-1951. In regard to this incident, the petitioner gives a different story. According to him, the statements were taken by the Principal at a later stage as a counterblast to his protesting and rousing indignation against their partiality. He admits that the Principal orally intimated to him on 18-7-1951 about the conclusion arrived at by the College Council but states that he did not give him any opportunity to establish his innocence. According to the Principal, on the morning of 19th July 1951, when the classes were working peacefully in both the Science or Arts blocks, the petitioner at the head of about 100 students entered the Science block of the College at about 11-10 a.m. and from there came 'en masse' to the Arts block at about 11-30 a.m. shouting slogans like "Down with the Principal" disturbing the classes and persuading the students to come out. Fearing that some damage might be done to the College property, the Principal closed the college at about 11-45 a.m. for the day.

(4) The petitioner does not deny that incident but described the demonstration by the students as one made in a peaceful and orderly manner as protest against the high-handed action of the respondent and the College authorities in the treatment of a fellow-student of theirs. The petitioner's father by letter dated 19-7-1951 requested the Principal to reconsider the position, and permit the petitioner to prosecute his studies as before but the Principal replied giving all the details which necessitated the drastic action taken by him and expressed his view that there is no need to reconsider his case. The petitioner having failed in his attempt to get himself reinstated filed the present mandamus petition for the aforesaid relief.

(5) The learned Counsel for the petitioner contended that his client has a legal right to continue his studies in the College and that the act of the Principal and that of the College Council in sending him out of the College was arbitrary and against the fundamental principles of natural justice and therefore he would be entitled to a Writ of mandamus. The learned Counsel for the respondent raised a preliminary objection that the present application for mandamus was not maintainable as such a writ would not issue against a private institution and that the petitioner had an adequate remedy by instituting a regular suit if his rights were in any way interfered with. He further argued that the action of the Principal and of the College Council in sending out the student from the College for misconduct is a question entirely within their jurisdiction and the High Court will not interfere with their discretion in the exercise of their disciplinary jurisdiction. The first question therefore is whether a writ of mandamus will issue against the authorities of a collage directing them to allow a student to continue his studies in the college when he was dismissed by them in exercise of their disciplinary jurisdiction.

(6) The right of the High Court to issue writs like mandamus is governed by Art. 226 of the Constitution of India. It reads:

> "Notwithstanding anything in Art. 32 every High Court shall have power throughout territories in relation to which it exercises jurisdiction to issue to any person or authority including in proper cases any Government within those territories, directions orders or writs including writs in the nature of habeas corpus, mandamus prohibition, quo warranto and certiorari or any of them for enforcement of any of the rights conferred by Part III and for any other purpose."

The power of the High Court is expressed in general terms and the words are susceptible of the construction sought to be put upon them by the learned Counsel for the petitioner that under the Article a Writ of Mandamus could be issued not only against persons entrusted with public duties but also against persons discharging duties other than public. But this construction is no longer open in view of the Bench decision of this Court reported in 'In re Thippasami', 64 Mad L W 665. There an application was filed purporting to be under Art. 226 of the Constitution at the instance of a minor by his guardian for directions in the nature of a Writ of Mandamus directing the respondents to forbear from cutting the trees standing on certain survey numbers in a village and from removing the timber from the said lands. The learned Judges Rajamannar C. J. and Balakrishna Aiyar J. lay down the scope of a Writ of Mandamus under Art. 226 of the Constitution of India as follows:

> "In our opinion Art. 226 of the Constitution should not be construed so as to replace the ordinary remedies by way of a suit and application available to the litigant under the general law of the land. Directions in the nature of a writ of mandamus should not, in our opinion, issue under this article except to a public, a quasi-public body or officer which is under an obligation, statutory or otherwise to do or refrain from doing anything which is likely to interfere with the rights of persons."

To put in other words, the learned Judges held that the scope of a Writ of Mandamus under Art.

226 is not different from that obtaining in England. The law on the subject, as administered in England is succinctly stated in Halsbury's Laws of England, 2nd Edn. IX volume at page 744 as follows:

"The writ of mandamus is a high prerogative writ of a most extensive remedial nature and is, in form, a command issuing from the High Court of Justice directed to any person, corporation, or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual."

I accept the statement as a complete and brief summary of the law on the subject. This power to issue a writ of mandamus is embodied in S. 45 of the Specific Relief Act, 1877. S. 45 reads as follows:

"Any of the High Courts of Judicature at Calcutta, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of judicature.

Provided (a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

(b) that such doing or forbearing is, under the law for the time being in force, clearly incumbent on such person or Court in his or its public character or on such corporation in its corporated character;

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

(d) that the applicant has no other specific and adequate legal remedy, and

(e) that the remedy given by the order applied for will be complete".

Under S. 45 the power to issue directions in the nature of a writ of mandamus is confined to the ordinary original civil jurisdiction. But under Art. 226 of the Constitution of India this Writ can be issued throughout the Madras State. The other provisions of the section laying down the limits of the exercise of jurisdiction is nothing more than the limits of the writ of mandamus issued by the King's Bench Division of the High Court of Justice in England. Under this section, a Writ will be issued against any person holding a public office or a corporation or an inferior Court of judicature. An application can be filed only by a person whose property, franchise or personal right would be injured and the Court will compel only such a person if the doing or forbearing is incumbent on such person in his public character under any law for the time being in force.

(7) The learned counsel for the respondent therefore contended that the Principal is neither a person holding a public office nor is the forbearing to discharge the duty of a public character imposed on him under any law for the time being in force. It is therefore necessary to ascertain the character of the principal's office and the duties imposed on him by any statute or rules framed thereunder.

(8) The Pachaiyappa's College is conducted by the Pachiappa Trust from out of the funds of the Pachiappa charities, which is admittedly a public charitable endowment. The charities owe their origin to the endowment made by late Pachiappa Mudali and later augmented by donations made or endowments created by philanthropically minded gentlemen from time to time. The High Court of Madras framed a scheme under S. 92, C.P.C., whereunder provision was made for the management of the various institutions.

(9) Under Clause 4 (1) the College Council is empowered to deal with the promotion, removal or expulsion of students. Under Clause 4 (a) the Executive Management of the College and of the High School attached thereto shall subject to the general control of the Board of Trustees be vested in the Principal of Pachiappa's College assisted by a College Council. Under Clause 4 (c) save as herein otherwise provided, the Principal shall ordinarily be bound by the opinion of the majority of the College Council but may overrule such opinion and shall then submit to the Board of Trustees in writing his reasons for dissenting from the views of the Council together with such minutes on the subject as the Council or individual members thereof may wish to record for the consideration and final decision of the Board of Trustees. Clause 4 (r) says that as regards the students of the College, the Principal shall have exclusive control in matter of discipline and punishment and the Council shall not be entitled to interfere therein except in cases of expulsion.

(10) The Madras Educational Rules divide Educational Institutions into two main classes "Public" and "Private." Six classes of public institutions are given, one of them being Colleges affiliated to the University of Madras. All other educational institutions are classed as private institutions. Public institutions are classified into two categories (i) those under the management of the Government or local boards or Municipal Councils known as institutions under public management, and (ii) those under the management of private persons or associations known as institutions under private management. Public institutions under private managements are classified into aided and unaided according as they do or do not receive aid from the public fund. It is not disputed that Pachiappa's College is a public institution coming under the second category and that it also receives aid from public funds. Chapter VIII of the rules provide for disciplinary regulations in regard to colleges. Rules 95 provides that Headmasters, Principals or other constituted school, college or hostel authorities may frame and issue from time to time disciplinary rules of a permanent or temporary character regulating the conduct within this school, college, or hostel precincts of students on the rolls. Rule 97 says that Headmasters, Principals or other constituted school, college or hostel authorities shall have full power to inflict the following punishments in the interests of the students or the institutions concerned:

Fine, loss of attendance, loss of term certificates, suspension and expulsion.

It is also provided therein that in cases of colleges such disciplinary regulations as may be issued by the respective universities to which they are affiliated and as are not inconsistent with the regulations in this Chapter will also apply.

(11) It will be seen from the aforesaid rules and the clauses of the scheme that the Pachiappa's College is a public institution, that the principal and the college council in discharge of their duties are governed by the Madras Educational Rules, by the disciplinary Regulations issued by the University and by the clauses of the scheme framed by the High Court. It may therefore be held that the Principal is holding a quasi-public office and is bound to discharge his duties in accordance with

the rules governing this institution and regulating his conduct.

(12) In this connection the learned counsel for the respondent cited before me a long catena of cases. I shall now proceed to deal briefly with the relevant cases, which throw light on the question now raised. The learned counsel for the respondent strongly relied upon the decision reported in 'Ex parte Mann', (1916) 32 TLR 479. It is laid down therein that a mandamus will not be issued against a tribunal to do an act, which it is not authorised to do in pursuance of any statutory authority. It is not necessary to canvass the correctness of this proposition as in this case I have already pointed out that the Principal is bound to exercise his jurisdiction in compliance with the Educational Rules, the regulations made by the University and the clauses of the scheme framed by the High Court. The decision in 'The King v. Benchers of Lincoln's Inn', (1825) 107 E R 1277, is relied upon for the proposition that a Court cannot compel an institution to adimt a student. In that case, one Wooler made an application at the Steward's office of the Society of Lincoln's Inn to have his name enrolled as a member of that society and left a paper containing his name, etc. conformably to the regulations of the society. His application was rejected by the Benchers. He applied for an opportunity to be heard but he was rejected. He then applied to the High Court for a rule calling upon the Masters, Treasurers, and Benchers of Lincoln's Inn to show cause why a writ of mandamus should not issue commanding them to admit him as a member of their society for the purpose of qualifying himself to be called to the Bar. That application was dismissed mainly on the ground that he had no inchoate right to be admitted as a member of the association and there was no obligation on the part of the association to admit him. At page 1279, Abbot, C. J., made the following remarks:

"It has been argued that every individual has 'prima facie' an inchoate right to be a member of one of these societies for the purpose of qualifying himself to practise as a barrister. If that proposition were established, there would be a sufficient ground for granting a mandamus but I apprehend that there is no such inchoate right. It might as well be said that every individual had an inchoate right to be admitted a member of the College in either of the Universities or College of Physicians or any other establishment of that nature. But supposing an individual were desirous to practice medicine in London, this Court would not grant a mandamus to compel the College of Physicians to admit him as one of their members or as a licentiate. I think therefore that in this case we ought not to grant a mandamus."

Bayley, J., says in the same page:

"They make their own rules as to the admission of members and even if they act capriciously upon the subject this Court can give no remedy in such a case, because in fact there has been no violation of any right. This case is analogous to that of a college."

But to my mind there is an esssential distinction between admission to a college and illegal removal or expulsion of a student. In the latter case, it cannot be said that he has no right to have a particular thing done and there is no obligation upon the other party to do it. If he is a student of the College, he is entitled to not to be removed otherwise than under the procedure prescribed under the rules and if the Principal acts arbitrarily or contrary to the rules, he has got a right to compel the principal to allow him to continue to study in the college.

(13) In "The King v. The Chancellors, Masters and Scholars of the University of Cambridge' 92 E R 818, an application for issuing a writ of mandamus was taken out to restore one Richard Bentley to his degree of Doctor of Divinity. He had been degraded by the Vice-Chancellor's Court of the University of Cambridge for having been guilty of contempt in speaking approbrious words against the Vice-Chancellor. One of the grounds of objection raised by Mr. Bentley was that in the Vice-Chancellor's Court he was not summoned which was against natural justice and against law of God and man. At page 819, the learned Judges held that:

"This is a very proper mandamus for it is to restore a member of a great corporation to a great office, a dignity and a free-hold. First an office that concerns the Government of a corporation and so agreed in the return. And is not the Government of so great an University as Cambridge of as great concern as the Government of a poor borough?"

The mandamus was issued on the only ground that the petitioner was not summoned in the Court. There is no analogy on facts between this case and that before me but this decision was relied upon by the learned counsel for the petitioner in support of his contention that an order made which is against natural justice and against the law of God and man is bad. 'Ezra v. Mahendranath', ILR (1946) 2 Cal 88, relates to the expulsion of a member from the masonic conclave. The expelled member filed a suit for a declaration that the expelling resolution is null and void and that he is still a member of the conclave and for an injunction restraining the respondent and other officers and members of the conclave from preventing him from participating in its management and exercising his rights and privilege as a member. As notice of the charge that the petitioner has instituted criminal proceedings against a brother masonic was not given to him, the learned Judges in that case held that the appellant was not properly, correctly and legally expelled. This case does not relate to a writ of mandamus and does not really afford any guide. It is relied upon only for the purpose of showing that expulsion without giving notice of charges for which one is expelled is contrary to the principles of natural justice and is therefore bad in law. The decision in 'Ambalal Sarabhai v. Phiroz H. Antia', AIR (26) 1939 Bom 35. relates to a club. A member of the club had been expelled by a resolution of the members of the club. The requisition for the meeting gave no reasons whatever for the expulsion nor was there any correspondence between the plaintiff and the Managing Committee or Honorary Secretary or any member with respect to the reasons for the expulsion. The expelled member did not attend the meeting. The Court held that the action on the part of the members of the club offended against the elementary principle of natural justice and reason and justified interference by a civil Court and the plaintiff was entitled to the relief claimed by him. This decision also does not really bear on the question to be decided. The question arose in a suit, the institution concerned is a Club and the expulsion made therein was contrary to all the principles of natural justice. But a case reported in 'Woods v. Simpson', 39 American L R 1016, is very instructive. There a girl student of the University of Maryland was refused admittance to the third year of work after she had finished the first two years. This girl student was not readily submissive to the rules and regulations and that during her two years at the University she was, to a considerable extent. in conflict with the authorities who had her in charge. It appears that a Washington newspaper was supplied with a report professing to

have been furnished by the girl students of the college to the effect that men officials of the University were making objectionable suggestions to girl students and otherwise exhibiting a wrong moral attitude towards them. Unlike what generally happens in the Colleges of our State, a students mass meeting passed a resolution of confidence in the administration, denying the report and all voting in favour of the resolution except the petitioner and one other. The Principal invited the petitioner and asked her whether or not she had sent the report. She replied that she could not answer that question. As she did not comply with that request, she was transferred to some other University. She brought proceedings in Baltimore for the issue of a writ of mandamus to compel the officers of the University of Maryland to permit her to continue her course. The City Court of Baltimore issued the mandamus but on appeal that order was set aside by the appellate Court. The following observations of Bond, C. J., may usefully be stated:

"The maintenance of discipline, the upkeep of the necessary tone and standards of behaviour in a body of students in a college is of course a task committed to its faculty and officers, not to the Courts. It is a task which demands special experience and is often one of much delicacy, especially in dealing with girl students and the officers must of necessity be left untrammelled in handling the problems which arise as their judgment and discretion may dictate, looking to the ends to be accomplished. Only in extraordinary situations can a Court of law ever be called upon to step in between students and the officers in charge of them. When it is made clear that an action with respect to a student has not an honest exercise of discretion, looking to the proper ends, but beyond the limits of that discretion or arising from some motive extraneous to the purposes committed to that discretion, the Courts may be called upon for relief. In such case the officials have, as it is sometimes stated, acted arbitrarily or abused their discretion and the Courts may be required to remedy that."

(14) Another case which also throws much light on the question is 'Lakshmikant Shripat v. C. R. Gerrard', AIR (34) 1947 Bom 193. In that case a young man named Lakshmikant Shripat Bhandare was a student of the J. J. School of Arts. He filed an application in the Bombay High Court under S. 45 of the Specific Relief Act and asked for an order directing the respondent who was a Director of the Institution to forbear from enforcing an order purporting to expel him from the J. J. School of Arts and from preventing the petitioner from attending the said school. The application was dismissed on the preliminary ground but the learned Judge proceeded to consider the other questions raised. At page 196, Blagden ,J., says:

"It is perfectly true that the headmaster of a school or the principal of a college in the administration of his establishment has not got arbitrary and unfettered powers to expel students as and when he thinks fit or even to do so merely because he thinks that the interests of the institution require their expulsion. He cannot for example expel a pupil merely because he dislikes his appearance or even because he thinks, disregarding the interests of the pupil, that the school would be a better place without that pupil. He is bound to take into account the interests both of the particular pupil and of the other pupils. There is no indication in the present case that there has been any departure from that course."

(15) At page 198 the learned Judge proceeds to state that:

"that case alone seems to me to show that continued defiance of scholastice discipline is a thing in itself quite inconsistent with the relationship which ought to exist between the teacher and the taught and if persisted it can only result in the pupil's being dismissed, for if it continues it must completely undermine the teacher's authority over other pupils."

(16) The following principles emerge from a consideration of the aforesaid case-law on the subject: (i) Though the provisions of Art. 226 of the Constitution of India are apparently wide, directions in the nature of a writ of mandamus should not issue except to a public or quasi-public body or officer which is under an obligation, statutory or otherwise to do or refrain from doing anything and which is likely to interfere with the rights of persons (ii) A student studying in a College has a personal right to continue to study therein till the course is completed or he has otherwise been removed or expelled in strict compliance with the rules governing the institution. (iii) The Principal of an institution maintained from the funds of a public trust contributed from public funds affiliated to the University and governed by the rules of the University, and the scheme framed by the High Court is certainly a person holding a quasi public office; (iv) The maintenance of discipline, the upkeep of the necessary tone and standards of behaviour in a body of students in such a college is primarily entrusted to the Principal or other officers of the institution. The High Court will not interfere with the discretion of such an authority unless it is clearly established that the authority concerned has not honestly exercised the discretion, actuated by some motive extraneous to the purpose committed to their discretion. To put in other words, the High Court will not interfere unless the authority concerned acted arbitrarily or abused his discretion; (v) The principle of natural justice is an elastic conception especially when applied to educational institutions. It is wrong to import the conception of "lis" in the dealings of a Principal with his students. The Court will alone interfere, if it be satisfied on a consideration of the entire material placed before it that the action of the authority concerned is arbitrary, is due to a mala fide exercise of discretion actuated by extraneous circumstances.

(17) Following the aforesaid principles, can it be said in this case that the principal of the College acted arbitrarily in the exercise of his discretion or actuated by any extraneous circumstances? The learned counsel for the petitioner rightly conceded that he could not ask the Court to go into the correctness or otherwise of the action taken by the principal. Nor does he pursue the line suggested in the affidavit that he was actuated by extraneous circumstances. But he pressed on me to hold that the order directing his client to leave the College was made behind his back without giving him an opportunity to explain the charges made against him and therefore is arbitrary. But a perusal of the records does not disclose that the principal acted arbitrarily. I have no hesitation to accept the facts, as stated in the Principal's affidavit especially as some of the said facts were corroborated in all the material particulars by the affidavits filed by the Assistant Lecturers. The petitioner had been expelled once from the hostel. As early as 19-7-1950, the Principal complained to the petitioner's father that the petitioner's behaviour was not as it should be. On 12-7-1951 at 3-30 p.m., the principal says he took him to his room and questioned him about his unseemly behaviour but the petitioner complained against the office staff. On the 12th itself the staff of the College including two of the lecturers made statements to the Prin-

cipal narrating the particulars of his behaviour in the office. On the 17th the college council made an enquiry, listened to the report of the principal and unanimously resolved to send the petitioner out of the college. On the 18th at 11-15 a.m., the respondent sent for the petitioner who was in his class room but he did not turn up. At 11-45 a.m., the principal went to the class room and brought him to his chambers. When he put to him all the facts as stated to him by the clerks and the other members of the staff, the petitioner totally denied that he abused anybody or created any scene and turned round and called the head clerk a liar and also the respondent a liar. As the petitioner refused to take the certificate and did not leave the room, the class had to be dispersed that day. On the 19th, a demonstration by 100 students was held in the college premises and the college had to be closed that day. I cannot say from the aforesaid circumstances that the principal acted arbitrarily. If so, as the principal is the authority to exercise disciplinary jurisdiction, he was within his rights to ask the student to leave the college.

(18) I do not see much force in the argument of the learned counsel for the respondent that this Court has no power to issue a writ as the petitioner can file a suit for declaration of his right. Such a remedy cannot be an adequate remedy for by the time the suit is disposed of, the term of the college may run out.

(19) But before closing, I would not be doing my duty if I did not express the feeling that oppressed me during the arguments and of which I gave expression on more than one occasion that the object or discipline might have been better served if the principal had accepted the unconditional apology agreed to be tendered by the student and the undertaking by the father guaranteeing the future good conduct of his son, and magnanimously pardoned him as a father would do his son rather than putting a seal of finality of the punishment inflicted by him. That would have enhanced the prestige of the principal and of his college in the eyes of not only his students present and future but also the public. Though it is not within my province to dictate what the principal should or should not do to meet a particular contingency I express my view for the consideration of the Principal and the College Council.

(20) In the result, the application is dismissed, but in the circumstances without costs.

C.R.K./R.G.D. *Application dismissed.*

A. I. R. (39) 1952 MADRAS 157 (C. N. 67)

MACK AND SOMASUNDARAM, JJ.

In re Kondiddasu Appalaswamy, Detenue, Petitioner.

Criminal Miscellaneous Petition No. 1716 of 1951, D/- 27-8-1951.

Preventive Detention Act (1950), S. 3 (1), (a), (iii) — Detention under — Validity — Smuggling and black-marketing in rice if prejudicial to maintenance of supplies and services essential to the community.

The petitioner was arrested and detained under S. 3 (1) (a) (iii), Preventive Detention Act, for action prejudicial to the maintenance of supplies and services essential to the community. The grounds of detentnion served on him alleged that the petitioner was smuggling rice into his mill and was carrying on black-marketing activities in rice on a large scale in the course of which he was estimated to have made illegal profits amounting to about five lakhs of rupees.

'Held' that the grounds alleged against the petitioner came within the scope of S. 3 (1) (a) (iii), Preventive Detention Act and as such the detention was not illegal. (Para 5)

K. S. Jayarama Ayyar for G. K. Venkatanarasimhan, for Petitioner.

MACK, J.: Petitioner, Kondidasu Appalaswami was arrested on 2-8-1951, i.e., rather more than three weeks ago and detained for action prejudicial to the maintenance of supplies and services essential to the community under Section 3 (1), (a), (iii) of the Preventive Detention Act of 1950. The grounds of detention were served on him on 4-8-1951. We are precluded from going into the truth or the adequacy of the grounds. It is sufficient to say that they constitute a grave indictment of the petitioner, who is said to have organized black-marketing activities in rice to an alarming extent in the course of which he is estimated to have made illegal profits amounting to about five lakhs of a subterranean nature not brought into his regular accounts and registers, on which no income-tax has of course been paid.

(2) The petition is supported by an affidavit by petitioner's brother's son Surya Rao according to which he and his uncle are the proprietors of the Sri Ganeswara Rice and Oil Mills at Payakaraopeta in Vishakapatnam District. It is on the bank of the Tandava river which, it would appear, is strategically situated for black-marketing activities in rice near Tuni Town in the delta and rice producing District of East Godavari. His 'modus operandi' as described in the grounds of detention is the smuggling of rice into his mill from the East Godavari District by employing hundreds of persons for this purpose, who bring paddy to his mill in diverse ways across the river by head-loads, boat, bullock-cart and also by train, all paid for in spot cash. This rice is said to have been transported in lorries and carts at the rate of a thousand bags a day to feed the black-market in various towns in Vishakapatnam District. At an inspection of his mill on 6-6-1951. large variations in the stock book and in the actual stock in the mill are said to have been discovered, and according to slips found in the mill unauthorised purchases of paddy to the extent of 280 bags for over Rs. 17,000/- that day alone detected. The grounds contain further specific instances of alleged unauthorised transport of paddy by petitioner by lorry in June 1951 and also refer to several specific persons, who carried the paddy from East Godavari to his mill.

(3) According to the affidavit supporting the petition, the petitioner is a license-holder under the Madras Food-Grains Control Order and also under the Madras Rice Mills Licensing Order 1941 entitled to purchase any quantity of paddy and store rice in the mill premises after milling, and to sell it to "appropriate persons" in Vizagapatnam, which is a derationed district. The affidavit urges that the petitioner was one of "the leading citizens" of the locality, that the order of detention is an abuse of power by the authorities and that he has done nothing illegal.

(4) Mr. Jayarama Ayyar, who appeared for the petitioner, has urged that the activities set out in the grounds cannot be said to be prejudicial to the maintenance of supplies 'and' services essential to the community. His argument, as we understand it, is that though smuggling of rice may be prejudicial to the maintenance of supplies, it cannot be said to be prejudicial to "services essential to the community." (His Lordship referred to two decisions, 'Bhaktawar Singh v. The State', AIR (38) 1951 Simla 157 and 'Misrilal v. The State', AIR

(38) 1951 Pat 134, and held them not useful for the purpose of the case before the Court).

(5) Reverting to the present petition, there can in our opinion be no douot at all that the grounds come within the scope of Section 3 (1), (a) (iii). The Food Department and a vast system of food control have come into existence for the specific purpose of providing food for the community on an equitable and rationed basis with a view to seeing that so far as humanly possible no deficit areas perish from starvation. Mr. Jayarama Ayyar seeks to confine essential services to services such as the Railways, electricity undertaking and so on. But it appears to us that the services of a specially created department and of Executive Officers under it and the Revenue Department directly charged with the responsibility of carrying out orders having the force of law for the satisfaction of that most vital of all human essentials, viz., food, far from being non-essential, transcend in fact in importance all other forms of "essential services." We can see no substance in the point of law raised.

(6) Mr. Jayarama Ayyar has urged that the correct course for the Government is to prosecute the petitioner directly under the Criminal Law for the many alleged offences he has committed. We are in complete agreement and presume there will and consider that there should be such a prosecution, mere preventive detention being quite inadequate punishment for so shocking an indictment of black-marketing activity as that disclosed in the grounds. We are of the opinion that not only in fairness to the petitioner but in wider public interests, the petitioner should be prosecuted criminally and as expeditiously as possible on the grave charges in this comprehensive indictment, within the ambit of Criminal law. It is true that detention under the Preventive Detention Act is essentially preventive and not punitive. But we have no reason to infer that the object of this detention is not essentially preventive, viz., to put a summary stop to black-marketing activities such as those disclosed in the grounds. We can see no legal impediment to a person being detained under the Preventive Detention Act, and while under such detention, answering serious criminal offences, he is alleged to have committed in a Criminal Court of law. We would rather strongly deprecate any line of least resistance being taken in such cases and the Preventive Detention Act used, if not abused, merely to detain persons on grounds such as those alleged against the petitioner and not to prosecute them through the ordinary Courts, so that they may be acquitted if innocent and drastically punished if guilty, for black-marketing offences such as those disclosed in the indictment.

(7) In the affidavit it is alleged that the petitioner is a leading citizen. Our Courts are today cluttered as never before in their history with masses of cases against comparatively "small persons for violating food control laws and regulations, prohibition laws and other special laws. It is our opinion that if a leading citizen, such as the petitioner claims to be, is, in fact guilty of black-marketing activities and offences on the scale alleged in the indictment, his moral turpitude only becomes the grosser by reason of his prominent position in society, and the sterner and the more rigorous should in consequence be his punishment, if convicted in a criminal Court.

(8) According to the grounds, the black-marketing activities of the petitioner have gone on for some considerable time. With an expression of our pained astonishment that he has been allowed to continue them for so long without being stopped by punitive proceedings, we dismiss this petition summarily.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (39) 1952 MADRAS 158 (C. N. 68)

RAMASWAMI, J.

S. Arunachala Goundan, Petitioner v. K. S. Akhileshwara Ayyar; Respondent.

Criminal Revision Cases Nos. 880 and 865 of 1951, D/- 17-10-1951.

Criminal P. C. (1898), Ss. 179 and 181 (2) — Charge of criminal misappropriation — Venue of trial.

Where the charge is of non-accounting and there is no specific allegation of misappropriation in any particular place the venue of the trial will be the place where the accounting has got to be done and has not been done. AIR (18) 1931 Cal 528; AIR (21) 1934 Cal 392; AIR (23) 1936 All 193; AIR (25) 1938 Rang 94, Rel. on; AIR (29) 1942 Cal 575, Diss. (Para 8)

Where the accused who was constituted an agent of the complainant for the purpose of making collections regarding the distribution of a certain picture in the State of Travancore and was to remit the sums to the complainant in Coimbatore district and the accused failed to remit the amounts and was not accounting for the same.

'Held' that the Coimbatore Court had jurisdiction to entertain the complaint regarding the mis-appropriation of the amounts. (Para 9)

Anno: Criminal P. C., S. 179, N. 5; S. 181, N. 7.

V. Rajagopalachari and R. V. Raghavan, for Petitioner; A. Santhanam, for Public Prosecutor, for State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('35) 58 All 644: (AIR (23) 1936 All 193:37 Cri L J 284) (Pr 6)

('32) 59 Cal 92: (AIR (18) 1931 Cal 528:32 Cri L J 1167) (Pr 4)

('34) AIR (21) 1934 Cal 392: (35 Cri L J 734) (Pr 5)

('42) AIR (29) 1942 Cal 575: (44 Cri L J 132) (Pr 8)

('38) AIR (25) 1938 Rang 94: (39 Cri L J 529) (Pr 7)

ORDER.: This criminal revision petition has been filed against an order refusing to entertain a complaint within the limits of Coimbatore district on the ground that it should have been filed within the limits of Travancore-Cochin State.

(2) The brief facts are: The complainant and the accused were parties to a civil suit numbered as O. S. No. 217 of 1950, District Munsiff's Court, Coimbatore. They entered into a compromise under which the accused was constituted agent for the purpose of making collections for the complainant in regard to the distribution of a picture called "Mangayarkarasi" in the State of Travancore and that the accused was to remit the sums to the complainant in Coimbatore district. There had been default and it is stated that the accused had been swindling moneys and was not accounting for the same. Therefore the complaint was laid in Coimbatore.

(3) The learned Sessions Judge citing five decisions held that the complaint ought to be laid in Travancore State and not in Coimbatore and dismissed the revision petition filed by the complainant whose complaint was returned by the First Class

Magistrate, Coimbatore, under S. 201, Criminal P.C. for want of jurisdiction.

(4) On going through the decisions I find that out of five four in fact support the contention of Mr. V. Rajagopalachari that the complaint ought to have been laid only in 'Coimbatore. In 'Paul De Flondor v. Emperor', 59 Cal 92, it has been held that where there is no evidence to show that the alleged misappropriation was committed, other than the fact of non-accounting, the venue may be laid in the place where the accused failed to account which here as per the razinama is Coimbatore.

(5) In 'Prokash Chandra v. Mohim Chand', AIR (21) 1934 Cal 392, it was held that where there was no definite allegation of misappropriation having been committed in any particular place in respect of a sum which forms the subject-matter of a case but the allegation is merely of non-accounting as here, in respect of the same, failure to account may itself be taken as evidence of intention to misappropriate and the offence of misappropriation is deemed to have been committed at the place at which the accused ought to have rendered the accounts and which is Coimbatore in this case.

(6) In 'Emperor v. Mohrulal', 58 All 644, it has been observed that where it is alleged that the accused has failed to account for the property then the second part of S. 405, will apply and jurisdiction exists at the place where the property should have been delivered by the accused.

(7) In 'Vasanji Khimjee v. Kanji Tokersey', AIR (25) 1938 Rang 94, it was held that the complaint must be laid where the accused had failed to do the thing which he was required to do and which in this case was the accounting to be done at Coimbatore.

(8) The only case which is found to be unfavourable to the complainant is that in 'Daityari Tripetti v. Subodh Chandra', AIR (29) 1942 Cal 575, where on different set of facts it was held that S. 181 (2) Criminal P. C., does not confer jurisdiction on a Court at a place where the accused has failed to account or dispose of property as per contract. In view of the other four decisions which commend themselves to me, I respectfully disagree with the last mentioned decision and hold that where the charge is of non-accounting and there is no specific allegation of misappropriation in any particular place the venue of the trial will be the place where the accounting has got to be done and has not been done.

(9) In these circumstances I hold that the complaint can be entertained by the First Class Magistrate, Coimbatore. The orders of the lower Court are set aside and the First Class Magistrate is directed to entertain the complaint and proceed to dispose of it in accordance with law.

C.R.K. /K.S. *Order set aside.*

A. I. R. (39) 1952 MADRAS 159 (C. N. 69)

RAMASWAMI GOUNDER J.

Sha Ganraj Poonamchand, Petitioner v. V. P. Venkataratnam Chetti, Respondent.

Civil Revn. Petn. No. 778 of 1951, D/- 31-8-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XV (15) of 1946) Ss. 7(2) Proviso, 12B, 24 — S. 12B — Retrospective effect. S. 24 specifically makes the provisions of the Amendment Act applicable only to applications appeals and other proceedings pending at the commencement of the Act and not disposed of before the Act came into force. It cannot be contended that the Explanation to S. 12B under which the High Court is given revisional jurisdiction even in respect of orders passed six months earlier necessarily means that all the other provisions of the Act are to be applied even in a case which is not pending at the commencement of the new Act but disposed of before the Amendment came into force. Where the order of the appellate tribunal was made in April 1951 the case cannot be sent back to the tribunal for a finding whether the default was wilful or not, so that the discretion under S. 7(2) proviso might be exercised in case it came to the conclusion that the default was not wilful. (Para 2)

P. S. Kothandapani, for Petitioner; C. Srinivasan and P. Venkataswami, for Respondent.

ORDER: This revision is filed against an order passed by the Small Cause Judge, Madras, in appeal against the order of the Rent Controller evicting the present petitioner from the premises. The respondent is the owner of the premises, and he filed the application for eviction on the ground that the petitioner did not pay the rent due for March 1950. The contention of the petitioner was that as usual he had paid the rent for that month also by sending a cheque dated 11-4-1950, and that in the ordinary course it must have reached the landlord. But both the Courts have not accepted that case and have found that there was a default in the payment of rent. The Rent Controller therefore passed an order of eviction, which has been confirmed by the Appellate Tribunal.

(2) The contention before me is that under the new S. 12-B introduced by the Amendment Act of 1951 which came into force on the 1st May 1951, this Court is given revisional jurisdiction even over the orders passed by the subordinate tribunals six months before the commencement of the Amendment Act, and that the order of eviction should not have been passed, under the proviso to Sub-s. (2) of S. 7 of the Act, without a finding whether the default was wilful. According to that proviso, if the default was not wilful, then a discretion is vested in the tribunal to give a reasonable time not exceeding 15 days before making the order of eviction. The contention, therefore, is that in this case the order of the tribunal was made before the coming into force of the Amendment Act, and so the case must go back to it for a finding whether the default was wilful or not, so that the said discretion, might be exercised in case it came to the conclusion that the default was not wilful. But it will be seen that S. 24 of the Act makes the provisions of the Amendment Act applicable only in respect of applications made or appeals preferred or other proceedings instituted under the old Act and pending at the commencement of the Amendment Act. The present case was one instituted under the old Act, but was not pending at the commencement of the Amendment Act, for the order of the Appellate Tribunal was made in April 1951. But the learned counsel for the petitioner contends that the Explanation to S. 12 B under which this Court is given revisional jurisdiction even in respect of orders passed six months earlier necessarily means that all the other provisions of the Act are to be applied even in a case which is not pending at the commencement of the new Act but disposed of, as in this case, before the new Act came into force. But this argument seems to be opposed to the provisions of S. 24, for it specifically makes the provisions of the new Act applicable only to applications, appeals and other proceedings pending at the commencement of the new Act and not disposed of before the new Act came into force. That being so, I consider that the proviso to sub-s. (2)

of S. 7 cannot be invoked by the present petitioner, with the result that there being no other point raised, this revision must fail.

(3) But the learned counsel for the petitioner makes an appeal that his client may be given some time to vacate the premises. Having regard to the fact that he has been occupying the premises for a number of years and also the fact, which seems to be correct, that except for this particular month he has been regular in the payment of rent, I think some such indulgence by way of extending the period of eviction till the end of this year may be shown. The revision petition is therefore dismissed with costs, but the order of eviction will not be enforced during the year 1951.

C.R.K./D.H. *Revision dismissed.*

A. I. R. (39) 1952 MADRAS 160 (C. N. 70)

PANCHAPAKESA AYYAR J.

Sri Dhana Lakshmi Ginning and Rice, Oil Working Co., Mangalagiri, Petitioner v. Yelukuru Yellappa Chetti, Respondent.

Civil Revn. Petn. No. 202 of 1950, D/- 9-2-1951.

(a) Civil P. C. (1908), O. 9 R. 13 — When a decree can be said to be ex parte.

In a suit the plaintiff's witnesses were examined and cross-examined. The defendant who was present with his vakil took an adjournment for the next day for producing his witnesses and examining them. But on the next day he was absent; he sent a telegram stating that he and his witnesses were all ill and asked his vakil to take an adjournment. This adjournment was refused by the Court, upon which the vakil reported "no instructions". The Court then gave judgment on merits.

'Held' that the judgment was an 'ex parte' judgment and not on merits; but that the defendant who was trying to set aside the 'ex parte' judgment deserved to be drastically dealt with such as by imposing a heavy solatium. (Para 2)

Anno: C. P. C., O. 9 R. 13 N. 6.

(b) Practice — Statements of facts in judgment of lower Court if can be attacked.

It will be against public policy to allow counsel arguing the case in the High Court to attack 'statement of fact' in judgments of judicial officers, as that will be dragging the judicial officers into an unnecessary and undignified controversy in which they cannot take part. (Para 2)

C. V. Dhikshitalu, for N. Rammohan Rao, for Petitioner; A. Ranghaviah, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian cases).

('99) 22 All 66: (1899 All W N 176 F B) (Pr 2)
('25) AIR (12) 1925 All 182: (47 All 181) (Pr 2)
('07) 34 Cal 403: (5 Cal L J 247 F B) (Pr 3)
('32) AIR (19) 1932 Lah 477: (138 Ind Cas 200) (Pr 2)
('35) 58 Mad 817: (AIR (22) 1935 Mad 210) (Pr 2)
('48) 1948-1 Mad L J 65: (A I R (36) 1949 Mad 78) (Pr 2)

JUDGMENT: This is a petition to revise the order of the District Judge, Krishna, at Masulipatam, dated 21st November 1949, in C. M. A. No. 26 of 1949, restoring C. M. P. No. 383 of 1949 a petition to set aside the 'ex parte' decree in O. S. No. 164 of 1946. a suit involving some Rs. 4000 on the file of the Sub-Judge, Vijayyawada. The Additional Subordinate Judge, Mr. Narayanamurthi, decreed the suit on 10th December 1948, and he considered that he had decided the suit on merits on the evidence available. The civil miscellaneous petition was filed on 27th December 1948 and was dismissed by the Additional Sub-Judge on 9th April 1949 on the ground that an application under O. IX, R. 13 Civil P. C. would not lie as it was not an 'ex parte' decree. The District Judge held that O. IX R. 13 Civil P. C. would apply to the decree in the facts of the case, and remanded the civil miscellaneous petition for disposal 'on merits' directing the costs in the civil miscellaneous appeal to abide the result in the lower Court of the remanded civil miscellaneous petition.

(2) The facts are rather interesting. The defendant, Yellayya Chetti, was present with his vakil in the Sub-Court on 9th December 1948 when the suit plaintiff's witnesses in the suit were examined and cross-examined. He took an adjournment for the next day for producing his defence witnesses and examining them. But, on 10th December 1948, to which date the suit stood posted for examining his witnesses at his own request, he was absent. He sent a telegram stating that he and his witnesses were 'all ill', and asking him to take an adjournment from Court that day so that he might attend Court with his witnesses on the adjourned date and examine them. The Sub-Judge naturally 'refused an adjournment' as the defendant had taken an adjournment from him 'to that date' for producing and examining his witnesses and had then sent a mere telegram like this without any medical certificate. The learned counsel for the defendant found himself, after the refusal of the adjournment, at a loose end, with no witnesses to examine and no client to instruct him. His client had only wired to him to apply for an adjournment and had not authorised him to go on with the suit. So he reported "no instructions", though the learned Subordinate Judge, in his order set aside by the learned District Judge, omitted to note it, and noted the name of the vakil in the judgment passed that day in that suit as if he had taken part in the trial that day. This matter becomes very relevant for considering whether the judgment delivered that day by the learned Subordinate Judge was an 'ex parte judgment' or 'a judgment on merits'. Mr. Dikshitalu, for the petitioner in this civil revision petition, fairly conceded that it would be an 'ex parte' judgment if there had been a report of "no instructions", and not taking part in the trial that day by the defendant's vakil. That will be so in view of the decisions in 'Ram Adhin v. Ram Bharosa', A I R (12) 1925 All 182 and 'Madan Gopal v. Budhu', A I R (19) 1932 Lah 477. Mr. Dikshitalu, however, urged that the vakil's endorsement of the "no instructions" was not recited in the Subordinate Judge's order dated 9th April 1949 in the civil miscellaneous petition, and that the District Judge, though he referred to it in para 4 of his judgment, did not hold further that the vakil had only instructions to apply for an adjournment and that he had not taken any further part in the trial that day. The learned District Judge has said "But it is seen from the records that on that day he had filed a memo representing 'no instructions'." I am satisfied that the defendant's vakil took no part in the 'trial' that day, and that his name was wrongly noted in the judgment. It is clear to me that when a vakil is asked by his client by wire merely to take an adjournment, and he applies for an adjournment and it is refused, and he reports "no instructions" on the adjournment being refused if the Court proceeds to deliver judgment, it can only be an 'ex parte' judgment and not one on merits, even if the Court purports to deliver a judgment 'on merits'. The two rulings quoted above and the

rulings in 'Satish Chandra v. Ahara Prasad', 34 Cal 403 (F B) and 'Lalta Prasad v. Nanda Kishore', 22 All 66 will show this. No doubt in such a case, the party trying to set aside that 'ex parte' judgment must be drastically dealt with, especially when the plaintiff had let in all his evidence and the Court believed that it was delivering a judgment 'on merits', so that he may not repeat such tactics, of promising to come with his witnesses on a certain day and taking an adjournment for that specific purpose and not coming on that day and sending a mere telegram alleging "all-round illness' to his vakil instead. The learned counsel for the defendant frankly conceded that the defendant in the circumstances of this case, deserved to be punished for his laches by imposing a heavy solatium even for getting a remand like the one the learned District Judge gave. Mr. Dhikshitalu's contention that it cannot be taken as proved that the defendant's vakil reported "no instructions" on 10th December 1948, and took no part in the trial that day, cannot be upheld because there is not only a definite assertion by the learned counsel for the defendant before me that the defendant's vakil did report "no instructions" in the Sub Court on 10th December 1948 and took no part in the trial that day, but there is also a recital by the learned District Judge to that effect in his judgment 'after perusing the records and seeing a memo of the defendant's vakil'. A remark to that effect in a judgment of an appellate judicial officer, like a District Judge, cannot be attacked as unreliable or incorrect simply because the subordinate judicial officer who tried the case does not refer to the memo or the endorsement of "no instructions". Mr. Dhikshitalu was not prepared to deny the existence of such a memo on record, or to attack it as a subsequent fabrication or interpolation. It will be against public policy to allow counsel to attack 'statement of fact' in judgments of judicial officers, as that will be dragging the judicial officers into an unnecessary and undignified controversy in which they cannot take part. A reading of the Subordinate Judge's order in the civil miscellaneous petition shows that he delivered the judgment only on the available evidence left with him; that is not inconsistent with the defendant's counsel's reporting "no instructions" in a memo like that and ceasing to take any part in the trial that day. In that view, the rulings in 'Govindarajulu v. Imperial Bank of Vellore', 58 Mad 817 and 'Dakshinamurthi v. Ponnusami', 1948-1 Mad L J 65 will not apply to the facts of this case, as the defendant was not really represented in Court on 10th December 1948, and he and his Vakil took part in the trial that day. So the learned District Judge's order of remand deserves modification only in one respect, viz., the saddling of the respondent-defendant with a substantial condition precedent solatium calculated to punish him for his laches before granting him the luxury of a remand in a case like this where the judgment and decree had been passed by the Sub Judge after discussing the entire available evidence on record and on the basis that it was a judgment 'on merits' because of the defendant's failure to bring the witnesses that day as promised. His counsel has no objection to the imposition of a solatium of Rs. 100 as a condition precedent. He merely wants a Sub Judge of Vijayawada Sub Court other than Mr. Narayanamurthi, who must have formed an opinion even about the merits, to hear the remanded civil miscellaneous petition — not an unreasonable request in the circumstances.

(3) In the end, therefore, I pass an order on terms; I direct the respondent to pay the counsel for the petitioner, by 3 p.m. on the 15th March 1951 a consolidated sum of Rs. 100 (Rs. one hundred) which will not be costs in this petition or in the civil miscellaneous petition or in the suit or in any other proceedings whatever, to compensate the petitioner for the waste of time, money and energy caused to him by his laches. On such payment by such date, the order of the learned District Judge remanding the civil miscellaneous petition for fresh disposal will stand, and this revision petition will stand dismissed without costs. On failure to pay the said amount by such date, the judgment and decree of the learned District Judge remanding the civil miscellaneous petition for fresh disposal will be set aside and this petition will stand allowed without costs. The remanded civil miscellaneous petition (if the condition imposed above is satisfied) will be heard by some Subordinate Judge of Vijayawada Sub-Court other than Mr. Narayanamurti who heard it before, as requested by the learned counsel for the respondent. Of course, I say nothing about the merits of the civil miscellaneous petition or the desirability or otherwise of setting aside the 'ex parte' decree. All that will depend on the evidence and findings at the remanded hearing.

C.R.K./V.S.B. *Order accordingly.*

A. I. R. (39) 1952 Madras 161 *[C. N. 71.]*

GOVINDA MENON, J.

Parol Abu Packer, Appellant v. Pokkyarath Sivasankara Kurup, Respondent.

A. A. A. O., No. 218 of 1950, D/- 27-4-1951.

Civil P. C. (1908), S. 51, Proviso — Opportunity to show cause.

Before an order for arrest is made, the judgment-debtor should be given an opportunity of showing cause why he should not be arrested. Otherwise the order of arrest is unsustainable and must be set aside. *(Para 1)*

Anno: C. P. C., S. 51, N. 5a,

S. Venkatachala Sastry, for Appellant; K. Kuttikrishna Menon and V. Balakrishna Eradi, for Respondent.

JUDGMENT.: It is clear that before the appellant was ordered to be arrested, no notice was given to him and therefore the order of the learned Judge to the effect, viz., "means proved, arrest by 6th June 1950" cannot be justified in view of the proviso to Section 51 of the Civil Procedure Code, which lays down that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, etc. So it is clear that before an order for arrest is made, the judgment-debtor should be given an opportunity of showing cause why he should not be arrested. The preamble to the District Munsiff's order clearly states that the respondent has been given no notice at all. Such being the case, the order appealed against is unsustainable and has to be set aside. I set aside the orders of the lower Courts and remand R.E.P. No. 112 of 1950 to the trial Court for restoration to its original number on the file and disposal, after giving notice to the respondent, expeditiously. As this point was not taken in the lower Court, nor even in the grounds of appeal to this Court, I direct each party to bear his own costs in this second appeal.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 Madras 162 *[C. N. 72.]*

PANCHAPAKESA AYYAR, J.

The Public Prosecutor, Appellant v. K. V. K. Ramasami, Respondent.

Criminal Appeal No. 122 of 1950, D/- 15-3-1951.

Iron and Steel (Control of Production and Distribution) Order (1941), Clause 8 — Permit for iron for specific purpose — Accused not using it for that purpose — Burden of proof — Evidence Act (1872), S. 106 — Essential Supplies Temporary Powers Act (1946), S. 7 (1) and 17 (2).

The accused was granted a permit for iron for the specific purpose of making additions to a school of which he was the Secretary. He agreed under the permit to use the materials for that specific purpose and in case the purpose ceased to exist to return the permit to the officer concerned. The accused purchased the goods on the permit through another person but the materials were not used for that purpose. In a prosecution of the accused for contravening Clause 8 of the Order the prosecution failed to prove where the materials were and how they had been misused:

'Held' that the accused must be held guilty of the offence unless he proved that he had utilised the materials for the specific purpose. It was a fact within his special knowledge which he was bound to prove under Section 106, Evidence Act, and simply because the prosecution failed to prove the misuse of the materials he could not escape from the liability. (*Paras 4, 6*)

Anno: Evidence Act, S. 106, N. 2.

Public Prosecutor in Person; P. S. Kailasam, for Respondent.

JUDGMENT.: This appeal is by the Madras State against the acquittal of one Ramaswami, the accused in C. C. No. 155 of 1949, by the Sessions Judge of Salem in C. A. No. 174 of 1949, and shows the utility and importance of Section 106 of the Indian Evidence Act in certain cases. This Ramaswami, as the Secretary of the village school building committee, Pattanam, Salem district, has admittedly, been given 2½ tons of M. S. Rounds 5/8" from one S. Kuppuswami Chetti of Madras (P.W. 1's firm), for making certain additions and constructions in an elementary school in Pattanam village. He agreed, under the permit, that he would utilise the material that was allowed to be purchased by him for the purpose above-mentioned and that he would return the permit to the Director of Industries and Commerce and the Provincial Iron and Steel Controller if the purpose for which it had been issued ceased to exist, and the permit was made valid for 30 days from the date of its issue, namely, 6-1-1949. Admittedly, he bought the goods through P.W. 2 from P.W. 1's firm on 25-1-1949, after endorsing the permit in his favour. P.W. 2 swore that he was given Rs. 875-15-6 and the permit by the accused and that he bought the articles from P.W. 1 and put them in a cart and was taking them to the railway station in Madras (Salt Cotaurs) to book them for Salem when the accused met him and took over the articles from him. He was not believed regarding this by the trial Court which, however, convicted the accused under Clause 8 of the Iron and Steel Production and Distribution Order read with Clauses 7 (1) and 17 (2) of Central Act 24 of 1946, holding that he and P.W. 2 must have colluded together to use the goods purchased under the permit otherwise than in accordance with the conditions mentioned in it. It sentenced the accused to pay a fine of Rs. 1,000. It observed that there was no proof that he had disposed of the goods in the black-market with a view to enrich himself. The accused had examined D.Ws. 1 to 3 to show that he had given away the permit to P.W. 2, under the orders of P.W. 5, the President of the School Committee and a relation of P.W. 2, for some money due by the school committee to P.W. 2, for iron articles, weighing 8 cwt. and odd, got already and utilised for the building of the school. He had also said that despite several demands, P.W. 2, failed to deliver to him the goods purchased under the permit and that he intended to proceed against P.W. 2, for breach of trust, regarding these iron goods after this case was over.

(2) On appeal, the learned Sessions Judge, Salem, held that upon the proved facts of evidence and taking them at their face value the accused was entitled to an acquittal as there was no evidence to show what happened to the materials purchased under the permit, Ex. P. 1, by P.W. 2 from P.W. 1, or that they had been disposed of in the black-market or in any improper manner. He relied on the wording of Rule 8 of the Iron and Steel Production and Distribution Control Order, 1941, which runs as follows:

> "A person acquiring iron or steel in accordance with the provisions of Clause 4 shall not use the iron or steel otherwise than in accordance with any conditions contained or incorporated in the document which was the authority for the acquisition."

The learned Sessions Judge set aside the conviction and sentence of the accused as the prosecution had not proved that the accused had misused the materials, and as the permit did not prescribe a time limit for use of the materials and so the accused could still use the materials some day in the future. The State has filed this appeal against the acquittal, urging that the case against the accused Ramaswami has been proved satisfactorily, especially in view of S. 106 of the Indian Evidence Act which was overlooked by the Sessions Judge and which puts the burden of proving the fact of the use or location of the things purchased under Ex. P. 1 on the accused as they are within his special knowledge.

(3) I have perused the records, and heard the learned Public Prosecutor for the appellant, and Mr. Kailasam, the learned Counsel for the accused Ramaswami. There is no doubt in my mind that the learned Sessions Judge was wrong in acquitting Ramaswami in the light of the evidence in the case and in view of S. 106 of the Indian Evidence Act which throws on the accused the burden of proving what became of the materials he brought under Ex. P. 1.

(4) It will be indeed a sad state of affairs if any man taking a permit for steel or iron for a specific purpose, as the accused Ramaswami did, undertaking to use the materials for that purpose and that purpose alone, and to return the permit in case that purpose had ceased to exist, should be allowed to escape all liability and punishment, even though he purchased the materials and even though the purpose has admittedly not been carried out, simply because, though the materials are not accounted for by the man and he gave a false explanation (as the accused did to P.W. 6, the Revenue Inspector when he told him on 17th February 1949, under Ex. P. 12, that he had received the materials and utilised them in full for the school) and simply because the prosecution could not find out where the materials were and how they had been misused. The accused alone had this special knowledge, and he will be liable under S. 106 of the Indian Evidence Act to be convicted of this offence unless he proved that he had utilised the materials for the purpose granted.

Courts should never fail to apply S. 106 to cases of special knowledge and burden, like this.

(5) To allow this accused to escape simply because the prosecution could not show where the materials which this accused bought through P.W. 2, were, and how they were utilised, things which the accused alone knew, will be like allowing a shop servant charged with misappropriating a bottle of wine when taking it to a permit-holder to escape, despite proof of his being entrusted with it for delivery, because the prosecution could not say what became of the wine later on, though it suspects that the wine might have been sold or consumed by the servant but cannot prove it, and the accused, who has special knowledge of it, will not say what became of it! Mr. Kailasam, for the accused, frankly conceded that the materials bought under Ex. P. 1, by the accused through P.W. 2 from P.W. 1, were not utilised for the purpose for which they were applied for, and for which the permit was granted, and also said that there is no intention on the part of the accused to use the materials 'in the future', as he has not got them. The accused said in Ex. P. 12 that he got the materials under Ex. P. 1, and that he utilised them for the purpose mentioned in Ex. P. 1. That is now proved to be false. The accused did not file a complaint against P.W. 2, for failure to give him the materials purchased under Ex. P. 1 from P.W. 1. Obviously he could not be speaking the truth here in the light of his own statement in Ex. P. 12. The irresistible inference is that he used the materials purchased under the permit, Ex. P. 1, otherwise than in accordance with the conditions contained in Ex. P. 1, and he would be guilty as charged. Of course, if he had proved that the materials were swallowed up by an earthquake, or were carried away by thieves, or even misappropriated by P.W. 2 or others without his connivance, S. 106 will not apply and enable the Court to convict him. But he egregiously failed to do so. Even if P.W. 2 and P.W. 5 were liable for abetment of the offence of misuse of the materials granted under Ex. P. 1, by handing them over to P.W. 2 for his use for the debt due to him by the school committee (many committees raise funds by lotteries, contracts, sale of permits, etc., it is said), the accused's liability will not cease. Proof does not mean only proof by 'direct evidence', as proof of sale in black-market, utilisation for another building in a different place by a different person, etc., as the learned Sessions Judge seems to have taken it to mean. It will also include proof by 'indirect evidence.' Indirect evidence, or circumstantial evidence, leading to an irresistible inference of guilt is sufficient for a conviction even in murder cases, and much more so in less grave cases like this.

(6) I am satisfied that the accused Ramaswami has committed the offence charged against him though he has not been proved to have sold the materials in the black-market and enriched himself. It is probable that this village committee owed money to P.W. 2 for the construction already made, and that P.W. 2 was given the permit by the accused illegally, and possibly also with the connivance of P.W. 5, the President, in discharge of his dues, by allowing him to purchase the materials and utilise them himself, unlawfully and in contravention of the conditions in Ex. P. 1. So, I set aside the acquittal of the accused and convict him of the offence charged. Mr. Kailasam pleaded for a very lenient sentence as the accused has only been made a scapegoat of by P.W. 5 and the other committee members and has not earned one pie by this offence. I agree. Considering all the circumstances, and the possible complicity of P.Ws. 2 and 5 also in this offence, and the fact that the accused did not make any profit himself, I sentence him to pay a fine of Rs. 50, or, in default, to undergo rigorous imprisonment for one month, as that will meet the ends of justice in this case, as conceded by the learned Public Prosecutor. Time is granted till 3 p.m., on 30th March 1951 to pay the fine in the trial Court.

C.R.K./K.S. *Appeal allowed.*

A. I. R. (39) 1952 Madras 163 [*C. N. 73.*]

BALAKRISHNA AYYAR, J.

Batcha Sahib, Appellant v. Periyanayagammal; Respondent.

A. A. A. O. No. 113 of 1948, D/- 24-1-1951

Civil P. C. (1908), O. 23, R. 3 — Compromise creating a charge — Want of attestation if affects validity of decree passed on it — T. P. Act (1882), S. 100.

Where a compromise creating a charge is embodied in a decree, the mere fact that the compromise is not attested would not invalidate the decree and the charge created thereby. Want of attestation of the compromise is a mere matter of form which would not affect the substance of the transaction. The decree creates a charge by operation of law and it would not be open to the parties to object to the execution of the decree on ground that the compromise was not attested. AIR (33) 1946 Mad 51; AIR (30) 1943, Oudh 354, (FB) and AIR (30) 1943 Bom 414, Rel. on.; AIR (27) 1940 Nag 163, not followed. (Para 2)

Anno: C P C O 23, R. 3, N 27, 28; T P Act S. 100, N. 28.

K. V. Ramachandra Iyer, for Appellant; V. C. Veeraraghavan, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('43) AIR (30) 1943 Bom 414: (210 Ind Cas 422) (Pr 2)

('45) 1945-2 Mad L J 388: (AIR (33) 1946 Mad 51) (Pr 2)

('41) ILR (1941) Nag 513: (AIR (27) 1940 Nag 163) (Pr 3)

('43) AIR (30) 1943 Oudh 354: (210 Ind Cas 326 FB) (Pr 2)

JUDGMENT.: The document of compromise executed by the parties does not appear to have been before either of the Courts below so that we do not know for certain whether as a matter of actual fact that document was attested or not. The copy of the decree in O. S. No. 577 of 1936 shows that two advocates appeared for the petitioner and a pleader for the first defendant and in the ordinary course of practice, the learned District Munsiff would not have accepted the compromise and embodied it in a decree of his Court if counsel on both sides had not signed the document to vouch for its authenticity. The probability is therefore in favour of the view that the document was actually attested.

(2) Even if it was not, I do not think that it vitiates the decree and the charge it created. In those cases where parties enter into a compromise and that compromise is embodied in a decree of Court, we have to make a distinction between the substance of the transaction and the formalities necessary to give it validity. Thus merely because a compromise is embodied in a decree it will not prevent the parties affected by it from showing that it was vitiated by fraud, deception, undue in-

fluence or other invalidating circumstances. Such factors would affect the substance of the transaction. But this does not mean that the decree which embodies the compromise entered into by the parties should be attested in those cases where the agreement between the parties requires attestation or that because the agreemnt subsequently embodied in the decree is not attested, the decree is invalid. These are matters of form which do not affect the decree. The provisions relating to attestation are primarily intended as safeguards against forgery and false personation and similar malpractices and there is no reason in principle why the requirements about attestation should be extended to agreements which immediately afterwards are incorporated in a decree of Court. After all, it is the decree that is being executed and not the agreement on which it is founded. And the decree creates a charge by operation of law (vide 'Venkatachala Pillai v Rajagopal Naidu', 1945-2 Mad L J 388, 'Abdul Gaffar v. Ishtiqa Ali', AIR (30) 1943 Oudh 354 (FB); 'Rustamali v. Aftabhusein Khan', AIR (30) 1943 Bom 414.

(3) It is true that a different view was taken in 'Ghasiram v. Kundanbai', ILR (1941) Nag 513, but I find it difficult to follow it.

(4) I think the objections taken to the execution of the decree are without substance. The appeal is allowed with costs throughout.

Appeal allowed.

C.R.K./K.S.

A. I R. (39) 1952 Madras 164 *[C. N. 74]*

PANCHAPAKESA AYYAR, J.

In re Maniklal, Appellant.

Criminal Appeal No. 504 of 1950, D/- 28-3-1951.

Madras Civil Motor Cars Control Order, (1947), Clause 6 — Sale of cars above controlled price — Sale price given in circulars from head office — Sale permitted by Provincial Motor Transport Controller — Good faith and absence of moral turpitude — Effect.

In a trial for selling a motor car above the controlled rate, the local agent of a Calcutta company pleaded in defence that the prices were fixed by the head office, that he had given those prices to the Provincial Motor Transport Controller who had by his letter permitted him to sell the cars at that price provided he supplied certain particulars about the price which he had called for from his head office, that he had acted in good faith and without any moral turpitude;

'Held' that the Controller was not empowered to grant permission to sell the cars above the controlled price and as such the alleged permission would be of no avail for purposes of escaping from the liability for prosecution or conviction for the offence:

(2) *that the offence was not one involving moral turpitude and the conviction followed when all the requisite elements required by law were present;*

(3) *but these facts might be taken into consideration for the purpose of sentence. (Sentence reduced.)* (*Paras 2, 3, 4*)

V. Rajagopalachari and R. V. Raghavan, for Appellant; The State Prosecutor, for the State.

JUDGMENT.: This appeal has been filed by Manicka Lal, the Madras agent of Hindustan Motors Limited, Calcutta, and the second accused in C. C. Nos. 435, 436 and 437 of 1949 on the file of the third Presidency Magistrate, Madras, against his conviction on three counts, regarding the sale of three "Hindustan Ten" cars at Rs. 9,350 each, as against the controlled price of Rs. 8,195 each, under S. 12 of the Madras Essential Articles Control and Requisition (Temporary Powers) Act, read with Clause 6 of the Madras Civil Motor Cars Control Order, 1947. The first accused, the absentee master of the firm, residing at Calcutta, was acquitted, by giving him the benefit of the doubt, and the second accused, the local manager of the firm in Madras, who actually sold the three cars in question above the controlled price, was convicted on all the three counts, and sentenced to pay a fine of Rs. 250 each, or Rs. 750 in all, or, in default, to undergo rigorous imprisonment for three months. He has paid the fines, and then appealed.

(2) I have perused the records, and heard Mr. V. Rajagopalachari, for the appellant, and the State Prosecutor 'contra.' Mr. Rajagopalachari raised three main contentions. The first was that the letters of the Provincial Motor Transport Controller, Exs. D. 2 and D. 3, dated 25-11-1947 and 2-12-1947, while calling for certain particulars regarding the price of Rs. 9,350 fixed by the Calcutta Headquarters and mentioned by the appellant, stated 'inter se', in Ex. D. 2, the letter to the appellant:

> "You will have to sell the cars at the rates fixed in those circular letters and 'take steps to see that the particulars called for by me are furnished by your principals without which the Provincial Motor Transport Controller will not be in a position to recognise any increase in the prices .... Please take note that the failure to comply with this order will render you liable for prosecution."

and that Ex. D. 3, the letter to the Headquarters firm at Calcutta said 'inter se':

> "I have informed Messrs. Lakshman Prasad and Sons that the prices contained in your Circular Nos. 60 and 61 are the ruling prices now."

The price mentioned in the circulars mentioned in these letters was Rs. 9,350 the price at which the cars were sold. But there are two considerations which will make the argument that these letters empowered the petitioner to sell at Rs. 9,350 untenable. The first is that the 'Provincial Motor Transport Controller had no power' to empower the appellant to sell at a price higher than the price which could be fixed under the rules, in other words, higher than Rs. 8,195. He evidently took the price of Rs. 9,350 shown in the circular of the firm, 'for the time being to be correct', on the assumption that the appellant would furnish particulars to show that Rs. 9,350 would be the proper price under the rules. So, it is 'not an absolute permission' to the appellant to sell the car at Rs. 9,350, as it is based on the assumption that the particulars justifying a controlled price of Rs. 9,350, as shown in the circular, would be 'furnished in due course.' Nor was the person who gave this alleged absolute permission empowered to give such permission and fix the price at Rs. 9,350 without getting the particulars and getting the sanction of the Government. So the Provincial Motor Transport Controller's letters will only be relevant for two purposes; firstly, to show that the appellant had 'no moral turpitude', as he was relying on the price given by his principals at Calcutta and was calling for the particulars from Calcutta and had not the particular himself, at Madras, and had acted in good faith on an implied assumption that he was permitted to sell the cars 'validly' at Rs. 9,350 per car on a supposed absolute permission by the Provincial Motor Transport Controller. Secondly, it will be relevant for the question of 'sentence', because of the absence of moral turpitude. But it 'will not be relevant for setting aside the conviction.' An illegal

and unconditional permission (or even an illegal promise not to prosecute — though there is no such promise here) by an officer not empowered to give any such permission or promise will, of course, be of no avail for the purpose of escaping from the liability for prosecution or 'conviction' for the offence. The remark in Exs. D. 2 and D. 3, regarding prosecution if the cars were sold for higher price than Rs. 9,350, will not imply a promise not to prosecute if the cars were sold only at Rs. 9,350 each, as urged by Mr. V. Rajagopalachari. To say "If you commit murder, you will be prosecuted" will not mean that there will be no prosecution if there is no murder but only an offence of grievous hurt.

(3) The second contention of Mr. Rajagopalachari was that the petitioner himself gave a price of Rs. 7,700 in his letter dated 23-3-1948 for the very type of car, and that this showed that he was not motivated by 'greed' in selling the car at Rs. 9,350 on the wrong assumption that the price shown in the Head Office circular must be the real controlled price. That may be so, but is not relevant for the purpose of considering the validity of the 'convictions.' There are two types of offences under our law; offences 'involving moral turpitude', and offences 'not involving moral turpitude', but having all the requisite elements required by law for a conviction, like, for instance, buying or selling a controlled article without permit, not knowing that a permit is required; or keeping a gun without a licence by simply forgetting to renew the licence. The offences committed by this appellant fall under the latter category. That is, though all the requisites under the law to complete the offences and warrant the convictions are found, moral turpitude, like greed, and other unworthy motives are absent, though, of course, 'totally irrelevant except for sentence.' So, I confirm all the three convictions of the appellant as all the requisites under the law to complete the offences are satisfied.

(4) The third contention of Mr. Rajagopalachari was that the sentence of fine of Rs. 250 on each count is far too heavy, considering the circumstances, and also the fact that several other similar cases are pending against the appellant, these three being merely test cases, and that a nominal fine of Rs. 10 or Rs. 15 will do on each count. Though I agree that the fines are far too heavy, I am of opinion that a fine of Rs. 50 for each offence will be 'the minimum thinkable' in this case, as Courts must necessarily make a distinction between sales of costly motor cars, as here, irregularly, and sales of a petty quantity of iron nails or vegetables, in awarding sentences. In the end, therefore, I modify the sentences imposed by the lower Court into fines of Rs. 50 on each count, or Rs. 150 in all for the three offences put together. The excess fine of Rs. 600, paid already by the appellant, will be refunded to him.

C.R.K./D.R. *Sentence reduced.*

A. I. R. (39) 1952 Madras 165 *[C. N. 75.]*

GOVINDA MENON AND CHANDRA REDDI, JJ.

In re Bora Narasimhulu; Appellant.

Referred Trial No. 141, and Criminal Appeal No. 876 of 1950, D/- 12-2-1951.

Evidence Act (1872), S. 33 — Opportunity to cross-examine — Meaning.

What is contemplated under S. 33 is an opportunity of cross-examining the witness and not an effective use of it. All that the Court has to do in such cases is to exercise caution before admitting a statement under S. 33. It cannot be postulated that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under S. 33. (*Para 3*)

Anno: Evidence Act, S. 33, N. 11, Pt. 2.

K. Narayanaswami Mudaliar, for Appellant; Public Prosecutor; for the State.

CHANDRA REDDI, J.: (After stating the facts and the plea of the accused, the judgment proceeds as follows:) Rejecting this theory and accepting the prosecution case 'in toto' the learned Sessions Judge found the appellant guilty of the offences of murder and sentenced him to death.

(2) The prosecution case rests mainly on the evidence of the boy Pydireddi who was the only inmate of the house at the time of the occurrence. He was examined at the time of the preliminary enquiry but subsequently he could not be traced in spite of the deligent searches made by the concerned police authorities. P.W. 1, the aunt of the boy, stated that he was staying with her subsequent to the death of his parents and suddenly disappeared one day from the house when she had taken ill. P.Ws. 2 to 4 the police officers deposed that they searched for the boy at all places where he was likely to be found, in vain. They could not trace him either in the East Godavari district or in the Visakhapatnam district. In these circumstances, the Sessions Judge had to admit the evidence of the boy given in the preliminary enquiry under S. 33 of the Evidence Act. This is marked as Ex. P. 8 in the case. We are satisfied that every possible effort was made to trace Pydireddi and that he could not be found. The Sessions Judge was therefore right in having marked his deposition in the preliminary enquiry under S. 33 of the Evidence Act. The relevant portion of Ex. P. 8, is as follows:

"On the night of the date of death we all took our supper. I slept at the gate. Father slept on a cot in the front yard. My mother cleaned pots, etc., went into the house and came out. I was awake then. Accused came from the roadside. He pierced my mother with a sword on her upper arm first. I did not get in. Next he pierced on the chest. She fell down on her back crying "Ammo, Ammo" My father got up at once and caught hold of the accused's hair. He asked him "why did you pierce"? Then he pierced on a side of my father's chest with the sword and rent it. My father fell aside crying 'Ammo.'. You have killed me.' Accused also rent on his stomach with the sword. He also fell on my father's side. Karri Venkanna and Dokkali Bangarayya came by this time. I and Bangarayya went to the clerk's house in Guduvari street. I, Bangarayya and the clerk then went to the police station and gave a report. I told Bangarayya and the clerk how the accused stabbed my father and mother."

The evidence of this boy, if accepted, would prove the guilt of the appellant beyond all reasonable doubt. There is nothing to suggest that the boy was speaking to something that he had not witnessed. Nor is there any motive for boy to give false evidence against the appellant. It may also be mentioned that immediately after the occurrence when P.W. 12, rushed to the spot on hearing the cries of the boy, the boy mentioned to the former that it was the appellant that had stabbed both his parents and stabbed himself.

(3) Mr. Narayanaswami, learned Counsel for the appellant urged that it is not safe to act on Ex.P. 8

inasmuch as the appellant did not have an opportunity of cross-examining the witness effectively. S. 33 of the Evidence Act makes a statement made by a witness in a judicial proceeding admissible in a subsequent judicial proceeding or at some stage of the same judicial proceeding provided the person against whom it is sought to be used had a right and opportunity of cross-examining the witness. In this case it could not be said that the appellant had no right or opportunity to cross-examine Pydireddi. It may be that the appellant was not represented by a counsel to effectually cross-examine the witness as contended for by Mr. Narayanaswami. What is contemplated under S. 33 is an opportunity and not an effective use of it. All that we have to do in such cases is to exercise caution before admitting such a statement. It could not be postulated, that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under S. 33 of the Evidence Act. It must also be remembered that in this case the accused did cross-examine, though not elaborately. On a careful consideration of all the circumstances and on a perusal of the statement we think that this statement could safely be acted upon. No case has been brought to our notice which has gone to the extent of laying down that where an accused had not got the advantage of being represented by a counsel who could effectively cross-examine a witness, the statement given by a witness either in a previous judicial proceeding or in the same proceeding, could not be admitted in evidence. We think that there is not much substance in the contention advanced on behalf of the appellant based on the want of an opportunity for effective cross-examination. It follows that the Sessions Judge was justified in admitting the statement of Pydireddi made in the Committal Court as evidence. We have no hesitation in coming to the conclusion that this evidence could safely form the basis of the appellant's convictions.

(4) In our opinion the convictions of the appellant are right. There are no mitigating circumstances which would entitle the appellant to a lesser sentence. The convictions and sentences are confirmed and the appeal is dismissed.

C.R.K./D.R. *Appeal dismissed.*

A. I R. (39) 1952 Madras 166 *[C. N. 76.]*

SUBBA RAO J.

Ammireddi Sooramma, Appellant; v. Ammireddi Venkataratnam, Respondent.

Second Appeal No. 715 of 1948, D/- 24-7-1951.

(a) Deed — Construction — Document — Whether conferred life estate or absolute estate — Transfer of Property Act (1882) S. 11.

By a registered partition deed, one X and his son Y by his first wife partitioned the family properties. Under the deed the A marked schedule properties were allotted to X and the B marked schedule properties to Y. It was also provided thereunder that X should only enjoy the income derived from the property allotted to him without powers of alienation and that after his death if sons had been born to him they should take it absolutely and in case he had no male issue, it would go to Y. In the happening of the second contingency the document directed Y to give maintenance to the second wife of X.

'Held' that the document conferred only a life estate on X and the clause restricting the alienation was not in derogation of an absolute grant but was a condition of the grant itself. (Para 2)

Anno: T. P. Act, S. 11 N. 7.

(b) Transfer of Property Act (1882), S. 105 — Resumption of service grants.

Resumption consists in putting an end to the grant under which lands are held remitting the services. On the exercise of the right of resumption, the zamindar may recover possession of the land, if the land itself had been the subject matter of the grant or if the grant was only of the melwaram in whole or in part and the grantee had been in possession before such a grant, he may put an end to the beneficial tenure and impose full assessment, but before he could exercise his right to resume or take possession of the land, he must establish his right to resume and evict the person in possession of the land. That depends upon the nature, extent and terms of the grant. Held it was not possible to hold on the evidence that the party and his ancestors had no pre-existing interest in the lands and that the zamindar validly resumed the lands and conferred a new root of title on him. 7 Moo Ind App 128 (P C), A I R (3) 1916 Mad 826 and A I R (17) 1930 Mad 755 F. B. Ref. (Para 3)

Anno: T. P. Act, S. 105 N. 69.

(c) Hindu Law — Inheritance — Still-born son — Right of.

Under the Hindu law, a posthumous son will be entitled to succeed to the father or to claim a share in the joint family property. But the principle cannot be extended to a case of a stillborn son. The law of inheritance applies only to persons who are born alive but not to corpses. 'Inherit' means 'receive by legal descent or succession". and obviously a corpse cannot receive the property from another. A living person, though not born, but only existing in the womb at the time the succession opened is treated by fiction under Hindu law for the purpose of succession as if in existence at the time the succession opened, but a dead body cannot have a legal existence. 8 Mad 89 Referred. (Para 5)

(d) Civil P. C. (1908), O. 41, R. 1 — Suit by plaintiff — Defendant appealing to lower Appellate Court but not the plaintiff — Second appeal by plaintiff — Latter would be entitled to support the judgment of the first Court on other grounds though he could not get a higher relief, even if he succeeded, than that given to him in the first Court. (Para 6)

Anno: C. P. C., O. 41, R. 1, N. 11.

P. Somasundaram and M. V. Srinivasa Rao, for Appellant; C. Rama Rao and P. Ramachandra Reddi, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1857-58) 7 Moo Ind App 128: (4 W R 121 P C) (Pr 3)
('85) 8 Mad 89 (Pr 5)
('15) 18 Mad L T 142: (AIR (3) 1916 Mad 826) (Pr 3)
('30) 59 Mad L J 183: (AIR (17) 1930 Mad 755 FB) (Pr 3)
('32) 62 Mad L J 598: (AIR (19) 1932 Mad 289) (Pr 3)

JUDGMENT.: This is a second appeal against the decree and judgment of the District Judge of Krishna modifying that of the Subordinate Judge of Masulipatam in O. S. No. 11 of 1943. Plaintiff is the second wife of one Kottayya. By a registered partition deed, Ex. D-1, dated 6-7-1923

Kotayya and his son Venkataratnam (the defendant), by his first wife partitioned the family properties. Under the said deed the 'A' marked schedule properties were allotted to Kotayya and the B marked schedule properties to Venkataratnam. It was also provided thereunder that Kotayya should only enjoy the income derived from the property allotted to him without powers of alienation and that after his death if sons had been born to him they should take it absolutely and in case he had no male issue, it would go to Venkataratnam. In the happening of the second contingency the document directed Venkataratnam to give maintenance to the plaintiff at the rate of one putti of paddy per year. The aforesaid 'A' Schedule land was service inam land situated in the village of Choragudi. In or about 1869 the Government resumed that inam and conferred a ryotwari patta on the ancestors of Kotayya. In 1922 the Government decided that the land was zamindari land and cancelled its order of resumption. After this Kotayya paid Nazarana to the zamindar and obtained Patta from him in the year 1928. On 4-9-1941, Kotayya executed a gift deed, Ex. P-4, in favour of the plaintiff in respect of the said property. Kotayya died in 1942 and the defendant took possession of the property shortly thereafter. The plaintiff filed O. S. No. 11 of 1943 for a declaration of her title and for possession of the suit properties. Alternatively she claimed maintenance at the rate of 4 putties and 6 tooms of paddy per year. The plaintiff's case is that after the Government recognised the zamindar's right in 1922, the zamindar resumed the lands and conferred a new title on Kotayya for consideration and, therefore, the gift-deed in her favour was valid. Alternatively though this was not raised in the pleadings it was contended in the Courts below that a boy was born to her, that he died on the next day and that she succeeded to him as his mother. She also pleaded that the clause in the partition deed conferring a title on the defendant was repugnant to the absolute interest conferred on her husband and was therefore void. The defendant contended that as the plaintiff had no children he became the absolute owner of the properties under Ex. D-1, subject to the maintenance. The learned Subordinate Judge held that a son was born to the plaintiff and that but for the occurring of that contingency, the property would have devolved upon the defendant. He found that the patta conferred upon Kotayya by the zamindar was only in recognition of the pre-existing rights in the family and did not create a new title in him. He was also of the view that the maintenance fixed under the document was rather inadequate but that the reasonable rate would be 2 putties per year. Pursuant to the aforesaid finding he gave a declaration that she was entitled to a life estate in the suit properties and directed possession of the suit properties. The defendant preferred an appeal to the District Court, A. S. No. 193 of 1945. The learned District Judge on the evidence found that the child was only a still-born one. He agreed with the Subordinate Judge that the partition deed was valid and that Kotayya did not acquire a fresh title by the patta issued by the zamindar. As he held that the child was not born alive, he modified the decree of the Subordinate Judge and gave a decree instead for maintenance. The plaintiff has preferred the above second appeal.

(2) The learned counsel for the appellant raised before me the points his client had unsuccessfully pressed before the Court below. The learned Counsel argued that the clause in the partition deed restricting Kotayya's right to dispose of the property by gift or sale was repugnant to the absolute title conferred thereunder. To put it in other words he said that under the partition deed the property to which Kotayya was absolutely entitled was allotted to his share and that the subsequent clause restricting his right of alienation is in derogation of that right and therefore void. Though Ex. D-1, is styled a partition deed, it was really a settlement deed executed between the father and son having regard to the circumstances then obtaining in the family. As already stated, the defendant was Kotayya's son by the first wife. When Kotayya married a second wife, presumably, the defendant pressed for his share. Kotayya was also anxious to make a provision for his children,— if any, by his second wife and in case she had no children, to provide for her maintenance. The intention of the parties was effectuated by giving a life estate to Kotayya in respect of the A Schedule property and a vested remainder to the plaintiff's sons, if any, and if she had no sons, to the defendant. In the happening of the latter contingency she was provided with maintenance. A fair reading of the document, therefore makes it clear that no absolute interest was intended or as a matter of fact conferred on Kotayya. The relevant words are,

> "It has been settled that the said Kotayya shall throughout his lifetime enjoy only the income from the A marked property without having powers of disposition by way of gift and sale therein."

The words are clear and unambiguous and confer only a life estate on Kotayya. I therefore hold that the clause restricting the alienation is not in derogation of an absolute grant but is a condition of the grant itself.

(3) It was then contended by the learned Counsel that the issue of a patta in favour of the plaintiff's husband created a new root of title. The question therefore is whether the Zamindar by issuing a Patta recognised the pre-existing rights of the family in the property, as contended by the respondent, or resumed the lands and created a new title for the first time in favour of Kotayya. If it is the former, Ex. D 1, would operate on these properties and the title to the properties would be governed by its provisions. If it is the latter, the gift-deed in favour of the plaintiff would be valid. Before considering the evidence in this case it is as well that I briefly notice the law on the subject which is fairly well settled. Resumption consists in putting an end to the grant under which lands are held remitting the services. Vide 'Rajaharaje Bommarauze Bahadur v. P. Venkatadri Naidu', 7 Moo Ind App 128. On the exercise of the right of resumption, the zamindar may recover possession of the land, if the land itself had been the subject-matter of the grant or if the grant was only of the melwaram in whole or in part and the grantee had been in possession before such a grant, he may put an end to the beneficial tenure and impose full assessment, but before he could exercise his right to resume or take possession of the land, he must establish his right to resume and evict the person in possession of the land. That depends upon the nature, extent and terms of the grant. In 'Siyyadi Gam v. Visweswara Missanka', 18 Mad L T 142, the question was whether the zamindar was entitled to resume and recover possession of the lands granted to the defendants for discharging personal services such as for carrying the zamindari palanquin. The learned Judges held that the burden was on the zamindar to show that he had a right to evict. At page 144 the learned Judges say:

> "Resumption means no more than a taking back of that which was once given, and therefore the plaintiffs cannot succeed in evicting the defen-

dants unless they are able to show that what was originally granted was not merely a slice of the melwaram or landlord's share of the produce but the land itself."

A Full Bench of the Madras High Court considered the rights of a zamindar to resume a pre-settlement grant in 'Rajah of Vizianagaram v. Appalasami', 59 Mad L J 183. Kumaraswami Sastri, J., who delivered the judgment on behalf of the Full Bench pointed out that there was a distinction between a grant burdened with service and one made in lieu of wages and that in the former case the grant could not be resumed without at least showing that the services were required to be done and were refused. The Full Bench also laid down the following two propositions (1) where a zamindar wants to resume land granted before the Permanent Settlement and held by the grantee, from father to son, the onus is always on the plaintiff, (2) where the question is as to the class to which a specified grant involving service belongs there is no presumption one way or the other. Therefore the zamindar who seeks to eject a tenant must establish his right to resume the lands. In the present case the original grant is not filed. Nor do the documents filed in the case establish that the zamindar exercised his rights of resumption and purported to confer a new title on Kotayya. Exs. P. 14-b, P. 15-a, P. 14-a, P. 15 and P. 13 only show that the zamindar collected some amounts from Kotayya and issued a patta. They are consistent both with the recognition of a pre-existing right and with conferment of a new title. The only document which discloses the history of the plaint schedule lands is Ex. P-3, the Register of Inams dated 7-10-1859. It shows that the lands were given for service under the zamindar. It indicates that even in 1794 a member of the Ammireddi family was in possession. It shows that the Government issued a title-deed in favour of Ammireddi Venkatachalam, but later on cancelled the resumption in the year 1922. It is not known when the grant was made and by whom or whether the services were continued or discontinued or demanded or refused. It is also not clear whether the land was given by the zamindar or whether the Inam was comprised of both the varams or the melvaram. But one thing it clearly shows is that this family had been in possession and enjoyment of this plot for over 100 years. It does not establish that Kotayya and his ancestors were doing any service for a long period of time. It is impossible therefore to hold on the evidence that Kottayya and his ancestors had no pre-existing interest in the lands and that the zamindar validly resumed the lands and conferred a new root of title on Kotayya. Learned counsel for the appellant relied upon the decision in 'Sadasivarayudu v. Venkataswami', 62 Mad L J 598, and contended that it was in all forms with the instant case. I cannot agree. There the learned Judges held that a holder of a village under a service tenure cannot acquire a right of permanent occupancy under the Estates Land Act and his tenants are in no better position. The right of the zamindar to resume the village was not questioned in that case, but it was argued that the tenants who were let into possession by the Inamdar acquired rights under the provisions of the Estates Land Act. The learned Judges held that the land which cannot be a ryoti land between the grantor and the service-holder cannot become a ryoti land as between the later and his tenant. This decision does not support the contention of the appellant. I, therefore, accept the finding of the Court below that Ex. P-4, dated 4-4-1941 was not valid and did not convey any interest to the plaintiff.

(4) The learned counsel for the appellant next contended that the finding of the learned Judge that a son was not born alive to the plaintiff was not correct. This is a pure question of fact and no permissible grounds have been advanced before me to justify interference. I accept the finding.

(5) Lastly it was contended that for the purpose of inheritance it was not necessary that the child should have been born alive but it would be enough that it was conceived. Reliance was placed upon the well recognised principle of Hindu Law that the rights of a son in the womb to the ancestral property cannot be defeated by a will or a gift. In 'Minakshi v. Virappa', 8 Mad 89, it is stated that the author of Smrithi Chandrika reciting the sloka:

"The venerable teachers direct that ownership to wealth is acquired by birth alone" explains the terms "By birth alone" as meaning by the very formation of the foetus in the mother's womb."

It is not necessary to multiply cases. It cannot be disputed that under the Hindu Law a posthumous son will be entitled to succeed to the father or to claim a share in the joint family property. But the learned counsel argued for an extension of the principle even to a case of a still born son. His argument may be ingenious but, in my view, it is fallacious. The law of inheritance applies only to persons who are born alive but not to corpses. "Inherit" means "receive by legal descent or succession", and obviously a corpse cannot receive the property from another. A living person, though not born, but only existed in the womb at the time the succession opened is treated by fiction under Hindu law for the purpose of succession as if in existence at the time the succession opened, but a dead body cannot have a legal existence. The learned author of Hindu law (Golapchandra Sarkar Sastri), in his 8th Edition at page 274 says:

"Hence a son and the like may be said to acquire the right from the moment of their conception; but it is absolutely necessary that the child in 'embryo' should be born alive or come into existence in order to be invested with the right; for, the course of inheritance cannot be diverted by the mere foetal existence of a child not born alive; and no person can claim an estate, as neir of a still born child."

I respectfully agree with the above observations of the learned author. I cannot therefore accept this contention either.

(6) Before I close it is also necessary to notice a preliminary objection raised by the learned Counsel for the respondent. The learned Judge gave a declaration that the plaintiff was entitled to a life estate. The defendant preferred an appeal to the District Judge, but the plaintiff did not choose to do so. It is therefore contended that the appellant is precluded from arguing that the defendant did not acquire any right under Ex. D-1. There is no force in this argument, for the appellant would be entitled to support the judgment of the first Court on other grounds, though he could not get a higher relief, even if he succeeded, than that given to him in the first Court.

(7) In the result the second appeal is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 169 *[C. N. 77.]*

SATYANARAYANA RAO J.

Chodipalli Masenu, Appellant v. Gampala Narasamma, Respondent.

A. A. O. No. 299 of 1949, D/- 17-4-1951.

Workmen's Compensation Act (1923), S. 3 — "Employer" Meaning of — Lease of boat — Death of workman on boat — Lessor whether liable to pay compensation.

'B' entered into a contract with 'A' the owner of a boat whereunder it was agreed that in consideration of 'B' paying to the owner of the boat a sum of Rs. 600 as hire, the boat should be allowed to carry bales of palmyra fibre from Kakinada Port to Tuticorin which 'B' agreed to carry on behalf of a company, for hire of Rs. 1500. Under the terms of the agreement 'A' was under no responsibility for the expenses of the trip and the salaries of the crew etc. The boat reached safely Tuticorin Port and while returning empty had to face rough weather when a workman fell down from the boat and died. His widow applied for compensation and she impleaded, as party to the application 'B' the person who hired the boat under the contract:

'Held' that the agreement between 'A' and 'B' was entered into 'bona fide' and there was no intention to defeat the rights of any person or persons at the time the parties entered into the contract; that the terms of the agreement were wholly inconsistent with either the relationship of partners or the relationship of master and servant or that of agent and principal and that as the contract was a mere demise of the boat, 'A' could not be made liable for the payment of the compensation. '(1913) 2 Ir Rep. 385, Dist. (*Para 3*)

Anno: W. C. Act, S. 3 N. 2.

C. Rama Rao, for Appellant; R. Venkataraman, for Row and Reddy, for Respondent.

Case referred to:

(1913) 2 Ir R 385: (1913 W C & I Rep 418) (Pr 4)

ORDER.: This is an appeal by the owner of a boat who was made liable to pay compensation to the respondent under the Workmen's Compensation Act. The respondent's husband, one Somitri, was engaged as a member of the crew of the boat of one Merugu Masenu. This Merugu Masenu, entered into a contract dated 26-3-1948, with Chodipalli Masenu, the owner of the boat whereunder it was agreed that in consideration of Merugu Masenu paying to the owner of the boat a sum of Rs. 600 as hire, the boat No. 141 should be allowed to carry 500 bales of palmyra fibre from Kakinada Port to Tuticorin which Merugu Masenu agreed to carry on behalf of Krishna Company, Kakinada for hire of Rs. 1,500. Under the terms of the agreement the owner was under no responsibility for the expenses of the trip and the salaries of the crew, etc. He was paid Rs. 300 as advance on the date of the agreement and the balance was agreed to be paid after the boat had reached Tuticorin and the goods were unloaded. If however the bales to be carried were more than 500, the owner should be paid one-third of the hire received in excess and should similarly be entitled to hire which might be received by Merugu Masenu on his return trip from Tuticorin to Kakinada in case any goods should be carried on the return voyage. The boat reached safely Tuticorin Port and while returning empty had to face rough weather when Somitri fell down from the boat and died. The petitioner in the lower Court is the unfortunate widow of Somitri and she impleaded as party to the application the owner of the boat Chodipalli Masenu but did not implead Merugu Masenu, the person who hired the boat under the contract already referred to.

(2) There is no serious dispute that Somitri was a "workman" within the meaning of the Workmen's Compensation Act, and that he had met with his death by accident arising out of and in the course of the employment. The amount of compensation is also not in dispute between the parties. The only point on which there was serious difference between the parties was whether the owner of the boat could be made liable to pay the amount of compensation fixed by the Additional Commissioner.

(3) The Commissioner was of opinion that the agreement entered into between the owner of the boat and Merugu Masenu was merely a make believe arrangement intended to defeat the rights of persons like the respondents who might claim compensation under the Workmen's Compensation Act and it was with this object that Merugu Masenu, who it is alleged was a man of straw, was elected. The real dispute therefore has to be decided upon a proper construction and the truth of the agreement, Ex. D. 1. Having read the evidence adduced in the case I have no doubt that the agreement was entered into 'bona fide' and there was no intention to defeat the rights of any person or persons at the time the parties entered into the contract. The opinion of the Commissioner is not warranted by anything which appears in the evidence in the case. It is claimed on behalf of the respondent by his learned Advocate that this agreement, Ex. D. 1, brought about the relationship of principal and agent or master and servant, and, as a last resort, the relationship of partners, and that therefore the owner of the boat was either the principal, the master or the partner of Merugu Masenu. It is rather difficult to accept this interpretation of the agreement. In my view the agreement is a mere demise of the boat for hire which was agreed to be paid between the parties, and thereafter the owner had nothing to do with the boat or the trip or the cost of it. The entire amount payable as freight for the carriage of the cargo is receivable under the agreement from Krishna and Company by Merugu Masenu alone. It is not as if Merugu Masenu received the amount on account of the owner of the boat and made himself liable to account to him for the expenses and for the profits. The fact that if there was more cargo to be carried, a portion of the extra hire that might be earned by the trip was made payable to the owner would not, in my opinion, alter in any way the original demise of the boat by the owner to Merugu Masenu. The terms of the agreement are wholly inconsistent with either the relationship of partners or the relationship of master and servant or that of agent and principal. It is not disputed that if the contract is a mere demise of the boat the appellant cannot be made liable for the payment of the compensation.

(4) It is, however, argued on behalf of the respondent that the decision of the Irish Court of Appeal in 'Kelly v. Owners of Ship' "Miss Evans" (1913) 2 Ir R 385, concludes the matter in favour of the respondent. The agreement in that case was one between Richard Jones acting on behalf of the owners and Kinsella, who was appointed captain by the former. Under the agreement Kinsella was to work the vessel

> "On the best paying trade for the benefit of all concerned, receiving for his services two-thirds of all freights carried, out of which he is responsible, and agrees to pay, all crew's wages, victuals of crew, port charges, towages, and all and every other expenses connected with the working of the vessel; the remaining one-third he agrees to remit to the said Richard Jones as owners' share."

In pursuance of this agreement Kinsella appointed the crew for the vessel, and the question was whether when one of the crew who was engaged by the captain met with an accident and claimed compensation against the owners under the Workmen's Compensation Act of 1906 the owners could be made liable. The contention apparently urged on behalf of the owners was that the agreement was a demise of the schooner, and that there was no relationship of master and servant between the crew and the owners. Under the terms of the agreement, it is obvious that Kinsella was appointed as merely a captain of the vessel by a person acting on behalf of the owners, and he did not therefore become a lessee of the vessel. When once he was appointed captain it was his duty to appoint the crew and when once they were so appointed they became the servants of the owners. The remuneration of the captain no doubt was not fixed on the basis of the remuneration to be paid by the owners on a monthly basis, but he was to receive for his services two-thirds of the gross freights, which were to cover not only his remuneration but also the wages of the crew and other expenses. That did not alter the nature of the agreement, and the relationship that was brought about under the terms of the agreement. He was no more than an agent of the owners, and even if it was assumed that he became a partner by virtue of the agreement, as did Holmes, L. J., in the case, even then the owners would be liable. The question in the case mainly turned upon the interoretation of the clause which gave to the captain two-thirds of the freights, and O'Brien, L. C., Holmes, L. J., and Cherry, L. J., agreed in holding that that clause did not alter the relationship between the owners and the crew, which was that of master and servant and that therefore they were liable to pay the compensation.

(5) It would be therefore seen that that decision is clearly distinguishable from the present case, as in the present case the agreement undoubtedly created a demise of the boat in favour of Merugu Masenu. The amount that was payable under the agreement was clearly a payment for the hire, and was not a share of the profits or an amount which Merugu Masenu was bound to collect on behalf of the principal and account to him after deducting the expenses for the trip. It therefore follows that the view taken by the Commissioner is wrong and the owners cannot be made liable for the damages. The result no doubt from the point of view of the unfortunate widow is to be regretted, but it cannot be helped as she did not implead as party to this petition Merugu Masenu also in addition to the owner, in which case it would have been possible to grant a decree against him. It follows that the appeal must be allowed and the order of the Additional Commissioner must be set aside. In the circumstances of the case I think this is not a fit case in which I should award costs to the appellant. The Commissioner will refund the amount which it is said has been deposited by the appellant.

C.R.K./V.S.B. *Appeal allowed.*

A. I. R. (39) 1952 Madras 170 [C. N. 78.]

CHANDRA REDDI, J.

In re Muthuvedi Ammal and another, Petitioners.

Criminal Revn. No. 56 and Cri. Revn. Petn. No. 54 of 1950, D/- 21-2-1951.

Criminal P. C. (1898), Ss. 198, 199 — Offence u/s. 426 I. P. C. — Complaint by aggrieved person not necessary.

An offence u/s. 426, I.P.C. is not one that is covered either by S. 198 or by S. 199, Criminal P.C. and that being so in respect of an offence under that section the complaint of the person aggrieved is not essential. There is no warrant for enlarging the scope of these provisions. A I R (35) 1948 Mad 473, disting. (Para 5)

Anno: Cr. P. C., S. 198 N. 1.

V. V. Raghavan, for Petitioners; Public Prosecutor, for the State.

Case referred to:

('48) 1948 Mad W N Cr 80: (A I R (35) 1948 Mad 473: 49 Cri L J 711) (Pr 4)

ORDER: The petitioners were convicted for an offence under S. 426, I.P.C., and sentenced to pay a fine of Rs. 25 each which was reduced in appeal to Rs. 15.

(2) The case against these petitioners was as follows. There was a quarrel on the 11th of September 1948 between the first petitioner and the daughter-in-law of P. W. 1. In order to wreak vengeance on P. W. 1's family, the first petitioner asked the second petitioner to demolish the compound wall of the house belonging to P. W. 1's son and the latter accordingly demolished the same to a height of 3 feet and to a length of 24 feet, causing thereby damage to the extent of Rs. 10 or 15. The guilt of the petitioners was proved beyond all reasonable doubt by the evidence of P. Ws. 1, 2 and 3. The trial Court has accepted their evidence and convicted the petitioners as stated above.

(3) In this revision petition the correctness of the conviction could not be challenged. The only point that was raised by Mr. Raghavan, the learned counsel for the petitioner is that the conviction of the petitioners is unsustainable, as it is based on a complaint by P. W. 1, who is not the owner of the house to the compound wall of which damage was caused but the father of the owner. According to him, a prosecution under S. 426, I.P.C., can only be launched on the complaint of a person, who is the owner of the property concerned or any other person who is beneficially entitled thereto.

(4) In support of this submission he relied on a decision of Yahya Ali J. in 'Vaiyapuri Goundan v. Kuppusami Goundan', 1948 Mad W N Cr 80. In that case, the accused and the complainant were attempting to get a communal land in a village on assignment and each of them was trying to use it in his own way. One year the complainant — P. W. 6 — raised some crops on that land and according to the prosecution, the cattle belonging to the accused were driven into the crops on the land with the result that the crop was damaged. Prosecution having been launched against him under S. 427, I.P.C., the accused raised the plea that he could not be guilty of the offence of mischief, assuming the prosecution case to be true, because the land did not belong to P. W. 6, and it could not therefore be said that when these crops were damaged, any wrongful loss or damage was caused to the latter. This plea did not find favour with the Court below. But when it came up finally in revision to this Court, the learned Judge who heard it agreed with the contention raised on behalf of the accused and held that P. W. 6 could not be said to have sustained wrongful loss within the meaning of S. 23, I.P.C., not being the owner of the land and the offence said to have been committed by the accused did not amount to an offence under S. 425, I.P.C. It is manifest that this decision has no bearing on the question to be decided by me.

(5) No other case has been cited to me as substantiating Mr. Raghavan's proposition. On the other hand, an examination of the relevant provi-

sions of law shows that there is no basis for this contention. My attention has not been drawn to any rule of law which lays down that the complaint of the aggrieved person in the 'sine quo non' of the prosecution for an offence under S. 426 I.P.C., Chapter XV-B, Criminal P.C., deals with the conditions requisite for the initiation of proceedings. While Ss. 195 and 196 Criminal P. C. provide for the mode in which prosecution can be launched for offences against public justice and against the State etc., Ss. 198 and 199 of the Code concern themselves with offences against individuals. The two latter sections require the complaint of the aggrieved person for starting prosecution against the offender in respect of offences mentioned therein. An offence under S. 426, I.P.C., is not one that is covered either by S. 198 or by S. 199, Criminal P.C., and that being so it appears to me, that in respect of an offence under that section the complaint of the person aggrieved is not essential. There does not seem to be any warrant for enlarging the scope of the above mentioned provisions of the Criminal P. C. If the contention of Mr. Raghavan were to be accepted, it would lead to disastrous consequences. Suppose the owner of a house has gone abroad, any person with intent to cause damage to the owner may set fire to the house with impunity, because the person aggrieved is not there to file a complaint against the miscreants. I do not think that such a result was ever contemplated by the legislature. The offences referred to in Ss. 198 and 199 stand altogether on a different footing and the reason for requiring the complaint of the person aggrieved by such an offence is obvious.

(6) It looks to me that there is no substance in the contention urged by Mr. Raghavan. The convictions and sentences are, therefore, confirmed.

(7) Another argument advanced by Mr. Raghavan is that the trial Court erred in awarding compensation to P. W. 1, who is not the owner of the house. It looks to me that this does not make any difference so far as he is concerned, whether the compensation is payable to P. W. 1 or to his son, who according to him, is the owner of the house. I, therefore, reject this argument also.

(8) In the result, this revision petition fails and is dismissed.

C.R.K./D.R. *Revision dismissed.*

A. I. R. (39) 1952 Madras 171 *[C. N. 79.]*

RAGHAVA RAO, J.

Adapaka Sanyasamma, Appellant v. Vimarsa Prakasa Vireswaswami alias Visweswaraswami, represented by Trustee Tholagupu Gowripati and another, Respondents.

Second Appeal No. 2288 of 1947, D/- 27-3-1951.

Limitation Act (1908), Article 134-B — Starting point — Cessation of trusteeship.

It is not the cessation of trusteeship generally that matters for purposes of the application of Article 134-B; it must be cessation by means of the three events referred to in the third column of the article, death, resignation or removal. The prior trustee may have alienated wrongfully all properties belonging to the trust; but that does not mean that he has ceased to be trustee. The period of limitation will start only from the date of the order of appointment of the new trustees and formal removal of the prior trustee. (Para 4)

Anno: Limitation Act, Arts. 134-A to 134-C, N. 9.

S. Ramamurthy, for Appellant; Y. Suryanarayana, for Respondents.

JUDGMENT.: I have heard an able and interesting argument from Mr. Ramamurthi for the appellant. The question raised is whether or not the suit is barred by limitation. The trial Court held it was. The lower Appellate Court has held it was not.

(2) The suit was by a certain person appointed as trustee of a temple, by the Madras Hindu Religious Endowments Board. If from the date of order of appointment time is reckoned the suit is obviously in time. It is said for the appellant that the suit is barred because under Art. 134 (B) which is the article that matters there was cessation of trusteeship on the part of one Ramalingaswami, the prior trustee, as early as 1922, which was the year in which he made his last alienation of the trust properties, that is to say of the temple itself.

(3) The terms of the third column of Art. 134 (B) of the Indian Limitation Act are:

"Time from which period begins to run. : The death, resignation or removal of the transferor."

The learned Subordinate Judge has observed on the facts of this case, that there is no proof that any of these three events referred to in the third column of the article occurred at any time more than 12 years before the date of suit.

(4) It is contended by Mr. Ramamurthi that when in the earlier plaint of this plaintiff for recovery of possession of other properties he made his allegations therein, he stated that Ramalingaswami had ceased to be trustee as early as 1922. That may be; but it is not the cessation of trusteeship generally that matters for purposes of the application of Art. 134 (B); it must be cessation by means of the three events referred to in the third column of the article mentioned above, death, resignation or removal. It is contended by Mr. Ramamurthi that when even the temple itself was actually alienated, quite apart from other properties attached to the institution, it could not reasonably be contended that Ramalingaswami continued to be trustee thereof. That, in my opinion, is a legal misconception. The person may have alienated wrongfully all properties belonging to the trust; but that does not mean he has ceased to be trustee. In the case of a person, like the trustee against whom estoppel does not operate, it is competent to him to seek to recover the properties alienated by hmself. Mr. Ramamurthi further contends that the order of the Hindu Religious Endowments Board shows that they made the order because there was no trustee functioning. That may be, but that does not mean that Ramalingaswami actually died, or resigned, or was formally removed from the office of trustee at any time more than 12 years prior to the date of suit. In spite of the allegations in the former plaint and the actual wording of the order of the Hindu Religious Endowments Board, it was competent to the learned Subordinate Judge to have found, as he has done, that in the absence of proof that any of the three events referred to in the third column of Article 134 (B) occurred more than 12 years prior to the date of the suit, it should not be treated as barred by time.

(5) In these circumstances I have to dismiss this second appeal with costs. (No leave.)

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 172 [*C. N. 80.*]

PANCHAPAKESA AYYAR, J.

In re: K. Palani Moopan, Appellant.

Criminal Appeal No. 573 of 1950, D/- 15-3-1951.

(a) *Penal Code (1860), S. 304, Para 2 — Fatal injury on vital portion with deadly weapon.*

Every man must be presumed to intend the natural consequences of his act. An offence under S. 304, para, 2, would be clearly proved against a person where a fatal injury is inflicted by him on a vital portion of the deceased's body, the abdomen, with a deadly weapon, a spear. (*Para 5*)

Anno: Penal Code, S. 304, N. 1, 6.

(b) *Madras Borstal Schools Act (V (5) of 1926), S. 8 — "Criminal tendencies."*

The words "Criminal tendencies" occurring in Section 8, should not be given a narrow interpretation, and S. 8 should be interpreted to mean that whenever an adolescent offender has been convicted of an offence he should ordinarily be given the advantage of being put in the Borstal School so that by the training therein he should become a useful citizen of the country. A "criminal tendency" does not manifest itself only in acts involving dishonesty, such as theft or cheating. It can be inferred also in a person who owing to lack of self-control or as a result of environment or association, is unable to control himself and commits an offence of either grievous hurt or homicide, by using a deadly weapon without regard to the consequences for a very petty reason. AIR (36) 1949 Mad 648 and AIR (36) 1949 Mad 460, Rel. on. (*Para 6*)

(c) *Criminal P. C. (1898), S. 367 — Appreciation of evidence.*

When the minor discrepancies in the evidence in a case under S. 304, Penal Code do not go to the root of the case and do not affect the credibility of the evidence regarding the fatal stab administered to the deceased by the accused, there is no need to worry over much with these minor discrepancies. (*Para 3*)

Anno: Criminal P. C., S. 367, N. 6.

(d) *Criminal P. C. (1898), S. 423 — Appreciation of evidence by appellate Court.*

The accused cannot rely on the remarks of the lower Court regarding the credibility of the prosecution witnesses without proving, from the original records, that the prosecution witnesses attacked by him and believed in by the lower Court are really persons unworthy of credence. The H. C. has got full seisin of the matter in the appeal, and is not bound to accept every remark of the lower Court regarding the credibility or otherwise of the witnesses, though, naturally, it will not distrust a finding of fact arrived at by the lower Court which saw the witnesses and observed their demeanour. (*Para 3*)

Anno: Criminal P.C., S. 423, N. 14.

K. V. Ramaseshan, for Appellant; The Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('48) 1948-2 Mad L J 630: (AIR (36) 1949 Mad 460: 50 Cri L J 656) (Pr 6)

('49) 1949-1 Mad L J 282: (AIR (36) 1949 Mad 648: 50 Cri L J 896) (Pr 6)

JUDGMENT.: This is an appeal filed by Palani Moopan, the fourth accused in S. C. No. 64 of 1950 on the file of the Additional Sessions Judge, Coimbatore. He is a boy aged 19 years and has been convicted by the learned Additional Sessions Judge under Section 304, paragraph 2, Indian Penal Code, while acquitting him of the offence under S. 302, I.P.C., and sentenced to undergo rigorous imprisonment for ten years. There were four other accused in the case. They have all been acquitted.

(2) The facts are briefly these. The appellant and the deceased Palani Moopan were agnates and 'pangalis.' Owing to misunderstandings over a lease of land and a manure pit there was a sudden and unexpected quarrel just at sunset time on 1st February 1950 between the five accused on one side and the deceased and P.W. 5 on the other and all the five accused are said to have fallen upon P.W. 5 and the deceased. According to the first information report, the dying declaration and the evidence of P.Ws. 1, 2, 3, 5 and 7, this appellant stabbed the deceased, in the course of the quarrel, on the right side of his abdomen with a spear. The deceased did not die at once but survived to state that it was this appellant that stabbed him thus and to give a dying declaration to that effect. He died on the next day (2nd February 1950.) The lower Court, after discussing the evidence, found the evidence not to be satisfactory as regards the other four accused and to be satisfactory regarding the offence under S. 304, paragraph 2, I.P.C., regarding this appellant, and, so convicted and sentenced him. It did not consider it fit to apply S. 562, Criminal Procedure Code to this appellant, and does not seem to have considered the applicability of S. 8 of the Borstal Schools Act.

(3) I have perused the entire records and heard the learned Counsel for the appellant and the learned Public Prosecutor 'contra.' The learned Counsel for the appellant raised three main contentions. The first was that on much the same evidence the lower Court has acquitted the other four accused and so should have acquitted this appellant also, at least by giving him the benefit of the doubt. But, after perusing the evidence, I am of opinion that the evidence against this appellant was far more consistent and satisfactory, and, indeed, proved conclusively that it was the appellant who gave that fatal stab to the deceased, whereas the evidence regarding the other four accused was not at all consistent. I cannot accept the argument of the learned Counsel for the appellant that simply because there are some minor discrepancies in the evidence whether the beatings by the other accused preceded the stabbing by this appellant or the stabbing by this appellant preceded the beatings by the other accused, and, because of the observation of the lower Court that it was not satisfied with the evidence of some of the prosecution witnesses who implicated this appellant, but was satisfied with the evidence of other prosecution witnesses who implicated him, the appellant should be given the benefit of the doubt and acquitted. Such minor discrepancies on 'immaterial collateral' matters exist in almost every criminal case of this description. When they do not go to the root of the case, as here, and do not affect the credibility of the evidence regarding the fatal stab administered to the deceased by this appellant, there is no need to worry over much with those minor discrepancies. Nor can the learned Counsel for the appellant rely on the remarks of the lower Court regarding the credibility of some of the prosecution witnesses and attack the remarks of the lower Court regarding the reliability of the other prosecution witnesses without proving, from the original records, that the prosecution witnesses attacked by him and believed in by the lower Court are really persons unworthy of credence. This Court has got full seisin of the matter, in the appeal, and is not bound to accept every remark of the lower Court regarding the credibility

or otherwise of the witnesses, though, naturally, it will not distrust a finding of fact arrived at by the lower Court which saw the witnesses and observed their demeanour. In this case, I see no reason whatever to disbelieve the evidence of P.Ws. 1, 2, 3, 5 and 7 who implicate the appellant regarding this fatal stab on the deceased with a spear. That evidence is corroborated by the statement of the deceased, who had no motive to implicate the appellant falsely in his complaint, and also by his dying declaration, and the medical evidence. That the deceased spoke to some spear injury inflicted on his son by the fifth accused is no ground for disbelieving his statement regarding this appellant. It is evident that a man attacked by five people, and fatally stabbed, and suffering terribly, may observe closely the person who stabs him, and be correct about it, while his observation of a stabbing at about the same time of another individual may be defective and inaccurate. He might have seen the fifth accused aim with his spear at his son and might have thought that his son had also been injured, whereas, the blow might have escaped the son. The important fact to remember is that the deceased had no enmity towards the appellant, and that his condition, after receiving the fatal injury, would have been so precarious that his memory cannot be expected to be precise regarding all the details he has observed about the occurrences that day. That will account for the discrepancies mentioned above.

(4) P.W. 1 is the wife of the deceased. P.W. 2, is the son of the deceased. P.W. 3 is the daughter of the deceased. None of these three also was alleged to have any motive to perjure against the appellant. P.W. 5 alone was said to have some enmity. P.W. 7 was the servant of P.W. 3's husband, and not of P.W. 5, and so must be held to have no motive himself to implicate the appellant falsely. What is more, there was no particular motive for any one to implicate this appellant, a young boy, unnecessarily, leaving out the real culprit, when there was sufficient daylight to observe the real culprit. It was not also a case of rioting by a huge mob, there being only five persons involved in the entire attack on 2 or 3 persons. The story regarding the appellant's dealing the fatal stab on the deceased has been consistent from the very start to the very last, and has not been shaken in the least in cross-examination. We are not concerned here with the discrepancies regarding the beatings administered to the deceased by the other four accused who have been acquitted, or regarding the injuries received by some of the accused and some of the prosecution witnesses.

(5) The next contention of the learned Counsel is that the conviction under S. 304, paragraph 2, I.P.C., would not be justified, in the circumstances of the case, even if this appellant had caused the fatal injury, as there is nothing to show that he had a motive or intention to 'kill' the deceased, and that it may be that he wanted to deal a simple injury but that it resulted in a fatal injury like this. I cannot agree. Every man must be presumed to intend the natural consequences of his act. So, while there is no need to infer an intention on the part of the appellant to 'murder' the deceased, an offence under S. 304, paragraph 2, I.P.C,. would be clearly proved against him, in these circumstances, where a fatal injury was inflicted by this appellant on a vital portion of the deceased's body, the abdomen, with a deadly weapon, a spear, and the blow must have been dealt with terrific force judging from the nature of the injury. The exceptional case referred to by the learned Counsel for the appellant will not apply here. That will be the case where a man intends to inflict a stab on the leg of another, but by 'misfortune', the stab falls on the stomach or other vital spot of the other by the other turning a somersault or making an unexpected movement at the psychological moment and getting the stab in that vital spot. In this case, no such circumstance exists. So, the conviction must only be under S. 304, paragraph 2, I.P.C. I confirm the conviction of the appellant by the lower Court.

(6) The learned Counsel for the appellant next urged that this was a fit case for applying S. 8 of the Borstal Schools Act to this appellant, who was only 18 or 19 years old, and who was proved by his act itself to be of criminal tendencies and to have been asscciated with contankerous persons. I agree. In two cases decided by Benches of this Court, viz., 'The Public Prosecutor v. Nagappa Pujary', 1948-2 Mad L J 630, and 'In re Chelliah, 1949-1 Mad L J 282, to which latter case I too was a party, it has been held that the words "criminal tendencies" occurring in S. 8 of the Madras Borstal Schools Act should not be given a narrow interpretation and that S. 8 should be interpreted to mean that whenever an adolescent offender has been convicted of an offence he should ordinarily be given the advantage of being put in the Borstal School so that by the training therein he should become a useful citizen of the country, and that a 'criminal tendency" does not manifest itself only in acts involving dishonesty, such as theft or cheating, and that it can be inferred also in a person who, owing to lack of self-control or as a result of his environment or association, is unable to control himself and commits an offence of either grievous hurt or homicide, by using a deadly weapon without regard to the consequences for a 'very petty reason' as in this case.

(7) In the result, I set aside the sentence of imprisonment for ten years awarded on this appellant by the lower Court, and substitute, instead an order of detention in the Borstal School, Palamcottah, for a period of three years from the date of this order, and, for this purpose declare the age of this appellant to be exactly 19 today.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 Madras 173 *[C. N. 81.]*

RAJAMANNAR, C.J., AND SOMASUNDARAM, J.

K. Murugappa Chettiar, Petitioner; v. C. Balasundaram Chetty and another; Respondents.

Civil Miscellaneous Petition No. 4564 of 1950, D/- 22-2-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control), Act (XV (15) of 1946), S. 7 — Default.

Where the rent was payable daily, the default would occur under S. 7, after the lapse of 15 days in respect of every day's rent. The fact that there was an application for fixation of fair rent and according to the rent fixed in that application, the landlord would have with him sufficient money to discharge the arrears relating to the period of the alleged default does not save the tenant from the consequence of the admitted default he has made. (Para 1)

V. Srinivasan, for Petitioner; A. Narasimhachari and K. S. Narayana Aiyar; for Respondents.

ORDER.: There is no error of law apparent on the face of the order of the Appellate Tribunal, which directed eviction of the petitioner for default in payment of rent. The rent was payable dally and admittedly the petitioner did not pay or tender any rent after 29th August 1949. As the

rent was payable daily, the default would occur under Section 7 of the Madras Buildings (Lease and Rent Control) Act, 1946, after the lapse of 15 days in respect of every day's rent. The only point pressed on us by petitioner's learned Counsel, is that, there was another application for fixation of fair rent and according to the rent fixed in that application, the landlord would have with him sufficient money to discharge the arrears relating to the period of the alleged default. That may be so. But that does not save the tenant from the consequence of the admitted default he has made. It is one thing to say that the tenant has a right to have the excess amount, on the basis of the fair rent, adjusted towards the arrears; it is another thing to say that he can escape the consequences of not tendering or paying the rent on or before the date allowed under Section 7 of the Act. This petition is dismissed with costs.

C.R.K./D.H. *Petition dismissed.*

A. I. R. (39) 1952 Madras 174 *[C. N. 82.]*

GOVINDA MENON AND RAMASWAMI, JJ.

In re, Govindaswami Padayachi, Accused.

Criminal Appeal No. 882 of 1950, D/- 31-7-1951.

Penal Code (1860), S. 84 — Benefit under — Crucial point of time.

The crucial point of time for deciding whether the benefit of S. 84 should be given or not is the material time when the offence takes place. In coming to that conclusion, no doubt, the Court has to take into consideration the relevant circumstances like the behaviour of the accused before the commission of the offence and after the commission of the offence. The non-exhibition of feelings and the absence of secrecy on the part of the accused are only some of the relevant circumstances which have to be considered along with the other circumstances of the case and by themselves they do not make out sanity or insanity. (*Paras 4, 5*)

Anno: Penal Code S. 84 N. 3.

Miss Perween Amiruddin, for Accused; Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) 1949 Mad W N Cr 6: (A I R (36) 1949 Mad 460: 50 Cri L J 656) (Pr 7)

('49) 1949 Mad W N Cr 58: (A I R (36) 1949 Mad 648: 50 Cri L J 896) (Pr 7)

RAMASWAMI J.: The point taken before us by the learned counsel for the appellant is that he should have been given the benefit of S. 84, I.P.C. and acquitted.

(2) In order to comprehend the point taken by the learned counsel for the appellant, which was also urged in the lower Court, the following short facts are necessary. The appellant who is described by the learned Sessions Judge as aged about 16 and whom the record of the lower Court shows to be 18 had a bitter quarrel just preceding this occurrence with his mother, the deceased in this case, regarding the execution of a promissory note by his brother. Then this appellant asked his mother to serve him food. The irritated mother told him that he should either serve himself or get his father who was in the fields to serve him. The accused thereupon in a fit of rage dragged his mother inside the hut, bolted the door and bashed his mother with a spade lying nearby. The cries of the mother attracted the people in the neighbourhood, and when they came, they found the door shut and bolted against them. Therefore, they asked the door to be opened and the accused did not open the door. Therefore, the neighbours started hammering on the door and threatened to batter it. The accused thereupon opened the door and came out. Subsequently when he was questioned, as he would be naturally questioned by the neighbours, he has been telling one and all that he killed his mother, because she repeatedly refused to serve him food. Then he has also pointed out to a relative the spade with which he had committed the fell deed. It is significant that when the accused was questioned by that relative and before he showed the spade, the accused was red with anger, showing clearly that with the repeated refusal of his mother he became enraged and committed the deed and his anger has not subsided even thereafter. The accused then finally told the people that the corpse might be shown to the elders of the village and then cremated, clearly recognising that it was not the normal mode of death and that an offence had been committed relating thereto and that therefore the elders of the village should adjudge before the corpse was given its last rites.

(3) On these facts, the learned Sessions Judge came to the conclusion that the accused might have been abnormal and been even showing signs of insipient insanity before the commission of this offence and that he might have become, after the commission of this offence and when he was incarcerated, worse still and become a real lunatic but that when the murder took place the accused was not labouring under such a defect of reason as not to know the nature of the act he was doing or that if he kenw of it he did not know it was either wrong or contrary to law.

(4) We have been taken through the evidence by the learned counsel for the appellant and see no reason whatsoever to differ from the conclusion of the learned Sessions Judge. The crucial point of time for deciding whether the benefit of S. 84 should be given or not is the material time when the offence takes place. If at that moment a man is found to be labouring under such a defect of reason as not to know the nature of the act he was doing or that even if he knew of it he did not know it was either wrong or contrary to law, then we must apply S. 84. In coming to that conclusion, no doubt, we have to take into consideration the relevant circumstances like the behaviour of the accused before the commission of the offence and the behaviour of the accused after the commission of the offence. The learned Sessions Judge has applied all these tests and has come to the aforesaid conclusion; and the details set out above show that the accused knew full well that he was murdering his mother and that what he had done was a grave offence which was both wrong and contrary to law.

(5) In this connection, the non-exhibition of feelings and the absence of secrecy on the part of the accused are stated to be strong indications of his insanity at that time. But we have got to remember that these are only some of the relevant circumstances which have to be considered along with the other circumstances of the case and that by themselves they do not make out sanity or insanity. One may be a hardened criminal and not exhibit any signs of feeling at what he had done, while another may easily break down. In that case as a matter of fact the accused was red with anger as one witness puts it. Then, some may consider secrecy as essential for covering up their crimes, while in others the criminal might despair that what he had done could not be covered up and make no attempt at secrecy. The murder in

this case resulted from a moment's anger and the accused was literally caught red-handed and no possibility of secrecy arises here.

(6) In these circumstances, we are of opinion that the learned Sessions Judge has rightly refused to apply S. 84, I.P.C., to this case and he has awarded the lesser of the two sentences prescribed by law. Therefore we affirm the conviction as well as the sentence.

(7) In the last paragraph of his judgment the learned Sessions Judge has stated that in his opinion the State Government might consider whether S. 10(a) of the Borstal Act should not be applied to this case. We do not wish to express an opinion because we consider that the decision in 'Chelliah v. The King', 1949 Mad W N Cr. 58 following an earlier decision in the 'Public Prosecutor v. Nagappa Pujari', 1949 Mad W N Cr 6 in both of which still earlier decisions to the contrary have not been adverted to or considered, requires reconsideration. Therefore we do not wish to endorse the expression of opinion by the learned Sessions Judge.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 175 *[C. N. 83.]*

GOVINDA MENON AND CHANDRA REDDI, JJ.

In re: Palaniswami Goundan, Accused.

Referred Trial No. 123 and Criminal Appeal No. 821 of 1950, D/- 8-1-1951.

Penal Code (1860), S. 302 — Sentence — Mental condition of accused.

Where the murder was committed when the accused, who did not possess the mentality of an ordinary person, was in some frenzied mood or something in the nature of an abnormal state of mind, 'held' that the ends of justice would be met if the sentence of death was reduced to one of transportation for life. *(Para 4)*

Anno: Penal Code, S. 302, N. 5.

V. N. Srinivasa Rao as amicus curiae, for Accused; The Public Prosecutor, for the State.

GOVINDA MENON, J.: The appellant has been convicted for having murdered his wife Pappayammal and his father Chinnappa Goundan and caused injuries to his son Perumal with the intention of causing his death. For the double murder he has been sentenced to death by the learned Sessions Judge. There can be no doubt whatever on the evidence before the lower Court, that it was due to the injuries inflicted by the appellant that both Pappayammal and Chinnappa Goundan died. It was also the appellant who inflicted the injuries on Perumal which might have proved fatal. P.W. 1 is an eye-witness to the whole incident. She speaks to the fact that it was while she was at the scene of crime that the appellant hacked to death his wife Pappayammal. Chinnappa Goundan, the father who was outside on a cot was next attacked by the appellant and in a very brutal manner injuries were inflicted which proved fatal also. P.W. 5 the mother of the appellant speaks to what P.W. 1 told her as well as to what happened immediately before the commission of the crime. P.Ws. 2 and 3 speak to the appellant cutting Perumal but were not witnesses to the inflicting of injuries on Papayammal or Chinnappa Goundan. Immediately after these injuries were inflicted P.W. 4 saw the appellant coming out with an aruval in his hand. There is further evidence that the appellant was disarmed by persons who came immediately on the scene and tied to a tree.

(2) The defence of the appellant was a version which cannot be accepted at all. What he said was that he found his child Perumal weeping at the threshold of his house and took up the boy in his hands when his maternal uncle's son Palani Goundan stood inside the house armed with a knife. The appellant immediately ran away into the street when Appachi Goundan and others caught him. Palani Goundan aimed the knife at him when it struck Perumal on the neck. He was then caught and beaten and the weapon was placed in his hands.

(3) There is no suggestion or defence as to how the wife Papayammal and his father Chinnappa Goundan came by their death. The learned Sessions Judge has rejected this plea of the appellant as puerile and unworthy of any credence and we entirely agree with the learned Judge. It is unnecessary for us to discuss in any detail the details of the incident as spoken to by the various witnesses adverted to by us above. Suffice it for the purpose of this case to say that we entirely agree with the learned Judge that the witnesses are speaking the truth and their version is entirely acceptable. We are therefore of opinion that the appellant caused the death of his wife and father and inflicted injuries on his son Perumal which might have proved fatal. It cannot be said that he has let in evidence to show the state of mind at the time when he committed the offence and no plea of insanity has been alleged and proved before the lower Court. The offence cannot be anything but murder. We are therefore of opinion that the Sessions Judge was perfectly right in convicting the appellant of the offence under S. 302 I.P.C., for the murder of his wife and father and S. 307, for attempting to cause the death of his child Perumal.

(4) The only point that requires consideration is whether the extreme penalty of the law should be inflicted in the circumstances of the case. The learned Sessions Judge himself was of opinion that the acts of the appellant were hardly those of a normal and sane person. There was no motive disclosed in the evidence as to why those ghastly and brutal murders should have taken place. The evidence of the appellant's mother P.W. 5 was to the effect that the appellant and his wife were not quarrelling and they were leading normal lives. Nothing has been elicited as to why the appellant should have murdered his own father or attempted to kill his child Perumal. There is evidence elicited in the cross-examination of P.W. 5 that the appellant used to sit often with a dazed and vacant look during the period he was not working. At that time he would not talk to any one. Those things indicate that the appellant did not have the normal mentality of an ordinary and sane person and though it cannot be predicated from the evidence that he was unsound or that he did not know the nature of the act as well as the circumstance that he did not know that he was committing a crime, it may be said that some kind of hallucination or frenzy might have been working in his mind and such being the case it seems to us that the ends of justice would be met if the sentence of death is reduced to one of transportation for life. We feel that the murder must have been committed in some frenzied mood or something in the nature of an abnormal state of mind. Subject to the above modification the appeal is dismissed.

C.R.K./V.B.B. *Sentence reduced.*

A. I. R. (39) 1952 Madras 176 *[C. N. 84.]*

RAGHAVA RAO, J.

Tavanur Manakkal Raman Nambudiri, Appellant; v. Chenni Veettil Karthiya and another, Respondents.

A.A.O. Nos. 149 and 150 of 1949, D/- 18-4-1951.

(a) Civil P. C. (1908), S. 100 — Construction of documents — Interference in second appeal.

The High Court is ordinarily loth to interfere on a question of construction of a document, with the view of the lower appellate Court in any case, but where the Courts below have differed, the question is whether the lower appellate Court had sufficient reason in law which compelled it to differ from the trial Court on the construction which the latter had placed upon the document. (Para 3)

Anno: C. P. C., S. 100, N. 29.

(b) Deed — Construction — Kanom or usufructuary-mortgage — T. P. Act (1882), S. 58.

In order to know whether a particular document amounts to a kanam it is not improper to see whether it provides for liability to pay renewal fee.

On the expiry of a prior kanam the parties executed a document titled 'panayam kychit' and an amount of Rs. 250 was fixed by the parties as 'purapad' payable on the date of the execution of the document. The document however did not make it clear whether the Rs. 250 payable on the date of its execution was paid as a renewal fee but in the account books of the parties the amount was shown to be 'avakasam.'

'Held' on a construction of the document and the relevant facts that it was not a kanam but a usufructuary mortgage. (Para 6)

D. A. Krishna Wariar, for Appellant; N. Sundara Iyer, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('37) AIR (24) 1937 Mad 339: (169 Ind Cas 346) (Pr 4)

('48) C R P No. 1253 of 1948 (Mad) (Pr 5)

JUDGMENT.: These two appeals which are against orders of remand raise a common question for determination, and that is the construction of a certain document, Ex. A. 1, a panayam kychit, as it is called, dated 25th May 1923. The suit out of which these appeals arise was one for redemption on the footing that the document constituted a usufructuary mortgage. It was resisted by the defendants on the ground that the transaction was in the nature of a kanam. The suit was decreed by the trial Court but dismissed on appeal with the result that an application for renewal of the kanam which had been rejected by the trial Court was ordered by the lower appellate Court.

(2) There has been much argument advanced on both sides on this question of the construction of the document, but I think that if certain broad considerations of perspective are borne in mind the construction is not by any means one of difficulty.

(3) That there was a prior kanam on the expiry of which the suit document came into existence is not disputed. That an amount of Rs. 250 was fixed by the parties as purapad payable on the date of the execution of the document in question and was in fact so paid is also common ground. Laying down for his guidance two basic principles (1) that it is more the substance of a transaction than its name that has to be looked into for the purpose of ascertaining the true nature of the transaction, and (2) that where the parties to a transaction with full knowledge of its legal implications have chosen to give a particular name to the transaction which is known to law, and the document evidencing the terms of the bargain makes it clear that the intention of the parties was to enter into such a transaction as is named by them, the Court is bound to give effect to the plain terms and tenor of the document, unless it is shown that the terms of the bargain are repugnant to the character of the transaction as intended by the parties, the learned District Munsiff came to the conclusion that the document in question in the present case was in the nature of a possessory mortgage. The learned Subordinate Judge on appeal reversed him essentially under the influence of the impression, which is not warranted by the document itself, that although the parties intended a kanam they wanted to make it appear that it was a mortgage and that way "to anticipate a passing of any tenancy legislation giving protection to kanomdars." I should ordinarily be loth to interfere on a question of construction with the view of the lower appellate Court in any case, but where the Courts below have differed, the question which I generally propound to myself, is whether the lower appellate Court had sufficient reason in law which compelled it to differ from the trial Court on the construction which the latter had placed upon the document. Applying this point of view to the present case, I have, after a careful and anxious consideration of the arguments of counsel on both sides, arrived at the distinct conclusion that the trial Court in the present case approached the matter from the right perspective and decided the case aright, whereas the lower appellate Court without sufficient warrant interferred with the conclusion arrived at by the trial Court. It follows in my opinion that the order of the lower appellate Court in the present case must be set aside and the decree and order of the trial Court should be restored.

(4) Looking at the definition of "kanam" in the Malabar Tenancy Act (Section 3 (1), it is common ground that the first four conditions stand satisfied, namely, a right in the transferee to hold the property liable for the consideration, (2) the liability of the transferor to pay to the transferee interest on the consideration, (3) the payment of michavaram by the transferee and (4) the right of the transferee to enjoy the property for the period provided for. As regards the fifth condition of the definition it is argued by Mr. Krishna Wariar that it does not exist in the present case, because on the report of the Commissioner both the Courts have concurred in holding that the renewal fee payable is nil. Mr. Sundara Aiyar has, on the other hand, contended contra relying upon a case in 'Kannathazha Pakran v. Aminal Umma', AIR (24) 1937 Mad 339. In that case in a transfer described as kanom the transferee was permitted to enjoy the property for a further period after the termination of the original period. The renewal fee calculated according to the provisions of the Act amounted to nothing. The transferee contended that he was not liable to pay any renewal fee at all and that consequently there was no kanom. It was held by Burn, J., that the contention was wrong, because, as the learned Judge put it, it confused the question of the liability of the transferee to pay renewal fee with the question of the amount of renewal fee. The liability to pay renewal fee being still there, the kanam was, according to the learned Judge, still a kanom. It is not necessary for me to go into the relative merits of the contention of counsel on either side on this aspect of the matter, because I am clear that the document in the present case does not provide for the liability of the transferee to pay any renewal fee to the transferor, if the transferee is permitted to enjoy the property

in question for a further period after the termination of the original period. Mr. Sundara Aiyar contends that if the character of the document as a kanom is otherwise established, the liability to pay a renewal fee follows as a matter of course as one of the incidents which in law attaches to the transaction. That is true, but in order to know whether the transaction amounts to a kanam or not, it is not improper to see whether the document provides for liability to pay a renewal fee. The document in the present case does not provide for it, nor does it go under the label of kanom, as the document in the case in 'Kannathazha Pakran v. Aminal Umma', AIR (24) 1937 Mad 339 did.

(5) The name "panayam kychit" is, as Subba Rao, J., has observed in 'C. R. P. No. 1253 of 1948', a very well-known word in Malabar, and where that is used, there is no reason to suppose that a mortgage is not what was intended by the parties but a kanam. If really the parties intended a kanom there was no difficulty in the way of their use of that word. That the parties in the present case have not used that word but have used altogether a different word is a point of considerable significance, in my opinion, which the lower appellate Court has altogether missed. It is argued by Mr. Sundara Aiyar that the name is not all that matters, but that the substance of the transaction must be looked into. That is true; but where the substance of the transaction is not by any means a thing susceptible of easy definition on the provisions of the document the significance to be attached to the name still remains, as I think.

(6) It was argued by Mr. Sundara Aiyar that the payment of Rs. 250 by his client to the appellant on the date of the execution of the earlier document was itself in the nature of a renewal fee for the prior kanom transaction, and that if the possession of his client under that transaction continued under the present document his status as a kanamdar must be deemed to be continuing. That the Rs. 250 was paid as a renewal fee is not made out by the document itself but by an account book, the genuineness of which is not however by any means open to doubt. The word "avakasam" however which is to be found used in the account book does not necessarily show that it was by way of renewal fee of a kanom as such that the amount was paid. As Mr. Krishna Wariar, in my opinion, rightly points out, instead of the generic word "avakasam" it was open to the parties if they meant renewal fee for a kanom as such to have used the specific expression "poliche eduthuka avakasam." 'Avakasam", the generic word, may have been used, as I think, because while no doubt the possession already obtaining under the prior kanam was intended to continue it was not intended that it should continue as possession under a continuing kanam but only as possession under a panayam kychit which the parties entered into in place of the old kanam transaction. The avakasam of Rs. 250 may have been for the continuance of possession under the new document though on a different jural basis to that of possession under the earlier kanam transaction. It is also said by Mr. Sundara Aiyar that the fact that his client had to bear the stamp and registration expenses would go to show that the transaction in question was a kanam rather than a mortgage. I do not consider this circumstance to be by any means conclusive. On the whole the question is one of inference from all the relevant facts put together, and while no doubt there is some force in what the learned counsel is saying I have on the whole no doubt in my mind but that the judgment of the learned District Munsiff alike with reference to perspective and with reference to considerations of detail is so clearly correct that it ought not to have been touched by the lower appellate Court in the slightest.

(7) In these circumstances these appeals must be allowed with costs here and in the lower appellate Court (Advocate's fee in A.A.O. No. 149 of 1949 only.)

C.R.K./K.S. *Appeals allowed.*

A. I. R. (39) 1952 Madras 177 *[C. N. 85.]*

GOVINDA MENON AND RAMASWAMI, JJ.

In re Sagili Solomon, Appellant.

Criminal Appeal No. 894 of 1950, D/- 23-7-1951.

Criminal P. C. (1898), S. 342 — Non-compliance with S. 342 — Effect of — Questioning of accused in committing Court whether enough.

The omission to strictly comply with the terms of S. 342, vitiates the trial. The fact that in the committal Court there has been a complete and full questioning of the accused is not sufficient because it is obligatory upon the Sessions Judge to put the evidence against the accused to him and elicit answers from him. AIR (20) 1933 P. C. 124; AIR (23) 1936 Mad 715, Foll. (Paras 1, 2)

Anno: Criminal P. C., S. 342, N. 20, Pt. 1.

O. Chinnappa Reddi, for Appellant; Public Prosecutor; for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('33) 64 Mad L J 466: (AIR (20) 1933 P C 124: 34 Cri L J 322) (Pr 1)

('36) 59 Mad 622: (AIR (23) 1936 Mad 715: 38 Cri L J 45) (Pr 1)

GOVINDA MENON, J.: It has been repeatedly held, not only by their Lordships of the Privy Council, but also by this Court that the omission to strictly comply with the terms of S. 342, Criminal P.C., vitiates the trial In 'Dwaraknath Varma v. Emperor', 64 Mad L J 466, the Privy Council held that S. 342, Criminal P. C., ought to be strictly followed. This decision has been followed in 'Sangama Naicker', In re: 59 Mad 622.

(2) In page 20 of the printed papers we find the questions put to the accused under S. 342, Criminal P.C., as follows:

Q: The statement made by you in the committing Court is read out to you now. Is it the one made by you and is it correct?

A: Yes, it is correct (marked as Ex. P. 16)

Q: Do you wish to say anything more in addition to that statement?

A: Nothing.

Q: Are there witnesses on your behalf?

A: No.

We do not find any question put by the learned Judge asking the accused to explain the circumstances that have been proved against him. In our opinion, the mere fact that the accused is asked whether he wishes to say anything more in addition to what he has stated in the committing Court is not sufficient. The learned Public Prosecutor invites our attention to the fact that in the committal Court there has been a complete and full questioning of the accused, but that in our opinion is not sufficient because it is obligatory upon the Sessions Judge to put the evidence against the accused to him and elicit answers from him. Therefore, we are of opinion that the trial is vitiated by this circumstance.

(3) The conviction and sentence are set aside and the accused will be retried by the present Sessions Judge of Cuddappah.

C.R.K./V.S.B. *Retrial ordered.*

A. I. R. (39) 1952 Madras 178 *[C. N. 86.]*

PANCHAPAKESA AYYAR, J.

Swaminatha Pillai, Petitioner v. Balasubrahmanya Udayar; Respondent.

Civil Revision Petition Nos. 1198 and 1199 of 1950, D/- 22-1-1951.

Civil P. C. (1908), O. 44, R. 1, Proviso — Appellate Court, competency of, to reject pauper petition without assigning reason.

An appellate Court is bound to reject under the proviso to R. 1 an application to file an appeal in 'forma pauperis' if upon a perusal thereof, and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. When it hears the counsel for the petitioner and rejects the petition, it must be presumbed to have applied its mind to the arguments of the counsel and the facts of the case before rejecting the petition. The fact that the points urged by the counsel who appeared for the petitioner are not set out or discussed or that no reasons have been given while rejecting the application is no reason for interfering on revision with the order of rejection. AIR (20) 1933 Mad 519, AIR (23) 1936 Mad 101 and AIR (29) 1942 Mad 478 (1) Foll.; AIR (18) 1931 Mad 198 Not foll. **(Para 4)**

Anno: C. P. C., O. 44, R. 1, N. 6.

T. S. Vydianatha Ayyar, for Petitioner; A. V. Narayanaswami Ayyar; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) ILR (1950) Mad 1: (AIR (36) 1949 PC 156) (Pr 4)

('04) 28 Bom 451: (6 Bom L R 442) (Pr 3)

('30) 53 Mad 245: (AIR (18) 1931 Mad 198) (Prs 2, 3, 5)

('33) 56 Mad 323: (AIR (20) 1923 Mad 519) (Pr 3)

('36) 59 Mad 805: (AIR (23) 1936 Mad 101) (Pr 3)

('42) ILR (1942) Mad 746: (AIR (29) 1942 Mad 478 (1)) (Pr 3)

('25) 4 Pat 67: (AIR (12) 1925 Pat 442) (Pr 3)

('25) AIR (12) 1925 Rang 249: (88 Ind Cas 988) (Pr 3)

JUDGMENT.: The question for consideration in these two petitions is whether an order passed by the District Judge, Tiruchirapalli, under O. 44, Rule 1, of the Civil Procedure Code, rejecting two petitions to entertain pauper appeals, against the judgments and decrees in O. S. Nos. 37 and 40 of 1949 on the file of the A.D.M., Tiruchirapalli, after hearing the counsel for the petitioner, can be interfered with and set aside in revision simply because the points urged by the learned counsel who appeared for this petitioner in the two O. Ps. are not set out and discussed, and the order simply runs as follows:

> "I see no reason for thinking that the decision of the lower Court is contrary to law or is otherwise erroneous. Petition rejected."

(2) Mr. Vydianatha Aiyar, for the petitioner in both the civil revision petitions, relied on the ruling in 'Chennamma In re: 53 Mad 245. There, it was held by a Bench of this Court, consisting of Venkatasubba Rao and Madhavan Nair, JJ., that it was not enough if the order rejecting the petition to file the pauper appeal simply quoted the words of the proviso to O. 44, Rule 1, C.P.C., and that an applicant should be granted leave to file a pauper appeal in case he showed that he had 'prima facie' a good case. But, here, the fact remains that the learned District Judges heard the counsel for the petitioner, and came to the conclusion that the petitions should be rejected, thereby showing that in his opinion the petitioner had 'prima facie' no good case in either of the proposed appeals.

(3) It has been held by a later Bench of this Court, in 'Narayana Rao v. Veerayya', 56 Mad 323, that the proviso to O. 44, Rule 1, is mandatory and that it only contemplates a perusal of the application, the judgment and the decree by the appellate Judge and nothing else, and that unless in the opinion of the appellate Judge the decree is contrary to law or otherwise erroneous or unjust he is bound to dismiss the application; and that O. 44, Rule 1, C.P.C., does not say that the Court shall not reject the application if the appeal raises a substantial question of law or if the appellant has 'prima facie' a good case. The ruling in 'Chennamma, In re: 53 Mad 245, especially as a still later followed, as being in conflict with the ruling in 'Sakubai v. Ganpat', 28 Bom 451, 'Rajendra Prasad v. Gopal Prasad', 4 Pat 67 and 'Maung Tha Din v. Daw Paw', AIR (12) 1925 Rang 249. With very great respect, I prefer to follow the later Bench ruling in 'Narayana Rao v. Veerayya', 56 Mad 323, in preference to the earlier Bench ruling in 'Chennamma' In re: 53 Mad 245 especially as a still later Bench of this Court has held in 'Subba Rao v. Tata Reddi', ILR (1942) Mad 746, that it is not even necessary for the appellate Court to hear the petitioner in a pauper appeal before rejecting the appeal under O. 44, Rule 1, C.P.C., and Wadsworth, J., has held in 'Kanthimathi Ammal v. Ganesa Aiyar', 59 Mad 805, that the Court does not act illegally if it disposes of an application for leave to appeal 'in forma pauperis' in a summary manner without hearing the applicant, and even in Chambers, and without giving him time for payment of the deficient court-fee after rejection of the petition. I am satisfied that the mandatory provisions of the proviso of O. 44, Rule 1, C.P.C., will allow only of the interpretation put upon it in the case in 'Narayana Rao v. Veerayya', 56 Mad 323, 'Kanthimathi Ammal v. Ganesa Aiyar', 59 Mad 805, and 'Subba Rao v. Tata Reddi', ILR (1942) Mad 746, and that the over-liberal interpretation put on it in 'Chennamma In re 53 Mad 245, is not to be preferred to the stricter interpretation in these rulings.

(4) Even considering the matter solely and purely in the light of the proviso to O. 44, Rule 1, C.P.C., and without reference to any rulings, I am satisfied that a Court is bound to reject an application to file an appeal in 'forma pauperis' if upon a perusal thereof, and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. When it hears the counsel for the petitioner and rejects the petition, it must be presumed to have applied its mind to the arguments of the learned counsel and the facts of the case before rejecting the petition. So any interference in revision under S. 115 of the Code of Civil Procedure with such an order appears to me to be not justified, especially in the light of the Privy Council ruling in 'Venkatagiri v. H. R. E. Board, Madras', ILR (1950) Mad 1, laying very strict limits within which alone powers of revision can be exercised, none of which conditions are satisfied here. The mere fact that the learned District Judge gave no detailed reasons for his rejection is no proof that he did not apply his mind to the facts of the case or the arguments the learned counsel had urged. The mind of a highly trained judicial officer, like a District Judge, cannot be taken to be a vacuum to which arguments are addressed without leaving any effect behind. No ruling has been shown to me by Mr.

Vydianatha Aiyar which requires the District Judge to give detailed reasons for rejecting a pauper application under the proviso to O. 44, Rule 1, C.P.C. Indeed, in most cases, it will be a sheer waste of time, money and energy to write long orders when rejecting such pauper petitions under that proviso. It is enough if the Judge is proved to have applied his mind to the judgment and decree and the pauper application. Though he was not bound under the rulings cited above even to hear the counsel for the petitioner before rejecting the application, the learned District Judge did hear the counsel for the petitioners. Though he was not bound, under the above rulings, to give time for payment of the Court-fee, after rejecting the applications, he gave time for paying the Court-fee. So the learned District Judge has really granted more indulgence to the petitioner than he was entitled to, and there is nothing for the petitioner to complain. Paupers are entitled only to the privleges granted to them. They shall not be allowed more privileges, much less to take up an undue part of the Court's time, crowding out the litigants who pay the stipulated Court-fee.

(5) These petitions deserve to be and are hereby dismissed, but, in the peculiar circumstances, without costs, as these petitions seem to have been filed relying on the ruling in 'Chennamma in re: 53 Mad 245. Time granted for payment of Court-fee in both these appeals till 3 p.m., on the 22nd February, in the District Court, Tiruchirapalli. In no circumstances will this time be extended.

C.R.K./V.S.B. *Revision dismissed.*

A. I R. (39) 1952 Madras 179 *[C. N. 87.]*

GOVINDA MENON AND RAMASWAMI GOUNDER JJ.

Konithala Chinna Subba Naidu, Appellant v. Chandra Kuppa Naidu and others, Respondents.

A. A. O. No. 24 of 1951, D/- 27-8-1951.

Provincial Insolvency Act (1920), S. 37 — Adjudication annulled — Vesting order not passed — Effect — Possession of official Receiver does not become adverse — (Limitation Act (1908), Arts. 142 and 144.)

Where the adjudication order is annulled but the Insolvency Court does not make any order under S. 37, vesting property in the Official Receiver, the position is that the situation, becomes as before the adjudication and the quondam insolvent gets back his property saddled with all the debts. But if he does not take back the possession which still remains with the Official Receiver, the possession of the latter does not become adverse to the quondam insolvent. He holds the property on behalf of the rightful owner. If the Receiver sells the property the possession of the purchaser however becomes adverse to the quondam insolvent from the date of the sale but his suit for possession filed within 12 years is not barred. A. I. R. (6) 1919 Mad. 8 Rel. on. (*Para 3*)

Anno: Prov. Insol. Act, S. 37 N. 5; Lim. Act Arts. 142 & 144 N. 71.

D. Muni Ramiah and A. Balakrishna Rao, for Appellant; V. Vedanthachari and T. Rangaswami Iyengar, for Respondents.

Case referred to:

('19) A I R (6) 1919 Mad 8: (49 Ind Cas 89) (Pr 3)

GOVINDA MENON J.: The order of the learned Subordinate Judge cannot be supported and has therefore to be set aside. The appellant was adjudicated insolvent in I. P. No. 9 of 1932 on 10-3-1933 and his properties of which the subject-matter of the suit formed a part, vested in the Official Receiver on 6-3-1934. The Official Receiver sold these properties to a third party on 2-5-1935 but as a result of proceedings about which it is unnecessary to discuss in the present context, that sale was set aside and the properties became revested in the Official Receiver. On 4-9-1935 the Official Receiver wrote to the Insolvency Court requesting that the order of adjudication should be annulled because the insolvent had taken no steps to get the order of discharge. The learned Subordinate Judge made an order annulling the adjudication in the following terms on 12-9-1935.

"The insolvent is absent. His advocate has no instructions. The adjudication order is annulled."

At the time this order was made, the learned Judge did not make any order under S. 37 of the Provincial Insolvency Act vesting the properties in the Official Receiver. Therefore the position came to this, namely, that by the order of annulment the situation became as it was prior to the adjudication. Such being the case, it was open to the insolvent to get back possession of the property saddled with all the debts which he had to pay. The insolvent did not take any steps and, therefore, on 5-1-1937 despite the fact that the insolvency was annulled, the Official Receiver sold these properties to the present respondents. A petition to sue in forma pauperis was filed on 17-12-1938 by the quondam insolvent for recovery of possession of property from the alienee from the Official Receiver. Two points were raised before the lower Court, namely, firstly, whether the petitioner was a pauper, and secondly, whether the petitioner had no cause of action?

(2) On the first point, the learned Judge found that the petitioner was a pauper.

(3) On the second point, the learned Judge was of opinion that the provisions of O. XXXIII, R. 5 (d. 1) Civil P. C. should apply, namely, that the suit appeared to be barred by law. The learned Judge was of opinion that from the moment the insolvency was annulled on 12-9-1935, the possession of the properties by the Official Receiver became adverse to that of the quondam insolvent and therefore he must be deemed to be a trespasser. Such being the case, since the suit was filed only on 17-12-1948, that is more than 12 years after the date when the possession became adverse, the suit is barred. In our view, the learned Judge is wrong. It has been held in 'Kuppusami v. Kausala Ramiah', A I R (6) 1919 Mad 8 at p. 10 by Wallis C. J. and Spencer J. that even in a case where the property vested in the receiver and the receiver was discharged, still the possession of the receiver would not be adverse to the persons who are really interested. The observations are as follows:

"The possession of the Court through the receiver was therefore the possession of the insolvent. The receiver, defendant 3, has never yet been discharged and even if he had been discharged that would make no difference. He would still hold the property on behalf of the rightful owner, as observed in the note in Karr on Receivers at page 151, Edn. 4 citing Horlock v. Smith, 1842-2-L. J. Ch. 157".

Following this decision, we hold that even though the insolvency was annulled on 12-9-1935, the receiver continued to hold the property on behalf of the rightful owner, namely, the quondam insolvent. Therefore, the receiver's possession cannot be said to be adverse to that of the quondam insolvent nor that the receiver can be considered to be a trespasser. If that is so, the question of adverse possession can arise, if at all, only when

the Official Receiver sold the property on 5-1-1937, and the present suit being within 12 years of that date, there can be no bar of limitation.

(4) Mr. T. Rangaswami Aiyangar for the respondents contends that the petition is barred by some other provision of the statute of limitation. The learned Judge has not considered that aspect of the case and we do not wish to express any opinion on that. It is open to him to raise any such defence in the suit. The order of the learned Judge is therefore set aside and O. P. No. 1 of 1949 is remanded to the lower Court to be registered as a suit and to be proceeded with accordingly. The appellant will be entitled to the costs of this civil miscellaneous appeal.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Madras 180 *[C. N. 88.]*

BASHEER AHMED SAYEED J.

Sadhu Venkayya and another, Petitioners v. Colla Meenakshamma, Respondent.

Civil Revn. Petn. No. 1115 of 1949, D/- 7-8-1951.

Contempt of Court — Disobedience of order of Court — Constructive liability.

In cases where persons have to be committed for contempt of Court for the reason that they disobeyed the orders of Court, (not to cut and remove the crops standing on a certain piece of land) no question of constructive liability would arise. On the other hand, it is absolutely essential that it should be proved beyond doubt that the persons who were charged with contempt did really disobey an order validly passed by Court and which was brought home to them, and a copy of which was personally served in the manner required by the procedure. Where the Court instead of giving a finding that the defendants chargea with contempt before him have been proved to have committed contempt by disobedience of the order of Court has simply proceeded on certain inferences and surmises, such procedure is not warranted. If the commissioner's report upon which the proceedings were based is not conclusive and does not help in bringing home the guilt of disobedience to the defendants they are entitled to be acquitted of any such offence. Simply because defendants were the owners and simply because they stated that they were interested in the crop, it could not be presumed that they should have instigated the people who actually cut away the crops, unless there was direct relationship established between the defendants and persons who were actually responsible for the act of cutting and removing the crops. (*Para 3*)

P. V. Chalapathi Rao, for Petitioners; A. Bhujanga Rao and D. R. Krishna Rao, for Respondent.

ORDER: This revision petition has been preferred by defendants 1 and 2 who have been committed for contempt of Court by the learned First Additional Subordinate Judge of Guntur for having disobeyed the order passed by the learned District Munsif of Guntur not to cut and remove the crops on the land to which the petitioners laid claim as owners, on the appointment of a receiver.

(2) The learned District Munsif who heard the application for committing these petitioners for contempt dismissed the application as there were not sufficient grounds to hold that the defendants committed any disobedience of his order, but on appeal by the plaintiffs the learned Subordinate Judge of Guntur while holding that there was no sufficient evidence to establish the individual guilt of defendants 3 to 9 and that there was no satisfactory evidence to prove that they have taken part, still held that the defendants 1 and 2 who were the owners of the land should be deemed responsible for the disobedience of the order of injunction. He further found that the defendants 1 and 2 had deliberately disobeyed the order of injunction and that they were liable to be punished by being sent to civil prison and committed them for a period of two months holding that that period would be sufficient. Defendants 1 and 2 have preferred this revision petition.

(3) I have been taken through the evidence and in particular the report of the commissioner who was appointed for the purpose of harvesting the crops that were in dispute and also the judgments of the Courts below. On a careful consideration of the evidence as also the reasoning given in the learned Subordinate Judge's judgment, I am constrained to observe that the learned Subordinate Judge has not been correct in holding that defendants 1 and 2 were responsible for any disobedience. The commissioner's report which is the main basis for coming to the conclusion that there was any disobedience on the part of defendants 1 and 2 is most inconclusive on the point, and if that report is to be accepted, there can be no justification for holding that defendants 1 and 2 had committed any disobedience at all. In his judgment, the learned Subordinate Judge has himself observed that the commissioner's report does not implicate defendants 1 and 2 in such a manner as to convict them of contempt of Court. A careful reading of the judgment of the learned Subordinate Judge leads me to the conclusion that the learned Subordinate Judge has acted upon the principle of constructive liability for the disobedience of the order. In cases where persons have to be committed for contempt of Court for the reason that they disobeyed the orders of Court, no question of constructive liability would arise. On the other hand, it is absolutely essential that it should be proved beyond doubt that the persons who were charged with contempt did really disobey an order validly passed by Court and which was brought home to them, and a copy of which was personally served in the manner required by the procedure. Instead of giving a finding that the first and second respondents before him have been proved to have committed contempt by disobedience of the order of Court, the learned Subordinate Judge has simply proceeded on certain inferences and surmises. I do not think such procedure is warranted. If, as I have said before, the commissioner's report, is not conclusive and does not help in bringing home the guilt of disobedience to the defendants 1 and 2, defendants 1 and 2 were entitled to be acquitted to any such offence. I do not think, therefore, that this judgment of the learned Subordinate Judge could be supported or upheld in so far as he has not found on any acceptable evidence that the 1st and 2nd defendants wilfully committed contempt by disobeying the order of the District Munsif. Simply because defendants 1 and 2 are the owners and simply because they state that they were interested in the crop, it cannot be presumed that they should have instigated the people who actually cut away the crops, unless there is direct relationship established between the accused and persons who were actually responsible for the act of cutting and removing the crops. This has not been the case in the present petition before me. In such circumstances, I think the order of the learned Subordinate Judge should be set aside and the 1st and 2nd defendants should be declared not to have committed any contempt of Court. In the result, this petition is allowed with costs.

C.R.K./R.G.D. *Revision allowed.*

A. I. R. (39) 1952 Madras 181 *[C. N. 89.]*

RAJAMANNAR C. J. AND SOMASUNDARAM J.

R. Govindaswami Naidu, Petitioner v. G. Pushpalammal and another, Respondents.

Civil Misc. Petn. No. 2365 of 1951, D/- 26-7-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XV (15) of 1946) S. 7(2) and (3) — Eviction — Waste by tenant — Nature of evidence — Duty of Rent Controller to take notes of inspection.

Every act of waste by the tenant will not entitle the landlord to obtain an order of eviction under the provisions of S. 7. It cannot be laid down as a rule of law that a demolition of any wall in a building must necessarily be deemed to be an act of waste which is likely to impair materially the value or utility of the building. A finding on this point is a finding which must be based upon the particular facts as emerge from the evidence that is adduced in the case. Where there is almost complete absence of material relevant to the determination of this main question, except the evidence of the landlady's husband who said that the act of the tenant would impair materially the value or utility of the building but did not choose to say how and why and there are no notes of the local inspection made by the Rent Controller, it is difficult to hold that the demolition must have resulted in impairing the value or utility of the building.

In cases where the Rent Controller makes a local inspection, it is desirable — and it will be useful also at the further stages of the case — that he makes notes of the inspection forthwith to the knowledge of the parties and counsel who may be present at the time. This procedure will help the parties to know the impressions which the officer had formed as a result of the local inspection and this knowledge will enable them to adduce such evidence as they may choose to support or controvert the impressions of the officer. (*Para 3*)

V. V. Srinivasa Ayyangar and V. Devarajan, for Petitioner; G. Chandrasekhara Sastri, K. Varadachari and G. Venkatesiya, for Respondents.

RAJAMANNAR, C. J.: This application relates to the petitioner's occupation of house No. 7, Ramakrishna Street, G. T. Madras as a tenant under the respondent. He originally entered on the premises on or about 1-11-1944 and it is common ground that the premises were let to him for manufacturing peppermints. On 16-1-1950 the landlady issued a notice to the petitioner through her advocate calling upon him to vacate and deliver vacant possession of the house on the ground that he had committed acts of waste. The acts mentioned in that notice were that he had demolished the wall of the inside room in the front yard and removed the threshold and doorway and converted the room into one big hall and that he had removed the rafters and inserted in their places bamboo sticks. The reply to this notice contained several matters not strictly pertaining to the disposal of the application before us, but it was alleged therein that the notice was not issued 'bona fide' as it was full of falsehoods, but it was issued maliciously with a view to extort money and blackmail him. As regards the charge about removal of the rafters, the tenant stated that it was at the instance of the landlady that he substituted bamboo rafters in place of rotten palmyra ones. He also alleged that the alterations and other necessary repairs were done by him with the consent and at the instance of the landlady. On 14-2-1950 the landlady filed a petition under Ss. 7(2) and (3) of Madras Act XV of 1946 for eviction of the petitioner. The material portion of this petition is paragraph 7 in which it was alleged that without the knowledge and consent of the landlady or her husband, the tenant had demolished the wall of the inside room in the front compartment and removed the threshold and doorway and converted the room into a big hall and that he had further removed several rafters and inserted in their place bamboo sticks. In paragraph 8 it was stated that by reason of such demolition and alteration in the building the respondent had committed serious acts of waste which had materially impaired the value of the building. Before the Rent Controller the landlady's husband gave evidence as P. W. 1 and three witnesses were examined on behalf of the tenant. The Rent Controller also appears to have made an inspection of the premises in the presence of P. W. 1 and the respondent. The Rent Controller found that one wall which separated the western room from the main hall in the front yard of the suit building had been removed leaving only the wooden door frame intact. This finding of fact was also based upon the evidence of the landlady's husband and it must be accepted. There is no finding either of the Rent Controller or of the appellate tribunal as to the rafters. The Rent Controller came to the conclusion that the wall which had been demolished had also been to some extent a support to the tiled roof above. Apparently because of this he was satisfied that the tenant had by demolishing impaired materially the value and utility of the building. He therefore passed an order for eviction. There was an appeal by the tenant and the appellate tribunal dismissed the appeal. The learned Judge held that there could be no dispute about the demolition of the wall. He concluded — as did the Rent Controller — that the wall must have been a support to the roof above and its removal must amount to less protection for the roof which thereby would put the house in a dangerous condition. He was therefore of the opinion that the tenant was guilty of an act which impaired the value and utility of the building. The application now before us has been filed by the tenant to quash the orders of the Rent Controller and the appellate tribunal.

(2) Several points were raised before us by Mr. Srinivasa Ayyangar, learned counsel for the tenant. The first point was that there is no definite finding that the act of waste alleged was done after the coming into force of Madras Act XV of 1946 and in the absence of such a finding the petition for eviction was not maintainable. It is true that there is no definite finding, but we do not wish to say anything further on this point as we think that the application must be heard and disposed of afresh in the view we are taking on another point.

(3) The next point urged before us — and which we think is clearly sustainable — is that the finding of the Rent Controller and the appellate tribunal that the tenant has committed an act of waste as is likely to impair materially the value or utility of the building is not a finding based on any evidence in the case and therefore neither tribunal has really determined the main issue which fell to be determined in this case. It is obvious that every act of waste will not entitle the landlord to obtain an order of eviction under the provisions with which we are now concerned. It is equally clear that it cannot be laid down as a rule of law that a demolition of any wall in a building must necessarily be deemed to be an act of waste which is likely to impair materially the value or utility of the building. A finding on this point is a finding which must be based upon the particular facts as emerge from the evidence that is adduced in the case. In the present case before us there is almost

complete absence of material relevant to the determination of this main question. The landlady's husband gave evidence as P. W. 1 and he contended himself with saying that the act of the respondent would impair materially the value or utility of the building. He did not choose to say how and why. There is no other evidence adduced on behalf of the landlady. Mr. Chandrasekhara Sastri for the respondent strongly relied upon two other facts in addition to the oral testimony of P. W. 1 to support the decisions of the two tribunals. The first is the fact that the Rent Controller made a local inspection in the presence of the concerned parties and formed the impression that the demolition was an act of waste likely to impair materially either the value or the utility of the building. We have not been able to find among the records any notes of the local inspection which the Rent Controller made. In the absence of such notes, it is difficult to ascertain from the order itself on what facts he came to the conclusion that the demolition must have resulted in impairing the value or utility of the building. In cases where the Rent Controller makes a local inspection, it is desirable — and it will be useful also at the further stages of the case — that he makes notes of the inspection forthwith to the knowledge of the parties and counsel who may be present at the time. This procedure will help the parties to know the impressions which the officer had formed as a result of the local inspection and this knowledge will enable them to adduce such evidence as they may choose to support or controvert the impressions of the officer. In this case, as already mentioned, there are no notes of inspection. The other fact relied upon by the respondent's counsel was that the allegation in the notice which was issued before the filing of the petition was not denied by the tenant. We are unable to find anything in the reply notice of the tenant which could be utilised as an admission by him that any act of his was likely to impair materially the value or utility of the building.

(4) In the circumstances we do not think we should sustain an order of eviction based upon a finding which cannot be deemed to be a proper finding in law. We therefore quash the orders of the Rent Controller and the appellate tribunal with the result that the petition for eviction filed by the respondent will stand restored to the file of the Rent Controller. The parties will be at liberty to adduce fresh evidence if they chose to. In the circumstances of the case there will be no orders as to costs.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Madras 182 *[C. N. 90.]*

RAJAMANNAR C. J.

A. R. Senthilanathan Chettiar, Petitioner v. The Panchayat Board of Mohanur by its Executive officer for the time being S. Abdul Hamid Khan, Respondent.

Civil Revn. Petn. No. 1105 of 1949, D/- 16-2-1951.

Madras Local Boards Act (XIV (14) of 1920) Ss. 193 (1), 212 (2) — Licence fee — Object of Machinery in one place used for two purposes — Rate of fee.

The licence fees which the Local Boards are permitted to levy are not intended to augment the revenues of the Board and their real purpose is to defray the expenses of the Board for supervising the places for which the licence is granted.

It is obvious from the plain language of S. 193 that in respect of any one place, only one licence is contemplated though that place may be used for one or more of the purposes specified in Sch. VII. Thus where a Panchayat Board fixes a certain rate of licence fee under S. 212 (2) for a certain machine used for one purpose, they are not entitled to charge an additional licence fee if the same machine is used in the same place for some other purpose. (Paras 4, 5)

A. Srirangachari, for Petitioner; N. S. Raghavan, for Respondent.

JUDGMENT: The petitioner in the above revision petition is the proprietor of Seethalakshmi Mills at Mohanur within the limits of the Panchayat Board of Mohanur. He owns and runs a 20 H. P. motor. When he applied for renewal of his licence to use the place for the purpose specified in Sch. VII of the Madras Local Boards Act, under S. 193 of that Act, a sum of Rs. 50 was demanded from him towards licence fees, though the licence fee according to the rates already published was Rs. 25 in cases where a machine of 20 H. P. was installed. The addition levy of Rs. 25 was sought to be justified by the Panchayat Board on the ground that the plaintiff should pay separately at Rs. 25 for each of the purposes for which he put the motor to use namely, rice hulling and decorticating groundnuts. The plaintiff paid that amount under protest and filed the suit for the recovery of the excess fee of Rs. 25 paid by him. His case is that he is liable to pay only one fee of Rs. 25 for running a 20 H. P. motor irrespective of the uses to which he may put the motor.

(2) The defendant Board alleged that when the plaintiff was originally granted a licence he was using his electric motor of 20 H. P. only for purposes of running a rice huller and that subsequently the plaintiff installed a disintegrator in the same premises in 1947 and the defendant Board levied an additional licence fee for running the decorticator for the year 1947-48 and collected the same. The further contention of the Board was that the Board was authorised to levy additional fee for using the motor for additional purposes though the horse power of that may not change. They sought support for their action in two Government Orders, Nos. 1570 and 40 dated 13th June 1945 and 4th January 1945 respectively.

(3) The learned District Munsiff of Namakkal dismissed the suit on the footing that the Panchayat Board was right in collecting additional fee of Rs. 25 mainly relying upon the instructions issued by the Government in the Government Order, dated 13th June 1945. The material portion of that Government Order is as follows:

> "If the machine installed in the same premises are for different industrial purposes, a separate licence should be insisted upon in respect of each of the machines and fees charged for the licence according to the rates fixed."

Presumably, the licence and fees referred to in this passage relate to the licence issued under S. 193 of the Local Boards Act. They cannot refer to the permission granted under S. 194 for which there cannot be a recurring levy of any fee.

(4) Under S. 193 of the Act a Panchayat may notify that no place within the limits of the village shall be used for any one or more of the purposes specified in Schedule VII without a licence issued by the executive authority of the Panchayat Board and except in accordance with the conditions specified in such licence. It is obvious from the plain language of the section that in respect of any one place, only one licence is contemplated though that place may be used for one or more of the purposes specified in schedule VII. One of such purposes mentioned in the schedule is 'using for any industrial purpose any fuel or machinery." Under S. 212, sub-section (2) of the same Act for every

licence issued by the Board fees may be charged at such rates as may be fixed by the Board. It is not disputed that the rate so fixed when the machinery installed is one not exceeding 20 H. P. is Rs. 25. Reading S. 193 (1) and 212 (2) and the rates published originally by the Board it appears to be clear that the licence fee for a place used for any of the purposes specified in Schedule VII can be when the machinery installed is an electric motor of 20 H. P. is only Rs. 25. What the Panchayat Board appears to have thought is that they were entitled, if with the help of the same electric motor more than one machine was being run in the same premises ,to charge separate license fee at the rate of Rs. 25, for each of the purposes though for all these purposes the same motor was being used. This is what they declared in their Resolution Ex. B. 2.

(5) It has been pointed out time and again that the licence fees which the Local Boards are permitted to levy are not intended to augment the revenues of the Board and that their real purpose was to defray the expenses of the Board for supervising the places for which the licence were granted. Under S. 193 it is the place that has got to be licensed and for one place there can be only one licence, whether that place is being used for one or more purposes, specified in Schedule VII. In any event, as the schedule of rates stands, the Panchayat Board would be not be entitled to levy an additional fee as if for a separate licence in respect of the same place.

(6) The revision petition is allowed and the plaintiff's suit is decreed with costs. The petitioner will have his costs of the revision petition.

C.R.K./D.R. *Revision allowed.*

A. I. R. (39) 1952 Madras 183 *[C. N. 91.]*

SUBBA RAO, J.

The Public Prosecutor, Appellant v. K. M. Vedantam, Respondent.

Criminal Appeal No. 102 of 1950, D/- 30-1-1951.

Penal Code (1860), S. 415 — Borrowing money on representation — Intention to defraud —Absence of.

A borrowed money from B on promissory notes on the representation that he wanted the money urgently for depositing it with the forest department. B lent the money not because of A's representation but because he knew that A was solvent. A however did not make the deposit on account of certain dispute between him and the forest department.

'Held' that A was not guilty of the offence of cheating as he could not be said to have the intention, at the time of borrowing, to defraud B.

(Paras 4 and 5)

Anno: Penal Code, S. 415, N. 2, 4.

State Prosecutor, for Appellant; K. Kalyanasundaram, for Respondent.

JUDGMENT.: The accused was charged under three counts under S. 420, I.P.C., and was convicted by the Court of the Joint First Class Magistrate, Coonoor, and sentenced to pay a fine of Rs. 300 for each of the three offences, in default to undergo rigorous imprisonment for three months. In appeal the Additional Sessions Judge of Coimbatore set aside the conviction. The Public Prosecutor preferred the above appeal.

(2) The case of the prosecution may be briefly stated as follows. The accused was the highest bidder for the year 1947-48 at the auction of minor forest produce in Ooty, Seegur and Mudumalai ranges. The amount of his bid was Rs. 10,750, and he paid 25 per cent of the bid amount, that is Rs. 2,887-8-0, on 25th June 1947 and 26th June 1947. He represented to P.W. 1 and her father P.W. 3 that he urgently required money for depositing the balance of the bid amount with the forest department and that P.W. 1 believing his representations lent him a sum of Rs. 5,500 on three promissory notes dated 8th July 1947, 17th July 1947 and 19th August 1947, Exs. P. 2, P. 3 and P. 4 respectively. He also represented that he had 10 tons of sandal wood worth Rs. 13,000 and that he had sold sandalwood worth Rs. 7,000 to one Sarobji and that he had not received the money yet from him. Relying upon those two representations the accused fraudulently, with no intention of repaying the amount, committed the offence of cheating.

(3) The offence of cheating is defined by S. 415 of the Indian Penal Code. It reads:

> "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act of omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."
>
> 'Explanation': A dishonest concealment of facts is a deception within the meaning of this section."

The offence therefore is made up of two ingredients. (1) Deception of any person. (2) (a) fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property or 2 (b) intentionally inducing that person to do or omit to do anything which if he were not so deceived & which act or omission causes or is likely to cause harm to that person in body, mind, reputation or property. For the purpose of this case 2 (b) may be ignored as the arguments were advanced to bring in the case within the first part of the definition.

(4) Deceiving generally is to lead into error by causing to believe what is false or to disbelieve what is true. If A makes a representation to B intending to deceive B and B acts upon that representation, B may be said to be deceived by A. If A makes that representation which induces B to lend money to him who has no intention of repaying it to A, the offence of cheating is complete. But, on the other hand, if B does not act upon the representation of A but lends money because he is satisfied with the financial position of A and if A has the intention of repaying it, it cannot be said that A is guilty of the offence of creating.

(5) (After discussion of the evidence the judgment proceeds:) On the evidence, therefore, the following facts emerge. The accused, to the knowledge of P.Ws. 1 and 3, was solvent. They lent the money to him in promissory notes carrying 12 per cent interest. He badly wanted the money at that time as he had to deposit the sum with the forest department. But he did not deposit the amount on account of disputes between them. He had therefore no intention at the time of borrowing to defraud P.W. 1, nor did P.W. 1 lend the money because of his representation that he wanted the money for paying to the forest department. At best that was only the occasion for borrowing. On these facts, it is manifest that the accused did not, by deceiving P.W. 1, fraudulently or dishonestly, induce her to deliver any property to him. I therefore agree with the learned Additional Sessions Judge that the prosecution did not make out the case against the accused.

(6) In the result, the appeal is dismissed.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 184 *[C. N. 92.]*

SOMASUNDARAM J.

Aravamuda Aiyangar, Petitioner v. V. Santhanakrishnan, Respondent.

Criminal Revn. No. 1142 and Cri Revn Petn No. 1075 of 1949, D/- 11-4-1951.

Penal Code (1860), S. 499, Exception 9 — Case by 'A' against 'B' — Transfer application by 'B' — Application containing allegation against 'C', friend of 'A' and Magistrate — Allegation held was covered by exception 9.

In a case filed by 'A' against 'B', 'B' made an application for transfer, his case being that 'C', on account of his influence which was secured in undesirable ways, was using it against 'B' by securing witnesses against him and that he ('C') was very friendly not only with 'A' but with the Magistrate and was using this friendship to the detriment of 'B'. It was also stated that 'C' being rowdy and considered to be a bad element he (B) apprehended that he would not have a fair and impartial trial. On the perusal of the police record the High Court found that the description of 'C' amounted to his being rowdy.

'Held', that it could not be said that the allegation was not made for the protection of the interest of 'B'. The reputation of 'C' bore out clearly the truth that 'B' had made the allegation in good faith. The allegation was, therefore, clearly covered by exception 9 of S. 499. (*Para 3*)

Anno: Penal Code, Ss. 499/500, N. 12.

C. Narasimhachariar, for Petitioner; S. Krishnamurthi, for Respondent; The State Prosecutor, for the Public Prosecutor, for the State.

ORDER: This revision arises out of a complaint filed by the petitioner herein against the respondent for defamation. The defamatory statement itself was made by the respondent in an application for transfer of a case filed against him by one Muthukrishna Iyer who was a branch postmaster at Uttiramerur wherein the respondent was a clerk. In the affidavit filed by the respondent in support of his application for transfer, the respondent stated that the complainant, Aravamuda Iyengar, is a rowdi and that he has been enlisted as such in the police records and is also one of the bad elements. He stated also that there was a faction in the village of Uttiramerur and the witnesses were supplied by the petitioner herein for the purpose of giving evidence in the Court against him. He further stated that the Magistrate is well known to the petitioner who arranges functions which the complainant Muthukrishna Iyer and the Magistrate attend. The said Aravamuda Iyengar is said to be a friend of the complainant, Muthukrishna Iyer. On account of their friendship it was suggested that Aravamuda Iyengar who was man of considerable influence was securing witnesses for the complainant and the said Aravamuda Iyengar being a rowdy and considered to be a bad element, it was stated that the respondent apprehended he would not have a fair and impartial trial and the interests of justice required that the case must be transferred from the file of the Magistrate before whom it is pending.

(2) The question is whether the allegation made by the respondent in the affidavit for transfer is protected by the exception 9 to S. 499 of the Indian Penal Code. The First Class Magistrate found the respondent guilty and sentenced him to a fine of Rs. 60 but in appeal the learned Sessions Judge disagreed with the decision and acquitted the respondent of the offence of defamation. At the trial the accused, to support his case that the petitioner herein as a bad element and is a rowdi, summoned certain police records from the office of the Deputy Superintendent of Police, Chingleput, particularly the inspection report of the Uttiramerur police station by the Deputy Superintendent of Police, part IV relating to one Aravamuda Iyengar maintained at the Uttiramerur station for the period 1938 to 1948 and also part I relating to Aravamuda Iyengar maintained by the Uttiramerur police for the period of 1938 to 1948. A privilege was claimed by the police and the privilege was upheld. The petitioner herein also supported the plea of privilege at the trial Court and in fact wanted the Court not to look into the records of the police. But in appeal, the learned Sessions Judge has looked into the records of the police and he states that in the police records, parts I and IV of the Uttiramerur station for the period 1938 to 1948 the name of the petitioner, Aravamuda Iyengar, had been entered. The names of the persons entered in Parts I and IV are only those of the troublesome persons who are disturbers of peace. Their movements have to be watched. Finally the learned Sessions Judge held that the records bear out the allegations that the petitioner is a rowdy. He acquitted the respondent herein finding that the accused made the allegation for the purpose of self-protection and that he acted in good faith. It is against this acquittal that the complainant has preferred this revision.

(3) After the admission of the revision, the petitioner filed another petition herein and asked for the documents in Parts I and IV of the police records to be sent for. They were accordingly sent for and a perusal of the records bears out the allegation that the petitioner, Aravamuda Iyengar is a person of bad character. After calling for the records and after a perusal of the records by me it is contended by Mr. Narasimhachariar that these documents are absolutely privileged and they cannot be looked into. If documents were really said to be privileged documents as is now contended for, I do not see why he should have made an application for calling for the records. At a time when he made this application it is obvious that he thought and believed that there is no statement in the records that the said Aravamuda Iyengar is a rowdy and the version of the respondent is false. But when he found that the records did not support his case, he has turned round and has attempted to argue that they are absolutely privileged documents and they could not be looked into. I do not think I can permit this contention to be advanced after he himself has asked for the calling of the documents and asked the Court to look into them. It is not open to him now to say that the documents are privileged ones because the entries in them happen to be against him. I, therefore, overrule his objection. On a perusal I am satisfied that the description of the petitioner amounts to his being a rowdi and the description is not without justification. The only other question is whether the respondent can make the allegation in an affidavit for transfer. It is clear from the affidavit filed by the respondent in this case that his case was that this petitioner, on account of his influence which was secured in undesirable ways, was using it against the respondent by securing witnesses against him and that he was very friendly not only with Muthukrishna Iyer but with the Magistrate and was using this friendship to the detriment of the respondent herein. I cannot say that this allegation was not made for the protection of the interest of the respondent herein. The reputation of the petitioner bears out clearly the truth that this respondent has made the allegation in good faith. The allegation is, therefore, clearly

covered by exception 9 of S. 499, Indian Penal Code. In this view, the learned Sessions Judge was right in acquitting the respondent of the offence of defamation.

(4) This revision petition is, therefore, dismissed.

C.R.K./G.M.J. *Revision petition dismissed.*

A. I. R. (39) 1952 Madras 185 *[C. N. 93.]*

BASHEER AHMED SAYEED, J.

Neney Kasi Viswanatham, Petitioner v. Gadigay Sanna Lingappa Dakappa by managing member Gadigay Dakkappa; Respondent.

Civil Revision Petition No. 1190 of 1949, D/- 24-7-1951.

Sale of Goods Act (1930), S. 54 (2) — Passing of goods — Necessity of giving notice.

When once the goods have passed to the purchaser and the question of resale arises in consequence of the refusal of the purchaser to take delivery of goods and pay the balance of the price, the vendor would be bound to give notice of resale before the actual resale takes place. When once the goods had been selected and purchased and despatched to the purchaser after payment of advance towards a part of the price and when according to the arrangement entered into between the parties it was proposed that the money should be collected through the instrumentality of a certain bank the property in the goods must be held to have passed to the purchaser. In such a case the mere despatch of goods by rail and R.R. being sent to the bank for collection of the balance of unpaid sale price would not mean that the property in the goods had not passed to the purchaser. AIR (39) 1952 All 242; AIR (36) 1949 Mad 145, Rel. on. (Para 1)

Anno: Sale of Goods Act, S. 54, N. 1, 2.

Ch. Suryanarayana, for Petitioner; K. Srinivasan, and S. Krishnamurthy; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('50) 1950 All L J 583: (AIR (39) 1952 All 242) (Pr 1)

('48) 61 M L W 510 (2): (AIR (36) 1949 Mad 145) (Pr 1)

ORDER.: The point that arises for consideration in this revision petition is whether the requirements of S. 54 (2) of the Sale of Goods Act have been complied with in order to entitle the plaintiff, respondent to recover the deficiency on resale of goods consigned to the petitioner, and which the petitioner is said to have refused to take delivery. The facts of the case are fairly simple. The defendant purchased goods from the plaintiff through his agent P.W. 1. The agent selected the goods of the plaintiff in his shop and in respect of the price paid a sum of Rs. 158 and odd and wanted that the goods should be despatched to the defendant at Bezwada and the balance of price should be collected through the Kanara Bank at Bezwada. The goods were accordingly despatched and the R.R. was sent to the bank to be delivered over to the defendant on payment of the balance of the price. The defendant did not choose to pay the amount and take delivery of the R.R. or the goods. Thereupon the plaintiff proceeded to Bezwada to have the matter settled and then tried to use the good offices of P.W. 1 and also certain others to mediate and see that the dispute was settled. But the plaintiff did not succeed in that. Thereupon he sold the goods to one Bugadi Lakshmanna for the price then prevailing in the market and filed the suit for the difference that he was entitled to on account of the resale. The defendant raised the plea that he did not commit any breach of contract and that in any event the plaintiff was not entitled to resell the goods without notice of resale and without giving him the opportunity he was entitled under S. 54 (2) of the Sale of Goods Act. The learned trial Judge has simply proceeded on the basis that the defendant committed breach of contract in refusing to take delivery of the goods, that the plaintiff was entitled to resell the goods on such refusal and that he was entitled to claim the difference in price on resale. It was incumbent upon the learned Judge to find out whether there was notice of resale as required by S. 54 (2) of the Act but he did not do so. On the other hand, the evidence is clear on both sides that no notice of resale of the goods was issued by the plaintiff to the defendant before the sale to Lakshmanna actually took place. S. 54 (2) lays down that the resale can take place only after notice of resale has been given to the defendant who refuses to take delivery of the goods in pursuance of the contract and it also disentitles the plaintiff to claim damages in the absence of notice of resale having been issued to the defendants. On this ground, I should think that the defendant was entitled to succeed against the plaintiff. But the learned Counsel for the respondent, plaintiff, would say that notice of resale would be essential only when the goods had passed to the defendant and that in this case the property and the goods did not pass to the defendant and that when no property has passed to the defendant the plaintiff would be entitled to resell the goods and claim the difference between the contract price and the market price. On the question as to whether the goods had really passed to the defendant or not I am unable to agree with the learned Counsel for the respondent for when once the goods had been selected and purchased and despatched to the defendant after payment of advance towards a part of the price and when according to the arrangement entered into between the parties it was proposed that the money should be collected through the instrumentality of a certain bank, I fail to see how the property in the goods could not have passed to the purchaser. If the vendor, after the goods had been selected and advance had been paid in respect of the same, had not despatched the goods, certainly it would be open to the defendant to say that the goods had become his after selection and after payment of advance. In such a case the mere despatch of goods by rail and R.R. being sent to the bank for collection of the balance of unpaid sale price would not mean that the property in the goods has not passed to the vendee. On the facts of this case it is clear that the property in the goods had passed to the purchaser and when once the goods had passed to the purchaser and the question of resale arises in consequence of the refusal or the purchaser to take delivery of goods and pay the balance of the price, the vendor would be bound to give notice of resale before the actual resale takes place. Even otherwise it is not clear in the plaint that the plaintiff claims only the difference in price between the contract rate and the market-rate. On the other hand, what the plaintiff seems to claim according to the plaint is the difference on resale of goods in favour of the subsequent purchaser. Besides, the evidence of P.W. 1 also makes it clear that the plaintiff told P.W. 1 that the defendant took delivery of a part of the goods and that in regard to the balance he failed to take delivery and that he asked P.W. 1 to get the matter settled. P.W. 1's efforts did not fructify in that direction. In the light of the circumstances I do not think there is much force in the contention of the learned Coun-

sel for the respondent that the goods did not pass or that the plaintiff was entitled to claim the difference between the market-rate and the contract rate which is not the case in the present suit. If authority is required for the position that the vendor will not be entitled to resell the goods and claim the difference on resale without giving notice of resale to the purchaser who refused to take delivery of the goods, it is enough to refer to the latest decision in 'Motilal Jhun Jhunia v. Moolchand', 1950 All L J 583, which has been referred to by the learned Counsel for the petitioner. There are also numerous other decisions of this Court and other Courts to which my attention has been drawn by the learned Counsel for the petitioner. I do not think it necessary to refer to them at length on the question whether the property had passed to the vendee or not. Now on the facts in the present case I should think that the decision in 'Parthasarathi Gupta v. The Calcutta Glass and Silicate Works', (1936) Ltd.' 61 Mad L W 510 at p. 512 would apply to the facts. In these circumstances I think the decision of the learned trial Judge cannot be upheld and the same will have to be set aside.

(2) The petition is, therefore, allowed and the decree of the lower Court is set aside. The petitioner will be entitled to his costs.

C.R.K./D.H. *Revision allowed.*

**A. I. R. (39) 1952 Madras 186 *[C. N. 94.]*

(FULL BENCH)

RAJAMANNAR, C. J., PANCHAPAKESA SASTRY AND SOMASUNDARAM, JJ.

Kandaswami Pillai, Appellant v. Kannappa Chetty, Respondent.

A. A. A. O No 155 and Civil Miscellaneous Petition No. 10211 of 1949, D/- 6-4-1951, decided by Full Bench on Order of Reference made by Panchapakesa Aiyar, J., D/ 24-11-1950.

✠✠ *(a) Civil P. C. (1908), S. 48 — S. 48 is controlled by S. 15 (1) Limitation Act — Limitation Act (1908), Ss. 15 (1) and 29.*

Section 48 Civil P. C. is controlled by S. 15 (1) Limitation Act: 45 Mad 785: AIR (9) 1922 Mad 268:70 Ind Cas 396; AIR (15) 1928 Mad 1154:113 Ind Cas 260 and 1944-2 Mad L J 403: AIR (32) 1945 Mad 70, Overruled. Case law discussed. (Para 24)

The expression "prescribed" in S. 15 (1) of the Limitation Act does not mean "prescribed by the first schedule" to the Act. It would include a case where a period of limitation is prescribed by any general statute like the Civil Procedure Code. Even if it be understood in the strictest sense, the period fixed by S. 48 of the Code must be deemed to have become a part of the Limitation Act by a process of incorporation in Arts. 181 and 182. Whether the word "prescribed" in S. 15 (1) would apply to periods of limitation provided by other statutes or not, it is clearly indicated by Art. 181 that the period fixed by S. 48 is in 'pari materia' with the periods of limitation provided in the schedule to the Limitation Act. Column 1 of Art. 182 further supports this view. The very fact that S. 48 of the Code operates in curtailment of the period provided by Art. 182, conclusively shows that S. 48 also prescribes a period of limitation. (Para 22)

Anno: Civil P. C. S. 48, N. 14; S. 29, N. 6a.

(b) Limitation Act, (1908), Pre. — Acts in pari materia — Civil P. C. (1908), Pre.

The Limitation Act and the Civil Procedure Code are to be read together, because both are statutes relating to procedure and they are in 'pari materia' and therefore to be taken and construed together as one system as explanatory of each other. 5 Moo Ind App 234 (PC); AIR (8) 1921 Mad 163 FB and AIR (19) 1932 Pat 80, Ref. (Para 14)

Anno: Limitation Act, Preamble, N. 7; Civil P.C., Preamble N. 7.

✠ *(c) Limitation Act (1908), S. 29 — 'Special law' Meaning of — Civil P. C. is not a special law. (Words and Phrases.)*

The expression "special law" which has not been defined in the Limitation Act, was intended to cover only laws like the Rent Act of 1859 which was a complete Code in itself. In the ordinary sense "special" is used in antithesis to "general." A special Act as opposed to a general or public Act means one that is directed towards a special subject or special class of objects. The special law contemplated is the law which gives rise to special causes of action and which itself provides for the method of enforcement of rights conferred by that Act or for redress of injuries suffered by the application of the provisions of that Act. The Provincial Insolvency Act, for instance, would be a special law; likewise the Income-tax Act. The Civil Procedure Code is not such a special law. It is a general law relating to procedure. AIR (31) 1944 Nag 155, diss. from. (Para 21)

Anno: Limitation Act, S. 29, N. 6.

(d) Limitation Act (1908), Pre. — Interpretation of statutes of limitation.

Though it is true that in construing statutes of limitation, considerations of hardship and anomaly are out of place, it is permissible to adopt a beneficent construction of a rule of limitation if alternative constructions are possible. (Para 23)

Anno: Limitation Act Preamble N. 6-B.

(e) Limitation Act (1908), S. 19 — Whether an acknowledgment in writing before the expiry of period prescribed by S. 48, Civil P. C., will give a fresh period of twelve years from date of acknowledgment — ('Quaere'). (Para 24)

Anno: Limitation Act, S. 29, N. 6a.

S. Vaidhyanathan, for B. C. Seshachala Iyer, for Appellant; E. Vinayaka Rao, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1851-54) 5 Moo Ind App 234: (8 Moo PC 4 PC) (Pr 14)
('75-77) 1 Cal 226: (3 Ind App 7 PC) (Prs 4, 8, 15)
('34) 12 Pat 195: (AIR (20) 1933 PC 52) (Pr 12)
('51) 1951 SCJ 19: (AIR (38) 1951 SC 16) (Pr 13)
('18) 40 All 198: (AIR (5) 1918 All 216 (2)) (Pr 5)
('20) 42 All 118: (AIR (6) 1919 All 64 (2)) (Pr 5)
('39) ILR (1939) ALL 647: (AIR (26) 1939 All 403 FB) (Prs 6, 8, 10, 11, 23)
('92) 16 Bom 536 (Pr 4)
('94) 18 Bom 734 (Pr 4)
('39) ILR (1939) Bom 87: (AIR (26) 1939 Bom 75) (Pr 10)
('43) AIR (30) 1943 Bom 164: (208 Ind Cas 254) (Pr 10)
('65) 3 W R 8 (Cal) (Pr 15)
('14) 27 Mad L J 25: (AIR (2) 1915 Mad 449) (Prs 4, 5)
('21) 44 Mad 902: (AIR (8) 1921 Mad 163 FB) (Pr 14)
('22) 45 Mad 785: (AIR (9) 1922 Mad 268) (Prs 5, 6, 7, 9, 10, 11, 12)

('28) AIR (15) 1928 Mad 1154: (113 Ind Cas 260) (Pr 6)
('39) ILR (1939) Mad 611: (AIR (26) 1939 Mad 270) (Prs 6, 7)
('44) 1944-2 Mad LJ 403: (AIR (32) 1945 Mad 70) (Pr 6)
('44) ILR (1944) Nag 250: (AIR (31) 1944 Nag 155) (Prs 11, 21)
('47) ILR (1947) Nag 25: (AIR (34) 1947 Nag 101) (Pr 11)
('16) 20 Cal W N 952: (AIR (4) 1917 Pat 485) (Pr 24)
('29) AIR (16) 1929 Pat 597: (120 Ind Cas 315) (Pr 12)
('31) 10 Pat 670: (AIR (19) 1932 Pat 80) (Pr 14)
(1878) 3 AC 944 (Pr 21)

RAJAMANNAR, C. J.: The point referred to us for our opinion is one of considerable difficulty. At every step of the reasoning in support of either view taken on it there is considerable divergence of judicial authority. There is much to be said for either view and ultimately our decision must depend upon what view appeals to us. The question is:

"Is section 48, Civil P. C., controlled by S. 15 of the Indian Limitation Act, or does it prescribe an absolute prohibition of an entertainment of a fresh execution application beyond twelve years from the date of the decree subject only to the exceptions contained in that same section?"

Section 48 runs as follows:

"(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from:

(a) the date of the decree sought to be executed, or;

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed:

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Art. 183 of the First Schedule to the Indian Limitation Act, 1908."

The section is given under a separate heading "Limit of time for execution." The marginal note is "Execution barred in certain cases."

(2) Section 15 of the Indian Limitation Act in so far as it is material is in the following terms:

"(1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded."

The Legislative history of this provision is as follows: In the Act of 1859 there was no provision corresponding to this. In the Act of 1871 the corresponding provision was S. 16 which ran thus:

"In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time for the continuance of the injunction shall be excluded."

In the next Act of 1877 the corresponding provision was S. 15 which ran thus:

"In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn shall be excluded."

The conflict of opinion is in respect of the construction of the two expressions "the period of limitation" and "prescribed" which occur in S. 15 of the Limitation Act. Does "prescribed" mean "prescribed in the schedule to the Limitation Act", or does it mean "prescribed either in the schedule or in any other enactment?" Is the period of 12 years mentioned in S. 48, Civil P. C., a period of limitation within the meaning of S. 15 of the Limitation Act? It is obvious that unless the 12 years period is a period of limitation and "prescribed" is understood in an extended sense as not confined to the provisions of the schedule to the Limitation Act, Section 15 of that Act cannot apply in computing the period of 12 years under S. 48 of the Code.

(3) Another statutory provision to which it is necessary to refer is S. 29 (2) of the Limitation Act as it now stands after the amendment in 1922 which runs thus:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:

(a) the provisions contained in S. 4, Ss. 9 to 18 and S. 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

The corresponding provision before the amendment was as follows:

"29 (1) Nothing in this Act shall..... (b) affect or alter any period of limitation specifically prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The Limitation Act of 1877, Section 6, was more or less in similar terms, namely:

"Where, by any special or local law or hereafter in force in British India a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed."

Whether the Civil Procedure Code is a special or local law within the meaning of S. 29 is also one of the questions which falls to be determined before arriving at a final conclusion on the point referred to us.

(4) The earliest case of our Court with which we can start the discussion is that 'Venkata Perumal v. Velayudha Reddi', 27 Mad L J 25. In this case Sadasiva Aiyar, J., made the following observations though they were 'obiter':

"Following the observations in 'Phoolas Koonwar v. Lalla Jogheshwar' Sahay', 1 Cal 226, p. 242, the observations in 'Navalchand v. Amichand', 18 Bom 734 and 'Moro Sadashiva v. Visaji Raghunath', 16 Bom 536, I am inclined to hold that the Civil Procedure Cole is not a 'special statute'

but it is a general law of procedure usually passed in the same year as the Limitation Act, and that the sections of the Limitation Act relating to exclusion of time and obtaining the benefit of the time spent in certain necessary acts, other and similar provisions govern also the 12 years period of limitation provided for in S. 48, C.P.C."

The other learned Judge (Wallis, J.) thought it unnecessary to consider whether the time as limited by S. 48, C. P. C., for the execution of a decree can be extended by virtue of the general provisions of the Limitation Act.

(5) The leading decision in this Court directly on the point is to be found in 'Subbarayan v. Natarajan', 45 Mad 785. It was therein held by Spencer and Ramesam, JJ., that S. 48 of the Code contains an unqualified prohibition against execution of certain kinds of decrees more than 12 years old and is not controlled by S. 15 (1) of the Limitation Act of 1908. Though the two learned Judges concurred in this final conclusion their reasoning proceeded on different lines. Spencer, J., held that the word "prescribed" in S. 15, Limitation Act must be understood as prescribed in the schedule to the Act, though the words "in the schedule" do not occur in the section. He made reference to two decisions of the Allahabad High Court in 'Jurwan v. Mahabir Dube', 40 All 198 and 'Shyam Karan v. Collector of Benares', 42 All 118, as supporting him in his view. According to him, S. 48 has nothing to do with the periods of limitation prescribed in the schedule to the Limitation Act. He noticed the view to which Sadasiva Aiyar, J., was inclined in 'Venkata Perumal v. Velayudha Reddi', 27 Mad L J 25, but apparently did not agree with him. He dismissed S. 29 of the Limitation Act as not affecting the matter one way or the other, because it related to special or local laws which contain special provisions of their own for the limitation of certain proceedings taken to obtain reliefs provided therein and did not include the Civil Procedure Code in its scope.

(6) Ramesam, J., did not agree with Spencer, J., in confining the application of S. 15 (1) of the Limitation Act to the periods of limitation provided in the schedude to the Act. He held that the Civil Procedure Code was a general law and hence periods of limitation in it were governed by the Limitation Act. On the second point, however, he held that the period of 12 years mentioned in S. 48, Civil P.C., is not a period of limitation within the meaning of S. 15 of the Act. He pointed out that the phrase "period of limitation" could be used in the two senses, a strict and a loose sense. In the strict sense it meant such a provision that a proceeding to which it is sought to be applied will be in time if filed within the period and beyond time if filed after it. The period in S. 48, Civil P. C., was not a period of limitation in the strict sense, for an application for execution of a decree of the kind mentioned in S. 48 will in general not be in time if filed within 12 years. It will be out of time unless it is within three years from any of the dates mentioned in the third column of Article 182. Referring to Col. 1 of Art. 182 which speaks of the execution of a decree or order of any Civil Court not provided for in Art. 183 or by S. 48, Civil P.C., and the first column in Art. 181 which runs thus: "Application for which no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C., 1908," the learned Judge expressed his opinion that it was in the looser sense, the phrase "period of limitation" was there used. The learned Judge was inclined to hold that it was in the stricter sense that the phrase was used in S. 15 of the Limitation Act. He was well aware that there was no conclusive reason in support of this view because he said: "On this question one has to find the sense in which it is used, as best as he can." He agreed finally with Spencer, J., in holding that in computing the period of 12 years in S. 48, Civil P. C., S. 15 (1) of the Limitation Act could not be applied. The next decision of this Court to which reference may be made is 'Tandavamurthi v. Durgamba', AIR (15) 1928 Mad 1154. The learned Judges (Wallace and Thiruvenkatachariar, JJ.) came to the same conclusion as the learned Judges in Subbaraya v. Natarajan', 45 Mad 785, but apparently on the ground that S. 15 (1) of the Limitation Act applies only to the periods prescribed in the schedule to that Act and does not apply to the periods mentioned in S. 48, Civil P.C. This was the ground on which Spencer, J., based his decision,though Ramesam, J., was of a contrary view. There is no further discussion in 'Thandavamurthi v. Durgamba', AIR (15) 1928 Mad 1154 and it does not carry the matter further. Wadsworth, J., followed the ruling in 'Subbarayan v. Natarajan', 45 Mad 785 in 'Manickam Chettiar v. Ramasami Chettiar', 1944-2 Mad LJ 403. He held that the period of stay under Madras Act IV of 1938, could not be excluded under S. 15 of the Limitation Act, for the purpose of calculating the 12 years contained in S. 48, Civil P. C. He felt himself bound by the decision in 'Subbarayan v. Natarajan', 45 Mad 785, though his attention was drawn to the decision in 'Kalyanasundaram Pillai v. Vaidhialinga Vanniar', ILR (1939) Mad 611, in which the reasoning of Ramesam, J., in 'Subbaraya v. Natarajan', 45 Mad 785, had been criticised. and to the decision of the Full Bench of the Allahabad High Court in 'Drigpal Singh v. Pancham Singh', ILR (1939) All 647 FB, in which a different view had been taken. No other decision of this Court was brought to our notice which deals directly with S. 15 (1) of the Limitation Act in its application to S. 48 of the Code.

(7) But it will be useful to refer to the decision in 'Kalyanasundaram Pillai v. Vaidhialinga Vanniar', ILR (1939) Mad 611, though it is not a direct case on the point. The learned Judges (Kings and Krishnaswami Aiyangar, JJ.) were there concerned with the construction of S. 78 (2) of the Provincial Insolvency Act. Under that provision where the order of adjudication has been annulled under that Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree other than a suit or application in respect of which the leave of the Court was obtained under Sub-section (2) of S. 28, the period from the date of the order of adjudication to the date of the order of annulment has to be excluded. The learned Judges held that the benefit of this provision would enure to a decree-holder even in the computation of the period of time limited by S. 48, C.P.C. Krishnaswami Aiyangar, J., who delivered the judgment of the Bench discussed at length the question: "What is and what is not a period of limitation". He was clearly of opinion that the period of 12 years limited by S. 48 of the Code should be regarded as a period of limitation. He said:

"If the law fixes a period of time after which a suit or other proceeding is not to be entertained by the Court, the period so limited is etymologically a period of limitation."

He was not satisfied about the necessity or the correctness of classifying rules of limitation as falling under two heads, strict and loose. This classification was artificial and not founded on any rational basis and not warranted by the statutory language. At the same time he was not evidently prepared to say that Spencer, J., was wrong in

holding that in computing the period of 12 years under S. 48 of the Code, it was not permissible to exclude under S. 15 of the Limitation Act the period of time during which the decree had been stayed by an order of Court. Of course, it was not necessary to canvass the correctness of the decision in that case, as the learned Judges were concerned with construing a section in another Act, namely, the Provincial Insolvency Act. There is no clear indication as to what the learned Judges would have held if the very question which arose in 'Subbarayan v. Natarajan', 45 Mad 785, had arisen before them. There is one statement in Krishnaswami Aiyangar, J.'s judgment which appears to me to be not quite correct. He said at page 619:

> "Both the learned Judges held that the section was inapplicable, as on its true construction the word 'prescribed' found in it meant 'prescribed in the schedule to the Act' though these latter words do not occur in it."

With great respect to the learned Judge, I venture to point out that this was the view of Spencer, J., only and not of Ramesam, J., who was not prepared to place such a narrow construction of the word "prescribed."

(8) In Allahabad the question was very elaborately discussed by a Full Bench in 'Drigpal Singh v. Pancham Singh', ILR (1939) All 647 FB. The decision of the Full Bench was that the provisions of S.15 (1) of the Limitation Act applied to and affected S. 48, C.P.C. The learned Judges held that the word "prescribed" has been used in S. 15 of the Limitation Act in a general sense as meaning 'prescribed by any enactment for the time being in force"and that S. 48, C.P.C., does prescribe a period of limitation. Thom, C. J., relied upon the following circumstances in concluding that S. 15 of the Limitation Act need not be confined in its operation to periods of limitation prescribed by the Act itself or by its schedule. The terms of S. 15 were perfectly general and it must be assumed that the Legislature advisedly did not include the words "by this Act" or "by the first schedule of the Act." The first schedule of the Limitation Act is not the only statutory provision which prescribes a period of limitation. S. 29 of the Limitation Act refers to the periods of limitation which are prescribed by any special or local law. The learned Chief Justice summed up the position thus:

> "In view of the unqualified terms of S. 15 of the Act, and of the fact that periods of limitation are prescribed in a number of statutory enactments, it does not appear that there is any justification, judicial authority apart, for restricting the operation of the section to the periods of limitation prescribed by the Act or by the First Schedule."

In considering the second question. "Does S. 48, Civil P. C., prescribe a period of limitation?" the learned Chief Justice refers to the terms of Art. 181 of the Limitation Act as well as Art. 182. Having regard to the language used by the Legislature in Arts. 181 to 183 and to the heading of S. 48, namely, "Limit of time for execution", it appeared to be clear to him that S. 48 of the Code does prescribe a period of limitation. He found great difficulty in accepting the distinction between periods of limitation in a loose sense and periods of limitation in a strict sense. His definition of "a period of limitation" is as follows:

> "It appears to me that if the result of a statutory provision is in substance to fix a period within which a person must take appropriate and necessary action if he desires to assert his rights in a Court of law, that provision prescribes a period of limitation."

He sought support for this definition in the ruling of the Privy Council in 'Phoolbas Koonwar v. Lalla Jogneshwar Sahay', 1 Cal 226 P. C. Iqbal Ahmad, J., discussed both the questions which fell to be considered. The learned Judge gives additional reasons of holding that the word prescribed" in S. 15 of the Limitation Act is used in a general sense as meaning "prescribed by any law whatsoever". In the group of Sections from 3 to 29 in Ss. 3, 6 and 29, after the word "Prescribed" reference has expressly been made to the first schedule. The omission of this qualification in the other sections including S. 15 is significant and with a set purpose, namely, to make those sections of universal application. If the Legislature intended to use the word "prescribed" in all sections of the Act in one and the same sense, then it would have been easy to define that word in S. 2 of the Act. The learned Judge was unable to discover any reason why the rules as to computation of period of limitation which accord with common sense should have been intended by the Legislature to apply only to periods of limitation provided for by other enactments. The learned Judge answers the argument founded on S. 29 by referring to the course of legislation on the subject.

(9) On the other question, namely, whether S. 48 prescribes a period of limitation, after giving it his best consideration and after referring to the decision in 'Subbarayan v. Natarajan', 45 Mad 785 the learned Judge arrived at the conclusion that S. 48 did prescribe a period of limitation. It is unnecessary to repeat the reasons for his decision which were practically identical with those given by the learned Chief Justice. In addition to these reasons, the learned Judge points out that to hold that S. 48 is not subject to the rules laid down by S. 15 of the Limitation Act would lead to starting results. I must confess that I was much impressed with the illustration that he gave (at page 669):

> "take a case in which a Hindu son files a suit assailing the validity of a decree passed against his father and the family property and execution of the decree is stayed by an injunction and litigation does not terminate for a period of 12 years. On what principle the Court in such a case can refuse to execute the decree after the period of 12 years passes my comprehension."

Bajpai, J., was in complete agreement with the reasoning of the learned Chief Justice and Iqbal Ahmad, J., on both the questions.

(10) The question came up before the Bombay High Court in 'Rango Ramacharya v. Gopal Narayan', ILR (1939) Bom 87. Though the actual decision in the case was on a different point, Broomfield, J., discussed the decision of this Court in 'Subbarayan v. Natarajan', 45 Mad 785. The learned Judge thought that the reasoning of Ramesam. J., was not very convincing. Referring to the view of Ramesam, J., that the period prescribed by S. 48 was not strictly a period of limitation, he said:

> "I must confess that I cannot see that there is much difference between an enactment which forbids execution upon a decree more than 12 years old and one prescribing a maximum period of limitation of 12 years."

He finally concluded that on general principles there seemed to be no reason why S. 15 should not be applied so as to extend the period prescribed by S. 48 of the Code. In a later decision of that Court the point was directly decided by a Division Bench. In 'Ramgopal v. Sidram', AIR (30) 1943 Bom 164 Broomfield and MacKlin, JJ., held that S. 48, C.P.C., was controlled by S. 15 of

the Limitation Act. In effect the learned Judges differed from the reasoning in 'Subbarayan v. Natarajan', 45 Mad 785 and fully approved that in 'Drigpal v. Pancham Singh', ILR (1939) All 647.

(11) The later decisions of the Nagpur High Court have also followed the ruling in 'Drigpal v. Pancham Singh', ILR (1939) All 647 and not that in 'Subbarayan v. Natarajan', 45 Mad 785. In 'Sitaram v. Chunilalsa', ILR (1944) Nag 250, Grille. C. J., and Sen, J., after examining the several decisions on the point were of opinion that S. 48 of the Code was controlled by S. 15 of the Limitation Act. In addition to the reasons given by the learned Judges in 'Drigpal Singh v. Pancham Singh', ILR (1939) All 647, they gave another reason based on S. 29 (2) of the Limitation Act. In their view, any enactment which prescribed a period of limitation for any suit, appeal or application was a special law with reference to the Limitation Act which embodied the general law regarding limitation. The Civil Procedure Code was a general law in matters of civil procedure, but in so far as it prescribed a period of limitation, it was a special law regarding limitation. Otherwise the reasoning is identical with the Allahabad Full Bench (Vide also Meer Bismulla v. Jagannath', ILR (1947) Nag 25.)

(12) In 'Kirtyanand Singh v. Pirtichand', AIR (16) 1929 Pat 597 'Kulwant Sahay, J., was inclined to take the view in 'Subbarayan v. Natarajan', 45 Mad 785 but it was not necessary to decide the point. There is no discussion and the other learned Judge merely agreed with him. This case went up on appeal to the Privy Council in 'Kirtyanand Singh v. Raja Pirtichand Lal', 12 Pat 195, but their Lordships considered it unnecessary to deal with this point.

(13) The recent decision of the Supreme Court in 'Yeshwant Deorao v. Walchand Ramchand', 1951 S C J 19 (SC) was also cited to us, but it is clear that their Lordships did not deal with the point now before us.

(14) In this state of divided judicial opinion I think it useful and instructive to trace the course of legislation in so far as it has a bearing on the present question. In doing so, I propose to deal with the several Limitation Acts and the Civil Procedure Codes together as having material bearing on each other. It is well established that the Limitation Act and the Code are to be read together, because both are statutes relating to procedure and they are in 'pari materia' and therefore to be taken and construed together as one system as explanatory of each other (Vide Ruckmaboye v. Lullooo Bhoy', 5 Moo Ind App 234, 'Arunachala Chetti v. Periasami Servai', 44 Mad 902 at p. 909 and 'Tribeni Prasad v. Ramasray Prasad', 10 Pat 670 at pp. 702 and 718). It is not without significance that in the same year when the one Code was replaced by a subsequent Code, similarly a new Limitation Act succeeded the one already in existence.

(15) It is sufficient to begin from 1859. In that year the Civil Procedure Code, Act VIII of 1859 came into force on 22nd March 1859. The Limitation Act came into force soon after on 4th May 1859. It is abundantly clear from a perusal of the provisions of the two enactments that they should be read together. The Limitation Act did not provide the periods for several applications for which subsequent Limitation Acts provided by the Articles in the schedule. S. 1 of this Limitation Act declared that no suit shall be maintained in any Court unless the same was instituted within the period of limitation thereinafter made applicable to a suit of that nature. The periods of limitation for several kinds of suits were set out in Clause (i) to (xvi). S. 2 corresponds to the present S. 10, S. 3 to S. 29, and S. 4 to S. 19. Ss. 5 to 14 laid down rules for the computation of the period of limitation in suits. These rules did not apply to applications either for execution or for other reliefs. Ss. 19 and 20 were the main provisions relating to execution. S. 19 provided a period of 12 years for enforcement of the judgment, decree or order of a Court established by Royal Charter and for reviver and enlargement of time by payment or acknowledgment. S. 20 dealt with other judgments, decrees and orders and ran thus:

> "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree or order, or to keep the same in force within three years next preceding the application for such execution."

The Limitation Act did not provide any periods of limitation for several applications under the Civil Procedure Code. Nor did it provide for appeals and review. Now we find all these periods contained in the Civil Procedure Code of 1859. To give a few illustrations, S. 119 provided for a period of thirty days for an application to set aside an 'ex parte' decree. S. 230 prescribed one month for an application by a person dispossessed of immovable property in execution of a decree to be put back into possession. Under S. 246 a period of one year was prescribed for a suit to establish a right negatived in claim proceedings. Under S. 256 the period of limitation for an application to set aside an execution sale on the ground of any material irregularity in publishing or conducting the sale was 30 days from the date of sale. S. 33 prescribed the periods of limitation for appeals to the District Court and to the Sudder Court and S. 377 for an application for review. In 1859 therefore it could not be said that the general law relating to limitation of suits and applications was contained only in the Limitation Act. Nor could it be said with any justification that the Civil Procedure Code was a special law relating to limitation. The fact was that both the enactments were treated as supplementary to each other and concerned with procedural law. It followed that if there was a general provision in the Limitation Act, it would govern also provisions as to limitation contained in the Civil Procedure Code. This was authoritatively laid down by their Lordships of the Judicial Committee in 'Phoolbas Koonwar v. Lalla Jogheswar', 1 Cal 226 P C. I have already referred to S. 246 of the Code of 1859 which prescribed a period of one year for a claim suit. The question which arose for decision was whether this provision was subject to be modified by Ss. 11 and 12 of the Limitation Act. These sections provided for computation of the period of limitation in case of persons under legal disability like minors and lunatics. A person under disability was permitted to bring the action within the same time, after the disability shall have ceased, as would otherwise have been allowed for the time when the cause of action accrued, unless such time exceeded the period of three years in which case the suit had to be commenced within three years from the time when the disability ceased. Their Lordships held that Ss. 11 and 12 applied to S. 246 of the Code of that year. The following observations of their Lordships contain the 'ratio decidendi' of that decision:

> "The two statutes were passed in the same year, the assent of the Governor-General being given to Act VIII on the 22nd of March to Act XIV on the 4th of May 1859. The object of the first

was to enact a general Code of Procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general law of limitation in supersession both of the Regulations which had governed those Courts and of the English Statutes which had regulated the practice of Courts established by Royal Charter. Looking to the fifth sub-section of the first section, and the third and the eleventh sections of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 24oth section of Act VIII should, in the case of a minor, be modified by the operation of the eleventh section of Act XIV; and that this construction has obtained in the Courts of India appears from the case of 'Huro Soondaree v. Anundanath Roy', 3 W R 8."

The importance of this decision of the Privy Council appears to me to be this that the Rules laid down in the Limitation Act relating to the computation of the periods of limitation need not necessarily be confined to periods prescribed in that Act and in proper cases due regard being of course had to the language, can be applied to periods of limitation prescribed by other statutes of a general nature like the Civil Procedure Code.

(16) There is no provision in the Code of 1859 corresponding to the present S. 48. The only limit of time imposed on an application for execution of a decree other than that of a Chartered High Court was that contained in S. 20 of the Limitation Act. There was no provision corresponding to S. 15 of the present Limitation Act either.

(17) The Limitation Act of 1871 (IX of 1871) repealed the Limitation Act of 1859. Its scheme was far more comprehensive than the Act of 1859. It not only provided for the limitation of suits, it also provided for appeals and certain applications to Court which had been provided in the Civil Procedure Code of 1859. Another important provision enacted by this statute which is however not very material for us is the provision of rules for acquiring ownership by prescription. This Act of 1871 repealed practically all such portions of the Civil Procedure Code of 1859 which contained periods of limitation for specified applications, illustrations of which were already given earlier in this judgment. The third column of the first schedule to this Act relating to Act VIIII of 1859 shows the extent of the repeal of the provisions of the Code relating to limitation. Corresponding provisions are made in the second schedule of the Act in the form of Articles. It is sufficient to mention Art. 167 which provided for the execution of a decree or order of any civil Court not provided by for by Art. 169 which related to the enforcement of a judgment, decree or order of chartered High Court in the exercise of its ordinary original civil jurisdiction. Art. 168 provided for the execution of the decree or order of any Court of which a certified copy had been registered under the Indian Registration Act. This Act clearly demonstrates the close relationship between the Code and the Limitation Act in the matter of prescribing periods of limitation. It was in this Act for the first time we find a provision corresponding to the present S. 15. This provision is S. 16 which runs thus:

"In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded."

It did not expressly apply to applications for execution.

(18) In 1877 there were two corresponding enactments dealing with procedure and limitation, namely, Act X of 1877 and Act XIV of 1877 respectively. It is in the Code of this year that a provision corresponding to the present S. 48 of the Code makes its first appearance in S. 230. That section in so far as it is material ran as follows:

'Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting any such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of twelve years from any of the following dates (namely):

(a) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same; or

(b) where the decree or any subsequent order directs the payment of money or the delivery of property by instalments — the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within 12 years immediately before the date of the application."

Evidently because of this new additional provision fixing a period of limitation that there were consequential changes in the second schedule of the Limitation Act (1877). In the Limitation Act of that year, Art. 178 was a new Article which ran thus:

"Applications for which no period of limitation is provided elsewhere in this schedule or by the Civil Procedure Code, Section 230 .....Three years ..... when the right to apply accrues."

In Article 179 after the words "for the execution of a decree or order not provided for by No. 180" in Column 1, the following words were added, namely, "Or by the Code of Civil Procedure, Section 230." It must be noticed, however, that S. 15 of that Limitation Act in terms applied only to suits and not to applications including applications for execution. There was another Civil Procedure Code in 1882 to which it is not necessary to refer.

(19) Then we come to 1908 in which year again there was another Civil Procedure Code and another Limitation Act, Act V of 1908 and Act IX of 1908 respectively. The corresponding provisions in these two enactments do not contain many radical changes, though there are some changes. For instance, while the old S. 230 of the Code of 1877 and of 1882 applied only to decrees for payment of money or delivery of other property, the present Section 48 is made applicable to all decrees of any kind whatever except decrees granting injunction. The reference to "subsequent applications" is omitted as well as the words "or of the decree in appeal, if any, affirming the same." In the Limitation Act, S. 15 has been expressly made applicable to an application for the execution of a decree.

(20) It appears to me from the course of legislation to which I have adverted above that the provisions of the Limitation Act must be read with

those provisions of the Civil Procedure Code which are intimately connected therewith. There is no doubt room for comment in the fact that while other provisions prescribing periods of limitation for applications, appeals and suits found in the Civil Procedure Code of 1859 are subsequently transferred to the Limitation Act, the provision corresponding to S. 48 of the Code, namely, S. 230 of the Code of 1877 continued to remain in the Code and did not find a place in the subsequent Limitation Act. But it is equally apparent that the Legislature was well aware that S. 48 of the Code also prescribed a period of limitation apart from the period of limitation prescribed by the Articles in the Limitation Act. This appears to me to be conclusively established by the reference to S. 48 of the Code (and its corresponding provision in the earlier Code) in Column 1 of Articles 181 and 182 of the Limitation Act of 1908 (and the corresponding articles in the earlier Acts.) I do not find anything repugnant to legal sense in that for an application for execution there should be an outside limit of a longer period after which there should be no further execution at all as well as shorter periods for successive applications within this longer period.

(21) It was contended before us that S. 29 of the Limitation Act as it now stands after the amendment by Act X of 1922 might help us to come to the conclusion that S. 15 (1) controls S. 48 of the Code. This depends upon the question whether the Civil Procedure Code can be deemed to be a special or local law within the meaning of S. 29 of the Limitation Act. It is certainly not a local law, but is it a special law? We have seen how the learned Judges of the Nagpur High Court in 'Sitaram v. Chunilalsa', ILR (1944) Nag 250 were inclined to hold that the Code could be treated as a special law in so far as it provides a period of limitation in S. 48. I am unable to agree with this view. I think that the expression "special law" which has not been defined in the Limitation Act, was intended to cover only laws like the Rent Act of 1859 which was held by the Privy Council to be a complete Code in itself. In the ordinary sense "special" is used in antithesis to "general." A special Act as opposed to a general or public Act means one that is directed towards a special subject or special class of objects. (See 'Carnet v. V. Broadley', (1878) 3 A C 944 at p. 950.) It is a specious argument to say that the Civil Procedure Code deals with a particular subject, namely, procedure. The special law contemplated is the law which gives rise to special causes of action and which itself provides for the method of enforcement of rights conferred by that Act or for redress of injuries suffered by the application of the provisions of that Act. The Provincial Insolvency Act. for instance, would be a special law; likewise the Income-tax Act. The Civil Procedure Code is not such a special law. It is a general law relating to procedure. I am definitely of opinion that S. 29 has no bearing on the question referred to us.

(22) On a careful consideration of the decided cases on the point and the course of legislation I have arrived at the following conclusions: The expression "prescribed" in S. 15 (1) of the Limitation Act does not mean "prescribed by the first schedule" to the Act. It would include a case where a period of limitation is prescribed by any general statute like the Civil Procedure Code. I venture to think further that even if it be understood in the strictest sense, the period fixed by S. 48 of the Code must be deemed to have become a part of the Limitation Act by a process of incorporation in Arts. 181 and 182. Column 1 of Art. 181 speaks of application for which no period of limitation is provided elsewhere in this schedule or in S. 48 of the Civil Procedure Code, 1908. Whether the word "prescribed" in S. 15 (1) would apply to periods of limitation provided by other statutes or not, it is clearly indicated by Art. 181 that the period fixed by S. 48 is in 'pari materia' with the periods of limitation provided in the schedule to the Limitation Act. Column 1 of Art. 182 further supports this view. The period of 12 years mentioned in S. 48 of the Code is a period of limitation. The term "period of limitation" means the time prescribed by law at the end of which a right ceases to be enforceable in a Court whether by a suit or application. Some provisions of law not only bar rights of action after the lapse of a prescribed period but even extinguish rights and title altogether. But the common features of all statutes of limitation is that they fix a certain period after the expiry of which an action is not maintainable. Ramesam, J., was inclined to hold that in the strict sense a rule of limitation implies that if an action is brought or an application is made within the time prescribed, it will not be barred. Applying this test, he considered the rule laid down in S. 48 of the Code would not be a rule of limitation in the strict sense, because even if an application for execution is made within the period fixed by that section, the application may be nevertheless barred unless it is within three years from any of the dates mentioned in the third column of Art. 182 . With great respect, I find no authority for defining "limitation" in the manner in which Ramesam, J., understood it to mean. Even so, I do not see any anomaly. If an execution application is filed within 12 years of the date specified in S. 48 of the Code, such an application will be maintainable under S. 48 of the Code, but that does not mean that it may not be barred on account of another provision, namely, Art. 182 of the Limitation Act. Presumably Ramesam J. was of opinion that the period specified in Art. 182 of the Limitation Act is a period of limitation. But the test which he lays down will not be satisfied even as regards that Article. For an application may be within time according to Art. 182 but if such application is beyond the period of twelve years specified in S. 48 of the Code, it will not be maintainable. Ramesam, J., himself explains later the mutual operation of Art. 182 of the Limitation Act and S. 48 of the Code. The very fact that S. 48 of the Code operates in curtailment of the period provided by Art. 182, to my mind conclusively shows that S. 48 also prescribes a period of limitation. I respectfully agree with Krishnaswami Aiyangar, J., and Thom, C. J., in their criticism of the reasoning of Ramesam, J., based on a distinction between a stricter and a looser sense of the expression "period of limitation" for which there appears to be no warrant either in authority or in principle.

(23) Though it is true that in construing statutes of limitation, considerations of hardships and anomaly are out of place. it is, I think, permissible to adopt a beneficient construction of a rule of limitation if alternative constructions are possible. One can understand the policy underlying S. 48, namely, the desirability of giving a quietus to proceedings in execution. A judgment-debtor cannot be harassed interminably. It is evidently because that all rights under the decree would cease to be enforceable thereafter that a long period of limitation of 12 years was fixed in S. 48 of the Code. But then the decree-holder should have had an opportunity of working out his rights under the decree for this full period of 12 years. If by an act of Court over which the decree-holder has not control he is prevented from recovering the fruits of his decree

during the full period of twelve years, it appears to me to be highly unreasonable that by the mere lapse of twelve years from the date of the decree, his rights should become extinct rights which he was prevented from enforcing for a part at least of the period of twelve years. I recall in this connection the instance referred to by Iqbal Ahmad, J., in 'Drigpal Singh v. Panchan Singh', ILR (1939) All 647 FB.

(24) Though it did not directly arise in this case, one other question has given me considerable difficulty, namely, the applicability of S. 19 of the Limitation Act to S. 48 of the Code. Will an acknowledgment in writing before the expiry of the period prescribed by S. 48 of the Code furnish a fresh period of twelve years from the date of the acknowledgment? If the expression "prescribed" in that section (19) means "prescribed not only in the schedule but also prescribed by S. 48 of the Code", then it may be contended that an acknowledgment will have that effect. It has, however, been held by the Patna High Court in 'Krishna Dayal v. Mt. Sakina Bibi 20 C W N 952, the words "fresh period of limitation" in S. 19 do not refer to the terms of twelve years prescribed by S. 48 of the Code. No reasons are given. The question will have to be carefully examined if and when it arises directly. The question referred to us must be answered as follows:

"Section 48, Civil Procedure Code is controlled by Section 15 (1) of the Indian Limitation Act."

(25) PANCHAPAGESA SASTRI, J.: I agree.

(26) SOMASUNDARAM, J.: I agree.

C.R.K./K.S. *Answer accordingly.*

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*A. I. R (39) 1952 Madras 193 [C. N. 95.]

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Srinivasa Aiyar, Petitioner v. Saraswathi Ammal, Respondent.

Criminal Revn. Cases Nos. 506, 713, 1431, 1481 of 1950 and 592 of 1951. Criminal Revn. Petns. Nos. 506, 655, 1356, 1405 of 1950 and 587 of 1951. Criminal Misc. Petns Nos. 151, 223, and 1099 of 1951. D/- 24-9-1951.

✣ (a) *Madras Hindu (Bigamy Prevention and Divorce) Act (VI (6) of 1949) — Validity — Act does not offend Arts. 15 and 25 of the Constitution and is valid — Constitution of India Arts. 15, 25 and Sch. VII List III Items 5. — Government of India Act (1935), Sch. VII List III items 6, 7.*

The Madras Hindu (Bigamy Prevention and Divorce) Act does not offend either Art. 15 or Art 25 of the Constitution of India and is not void on that ground. The Act makes no discrimination between Hindus and Mohamedans on the ground of religion. Sch. VII List III items 6 and 7 of the Government of India Act corresponding to Item 5, List III of Sch. VII to the Constitution of India, under which the impugned Act is passed, itself confers legislative power to enact laws, amend or alter or repeal parts or whole of the personal law as is clear from the fact that adoption, joint family and partition are matters peculiar to Hindu Law and do not relate to any other law. Prima facie, therefore, the legislative power of the State Legislatures legitimately extends to affect the personal law of the Hindus. That does not however mean that this legislative power could abrogate the fundamental rights in Part III of the Constitution. But it is surely an indication that it recognises the classification already in existence that a section of the people, viz, the Hindus are subject to a system of law peculiar to them. The essence of that classification is not their religion but that they have all along been preserving their personal law peculiar to themselves which was derived from the Smritis, commentaries, custom and usage, in the same manner in which the Mohamedans are subject to their personal law. It is that personal law that was now sought to be affected by the Act to the extent of modifying and abrogating the rule that a Hindu is entitled to marry any number of wives without restriction; in other words, abolition of polygamy. AIR (38) 1951 S C 226, AIR (38) 1951 S C 318, Ref. (Pr 3)

The freedom to practise religion is not an absolute right out as Art. 25 itself states it is subject to public order, morality and health and subject to the other provisions of this part. Art. 25(2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary to do so. The argument therefore that the legislation contravenes the rights under Art. 25(1) of the Constitution is without any force and must be rejected. (1879) 98 U S 145, Ref. (Para 4)

(b) *Constitution of India, Art. 13(1) — Retrospective operation — Act constituting offence according to law in force prior to constitution — Law even if declared void under Art. 13(1) does not affect trial of offence.*

Art. 13 (1) has no retrospective effect but is wholly prospective in its operation. If the act which was an offence at the time, was done before the commencement of the Constitution, in contravention of the provision of any law, which after the Constitution became void with respect to the exercise of fundamental rights, the inconsistent law is not wiped out retrospectively so as to make the act not an offence. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. AIR (38) 1951 SC 128 Foll. (Pr 1)

(c) *Criminal P. C. (1898), S. 198 — Offence under S. 4(2) Madras Hindu (Bigamy Prevention and Divorce) Act — S. 198 applies — Penal Code (1860), S. 494 — Madras Hindu (Bigamy Prevention and Divorce) Act (VI (6) of 1949), S. 4 (2).*

The procedure prescribed by S. 198 Criminal P. C. applies when a Court is called upon to take cognizance of an offence punishable under S. 494 I. P. C. An offence punishable under S. 494 I. P. C. even read with S. 4(2) of the Madras Hindu (Bigamy Prevention and Divorce) Act is an offence that "falls under Ss. 493 to 496, I. P. C." within the meaning of S. 198 Cr. P. C. Therefore, a Court cannot take cognizance of an offence under S. 4(2) of the Madras Act unless the complaint in respect thereof is filed by the aggrieved person. (Pr 6)

In the first place, the Madras Act having altered the rule under the Hindu Law the second marriage becomes an offence under S. 494 Penal Code even without its being declared so by S. 4 (2) of the Madras Act. In the second place the expression "shall be deemed to have committed" in S. 4(2) must be construed to mean that all the procedure prescribed for an offence under S. 494 Penal Code is attracted. AIR (24) 1937 Mad 610 FB; 28 Mad 420 and AIR (6) 1919 Mad 590, Ref; AIR (35) 1948 Bom 374, Dist. (Para 6)

Anno: Cr. P. C., S. 198 N. 2a.

† (d) *Criminal P. C. (1898), S. 198 — Abetment of offence under S. 494 Penal Code — Section applies — Penal Code (1860), Ss. 494, 109, 114.*

Section 198, Criminal P. C. applies to an abetment of an offence under S. 494 Penal Code.

No express provision having been made by the Penal Code for the punishment of the abetment of an offence punishable under S. 494 I. P. C. such abetment is punishable with punishment provided for the offence falling under S. 494 I. P. C. by reason of Ss. 109 and 114 Penal Code. Abetment of an offence punishable under S. 494 I. P. C. is also thus an offence that "falls under S. 494 I. P. C." within the meaning of S. 198 Criminal P. C. That there is no specific provision like S. 195(4) Criminal P. C. in S. 198 Criminal P. C. does not make S. 198 Criminal P. C. any the less applicable where the charge is abetment of an offence punishable under S. 494, I. P. C. (Para 7)

Anno: Cr. P. C., S. 198 N. 2.

G. Gopalaswami, K. V. Ramaseshan, C. F. Lonis, for M. K. Nambiar, V. Venkataraman, for Row and Reddi, C. A. Vaidhialingam, M. V. Ganpathi, A. Nagorajan and P. S. Kailasam, for Petitioners; M. Natesan, P. I. Kailasam, D. P. Narayana Rao, T. S. Santhanam and Srinivasagopalan, for Respondents; The Advocate-General, for the Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) 1951 S C J 182: (AIR (38) 1951 S C 128: 52 Cri L J 860) (Pr 1)

('51) 1951 S C J 313: (AIR (38) 1951 S C 226) (Pr 2)

('51) 1951 S C J 478: (AIR (38) 1951 S C 318) (Pr 2)

('48) I L R (1948) Bom 412: (AIR (35) 1948 Bom 374: 49 Cri L J 685) (Pr 6)

('05) 28 Mad 420 (Pr 6)

('19) 41 Mad 691: (AIR (6) 1919 Mad 590) (Pr 6)

('37) I L R (1937) Mad 880: (AIR (24) 1937 Mad 610 FB) (Pr 6)

('50) 1950-2 Mad L J 404: (AIR (38) 1951 Mad 120 FB) (Pr 2)

(1891) 60 L J Q B 379 (Pr 6)

(1879) 98 U S 145 (Pr 4)

ORDER: These eight petitions have been posted before us as they raise the important question of the validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, Madras Act VI of 1949 (hereinafter called the Act). The Act came into force on the 29th March 1949 before the Constitution of India came into force. In five of the petitions, the marriages in question were performed before the Constitution came into force. Criminal R. C. Nos. 713 and 1431 of 1950 relate to the same marriage and Criminal R. C. Nos. 506 and 1481 of 1950 and Criminal M. P. No. 157 of 1951 are petitions relating to marriages performed before the Constitution of India came into force. In Criminal R. C. No. 592 of 1951 and Criminal M. P. No. 223 and 1099 of 1951 the alleged marriages were after the Constitution of India came into force. In all these cases, criminal proceedings were initiated for an offence under S. 494 I. P. C. read with S. 4(2) of the Act. In some of the cases proceedings were taken for the abetment of the offences against the abettors. Under S. 494 I.P.C.,

> "Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The section does not in terms declare the second marriage void; but if under the law to which the parties are subject, the second marriage is prohibited and is therefore void, the person contracting second marriage which is performed notwithstanding the prohibition of the law to which the parties are subject, will be guilty of an offence punishable under S. 494 I. P. C. In order therefore to determine whether the second marriage is void or not by reason of its taking place when such husband or wife is alive, one has necessarily to look to the law to which the parties are subject. Under the personal law governing the Hindus and the personal law governing the Mahomedans, the second marriage is not void by reason of its taking place during the life of a wife. Therefore, a second marriage could be contracted with impunity under the personal law governing the Hindus and Mahomedans. The Act was placed on the Statute Book with the object of prohibiting bigamous marriages among, as the preamble shows, and to provide for a right of divorce for, Hindus in the Province of Madras. S. 2(1) defines "Hindu" as meaning

> "(a) a person professing the Hindu religion in any of its forms or developments, including a Virashaiva or Lingayat or a member of the Brahmo, Prarthana or Arya Samaj or
> (b) a person professing the Buddhist, Jaina or Sikh religion."

The other parties of the section not being relevant need not be quoted. The Act is made applicable by S. 3 to Hindus domiciled in the Province of Madras and the explanation to that section states that the Act shall also apply if either of the parties to the marriage was a Hindu domiciled in the Province of Madras. S. 4 declares bigamy to be void and makes it punishable. Sub-s. (1) to S. 4 runs thus:

> "Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void whether the marriage is solemnized within or outside the Province of Madras."

Omitting the proviso and the explanation to this sub-section, there is sub-s. (2) which is relevant and which states:

> "If a party to a marriage which is void under sub-s. (1) has completed eighteen years of age at the time of the solemnization of such marriage, he or she shall be deemed to have committed an offence under S. 494 or S. 495 I. P. C. as the case may be."

The effect of sub-s. (1) is undoubtedly to modify that part of the personal law of Hindus relating to marriage which permitted bigamy as a consequence of which the second marriage would be void and would attract the provision in S. 494 I. P. C. By Sub-s. (2) it is further provided that he or she shall be deemed to have committed an offence under S. 494 or 495 I. P. C. The validity of the Act was impugned on the ground that it offends the fundamental rights recognised under the Constitution in Arts. 14, 15 and 25 and that as the provisions of the Act are inconsistent with the provisions of Part III of the Constitution, it is claimed that to the extent of such inconsistency, the Act should be held to be void within the meaning of Art. 13(1) of the Constitution. Art. 13(1) does not help the petitioners in cases in which the marriage took place before the Constitution came into force as it has now been authoritatively decided by the Supreme Court in 'Keshava Madhava Menon v. State of Bombay', 1951 S C J 182 that Art. 13(1) has no retrospective effect but is wholly prospective in its operation and that if the act which was an offence at the time, was done before the commencement of the Constitution, in

contravention of the provision of any law, which after the Constitution became void with respect to the exercise of fundamental rights, the inconsistent law is not wiped out retrospectively so as to make the act not an offence. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. In view of this decision, the petitions in Crl. R. C. Nos. 713, 1431, 506 and 1481 of 1950 and Crl. M. Ps. Nos. 157 of 1951 were not pressed. They have all therefore to be dismissed subject however to one question which arises for consideration in Crl. P. C. Nos. 713 and 1431 of 1950 which relate to the same marriage. That question will be dealt with later. The other three petitions raise the question of the validity of the Act on the ground that it encroaches on the fundamental right recognised by the Constitution and it became therefore void as it is inconsistent with the provisions of Part III of the Constitution.

(2) Though reference was made in the course of the argument to Art. 14 of the Constitution also, reliance on behalf of the petitioners who impugned the validity of the Act was placed only on Arts. 15 and 25. Under Art. 15(1) the State is prohibited from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The contention strongly pressed before us was that the Act in question selected the Hindus for this kind of discriminatory legislation leaving the Muhammadans out of consideration altogether. While permitting the Mahomedans to continue under their personal law to marry more than one wife, the Act in the case of Hindus prohibits bigamy and makes it an offence. In support of this, the decision of the Full Bench of this Court in what is known as the Communal G. O. case 'Champakam Dorairajan v. The State of Madras', 1950-2 Mad L J 404 was cited. The Communal G. O. was declared invalid by the Full Bench on the ground that it discriminated against citizens because of caste. The learned Chief Justice and Viswanatha Sastri J. considered the decisions which throw light in considering a question of this nature. The decision was affirmed by the Supreme Court in the 'State of Madras v. Champakam Dorairajan', 1951 S C J 313 though the Supreme Court rested its decision only on Art. 29(2) and did not express any opinion on Art. 15. Prima facie, the argument advanced on behalf of the petitioners seems to be attractive and lends support to the view that discrimination was made between Hindus and Mohamedans on this question of the right to marry more than one wife. But the point for consideration is, does discrimination proceed on the ground of religion? It is common knowledge that from early times when the British acquired the administration over this country, the personal law was applied in the case of Hindus and similarly in the case of Mohamedans also, their personal law was applied in certain matters. It is unnecessary to subject these provisions of the Statutes bearing on this question to a detailed examination as the learned Advocate General has done in the course of his argument as the proposition cannot be contested. Art. 14 of the Constitution is a general article guaranteeing to a person that a State shall not deny him equality before the law or the equal protection of the laws. As a corollary to this, we have Arts. 15 and 16 which prohibit discrimination on the ground of religion, race, caste, sex, place of birth in the case of citizens. It is no doubt true that the decisions have established that Art. 14 does not prevent classification based on reasonable ground for specified objects. The principles which should govern the application of Art. 14 have been laid down and summarised by Fazl Ali J. in the Bombay Prohibition case, the 'State of Bombay v. Balsara', 1951 SCJ 478 at 491 in the form of propositions. The learned Judge also cited with approval the passage from Prof. Willis' book dealing with the fourteenth amendment to of the Constitution of the United States in which the learned author summed up the law relating to the guarantee of equal protection of laws under the Constitution of the United States. The application therefore of that article in view of the clarification made by the Supreme Court does not present any difficulty. As pointed out by Fazl Ali J. the classification is bound to produce some inequality to a certain degree but that would not be enough to invalidate a law so long as the law deals equally within the members of a well defined class. The classification which is permissible however should not be based upon unreal and unsubstantial grounds and should not be arbitrary and without any substantial basis. If the statute however prohibits classification on a particular basis as do Arts. 15 and 16 of the Constitution, the law cannot be justified on the ground that notwithstanding that it contravenes the prohibition it is valid on the ground that it attempts at a reasonable classification based upon real, substantial and reasonable grounds.

(3) Bearing these principles in mind, the contention that the impugned legislation infringes the rights recognised under Art. 15 as it is based on discrimination of religion and religion only, may now be examined. "Marriage and divorce, infants and minors, adoption" are in the Concurrent Legislative List. List III of Sch. 7 of the Government of India Act, 1935 item 6, and item 7 relates to "Wills, intestacy and succession". Under the present Constitution, the Concurrent List, List III item 5 relates to Marriage and Divorce; infants and minors; adoption; Wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Legislative power therefore is conferred by these Articles (items?) to enact laws, amend or alter or repeal parts or whole of the personal law as is clear from the fact that adoption, joint family and partition are matters peculiar to Hindu Law and do not relate to any other law. Prima facie therefore the legislative power of the State Legislatures legitimately extends to affect the personal law of the Hindus. That does not however mean that this legislative power could abrogate the fundamental rights in Part III of the Constitution. But it is surely an indication that it recognises the classification already in existence that a section of the people. viz., the Hindus are subject to a system of law peculiar to them. The essence of that classification is not their religion but that they have all along been preserving their personal law peculiar to themselves which was derived from the Smritis, commentaries, custom and usage, in the same manner in which the Mohamedans are subject to their personal law. It is that personal law that was now sought to be affected by the Act to the extent of modifying and abrogating the rule that a Hindu is entitled to marry any number of wives without restriction; in other words of abolition of polygamy. The argument of the learned Advocate General therefore that the Act does not offend on the ground of discrimination based on religion seems to be sound. It is unnecessary to consider how far and to what extent polygamy was permitted under Hindu law and whether it is an absolute or unrestricted right or was only a limited right; nor is it necessary to go into the more difficult question whether the ex-

pression "all laws in force" in Art. 13(1) of the Constitution includes personal law or not for even assuming that it does, the Act does not offend in our opinion, Art. 15. If the argument of the petitioners were to be accepted, most of the personal law of the Hindus may have to go as there are fundamental differences on various matters between the personal law of the Hindus and the personal law of the Mohamedans. The petitioners' learned advocate however did not go to that length in the course of the arguments before us. It is a classification of persons which existed from a long time not based solely on the ground of religion but based on considerations peculiar to each of the communities, Hindus and Mohamedans. Hindu law, as is well known, had a peculiar growth and was to a large extent modified by legislation and also by judicial decisions during the British period and it is therefore difficult to accept the contention that the law applicable to Hindus is a law which discriminates against citizens on the ground 'only' of their religion.

(4) The next argument was based upon Art. 25 (1) of the Constitution which confers upon persons freedom of conscience and the right freely to profess, practise and propogate religion. It is said that the prohibition enacted by the Act against polygamy and preventing a man from marrying a second wife when the first was alive takes away the right of the person freely to practise his religion. It is essential no doubt, according to Hindu law, that a man should have a son for the discharge of the three debts to which a person is subject after his birth and for the performance of religious ceremonies which are calculated to conduce to the spiritual welfare of the deceased father. If a person is not able to get a son by his first wife, he may have to marry a second wife with a view to produce a son. The free practice of religion therefore, it is said was prohibited by the Statute. It is rather difficult to accept this argument. If a man has no natural son born by his first wife, the law recognises the right to adopt a son to perpetuate his lineage and to continue his line. The adopted son serves the same purpose from the point of view of religion as the natural born son. A person therefore if he is prevented from marrying a second wife is not thereby prevented from the free practise of his religion. It is more a matter of sentiment even if the belief that he would procure a son by a second marriage is well founded. It is unnecessary to refer to the decisions of the Supreme Court, United States which have been referred to by the learned Advocate-General in the course of the arguments. They do not throw much light on the question now in controversy. In the case of 'Reynolds v. United States', (1879) 98 U S 145 at 166-167, which also related to the validity of a Statute prohibiting polygamy, it was pointed out that:

> "Laws are made for the Government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil Government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed that it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil Government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practice to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

We have quoted this passage to show that this freedom to practise religion is not an absolute right but as Art. 25 itself states it is subject to public order, morality and health and subject to the other provisions of this part. Art. 25 (2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practice therefore may be controlled by legislation if the State thinks that in the interests of social welfare and reform it is necessary to do so. The argument therefore that the legislation contravenes the rights under Art. 25 (1) of the Constitution is without any force and must be rejected.

(5) It follows therefore that the Act is valid and these petitions must be dismissed.

(6) Criminal R. C. Nos. 713 and 1431 of 1950: We have reserved to the last the consideration of a question which is peculiar to these revision petitions. Though the marriage took place before the coming into force of the Constitution and Constitution does not help the petitioners, the further question raised is whether the complaint in the case should have been filed by a person aggrieved within the meaning of S. 198, Criminal P.C., which lays down:

> "No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under Ss. 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence."

In the present case, the complaint was filed by an outsider and the objection was taken that as the person is not aggrieved within the meaning of S. 198, Criminal P.C., the complaint was not maintainable. This of course was on the assumption that for an offence under the Act, the procedure laid down under S. 198, Criminal P.C., is attracted. The argument is that S. 4 (2) states that "he or she shall be deemed to have committed an offence under S. 494 or S. 495, I.P.C." and therefore it is not an offence under S. 494 as such and the procedure laid down under S. 198 Criminal P.C., was not attracted. The contention that S. 198, Criminal P.C., was appilcable was accepted by the first Court but the appellate Court upheld this contention only so far as accused 1 and 2 are concerned but so far as accused 3 to 5, the abettors are concerned, it overruled this contention and directed the Additional First Class Magistrate to proceed with the complaint against them. Criminal R. C. No. 713 of 1950 was filed by the complainant against that part of the order of the Courts below in so far as it was held that the complaint could not be proceeded with against accused 1 and 2 without a complaint by a person aggrieved within the meaning of S. 198, Criminal P.C. The connected revision petition is by accused 3 to 5 as the lower Court directed that the enquiry should proceed against them. The main contention was that S. 198, Criminal P.C., has no application as a new offence was created under the Act though the punishment should be if the offence is established as provided by S. 494, I.P.C. In the first place when once the rule under Hindu Law is altered

the second marriage becomes an offence within the meaning of S. 494, I.P.C., even without its being declared so by S. 4 (2) of the Act. Therefore, S. 198, Criminal P.C. is automatically attracted. In the second place, the expression shall "be deemed to have committed" is familiar to legislative practice and as pointed out by Cave, J., in 'Rex v. Norfolk County Council', (1891) 60 L J Q B 379 at p. 380:

> "Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless ..... it is to be deemed to be that thing."

It was applied in 'Venkatanarayana v. Somaraju', ILR (1937) Mad 880 at p. 897. In various acts of the local legislature, the words "as if they were arrears of land revenue" were introduced so as to recover the amount due to the State. This expression has been construed to mean that the procedure laid down in the Revenue Recovery Act is made applicable in its entirety — See 'Ibrahim Khan v. Rangasami', 28 Mad 420 and 'Sankaran Nambudripad v. Ramaswami Aiyar', 41 Mad 691 at p. 698 where the earlier authorities were all collected. Learned counsel for the petitioner relied on the decisions of the Bombay High Court in 'Emperor v. Manju Hanmant', ILR (1948) Bom 412. That was a case under the Bombay Prevention of Hindu Bigamous Marriages Act, Bombay Act XXV of 1946 where it was held that having regard to the peculiar provision of that Act contained in S. 9 which made offences under that Act cognizable that the provision of S. 198, Criminal P.C., was not attracted. S. 9 of that Act definitely laid down that offences under that Act shall be cognizable. The effect of making the offences cognizable is undoubtedly to enable the police to initiate proceedings, vide S. 190, Criminal P.C. When once that is recognised the requirement of S. 198, Criminal P.C., must be deemed to have been done away with and the intention of the legislature was not to insist that the procedure in S. 198, Criminal P.C., should be complied with. It cannot be said that a police officer after taking cognizance of the offence should keep the person in jail for a period of 15 days and should drop the matter thereafter without initiating proceedings under S. 190, Criminal P.C. The offence under S. 494, I.P.C., is not a cognizable offence. But the Bombay Act made it cognizable. It is therefore clear that the Madras Act departed from the procedure laid down in the Bombay Act. The decision therefore in 'Emperor v. Manju Hanmant', ILR (1948) Bom 412 affords no guidance in interpreting the provisions of the Madras Act. We must therefore hold that the procedure prescribed by S. 198, Criminal P.C. applies when a Court is called upon to take cognizance of an offence punishable under S. 494, I.P.C. An offence punishable under S. 494, I.P.C., even read with S. 4 (2) of the Act is an offence that "falls under Ss. 493 to 496, I.P.C.," within the meaning of S. 198, Criminal P.C. That should suffice to dismiss Criminal R. C. No. 713 of 1950.

(7) It was not contended before us that if the Court is precluded by S. 198, Criminal P. C., from taking cognizance of an offence punishable under S. 494, I.P.C., without a complaint made by a person aggrieved, the Court could still take cognizance of an abetment of such an offence without a complaint made by a person aggrieved. S. 40, I.P.C., runs:

> "Except in the chapters and sections mentioned in Clauses 2 and 3 of this Section, the word 'offence' denotes a thing made punishable by this Code."

S. 494, is not one of the sections excepted by Clause 2 or Clause 3.

S. 109, I.P.C., runs thus:

> "Whoever abets any offence shall, if the Act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

S. 114, I.P.C., is as follows:

> "Whenever any person, who if absent would be liable to be punished as an abetter, is present when the Act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such an act or offence."

No express provision having been made by the Indian Penal Code for the punishment of the abetment of an offence punishable under S. 494, I.P.C., such abetment is punishable with punishment provided for the offence falling under S. 494, I.P.C. Abetment of an offence punishable under S. 494, I.P.C., is also thus an offence that "falls under S. 494, I.P.C." within the meaning of S. 198, Criminal P.C. That there is no specific provision like S. 195 (4) Criminal P.C., in S. 198, Criminal P.C., does not in our opinion, make S. 198, Criminal P.C., any the less applicable where the charge is abetment of an offence punishable under S. 494, I.P.C.

(8) The charge against accused 3 to 5 in the complaint as it was preferred was under S. 494, I.P.C., though S. 4 (2) of the Act was also invoked. The allegation was that accused 1 married accused 2 in the presence of his mother accused 5 and accused 3 and accused 4 and with their active cooperation. The scope of that allegation was much wider than that of the "offence" defined by S. 4 (4) of the Act, which referred to the performance and conduct of the bigamous marriage and with the abetment thereof. Thus the offence with which accused 3 to 5 were charged in the complaint was one punishable under S. 494, I.P.C., the allegations laid the basis for a charge of abetment of an offence punishable under S. 494, I.P.C. What the position would have been had accused 3 to 5 been charged with an offence punishable under S. 4 (4) of the Act we are not called upon to decide in these proceedings. Both in form and in substance, the charge against accused 3 to 5 was abetment of an offence punishable under S. 494, I.P.C., and to such a complaint S. 198, Criminal P.C., is clearly applicable.

(9) Criminal R. C. No. 1431 of 1950 is allowed; and the order of the learned Additional Sessions Judge is set aside; and the order of dismissal of the complaint under S. 203, Criminal P.C., passed by the learned Magistrate is restored.

C.R.K./K.S. *Order accordingly.*

A. I. R. (39) 1952 Madras 197 *[C. N. 96.]*

SOMASUNDARAM, J.

In re: M. L. Dalmia, Petitioner.

Criminal Revision Case No. 1321 and Criminal Revision Petition No. 1249 of 1950, D/- 11-7-1951.

Madras Shops and Establishments Act (XXXVI (36) of 1947), Ss. 7 and 9 — Work for extra period of 15 minutes mentioned in S. 7 — Liability to pay extra wages.

If a workman works for the extra period of 15 minutes mentioned in S. 7 and if it is beyond the 8 hours of his work then he is certainly entitled to extra wages for the brief period of 15 minutes.

Failure to pay for this extra period constitutes an offence. (Para 1)

S. K. L. Ratan, for Petitioners; The State Prosecutor, for the State.

ORDER.: The main contention of the learned Advocate for the petitioner is that the words "subject to the provisions of this Act" in Section 9 must be read with Section 7 of the Act and therefore if the workman works for the extra period of 15 minutes mentioned in Section 7, no extra wages need be paid. I am unable to agree with this contention. Section 7 deals only with the time to be taken for serving a waiting customer, if he happens to come to the shop at about the closing time allowed by law. It is an indulgence granted for the advantage of the employer. But Section 9 deals with extra wages to be paid to the workmen when they work for more than 8 hours a day. Undoubtedly for the 15 minutes allowed to the employer to serve a waiting customer if the workman works and if it is beyond the 8 hours of his work then he is certainly entitled to extra wages for that brief period of 15 minutes. Failure to pay for this extra period constitutes an offence. The conviction is therefore correct and the fine is not excessive. The petition is dismissed.

C.R.K./G.M.J. *Petition dismissed.*

A. I. R. (39) 1952 Madras 198 *[C. N. 97.]*

SATYANARAYANA RAO AND VISWANATHA SASTRI, JJ.

The Commissioner of Income-tax, Madras, Applicant v. The Mysore Chromite, Ltd., Respondent.

Case Referred No. 44 of 1948, D/- 29-3-1951.

Income-tax Act (1922), S. 4 — Assessee, a non-resident company — Sale of goods through managing agents in British India — Delivery F O B Madras — Weighing and assaying of goods in London — Delivery of bill of lading in London — Acceptance of bill of exchange by buyer's bank in London — Payment of price to seller's Bank in London — Advance of percentage of price to sellers by Bank in British India — Sale, held took place outside British India — Profits held arose and were received outside British India.

The assessee company, whose registered offices were in Mysore State acquired certain mining rights from the Government of Mysore over certain properties situate in that State. Messrs. Oakley Bowden and Company, Limited, Madras, were the Managing Agents of the assessee, and their registered office was at Madras. The assessee sold chromite ore after converting it into a merchantable product, mostly to buyers in America and in Europe. Messrs. Bowden Oakley, Limited, London, were the agents of the Assessee in Europe while Messrs W. R. Grace and Company, New York were the agents for business in New York. The course of dealing carried on by the assessee through their agents to buyers in Europe was that the buyers entered into contracts for the purchase of the product through the agents of the assessee in London. In regard to the American buyers, the agents in New York themselves entered into contracts with the company. The contracts were signed by Messrs. Bowden Oakley and Company (Madras), Limited, on behalf of the assessee at Madras in respect of the American buyers. The contracts for sale between the European buyers and the assessee were signed by Messrs. Bowden Oakley Company (London), Limited. The main terms of the contracts were the delivery of the goods in F. O. B. Madras or Marmagoa. Practically all the shipments were from Madras. The goods had to be weighed and sampled and assayed after they reached the place of destination, the expenses for which had to be borne jointly by both the buyers and sellers. The buyers had to open before the goods were actually shipped, a confirmed letter of credit with a Bank in London and out of the full amount of the provisional invoice, 90 per cent. of it in the case of European contracts was to be paid to the sellers. The Eastern Bank, Limited, London, acted as the bankers for the sellers and they had also a branch in Madras. The fact that the buyer's bank obtained a confirmed letter of credit was communicated by the Eastern Bank, Limited, London, to their branch at Madras and after this information was received and the goods were shipped after taking a bill of lading, a bill of exchange for the provisional invoice value of the goods was drawn up by the sellers, that is, the assessee upon the buyer's bank in London for acceptance. The payee under this bill of exchange was the Eastern Bank, Limited, London. The bill of lading, the bill of exchange and the provisional invoice were handed over to the Eastern Bank, Limited, Madras, which was the negotiating or the exchange bank. As a negotiating bank the Eastern Bank wrote a letter to the Managng Agents of the assessee offering to negotiate the drafts drawn in terms of the contracts provided that the documents, namely, the bill of lading, the bill of exchange and the provisional invoice were found to be in order. In that letter they made it perfectly clear to the sellers that the advice given to the sellers by the Eastern Bank was only for guidance and that it did not involve any responsibility on the part of the bank. The balance of the price, that is, 10 per cent. in the case of European contracts and 20 per cent. the case of American contracts was to be paid at London on ascertainment of the weight of the goods after they were assayed. The Eastern Bank, London, also realised, the balance of the purchase price — 10 per cent in the case of European contracts and 20 per cent. in the case of American contracts — after the goods were weighed and assayed so that the total amount of the purchase price of the goods was realised from the buyer's bank after the bill of exchange was accepted and bill of lading was handed over. The Eastern Bank, London, deducted the advance already paid to the sellers by their branch at Madras and the balance of the purchase price was thereafter received by the Managing Agents of the sellers:

'Held' that the sale which was of unascertained goods took place and was completed and the profits arose at the place and at the moment, when the property in the goods passed to the buyer. The property in the goods did not pass at any place in British India and passed only in London where the bills of exchange were accepted and the delivery of the bills of lading were obtained from the Eastern Bank, Limited, London. It followed therefore, that the profits arose outside British India in London. The payment of 80 per cent. or 90 per cent. of the provisional invoice price by the Eastern Bank, Limited, Madras, to the seller was not the realisation of part of the purchase price and payment on account by the Eastern Bank, Limited, Madras. The Eastern Bank, Limited, Madras, was only an exchange bank, a bank which negotiated the bill of exchange. Their position, therefore, was merely that of intermediate financiers who, on the security of the documents of title to the goods which had been handed over to them and the bill of exchange under which they were the payees, agreed to advance 90 per cent. or 80 per cent of the provisional invoice price to the sellers. It was a well-known method of secur-

ing money for purposes of further trade. It was nothing more than a mere loan to the sellers on security of the goods. It was not payment of the purchase price as at that moment of time the property in the goods did not pass and the Eastern Bank, Limited., were not acting in any sense of the term as agents of the buyers. (1940), 3 All E R 60; (1917) A C 586, Relied on. (Paras 4, 6, 10)

'Held also' that the profits were also received outside British India. The sale proceeds were received in London exclusively and the subsequent adjustments made by the Eastern Bank would not at all affect the legal position and would not make the adjustment a further receipt in British India. AIR (32) 1945 Bom 258; (1902) A C 287; AIR (25) 1938 Bom 207. AIR (25) 1938 Bom 490; AIR (27) 1940 Mad 433 (SB), Relied on. (Para 12)

Anno: Income-tax Act S. 4, N. 6, 9.

C. S. Rama Rao Saheb, for Applicant; T. V. Viswanatha Ayyar, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('38) ILR (1938) Bom 171: (AIR (25) 1938 Bom 207) (Para 12)
('38) ILR (1938) Bom 803: (AIR (25) 1938 Bom 490) (Pr 12)
('45) 1945-13 ITR 245: (AIR (32) 1945 Bom 258) (Pr 12)
('40) ILR (1940) Mad 618: (AIR (27) 1940 Mad 433 (SB)) (Pr 12)
(1902) A C 287: (71 L J K B 618) (Pr 12)
(1917) A C 586: (86 L J P C 165) (Pr 7)
(1940) 3 All E R 60: (164 L T 102) (Pr 8)

SATYANARAYANA RAO, J.: The Appellate Tribunal referred the following two questions of law to this Court for decision under Section 66 of the Indian Income-tax Act. The questions are:

"(1) Whether on the facts and in the circumstances of the case, the profits derived by the assessee company from sales made to European and American buyers arose outside British India? and

"(2) Whether on the facts and in the circumstances of the case, the profits derived by the assessee company from sales made to European and American buyers were received outside British India."?

The assessment years with which we are concerned in this reference are four years — 1939-40, 1940-41, 1941-42 and 1942-43. The facts are common to the assessment years and therefore it is that a consolidated reference has been made to this Court. The statement of facts by the Appellate Tribunal and the facts as set out in the order of the Tribunal on appeal from the Appellate Assistant Commissioner are not in dispute and the statement of facts drawn up by the Appellate Tribunal has been agreed to by the Commissioner of Income-tax and the assessee.

(2) The Assessee is Mysore Chromite, Limited, a company registered under the Mysore Company Regulations Its registered office is at Sinduvalli in Mysore State It acquired certain mining rights from the Government of Mysore over certain properties situate in that State. Messrs. Oakley Bowden & Company, Limited, Madras, are the Managing Agents of the assessee, and their registered office is at No 15, Armenian Street, Madras. The assessee sells chromite ore after converting it into a merchantable product, mostly to merchants outside India, that is to buyers in America and in Europe Messrs. Bowden Oakley, Limited, London, are the agents of the assessee in Europe while Messrs. W R. Grace and Company, New York are the agents for business in New York. The course of dealing carried on by the assessee through their agents to buyers in Europe is that the buyers entered into contracts for the purchase of the product through the agents of the assessee in London. In regard to the American buyers, it appears that the agents in New York themselves entered into contracts with the company without disclosing the principals on whose behalf they seem to have acted. The contracts are signed by Messrs. Bowden Oakley and Company (Madras), Limited, on behalf of the assessee at Madras in respect of the American buyers. The contracts for sale between the European buyers and the assessee are signed by Messrs. Bowden Oakley, Company, (London), Limited. Two specimen forms of contract with the European and American purchasers are set out in the order of the Tribunal.

(3) The main terms of the contracts are the delivery of the goods in F. O. B. Madras or Marmagoa. It is admitted that the shipment of the goods at Marmagoa were insignificant and it was therefore taken that practically all the shipments were from Madras. The goods have to be weighed and sampled and assayed after they reach the place of destination, the expenses for which has to be borne jointly by both the buyers and sellers. As is customary in transactions of this kind, the buyers have to open before the goods are actually shipped, a confimed letter of credit with a Bank in London and out of the full amount of the provisional invoice, 90 per cent. of it in the case of European contracts and 80 per cent. of it in the case of American contracts was to be paid to the sellers. The Eastern Bank, Limited, London, acted as the bankers for the sellers and they had also a branch in Madras. The fact that the buyer's bank obtained a confirmed letter of credit was communicated by the Eastern Bank, Limited, London to their branch at Madras and after this information was received and the goods were shipped after taking a bill of lading, a bill of exchange for the provisional invoice value of the goods was drawn up by the sellers, that is, the assessee, upon the buyer's bank in London for acceptance. The payee under this bill of exchange is the Eastern Bank, Limited, London. The bill of lading, the bill of exchange and the provisional invoice were handed over to the Eastern Bank, Limited. Madras which was the negotiating or the exchange bank. As a negotiating bank the Eastern Bank wrote a letter to the Managing Agents of the assessee offering to negotiate the drafts drawn in terms of the contracts provided that the documents, namely, the bill of lading, the bill of exchange and the provisional invoice are found to be in order. In that letter they made it perfectly clear to the sellers that the advice given to the sellers by the Eastern Bank was only for guidance and that it did not involve any responsibility on the part of the bank. The balance of the price, that is, 10 per cent in the case of European contracts and 20 per cent in the case of American contracts was to be paid at London on ascertainment of the weight of the goods after they were assayed. There was a provision in the case of European contracts for insurance by the buyers but there is no such provision in the case of American contracts. In pursuance of this mode of mercantile dealing the goods were shipped by the Managing Agents of the assessee company who prepared the provisional invoice and a bill of exchange on the buyer's bank for the 90 per cent or 80 per cent as the case may be of the value of the provisional invoice amount payable at sight in the case of European contracts and at 90 days' sight in the case of American contracts to the Eastern Bank, Limited, London. The bill of exchange and the bill of lading which was

taken in the name of the seller but endorsed in blank by the sellers and the provisional invoice were then negotiated through the Eastern Bank, Limited, Madras. The Eastern Bank, Limited, Madras which as stated already, is an exchange bank advanced 90 per cent or 80 per cent of the provisional invoice amount to the seller at Madras. These documents were ultimately sent to London to the Eastern Bank Ltd., London, which presented the bill of exchange to the buyers Bank which accepted it and obtained a bill of lading and paid the price of the goods in accordance with the bill of exchange to the Eastern Bank, London. The Eastern Bank, London, also realised, and there is no dispute about that, the balance of the purchase price — 10 per cent in the case of European contracts and 20 per cent in the case of American contracts — after the goods were weighed and assayed so that the total amount of the purchase price of the goods was realised from the buyer's bank after the bill of exchange was accepted and the bill of lading was handed over. The Eastern Bank, London, deducted the advance already paid to the sellers by their branch at Madras and the balance of the purchase price was thereafter received by the Managing Agents of the sellers.

(4) On these facts the two questions referred to us have been raised. The assessee will be liable to pay tax on the profits realised by the sales if he is within the purview of either S. 4(1)(a) or 4(1)(c) of the Income-tax Act. The assessee is not a resident in British India and therefore he would be liable to pay tax on the profits only if the income had accrued or had arisen in British India during the accounting year or if it was received in British India during the relevant accounting period. The accrual of the income, it is common ground, would depend upon the place at which the sale took place. It is pointed out by the Appellate Tribunal both in the statement of facts and also in the order that it was accepted by both the parties that the income arises at the place where the sale takes place, and that therefore the only question for determination is whether the sale had taken place in British India or outside. This in its turn depends upon the application of the principles of Law relating to sale of goods under the Sale of Goods Act to the facts as set out above. Where did the sale take place in the circumstances of this case? It is contended on behalf of the department that the sale took place at Madras, where the sellers did all that they were required to do under the contract and received a part payment out of the amount of the provisional invoice. The sale, it must be remembered, is not a sale of ascertained goods but of unascertained goods. The sale takes place and is completed and the profits arise at the place and at the moment, when the property in the goods passed to the buyer.

(5) Where did the property in the goods pass in the present case? S. 18 of the Sale of Goods Act lays down that in the case of sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained. Under S. 23 of the Act in the case of sale of unascertained goods unconditional appropriation of the goods to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller passes the property in the goods to the buyer. But it must be noticed that the appropriation in such a case must be unconditional. Under S. 25 of the Act it is open to a seller either by virtue of the terms of the contract or by his appropriation, to reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, it is stated in the section "notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled". From the facts stated above, it is clear that until the buyer's bank accepted the bill of exchange, the bill of lading which was taken in the name of the seller but endorsed in blank would not be delivered by the Eastern Bank Limited, London to the buyer's Bank who acted on behalf of the buyer. The condition therefore to be fulfilled so as to entitle the buyer to obtain the property in the goods and to obtain their delivery is to pay the purchase price at London and take delivery of the bill of lading, the document of title to the goods. This is the ordinary mercantile usage by which where a seller and buyer are in distant countries, the seller's and buyer's rights are secured. On the one side the seller would be anxious not to part with the property in the goods to a foreign merchant whose financial status is not known to the seller, on the other hand the buyer would not be willing to part with his money until he secures his title to the goods. Both the parties therefore are brought together at the crucial point of time, namely, the delivery on the one hand of the title deeds to the goods, that is, the bill of lading and the payment of the money by the buyer at the same time. Of course, in all these stages both the buyer and the seller are represented by their agents and also by their banks. The problem therefore viewed from the plain language of the provisions of the Sale of Goods Act seems to be of easy solution. The provisions of the Indian Sale of Goods Act, are modelled on the English Sale of Goods Act which in its turn embodies in a crystallised form the well established principles of law relating to the sale of goods, and in particular the point of time at which the property in the goods passes from the seller to the buyer.

(6) It is however, argued by Mr. Rama Rao Saheb that the payment of 80 per cent or 90 per cent of the provisional invoice price by the Eastern Bank Limited, Madras to the seller is really the realisation of part of the purchase price and a payment on account by the Eastern Bank Ltd. Madras. We think that this contention proceeds on a misapprehension of the relationship between the Eastern Bank Ltd., Madras, and the seller. The Eastern Bank Ltd. Madras is only an exchange bank, a bank which negotiated the bill of exchange as provided in the contract itself and also as intimated by the letter of the Eastern Bank to the sellers. Their position, therefore, was merely that of intermediate financiers who, on the security of the documents of title to the goods which have been handed over to them and the bill of exchange under which they are the payees, agreed to advance 90 per cent or 80 per cent of the provisional invoice price to the sellers. Of course, these devices are intended to prevent the seller's money being locked up for a long time and make it unavailable for purposes of trade. It is a well known method of securing money for purposes of further trade. It is nothing more than a mere loan to the sellers on security of the goods. It is not payment of the purchase price as at that moment of time the property in the goods did not pass and the Eastern Bank Ltd. were not acting in any sense of the term as agents of the buyers. The letter of credit was given by the buyer's bank and that fact was intimated through the Eastern Bank Limited, Madras to the sellers. The Eastern Bank throughout acted as bankers acting on behalf of the sellers and they had nothing to do with the buyers.

(7) A further contention that was argued on behalf of the department is that the conditions

imposed under the contract namely, provision for payment and assay are indicative of the intention of the parties that the property in the goods had already passed and that they were merely conditions subsequent. We do not think that this correctly states the position. After the goods were delivered to the buyers when the bill of exchange was accepted under the terms of the contract the buyers had the right to have the goods weighed and assayed in order to find out whether the specification in the contract of the percentage of chromite in the ore is satisfied or not, and if they were not so satisfied it was open to them to make the necessary adjustments in the price. The price was finally determined after weighment and assay and when that was finalised the amounts mentioned in the provisional invoice is revised and the price of the goods is finally fixed. It is after that that the balance of the purchase price deducting the amount payable under the term of the contract, namely, 90 per cent in the case of European contracts and 80 per cent. in the case of American contracts was realised. The conditions, therefore are not conditions which would indicate that already the property in the goods had passed at an earlier point of time earlier even to the acceptance of the bill of exchange and that subsequently if there was a breach of those conditions there was a defeasance of the title in the goods which was vested in the buyers. It is really unnecessary in view of the clear language of the Sale of Goods Act to refer to the decisions on the point but the position was examined and clearly defined in two decisions, one of the Privy Council and the other of the House of Lords. The decision of the Privy Council is in 'THE PRINZ ADALBERT', (1917) AC 586. In that case Lord Sumner points out at page 589 the legal effect of transactions of sale of a similar nature and the point of time at which the sales takes place. The learned Lord observed:

"By general mercantile understanding, which has the force of law where transactions originate, like the present, in time of peace without prospect of war, the delivery of an indorsed bill of lading, made out to the shipper's order while the goods are afloat, is equivalent to the delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of Municipal Law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise and the interest of parties concerned in it, suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading endorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being then owner of the goods, authorizes and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer 'that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done'. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted." (Italics (here words in single quotations) are mine)

(8) It is therefore obvious from this passage that until the bill of exchange is accepted, the bill of lading is to be retained. The obvious intention is that the seller intends to retain the ownership in the goods till the condition namely the acceptance of the bill of exchange is fulfilled by the buyer or the banker of the buyer. The question was recently examined by Lord Wright in 'Ross T. Smith & Co v. T. D. Bailey, Son & Co.', (1940) 3 All E R 60 where also the law is stated in similar terms, though the contract in that case was a C. I. F. contract. The learned Lord examined the corresponding provisions of the English Sale of Goods Act in the course of the judgment, and the principles therein laid down as applicable even to the present case. At page 65 the learned Lord states in his speech:

"I think, with respect, that the Court of appeal, presumably because they had not the bills of lading before them, have by inadvertence fallen into an error, which, if not explicitly and fully controverted by this House, might be taken to lay down a general principle, and so have serious consequences in unsettling the course of business generally in C. I. F. contract. The notice of appropriation under an ordinary C. I. F. contract is not intended to pass, and does not pass, the property. Whereas here, the sale is of unascertained goods by description there are, at that stage, no goods to which the contract can attach. The seller is free to appropriate to the contract any goods which answer the contract description. This he does by the notice of appropriation which specifies and defines the goods to which the contract attaches. These thereupon he is bound to deliver and the buyer is bound to accept subject to the terms of the contract. That, however, does not involve the passing of the property. The property cannot pass under a contract of sale until the goods are ascertained (the Sale of Goods Act, 1893, S. 16), but, once they are ascertained, the property passes at the time when the parties, intended it shall (Sec. 17(1).). As the parties seldom express any such intention, or perhaps even think of it, the intention will generally be a matter of inference from the terms of the contract, the conduct of the parties, and the circumstances of the case."

(9) Then S. 18 of the English Sales of Goods Act was quoted and at page 66 while referring to the requirement that the appropriation must be unconditional this is what the learned Lord says:

"However, the Court, I venture to think, should not have disregarded the word "unconditionally" in sub-r. (1) (corresponding to S. 23 of the Indian Sale of Goods Act). I do not construe sub-r. (1) as limited to a case where there is an express term that the notice of appropriation is unconditional, or, on the other hand, to a case where the notice of appropriation is in terms, conditional, though the words contained is the notice of appropriation namely, 'under the usual reserves as per contract' — would, I think, necessarily

import that the contract conditions were to be borne in mind. In this case, the facts known to both parties would import that the appropriation was conditional. The bills of lading were held by the appellants. The contract provided for cash or (at sellers' option) an acceptance of Sellers' draft against documents. That condition for the transfer of the documents had not been fulfilled. The bills of lading were the symbols of the goods, and the appellants by retaining them, retained, as against the respondents title and control over the goods. All the respondents had at that stage was a contractual right to obtain control, and thereby become owners upon taking up the documents."

Later on the provisions of S. 19 (corresponding to S. 25 of the Indian Sale of Goods Act) were also referred to. The principles applicable for ascertaining the intention of the parties are enunciated at page 67:

"In particular, the provision already referred to for cash against shipping documents clearly contemplated that the sellers (the appellants) were to retain the documents, including the bills of lading, until the condition of payment was fulfilled. It is true that, by the bills of lading, the goods were not in terms made deliverable to the seller or his agent, but for all purposes of the contract, the position was the same as soon as the bills of lading (which were to the shipper's order) were indorsed in blank and transferred to the appellants. When that happened, the appellants had title in and control over the goods. They could deal with the goods as they liked, even though to deal with them contrary to the notice of appropriation would 'prima facie' be a breach of the contract. No property passed to the respondent until the conditions stipulated in the bills of lading for the transfer of the property were fulfilled."

(10) It is therefore obvious that the property in the goods did not pass at any place in British India and passed only in London where the bills of exchange were accepted and the delivery of the bills of lading were obtained from the Eastern Bank Ltd., London. It follows therefore that the profits arose outside British India in London and the answer to the first question referred to us must be in the affirmative and against the Income-tax Commissioner.

(11) The next question for consideration is whether it can be said that the profits were received in British India, as 80 per cent and 90 per cent of the provisional invoice price were paid by the Eastern Bank Ltd., Madras, in the circumstances already set forth. The attempt of the department is to tax the assessee on the ground that even if the profits arose outside British India they were at least received in British India and therefore he is liable to pay tax. The contention strongly pressed before us by Mr. Rama Rao Saheb, the learned Advocate for the Income-tax Commissioner is that the amount paid to the Eastern Bank Ltd. Madras as advance is really receipt of part of the purchase price at Madras in British India and therefore it is that the assessee is liable to pay tax on the income. Here again one should not overlook the position that arises on the facts of the case. In the first place it must be remembered that at the time the Eastern Bank Ltd., Madras, paid this money it was not paid as part of the purchase price. No doubt there was the confirmed letter of credit by the buyer's bank on the strength of which it was that the Eastern Bank Ltd., London, intimated to the sellers through their branch at Madras that such a letter of credit was given on behalf of the buyer. But that was only to assure the seller that he should despatch the goods. The transaction between the Eastern Bank Ltd', Madras, and the sellers regarding the payment of the 80 per cent or 90 per cent of the invoice price was based solely upon the letter which the Eastern Bank Ltd., Madras, passed on to the sellers, offering to act as a negotiating bank & to accommodate the sellers if necessary as against the documents by advancing the amount of 80 per cent or 90 per cent of the provisional invoice price. That in our opinion was advanced on the strength and on the security of the documents of title which have been handed over to the Eastern Bank Ltd., along with the bill of exchange for negotiation. Under the bill of exchange it must be remembered the payee was the Eastern Bank, London, which is their own head office of the Madras Branch. The sale was not completed and under the terms of the contract the buyer was not bound to pay the price at that moment. The payment therefore must be treated merely as a loan and it has no other legal effect. At the other end when the sale was completed the price was paid by the buyer's bank to the Eastern Bank Limited, London. The price, therefore, was received on behalf of the sellers by the Eastern Bank Limited, London. Thereafter the Eastern Bank Ltd., London, adjusted from and out of the sale price the amount which has already been advanced by their branch at Madras to the sellers and the balance alone was paid to the sellers. The first receipt therefore of the price was by the Eastern Bank, London, on behalf of the sellers. Thereafter they made the necessary disbursements from and out of the receipts which they made from the buyer's bank. The receipt of the sale price out of which profits must have accrued was undoubtedly in London. It cannot be said that the adjustment of the loan amount from and out of the sale price received by the Eastern Bank Ltd., London, is either a remittance or a receipt of the sale price, in Madras by the sellers. The argument is that when the sale is completed the amount received at Madras from the Eastern Bank Limited as advance was converted retrospectively into sale price and therefore it operated as receipt of the profits. We are unable to accept this contention.

(12) The effect of the adjustment was only to lessen the liability of the assessee in British India to the Eastern Bank Limited, Madras. That cannot be treated as a receipt of the profits in British India. As has been pointed out by Kania, J., as the officiating Chief Justice as he then was in 'Sarupchand Hukumchand, In re', (1945) 13 ITR 245 (Bom) a mere lessening of liability in British India is not a receipt. To constitute a receipt there must be a receipt of the amount or at least by appropriate book entries of an asset which can be pointed out as resulting from the receipt (vide at page 260, and observations of Chagla, J., at page 262). As pointed out in the Gresham Case 'Gresham Life Assurance Society v. Bishop', (1902) AC 287 "the income may be received in specie or in any form known to the commercial world for the transmission of money from one country or place to another"; and that is the test which was adopted in 'Commr. of Income-tax Bombay v. Ahmedabad Advance Mills Ltd', ILR (1938) Bom 171 and also in 'Commr. of Income-tax, Bombay v. New India Assurance Co. Ltd', ILR (1938) Bom 803 and also in 'Commr. of Income-tax, Madras v. Muhammad Ismail', ILR (1940) Mad 618 (SB) Lord Lindley in 'Gresham Life Assurance Society v. Bishop', (1902) AC 287, stated:

"A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or other document

which represents and produces coin, and it treated as such by business men."

If however there is no receipt of the money in the manner and in the mode known to business men it cannot be said that there is a receipt of the money. The mere fact that the liability to the Eastern Bank Limited was adjusted in London cannot be treated as a receipt in British India. We think it is really unnecessary to advert to this aspect as in the present case the person who paid the purchase price and the person who received the purchase money are two different persons. The sale price was realised in London by the buyers Bank paying it to the Eastern Bank Ltd., who was acting on behalf of the sellers. That was the first receipt. It cannot be said that by subsequent adjustment towards the debt there was further receipt of the sale price by the sellers so as to attract the provisions of the Income-tax Act. The situation probably might have been different and it is unnecessary to go into that if the person who paid and received the sale price in the first instance happens to be one and the same person. That is not the case here. It is clearly a case where a receipt of the sale proceeds was in London exclusively and the subsequent adjustments made by the Eastern Bank would not at all affect the legal position and would not make the adjustment a further receipt in British India. We therefore think that the question referred to us must also be answered in the affirmative, and against the Commissioner of Income-tax. As the assessee has succeeded, he is entitled to costs which we would fix at Rs. 250.

C.R.K./R.G.D. *Reference answered accordingly.*

A. I. R. (39) 1952 Madras 203 *[C N. 98]*

RAJAMANNAR, C. J. AND VENKATARAMA AIYAR, J.

Rajah Sri Ravu Sweta, Chelapathi Ramakrishna Ranya Rao Bahadur, Rajah of Bobbili, Petitioner v. The State of Madras, represented by the Collector of Visakhapatnam, Respondent.

Civil Misc. Petns. Nos. 894 and 895 of 1951, D/- 14-9-1951.

† *Madras Estates Land (Reduction of Rent), Act (XXX (30) of 1947) — Provisions reducing rent and giving power to Government to collect same do not involve acquisition of land and do not contravene S. 299 (2) Govt. of India Act, 1935 and Art. 31 (2), Constitution of India — Act was within competence of Provincial Legislature and was covered by Entry 21 of List II Sch. VII Govt. of India Act — Act is not inconsistent with Arts. 19 (1), (f), 19 (5) or 14 of the Constitution — Madras Amending Act VII (7) of 1951 is also not void — (Govt. of India Act (1935), S. 299 (2), Sch. VII, List II, Entries 9 and 21) — Constitution of India, Arts. 13, 14, 19 (1) (f), 19 (5) and 31 (2)) — (Madras Estates Land (Reduction of Rent) Amendment Act (VII (7) of 1951.))*

When one speaks of acquiring the property of another, there are two ideas, namely, the idea of one gaining something which the other is deprived of. There is a divesting and a vesting of property or any interest in property, whether tangible or intangible. Hence though every instance of acquisition of property would be an instance of taking of property, the converse is not true. Every instance of taking as understood by later American decisions to mean substantial interference with with private property, which destroys or lessens its use and value or by which the owner's right to use or enjoy it, is abridged or destroyed in any substantial degree, would not amount to acquisition within the meaning of that term in S. 299 of Govt. of India Act or Art. 31 (2) of the Constitution of India. Even giving the word 'property" or "land" the widest connotation, there should be an element of transference before it can be said that there is an acquisition of any interest in land or in property. The Madras Estates Land (Reduction of Rent), Act (XXX (30) of 1947), provides (a) for the reduction of rents and (b) for the collection of the reduced rents by the Government. By reducing the rent payable by a tenant to a landlord, there cannot be an acquisition by the Government of any right or property of the landlord, though a reduction of rent would adversely affect the landlord by depriving him of a part of the benefit which he had been deriving from his property. But that element alone would not render the legislation confiscatory or exproprietary, since there is no transference of any right of the landlord to the Government, no vesting in the Government of any right of the landlord. The provision merely regulates the relationship between the landlord and the tenant. The landlord is entitled to collect from his tenant only the lawful rent and the Act determines what that lawful rent is. AIR (30) 1943 FC 29; AIR (33) 1946 PC 127; Rel. on. American, Australian and Indian Case Law Ref.

Similarly the provision relating to the collection of rents by the Government does not amount to acquisition. There is no vesting of any property right in Government simply because under the provisions of the Act, the Government alone can recover the rents due to the landholder. This collection must be deemed to be made only on behalf of the landholder, because the Government does not have any beneficial interest in the amount collected, except of course, to pay themselves the cost of the collection.

Thus the Act does not in any particular involve an acquisition of land (including by that term any interest in land) and the Act therefore does not contravene the provisions of S. 299 (2) of the Government of India Act, 1935 or did not become void on the coming of the Constitution under Art. 13 of the Constitution as being inconsistent with the fundamental rights guaranteed under Art. 31 (2). (Paras 14, 17, 18, 19, 30 and 42)

Since there is no acquisition by the Government it cannot be said that the legislature has adopted a device to escape from the provisions of Art. 31 (2), by calling the same Act by a different name. There is therefore no attempt by the legislature in trying to do indirectly what it cannot do directly. AIR (26) 1939 P C 53, Ref. (Paras 37, 60)

Since the Act does not involve any acquisition of land, Entry 9, List II Sch. VII of Govt. of India Act, has no application. But the provisions relating to reduction of rent would fall under Entry No. 21 of the List. This would come under relationship of landlord and tenant. The words "landlord and tenant" in Entry No. 21 are used in their widest sense and so long as the ryot is under an obligation to pay rent either in cash or in kind to the landholder and so long as the estate stands registered in the name of the landholder, it is not inappropriate to describe relationship between the landholder and the rayot in an estate as that between landlord and tenant. (Para 20)

The expression "the collection of rents" should not be confined to the collection of rents by the landlord alone. It can as well cover collection by agents on behalf of the landlord, and the Government under Section 3 (4) of the Mad. Est. Land (Reduction of Rent) Act is no more than a statutory agent. The Act even in so far as it provides for the compulsory collection of

rents by the Government is covered by Entry No. 21 of the Provincial List and therefore the Provincial Legislature was competent to enact it. AIR (37) 1950 Pat 392 (FB), Distinguished. (Paras 23, 55, 63)

('Obiter: Even if the provisions regarding the collection of rent (S. 3 (4)), are held invalid for any reason, remaining provisions relating to the reduction of rent can stand by themselves. 1947 A C 503, Applied.) (Paras 24, 61)

The Act or any of its provisions does not affect materially the right of the landholders to "hold" property. The proper meaning of the word "hold" is to "enjoy." Enjoyment of property consists in actual occupation and possession of it and will also comprise the perception of the rents and profits from it. The landholder will be entitled only to collect such rent as is lawful and in the exercise of the admitted right conferred on the Provincial Legislature to regulate the relation between landlord and tenant, an enactment could declare what that lawful rent is or provide for its determination. It is not as if there is an invoilable and absolute right in the landholder to collect any particular rent. It may be a matter of contract or of usage, but the legislature could always provide for the ascertainment of a fair and proper rent, notwithstanding any contract or usage. If the object of the legislation is to prevent the landholder making an excesstve use of his right, it would be open to the legislature to make such use unlawful. AIR (38) 1951 S C 41, Relied.

Thus the Act does not substantially affect materially the right of the landholders to acquire, dispose of or hold the property and is not void on the ground of its being inconsistent with Art. 19 (1) (f). (Para 25)

Even assuming that these provisions do restrict the exercise of the landholder's enjoyment of their property, the restrictions can be supported as reasonable restraints imposed in the interests of a large section of the public and therefore saved by Art. 19 (5). AIR (38) 1951 S C 118; AIR (37) 1950 S C 211, Applied. (Paras 28, 64)

The Act itself is not void, on the ground that it may virtually deprive the landholder of all beneficial enjoyment of his property. Each case must depend upon its special facts. The decision of the question would ultimately depend upon the circumstances of each estate. Rents which may be reasonable and just with respect to one estate may be unreasonable and unjust with respect to another. It is necessary therefore before any landholder can be given relief that he should allege and prove facts which conclusively show that as a result of the reduced rates of rent fixed under the Act, he has been totally or substantially deprived of the net income available to him. American Case Law Ref. (Paras 35, 36)

Collection of rent by the Government is also in the interest of the general public since this woula avoid the dangers of exaction. There is nothing unreasonable in the substantive or procedure provisions of the Act. (Para 29)

'Quaere'. If the deprivation of property by any law did not amount to taking possession or acquisition covered by Art. 31 (2), then will such law be valid under Art. 31 (1) and will Art. 19 (1) (f), not have any operation in such a case. (Para 30)

There is nothing in the Madras Act XXX (30) of 1947 which makes a distinction between one landholder and another or one tenant and another on the ground that it provides (S. 2 Expl. 1) only for reduction of rent and not for enhancement, where it is found that the rents were less than the fair rent. The Act is only an illustration of the constitutional practice of classification which is reasonable and permissible. The Act is not void on the ground that it contravenes Art. 14. (Paras 31, 66)

Thus the Madras Act XXX (30) of 1947 was valid when it was passed and did not become void after the coming into force of the Constitution. It follows therefore that the amending Act VII of 1951 is also not void. (Paras 38, 67)

K. Umamaheswaram, for Alladi Kuppuswami, for Petitioner; The Advocate-General, for State Counsel and Govt. Pleader, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('98) 21 Mad 299: (25 Ind App 84 P C) (Pr 59)
('39) 1939 A C 117: (AIR (26) 1939 P C 53) (Pr 37)
('46) 1946-2 Mad L J 29: (AIR (33) 1946 P C 127) (Prs 15, 17, 42)
('47) 74 Ind App 12: 1947-2 Mal L J 1: (AIR (34) 1947 P C 72) (Prs 21, 59)
('41) 1941-1 Mad L J 65 Sup: (AIR (28) 1941 F C 16) (Pr 55)
('43) 1943-2 Mad L J 114: (AIR (30) 1943 F C 29) (Prs 15, 17, 42)
('44) 1944-1 Mad L J 510: (AIR (31) 1944 F C 62) (Prs 15, 42, 45)
('44) AIR (31) 1944 F C 73: (ILR (1944) Kar F C 130) (Pr 55)
('46) 1946 F L J 57: (AIR (34) 1947 F C 1) (Pr 58)
('47) 'Uday Chand v. Samarendra Nath',: (AIR (34) 1947 F C 19) (Pr 55)
('50) 1950 S C J 571: (AIR (38) 1951 S C 118) (Pr 29)
('50) 1950 S C J 328: (AIR (37) 1950 S C 211: 52 Cri L J 550) (Pr 29)
('50) 1950 S C J 174: (AIR (37) 1950 S C 27: 51 Cri L J 1383) (Pr 30)
('51) 1951 S C J 29: (AIR (38) 1951 S C 41) (Prs 10, 26, 30, 47, 48, 65)
('51) 1951 S C J 203: (AIR (38) 1951 S C 97) (Pr 66)
('40) ILR (1940) All 455: (AIR (27) 1940 All 272 FB) (Pr 55)
('46) AIR (33) 1946 Bom 216: (47 Cri L J 594) (Prs 23, 48)
('93) 16 Mad 271 (Prs 20, 59)
('97) 20 Mad 299: (7 Mad L J 251) (Prs 20, 59)
('98) 21 Mad 116: (8 Mad L J 43 FB) (Pr 20)
('50) 29 Pat 790: (AIR (37) 1950 Pat 392 FB) (Prs 16, 21, 27, 50, 56)
(1947) A C 503: (63 T L R 479) (Prs 24, 61)
(1949) 1949 A C 110 (Pr 24)
75 C L R 1 (Australia) (Pr 11)
(1944) 68 C L R 261: (1944 A L R 89) (Prs 10, 15, 46, 48, 49, 50)
116 U S 307 (Pr 33)
(1890) 134 U S 418: (33 Law Ed 970) (Pr 34)
(1894) 154 U S 361: (38 Law Ed. 1014) (Prs 32, 64)
(1895) 156 U S 649: (39 Law Ed. 567) (Pr 33)
(1896) 164 U S 578: (41 Law Ed. 560) (Prs 33, 64)
(1898) 169 U S 466: (42 Law Ed. 819) (Pr 34)
260 U S 326: 67 Law Ed. 287 (Pr 46)
260 U S 393: 67 Law Ed. 322 (Prs 8, 13, 46)
328 U S 256: 90 Law Ed. 1206 (Prs 8, 13, 46)

RAJAMANNAR, C. J.: In this batch of applications filed on behalf of several land-holders in the State a common question arises as to the validity of Madras Act XXX (30) of 1947 & of Madras Act VII (7) of 1951 which amended the former Act in certain particulars. Individual applications also raise other questions, but it was considered convenient to hear and dispose of the main question before

dealing with other subsidiary questions. Madras Act XXX of 1947 received the assent of the Governor on the 6th January 1948. It is called the Madras Etsates Land (Reduction of Rent) Act, 1947 The descriptive title runs as follows:

"An act to provide for the reduction of rents payable by ryots in estates governed by the Madras Estate Land Act, 1908, approximately to the level of the assessments levied on lands in ryotwari areas in the neighbourhood."

The following is the preamble to the Act,

"Whereas the rents now payable by ryots in estates governed by the Madras Estates Land Act, 1908, are in many cases substantially higher than the assessments levied on lands in ryotwari areas in the neighbourhood;
and whereas it is expedient to provide for reduction of such rents approximately to the level of the ryotwari assessments in the neighbourhood".

The Act applies to all estates as defined in S. 3, Cl. (2) of the Madras Estates Land Act, 1908. These estates include zamindaries and major inams. Section 2 of the Act provides for the appointment of a Special Officer for the purpose of recommending fair and equitable rates or rent in the ryoti lands in such estate or estates in respect of which he is appointed. He has to first determine in respect of each village in an estate the average rate of cash rent per acre prevailing at the commencement of the Act for each class of ryoti land in that village such as wet, dry and garden. Where no cash rents are prevalent in the village in respect of any class of land, the officer has to determine the average rate of cash rent per acre prevailing for such class of land in the nearest village in the estate for which cash rents are prevalent for such class of land and in which conditions are generally similar to those obtaining in the principal village, or where there is no such village in the estate in the nearest village in the nearest estate in respect of which village both the above requirements are satisfied. The Special Officer has then to determine the average rate of assessment per acre prevailing at the commencement of the Act in respect of each of the classes of land in the nearest ryotwari area in which conditions are generally similar to those obtaining in the estate village. He has then to compare the average rates of cash rent prevailing in the estate village or as determined in the manner aforesaid with the average rates of assessment in the nearest ryotwari area and after making due allowance for any difference in the conditions prevailing in the two cases determine the extent, if any, to which the rates of rent payable for each class of ryoti land in the estate village should be, in his opinion, reduced. He shall then fix the rates of rent payable for each such class of land after such reduction. Explanation I is important, as a point was made on its terms,

"The Special Officer shall have power only to determine that the rents payable for any class of ryoti land in the principal village shall be reduced; and he shall have no power to determine that such rents shall be enhanced".

Explanation II declares that the extent of reduction shall also apply where rent in the village is paid in cash or on the estimated value of the share of the crop and in cases where rent is payable partly in kind and partly in cash. When the Special Officer has completed his task in any estate, he will submit his recommendations to the Provincial Government through the Board of Revenue specifying the extent if any to which the rents for each class of ryoti land in each village or group of villages in the estate should be reduced and the rate of rent payable for each such class after such reduction. The Provincial Government after considering the recommendations of the Special Officer and the remarks of the Board of revenue thereon shall by order published in Fort St. George Gazette fix the rates of rent payable in respect of each class of ryoti land in each village in the estate. It is specially provided, however, that where the rate of rent fixed in respect of ryoti land of any class exceeds the rate of rent payable in respect thereof at the commencement of the Act only the latter rate of rent shall be payable in respect of such land. The order of the Provincial Government shall take effect from the commencement of the fasli year 1357. S. 3(4) is another important provision which figures prominently in the arguments before this Court and may be set out in full:

"After such an order has taken effect in respect of any estate or portion of an estate, the rents due in respect of ryoti lands in such estate or portion with effect from the commencement of the fasli year 1357 as well as the rents which have fallen or may fall due in respect of such lands for any fasli subsequent to fasli 1357 until the commencement of the fasli year in which the estate may be finally taken over by the Provincial Government shall be recovered by the Provincial Government as if such rents were arrears of land revenue due to them; and the amount so recovered in respect of each fasli, after deducting therefrom the cost of such recovery as determined in accordance with such rules as may be made by the Provincial Government in that behalf, and also the peshkush; cesses, and other moneys due from the land-holder to the Provincial Government and constituting a charge on the estate shall be paid to the land-holder".

Once an order is published under S. 3(2) in respect of any estate or portion thereof, a ryot is not bound to pay rent for any ryoti land held by him at a rate exceeding that fixed by the order, notwithstanding anything contained in the Madras Estates Land Act, 1908. Ss. 5 and 6 deal specifically with the estates endowed for religious, educational and charitable institutions. Section 7 confers power on the Provincial Government to make rules to carry out the purpose of the Act. Section 8 declares that the validity of the following orders and proceedings shall not be liable to be questioned in any Court of law.

"(i) any order made under S. 3 Sub-s. (2),
(ii) any recovery of rent effected by the Provincial Government under S. 3, Sub-s. (4), or any payment made by them to the land-holder under the same sub-section;
(iii) any determination of net income or average net income made under S. 5 Sub-s. (2)."

The Amending Act (No. VII of 1951) received the assent of the President on the 17th April 1951. Sections 2 and 3 of this Act are the most important. By S. 2 the following words were added both in the long title and in the second paragraph of the preamble at the end, "and for the collection of such rents exclusively by the State Government." Section 3 amended S. 3 of the original Act as follows:

"(i) in Sub-s. (4) after the words "finally taken over by the State Government', the words brackets and figure 'and any interest payable on such rents under Sub-s. (6)' and after the words 'as if such rents', the words 'and interest' shall be inserted;
(ii) to the same sub-section, the following explanation shall be added, namely:
"Explanation: The provisions of this sub section shall apply to an estate,

whether the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, applies to it or not".

(2) After Sub-s. (4) three new sub-sections were added. Of these sub-sections, Sub-s. (7) is material. It runs thus:

"The land-holder shall not be entitled to collect, and the provisions of Chapters V and VI of the Madras Estates Land Act, 1908, shall cease to apply to, any rents or interest recoverable by the State Government under Sub-s. (4)".

Section 4 of the amending Act provides for the dismissal of all suits and proceedings pending at the commencement of that Act in which the land-holder seeks to establish against the State Government his right to collect or to recover from a ryot the rents to which the provisions of S. 3(4) of the Act shall apply. There is finally a provision (S. 4(2)) which enables the Court on the application of any person affected by such decree to vacate a decree or order passed before the commencement of the Act which is inconsistent with the provisions of S. 3, Sub-ss. (4), (5) and (6) of the Act as amended, and after vacating the decree the Court shall pass a fresh decree or order which shall be in conformity with the provisions aforesaid.

(3) It is obvious that the amending Act by itself can have no place in the statute book and cannot remain in force if for any reason it is held that the original Act is invalid. There is one difference between the original Act and the amending Act and that is that while the former Act was passed when the Government of India Act, 1935, was in force, the later Act was passed after the coming into force of the Constitution of India. The validity of the Original Act was impugned by the petitioners firstly on the ground that it was void even when it was passed, because it contravened certain provisions of the Government of India Act, 1935, and secondly, on the ground that in any event after the Constitution came into force, the Act became null and void as being inconsistent with certain of the articles in Part III of the Constitution.

(4) The first ground of attack is that the Act substantially reduces the rents payable to the land-holders and also takes away from them the right to collect the rents and therefore the Act relates to acquisition of land and as the Act does not provide for the payment of compensation to the land-holders, it is in contravention of S. 299(2) of the Government of India Act, 1935, which says:

"Neither the Federal nor Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined".

The next ground is that if it be held that the Act did not relate to compulsory acquisition,, then, the Act did not fall within the legislative competence of the Province, as the subject-matter is not covered by any of the entries in the provincial or concurrent lists. The only entry which could be pressed into service, leaving apart entry No. 9 of the provincial list, is entry No. 21. Even if this can comprise the provisions relating to reduction of rents, it cannot include within its ambit the provision which confers on the Government the exclusive right to collect the rents and deprives the landlords of such right.

(5) These contentions are based on the Government of India Act, 1935. The contentions based on the provisions of the Constitution of India are (1) that the Act infringes the fundamental right declared in favour of every citizen in and by Art. 19 (1)(f); (2) that the Act contravenes Art. 31(2) of the Constitution.

(6) It was then argued — and this argument was the same whether the Government of India Act applied or the Constitution of India — that in case it is found that either of the two main provisions of the Act is invalid, namely, either the reduction of rents or the taking over of the right to collect rents, then the Act in its entirety should be declared 'ultra vires' and void; the offending provisions alone cannot be discarded and the remaining provisions be allowed to stand.

(7) The Bill which ultimately became law as Act XXX of 1947 was first published in the Fort St. George Gazette dated 30th September 1947 as Bill No. XXIV of 1947. Along with this there were two other Bills published, namely, the Madras Estates Communal and Forest and Private Lands Prohibition of Alienation Bill (subsequently enacted as XIV of 1947 and (2) Madras Estates Repeal of Permanent Settlement and Conversion into Ryotwari Bill (No. XXXVII of 1947) which was afterwards passed as Act XXX of 1948. The statement of objects and reasons for Bill No. XXIV of 1947 (which eventually became Act XXX of 1947) was as follows:

"It is the policy of the Government to replace the zamindari by the ryotwari system at the earliest possible date. It will however take some time to pass the requisite legislation on the subject and to bring it into force in all the estates in this province.

2. The agrarian situation in estates, especially in the Circars, is worsening day by day and there is a growing agitation for the reduction of the high rents which prevail now. The Government consider that some immediate relief should be given to ryots and the object of this Bill is to provide for the reduction of rents in estates roughly to the level of the assessment prevailing in the neighbouring ryotwari areas. After the assessment has been finally fixed, the rights 'inter se' of land-holders and ryots in respect of the intervening period commencing with the current fasli will be suitably adjusted."

It will be seen that eventually there were changes in the enactments as actually passed from the original provisions. Whereas Bill No. XXXVII contemplated an Act which applied to all estates to which the Bill No. XXIV of 1947 applied, actually when the Act came to be passed, there was an important difference. Act XXVI of 1948 was not made applicable to Inams falling within S. 3(d) of the Madras Estates Land Act.

(8) We shall now take up the several contentions on behalf of the petitioners. Mr. Umamaheswaram who appeared on behalf of some of the land-holders put forward his case as regards S. 299 (2) of the Government of India Act, 1935 on an alternative basis. He first contended that the reduction of rents and the taking over of the right of collection by the Government both amounted to compulsory acquisition, and in the alternative that in any event the latter at least amounted to such acquisition. Learned counsel relied on decisions of the Supreme Court of the United States and several other decisions of other Courts including the Supreme Court of India. In 'Pennsylvania Coal Co. v. Mehon', 260 U S 393: 67 Law Ed. 322, it was held that a statute prohibiting the mining of coal under private dwellings or streets of cities in places where the right to mine such coal is re-

served in the grant is unconstitutional as taking property without due process of law. This case is not of much assistance, because it was admitted that the statute did destroy previously existing rights of property and contract. The only question was whether the police power could be stretched so far as to justify the legislation. The Supreme Court held that it could not be. Mr. Justice Holmes delivered the opinion of the Court and he summed up the true position thus:

"Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the dimunition. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power".

The general rule was that "while property may be regulated to a certain extent, if the regulation goes too far, it will be recognised as a taking". The following observations have been oft repeated in America and have been quoted by our own Supreme Court,

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change".

Ultimately, however, the question was one of degree and could not be disposed of by general propositions. Mr. Justice Brandeis dissented. He pointed out that every restriction upon the use of property imposed in the exercise of police power deprives the owner of some right and is in that sense an abridgment by the State of rights in property without making compensation. Of course, the restriction could be lawfully imposed only when its purpose was to protect the public interests. But the purpose of the restriction, he observed "does not cease to be public because incidentally some private persons may thereby receive gratutiously valuable special benefits". Dealing with the point emphasised by Mr. Justice Holmes that the main consideration for determining whether the limits of the police power had been exceeded was the extent of the resulting diminution in value, the learned Judge laid stress on the fact that values are relative. On the facts of the case before him, he was of the opinion that it had not been proved that there was an unreasonable exercise of the police power. In 'United States v. Causby', 328 US 256: 90 Law Ed 1206, the facts were peculiar and as follows. The plaintiff in the case owned a dwelling house with a compound and outhouses which were used for raising chickens near an airport. The end of one of the airport's runaways was very near the plaintiff's barn and house. Various aircrafts of the United States used to fly over the plaintiff's property at a height below the prescribed minimum and interfered with the normal use of the plaintiff's chicken farm. There was also a great inconvenience to the plaintiff as the plaintiff and members of his family were frequently deprived of their sleep and the family became nervous and frightened. On the basis of these facts, it was found that the plaintiff's property had depreciated in value. The question was whether there was such a taking of the plaintiff's property as to give him a constitutional right to compensation. It was held by the Supreme Court of the United States that there was. It was held that the damage to the property of the plaintiff in the case was not incidental and consequential from a legalised nuisance and therefore there would be a taking of an easement of flight. Here again the question was one of fact, because the normal inconveniences which the flight of aircraft may cause will not be compensable, but if the flights were so low and frequent as to have a direct and immediate interference with the enjoyment and use of private land, then there would be a taking.

(9) Besides citing these two cases, learned counsel for the petitioners also cited certain passages from text-books. In Corwins "The Constitution and what it means to day", the author sets out when property can be deemed to be taken. At page 174 he says,

"Property is 'taken', generally speaking, only when title to it is transferred to the Government or the Government takes over or assumes to control its valuable uses, or when, in the case of land, it commits a deliberate and protracted trespass, as by the repeated and persistent discharge of heavy guns across the grounds of a summer resort, with the natural result of frightening off the public; or the frequent flight at low altitudes of Army and Navy planes over a commercial chicken farm, with the natural result of destroying the value of the property for that use".

Willis in his Constitutional law after referring to the divergence of opinion as to what will amount to a taking of private property for a public use says that a newer view point on the subject is not to take a too narrow and mechanical view as to what amounts to "taking". "Ownership relates to rights, powers, privileges, and immunities concerning either land or chattels". Whenever any of these incidents of ownership are taken or destroyed, there would be taking of property according to the broader view point. The broader rule is thus stated,

"there is a taking whenever any incident of property whether a right, power, privilege, or immunity of ownership, is taken from the owner."

(10) Learned counsel relied upon the observations made in the 'Sholapur Mills case', 'Charanjitlal v. Union of India', 1951 S C J 29 that acquisition of property need not mean necessarily an acquisition of the totality of interests of the owner in that property. Mukherjee J. though he discussed the question, did not think it necessary to decide whether the word "property" as used in Art. 31(2) of the Constitution (corresponding to S. 299(2) of the Government of India Act, 1935) connotes the entire property; that is to say, the totality of the rights which the ownership of the object connotes. But His Lordship was evidently not inclined to accept the broad contention of the learned Attorney General that so long as the owner is not deprived of all the rights in and to the property, and some rights, however insignificant they might be still remain in the owner, there cannot be any dispossession as contemplated by that article. The test would be as to "whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right". Das J. was more pronounced in his opinion. He said,

"In my judgment the question whether the Ordinance or the Act has deprived the share-holder of his 'property' must depend, for its answer, on whether it has taken away the substantial bulk of the rights constituting his 'property'. In other

words, if the rights taken away by the Ordinance or the Act are such as would render the rights left untouched illusory and practically valueless, then there can be no question that in effect and substance the 'property' of the shareholder has been taken away by the Ordinance of the Act."

But their Lordships referred to a well known passage from the judgment of Rich J. in the 'Minister of State for the Army v. Dalziel', (1944) 68 C L R 261, which runs thus,

"Property, in relation to lands, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating".

(11) The judgment of the High Court of Australia in 'McClintock v. The Commonwealth', 75 C L R 1 was also relied by the learned counsel for the petitioners. In that case growers of pineapples were directed by orders made under the National Security (General Regulations) to deliver a prescribed per centage of their pineapples to a specified representative committee as agent for a department of the Commonwealth. Payment for pineapples so delivered was to be made at rates fixed from time to time by another committee. This provision was impugned on the ground that there was acquisition. of property without providing just terms for such acquisition. The action was dismissed by the Supreme Court of Queensland on the ground that although the order was invalid because they did not provide just terms, the plaintiff had delivered his pineapples voluntarily and therefore was not entitled either to compensation or damages. We are not concerned with the decision in this case which has no direct bearing on the questions which fall to be decided in this, but Mr. Umamaheswaram relied on the following passage in the judgment of Starke J.:

"The effect of Order No. 1 and the direction given under it is to require the grower to pick and deliver his pineapples as directed and fixes the price which is to be paid therefor. It certainly regulates the distribution and sale of the pineapples and controls the prices at which they may be sold. In operation it compels a grower to deliver his pineapples to canners at a fixed price. Such a transaction is a forced sale and results in the acquisition of property by some manner. And, therefore, the legislation, regulation and order must be founded on the constitutional power to make laws with respect to the acquisition of property."

(12) In my opinion much assistance cannot be derived from the American cases cited to us and similar cases not cited. The Fifth Amendment to the American Constitution declared inter alia that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without just compensation. Due process of law as a matter of substance has not been understood and interpreted as forbidding all social control. It protects personal liberty including property rights against social control, unless such social control is in the constitutional exercise of either the police power or the power of taxation or the power of eminent domain. Police power is the power vested in the legislature of the State to make reasonable laws for the good and welfare of the people and designed to promote public convenience and general prosperity as well as to make regulations designed to promote public health, public policy and public safety and to preserve public order. Taxation is the legal capacity of a Government to impose charges upon persons or their property to raise revenue for governmental purposes. Under the due process clause, personal liberty is protected against taxation only when such taxation is unreasonable (in the eyes of the Supreme Court). As a general rule, taxation is reasonable when it is for a public purposes. Eminent domain is the legal capacity of a sovereign or a governmental agent to take private property for public use upon the payment of just compensation. Like police power and taxation, eminent domain is "the offspring of political necessity". There are times when it is difficult to draw a clear line of distinction between the exercise of police power and the exercise of the power of eminent domain, though the distinction becomes very important on account of the fact that in the case of the former no compensation is required; whereas in the latter case, compensation is required.

(13) The express limitation contained in the Fifth amendment prohibits the "taking" of private property for a public use without just compensation. Property would obviously comprise not only land and buildings but also rights in and to property just as water rights, easements etc. As the passage cited earlier from Willis indicates, even in America there has been a divergence of opinion as to the interpretation of the word "taking". Of course where physical property is taken or there is a physical occupation of property, there can be no doubt, though all the incidents of ownership are not taken. It has been held that there is a "taking" where some incident of ownership is taken, but there are also many instances of taking to be found in American reports when there is no direct appropriation. In many cases a very extended meaning is given to the word "taking". To give an example the installation by railway of a fanning system in a tunnel which causes the emission of gas and smoke to the injury of the owners located near by the railway has been held to amount to taking. 'Pennsylvania Coal v. Mehon', 260 U S 393: 67 Law Ed 322 above referred and cited by the petitioners is a similar example, while the case in 'United States v. Causby', 328 U S 256: 90 Law Ed 1206 is an extreme instance of the application of the broad rule as to when taking occurs within the meaning of the Fifth Amendment.

(14) In my opinion, I do not think we shall be justified in importing all these rules into a discussion as to the interpretation of the word "acquisition" in S. 299 of the Government of India Act, 1935. In my opinion, though every instance of acquisition of property would be an instance of taking of property, the converse is not true. Every instance of taking as understood by later American decisions would not amount to acquisition within the meaning of that term in S. 299. Even giving the word "property" or "land" the widest connotation, I think there should be an element of transference before it can be said that there is an acquisition of any interest in land or in property. Even in America, the earlier view was narrow and a strict conception of "taking" was adopted and it was held that it required a physical invasion of the property affected by the appropriation, an actual seizure of the premises or a permanent ouster of the owner or such an interference with the rights of an owner as to deprive him of control of his property. But later authority abandoned this strict construction. Nichols in his "The Law of Eminent Domain" (1950 Edition) sums up the later view thus:

"The modern and prevailing view is that any substantial interference with private property which

destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed."

Thus it has been held that a legal restriction upon the use of the land will constitute a taking although the title is unaffected and the land is physically untouched, and likewise when the owner's enjoyment of the land is physically interfered with, although his legal rights remain unimpaired. Nichols says the same thing in another place in the following term:

"It is well settled that a taking of property within the meaning of the Constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation."

I am clearly of opinion that this extended connotation of the word "taking" cannot be given to the term "acquisition" in S. 299. "Acquisition" is the nominative of the verb "acquire" which means "gain by oneself and for oneself". When one speaks of acquiring the property of another, there are two ideas, namely, the idea of one gaining something which the other is deprived of. There is a divesting and a vesting of property or any interest in property, whether tangible or intangible.

(15) The Australian cases do not in any way help the petitioners to compel us to adopt the American view. The relevant provision in the Australian Constitution, namely, S. 51, placitum 31 contains the expression "acquisition of property". The decision in the 'Minister of State for the Army v. Dalziel', (1944) 68 C L R 261 is quite consistent with my construction of the word "acquisition". In that case Dalziel was a weekly tenant of certain vacant land upon which he carried on the business of a parking station for motor cars. The Minister for the Army purporting to act under Regn. 54 of the National Security (General) Regulations took possession of this land for defence purposes. The taking of possession was for an indefinite period and it was exclusive. In these circumstances it was held that there was an acquisition of property. Rich J. in the leading judgment of the Court observed:

"The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property.....Not only is a right to possession a right of property, but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights."

The view which I have been adumberating, namely, that the word "acquisition" in S. 299 of the Government of India Act imports the idea of transference of rights in property receives support from the following observations of Spens C. J. in 'Kunwar Lal Singh v. C. P. & Berar', (1944) 1 Mad L J 510 at p. 515 F C:

"It further seems to us that the word 'acquisition' implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to."

In that case there was an increase of assessment of land revenue and it was held that such increase would not involve the acquisition of any right in or over immovable property, though the position of the landholder would certainly be made worse by the increase of the revenue payable by him, because by a mere increase of the revenue there was no interference by the Government of any land or rights in or over immovable property which remained in the same possession and ownership as immediately before the increase of the assessment. A case very much in point is that relating to the constitutional validity of the United Provinces Tenancy Act (XVII of 1939), 'Jagannath Baksh Singh v. United Provinces', (1943) 2 Mad L J 114. That Act inter alia cut down the absolute rights claimed by the Talukdars to be comprised in the grant of their estates as evidenced by sanads issued to them. It was contended that the case fell within S. 299(2) of the Government of India Act, 1935, and a Provincial Legislature had no power to pass a law authorising the compulsory acquisition for public purposes of any land unless the law provided for the payment of compensation for the property acquired. The contention was rejected by the Federal Court. Gwyer C. J. said (at page 118):

"The answer to this is that a law which regulates the relations of landlord and tenant and thereby diminishes the rights which the landlord has hitherto exercised in connexion with his land does not authorise the compulsory acquisition of the land for public or any other purposes; and therefore the question of compensation does not arise."

The case went up to the Privy Council, 'Jagannath Baksh Singh v. United Provinces', (1946) 2 Mad L J 29 (PC) and the view of the Federal Court was approved. Speaking of the general scope of the Act Lord Wright said:

"It regulates and secures the rights of the tenants in various respects on lines sufficiently familiar in modern agricultural legislation. It is not contended that in doing so, it impunges on the powers which, but for such a measure, the taluqdars might have exercised within their estates".

The contention based on S. 299 was disposed of thus:

"The appellant relies on certain express provisions of the Government of India Act. Thus he relies on S. 299 of the Act which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land."

(16) In 'Kameshwar Singh v. State of Bihar', 20 Pat 790, a Full Bench of the Patna High Court had recently occasion to examine the validity of a Bihar Act very similar in scope to the Act now under consideration, namely, the Bihar State Management of Estates and Tenures Act, 1949. It is not necessary to set out the several provisions of that Act. It suffices to state that by that Act the management of certain estates were vested in a manager who was to be an officer, not below the rank of a Deputy Collector. The consequences of placing an estate under the management of the

Government were, among others, (a) the proprietor shall cease to have any power of management, (b) the manager shall take charge of the estates together with buildings, papers and other properties appertaining to the estates, (c) the proprietor shall be incompetent to mortgage or lease the estates or tenures or any portion thereof, (d) all rents and profits arising from the estate including arrears of rents and profits shall be payable to the manager. After making certain disbursements the manager is directed to pay to the proprietor the surplus, if any, remaining out of the moneys collected by him at the end of each financial year. Of the several questions raised in that case one was whether the Act contravened S. 299 (2) of the Government of India Act, 1935, because there was an acquisition of property without payment of compensation. Two of the three learned Judges who constituted the Special Bench took the view that the provisions of the Act did not involve an acquisition of land and therefore no question of compensation arose. Shearer J. found himself unable to accept the argument of Mr. P. R. Das that by the taking over of the management of the estate there was an acquisition. He points out that the proprietor is the main owner of the estate and is alone to be competent to sell or make a gift of it and he is to continue to derive a considerable, although, perhaps, a much reduced, income from it. Sinha J. dealing with this contention said:

> "As already pointed out, the impugned Act is a mixture of restraints on the power of alienation of land by a proprietor or a tenure holder, a suspension of his rights of management without acquisition of any rights by the Government to be exercised for the benefit of the public or for the benefit of any particular section of the public."

According to him the pith and substance of the Act was to deprive proprietors of their valuable right to manage their property, but it was not acquisition of any rights in property by the Government (see pages 891 and 892).

(17) Now let us look at the Act now impugned. It provides (a) for the reduction of rents and (b) for the collection of the reduced rents by the Government. I have no hesitation in holding that by reducing the rent payable by a tenant to a landlord, there cannot be an acquisition by the Government of any right or property of the landlord. Undoubtedly, a reduction of rent would adversely affect the landlord. It would deprive him of a part of the benefit which he had been deriving from his property. But that element alone would not render the legislation confiscatory or expropriatary. There is no transference of any right of the landlord to the Government. There is no vesting in the Government of any right of the landlord. The provision merely regulates the relationship between the landlord and the tenant. The landlord is entitled to collect from his tenant only the lawful rent and the Act determines what that lawful rent is. I think that this part of the petitioners' contention is concluded by the decision of the Federal Court in 'Jagannath Baksh Singh v. United Provinces', (1943) 2 Mad L J 114 affirmed on appeal by the Privy Council in 'Jagannath Baksh Singh v. The United Provinces', (1946) 2 Mad L J 29 P.C.

(18) Does then the provision relating to the collection of rents by the Government amount to an acquisition? Obviously one of the rights of a landlord in respect of the land which he owns is the right to collect and appropriate the rents and profits from it. If this right is taken over by the Government it may be said that the Government has acquired that interest, but have the Government done so. I think not. All that S. 3(4) of the Act provides is that after a particular date the collection of the rents shall be by the Provincial Government. This collection must be deemed to be made only on behalf of the land-holder, because the Government does not have any beneficial interest in the amount collected, except of course, to pay themselves the cost of the collection. The balance of the rents is payable to the land-holder. The Government is, as it were, a statutory agent of the land-holder for collection. When the land-holder appoints an agent to collect the rent from the tenants of his estate, there is no transference of any property right from the land-holder to the agent. There is no divesting of any right of the land-holder and no corresponding vesting of the same in the agent. In the same way I think that there is no vesting of any property right in Government simply because under the provisions of the Act, the Government alone can recover the rents due to the land-holder.

(19) For these reasons I hold that the Act does not in any particular involve an acquisition of land (including by that term any interest in land) and the Act therefore does not contravene the provisions of S. 299(2) of the Government of India Act, 1935.

(20) The next contention on behalf of the petitioners related to the competence of the Provincial Legislature to pass the impugned enactment. The only entries which could possibly cover the subject-matter of the Act are entries Nos. 9 and 21 of List II, Provincial Legislative List of Sch. VII of the Government of India Act, 1935. Item 9 is "Compulsory acquisition of land". As I have held that the Act does not involve any acquisition, it follows that entry No. 9 can have no application. That leaves us with entry No. 21 which runs as follows:

> "Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

It was not disputed that so far as the provisions relating to reduction of rent are concerned, they would fall within entry No. 21. Regulation of rent payable by the tenant to the landlord would certainly come within the expression "the relation of landlord and tenant." There was an attempt made by one of the counsel who appeared for some of the petitioners to contend that the relationship between the landholder and the ryot in an estate is not that of landlord and tenant and he called in aid the observations made in several of the early cases in Madras, namely, 'Venkata Mahalakshmamma v. Ramajogi, 16 Mad 271, 'Venkatanarasimha Naidu v. D. Kotayya', 20 Mad 299, and 'Lakshminarayana Pantulu v. Venkatarayanam', 21 Mad 116 (F B), that the land-holder and the ryot own two distinct interests in land, the melwaram and the Kudiwaram, and in one sense, even the tenant is a proprietor. In 'Lakshminarayana v. Venkatarayanam', 21 Mad 116 the ryot is referred to as a "peasant proprietor". Whatever may be the legal conception in this matter and there has not been uniformity as to this, I think the words "landlord and tenant" in entry No. 21 are used in their widest sense and so long as the ryot is under an obligation to pay rent either in cash or in kind to the landholder and so long as the estate stands registered in the name of the landholder, it is not inappropriate to describe their relationship as that between landlord and tenant.

(21) It was, however, pressed strongly upon us that the provisions relating to the Government

taking over the collection of the rents would not fall within the scope of entry No. 21. Reliance was placed on the judgment of the Full Bench of the Patna High Court in 'Kameshwar Singh v. State of Bihar', 29 Pat 790 FB. It was there held that entry No. 21 would not cover the provisions of the Bihar State Management of Estates and Tenures Act which deprived proprietors and tenure-holders of their rights to manage their property. After referring to a ruling of Judicial Committee in 'Meghraj v. Allah Rakhia', 74 Ind App 12 in which their Lordships pointed out that the words "that is to say" following the opening word "land" in entry No. 21 are not words of limitation but of explanation or illustration of the wide meaning which the Legislature intended to give to the word "land" the learned Judges held that the subject-matter of the impugned Act, namely, the taking over and managing the estates by Government officers is not to be found in any of the items of the Legislative Lists. The reasoning of Shearer, J., is as follows:

"It seems to me impossible to say that the subject-matter of the enactment is 'the relation of landlord and tenant', still less, that it is 'rights in or over land.' When the attention of the learned Government Pleader was drawn to the latter words in item No. 21, Mr. Lalnarayan Sinha said that the right of the plaintiff to manage his property, to collect rent from his raiyats and to make a valid mortgage or lease were taken away by the impugned Act. These, however, are not, strictly speaking, rights in property, but are powers incident to ownership .....There can, I think, be no doubt whatever that the draftsman used the words "rights in land' as connoting an interest or estate in land, and not a mere power incident to the right of ownership, and used the words "rights over land" as connoting an easement, such as right of way or some other incorporeal right."

(22) Sinha, J., said (at page 846):

"The provisions of Item 21 of List II do not include the power to take over management of property of such persons as do not come within any of the disabilities imposed by the Court of Wards Act or the Chota Nagpur Encumbered Estates Act, as indicated above."

Das, J., took a slightly different view. He thought that Item 21 of List II is limited by Item 2 of that list and Items 4, 8, 9 and 10 of List III would cover some of the provisions of the impugned Act. Sinha, J., was prepared to hold that Item 21 may cover some of the provisions of the Bihar Act in so far, for instance, as it dealt with collection of rents. But according to him, Item 21 would not cover deprivation of the proprietors' right to manage their property, irrespective of whether they were disqualified persons.

(23) The decision of Bhagwati, J., in 'Tan Bug Taim v. Collector of Bombay', AIR (33) 1946 Bom 216, was also relied on by the petitioners' Counsel. The learned Judge held that the requisition of immovable property under Section 2 (2) (xxiv) of the Defence of India Act read with Rule 75-A of the Defence of India Rules would not be covered by Entry No. 21. He considered that the rights which were created in the Government by the requisition of land did not create in the Government any interest in the land. They only created rights to temporary use and possession of land akin to the rights of a licensee. The learned Judge therefore concluded as follows:

"These rights of temporary use and possession which are created in the Government are not, in my opinion, ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the expression 'rights in or over land' and which are by reason of the amplification of the general topic or category of legislation 'land' mentioned in Item 21 deemed to be comprised within that topic or category of legislation 'land' as already indicated above. I have, therefore, come to the conclusion that the requisition of immovable property which is the subject-matter of these proceedings is not included in Item 21 in List II of the seventh schedule to the Government of India Act."

I do not think that either of these two rulings has any application to the case before us. S. 3 (4) of the Act in question only provides for one method of the collection of the rents due from the tenant to the landholder. Except collecting rents the Government do not, unlike in the Bihar Act, take over possession or management of the estate. A provision making the provisions of Revenue Recovery Act applicable to the collection and recovery of rents in an estate would obviously fall within the scope of Entry No. 21. Such a provision would be covered by the expression "the collection of rents." The fact that this method of collection is made the only method would not take away the subject-matter from the purview of that entry. If the Act had said that immediately there is an arrear of rent, the landholder shall notify the fact to a prescribed Revenue Officer, who shall thereupon proceed to recover the rent as if it was an arrear of land revenue, I do not think it can be contended with any justification that the provision would not be covered by the expression "the collection of rents." Section 3 (4) of the Act is substantially such a provision. I do not see why the expression "the collection of rents" should be confined to the collection of rents by the landlord alone. It can as well cover collection by agents on behalf of the landlord, and the Government under Section 3 (4) of the Act is no more than a statutory agent. In my opinion, the impugned Act even in so far as it provides for the compulsory collection of rents by the Government is covered by Entry No. 21 of the Provincial List and therefore the Provincial Legislature was competent to enact it.

(24) In this view it is not necessary to deal at any length with the contention of Mr. Kesava Aiyangar that in case it be held that the provisions relating to the collection of rents are declared invalid, the entire Act should be declared invalid because these provisions cannot be severed from the provisions relating to the reduction of rent. He contended that the reduction of rents and the collection of such reduced rents by the Government were parts of the same scheme and based upon the same policy of the Government of converting the zamindari and Inam tenure into ryotwari tenure and therefore if one integral part of the scheme failed, the entire thing must fail. The law relating to severability is discussed in the judgment of the Privy Council in 'Attorney-General for Alberta v. Attorney-General for Canada', (1947) A C 503. When a part of an enactment is declared invalid, the real question is in the words of Viscount Simon in that case:

"Whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all."

In 'Attorney-General for Saskatchewan v. Attorney-General for Canada', 1949 A C 110, the test laid down in 'Attorney-General for Alberta v. Attorney-

General for Canada', 1947 A C 503, was applied. Applying this test, I do not find any difficulty in holding that even if the provisions relating to the collection of rent by the Government are declared invalid for any reason, the remaining provisions relating to the reduction of rent can stand by themselves.

(25) The impugned Act must therefore be held to have been validly passed. The question then arises whether on the coming into force of the Constitution, the Act in its entirety or any part of it has become void under Art. 13 (1) of the Constitution as being inconsistent with the provisions of Part III thereof. Mr. Umamaheswaram for some of the petitioners first contended that the provisions of the Act both in respect of the reduction of rents and the taking over by the Government of the collection of rents were inconsistent with Art. 19 (1) (f) of the Constitution which declared the right of every citizen "to acquire, hold and dispose of property." As the exercise of this right is subject to the provision in Art. 19 (5), he also contended that the restrictions imposed on the landholders by the Act are not reasonable and not in the interests of the general public. Admittedly, nothing in the Act to any extent takes away or abridges the rights conferred by Art. 19 (1) (f) to acquire and dispose of property. It therefore remains to be considered whether the Act or any part of it affects materially the right of the petitioners to "hold" the property. I think the proper meaning to be attached to the word "hold" there is to "enjoy." Enjoyment of property consists in actual occupation and possession of it and will also comprise the perception of the rents and profits from it. Now in the case of these landholders in respect of ryoti land which is the only kind of land directly sought to be affected, the only way in which they can be said to hold the property is by appropriating the rents payable to them thereon. It may therefore be contended that inasmuch as the Act reduces substantially the rents and also takes away from the landholders the right to collect the rents, the Act does diminish their rights. But that is only a superficial aspect of the scope of the Act. The landholder will be entitled only to collect such rent as is lawful and in the exercise of the admitted right conferred on the Provincial Legislature to regulate the relation between landlord and tenant, an enactment could declare what that lawful rent is or provide for its determination. It is not as if there is an invoidable and absolute right in the land-holder to collect any particular rent. It may be a matter of contract or of usage, but the legislature could always provide for the ascertainment of a fair and proper rent, notwithstanding any contract or usage. What the Act purports to do is to reduce the rents payable by ryots in estates governed by the Madras Estates Land Act approximately to the level of the assessment levied on lands in ryotwari areas in the neighbourhood. Of course the legislature presumes that the ryotwari assessment is fair and reasonable and evidently for the reason that ryotwari lands are held directly under the State. If, therefore, rents substantially higher than the corresponding ryotwari assessments are being collected, it may be said that the landholder is collecting rents which are neither fair nor reasonable. If the object of the legislation is to prevent the landholder making an excessive use of his right, it would be open to the legislature to make such use unlawful. It is on this principle that forced exactions ostensibly based on contract and usage have been abolished in recent tenancy legislation.

(26) Though at first sight the argument that depriving the landholder of his right to collect the rents would amount to an interference with his right to hold the property looks plausible, yet on a close examination, it appears to me that there is really no abridgement of any property right by reason of the Government taking over exclusively the collection of rents. In the 'Sholapur Mills case, 1951 S C J 29, his Lordship Mukherjee, J., pointed out the difference between rights which would be comprised in the term "property" and privileges which are appurtenant to or flow from the ownership of property but by themselves and taken independently could not be reckoned as "property" capable of being acquired, held or disposed of as is contemplated by Art. 19 (1) (f) of the Constitution. In that case before the Supreme Court, the petitioner undoubtedly was precluded from exercising his right of voting at the election of directors, from getting a resolution passed by the shareholders without the sanction of the Central Government and from instituting any winding up proceedings in a Court of law; but these disabilities were not restrictions on the rights of the shareholders. Das, J., described these disabilities as curtailment of incidental privileges not amounting to deprivation of any property.

(27) The decision of the Special Bench in 'Kameshwar Singh v. State of Bihar', 29 Pat 790, was relied on by Mr. Umamaheswaram. I do not think that the Bihar Act and the Act now impugned are in 'pari materia.' It is impossible to say what the learned Judges would have held if the provisions of the Bihar Act had been exactly similar to the provisions of our Act. I shall only cite one passage from the judgment of Shearer, J., by way of illustration. The learned Judge said:

> "If the object of the impugned Act had merely been to confer power on the executive to take over the management of estates and tenures in order to prevent waste or the disappearance of village papers or the like during some comparatively short interval, which was expected to elapse before the estates or tenures could be acquired permanently by the State, the Act might, possibly, have been supported."

Now, Section 3 (4) of our Act expressly refers to the contemplated taking over of the estates finally by the Provincial Government.

(28) Even assuming that the provisions of the impugned Act do restrict the exercise of the petitioners' enjoyment of their property, I am prepared to hold that they can well be supported as reasonable restraints imposed in the interests of a large section of the public and therefore saved by Art. 19 (5) of the Constitution. In this State, agricultural tenants form a very large part of its people and any legislation undertaken with the object of ameliorating their condition must be held to be in the interests of the general public. Prima facie reduction of the prevailing rents to ryotwari level cannot be said to be unreasonable. Whether in a particular case the actual reduction effected is so drastic and there are other circumstances which lead to the inference that the landholder is practically deprived of all enjoyment of his property, then it may be in that case there has been an unreasonable restriction; but the Act as such cannot be declared to be void as necessarily being inconsistent with the provision of Art. 19 (1) (f), read with Art. 19 (5).

(29) Mr. Umamaheswaram referred us to observations in the judgments of the Supreme Court of India dealing with the test to find out what restrictions can be deemed to be reasonable. In 'Chintamanrao v. The State of Madhya Pradesh', 1950 S C J 571, his Lordship Mahajan J., delivering the judgment of the Court said:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment

of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public."

His Lordship the Chief Justice of India in 'Dr. N. B. Khare v. State of Delhi', 1950 S C J 328 said:

"In my opinion, Clause (5) must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause ..... The law providing reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law."

It was asked how the collection of rents by the Government is in the interests of the general public. It was evidently considered to be because the legislature apprehended that in spite of the reduction of rents by the State, the landholders might continue to collect at higher rates using their influence and power. While the application of the Revenue Recovery procedure would result in prompt and satisfactory collection beneficial to the landholder, the collection by a disinterested agency as the Revenue department of Government would avoid the danger of exaction. Applying these tests, I do not find anything unreasonable in the substantive or procedure provisions of the impugned Act.

(30) It was then contended that the provisions of the Act are inconsistent also with Art. 31 (2) of the Constitution. But as this is substantially similar to Section 299 (2) of the Government of India Act, 1935, no further argument was addressed by counsel for the petitioners. But I would like to deal briefly with an argument put forward by the learned Advocate-General, though it is not necessary to pronounce finally on it. He argued that Art. 31 (1) which provides that no person shall be deprived of his property save by authority of law implies that any person may be deprived of his property by the authority of law. "Law" meant "enacted law." Therefore, if the deprivation of property by any law did not amount to taking possession or acquisition covered by Art. 31 (2), then such law would be valid under Art. 31 (1) and Art. 19 (1) (f) would not have any operation in such a case. It is only so long as a person has any property that the right declared by Art. 19 (1) (f) could be exercised. If the person has been deprived of the property lawfully, it cannot be said that there has been an infringement of the exercise of any of his rights under Art. 19 (1) (f). There is one passage in 'Charanjitlal v. The Union of India', 1951 S C J 29 at p. 57 in the judgment of Das, J., which might lend support to this contention. His Lordship referring to what he had said in 'A. K. Gopalan v. State of Madras', 1950 S C J 174 observed:

"the right to property guaranteed by Art. 19 (1) (f), would likewise continue until the owner was, under Art. 31, deprived of such property by authority of law."

I am afraid that the argument when logically pushed to the extreme would be subversive of all private right of property. If any law which deprived a person of property would be quite valid even without payment of compensation so long as such deprivation did not amount to taking possession or acquisition falling under Art. 31 (2) and nothing in Art. 19 (1) (f) or Art. 19 (5) would apply to such an enactment, then there is nothing to restrain the State from depriving persons of property at their will and pleasure. Everything then would depend on the reasonableness of the legislature and the position would be equated to that which obtains in England. I do not think it necessary, having regard to my findings on the other questions to decide finally on the tenability of this contention.

(31) Mr. Kesava Aiyangar learned Counsel for some of the petitioners also addressed us an argument founded on Art. 14 of the Constitution. He contended that there was discrimination between landholder and tenant, because though the tenant was to get the benefit of a reduction, when the rent being paid by him exceeded the ryotwari rate, the landholder was not entitled to have an enhancement of rent in cases where the rents payable were less than the ryotwari rates. He drew our attention to explanation I to Section 2 of the Act which has already been extracted. Though at first sight it might appear to be making a discrimination, it is really not, when the scope and intendment of the Act are taken into account. The preamble to the Act says that rents now payable by ryots in estates are in many cases substantially higher than the assessments levied on lands in ryotwari areas in the neighbourhood and it is expedient to provide for the reduction of such rents approximately to the level of the ryotwari assessment. Any provision for enhancement of rent would be completely out of place in an enactment like this. There is nothing in the Act which makes a distinction between one landholder and another or one tenant and another. The Act is only an illustration of the constitutional practice of classification which is reasonable and permissible. The Act is not void on the ground that it contravenes Art. 14.

(32) The contention of Mr. Vedantachariar, another counsel for the petitioner, deserves separate consideration. His contention was first pitched at a higher key. He attempted to demonstrate that the inevitable result of the scheme of the Act with reference to reduction of rent was a total deprivation of the benefits of enjoyment of the property by the landholder. He wanted the Court to take into account the peshkash which had been fixed at a very high figure in most cases, the cesses and other outgoings payable by the landholder, the expenditure on irrigation works which are statutorily incumbent on him. In addition to these financial obligations he laid stress on the fact that the basis of ryotwari assessment differed radically from the basis of the rent in estates. The ryotwari rent would necessarily be much lower than the rents in estates. While on one hand the commitments and obligations of the landholder remain constant, his income is so much reduced that nothing or very little would be left as surplus. He submitted that if 16 annas in the rupee belonging to the landholder is taken away from him by the Act, then it would amount to an unreasonable restriction and contravened Art. 19 (1) (f) read with Art. 19 (5). It will also contravene Art. 31 (2) as it would virtually amount to an acquisition of property without compensation. He relied upon the decisions of the American Supreme Court which recognised the right of Judicial review of the actual application of a statutory provision or order to concrete cases to give relief if the guarantee of equal protection of the laws or the due process clause had to be given effect to. In 'Reagan v. Farmers Loan and Trust Co.', (1894) 154 U S 361: 38 Law Ed. 1014, it was held that the fixing and

enforcement by a rail road commission of unjust and unreasonable rates for transportation by rail road companies is an unconstitutional denial of the equal protection of the laws. The legislature of the State of Texas passed an Act to establish a rail road commission with power and authority vested in them to adopt all necessary rates charges and regulations to govern and regulate rail road freight and passenger tariffs etc. The rail road commission proceeded to establish certain rates for the transportation of goods over the rail roads in the State. The International and Great Northern Railway Company and the debenture trustees under a trust deed executed by the said railway company challenged the validity of the tariff fixed by the commission on the ground that the rates were unreasonable and unjust and worked a destruction of the company's rights of property. Mr. Justice Brewer delivering the opinion of the Court observed:

"The Courts are not authorised to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

In that case facts were disclosed regarding the indebtedness of the company, its capital, its earnings in previous years, its operating expenses exclusive of taxes etc., and it was shown that the actual reduction by virtue of the new tariff in the receipts made it impossible to work the company at a profit. Though an absolute rule could not be laid down in every case that a failure to bring some profit to those who have invested their money in the company is conclusive that the tariff is unjust and unreasonable, yet justice demanded that everyone should receive some compensation for the use of his money or property if it be possible without prejudice to the rights of others. The Court therefore issued an injunction restraining the railroad commission from enforcing the rates already established.

(33) In 'Convington and L. Turnpike Road Co. v. Sandford', (1896) 164 U S 578:41 Law Ed. 560, there is a full discussion of the principles which should apply to a judicial review of statutes and administrative orders reducing the income of persons including corporations. It was decided by the Supreme Court of the United States in that case that a statute reducing the tolls that may be charged by a turn pike company and requiring it to conform to a tariff of rates that is unjust and unreasonable, which prevents it "out of its receipts, from keeping its road in proper condition for public use or from earning any dividends is unconstitutional as a deprivation of property without due process of law" and was a denial of the equal protection of the laws. While one limit of the rule is that merely because a company is not allowed to charge as high rates as they have been accustomed to charge or as high rates as are charged by other companies differently located, it cannot be said that equal protection of the laws has been denied; the other limit of the rule is that the company can demand the right to receive such compensation as will be just both to itself and to the public under all the circumstances of the case. Mr. Justice Harlan who delivered the opinion of the Court cited the following passage from 'St. Louis and S F R Co. v. Gill', (1895) 156 U S 649:39 Law Ed. 567:

"there is a remedy in the Courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying on business, and that especially may the Courts of United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and, as depriving them of the equal protection of the laws."

As Chief Justice Waite said in 'Stone v. Farmers' Loan & T Co., 116 U S 307, the power to regulate is not a power to destroy, and "limitation is not the equivalent of confiscation."

(34) The same principle we find applied in 'Chicago M & St. P. R. Co. v. State of Minnesota', (1890) 134 U S 418:33 Law Ed. 970 and 'Smith v. Ames', (1898), 169 U S 466:42 Law Ed. 819.

(35) I see no reason why this salutory principle enunciated in several American decisions should not be applied in this country, in construing Arts. 14, 19 and 31 of the Constitution. Even applying this principle, I am, however, not persuaded by Mr. Vedantachariar to hold that the provisions of the Act as such inevitably transgress the limits allowed to the legislature by conflicting with the provisions of Part III of the Constitution. The impugned Act governs several zamindaries differently situated and held under different engagement with the Government. The sources of income of one zamindari are not necessarily the same as those of the other zamindaris. Besides Zamindaries major Inams are also covered by the Act. Different considerations would arise in the case of these inams many of which are either revenue free or are subject only to a nominal quit rent or jodi. Mere hypothetical calculations of the kind which Mr. Vedantachariar wanted to make cannot form the basis of a generalisation covering all the estates to which the Act applies. As the learned Advocate-General rightly pointed out, the income from the ryoti lands is not the only source of income for the landholder. Home farm lands, minerals, forest produce are some of other sources of income. These sources vary largely with each estate. I am therefore not prepared to hold that the Act itself is void, on the ground it virtually deprives the landholder of all beneficial enjoyment of his property.

(36) As pointed out in 'Covington and L. Turnpike Road Co. v. Sandford', (1896) 164 U S 578:41 Law Ed. 560, each case must depend upon its special facts:

"and when a Court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs."

We have only to substitute the word "rents" for "rates" and "landholders" for "corporation con-

trolling a public highway" in the above passage, when it can appropriately be applied to the cases before us. The decision of the question would ultimately depend upon the circumstances of each estate. Rents which may be reasonable and just with respect to one estate may be unreasonable and unjust with respect to another. It is necessary therefore before any landholder can be given relief on the principle above mentioned, that he should allege and prove facts which conclusively show that as a result of the reduced rates of rent fixed under the Act, he has been totally or substantially deprived of the net income available to him. Each case must be properly presented in the pleadings and there must be opportunity to the Government to traverse the allegations in such cases. In the absence of a detailed statement of the relevant facts, an application founded on mere general allegations must be dismissed.

(37) It is contended on behalf of the petitioners that the impugned Act was really in the nature of a colourable device to achieve something which the legislature could not achieve directly, namely, to acquire the entire interest of the landholder but without paying compensation. The decision of the Judicial Committee of the Privy Council in 'Attorney-General of Alberta v. Attorney-General for Canada', 1939 A C 117 was relied on in support of this contention. The rule is thus stated by Lord Maugham, L.C.

> "It is not competent either for the Dominion or a Province under the guise, or pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other."

Having regard to the view which I have already expressed that there is no acquisition by the State of landholder's interest I must reject this contention. The Government under the provisions of the impugned Act do not obtain any benefit by the reduction of rents. Even in cases in which the net balance of the landholder's income is nil or negligible, the State itself does not gain thereby. In such circumstances, it cannot be said that there has been an acquisition by the Government. So, it cannot be said that the legislature has adopted a device to escape from the provisions of Art. 31 (2) by calling the same Act by a different name. As I have already held that the reduction of rents and the taking over of the collection of the rents by the Government do not amount to taking up possession or acquisition of the landholder's property the Act would not fall within the scope of Art. 31 (2) in any instance. There is therefore no attempt by the legislature in trying to do indirectly what it cannot do directly.

(38) In the result I hold that the impugned Act, Madras Act XXX of 1937 did not become void after the coming into force of the Constitution. It equally follows that the amending Act, Act VII of 1951 is also not void.

(39) VENKATARAMA AYYAR, J.: These petitions raise the question of the validity of the Madras Estates Land (Reduction of Rent) Act, Act XXX of 1947 which came into force on 6-1-1948. In furtherance of a comprehensive scheme of land reform the Government of Madras introduced three bills of an allied character on 13-9-1947. The first of them called the Madras Estates Communal, Forest and Private Land (Prohibition of Alienation) Act, 1947 became law as Act XIV (14) of 1947, on 25-10-1947. This Act prohibited the landholders from alienating communal forest and private lands. The second bill, No. 24 of 1947, the Madras Estates Land (Reduction of Rent) Bill became law as Act XXX of 1947 and this is the legislation which is now impugned as 'ultra vires' and void. By this Act the rates of rent payable by the ryots in estates became reduced to those prevailing on ryotwari areas, and there are also provisions providing for collection of rent through Government Agency. Lastly there was a Bill, No. XXXVII of 1947, called the Madras Estates (Repeal of Permanent Settlement and Conversion into Ryotwari) Act of 1947 which became law on 19-4-1948, as the Madras Estates Abolition and Conversion into Ryotwari Act, XXVI of 1948. Under this Act all the notified estates were to vest in the Government and the ryoti lands were to be held by the ryots and private lands by the landholder as under ryotwari settlement. In their Original Draft both Bill No. 24 of 1947 and Bill No. 37 of 1947 were intended to comprehend all the estates which came within the definition in Section 3 (2) of the Madras Estates Land Act, 1908. But actually while Bill No. 24 of 1947 included as passed, all the estates falling within Section 3 (2) of the Madras Estates Land Act, Bill No. 37 of 1947 underwent a change in its passage through the Legislature. The estates which became such by virtue of the Amendment Act of 1936 were excluded from the operation of Act No. 26 of 1948. When Act No. 30 of 1947 was passed the intention was that all the estates covered by that legislation should be taken over by the Government (Vide Section 3, Clause 4), but as Act 26 of 1948 was not co-extensive in its operation with Act 30 of 1947 and as there were estates which would come under Act 30 of 1947 but could not be taken under Act 26 of 1948 a further amendment was made to Act 30 of 1947 by Act 7 of 1951 in which 'inter alia' the following explanation was added to Section 3 (4).

> 'Explanation': "The provisions of this sub-section shall apply to an estate, whether the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 applies or not."

There are other provisions in this Act to which I shall advert in due course but suffice it to note at this stage that the declared object of all these Acts is to effect agrarian reforms of a far-reaching character on the basis of two principles, namely that there should be no intermediary tenure-holder between the state and the tillers of the soil and that there should be uniformity in the extent of the obligations of the ryots all over the state.

(40) Now the grounds on which the validity of Act 30 of 1947 is assailed fall under two groups. Firstly, it is contended that the Act was void when it was passed as being repugnant to the provisions of the Government of India Act, 1935 which was the Constitution Act in force at the time of enactment. Secondly, it is argued that even if Act 30 of 1947 was valid when it was passed it became void under Article 13 of the Constitution as being inconsistent with the fundamental rights guaranteed under Part III of the Constitution. The objections that have been put forward under the first group are that under the Act the owners of the properties are deprived of substantial rights, and that as there is no provision for compensation it is opposed to Section 299 (2) of the Government of India Act and is therefore void. Another contention put forward under this heading is that the subject-matter of the legislation is not covered by any of the entries in list 2 to schedule 7 of the Government of India Act and therefore the Act is not within the legislative competence of the Madras Legislature. The objections falling under the second group are that the provisions of Act No. 30 of 1947 infringe the fundamental rights guaranteed under Art. 31, Article 19 and Article 14 of the Constitution and therefore the Act has become void under Article 13. Those are the contentions common to all the petitions. There are

besides some special contentions raised in some of the cases. It will be convenient to deal in the first instance with the common contentions. For determining whether the impugned legislation is open to the objections advanced by the petitioners it is necessary to examine the provisions of the Act with a view to ascertain its true character and operation. The Act is described as one to provide for the reduction of rents in estates governed by the Madras Estates Land Act, 1908 approximately to the level of the ryotwari assessment levied on land in ryotwari areas in the neighbourhood."

The preamble to the Act runs as follows:

> "Whereas the rents now payable by ryots in estates governed by the Madras Estates Land Act, 1908, are in many cases substantially higher than the assessments levied on lands in ryotwari areas in the neighbourhood; and whereas it is expedient to provide for the reduction of such rents approximately to the level of the ryotwari assessments in the neighbourhood."

Under S. 1 the Act is made applicable to all estates as defined in the Madras Estates Land Act, 1908. Section 2 (1) provides that the Government may appoint a "Special Officer for any estate or estates for the purpose of recommending fair and equitable rates of rent for the ryoti lands in such estate or estates." Then follow provisions which prescribe how the rate is to be fixed. Explanation (1) enacts that the special officer shall have power only to determine that the rents payable for any class of ryoti land shall be reduced and not enhanced. Under Section 3, Clauses 1 to 3 it is provided that the Provincial Government should after considering the recommendations of the special officer and the remarks of the Board of Revenue fix the rates of rent payable in respect of each class of ryoti lands in the estate. Then follows Sub-clause 4 which has been one of the main targets of attack in these proceedings. It provides:

> "that the rent shall be recovered by the Provincial Government as if such rents were arrears of land revenue due to them and the amount so recovered in respect of each fasli after deducting therefrom the cost of such recovery as determined in accordance with such rules as may be made by the Provincial Government in that behalf and also the peshkush, cesses and other moneys due from the landholder to the Provincial Government and constituting a charge on the estate shall be paid to the land-holder."

The above are the provisions in Act 30 of 1947 that are material for the purpose of these applications. The amendments introduced by Act 7 of 1951 may now be noticed. The preamble to the main Act has been enlarged by the addition of words "and for the collection of such rents exclusively by the State Government". The addition of explanation to Section 3 (4) has already been mentioned. One of the provisions newly incorporated by the Amendment Act is Section 3, Subclause (7) which is in these terms:

> "The landholder shall not be entitled to collect and the provisions of Chapters V and VI of the Madras Estates Land Act, 1908 shall cease to apply to any rents or interest recoverable by the State Government under Sub-section (4)."

There are other amendments but they are not material for the purpose of this case.

(41) From the above analysis it will be seen that the provisions of Act 30 of 1947 fall into two distinct categories; (1) Sections 2, 3, Sub-clauses 1 to 3 Sections 4 and 5 relate solely to reduction and fixation of rent payable by the ryots in an estate, (2) Section 3 (4) of the main Act and Sub-sections 5 to 7 of the Amending Act 7 of 1951 confer on the Provincial Government power to collect the rents due to the landholder as fixed under the Act and to pay him the net balance. The former category is tenancy legislation pure and simple while the latter is constitution of the Government as a statutory agency for collection of rents on behalf of the landholder. The question is whether either or both of them is void under the Government of India Act of 1935. Now the argument on behalf of the petitioners is that under both these categories valuable rights of the petitioners have been taken away; that it amounts to acquisition of property within the meaning of Section 299 (2) and as there is no compensation provided it is expropriatory and bad under that section. As the considerations applicable to the two categories differ I shall deal with them separately.

(42) Taking first, the sections relating to reduction of rent the contention as developed by counsel on behalf of the several petitioners is this: The landholder has a right to recover rent from the tenant at a particular rate; the effect of reducing the rent is to transfer to the tenant the landholder's right to the rent to that extent and that this is acquisition of right over immovable property as defined by Section 299, Clause (5). When rent payable by a tenant is reduced, the obligation is 'eo extanti' extinguished; it is thereafter not alive in any form and it is incapable of being transferred or acquired. The case is analogous to partial discharge of an obligation by a debtor in which case it will not be contended, I presume, that the debtor is an assignee of his own debt. It is unnecessary to discuss this matter at any great length because it is concluded by authority. In 'Jaganatha Baksh Singh v. United Provinces', 1943-2 Mad L J 114, the Federal Court had to consider the effect of tenancy legislation in the United Provinces. Under Act 17 of 1939 the quantum of rent recoverable by taluqdars, who held estates under Sanads corresponding to those of zamindars in the Madras Presidency was reduced. It was contended that the Act was opposed to Section 299 (2) of the Government of India Act, 1935, as the effect of reduction of rent amounted in taking property without compensation. This contention was rejected and the Court observed as follows:

> "First it is said that the provisions of the Act which are complained about in this case fall within Section 299 (2) of the Constitution Act. It provides that the provincial legislature has no power to pass a law authorizing compulsory acquisition for a public purpose of any land unless the law provides for payment of compensation for the property acquired. The answer to this is that the law which regulates the relations of the landlord and tenant and thereby diminishes the rights which the landlord has hitherto exercised in connection with his land does not authorize compulsory acquisition of the land for public or any other purpose; and therefore the question of compensation does not arise."

This decision was taken on appeal to the Privy Council and was confirmed by the Judicial Committee. Vide 'Jagannath Baksh Singh v. United Provinces', 1946-2 Mad LJ 29 (PC). Dealing with the contention that the reduction of rent was repugnant to Section 299 of the Act Lord Wright observes as follows:

> "The appellant relies on certain express provisions of the Government of India Act. Thus he relies on Section 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a provincial legislature shall have power to make any law authorising the compulsory acquisition of land for pub-

lic purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land."

In 'Lal Singh v. C. P. & Berar', 1944-1 Mad L J 510, the Federal Court had to deal with a case in which there was enhancement of the land revenue payable by the zamindars. It was contended that the increase of assessment amounted to acquisition of property, within the meaning of Section 299 (2). In repelling this contention Spens, C. J., delivering the judgment of the Court observes:

"In our judgment this view is misconceived. His rights over his land or his rights in or over his immovable property remain exactly the same, and only his liability for payment of takoli is increased. It is, we think, impossible to hold that the mere increase of an assessment for land revenue involves any acquisition of the land or any rights in or over immovable property. It further seems to us that the word "acquisition" implies that there must be an actual transference and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It is impossible in our view to suggest that when the land revenue is increased, there is any transference to the provincial government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of assessment. In our judgment the attempt to bring the case within Section 299-2 must fail."

In view of these authorities I am clearly of opinion that the mere reduction of rent is not acquisition of property within the meaning of Section 299 (2) of the Government of India Act.

(43) I shall now take up the second category of Sections in Act 30 of 1947 and Act No. 7 of 1951 and consider how far they are opposed to Section 299 (2) of the Government of India Act. For this purpose it is necessary first to examine what rights the landlord possessed before the impugned legislation came into force and how far these rights have been affected or modified thereby. It is essential to bear in mind that the rights and obligations of the landholders and tenants in estates as regulated by the Madras Estates Land Act are in many respects different from those of the landlords and tenants under the general law. The ryots have occupancy rights in their holding. So long as they pay rent they cannot be ejected. In other words the estate holders have no right to physical possession of the lands but only to rent accruing thereon. They have a charge on the holding for the rent due and they have also a right of distraint. These are not rights possessed by the landlords under the general law. For recovery of rent, proceeding had to be taken not in the ordinary civil Courts but in revenue Courts specially constituted under the Act. These are some of the special incidents attaching to the relationship of the landlord and the ryots in an estate under the Estates Land Act. Now under Section 3 (4) the rent is to be collected not by the landlord but by the Government and it is to be recovered as arrears of land revenue. The provisions of the Estates Land Act which provide for proceedings being taken by the landlord in revenue Courts for recovery of rent are repealed. The most important provision, however, is that the Government is to pay over to the landlord all the rent realised deducting the amounts payable as mentioned in Section 3 (4). The result of this legislation may thus be summed up: The landlord continues to be the owner of the estate as before his title being left untouched. As for possession it was the tenant who was entitled to it, the right of the landlord being only to recover rent and that right again is left unaffected by the legislation. The only change that has been effected is that the collection of rent is to be made not by the landlord but by the Government. The question is does this amount to acquisition within the meaning of Section 299 (2) of the Government of India Act?

(44) Mr. K. Umamaheshwaran the learned Counsel for some of the landholders argues that it does. He contends that that section is of sufficient reach to take in all cases in which properties suffer diminution in value as a result of legislation, that the right to recover rent is of the substance of the right of landlords and that when the Government takes it over there is acquisition within the meaning of Section 299 (2) and he cited a number of authorities in support of this position.

(45) With reference to the American authorities it must be remembered that they are decisions given under a different statute and under conditions vastly different from ours. The 5th amendment which was construed as a limitation on the powers of the Congress provided that no person shall be "deprived of the liberty or property without due process of law nor shall private property be taken over for public use without just compensation." The 14th amendment which operates as a limitation on the powers of the States provides "Nor shall any state deprive any person of life, liberty or property without due process of law." The power to take private property for a public purpose is stated to be an attribute of the sovereignty of the State and it is termed "Eminent Domain" in American jurisprudence. The statute requires that when property is taken under "Eminent Domain" there should be just compensation to the owner. There is another power also inherent in the States as an attribute of its sovereign character; that is the power to regulate the use of private property in such a manner as to advance the welfare of the public. That is called the police power and the law is that when the owner of property suffers loss or damage in relation to property by reason of the exercise of the police regulation it is 'damnum absque injuria' and no compensation can be recovered therefor. In such cases the attempt of the owner is to establish that the police regulations are in excess of what is required in the interests of the public welfare, that it is unreasonable and arbitrary and that it should not be upheld as a valid exercise of the police power, in which case it will be invalid. Thus the American decisions are based on a construction of the 5th and 14th amendments and on a consideration of the requirements of the due process clause and the reasonableness of the police power regulations. Great caution must be exercised in applying these decisions for determining the rights of the parties under Section 299 (2) of the Government of India Act and Article 31 (2) of the Constitution. Both these provisions speak of acquisition of property; whereas the 5th amendment refers to taking of property. Are the two expressions of the same import? While it has been held that acquisition of property in Section 299 (2) implies that there must be actual transference Vide 'Lal Singh v. Central Provinces and Berar', 1944-1 Mad L J 510, the expression taking of property has been construed as of much wider significance. Willis in his treatise on Constitutional Law states that at one time a narrow view was taken of the meaning of the word "taking" limiting it to physical possession and then refers to cases which have taken

a broader view, Vide pages 821 to 823 and the law is stated by him in these terms:

"The true effect of the Constitutional amendments referred to was only to require the Courts to do what they should have done without such amendments to wit; to hold that there is a taking whenever there is any injury to property other than by the police power or taxation which would be actionable if done by a private individual, that is, a tort; in other words, that there is a taking whenever any incident of property, whether a right, power, privilege, or immunity of ownership, is taken from the owner."

Another learned writer Nichols has the following on the meaning of the word taking:

"It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally diverting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation."

It is not necessary, in order to render a statute obnoxious to the restraint of the constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. Property in land is "taken" whenever any one of the qualified privileges of which it is imposed is taken. Vide Nichols on Law of Eminent Domain (1950 Edn.) Vol. 12 pp. 236-237. See also Corwin on Constitution and What It Means Today, p. 179.

(46) Thus under the American law taking includes not merely the transfer of title and taking physical possession but any act which interferes with the use and enjoyment of any right over property. The cases cited by Mr. Umamaheswaran, the learned advocate for the petitioners are instances of the extended meaning put upon the word "taking". Thus in 'Pensylvania Coal Co. v. Mahon', 260 US 393: 67 Law Ed 322, a state law which prohibited the owners from carrying on mining operations under certain circumstances was held to amount to taking property without compensation and therefore bad. Mr. Justice Holmes put the matter thus:

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

This reasoning will clearly be inadmissible in construing S. 299(2) or Art. 31(2) because a mere prohibition cannot be acquisition under these provisions. In 'United States v. Causby', 328 US 256: 90 Law Ed 1206, there was a chicken farm adjacent to an airport and the complaint of the owner was that the flight of the planes at low altitudes at all hours of the day and night and the frequent noise and glare of lights seriously interfered with the enjoyment of the property as chicken farm and diminished its value and that the acts amounted to taking of property without compensation. This contention was upheld. Mr. Justice Douglas observed:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe 'Cajus est colum ejus est usoue ad colum'. But that doctrine has no place in the modern world. The air is a public highway as Congress has declared

But that general principle does not control the present case. For the United States conceded an oral argument that if the flights over respondents' property rendered it uninhabitable there would be a taking compensable under the fifth Amendment."

On the same principle it was held in 'Portsmouth Harbour Land and Hotel v. United States', 260 US 326: 67 Law Ed 287, that the continuous firing and discharging of guns across a land which was used as a summer resort and which had the effect of frightening off the visitors would constitute taking of that land, if it was of an abiding character. These and similar decisions proceed on a principle of law which is different from that embodied in S. 299(2) and Art. 31(2) and cannot be relied on as furnishing a safe guide for interpreting them. It is essential under the Indian Law that there should be a transfer before these sections could be invoked. A case nearer home is the one reported in 'Minister of State for the Army v. Dalziel', (1944-68 C L R 261). That was a decision under placitum 31 to S. 51 of the Constitution Act of Australia which is in these terms: "The Parliament shall subject to this constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws".

(47) The question arose with reference to a vacant site belonging to the Bank of New South Wales of which the claimant was in possession as lessee. In 1942 the Government required it for the purpose of war and acting under certain regulations entered into possession of the same. Some compensation was awarded but the claimant contended that he was entitled to compensation on just terms treating the action of the Government as acquisition under S. 51 Placitum 31. The argument for the Government was that the acquisition under Placitum 31 could only mean an acquisition of the entire bundle of rights as owner or as tenant, that the tenancy of the respondent, claimant, was not acquired and the mere taking of possession was not acquisition. Latham C. J. was of the opinion that there was a distinction between acquisition of property and taking possession thereof and that on the facts there was no acquisition but only taking of possession as licensee. The following passages from his judgment may be quoted:

"But possession and ownership of land, though closely connected, are not identical. And accordingly in my opinion the facts that the right to possession is the most valuable attribute of ownership, that possession is prima facie evidence of ownership, and that possession may develop into ownership, do not justify any identification of possession with ownership but on the contrary, emphasize the distinction between the two ideas. The fact that the Commonwealth is in possession of land as a result of action under the Regulation does not show that the Commonwealth has become the owner of the land or of any estate in the land".

But the majority of the Court held that when a substantial portion of a right is taken away it must be treated as an acquisition notwithstanding that certain unessential elements of the right remains unaffected. Thus though the tenancy of Dalziel was not acquired as such, when possession of the property was taken away from him for an idefinite period there was nothing more left to him of his rights as a tenant excepting the "husk of tenancy" which the Court held amounted to an acquisition. The following oft-quoted passage from the judgment of Rich J. brings out the reasoning behind this decision:

"Property in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short the whole bundle owned by the person whom it was expropriating. 'Possession vaut titre' in more sense than one. Not only is a right to possession a right of property but where the object of proprietary right is a tangible thing it is the most characteristic and essential of those rights."

It will be noticed that this judgment does not dissent from the clear opinion of Latham C. J. that acquisition is different from taking of possession; it only decides that in determining whether there has been acquisition of property or not one must have regard to the substance of the matter and not its mere form. That is how this decision has been understood in 'Charanjit Lal v. Union of India,' 1951-14 S C J 29 at pp. 50 and 59, by Mukherjee, J. at page 50 and by Das J. at page 59.

(48) A question may be raised as to whether taking of possession apart from the acquisition of ownership is within S. 299(2) of the Government of India Act. Article 31, Cl. 2 of the Constitution mentions both acquisition and taking of possession suggesting thereby that the two are distinct and that acquisition does not comprehend taking of possession. In 'Charanjit Lal v. Union of India', 1951-14 S C J 29 already cited the following observations occur in the judgment of Mukherjea J.

"Article 31(2) of the Constitution itself makes a clear distinction between acquisition of property and taking possession of it for a public purpose, though it places both of them on the same footing in the sense that a legislation authorising either of these acts must make provision for payment of compensation to the displaced or expropriated holder of the property."

I have already referred to the observations of Latham C. J. in the 'Minister of State for the Army v. Dalziel', 1944-68 C L R 261 where ownership and possession are treated as different. As S. 299(2) of the Government of India Act refers only to acquisition but not to taking of possession it may be a debateable question as to whether mere taking of possession would be within that section. In 'Tan Bug Taim v. Collector of Bombay', AIR (33) 1946 Bom 216 Bhagavathi J. held that a requisition of immovable property could not be held to be acquisition within the meaning of Section 299(2) even with the aid of the definition in Section 299 (5). The effect of this decision was nullified by an ordinance and now under the Constitution requisition has been expressly included along with acquisition in Entry No. 36 in list No. II and in Entry No. 42 in List No. 3. It is however unnecessary to discuss this question further because even if it is to be assumed that S. 299(2) would cover cases of possession there has been no such taking of possession in this case. The petitioners had only a right to receive rent and that is wholly left in tact and has not been taken away. The decision in 'The Minister of State for the Army v. Dalziel', 1944-68 C L R 261 therefore does not help the petitioners.

(49) I shall now deal with the Indian authorities cited on behalf of the petitioners. In the case in 'Charanjit Lal Chowdhury v. Union of India', 1961-14 S C J 29 the facts were that under a special ordinance the Government superseded the existing directorate of the Sholapur Spinning and Weaving company and appointed a fresh set of directors with authority to take over the property, the effects and actionable claims of the company and to manage the same. Certain rights of the share-holders such as moving for winding up or appointment of receiver were suspended. An individual share-holder challenged the validity of this ordinance by a writ under Art. 32 of the Constitution. It was held that none of the fundamental rights of the share-holders were violated by the ordinance and that therefore the application by him was not maintainable. One of the points raised was whether the provisions of the ordinance were repugnant to Art. 31(2). In discussing this question a distinction was made between the rights of the company as a juristic person and the individual rights of a share-holder. Mukherjea J. with whom Kania C. J. and Fazl Ali J. agreed observed that an acquisition under Art. 31(2) must be of the right in its entirety.

"It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former."

and again concludes:

"In the context in which the word "Acquisition" appears in Art. 31(2) it can only mean and refer to acquisition of the entire interest of the previous holder by transfer of title and I have no hesitation in holding that there is no such acquisition either as regards the property of the company or of the share-holders in the present case."

This is clear authority against the petitioners' contention that taking over of the right to collect rent under S. 3(4) could be regarded as an acquisition under S. 299 (2). Then taking up the question of possession Mukherjee J. held that there was no dispossession so far as individual share-holders were concerned because their right to dividend and their right to dispose of the property were not affected by the legislation; that they were a substantial portion of their rights as share-holders and that even applying the test enunciated by Rich J. in 'The Minister of State for the Army v. Dalziel', 1944-68 C L R 261, there was no such dispossession as would in substance amount to acquisition. The question was raised as to whether the provisions relating to management by the new directors could not amount to dispossession of the company as a juristic person. It was contended by the learned Attorney General that the dispossession was not of the entire rights of the company and that, therefore, the case did not fall under Art. 31 (2) of the Constitution. As to this the learned Judge observed.

"It is difficult in my opinion to accept the contention formulated in such broad terms."

and he adds:

"It is not, however, necessary for my purpose to pursue the matter any further, as in my opinion there has been no dispossession of the rights of a share-holder in the present case."

Das J. also held that the restrictions imposed upon the rights of the share-holders did not take away their right to receive dividends or to dispose of the shares and as these rights were substantial Art. 31(2) did not apply. He also held that the curtailment of a right to elect directors, pass resolutions and present winding up petitions are really in the nature of privileges incidental to the ownership of the shares and not property within the meaning of that Article. Then dealing with the question whether the company was dispossess-

ed the learned Judge refers to the argument of the learned Attorney-General that the possession by the new directors may be construed as possession by the company and observed that that could not be the position as the directors were not under the control and direction of the company and accordingly there was great force in the contention that the company had been dispossessed. That, however, was held to give no right to the individual share-holder to apply under Art. 32. These observations do not help the petitioners because the position of the land-holders in these petitions is analogous to that of the share-holders, their right to receive rent and dispose of the property being unaffected by the legislation.

(50) Another decision relied on before us is the case in 'Kameshwar Singh v. State of Bihar', 29 Pat 790. I shall have to revert to this decision in dealing with another point. On the application of S. 299(2) this case does not support the petitioners. Shearer J. in dealing with this question says:

"There has been much controversy at the Bar as to whether or not, what is proposed to be done under the impugned Act amounts to the acquisition of the plaintiff's property. Mr. Das strongly relied on 'Minister of State for the Army v. Dalziel', 1944-68 CLR 261, and adopting the words of Rich J. contended that, once the management of his client's estate had been taken over, nothing would be left to him but "the empty husk of ownership" I find myself quite unable to accept this view. The plaintiff is to remain the owner of his estate and is alone to be competent to sell or make a gift of it, and he is to continue to derive a considerable, although perhaps a much reduced, income from it."

These words aptly describe the position of the present petitioners. Sinha, J., also takes the same view. He observes:

"As already pointed out, the impugned Act is a mixture of restraints on the power of alienation of land by a proprietor or a tenure-holder, a suspension of his rights of management without acquisition of any rights by the Government to be exercised for the benefit of the public or for the benefit of any particular section of the public."

and he held that the legislation did not amount to acquisition within Section 299 (2). Das, J., however was of a different opinion: vide the discussion at pages 888 to 892.

(51) In discussing the applicability of Section 299 (2) to this category of sections it has to be borne in mind that that section applies only to a acquisition of land which as defined in Section 299 (5) includes also rights over land. But what is the right to land which Section 3 (4) of XXX of 1947 takes away? The right to rent may be correctly described as a benefit to arise out of the ownership of the land but that as we have seen is not touched by Section 5 (4). Is the right to collect rent apart from the right to the rent itself an interest in immovable property? Clearly not. It is a mere power which the owner possesses as an incident to his ownership. It is only this power that has been transferred to the Government and not the interest in the land in respect of which this power is to be exercised. The argument for the petitioners fails to take into account the fundamental distinction which in law exists between an estate and a power. A right to collect rent even putting it as high as a right to manage the properties is nothing more than a power. The creation of a power does not in any way vest the property in the donee.' (Halsbury's Laws of England, Vol. 25 para 934) and Section 299 (2) is limited to acquisition of land or interests in land and not to grants of powers.

(52) Again when Section 299 (2) refers to acquisition of property and payment of compensation therefor, it obviously refers only to property for which there is a value. What is the value to be put on a right to recover rent apart from the rent itself?

(53) Under Section 3 (4) the Government undertakes a duty of collection and deducting the collection charges and dues it has to pay over the balance to the owner. Is this a right or an obligation? It appears to me to be clear beyond doubt that the right of management can in no sense be regarded as property within the meaning of Section 299 (2). To sum up:

(1) For Section 299 (2) to apply there must be a transfer of land or interest in land;

(2) mere reduction of rent or enchancement of assessment is not acquisition even though the value of the property might suffer diminution;

(3) an acquisition contemplated by Section 299 (2) is of the entire bundle of rights of the expropriated owner but if all, the substantial elements of rights have been taken away it can be treated as an acquisition notwithstanding that some unessential ingredients of the rights are left unaffected and

(4) a legislation which merely takes away the right of management without interfering with the title of the owner or his right to income from the property is not within Section 299 (2).

I am accordingly of opinion that Act 30 of 1947 is not bad as infringing the requirements of Section 299 (2) of the Government of India Act.

(54) I shall now deal with the contention that Act XXX of 1947 was beyond the competence of the provincial legislature as the subject-matter could not be brought under any of the entries either in the provincial or concurrent list in Schedule 7 of the Government of India Act. The learned Advocate-General conceded that this legislation does not fall under Entry No. 9 of the Provincial list, which is 'compulsory acquisition of land'; if it did, it will of course be hit by Section 299 (2) but he contends that it falls under Entry No. 21 of List No. 2 which is as follows:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonisation; Courts of Wards, encumbered and attached estates, treasure trove."

His argument is that the legislation is one in respect of collection of rent and that it is within the competence of the provincial legislature. That this is legislation relating to collection of rents cannot be disputed. The rent has to be paid by the tenant to the Provincial Government. In default it could be recovered as arrears of land revenue and the chapters of Estates Land Act relating to recovery of rent through revenue Courts are repealed by Act 7 of 1951. Thus these sections enact special provisions for collection of rent and they constitute the Government as statutory agents for the landlords and provide appropriate provisions for realising of the rents. It should also be remembered that from 1865 there have been special laws relating to collection of rents in estates; that under these laws proceedings are to be taken before a deputy collector and there are special rules enacted for the conduct of these proceedings. Section 3 (4) is one more step in the same direction and that instead of the landlord applying to the deputy collector to take action the provincial Government is itself to take action and in the place of the cumbersome machinery of suit and execution proceedings for the recovery of rent there

is substituted a procedure for realising rent as if it were arrears of land revenue. I am unable to see anything in Section 3 (4) which is outside the scope of Entry No. 21, nor is there anything in the language of Entry No. 21 to exclude Act 30 of 1947 from its purview.

(55) In the 'United Provinces v. Atiqa Begum', 1941-1 Mad L J 65 Sup, a question arose as to the validity of the United Provinces Regularization of Remission Act, 14 of 1938. Certain remissions of rent had been made by the Collector under the provisions of certain regulations and these were legalised by the Act 14 of 1938. In 'Atiqa Begum v. Abdul Maghni Khan', ILR (1940) All 455, a Full Bench of the Allahabad High Court had held that the impugned Act was 'ultra vires' as being opposed to Section 292 of the Government of India Act. Iqbal Ahmed, J., had further held that the legislation was not within the ambit of Entry No. 21 of List No. 2 and was therefore beyond the competence of the legislature. He observed:

> "By the authority given to it to make laws about the 'collection of rents' the Provincial Legislature is in my judgment authorised to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected, to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which the rent is to be collected to to legislate about kindred matters.
>
> The impugned Act, however, is not with respect to any such matter. It is therefore outside the scope of Entry 21 of the Provincial List."

In commenting upon the correctness of these observations Gwyer, C. J., stated:

> "I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive..... * * *
> The general descriptive words in Item No. 21 include "the collection of rents" and if a Provincial Legislature can legislate with respect to the collection of rents it must also have power to legislate with respect to any limitation on the power of the landlord to collect rents that is to say, with respect to the remissions of rents as well as to their collections." * * *
> I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in Item No. 21."

He also observes:

> "I think, however, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

Varadachariar, J., expressed himself in similar terms, vide P. 110. 'Uday Chand v. Samrendranath', AIR (34) 1947 FC 19, is another decision of the Federal Court in which the validity of a legislation was considered with reference to Entry No. 21, Section 168 (A) of the Bengal Tenancy Act prohibited the landlord from realising the rents due from a tenant from any property excepting the holding in respect of which it was due. It was held that this was "clearly a piece of legislation in respect of the right of landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant" and that it was 'intra vires' under Entry No. 21. These authorities show that the subject "collection of rent" is of wide import. This is in accordance with the view which is well settled that the words "with respect to any matter enumerated in the list" occurring in S. 100 of the Government of India Act should receive a liberal construction and that they should not be interpreted narrowly so as to invalidate legislation. Moreover there being a presumption in favour of the validity of an Act, it is a well settled rule of construction that when Courts are called upon to pronounce upon the validity of an Act they would be justified in putting as wide a construction on the words of the statute as possible for the purpose of giving effect to it. The following observation of the Federal Court in 'Re. In the matter of the powers of the Federal Legislature to provide for the levy of an estate duty', AIR (31) 1944 FC 73, in the judgment of Spens, C. J., and Varadachariar, J., is relevant:

> "When a Court is called upon to pronounce an actual legislation 'ultra vires' the view point of ascertaining the probable intention of Parliament becomes slightly different because though the intention of the Constitution Act is even then the test, the presumption in favour of validity — weak as it may sometimes be — inclines the Court to put as wide a construction as possible on the words used in the enactment."

I am accordingly of opinion that the language of Entry No. 21 should be construed as sufficiently wide to comprehend Act No. 30 of 1947.

(56) It is urged for the petitioners that under the Act the Government has in effect taken over the management of the estates and that is not a subject within the competence of the provincial legislature. The decision in 'Kameshwar Singh v. State of Bihar', 29 Pat 790, was strongly relied in support of this contention. There the question related to the validity of Bihar State Management of Estates and Tenures Act (Bihar Act XI of 1949) and it was held that that legislation was not covered by any of the entries in the Provincial list and that, therefore it was unconstitutional. An examination of the provisions of that Act shows that in its scope and operation it is altogether different from the Madras Act. It is unnecessary to set out in any detail the provisions of that Act because they have been exhaustively analysed in the judgments of the three learned Judges who pronounced that Act to be invalid. Some broad features wherein that Act differs from the Madras Act No. 30 of 1947 may be noted. That Act purports to "Provide for the State management of estates" and not merely 'for the collection of rents" as does the Madras Act. Under that Act the management is to be by an officer to be appointed by the Government whereas in the Madras Act the Provincial Government itself is constituted the collecting agency. The manager under the Bihar Act is empowered to take charge of the estates and such buildings and papers and other properties as are essential for the management and he has the power to cancel lease and mortgages, to ascertain amounts dut to creditors and frame scheme for the liquidation of the debts of the proprietor and the period of management is to last for twenty years. The substance of the Act was stated by Shearer, J., in the following terms:

> "The conclusion is, to my mind, irresistible and is that the impugned Act is to be used as a device for making the estate of the plaintiff and the estates of other substantial zamindars the 'vile corpus' of a vast and hazardous experiment. If it is found that the estates can be successfully managed and made a source of revenue to the Provincial Government, other estates will gradually be taken charge of. If on the other hand, the experiment proves a dismal failure, the estates will be restored to their owners, and the latter will be left to do what they can to rehabilitate themselves. Was the Provincial Legislature competent to enact such a law."

The learned Judge held that it was not. It will be seen that in the Madras Act the proprietors are

not dispossessed of any properties of which they had possession prior to the Act. No building and no papers are taken possession of and no management of their estates is generally undertaken. The Act does what it purports to do and only provides for recovery of rent due from the ryots. The decision in 'Kameshwar Singh v. State of Bihar', 29 Pat 790, is inapplicable to Act 30 of 1947.

(57) It is noteworthy that while the petitioners contend that this legislation does not fall under Entry No. 21 they do not suggest that it falls under any entry in List No. 1 so as to bar the jurisdiction of the provincial legislature. If their argument is to be accepted then the position would be that the subject does not fall within the scope of any of the entries enumerated in the three lists and that, therefore, it should form part of the residuary power in respect of which there could be legislation only in the manner provided in Section 104 of the Government of India Act.

(58) In 'Manikkasundara Bhattar v. R. S. Nayudu', 1946 F L J 57, a similar contention was put forward with reference to Entry No. 34, List No. 11 which was in these terms:

"Charities and charitable institutions; charitable and religious endowments."

The argument was that religious institutions were not within this entry and that there being no other entry relating to that subject it fell within Section 104 and that the legislation by the provincial legislature was incompetent. Rejecting this argument the Federal Court observed as follows:

"We should moreover in any event prefer a construction which would enable legislation on a subject of such vital importance in India to be enacted by some legislative body rather than leave it to be delt with under Section 104 * * *. But when there is a choice between two possible constructions of an entry or entries one of which will result in legislative power being conferred by some entry or entries in the lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to Section 104 the first construction should on principles analogous to those applied to the Canadian Constitution be preferred."

These observations furnish a strong ground for construing Entry No. 21, as wide enough to cover Act 30 of 1947.

(59) Mr. Vedantachariar appearing for the zamindar landholders sought to argue that the true relationship between a zamindar and a ryot was not that of a landlord and a tenant and he referred to passages from the fifth report and the observations in 'Venkatanarasimha Naidu v. Kotayya', 20 Mad 299, and 'Vellanki Venkatarama Rau v. Papanna Rao', 21 Mad 299 at p. 301 and 'Venkatamahalakshmamma v. Ramajogi', 16 Mad 271 at p. 274. It is true as already pointed out that the rights of the zamindar differ in material particulars from those of the landlords under the general law but those differences do not affect the relationship of the zamindar and the ryots in law which is that of a landlord and a tenant; nor do they alter the character of the payments made by the ryot to the zamindar whether in kind or money which is rent. The legislation on this subject has proceeded for nearly a century on the basis that they stand in the relation of a landlord and tenant and it is too late in the day to dispute that position. If the argument of Mr. Vedantachariar is to be accepted then the zamindar and the ryot will have to be regarded as being in the position of joint proprietors of the estate and the impugned legislation will then fall directly under the category of land under Entry No. 21. The following observations of the Privy Council in 'Meghraj v. Allah Rakhia', 1947-2 Mad L J 1 at p. 4, may in that context be quoted:

"The key to Item 21 is to be found in the opening word "land". That word is sufficient in itself to include every form of land, whether agricultural or not. Land is indeed primarily a matter of provincial concern.....

The land in each province may have its special characteristics in view of which it is necessary to legislate and there are local customs and traditions in regard to land-holding and particular problems of provincial or local concern which require provincial consideration. * * *.

It would be strange if the land in a province were to be broken into separate portions some within and some outside the legislative powers of the province. Such a conflict of jurisdiction is not to be expected. Item No. 21 is part of a Constitution and would on ordinary principles receive the widest construction, unless for some reason it is cut down either by the terms of Item No. 21 itself or by other parts of the Constitution which has to be read as a whole."

(60) Nor am I impressed by the contention that this is a colourable legislation. When the legislature intends to legislate on a subject which is ouside its competence and it seeks to usurp that jurisdiction by disguising itself as a legislation on subjects which are ostensibly within its jurisdiction then it can be characterised a colourable legislation and that, of course, will be invalid; but both the subjects covered by the Madras Act No. 30 of 1947 are within its competence and apart from those two subjects the Act does not in form or in substance legislate on any topic which is beyond its competence. There is no basis for the contention that the Government derives indirectly any benefit under this legislation. This contention must also be overruled. The result then is that the Act No. 30 of 1947 is within the ambit of Entry No. 21 of the provincial list and that it is a valid piece of legislation.

(61) In this view it becomes unnecessary to discuss whether the entire legislation should be regarded as bad in case Section 3 (4) and the connected sections are held to be beyond the competence of the legislature. It would be relevant for this purpose to note that the two categories of sections in the statute relating to reduction of rent and realisation of rent are distinct and severable, that the Bill in its original form related only to reduction of rent and Section 3 (4) came to be added only during the passage of the Bill in the Legislature. The two classes of sections are not so interwoven as to be inextricable. Reliance was placed on behalf of the petitioners on the following observations of Viscount Simon occurring in Attorney-General for Alberta v. Attorney-General for Canada', 1947 A C 503:

"This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is 'intra vires' "either in whole or in part", but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is 'ultra vires' at all."

Applying the above principles I should be prepared to hold that even if Section 3 (4) is 'ultra vires' of

the legislature the other portions of the statute relating to reduction of rent would be valid. I am accordingly of opinion that Act 30 of 1947 is not opposed to Section 299 (2) of the Government of India Act, 1935, nor is it 'ultra vires' of the powers of the Provincial Legislature and that it was therefore a valid piece of legislation when it was passed.

(62) Now I shall consider the second group of objection whether Act 30 of 1947 became void under Article 13 of the Constitution as being inconsistent with the fundamental rights declared in Article 31 (2), Article 19 and Article 14. The objections put forward on the basis of Article 31 (2) are identical with those urged in connection with Section 299 (2) of the Government of India Act, 1935 and for the reasons already given they must be overruled.

(63) It has been strongly pressed upon us that the provisions of Act 30 of 1947 are opposed to Article 19 (1) (f), as imposing restrictions on the rights of an owner to "hold" property and that they could not be upheld as either reasonable or made in the interests of the public. Here again it is necessary to consider separately the provisions relating to reduction of rent and those relating to realization of rent. It was argued by Mr. Kesava Iyengar who appeared for some of the petitioners that the Act avowedly reduced rents to a substantial extent and that it is, therefore, an invasion of the right of the owner to hold property which means, of course, his right to enjoy the income from the property. Indeed he argued that the reduction of rent payable to a landlord to any extent will be hit by Article 19 (1) (f). But the relationship of the land-holder and the ryot in an estate has peculiar incidents attaching to it, many of them having their roots in custom. The rights of a landlord in an estate are often variable and not seldom undefined. This is particularly so with reference to quantum of rent payable by ryots. Tenancy legislation has generally been directed to the ascertainment of these rights and it may be doubted whether Article 19 (1) (f) can in strictness be applied to such a legislation. The true scope of Article 19 (1) (f) is not to determine what rights a citizen possesses but only to confer on him a power to enjoy those rights to which he may be found to be entitled and the tenancy legislation which has for its object the determination of those rights cannot be said to be inconsistent with Article 19 (1) (f). It is true that there has been substantial reduction of rent and it is possible to contend that this is much more than ascertainment of rights and in reality an expropriation thereof but then the claim of the ryots is that they are liable to pay only what the tenants in the ryotwari areas pay and that the excess which they have been paying is illegal exaction by the landholder and if the legislature takes the view that that is the correct position, then the reduction of rent in estates to ryotwari levels will not deprive the landlord of what is justly due to him but would only limit his rights to what he is lawfully entitled. It is difficult to say that Section 19 (1) (f) stands in the way of such a legislation. In any event I am prepared to hold that the Act is saved by Article 19 (5) as a reasonable limitation on the rights of the proprietor made in the interests of the public. The occasion for the legislation was that a large population of tenantry in the estates was groaning under a heavy rate of rent and the Act was passed for granting a relief to them. Such a legislation will be within Article 19 (5). This objection must accordingly be overruled.

(64) Mr. Vedantachariar appearing for some of the zamindars raised a contention which was special to them. In order to appreciate this contention it is necessary to bear in mind that in the definition of Estates in the Madras Estates Land Act Section 3, Clause 2 are comprised different varieties of them. The Zamindars holding sanads under permanent settlement form one class. They are assessed to the payment of fixed peshkush to the Government. Then we have Jagirdars who bear analogy to zamindars in the nature of their estates but differ from them in that there is no permanent settlement and no liability to pay peshkush. In this respect they resemble inamdars who hold estates either free of assessment or on payment of favourable rates of assessment. These three classes differ considerably among themselves though they have this in common that the tenants in all of them have occupancy rights. The reduction of rent must operate with varying effects on the several classes of landholders. The zamindars unlike others are under an obligation to pay peshkush which was fixed in relation to income from the estate. In their case reduction of rent must operate more harshly than on the jagirdars or inamdars who pay little or no assessment and in whose case the reduction of rent is only a reduction of income. Now the contention of Mr. Vedantachariar is that the effect of this legislation must be confiscatory so far as zamindars are concerned because if the peshkush and cess and collection charges and other liabilities are deducted out of the reduced rent income there may be little or nothing left for them out of the estate, it indeed there be not any deficiency to be made good by them. He accordingly contended that if in the working of the Act the Zamindar is unjustly deprived of his property he will be entitled to protection under Article 19 (1) (f), and he relied on the cases in 'H. Reagan v. Farmers Loan & Trust Co.', 1894-154 U S 361: 38 Law Ed. 1014, and 'Convington & L. Turnpike Road Co. v. Sandford', 1896-164 US 578: 41 Law Ed 560. In these cases certain commissioners acting under the powers granted to them by the statute which created them fixed rates of tariff for railroad traffic in the former case and tolls in the latter. The complaint was that the rates were unreasonably high and unjust and amounted to destruction of rights of property. This contention was upheld. It might be conceded that by reducing the rent without reducing peshkush much injustice might result in particular cases. At the same time it must be remembered that Act 30 of 1947 operates only in respect of ryoti lands; that zamindars have other valuable incomes such as forestry, fishery and so forth and private lands of the zamindars are also left untouched. It is, therefore, difficult to hold without more than the Act must necessarily deprive the Zamindars as a class of their entire estate. It is just likely that some of them might be hit to such an extent as to bring their case within Art. 19 (1) (f), and that in turn will depend upon investigation of facts but we are now concerned only with validity of the legislation as a whole and there is no legal basis for holding that it is invalid.

(65) I shall now consider whether the provisions relating to collection of rents are hit by Article 19 (1) (f). It appears to me that this question is concluded by the decision of the Supreme Court in 'Charanjit Lal v. Union of India', 1951-14 S C J 29. There one of the contentions put forward by the share-holder was that the restrictions placed on his right as a shareholder were void under Article 19 (1) (f). In dealing with this contention Mukherjee, J., observed:

"It is quite clear that there is no restriction whatsoever upon the petitioner's right to acquire and dispose of any property. The shares, which he holds do remain his property and his right to

dispose them of is not fettered in any way. If to 'hold' a property means to possess it, there is no infringement of this right either for as I have stated already, the acts complained of by the petitioner do not amount to dispossession of him from any property in the eye of law. It is argued that 'holding' includes enjoyment of all benefits that are ordinarily attached to the ownership of a property. The enjoyment of the fruits of a property is undoubtedly an incident of ownership. The pecuniary benefit, which a shareholder derives from the shares he holds, is the dividend and there is no limitation on the petitioner's right in this respect."

Then dealing with the restrictions on the right of the shareholder to elect directors, pass resolutions or to institute proceedings in a Court of law the learned Judge observed:

"In my opinion, these rights are privileges which are appurtenant to or flow from the ownership of property but by themselves and taken independently they cannot be reckoned as property capable of being acquired, held or disposed of as is contemplated by Article 19 (1) (f) of the Constitution."

Das, J., expressed himself to the same effect, vide page 59. On this reasoning it must be held that no rights of the petitioners have been infringed under Article 19 (1) (f), because their title to the estate is unaffected; their right to dispose of it is untouched; and their right to receive rent has been expressly preserved. I am also prepared to hold that the provisions of Section 3 (4) of Act 30 of 1947 can be upheld as a reasonable restriction made in the general interests of the public, under Article 19 (5). I have already held that the provisions relating to reduction of rent are reasonable and in the interests of the public. Section 3, Clause (4) which is intended to give practical effect to the provisions relating to reduction of rent must also be held to be valid as being reasonable and in the interests of the public. To fix a reasonable rate of rent is not to bring home relief to the tenants so long as the landlords are unwilling to reconcile themselves to substantial reduction of rent which they had hitherto been receiving and resort to Courts might become necessary to work out the rights of the tenants. The relief might become slow and tardy and it is this state of affairs that is sought to be remedied by Section 3 (4). The landlord does not thereby lose any of his substantial rights; on the other hand the realisation of rent by the Government will be more speedy and less costly. Under the circumstances these provisions must also be held to be valid. I am, therefore, of opinion that none of the provisions of Act 30 of 1947 infringe the fundamental rights under Article 19.

(66) It remains to deal with the contention of Mr. Kesava Iyengar that the provisions of Act 30 of 1947 are opposed to Article 14 and that, therefore, it is invalid. This contention is based upon explanation I to Section 2 that the special officer has power only to reduce rent and not to enhance it. It is stated that in the same estate the rates of rent vary with different tenants, that while many of them pay more than the ryotwari rates, it is a legislation in respect of a class and reduction of rent but not enhancement thereof is discrimination within Article 14. So argues the learned Advocate. But it has been held that Article 14 does not apply where there is classification and as the legislation has for its object the reduction of rent where it is higher than the ryotwari rates, it is a legislation in respect of a class and not open to challenge under Article 14. Moreover if even after the enactment of Act 30 of 1947 there is difference in the rights of the several classes of tenants that is not discrimination arising by reason of the Act. The disparity in rates existed prior to the legislation and it is no objection to the validity of the Act that it has not entirely obliterated the pre-existing inequalities. The case is analogous to that in 'Ramjilal v. Income-tax Officer, Mohindar Garh', 1951 S C J 203. The facts of that case were that there was no income-tax law in the State of Nabha while the State of Kaparthala had one and after these states were integrated the residents of Nabha State were assessed to income-tax under the law of Pepsu Union. This rate was higher than the rates of income-tax in Kapurthala. Nabha contended that there was discrimination in that Kapurthala was paying less income-tax and that, therefore, the Pepsu regulation was discriminatory under Article 14. The Supreme Court rejected this contention, Das, J., observing:

"The discrimination, if any, was not brought about by the two ordinances, but by the circumstance that there was no income-tax Act in Nabha."

(67) The result then is that Act 30 of 1947 was valid when it was passed and has not become invalid under the Constitution and that Act 7 of 1951 is also valid.

(68) I agree with the conclusions of my Lord the Chief Justice and in the order to be passed on these petitions.

C.R.K./R.G.D *Order accordingly*

A. I. R. (39) 1952 Madras 224 *[C. N. 99.]*

RAJMANNAR, C. J. AND SOMASUNDARAM, J.

Sishtla Janakirama Sastri and another, Appellants v. Jagani Gopalam and others, Respondents.

Second Appeals Nos. 2203 to 2207 of 1945 and C. R. P. No. 1526 of 1945, D/- 23-2-1951.

(a) Tenancy Laws — Madras Estates Land Act (I (1) of 1908), Ss. 3 (2) (d), 3 (19) — Estate — Meaning — Area subsequently designed as village in revenue accounts — Effect.

The definition of "village" in S. 3 (19) cannot be incorporated into the definition of an "estate" in S. 3 (2) (d) of the Act.

Where therefore the original grant is not of a whole village, the grant does not fall within the definition of S. 3 (2) (d), merely because subsequently and at the time of the institution of the suits the area granted as inam was designed as a separate village in the revenue accounts. Decision in C. R. P. Nos. 1007 to 1014 of 1942 (Mad) overruled; AIR (38) 1951 Mad 376, Relied on. (Para 5)

(b) Grant — Construction of — Other documents — Use of — (Deed — Construction.)

When the terms of the grant are available other documents are not evidence as to the effect of the grant, which must depend upon the language used in the instrument and circumstances of the grant itself. AIR (8) 1921 P C 1 and AIR (35) 1948 P C 25, Ref. (Para 9)

(c) Tenancy Laws — Madras Estates Land Act (I (1) of 1908), S. 3 (2), (d) — Village described in inam as 'Khandrika' — Not a whole village (Grant-Inam-Construction) — (Deed — Construction.)

It is well established that any inam village in S. 3 (2), (d) means "a whole village granted in inam", and not anything less than a village, however big a part it may be of that village.

Where the grant of an inam describes the village as a hamlet (sivaru) and the grant to be of a "Khandrika of certain Khatties", the grant cannot be regarded as comprising a whole village. (Para 9)

(d) Words and Phrases — Khandrika — Meaning.

The word 'Khandrika' is derived from the Sanskrit word 'Khandam' which means a piece or a part and means a block of land granted as inam less than a village but larger than an ordinary inam. AIR (19) 1932 P C 238, Relied on. (Para 9)

P. Somasundaram and G. Venkatarama Sastry, for Appellants; K. Rajah Ayyar, P. Satyanarayana Raju; M. B. Rama Sarma; V. V. Raghavan and N. Rajeswara Rao, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('21) 44 Mad 421: (AIR (8) 1921 P C 1) (Pr 9)
('32) 63 Mad L J 649: (AIR (19) 1932 P C 238) (Pr 9)
('48) ILR (1948) Mad 585: (AIR (35) 1948 P C 25) (Pr 9)
('51) 64 Mad L W 1: (AIR (37) 1950 P C 105) (Pr 17)
('42) C R P Nos. 1007 to 1014 of 1942 (Mad) (Pr 3)
('44) C M P No. 584 of 1944 (Mad) (Pr 6)
('45) C M A No. 373 of 1945 (Mad) (Pr 6)
('47) C R P Nos. 593 to 601 of 1947 (Mad) (Pr 11)
('50) 1950-2 Mad L J 442: (AIR (38) 1951 Mad 376) (Prs 5, 6, 10)

RAJAMANNAR, C. J.: These five second appeals arise out of five suits which were tried together and disposed of by a common judgment by the learned Deputy Collector of Eluru division. They were brought by persons who were in possession of lands in the village of Idulakunta Agraharam, in Eluru taluk, West Godavari district, against the appellants and others under S. 55 of the Madras Estates Land Act praying that the defendants may be directed to execute pattas in their favour in accordance with the draft patta filed along with the plaint. The defendants resisted the suits mainly on the ground that the revenue Court had no jurisdiction as the lands did not form part of an estate within the meaning of that Act. Their plea was overruled and the Deputy Collector decreed the suits. The defendants preferred appeals to the District Judge of West Godavari who confirmed the decision of the Deputy Collector that the lands were situated in an estate. These second appeals by the defendants are against the decision of the District Judge.

(2) The main question for decision in these appeals is whether the lands in suit formed part of an estate as defined in the Madras Estates Land Act. The material statutory provisions in the Act relevant to this question are the following:

"Section 3 (2) (d): 'Estate' means any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees."

Explanation (1): (inserted by Madras Estates Land (Amendment), Act, 1945 — Madras Act II of 1945):

"Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes."

Section 3 (19): 'Village' means any local area, situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams or which is now recognised by the Provincial Government or may hereafter be declared by the Provincial Government for the purposes of this Act to be a village, and includes any hamlet or hamlets which may be attached thereto."

It is well established that any inam village in S. 3 (2) (d) means "a whole village granted in inam", and not anything less than a village, however big a part it may be of that village.

(3) The question, therefore, is whether the grant in favour of the appellants' predecessors-in-title which comprised the lands in suits was a grant of a whole village in inam. The learned District Judge was not prepared to hold that the original grant in favour of the defendants' predecessors was a grant of what was a whole village at the time of the grant, but he held that the grant fell within the definition in S. 3 (2) (d), because subsequently and at the time of the institution of the suits the area granted as inam was designated as a separate village in the revenue accounts. He relied upon the definition of 'village' in S. 3 (19) and held, following the unreported decision of a learned Judge of this Court, Shahabuddin, J., in 'C. R. P. Nos. 1007 to 1014 of 1942' that the expression "inam village" in S. 3 (2) (d), must be read along with the definition of "village" in S. 3 (19) of the Act.

(4) The decision of Shahabuddin, J., has never been followed in this Court to our knowledge. On the other hand, the correctness of that decision has been doubted more than once and the decision of a Division Bench of this Court runs contrary to it. The reasoning of Shahabuddin, J., is best expressed by the following extract from his judgment:

"The word "village" in that Clause (3) (2) (d), has naturally to be taken in the same sense which it bears in Sub-section 19 of S. 3 to which reference has already been made. Now under Sub-section (19) an area which was recognised as a village at the time of the Act or recognised as a village at the time the question arises or which may hereafter be declared as a village by the Provincial Government, is a village for purposes of this Act. It, therefore, appears to me that what Clause 3 (2) (d), says is that any inam which is recognised as a village in Government accounts as defined in Sub-section (19) of which the grant has been made, confirmed or recognised by the British Government, constitutes an estate..... It could not have been the intention of the Legislature that 'village' mentioned in Clause (d) of Sub-section (2) to S. 3 should bear a connotation different from that in Sub-section (19) and if once the definition of 'village' in Sub-section (19) applies to Clause (d) of Sub-section (2) to S. 3, then the determination of the question whether a particular area of inam land is an estate or not depends solely on whether that area at present comes within the definition of 'village' in Sub-section 19 irrespective of its character at the time of the grant."

(5) The defects in this construction of the expression 'village' in Section 3 (2) (d), are pointed out in detail by Raghava Rao, J., in 'Ramamoorthi Sastri v. Ammanna', 1950-2 Mad L J 442 at p. 448 and it is unnecessary to repeat them as we are in entire agreement with that learned Judge.

(6) Though the decision of Shahabuddin, J., is not referred to by them, the decision of Patanjali Sastri and Bell, JJ., in 'C. M. A. No. 584 of 1944 and C. M. A. No. 373 of 1945' reported in as a footnote to the case in 'Ramamoorthi Sastri v. Ammanna', 1950-2 Mad L J 442, goes against it. In that case what was granted originally was at the time of the grant a hamlet of an adjoining village;

but it came to be recognised subsequently as a separate village and treated as such in the revenue accounts. It was contended that as the grant comprised a local area which was recognised by the Government to be a village at the commencement of the Act the definition in S. 3 (2) (d), applied. But the learned Judges repelled the contention observing that S. 3 (19) refers only to a village situated in or constituting an estate and:

"to import that definition into Sub-clause (d) to S. 3 (2) which itself defines one category of estates, would lead to repugnancy in the context."

With respect, we are in full agreement with the reasoning of Patanjali Sastri and Bell, JJ., and Raghava Rao, J. In our opinion the definition of "village" in S. 3 (19) cannot be incorporated into the definition of an "estate" in S. 3 (2) (d), of the Act. The view of Shahabuddin, J., cannot be accepted as sound.

(7) The learned District Judge in view of the decision of Shahabuddin, J., which he followed considered it unnecessary to decide the other question whether the grant even at its inception was of a whole village as contended by the plaintiffs. In the view we have taken that the decision of Shahabuddin, J., was erroneous, it is now necessary to decide that question.

(8) The terms of the original grant are available to us as the sanad granted to the ancestors of the defendants has been produced (Ex. D. 1). It runs as follows:

"Bhudana dharma Sasana Patrika (deed of gift in respect of land) executed and delivered in the year 1678 of the 'Salivahana' era, corresponding to the 15th Vysakha Suddah of the current year 'Dhara' (1756) in favour of Sishtla Narasimha Garu by Jagannatha Appa Rayanim Garu Fasli 1165.

Eedulakuntapalem, hamlet of Mupparu relating to Haveli Ellore taluk-tank, '4 Khatties' and land of 8 Khatties all round the tank, wherein wet cultivation is carried on by transplantation, in all, a 'khandrika' of 12 'khatties' has been granted to you, in the name of God Sri Rama, as a Sarva Agraharam.

Therefore, growing crops therein every year, you may enjoy the produce thereof hereditarily from son to grandson and so on and live happily."

(9) There can be no doubt that when the terms of the grant are available other documents are not evidence as to the effect of the grant, which must depend upon the language used in the instrument and the circumstances of the grant itself. (See 'the Secretary of State v. Srinivasachariar', 44 Mad 421 at p. 431 and 'Sankaranarayana v. H. R. E. Broad, Madras', ILR (1948) Mad 585 at p. 599. The language of a grant — we have perused the Telugu original also — leaves no room for doubt, and we have no hesitation in finding that the grant was not of a whole village. It is quite clear that the main village is Mupparru. Eedulakuntapalem is described as a hamlet (Sivaru). This means that Eedulakuntapalem was not itself a separate village. The grant is described to be of a "Khandrika of 12 khatties." The word "Khandrika" appears to us to be very significant. It is derived from the Sanskrit word "Khandam" which means "a piece" or "a part." The Judicial Committee accepted the meaning of the expression "Khandrika" given to it in MacLean's Manual of the Administration in the Madras Presidency, Vol. III as:

"a block of land granted as inam, less than a village, but much larger than an ordinary inam."

('The Secretary of State v. Mallayya', 63 Mad L J 649 at p. 650.) According to Wilson's Glossary 'Khandrika' is:

"an allotment of privileged land not exceeding four or five 'kattis', or from 50 to 70 acres; it may be either rent free or subject to quit rent."

It is impossible to hold, having regard to the description of Eedulakuntapalem as a hamlet and the description of the area granted as "Khandrika" that the original grant comprised a whole village.

(10) In the case already referred to in another connection decided by Patanjali Sastri and Bell, JJ., the subject-matter of the grant was described as Patha Pentapadu, hamlet of Pentapadu village. This description was held to clearly show that what was granted as inam was not a whole village but only a portion of the village. In the other case decided by Raghava Rao J., 'Ramamoorthi Sastri v. Ammanna', 1950-2 Mad L J 442, the grant was of a hamlet adjoining a main village and the learned Judge came to a similar conclusion that it could not be deemed to be a grant of a whole village.

(11) Our attention was drawn to an unreported decision of Panchapagesa Sastri, J., in 'C. R. P. Nos. 593 to 601 of 1947, dealt with a grant of a "Khandrika" and the learned Judge held that the "Khandrika" was not at the time of the grant a separate village but was only a part of the main village.

(12) As the language of the original grant is clear and does not admit of any ambiguity, we do not think much useful purpose will be served by an elaborate discussion of the subsequent documents. Though there are some documents in which the Edulakuntapalem Agraharam has been treated as a separate village without reference to Mupparru village, there are other documents of great probative value which confirm the view taken by us of the original grant. There is a 'farmana' of the year 1791 from one William Warren, acting evidently on behalf of the East India Company addressed to the Circar Servants and Haveli servants of Paragana Haveli Ellore taluk. In this the grant is described as:

"a 'Khandrika of 12 khathies' consisting of tank of 4 'kathies' and land of 8 'kathies' all round the tank, wherein wet cultivation is carried on by transplantation in the hamlet, Eedulakuntapalem, 'Mourije' Mupparru....."

This description does not carry us any further than the original grant itself.

(13) The extract from the inam fair register relating to the grant in question is Ex. P. 26 but there is nothing in any of the columns on which much reliance could be placed by the respondents. The heading is "Register of Inams in the village of Idulagunta Agraharam in the taluk of Ellore, in the district of Godavari." This cannot in any way affect the scope of character of the original grant.

(14) As a consequence of the grant to the appellants' ancestors of a fairly large block of land which had a defined identity as a hamlet, it is not surprising that there should be separate chittas and other revenue papers. Exs. P. 23 and P. 23 (a) are two such faisala chittas for the years 1842-43 and 1850-51. On the same ground we find a separate entry of Eedulakuntapalam Agraharam in the register of inams (Ex. P. 26 already referred to and Ex. P. 24 of 1860 and Ex. P. 25 of 1885.) It is common ground that in or about 1911 a special triune officer was appointed for the Eedulakuntapalem village and thereafter the village was recognised as a revenue village. It is, therefore, unnecessary to refer to the documents subsequent to 1911. Nor is it necessary to refer to the document filed on behalf of the respondents, documents to which the appellants or their predecessors were parties in which Eedulakantapalem is described as a

village without reference to the main village Mupparu.

(15) On the other hand, there are public documents of great value which unmistakeably lead to the inference that Eedulakuntapalem until the beginning of this century was being treated as a part of the village of Mupparru though, of course, it was treated as inam. In Ex. D-12, the tracing from a map prepared in the survey of 1863 in Ex. D an extract from the survey and settlement register of Mupparru village of the year 1866, the area covered by the grant in question was shown as covered by survey Number 339 in the village of Mupparru. Again, in Ex. D. 7, a plan of Mupparu, prepared at the re-survey of 1894 and Ex. D. 5 re-survey and settlement register of that village prepared in 1902 the area of the grant is shown as a part of Mupparru village. It is on a consideration of these documents that the learned District Judge remarked:

> ".....it might have to be conceded in favour of the landlords that down to 1902, since the inam was treated as a survey number of Mupparru village, it could not be said that Idulagunta was treated as a separate village by itself."

(16) Mr. Rajah Aiyar for the plaintiffs-respondents tried to found an argument on the mention of the word "haveli" which qualifies Ellore in the original grant. He suggested that Mupparru was a "Haveli" village, that is, Government village and Eedulakuntapalem which was granted to the appellants' ancestors by the Zamindar must have been a separate village belonging to the zamindar. There is no basis in fact for this suggestion. The word "haveli" does not necessarily mean that Mupparru was a Government village, that is, a village in the possession of the East India Company. We find from Wilson's Glossary that villages formerly retained under the management of the officers of the Nawab of the Carnatic were generally known as "haveli" villages. There is nothing in the original grant to support the inference that the grantor owned the hamlet but did not own the main village and, therefore, the hamlet had a separate existence as an entire village.

(17) Mr. Rajah Aiyar referred us to the recent decision of the Privy Council in 'Krishnaswami Aiyangar v. Perumal Goundan', 64 Mad L W 1. That case related to a grant by the British Government in 1895. It was a grant of what was regarded as an entire village at the time. There was evidence that the village so granted had once formed part of a larger village. Their Lordships pointed out that in 1895 the Government granted on inam tenure the whole village that is, 'the whole village which for the past 100 years had been recognised as an inam village' and that the important fact was that the grant comprised the whole of what was then regarded as an inam village. We fail to see how the decision on such facts can be of any help to decide the question before us which must be decided on the construction of the terms of the original grant, Ex. D. 1.

(18) We find in conclusion that the lands in the suits are not situated in an estate as defined in S. 3 (2) (d), of the Madras Estates Land Act and the revenue Court had no jurisdiction to entertain the suits which purported to have been instituted under S. 55 of that Act.

(19) The second appeals are allowed and the suits dismissed with costs throughout.

(20) 'C. R. P. No. 1526 of 1945': This revision petition arises out of a suit filed by the landlords in ejectment in the Court of the District Munsiff of Eluru and relates to lands comprised in the same grant as we have dealt with in the above second appeals. The plaint was returned for presentation to the revenue Court on the ground that the lands were situated in an estate. Now that we have held that this view is wrong the civil Court would have jurisdiction to entertain the suit.

(21) The order of the learned District Judge is hereby set aside and the suit is remanded to the District Munsiff, Eluru, to be tried and disposed of according to law. The costs of the revision petition will abide the result of the suit.

C.R.K./D.R. *Order accordingly.*

A. I. R. (39) 1952 Madras 227 *[C. N. 100.]*

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

H. C. Kothari and others, Applicants v. The Commissioner of Income-tax, Madras, Respondent.

Case Referred No. 17 of 1949, D/- 21-9-1951.

Income-tax Act (1922), Ss. 2(6AA), 8, 10, 12 — Interest on securities — Relief of earned income.

If an income falls under more than one head, the assessee has the option of choosing for the purpose of income-tax such head which makes the burden on his shoulders lighter. But if there is no doubt as regards the head under which a given income becomes chargeable to tax, it is not open either to the assessee or to the department to ignore that head and deal with the income for the purpose of the tax under a different head. Section 8 which deals with interest on securities is a separate and distinct head, and if income is chargeable under that head, it is not open either to the assessee or to the department to change the head and claim to tax it under a different head. Where the interest on securities was already charged to tax at the source there is no option left to the assessee later on to claim that that interest should be treated as part of the income of his business. It is no doubt possible that these securities may be part of the trade assets of an assessee. But that circumstance does not make the interest in respect of such securities which is specifically chargeable under S. 8 as part of the profits of the business of the assessee under S. 10. S. 12 cannot be invoked unless the previous heads of income are exhausted. As the interest on securities is chargeable under S. 8, the assessee cannot claim that that income should be treated as income from other sources under S. 12. The assessee is not entitled to claim relief of earned income in respect of such interest. 1930 A C 432: (1932)-1 K B 517, AIR (27) 1940 Mad 366 S. B., Rel. on. *(Paras 5, 6)*

Anno: Income-tax Act, S. 8 N. 1, S. 10 N. 1, S. 12 N. 1.

M. Subbaraya Aiyar, for Applicants; C. S. Rama Rao Sahib, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('40) ILR (1940) Mad 178: (AIR (27) 1940 Mad 366 S B) (Pr 5)
(1930) AC 432: (99 L J K B 403) (Prs 3, 4)
(1932) 1 K B 517: (101 L J K B 342) (Pr 4)
(1932) 1 K B 283: (100 L J K B 622) (Pr 4)

SATYANARAYANA RAO, J.: The question is: "Whether on the facts and in the circumstances of the case, interest on securities received by the applicants should be treated as earned income, falling under the head 'income from business' (S. 10), or income from other sources (S. 12) and should not be treated as income from securities (S. 8)?"

The assessees during the accounting year ending with 31-12-1945 had several sources of income

viz., interest on securities, profits of business, dividends and other interests. The business, however ended in loss. They claimed earned income relief in respect of the interest on securities on the ground that the securities, the Government Promissory Notes, which they purchased and sold as part of their business formed stock in trade and that the profits arising in such purchase and sales including the interest on securities should be treated as business profits. As the other business ended in loss, naturally they could not claim earned income relief in respect of that business. The claim was, therefore, confined to the interest on securities. The definition of "earned income" in S. 2 (6AA) does not include interest on securities falling under S. 8 of the Act, as it does not involve a personal exertion in earning income on the part of the assessee. The attempt, therefore, of the assessees was to bring this activity, viz., purchase and sale of securities, as part of their business under S. 10 of the Income-tax Act. They were, however, not successful before the Revenue authorities who held that the interest on securities is assessable under S. 8 and could not be treated as part of the business income.

(2) This view of the department has been challenged before us solely on the ground that income treated as interest on securities should also be included in the business income, because it formed part of their business operations. The answer given on behalf of the revenue authorities by Mr. Rama Rao Sahib, learned Counsel, was that, as the income which represents interest on securities falls under a head which is specifically provided for by S. 8, it is not open to the assessees to contend that it should be treated as part of their business income, as it is made separately chargeable under S. 8.

(3) It is necessary in this connection to understand the underlying scheme of the provisions of the Act relating to the charging of income to tax and the mode of computation of income. It is an undoubted fact that income-tax is one single tax on the aggregate total income of an assessee. It is, however, classified under various heads and made chargeable under such heads. Section 3 of the Act is the charging section. Section 4 defines the limits to which the net may be spread by the department. Section 6 classifies the heads, and Ss. 8 to 12 enumerate the principles on which the computation of the income under various heads should be made. The classification under S. 6 under various heads however does not mean that there are as many taxes as there are heads of income. The tax, as stated above is one tax on the aggregate of the income. If once the income is dealt with under the proper head, it cannot be dealt with again under another head as when once the income is taxed, its source for purposes of taxation becomes exhausted. These principles have been well established both in England and in India. It is not open either to the department or to the assessee to claim that an income which clearly falls under one head should be dealt with under a different head for the purpose of either claiming more tax by the tax gatherers or claiming that the burden should be made light by the tax payer. The leading case on this subject is that of the House of Lords in 'Fry v. Salisbury House Estates Ltd', (1930) A C 432. No doubt, in that case the attempt to tax under a different head the same income was made by the Special Commissioners and not by the assessee but that does not in our opinion make any difference. The point is dispute shortly stated was that a certain house property was assessed to tax on its annual value under schedule A. The house was however let to various tenants and the assessee received rents from them after providing certain amenities to the tenants. There was no doubt a large difference between the annual value of the house as estimated in accordance with the principles laid down for the determination of the annual value and the rent actually received. The Special Commissioners claimed that notwithstanding that the house was assessed to tax under S. A, it was open to them to take into consideration in arriving at the profits of the business, the rents received from the tenants and after giving credit, with a view to avoid double taxation, to the amount which was taken into consideration as annual value, and that the balance of the profits left should be assessed under schedule D. It was held by the House of Lords that notwithstanding that more rent was received over and above the annual value of the building, it was not open to the Special Commissioners to take those rents into consideration with a view to arriving at the profits under Schedule D. It may be mentioned that the scheme of taxation under the English Act was: Sch. A provided for the taxatioin of income derived from property and lands; Sch. B for income derived from the occupation of land; Sch. C for income derived from Government securities; Sch. E for income derived from employment in public service and Sch. D provided for taxation of income not dealt with specifically in any of the schedules. Lord Atkin in the course of his speech at page 457 dealing with the scheme of these schedules observed:

"Believing as I do, that the specific Schs. A, B, C and E, and the rules thereunder contains definite Codes applying exclusively to their respective defined subject-matters I find no ground for assessing the tax payer under Sch. D for any property or gains which are the subject-matter of the other specific schedules. In the present case the income from the offices should be and has been assessed under Sch. A on the annual value as prescribed by Statute. It therefore is not the subject-matter of assessment under D. I should add that if there had been an option to assess under A or D, I cannot conceive a more conclusive election under the option that the assessment and receipt of payment under Sch. A, but this point need not be determined."

(4) This principle was applied by the Court of Appeal in 'Thompson v. Trust and Loan Co., of Canada', (1932)-1 K B 517 on appeal from the decision of Rowlatt J. in 'Thompson v. Trust and Loan Co. of Canada', (1932)-1 K B 283. In that case a company carried on business as a loan and finance company. In the course of its business it had dealings in stocks, shares and other securities. The process adopted by them in the purchase of treasury bonds was somewhat similar to the process adopted by the assessees in this case. They brought treasury bonds cum coupon but sold the bonds ex coupons. The coupons were cashed by them after detaching them from the bonds and they received interest on the bonds less tax deductible at the source. The Special Commissioners claimed that as the bonds were really part of the trade assets of the company, the income of the company should be assessed under Sch. D in respect of the profits or gains of the company's business and that the net interest received by the company which was taxed under Sch. C could be brought into account for the purpose of assessment by giving credit to it to avoid double tax. The interest on the bonds, of course, as under the Indian Act, was separately chargeable to tax under Sch. C. The contention of the Special Commissioners was disallowed by the Court of Appeal applying the principle of the definition in 'Fry v. Salisbury House Estates Ltd', (1930) A C 432. At p. 528 Lord Hanworth M. R. considered the question and observed:

"If then the company's purchase was of bonds which in the ordinary course would bear fruit, they are entitled for the purposes of Sch. D to set against the price paid for the bonds the price received for them. It may seem at first sight as if something more ought to be brought into account, as if for the purposes of an assessment under Sch. D that was too simple a way of looking at the transaction and that something more ought to be brought into account; but income-tax is charged upon the subject by the Income-tax Acts. It may well be that the system is not perfect, that it is not entirely a coherent whole, yet the Court has to see whether or not any other subject-matter is brought into charge under the Code provided by the Income-tax Acts. The reason why the 'Salisbury House case', (1930) A C 432 has been referred to is not because of an analogy in the facts, but because of the important demonstration in that case of the general principle underlying the Income-tax Act, 1918. Lord Dunedin there makes it plain that income-tax as it is imposed under this Act is one tax to be recovered in a particular manner in respect of each particular property and in accordance with the particular circumstances; and Lord Atkin, dealing with the matter in a manner which is a little closer to this case, says:

"In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Sch. D the income so derived is not to be brought into account",

and later,

"Similarly, I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in Government Securities must be taxed under Sch. C, and cannot for the purposes of assessment under Sch. D be brought into account".

Then again he says:

"I find no ground for assessing the tax payer under Sch. D for any property or gains which are the subject-matter of the other specific schedules".

At the bottom of page 529, it is observed:

"In the present case it is plain that this subject-matter of tax, coupons on Government bonds payable out of the Government funds, has got to be taxed under Sch. C. It cannot be taxed under any other schedule. When the total sum received out of public revenue has been subjected as a totality to the incidence of tax under Sch. C, it is removed from being taxed under Sch. D, for Sch. D in terms provides that it is only to apply under Case I (which applies here) 'in respect of any trade not contained in any other schedule."

(5) If an income falls under more than one head, the assessee has the option of choosing for the purpose of income-tax such head which makes the burden on his shoulders lighter. This was the principle enunciated by Krishnaswami Aiyangar J. in the 'Commr. of Income-tax v. Bosetto Bros. Ltd.', ILR (1940) Mad 178 (S B) where the learned Judge stated:

"Being a taxing statute, the Income-tax Act should receive a strict construction, that is, a construction in favour of the subject, and not in favour of the Crown. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him with a lighter burden."

The principle herein enunciated applies to a case where clearly an income can be brought under either of two heads. But if there is no doubt as regards the head under which a given income becomes chargeable to tax, it is not open either to the assessee or to the department to ignore that head and deal with the income for the purpose of the tax under a different head. In other words, it is imperative on the part of the department to charge the income under the specific head under which it falls since the law leaves no option in the matter.

(6) Bearing these principles in mind, it seems to us obvious that S. 8 of the Act which deals with interest on securities is a separate and distinct head, and if an income is chargeable under that head, it is not open either to the assessee or to the department to change the head and claim to tax it under a different head. In the present case, the interest on securities was already charged to tax at the source, and there is no option left to the assessee now to claim that that interest should be treated as part of the income of his business. It is no doubt possible that these securities may be part of the trade assets of an assessee. But that circumstance does not make the interest in respect of such securities which is specifically chargeable under S. 8, as part of the profits of the business of the assessee. A person may have more than one activity or operation with reference to one set of property, as for example, in this very case, where he gets his interest on the securities for which no exertion on his part is required, he may at the same time deal in such securities and make profit. The two activities or operations are entirely distinct. The profits made by him by his dealings in securities may legitimately be brought under S. 10 of the Act; but that is no justification for holding that interest on the securities also forms part of the profits of the business, within the meaning of S. 10 of the Act. S. 12 cannot be invoked unless the previous heads of income are exhausted. As we held that the interest on securities is chargeable under S. 8, the assessee cannot claim that that income should be treated as income from other sources under S. 12. It therefore follows that interest on securities must be treated as income from securities within the meaning of S. 8 of the Act and chargeable under that head, and the assessee is not entitled to claim relief of earned income in respect of such interest. The question referred to us must be answered against the assessees and we must hold that the income should be treated as income from securities within the meaning of S. 8. As the assessees have failed they must pay to the respondent his costs which was fix at Rs. 250.

C.R.K./D.H. *Answer accordingly.*

A. I. R. (39) 1952 Madras 229 *[C. N. 101.]*

SOMASUNDARAM J.

In re. Sugali Latchigadu and others, Appellants.

Criminal Appeal No. 590 of 1950, D/- 27-7-1951.

Criminal P.C. (1898), Ss. 162 and 537 — Failure to observe provisions of S. 162 — Effect — Destruction of short-notes of evidence of important eye-witnesses prepared at time of inquest — Prejudice.

In a case of rioting and murder, the Sub-Inspector who visited the scene of occurrence examined certain eye-witnesses and prepared short-notes of the inquest evidence. These notes were however destroyed by the Sub-Inspector when he prepared the inquest report. Subsequently the Circle Inspector again examined these witnesses and prepared the case diary. But there was nothing to show that these statements were the same that were made earlier at the inquest. All the accused were convicted at the trial.

'Held' that the destruction of the notes of 'inquest evidence' constituted a flagrant violation of

the mandatory provisions of S. 162, Criminal P. C. Since the earlier statements made by important eye-witnesses were never made available to the accused an irresistible inference that the accused were prejudiced in their trial arose and it could not be said that the accused had a fair trial. The accused must, therefore, be acquitted as no useful purpose could be served by ordering a retrial. AIR (34) 1947 P C 67, AIR (38) 1951 Mad 685, Rel. on. *(Paras 3, 4)*

Anno: Cr. P. C., S. 162 N. 20 and 20a; S. 537 N. 6.

B. T. Sundararajan and P. Basi Reddi, for Appellants; The State Prosecutor, for Public Prosecutor, for the State.

Cases referred to:

('48) ILR (1948) Mad 1: (AIR (34) 1947 PC 67: 48 Cri L J 533 PC) (Pr 3)

('31) 53 All 458: (AIR (18) 1931 All 262: 32 Cri L J 562) (Pr 3)

('51) 1951 Mad W N Cr 15 (2): (AIR (38) 1951 Mad 685) (Pr 3)

('45) ILR (1945) Nag 151: (AIR (32) 1945 Nag 1: 46 Cri L J 448) (Pr 3)

ORDER: The six appellants were tried by the Sessions Judge of Chittor for offences under Ss. 147, 148, 323, 342, 365, 307 and 302 read with S. 149 I. P. C. The first accused was charged directly with murder but was acquitted of the said offence but convicted under S. 304 I. P. C. Similarly, the second accused was acquitted under S. 307 I. P. C. but convicted under S. 324, I. P. C. Accused 1 to 3 were also convicted under S. 148 I. P. C. and accused 4 to 6 under S. 147, I. P. C. Accused 1 to 5 were convicted under S. 365, I. P. C. and accused 1 to 6 were convicted under S. 342, I. P. C. Such of the other accused who were not directly charged were convicted constructively for offences for which the other accused were convicted under the direct charge. They were sentenced to varying terms of imprisonment from six months to three years, the sentences were ordered to run concurrently.

(2) On the 22nd of December 1949, at about 4 P. M., there was undoubtedly a rioting at Regulavaripalle, in the course of which one Kuntadu was shot dead. The rioting itself was in connection with the wrongful confinement of one Lingayya who has been examined as P. W. 6 in this case. On receipt of information the police went to the spot and there the Sub-Inspector held the inquest over the body of the deceased. He says in his evidence that he examined P.Ws. 6 to 9 and others as per the inquest report. I find the above witnesses and P. W. 10 who was also examined at the inquest are eye witnesses to the occurrence. The Sub-Inspector made short notes, to use his own words, "of inquest evidence" and he says in evidence that the notes have been destroyed by him by his own authority even before the Circle Inspector arrived. The result is that the earliest statements made by these important eye witnesses have not been made available to the accused. The learned Judge in paragraph 18 of his judgment says "It is true that P. W. 13 (Sub-Inspector who held the inquest) destroyed the short notes of inquest evidence made by him. But the inquest report refers to that evidence and is attested by Panchayatdars who heard that evidence. The case diary maintained by P. W. 13 is intact and no portion of it has been destroyed." The Circle Inspector came the day after the inquest was held by the Sub-Inspector. There is no doubt that he examined these witnesses and prepared the case diary. But there is nothing to show that these statements were the same that were made earlier at the inquest. The destruction of the notes by the Sub-Inspector has obviously rendered it impossible for the Circle Inspector to verify that what they stated before him was the same as they stated before Sub-Inspector.

(3) The learned counsel for the appellants comments on this and contends that the deprivation of the earlier statements has resulted in prejudice to the accused and relied on the decision of the Privy Council reported in 'P. Kotayya v. Emperor', I L R (1948) Mad 1 at p. 9 (PC), where their Lordships observed as follows:

> "It is clear from the facts narrated above that there was a breach of the proviso to S. 162, Criminal P. C., and that the entries in the Police Sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break down of the whole of his evidence; and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to S. 162 as matter of gravity. 'Baliram v. Emperor', ILR (1945) Nag 151 where the record of statements made by witnesses had been destroyed, and 'Emperor v. Bansidhar', 53 All 458 where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of S. 162 have led to the convictions being quashed. Their Lordships, would, however, observe that where, as in these two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused."

In this case these statements were never made available to the accused and therefore an irresistible inference arises that prejudice has been caused to the accused. I have also pointed out in 'Chinna Lingappa v. State', 1951 Mad W N Cr. 15(2), how the denial of these statements to the accused results in the exclusion of evidence which could be used by him under S. 145 of the Evidence Act. The accused in this case cannot therefore be said to have had a fair trial and the convictions and sentences must be set aside. I would have ordered a retrial if at least the statements could be made available; but as the Sub-Inspector says he has destroyed them, those statements will not be available. Therefore, no useful purpose will be served by ordering a retrial. The accused are therefore acquitted.

(4) In this case if the accused are acquitted, it is not because they have been found to be innocent but because of the 'destruction' of the notes of "inquest evidence", which constitutes a flagrant violation of the mandatory provisions of S. 162, Criminal P. C. In the circumstances, it cannot be said that the accused had a fair trial. It is necessary that the investigating officers should be warned against committing such breach of the provisions of S. 162, Criminal P. C. This is the second or third case in which I came across such violations of S. 162, Criminal P. C. It is high time that this is put an end to. A copy of this judgment will be forwarded to the I. G. of Police.

C.R.K./K.S. *Accused acquitted.*

A. I. R. (39) 1952 Madras 231 *[C. N. 102.]*

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

The Commissioner of Income-tax and Excess Profits Tax, Madras, Applicant v. The South Indian Pictures Ltd. Karaikudi, Respondent.

Case Referred, No. 18 of 1949, D/- 26-9-1951.

Income-tax Act (1922), S. 10(1) — Capital or revenue receipt — Assessee carrying on business of film distribution — Solatim paid to assessee for termination of certain contracts regarding film distribution — Not taxable as income, profits or gains of business.

The assessee, a private limited company, carried on the business of distribution of films. The right of distribution in some instances was acquired by them by advancing money to producers; in other cases they purchased the pictures for exhibition and distribution. The dispute in the assessment year relates to a sum of Rs. 26000 which the assessee received as compensation for the termination of three contracts relating to the distribution of three pictures and which was paid by the producers to the assessee. The question was whether the sum so received by the assessee was a capital receipt and was not assessable to tax.

'Held', that on the facts and circumstances of the case that the sum so received by the assessee was not income, profit or gains of the business carried on by the assessee and was not taxable under S. 10(1) of the Income-tax. If the department claims to exercise the right of taxing the particular receipt, it must be established that the receipt in question is income, profit or gains falling under any of the heads of the income mentioned in S. 6 of the Act. If it does not fall under any of these heads, the receipt is not taxable and would not be a revenue receipt, for the purpose of income-tax. It may be casual receipt, or capital receipt. AIR (19) 1932 PC 138, Foll. (Para 3)

Anno: Income-tax Act, S. 10 N. 2.

C. S. Rama Rao Sahib, for Applicant. The Advocate General and N. V. B. Shanker Rao, for Respondent.

Case referred to:

('32) 59 Cal 1343: (AIR (19) 1932 PC 138) (Pr 2)

SATYANARAYANA RAO, J.: Under S. 66(1) of the Indian Income-tax Act, the Appellate Tribunal referred to us the following question for decision:

"Whether on the facts and in the circumstances of the case, the sum of Rs. 26000 received by the assessee from Jupiter Pictures Ltd', is a revenue receipt assessable under the Indian Income-tax Act?"

The assessee, the South India Pictures Ltd., is a private limited company. Its business consisted of distribution of films. The right of distribution in some instances was acquired by them by advancing money to producers; in other cases they purchased the pictures for exhibition and distribution. The dispute in the assessment year relates to a sum of Rs. 26000 which the assessee received as compensation for the termination of three contracts relating to the distribution of three pictures and which was paid by the producers to the assessee. The agreements were dated 17th September 1941, 16th July 1942 and 10th May 1945. In all the three cases, the agreements were for a period of five years to commence from the date of the first release of the picture. There are various clauses in the agreements providing for the advances to be made to the producers by the distributors, the method of recouping such advances and also the remuneration to which the distributors were entitled, the details of which are not relevant for the purpose of the disposal of this reference. On 31st October 1945 the Jupiter Pictures Ltd', who were the producers of three pictures relating to the three contracts, and the assessee entered into an agreement whereunder the rights of the assessee under the agreements were terminated in consideration of a sum of Rs. 26000 which was paid as commission under the three contracts. The Appellate Tribunal differing from the conclusion of the Appellate Assistant Commissioner held that this amount was a capital receipt and was not assessable to income-tax. The short question is whether the view taken by the Appellate Tribunal is correct.

(2) The revenue authorities claim that this amount represents the income, profits and gains of the business of the assessee which the assessee carried on in the accounting period, and that, therefore, the amount was assessable to income-tax. In our opinion, it is not necessary to consider the various decisions of the English Courts which have been cited on behalf of the Income-tax Commissioner by Mr. Rama Rao Sahib, the learned Advocate as the question now raised is really covered by the decision of the Judicial Committee in 'Commr. of Income-tax, Bengal v. Shaw Wallace and Co', 59 Cal 1343 (PC). In that case, Shaw Wallace and Co. carried on business in Calcutta as merchants and agents of various companies and they had branches at different parts of India. They acted as distributing agents in India of the Burmah Oil Company and also the Anglo Persian Oil Company. In 1927, the two oil companies made arrangement for the distribution of their products and the agency of the assessee company was terminated, for which a large amount of compensation was paid by the oil companies. The question that arose for decision was whether the amounts so paid represented the profits of the business of the assessee taxable under S. 10 of the Income-tax Act. The Judicial Committee held that it was not taxable as it was not an amount received by the assessee while carrying on business but was really a sort of solatium paid to them for compulsory cessation of the agency contracts. This decision was sought to be distinguished on behalf of the Income-tax Commissioner on the ground that it would apply only if the assessee acted on behalf of a single principal or if there was no other business carried on by the assessee. The reason for this argument is that the assessee in the present case admittedly was carrying on other business on behalf of other producers even after the termination of the contracts between the assessee and Jupiter Pictures Ltd. This distinction, in our opinion, has no foundation, for it was pointed out in the course of the judgment of the Judicial Committee by Sir George Lowndes that the assessee company therein did in fact carry on other business as merchants and agents for various companies, and it was further held that the mere fact that other business was carried on would not alter or change the character of the receipt, if, in fact, it was not a revenue receipt. The receipt in that case, as in the present case, had no connection whatever with the other business which was continued by the assessee. For this reason it is observed at page 1352 of the judgment as follows:

"It is contended for the appellant that the 'business' of the respondents did in fact go on throughout the year, and this is no doubt true in a sense. They had other independent commercial interests which they continued to pursue, and the profits of which have been taxed in the ordinary course without objection on their part. But it is clear that the sum in question in this appeal had no connection with the continuance of the respondents' other business. The profits earned by

them in 1928 were the fruit of a different tree, the crop of a different field."

(3) The next line of argument adopted on behalf of the Income-tax Commissioner is that the receipt in the present case is in the nature of a casual receipt and is not really income and that was the basis of the judgment also of the Judicial Committee. Even here, it is difficult to accept the contention. All that the Judicial Committee pointed out in that case was that the receipt in question had no connection with the business which was terminated by the oil companies. It was, therefore, in the nature of some sort of solatium paid for the compulsory termination of the agreements. It is unnecessary to describe such a receipt under any particular label, whether it was a capital receipt or whether it was casual receipt so long as it is not a profit, or gain from the business which the assessee carried on, but was outside it. If the department claims to exercise the right of taxing the particular receipt, it must be established that the receipt in question is income, profit or gains falling under any of the heads of the income mentioned in S. 6 of the Act. If it does not fall under any of these heads, the receipt is not taxable and would not be a revenue receipt, for the purpose of income-tax. It may be casual receipt, or capital receipt. It is unnecessary to express any opinion on the question whether it falls under the one head or the other so long as it is not income, profit or gains which is taxable under S. 10(1) of the Income-tax Act.

(4) For these reasons, we agree with the view taken by the Appellate Tribunal and answer the question referred to us in the negative and against the Income-tax Commissioner. The assessee is entitled to his costs which we fix at Rs. 250.

C.R.K./K.S. *Answer in the negative.*

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*A. I. R. (39) 1952 Madras 232 [C. N. 103.]

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

The Commissioner of Income-tax, Applicant v. Shahzadi Begum, alias Luthfunnisa Begum and others, Respondents.

Case Referred No. 7 of 1949, D/- 26-9-1951.

†✠ *Income-tax Act (1922), S. 31 — Order rejecting appeal as time barred — Appeal to Appellate Tribunal — Maintainability.*

An order of the Appellate Assistant Commissioner, rejecting an appeal on the ground that it was time barred is an order under S. 31 against which an appeal lies to the Tribunal. AIR (25) 1938 PC 175 and AIR (18) 1931 Pat 306 (FB) Foll. AIR (21) 1934 All 559 and AIR (36) 1949 Bom 400, Dissent. from, Case law discussed. (Paras 1 and 12)

Anno: I. T. Act, S. 31 N. 2.

C. S. Rama Rao Sahib, for Applicant; G. Ramakrishna Aiyar and K. Srinivasan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('32) 59 Ind App 283: (AIR (19) 1932 PC 165) (Prs 5, 9, 11)
('38) 65 Ind App 236: (AIR (25) 1938 PC 175) (Prs 6, 9)
('84) 7 All 42: (1884 All W N 223) (Pr 10)
('34) 1934-2 ITR 129: (AIR (21) 1934 All 559) (Prs 6, 7)
('35) 1935-3 ITR 200: (AIR (22) 1935 All 572) (Pr 7)
('50) 1950-18 ITR 204 (All) (Pr 7)
('51) 1951-19 ITR 58: (AIR (39) 1952 All 143) (Pr 7)
('51) 1951-19 ITR 63: (AIR (39) 1952 All 249) (Pr 7)
('49) 1949-17 ITR 478: (AIR (36) 1949 Bom 400) (Pr 8)
('83) 9 Cal 100 (Pr 9)
('29) 10 Lah 596: (AIR (16) 1929 Lah 593 FB) (Prs 6, 9)
('93) 16 Mad 285 (Pr 10)
('99) 22 Mad 155: (8 Mad L J 304) (Pr 10)
('04) 27 Mad 21: (13 Mad L J 300) (Pr 10)
('34) 57 Mad 741: (AIR (21) 1934 Mad 303) (Pr 11)
('36) 59 Mad 805: (AIR (23) 1936 Mad 101) (Pr 10)
('41) ILR (1941) Mad 954: (AIR (28) 1941 Mad 836 FB) (Pr 10)
('48) 1948-16 ITR 341: (AIR (36) 1949 Mad 358) (Pr 10)
('32) 11 Pat 187: (AIR (18) 1931 Pat 306 FB) (Prs 6, 9)
('44) 1944-12 ITR 59: (AIR (31) 1944 Pat 112) (Pr 9)
('31) 9 Rang 281: (AIR (18) 1931 Rang 194 FB) (Pr 6)

SATYANARAYANA RAO J.: The question referred to us under S. 66(1) of the Indian Income-tax Act by the Income-tax Appellate Tribunal is:

"Whether on the facts and in the circumstances of the case the order of the Appellate Assistant Commissioner, rejecting the appeal on the ground that it was time barred was not an order under S. 31 of the Indian Income-tax Act and against which no appeal lay to the Tribunal."

(2) The following facts relevant for the consideration of the question are taken from the statement of the case by the Appellate Tribunal. The assessees are the joint receivers appointed by the High Court for the management of the estate of the late Md. Umar Sahib of Madras. The receivers were, however, discharged after the application for reference under S. 66(1) was filed before the Tribunal and in their place, the heirs of the deceased were brought on record as respondents. For the accounting year 1943 a return of the income was made treating the estate as one single unit. The heirs, however, raised the contention that the assessment should be made upon them individually in proportion to the shares of the income which they obtained from the estate to which they succeeded. While that assessment was pending enquiry before the Income-tax Officer, for the subsequent year 1944, a return was again submitted by the assessees for separate assessment. The claim of the assessees for separate assessment was rejected by the Income-tax Officer for the two years. Against the order of the Income-tax Officer, appeals were preferred to the Appellate Assistant Commissioner and they were pending. For the accounting year 1945 again a similar claim was made by the heirs in their return submitted to the Income-tax Officer, and following the previous decision, the Income-tax Officer again negatived the claim. Against this order also there was an appeal to the Appellate Assistant Commissioner, which was filed on the 28th September 1946. The appeal was however out of time by 64 days. In a covering letter which they submitted to the Appellate Assistant Commissioner along with the memorandum of appeal, the assessees prayed for the condonation of the delay on the ground that the staff which received the order of the Income-tax Officer mislaid it and omitted to bring it to the notice of the assessees for the purpose of filing the appeal. The Appellate Assistant Commissioner was not satisfied with that explanation and therefore rejected the appeal on 11th October 1946. An appeal was thereafter preferred to the Appellate Tribunal against the order of the Ap-

pellate Assistant Commissioner rejecting the appeal. This appeal also was filed out of time but the Appellate Tribunal condoned the delay accepting the explanation offered by the assessees. When the appeal was taken up for hearing by the Tribunal, the departmental representative raised the preliminary objection that no appeal lay as the order of the Appellate Assistant Commissioner rejecting the appeal was an order under S. 30 of the Income-tax Act which was not appealable and that therefore the Tribunal had no jurisdiction to hear and dispose of the appeal. The Tribunal did not accept the contention, as in their opinion, the order of the Appellate Assistant Commissioner rejecting the appeal as time barred was a disposal of the appeal, and as the only section which empowered the Appellate Assistant Commissioner to dispose of an appeal was S. 31, the order of the Appellate Assistant Commissioner should be treated as one made under S. 31 of the Act. Therefore, the order, it was held by the Appellate Tribunal, was appealable. In the result the Tribunal allowed the appeal of the assessees and set aside the order of the Appellate Assistant Commissioner and remitted the case back for hearing. The question set out above was referred to this Court at the instance of the Income-tax Commissioner.

(3) On behalf of the Commissioner it was contended by Mr. Rama Rao Sahib, the learned advocate, that the order of the Appellate Assistant Commissioner was not one coming within S. 31 of the Act, and that, therefore the appeal to the Appellate Tribunal was incompetent. This argument is founded on the assumption, that S. 31 of the Act applies only to such appeals which are presented within the prescribed period or dealt with by the Assistant Commissioner after admitting appeal by condoning the delay, and that the section has no application to any orders passed by the Appellate Assistant Commissioner at a stage anterior to it. In support of this contention, learned counsel relied on certain decisions of the Bombay and Allahabad High Courts. On behalf of he assessees, reliance was placed upon the view taken by the Patna High Court, which, it was claimed, was also supported by a decision of the Judicial Committee.

(4) Before an examination of the decisions cited on either side it would be convenient to refer to the provisions of the Act relating to appeals and to examine the scheme underlying, these provisions. Under the Income-tax Act of 1922, before its amendment in 1939 and the introduction of the present S. 33, an appeal against the assessment order to the Assistant Commissioner was provided under S. 30 of the Act. The first sub-section to that section contained a proviso that no appeal shall lie in respect of an assessment made under Sub-s. (4) of S. 23, or under that sub-section read with S. 27. Sub-s. (2) of S. 30 provided that the appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment and power was also conferred upon the Assistant Commissioner to admit an appeal after the expiration of the period, if he was satisfied that there was sufficient cause for not presenting the appeal within the prescribed period. Sub-s. (3) required that the appeal should be in the prescribed form and should be verified in the prescribed manner. S. 31 laid down the procedure for disposing of the appeal and also the powers of the appellate authority in disposing of an appeal. A further appeal to the Commissioner was provided by S. 32 in a limited class of cases. There was then no further appeal to income-tax appellate tribunal as it was not constituted; and it was only under the present S. 33 that such a provision was made. In respect of orders under S. 31, it was open under S. 66 to require the Commissioner to refer to the High Court a question of law arising out of such an order or decision, and if he refused to do so under Sub-cl. 3 of S. 66, an application to the High Court could be made to require the Commissioner to state a case. This was altered in 1939 to some extent. The right of appeal under S. 30 of the Act against the orders of the Income-tax Officer relating to assessment to the Assistant Commissioner is continued by S. 30. The proviso to Sub-s. 1 in the old Act barring appeals against assessment orders under S. 23(4) has now been omitted and other provisos have been added. Sub-cl. (2) to S. 30, requiring that the appeal should ordinarily be presented within 30 days of the receipt of demand levying the assessment and the power of the Appellate Assistant Commissioner to admit an appeal after the expiration of the period of 30 days if there was sufficient cause for not presenting it within that period, remains unaltered. Sub-cl. (3) was also retained. The procedure to be followed and the powers to be exercised by the Assistant Commissioner acting as an appellate authority are retained under S. 31 though amplified to some extent. A second appeal is now provided to an Appellate Tribunal under S. 33 of the Act against orders passed by the Appellate Assistant Commissioner under S. 31. As we are now concerned only with an assessment order, we are not referring to the other provisions in Ss. 30 and 31 of the Act. The power to be exercised and the procedure to be followed by the Appellate Tribunal is also stated in S. 33. Under the present scheme, therefore, a further appeal to the Appellate Tribunal lies only if an order falls under S. 31 of the Act or under S. 28 and not otherwise. We are not in the present case concerned with S. 28. The appeal therefore to the Appellate Tribunal can be justified only if it is established that the order of the Appellate Assistant Commissioner rejecting the appeal is really one which was and could have been passed under S. 31 of the Act.

(5) The point for determination is whether the narrow construction put upon S. 31 by the Bombay and Allahabad High Courts should be preferred to the liberal construction placed upon that section by the Patna High Court. A form is prescribed by S. 30 and rules were made under the rule making power for presenting an appeal. After an appeal is so presented, the appellate authority may have to consider certain questions of a preliminary nature, not touching the merits of the order appealed against. Such questions are, for example whether the appeal was presented in time, and whether there was sufficient cause to condone the delay, whether an appeal conformed to the formalities prescribed by the rules or not, and whether an appeal was or was not barred by any of the provision of the Act and so on. These questions, though in a sense they may relate to the appeal, do not really concern the merits of the appeal i.e., the question whether the order appealed against was correct or not. There is no definition of an appeal in the Income-tax Act. While construing the word "appeal" in the third column in Art. 182 of the Limitation Act, Sir Dinshaw Mulla observed in 'Nagendranath Dey v. Sureshchandra Dey', 59 Ind App 283 at p. 287:

> "There is no definition of appeal in the Civil P. C., but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent."

There is no particular reason for not accepting and applying this definition of an appeal under

the Income-tax Act. The appeal may be an irregular appeal or an incompetent appeal or even may be an appeal which was presented out of time. But still the Appellate Court has to apply its mind before it rejects the appeal on a preliminary ground that no case for condoning the delay was made out or that the formalities required by law have not been complied with or that the appeal was incompetent. In considering these questions the appellate Court is undoubtedly exercising an appellate power and not a power which is outside it. No doubt under S. 30(2) of the Act power is given to condone the delay if sufficient cause is made out. But suppose a sufficient cause is not made out, then what is the kind of order wnich the appellate Court is authorised to make and under which section of the Act. Which is the section of the Act that empowers the appellate Court to consider and weigh the reasons put forward in justification of the filing of the appeal out of time and to come to a decision and reject the appeal? The Act does not specifically empower the Appellate authority to reject an appeal which is out of time or which did not comply with the formalities or even an appeal which was incompetent. Pushed to its logical conclusion, the argument on behalf of the Income-tax Commissioner would lead to the result that in such cases, the appellate Court would have no power at all to reject the appeal. This could not have been the result contemplated by the Legislature and that was for the reason that after the section conferring a right of appeal and empowering the appellate authority to excuse the delay if sufficient cause is made out and admit an appeal, there follows the section which defines the powers of the appellate Court and prescribes the procedure to be adopted in disposing of the appeal. Even in respect of the preliminary questions it cannot be doubted and indeed it was not disputed, that the appellate Court is bound to hear the appellant after fixing a date for hearing which section confers such a power except it be S. 31? The Legislature, in our opinion, thought that all such matters are covered by S. 31 which defines the procedure to be adopted and the power to be exercised by the Appellate Tribunal and therefore no other specific provision was made in the Act in that behalf.

(6) This view is to a large extent supported by the observations of the Judicial Committee in 'Commr. of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas', 65 Ind App 236. The view taken before the decision of the Privy Council in some of the High Courts was that under the proviso to S. 30, which is now omitted, an order by the Appellate Assistant Commissioner, that an appeal against an order of assessment under S. 23(4) was incompetent as such an appeal was barred by the proviso, and that a reference under S. 66 in such a case was precluded as the order was not one under S. 31. In the case before the Judicial Committee above referred to, the Income-tax Officer made an assessment first under S. 23 (4) and revised it later in view of a later order of the Commissioner declaring that the registration of a firm was invalid and passed a fresh order of assessment under S. 23(4) and made the assessees liable to super-tax under S. 55 of the Act. One of the questions considered was whether the later order was one against which an appeal to the Assistant Commissioner was competent. In dealing with this contention, their Lordships observed at page 251:

> "If it was made, as the Commissioner has found, in purported exercise of the powers given by S. 23, Sub-s. 4, the assessee nevertheless had a right of appeal to the Assistant Commissioner under S. 30 and the Commissioner was in error when he quashed the proceedings on that appeal."

For as was truly said by Sir Shadi Lal in 'Duni Chand v. Commissioner of Income-tax', 10 Lah 596 at p. 601:

> "The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section."

As a preliminary to the application of the old proviso to S. 30 barring a right of appeal, it was always necessary when the assessee complained to see whether the circumstances of the case were such as would have justified action on the part of the Income-tax Officer of making an assessment under the best judgment rule in S. 23(4). If the circumstances did not warrant it, the assessment would be unsustainable. If on the contrary, the circumstances assumed to have existed by the Income-tax Officer, did in fact exist, the order would be correct and the appeal would be incompetent. It cannot be said therefore that because an appeal was incompetent, an order disposing of the appeal as being incompetent is not appealable. These are all no doubt questions of a preliminary nature to be determined by the appellate authority in the exercise of its appellate powers. The decision of Sir Shadi Lal which had the approval of the Judicial Committee was the foundation of the view taken by the Patna High Court, in the earliest of the cases in 'Ananda v. Commissioner of Income-tax, B & O', 11 Pat 187. In the light of the decision of the Judicial Committee the earlier decision of the Allahabad High Court in 'Jotram Sher Singh v. Commissioner of Income-tax, U. P.', 1934-2 ITR 129 (All) which was based upon the Full Bench decision of the Rangoon High Court in 'In Adbul Bari v. Commissioner of Income-tax', Burma 9 Rang 281 seems to us erroneous. The Rangoon Full Bench disagreed to a considerable extent from the view taken in 'Duni Chand v. Commissioner of Income-tax', 10 Lah 596. To accept the limited and narrow construction for which the counsel for the Commissioner of Income-tax contends that the "appeal" in S. 31 must be understood as meaning only an appeal which was competent and was presented in time or which was admitted after the delay was condoned and which also complied with all the formalities, is to leave the appellate Court powerless to decide the preliminary points for there is no specific enumeration of the power in the scheme of the Act. It would also deprive the aggrieved party of a remedy and make him helpless even in cases where the order of the Appellate Assistant Commissioner was obviously wrong and unjust. There is no reason to restrict the meaning of the word "appeal" in S. 31 to an appeal which complied with all the requirements of the law and was ripe for consideration on the merits of order appealed against. The expression "hearing of the appeal" and "disposing of the appeal" in Sub-cls. 1 and 2 of S. 31 and the power to make further inquiry may all equally apply to the preliminary stages as well as the subsequent stages of the hearing of an appeal.

(7) The argument however most strongly pressed was that in enumerating the powers in Sub-s. 3 to S. 31 power to reject an appeal was not expressly mentioned, which, it was claimed, was an indication that the preliminary stages of an appeal and the disposal and hearing of it were not within the purview of S. 31. We are unable to agree with this view. If the appeal is dismissed as incompetent or is rejected as it was filed out of time and no sufficient cause was established, it results in an affirmation of the order appealed against. When pressed, learned counsel however was forced to

concede that if an appeal, though out of time, was admitted by mistake and at the hearing an objection was taken by the respondent which was upheld, the order rejecting the appeal at that stage would fall under S. 31. One of the decisions of the Allahabad High Court even held that once the delay was condoned and the appeal was admitted, but later, on the objection of the respondent, it was found that the condonation of the delay at the earlier stage proceeded on a mistake, an order rejecting the appeal at that stage would be one under S. 31. It is also stated that if a date for the hearing of the appeal was fixed and the appeal was heard, the order might possibly fall under S. 31. If the argument in support of the Allahabad view were correct, where is the power under S. 31 to reject an appeal even under those circumstances? It must be conceded that the order of rejection under such circumstances would amount to confirmation of the order of the Income-tax Officer. The diffieulty arises according to the argument advanced on behalf of the Income-tax Commissioner only in cases where the delay was not condoned by the Appellate Assistant Commissioner and when he deals with the matter ex parte. In such a case, it is said that the order would be outside the purview of S. 31. It is difficult to make a distinction in the manner suggested. It only shows and reinforces the argument that all the powers exercised and exercisable by the appellate authority are derived under S. 31 and that the language of S. 31 is wide enough to cover the two stages of the hearing of the appeal whether it related to questions of a preliminary nature or whether it related to the merits of the appeal. The decision of the Allahabad High Court in 'Jot Ram v. Commissioner of Income-tax, U. P.', 1934 2 ITR 129 (All), already referred to was followed by the same Court in 'Shivnath Prasad v. Commissioner of Income-tax', Central and United Provinces, (1935) 3 I T R 200 (All) in which the question was whether an order rejecting an appeal by the Assistant Commissioner as time barred was within the purview of Ss. 31, 32 or 33 of the Income-tax Act as it stood before 1939 and the High Court could direct the Commissioner to state a case under S. 66 of the Act. It was held that the order was not within S. 31 or any other section. It was an appeal filed out of time and the delay in presenting was not condoned and the appeal was non-existent; the question of the power to reject an appeal under any particular section of the Act was not considered by the learned Judges. An order rejecting an appeal on the ground of limitation was not considered to be an order confirming an assessment within the meaning of S. 31. According to the learned Judges an order confirming an assessment is an order which has reference to the assessment and which affirms it; in other words an express affirmation of the order of assessment should be made. All that the sectional an is that in disposing of an appeal, t[illegible]ppellate Assistant Commissioner may in the case of an order of assessment confirm the order; if the appeal is rejected or if the appeal is dismissed it tantamounts to a confirmation of the order. It is not the form in which the judgment is pronounced that matters, but the substance and the consequence of the dismissal or rejection of the appeal. In a recent decision of the same Court in 'Special Manager, Court of Wards v. Commissioner of Income-tax, U. P.', 1950 18 ITR 204 (All), there are observations doubting the correctness of the decision in 'Shivnath Prasad v. Commissioner of Income-tax, C. P. and U. P.' 1935 3 ITR 200 (All) though obiter, for it was found even by the Appellate Tribunal that the case was not one in which the delay should be excused on the merits, as they were not satisfied with the sufficiency of the grounds for condoning the delay. After referring to a decision of the Patna High Court to the contrary, this is what the learned Judges state at page 212:

> "The other view at the same time may be possible that even though the period of limitation is prescribed under S. 30 and the power to grant extension is also given in that section the power is really exercised under S. 31 as the appellate Assistant Commissioner when he decides not to extend the period of limitation may be said in a sense to have confirmed the assessment.
>
> This question may assume some importance in a case where the appeal was within time but the Appellate Assistant Commissioner made a mistake and refused to admit it on the ground that the appeal was barred by limitation or the question might well have to be seriously considered in a case where there was sufficient cause for condonation of the delay and the exercise of the discretion by the Appellate Assistant Commissioner was considered to be perverse. In the case before us, however, both the Appellate Assistant Commissioner as well as the Appellate Tribunal considered the case on the merits and both were of the opinion that there were no sufficient grounds for the condonation of the delay.....In the circumstances of the case, there is no point in having the question further considered by a larger Bench."

There are two decisions of the same Court in 1951. In 'Mohd. Naim Md. Alam v. Commissioner of Income-tax, U. P.', 1951-19 ITR 58 (All), the first of the cases, the Appellate Assistant Commissioner admitted an appeal but subsequently dismissed it on the ground that the appeal was time-barred. This order was passed after issue of notice to the assessee fixing a date and place of hearing of the appeal and the order was treated as one falling under S. 31 which was appealable. The reason given by the learned Judges was that after the admission of the appeal the only section that would apply at the time of the hearing was S. 31. They however expressly refrained from expressing any opinion on the larger question for they observed at page 62:

> "We do not want to go into the larger question whether an order refusing to condone the delay under S. 30(2) and thereafter rejecting the memorandum of appeal is an order under S. 30 (2) of the Indian Income-tax Act or, is an order under S. 31 of the Act."

The second decision is reported at page 63 as the 'Municipal Board, Agra v. Commissioner of Income-tax, U. P.', 1951-19 ITR 63 (All). The distinction was drawn in that case between an appeal which was dismissed 'in limine' on the ground of limitation in which case the order would be under S. 30 (2) and an appeal which was admitted and after fixing a date and place of hearing was dismissed as time-barred in which case it would be an order under S. 31 (1). On the facts it was a case where the appeal was dismissed 'in limine'. Therefore it was held that there was no appeal. The distinction if we may say so with respect, between the two cases seems to be very thin.

(8) The Bombay High Court in 'Commissioner of Income-tax v. Mysore Iron and Steel Works', 1949-17 ITR 478 (Bom), followed the Allahabad view. It was also a case where the Appellate Assistant Commissioner refused to condone the delay. The learned Judges refused to follow the Patna view and preferred the view taken by the Allahabad Court. With great respect we are unable to agree with the view taken by the learned Judges of the Bombay High Court. At page 480

the learned Chief Justice after examining the scheme of the Act, observes:

"Now, the scheme under Ss. 30 and 31 of the Act is fairly clear. An assessee has a statutory right to present an appeal within thirty days without any order being required from the Appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, then that statutory right to present an appeal goes; and an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condoning the delay. Therefore before an appeal could be admitted in this case, an order from the Appellate Assistant Commissioner, was requisite that the delay had been condoned, and it was only on such an order being made that the appeal could be entertained by the Appellate Assistant Commissioner. Now S. 31 deals only with such appeals which are presented within the prescribed period or admitted after the delay had been condoned, and the procedure laid down in S. 31 with regard to the hearing of appeals only applies to such appeals. Therefore, in my opinion, when the Appellate Assistant Commissioner refused to condone the delay, there was no appeal before him which he could hear and dispose of as provided under S. 31 of the Act."

This in substance is also the argument advanced on behalf of the Income-tax Commissioner by Mr. Ramarao Sahib.

(9) Considerable light is thrown on the question which we are considering in this reference by the decision of the Full Bench in 'K. Ananda v. Commissioner of Income-tax, B & O', 11 Pat 187. It was a case which arose under the old proviso to S. 30 barring a right of appeal in respect of an assessment order under S. 23(4). The observations of the learned Judges are in consonance with the principles laid down by the Privy Council in 'Income-tax Commissioner v. Khemchand Ramdas', 65 Ind App 236, already referred to. Courtney-Terrell C. J. observed at page 202:

"It is undoubtedly the duty of the Assistant Commissioner when the order of the Income-tax Officer comes before him on appeal to decide whether or not he is precluded by the Act from going into the amount or rate of the assessment or the liability of the assessee, and, if he is so precluded, he must reject the appeal. In so rejecting the appeal he is, in my opinion, under S. 31 'disposing of an appeal' and such disposal is a proceeding in connection with an assessment under this Act."

The observations of Fazl Ali J. (as he then was) are more pertinent. At page 215 the learned Judge states:

"The Assistant Commissioner did not summarily dismiss the appeal but fixed a date and place for hearing the assessee and after dealing with the point as to whether the assessee was liable to be taxed under the Act or not, confirmed the assessment on the ground that the assessment had been rightly made under S. 23 (4). The question is whether this order or decision was or was not one under S. 31. The learned Assistant Government Advocate contends that once it is found that no appeal lay to the Assistant Commissioner, the order passed by that Officer cannot be regarded as one passed under S. 31. Now S. 31 provides that the Assistant Commissioner may in disposing of the appeal confirm, reduce, enchance or annul the assessment or may set it aside and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit. In this case the Assistant Commissioner passed an order which is at least in form an order under S. 31. In passing the order the Assistant Commissioner also purported to act as the ordinary appellate authority and as far as I am aware there is no section in the Income-tax Act except S. 31 under which the order could have been passed. It appears to me, therefore, that the moment such an order is produced before the Commissioner of Income-tax, the assessee is entitled to ask him, if he so wishes, to refer such questions of law as arise out of it to the High Court under S. 66 (2) ..... Under S. 31, the Assistant Commissioner has the power to allow the appeal as well as to reject it and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not passed under S. 31."

Again at page 219 after referring to a decision of the Calcutta High Court under Art. 179 of the Limitation Act of 1877 which had to construe whether there has been an appeal as in 'Nagendranath De v. Sureshchandra Dey', 59 Ind App 283 (PC) the learned Judge adopts the reasoning in 'Wazir Mahton v. Lulit Singh', 9 Cal 100' and states:

"That case, it is true, was decided with reference to a wholly different Statute but the reasoning which was adopted there is, in my opinion, also applicable to this case and I think that where an appeal has been actually preferred to the appellate authority and where it has been disposed of by such authority, the order passed in such a proceeding may, without straining the actual words of the section, be regarded as an order under S. 31 or S. 32 as the cas may be."

The observations of Sir Shadi Lal in 'Duni Chand v. Commissioner of Income-tax', 10 Lah 596' which had the approval of the Privy Council were relied on. In a later case of the same Court in 'Gyan Manjari Kuari v. The Commissioner of Income-tax, B & O', 1944-12 ITR 59 (Pat), an appeal was rejected by the Appellate Assistant Commissioner on the ground that it was not in the prescribed form. It was held that the order of the Appellate Assistant Commissioner was within S. 31 of the Act and that the appeal was competent. Manoharlal, J., who delivered the judgment of the Court quoted 'in extenso' from the decision of the Full Bench in 'Kunwarji Ananda v. Commissioner of Income-tax, B & O.' 11 Pat 187, in support of his view. At page 65 occurs the following extract from Dhavle, J's. judgment which gives the basis of the decision:

"Where, however, the Assistant Commissioner holds that an appeal is barred by the proviso, (referring to the old proviso to S. 30), it has been urged by the learned Counsel for the income-tax Department that there is no order passed under S. 31 and that consequently the assessee is not entitled to resort to the provisions of Sub-sections (2) and (3) of S. 66 for coming up to the High Court on questions of law. It appears to me that this contention is unsound. If the order be not an order under S. 31, there is no other section in the Act under which it can come. It is true that S. 31 deals with the hearing of the appeals; but does this necessarily mean a hearing of the appeal on the merits."

(10) The view taken by the Patna High Court. in our opinion, for the reasons already mentioned is correct. Under the Civil Procedure Code, it was held that if an appeal was rejected either on the ground of limitation or for a similar reason that the order of rejection was appealable as a decree — See 'Ayyama v. Nagabhooshanam', 16 Mad 285, 'Zamindar of Tuni v. Bennayya', 22 Mad 155,

'Samintha Iyer v. Venkatasubba Aiyar', 27 Mad 21 in which 'Gulab Rai v. Mangilal', 7 All 42 was followed — See also 'Kanthimathi Ammal v. Ganesa Iyer', 59 Mad 805. But a Full Bench of our Court in 'Re: Kayambu Pillai', ILR (1941) Mad 954, held that an order dismissing an appeal for non-compliance of the order requiring security for costs and an order dismissing an appeal for non-payment of court-fee are not decrees and are not appealable as such. The decisions in 'Ayyanna v. Nagabhooshanam', 16 Mad 285, and 'Zamindar of Tuni v. Bunnayya', 22 Mad 155 were distinguished. There is a recent decision of Subba Rao, J., in 'Srinivasalu Naidu v. Commissioner of Income-tax', 1948-16 ITR 341 (Mad), which at first sight seems to be against the view which we have taken. The question which the learned Judge had to deal related to the construction of S. 33-A (2) of the Income-tax Act. The Commissioner is authorised by that section to exercise the power of revision but subject to certain restrictions provided in the section itself. The Commissioner has no power under that proviso to revise the order:

"(a) Where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal."

(11) In that case an appeal to the Appellate Tribunal under S. 33 against an order of the Apellate Assistant Commissioner was dismissed as time-barred. Thereafter the assessee applied to the Commissioner under S. 33-A (2) to revise the order of the Appellate Assistant Commissioner. He declined to entertain the application on the ground that the order of the Appellate Assistant Commissioner had already been made the subject of an appeal to the Appellate Tribunal. The assessee then applied to the High Court under S. 45 of the Specific Relief Act for directing the Commissioner to hear and determine the question. The objection raised was that the order of the Appellate Assistant Commissioner was made the subject of an appeal to the Appellate Tribunal though it was dismissed as being out of time and therefore the Commissioner could not be compelled to exercise the power of revision under S. 33-A (2). In the context in which the expression occurs it is clear that the bar to the exercise of the revisional jurisdiction was the actual pendency of an appeal before the Appellate Assistant Commissioner, or that there was a disposal on merits by the Appellate Tribunal and therefore it should not be again made the subject of revisional jurisdiction of the Commissioner. It was therefore rightly held by the learned Judge, if we may say so with respect, that a mere dismissal of an appeal 'in limine' on the ground of limitation did not attract the bar to the exercise of the revisional jurisdiction and therefore a mandamus was issued. Reference was made in that judgment to the decision of Madhavan Nair, J., in 'Bayya Reddi v. Gopalarao', 57 Mad 741 and of the Judicial Committee, in 'Nagendranath De v. Sureshchandra De', 59 Ind App 283. The decision, in our opinion, does not support to any extent the contention of Mr. Rama Rao Sahib. In 'Boya Reddi v. Gopalrao', 57 Mad 741, no doubt the appeal memorandum was rejected as being out of time and the view that there was no appeal within the meaning of Art. 182 (2) of the Limitation Act was based on the fact that under the Madras Amendment which introduced new Sub-section 3 to Rule 1 of Order XLI Civil Procedure Code, it was necessary to decide the application under S. 5 of the Limitation Act to excuse the delay before the appeal is admitted. The view therefore taken by the learned Judge in that case can be justified on the ground. But that does not help the contention of Mr. Rama Rao Sahib.

(12) We are therefore of opinion that the order of the Appellate Assistant Commissioner rejecting the appeal was one under S. 31 of the Income-tax Act and was appealable to the Appellate Tribunal. The question referred to us must therefore be answered in the affirmative and in favour of the assessee. As the assessee has succeeded in this reference, he is entitled to his costs which we fix at Rs. 250. (To be shared by the respondents between them.)

C.R.K./V.R.B. *Reference answered.*

A. I. R. (39) 1952 Madras 237 *[C. N. 104.]*

BASHEER AHMED SAYEED J.

Paledugu Nagaratnamma, Petitioner v. Kogant Seetharamamma (minor) and others, Respondents.

Civil Revn. Petn. No. 1947 of 1949, D/- 10-9-1951.

Civil P. C. (1908), Ss. 151 and 152 — Amendment of judgment and decree — Judgment silent as to interest — Decree in accordance with judgment — No appeal or review filed — Judgment and decree cannot be amended.

Where the judgments as well as the decree drafted in accordance with the judgment does not provide for payment of interest on the unpaid purchase money which the plaintiff was ordered to pay to the defendant and the defendant has not appealed against it or applied for review of the judgment, an application for amendment of the judgment and decree under Ss. 151 and 152 Civil P. C. by inclusion of such interest is not maintainable as it cannot be said that there has been an accidental slip or omission which could be rectified under Ss. 151 and 152. The failure to provide for interest in the judgment must be taken to have been deliberate and the implication would be that the Court refused it. Moreover, the decree not being at variance with the judgment the defect if any, could not be remedied under Ss. 151 and 152. (*Para 1*)

Anno: C.P.C., S. 152 N. 2, 3 N. 6 Pts. 7, 8, 9.

D. Munikanniah, for Petitioner; V. Subramaniam and P. Sithikanta Sastry, for Respondents.

ORDER: The point that arises for consideration in this civil revision petition is whether the learned Subordinate Judge was right in having declined to amend the decree and judgment in order to provide for the payment of interest on the unpaid purchase money directed to be paid by the plaintiff to the 1st defendant. The judgment as well as the decree drafted in accordance with the judgment did not provide for payment of any interest on the unpaid purchase money. The first defendant took out an application to amend the judgment and decree in order that such a provision may be made by the Subordinate Judge. The application was made under Ss. 151 and 152 C.P.C. and the learned Counsel for the petitioner urges that under S. 55(4) of the T. P. Act his client was entitled statutorily for payment of interest on the unpaid purchase money directed to be paid to her

under the judgment and decree. I do not think that it can be denied that interest should have been provided for on the unpaid purchase money both in the judgment and decree. But when that has not been provided, the question arises as to what is the procedure that the petitioner was entitled to have recourse to in order to get this omission rectified. He should have, in the first instance, preferred either a review or an appeal against the judgment and decree which failed to provide for interest on the unpaid purchase money which he was entitled to under S. 55(4) of the T. P. Act. He did not choose to do so and he allowed nearly 4 or 5 years to elapse before he could think of asking the Court to make the necessary amendment in the decree and judgment of the Court. When once the judgment is silent with regard to the provisions for payment of interest on the unpaid purchase money and the decree also is drafted in accordance with the said judgment, it cannot be said that there has been any omission or slip or accidental error that could be rectified under Ss. 151 and 152 C. P. C. The failure to provide for interest in the judgment must be taken to have been deliberate and the implication would be that the Court refused to provide for interest. It cannot be assumed that the Court was ignorant of the provision of law referred to by the learned counsel for the petitioner. On the other hand, the necessary inference warranted under the provisions of the Civil P. C. would be that the learned Judge who passed the judgment and decree did not think it fit or proper to award interest on the unpaid purchase money. However, that be, in so far as the decree is not at variance with the judgment and in so far as the learned counsel for the petitioner has not approached the Court by way of a review or even by way of an appeal to set right the omission to give him the interest which he was entitled to under the statute, I do not think the defect could be remedied by means of an application under Ss. 151 and 152 C. P. C. In these circumstances I must hold that what the learned Subordinate Judge has done is the right thing and there is no error of law or jurisdiction in the order that has been passed by the learned Subordinate Judge rejecting the application of the petitioner. This petition is therefore dismissed. In the circumstances I do not think there need be any order as to costs.

Revision dismissed.

C.R.K./K.S.

A. I. R. (39) 1952 Madras 238 *[C. N. 105.]*

SATYANARAYANA RAO AND RAGHAVA RAO, JJ.

M. P. Venkatachalapathy Iyer and S. K. Sundaramanier and Co. — Applicants v. The Commissioner of Income-tax, Madras, Respondent.

Referred Cases Nos. 65 and 66 of 1946, D/- 2-1-1951.

† *Income-tax Act (1922), S. 10 (2) (XI) (XV) — Embezzlement by servant of assessee.*

The assessees were a registered firm and carried on business as yarn merchants. One 'R' a former clerk of their firm was entrusted with manifold duties. He wrote account books, acted as salesman, received and disbursed cash in the absence of the managing partner and collected bills. In May 1941 it was discovered that he had embezzled a total sum of Rs. 36,298-3-6 during the period between 17th October 1939 and 24th October 1940. In June 1941, a criminal prosecution was launched against him and about the same time a civil suit for the recovery of the amount was also instituted. As a result of the intervention of certain mediators, the matter was compromised between the assessees and 'R' in August 1941 and he paid in full settlement of the claim of the applicants a sum of Rs. 16,250. The amount now claimed as a deduction from the income was the difference between the total amount embezzled and the amount paid by 'R' under the compromise.

'Held' (Per Satyanarayana Rao, J.) That (1) it was impossible to treat an amount misappropriated by a clerk as an expenditure for the purpose of a business under S. 10 (2) (xv) (old Cl. XII). (2) The amount in dispute could not be treated as a loan made by the assessees to 'R' and therefore it was not a debt. To claim a debt as a bad debt it must be shown that when it was a good debt, it went to swell the assets of the business in calculating the profits and it must be further shown that it was in fact a loan made in the course of the business. If these essentials are not established, it cannot be treated as a debt and cannot be claimed as a deduction if it becomes bad under S. 10 (2) (xi.) (3) (Per Satayanarayana Rao and Raghava Rao, JJ); the embezzlement was in the course of trade and was incidental to the business and it could therefore be legitimately treated as a trade loss deductible from the profits. The loss did not occur at the moment when the monies were misappropriated and taken away by 'R', but only when after discovery of the loss in May 1941, the assessee took steps to recover the amount from 'R' and obtained a large amount in settlement of the claim and the balance was then found to be irrecoverable. 'Case law discussed.' (Paras 6, 7, 16, 21)

Anno: Income-tax Act, S. 10, N. 1, 12, 13.

M. Subbaraya Aiyar and T. V. Viswanatha Iyer, for Applicants, C. S. Rama Rao Sahib; for Respondent.

Cases referred to:

(Arranged in order of Courts and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('32) 59 Ind App 290: (AIR (19) 1932 PC 178) (Prs 22, 25, 37)
('30) 53 Mad 904: (AIR (17) 1930 Mad 808 FB) (Prs 18, 19, 33, 34)
('40) 1940-8 ITR 69 (Mad) (Pr 22)
('49) 1949-17 ITR 247 (Orissa) (Prs 19, 20)
('25) 4 Pat 385: (AIR (12) 1925 Pat 408) (Prs 17, 20)
('38) AIR (25) 1938 Pat 159: (17 Pat 102) (Pr 20)
(1906) 5 Tax Cas 215: (1906 A C 448) (Pr 34)
(1919) 12 Tax Cas 232 (Pr 36)
(1919) 12 Tax Cas 227: (1919-2 K B 444) (Pr 34)
(1925) 9 Tax Cas 319: (94 L J K B 655) (Prs 12, 16, 18, 26, 28, 32, 33, 34, 35)
(1937) 21 Tax Cas 252: (1937-3 All E R 468) (Pr 23)
288 U S 156: 77 Law Ed 670 (Prs 23, 38)

SATYANARAYANA RAO, J.: The Income-tax Appellate Tribunal referred the following two questions to this Court for its opinion:

1. Whether in the circumstances of the case the sum of Rs. 21,372/- could in law be treated as a loss in the account period of the assessment year 1942-43 and if not;
2. Whether this sum could be deducted as an expenditure under Section 10 (2) (xii), or as a bad debt under S. 10 (2) (xi), of the Income-tax Act.

The assessees, who are the applicants, are a registered firm and carry on business as yarn merchants. They were assessed to income-tax for the assessment year 1942-43 (the accounting year ending with 12th April 1942) in which they claimed that they were entitled to deduct out of the income a sum of Rs. 21,372. The basis of the claim for de-

duction is that the amount represented the loss sustained by them as the result of embezzlement by one Rajarathnam Aiyangar, a former clerk of their firm. In such capacity the clerk was entrusted with manifold duties. He wrote account books, acted as salesman, received and disbursed cash in the absence of the managing partner and collected bills.

(2) The amounts received and spent by him in the course of the day used to be noted on slips of paper by him and he would hand over the slips with the cash balance in his hands to the managing partner at the close of the day. He maintained also cash chitta of transactions conducted by him including collections and expenses. In May 1941 it was discovered that he had embezzled a total sum of Rs. 36,298-3-6 during the period between 17th October 1939 and 24th October 1940. The 'modus operandi' adopted by him to embezzle the money was: while he entered the transactions faithfully in the books maintained by him, in totalling the receipts and payments of each day, he short-totalled the receipts and over-totalled the payments and prepared a statement of daily cash balance on the basis of such wrong totals and the cash actually handed over at the end of the day to the managing partner was only the cash as per the cash balance statement prepared by him on that basis. He pocketed therefore each day the difference between the actual balance on the basis of the correct totals and the balance as per the statement of cash prepared on the basis of wrong totals.

(3) The particulars of the amounts so misappropriated during the period are set out in the order of assessment of the Income-tax Officer. Misappropriation by short-totalling receipts, misappropriation by over-totalling payments, misappropriation by carrying forward wrong totals and various other heads amount to Rs. 36,298-3-6. The suspicion of the managing partner was aroused in October 1940 and Rajanathnam Aiyangar absented himself from his work and ceased to be an employee of the firm in November 1940. In June 1941, a criminal prosecution was launched against him and about the same time a civil suit for the recovery of the amount was also instituted. As a result of the intervention of certain mediators, the matter was compromised between the assessees and Rajarathnam Aiyangar in August 1941 and he paid in full settlement of the claim of the applicants a sum of Rs. 16,250. The amount now claimed as a deduction from the income is the difference between the total amount embezzled and the amount paid by Rajarathnam Aiyangar under the compromise.

(4) The Income-tax Officer refused to recognise the deduction of the amount as a loss on the ground that the assessees failed to establish the embezzlement. On appeal the Appellate Assistant Commissioner practically agreed with that finding of the Income-tax Officer. The Appellate Tribunal, however, differed from this finding and found as a fact that the embezzlement of Rs. 36,298-3-6 was true. But the Tribunal refused the claim to deduct the amount on the ground that the loss did not fall during the accounting year as, according to it the loss had occurred in the year 1939-40, i.e., previous to the accounting year. The assessees rested their claim also on the ground that it was a permissible deduction as a head of an expenditure or bad debt; but this contention was not accepted by the Appellate Tribunal.

(5) The two questions referred to us cover the same ground, viz., whether the amounts could be treated as a trade loss in the accounting period of the assessment year or at any rate, whether it can be treated as an expenditure under S. 10 (2) (xii) or as bad debt under S. 10 (2) (xi).

(6) The last two contentions may be disposed of first. The reference to S. 10 (2) (xii) in the question as framed is to the present Clause (xv) of S. 10 (2) which was introduced after certain alterations in 1946 by the Indian Income-tax (Amendment) Act, 1946. That clause requires, to claim an amount as a permissible deduction under the head of expenditure, that it should be made out as expended solely and exclusively for the purpose of such business, profession or vocation. It is impossible to treat an amount misappropriated by a clerk as an expenditure for the purposes of a business. No serious attempt was made on behalf of the assessees to argue the contrary. Under Clause (xi) of S. 10 (2), in order to constitute a bad debt, it must be a loan advanced in the ordinary course of business. The amount in dispute cannot be treated as a loan made by the assessees to Rajaratnam Aiyangar and therefore it was not a debt.

(7) No doubt, when the misappropriation was discovered in May 1941, this amount was entered in the accounts as a debit against Rajaratnam Aiyangar at the end of the previous accounting year and it was eventually argued before the Appellate Tribunal that as it was debited in the previous accounting year, it was converted into a debt due from the clerk to the assessees and as it became a bad debt to the extent of Rs. 21,372 in the accounting year now under consideration, it should be allowed as a deduction. To claim a debt as a bad debt it must be shown that when it was a good debt, it went to swell the assets of the business in calculating the profits and it must be further shown that it was in fact a loan made in the course of the business. If these essentials are not established, it cannot be treated as a debt and cannot be claimed as a deduction if it becomes bad. In fact, realising the defect, learned Advocate for the assessees did not press this contention.

(8) The only contention that requires serious and careful consideration is that it should be treated as a trade loss incurred during the accounting year and should be excluded from the profits of the year. Mr. Ramarao Saheb, learned Advocate for the Commissioner of Income-tax, took up the position that it was not in the first place a trade loss and that in any event, even if it was a loss, it was a loss sustained in the previous accounting year when the amount was actually intercepted by the clerk without allowing it to go into the till of the business. S. 10 (1) enacts that the assessee is liable to pay tax in respect of the profits or gains of any business carried on by him. Nowhere in the Act is the method of computation of the profits and gains of the business laid down and all that Section 10 (2), enacts is that the profits or gains should be computed after making the allowances enumerated in that Sub-section. The liability to pay income-tax under the Act in respect of a business is only on the profits and gains of the business and the meaning of the words "profits and gains" and the mode of their computation has been the subject-matter of decisions in England and India too numerous to be cited. It is well settled that profits and gains should be ascertained by ordinary, commercial principles of trading. Profits represent the surplus of trade assets over and above the disbursements and liabilities of the trade and this is the meaning which an ordinary commercial man would give to the words "profits and gains."

(9) The Legislature, after specifying the permissible deductions in S. 10 (2), has left the determination of the profits to be made in accordance with the principles well understood by business people. That is the reason why the trade loss to

be set off against the profits of the year is not specifically mentioned as an allowance. It must be remembered in this connection that every tax year is a self-contained period and the profits earned and the loss incurred during the particular year alone must be considered in order to arrive at the taxable profits. The previous year's and the subsequent year's profits or loss is wholly irrelevant for the purpose of computing the assessable income of a particular year. The allowances permitted under S. 10 (2) must generally be those incurred in the year in respect of which the income profits and gains are taken as the basis for assessment.

(10) It is not possible to give a precise definition of trade loss which can be set off against the profits of a tax year. In order, however, to constitute a trade loss, it must be either loss of the stock in trade or a loss incurred in the course of the business and as incidental to it. It is not every loss that has some reference to trade that can be considered as a permissible exclusion from the profits.

(11) If the business is of sufficient volume, it necessitates the employment of servants to look after its various parts. A trade cannot carry on his business without reposing confidence and trust in his servants and it is always a difficult question to decide whether embezzlement by people in whom such confidence is reposed can be treated as a trade loss. Except in the case of money lending business, it cannot be said that the defalcation entails a loss of the stock in trade. Whether it is a loss in the course of business and is incidental to it has of course to be determined on the facts and circumstances of each case as no general rule covering all cases can be laid down. The practice in England is stated by W. E. Snelling in the Dictionary of Income-tax and super-tax Practice, 5th Edn. 1923, page 231:

> "Embezzlement': If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as a deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed."

This practice is referred to also by Murray and Roger N. Carter in Guide to Income-tax Practice and Excess Profits Duty, 8th Edn. page 244:

> "Loss by embezzlement': A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem, and not one connected with, or arising out of, trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for income-tax purposes deemed an expense of the year in which it is written off in the books."

(12) In the Income-tax Law and Practice at page 73 Newport observes as follows:

> "Losses by Embezzlement': These will usually be incurred in the ordinary course of business, and will be allowed as incidental to the earning of the profits therefrom."

It seems to be a well established practice in England that loss of embezzlement is a permissible deduction. Of course, as pointed out by Snelling, the loss is allowed as a deduction only if the embezzlement can be said to be necessarily incurred in carrying on the trade and springs directly from the necessity of deputing duties to the various employees. The question whether the amount so appropriated was a trading loss and a permissible deduction from the profits for income-tax purposes, was considered by Rowlatt, J., in 'Curtis v. Oldfield Ltd.', (1925) 9 Tax Cas 319, where a managing director of a company who was in sole charge of the business of the company diverted the funds of the company for his personal use.

(13) The judgment of the learned Judge in my opinion deals with the question when a defalcation or embezzlement could be treated as a trade loss and when such diversion of monies unauthorisedly by an employee goes out of the ambit of trade loss. He draws the line of demarcation between the two situations and it seems to me that the statement of the law by the learned Judge is in consonance with the practice obtaining in England. He observes at page 330:

> "I quite think, with Mr. Latter, that if you have a business (which for the purposes of today at any rate I will assume) in the course of which you will have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all or something of that sort, that may be an expense connected with and arising out of the trade, in the most complete sense of the word. But here that is not this case at all. This gentleman was the managing Director of the company, and he was in charge of the whole thing, and all we know is that in the books of the company which do exist it is found that moneys went through the books into his pocket. I do not see that there is any evidence at all that there was a loss in the trade in that respect. It simply means that the assets of the company, moneys which the company had got and which had got home to the company, got into the control of the Managing Director of the company, and he took them out. It seems to me that what has happened is that he has made away with receipts of the company 'de hors' the trade altogether in virtue of his position as managing director in the office and being in a position to do exactly what he likes."

(14) What is it then, that makes the misappropriation or the interception of the funds of the company unauthorisedly by a subordinate a trade loss incurred in the course of the business? It is the employment of subordinates and the necessity to employ them and to entrust them with various duties including collection of monies that makes the loss a loss arising in the course of the business. The trade cannot be carried on without the employment of the servants and it is impossible to carry on the trade without reposing confidence in them. If, taking advantage of the situation in which they are placed and of the confidence reposed in them, they pocket a portion of the funds and intercept them without allowing such funds to reach the till, it follows that the loss incurred by such embezzlement is a loss in the course of the trade. If, however, — and this is the line of demarcation — the funds reach the till as in the case before the learned Judge (Rowlatt, J) and the monies, to use the language of the learned Judge:

> "had got home to the person entitled to their custody and control, and if thereafter, the funds are lost either by theft or by embezzlement, such loss is altogether outside the trade and the course of the business."

(15) In the present case, the money was intercepted & diverted by Rajarathnam Aiyangar before it reached the hands of the managing partner. He was entrusted with the duty of collecting funds and making disbursements and of maintaining the cash chitta with an obligation to account for the funds reaching his hands truly and faithfully to the managing partner at the end of the day and to hand over the balance. In violation of his duties and in breach of the confidence reposed in him, while he took care to see from the point of view of the customers that the entries are correctly made in the accounts, made wrong totals so as to cheat his master by representing that the

balance in his hands was much less than what is really was. The managing partner was induced into the belief that the totals in the account reflected the true financial position at the end of the day and took the balance handed over by Rajarathnam Aiyangar, trusting in his integrity. It was only when suspicion was aroused and an inquiry was made that it was discovered that he had embezzled this large amount.

(16) The till in this case is with the managing partner and it cannot be said that the temporary custody of the money with Rajarathnam Aiyangar constituted a till and the diversion of the funds by him was de hors the trade on the analogy of the facts in 'Curtis v. Oldfield Ltd.', (1925) 9 Tax Cas 319. The funds were not got home to the managing partner and did not come under his control as in the case of the managing director in the above case before the embezzlement was made. The decision of the learned Judge, if I may say so with respect, states in a short compass the law on the subject and defines with precision the limits when an amount embezzled becomes a trade loss and when it should be treated as outside the trade altogether. In view of this decision I have no doubt that in the present case, the embezzlement was in the course of trade and that it is incidental to the business and it can therefore be legitimately treated as a trade loss deductible from the profits.

(17) Of the decisions in India, 'Jagarnath v. Commissioner of Income-tax', 4 Pat 385, follows the English practice and holds that an amount embezzled by a gumastha of the assessee was a loss incidental to the conduct of the business and was a permissible allowance.

(18) If money is lost by theft it was held in this Court (by a majority of Judges, Ananthakrishna Aiyar J. however taking a different view) that it is not a permissible allowance, particularly when the theft was committed by persons who were not at the time of the offence in the employment of the assessee as his clerks or servants in the business — See 'Ramaswami v. Commissioner of Income-tax', 53 Mad 904. It is a case of money lending business and Curgenven J. held that in such a case, to establish loss, it must satisfy two conditions. It must be a loss of the part of the stock in trade of the business and it must be a loss of such a kind as is incidental to the business. The learned Judge had no difficulty in holding that there was a loss of stock in trade as it was money lending business but as regards the second requirement, he held that the money was not lost in the course of the business and as incidental to it. The learned Judge expressly confines his observations in the judgment to a case of theft by some external operator with or without the complicity of the domestic servants. On the facts of the case, the majority view is undoubtedly correct. In view of the practice in England which was accepted by Rowlatt J. that in cases where the business was not money lending business, the condition that there should be a loss of the part of the stock in trade of the business is not necessary. Even if the loss in the case of business other than money lending business is only of money lost in the course of and as incidental to the business, in circumstances which are within the line of demarcation drawn by Rowlatt J. in 'Curtis v. Oldfield Ltd.', (1925) 9 Tax Cas 319, it may be treated as a trade loss.

(19) In 'Bansidhar Onkarmal v. Commissioner of Income-tax, Bihar and Orissa', 1949 -17 ITR 247 (Orissa), the Orissa High Court dealt with a case of loss by theft of money of the business of selling yarn, speculation in cotton and money lending. The theft was by the accountant of the firm but was after the office hours. It was held that it was not a trade loss. Narasimham J. who delivered the leading judgment recognised however an exception when he observed at page 254 that the

> "position might have been quite different if the theft had occurred during office hours prior to the crediting of the sum to the account of the employer."

The implication of this, as I understand it, is that even if it is a case of theft, if it was committed by a servant or an employee during office hours, it would bring it within the course of the business and as incidental to it and therefore would have been a permissible allowance. The majority view in 'Ramaswami v. Commissioner of Income-tax, Madras', 53 Mad 904, was followed.

(20) The correctness of the decision in 'Jagarnath v. Commissioner of Income-tax', 4 Pat 385 was doubted in 'Mulchand Hiralal v. Commissioner of Income-tax, B & O', AIR (25) 1938 Pat 159; but as pointed out by Narasimham J. in 'Bansidhar Onkarmal v. Commissioner of Income-tax, B & O', 1949-17 ITR 247 (Orissa) the observations in the later Patna decision were 'obiter' and the later case was one of loss of money by theft. While criticising the judgment in 'Jagarnath v. Commissioner of Income-tax', 4 Pat 385, Courtney-Terrel C. J. in 'Mulchand Hiralal v. Commissioner of Income-tax', A I R (25) 1938 Pat 159 distinguished that case on the ground that it was a case of loss by embezzlement while the case before him was loss by theft. For the foregoing reasons, I have no hesitation in holding that the loss in question is a trade loss which is a permissible allowance in the computation of profits.

(21) But the question is when did the loss occur? Did it occur at the moment when the monies were misappropriated and taken away by the clerk, i.e., during the previous accounting year or did it arise only when after discovery of the loss in May 1941, the assessee took steps to recover the amount from the clerk and obtained a large amount in settlement of the claim and the balance was then found to be irrecoverable? Mr. Ramarao Saheb maintains that the former is the correct date of the accrual of the loss while Mr. Subbaraya Aiyar for the assessee maintains the latter. When the embezzlement was discovered, the assessees did not treat the amount as a loss but entered it in the account as a debit to the clerk. In that year of assessment, they did not claim the amount as a loss. But the income was computed and the assessment was made on the basis that that amount was a valuable asset. Notwithstanding this fact, the contention on behalf of the Income-tax Commissioner by Mr. Ramarao Saheb his learned advocate is that every item which goes out of the business by way of misappropriation by the clerk is an immediate loss without the necessity to wait and to take steps to recover the amount, if possible, from the clerk. Accepting the ordinary and popular connotation of the word "loss" it is rather difficult to say that the amount was lost the moment it was taken or misappropriated by the clerk. It is one thing to say that the amount was unauthorisedly appropriated by the clerk and it is a totally different thing to describe the amount so taken as a loss of the business.

(22) Loss implies that it is an amount which is gone for ever and it is impossible to recover it. The analogy of bad debts may be taken. It cannot be said that a debt becomes bad immediately it was advanced or immediately it was suspected that the debtor was not financially sound. The creditor has to establish that he had taken all available steps to realise the debt and that it was impossible to

recover it. The decision of this Court in 'Alagananda Mudaliar v. Commissioner of Income-tax, Madras', 1940 48 ITR 69 (Mad) relating to the insolvency of C. K. and Sons is an instance where it was held that the creditor is entitled to wait till the decision of the Privy Council which became necessary for settling the dispute with regard to certain matters before a debt is considered as bad debt and written off as such. It is not to be assumed by this that I am treating this loss as a debt and I have already given reasons for holding that it is not a debt. Before Cl. (xi) of S. 10(2) was introduced in the Income-tax Act making express provisions for bad debts, bad debts were excluded from the profits only as losses in trade as established by the decision of the Judicial Committee in 'Commissioner of Income-tax, C. P. & Berar v. S. M. Chitnavis', 59 Ind App 290 (PC). Of course, when exactly the loss is incurred and at what moment it became a loss is a matter which has to be determined upon a consideration of all relevant and admissible evidence.

(23) As in the case of a bad debt it cannot be said that until it is found that the clerk was unable to pay and it was impossible to recover the balance from him that the loss had been incurred by the business in this case. The mere entry in the accounts is of no consequence as what matters is the cash and not the entries in the accounts. The fact is that the amount became a loss only after the compromise and the moment the dispute was settled between the parties and Rs. 16250 was accepted in full settlement of the claim of the assessees against the clerk. Mr. Ramarao Saheb, learned advocate for the commissioner wishes to describe the situation as a loss and reimbursement or replacement of the loss for his contention is that the assessee should have claimed it as a loss in the previous accounting year and when the sum of Rs. 16250 was recovered from the clerk it could have been assessed as a trade receipt as in the case of money which the auditors paid to make up the loss by misappropriation incurred by Lord Penryhm in the case of 'Gray v. Lord Penryhm', (1937) 21 Tax Cas 252. The liability for the misappropriation by the clerk is a liability based on tort only. Such liability "does not create a certainty of loss", as, to quote the language in 'Burnett v. Huff', 288 U S Rep 156: 77 Law Ed 670 at p. 673,

> "the defalcation may be made good by the one who caused it or the liability of the tax payer may be enforced only to a limited extent or not at all. The requirement that losses be deducted in the year which they are sustained calls for a practical test. The loss must be actual and present."

(24) The facts in that case no doubt bear no analogy to the present case but the statement that the loss must be actual and present and must be certain cannot be taken exception to. In my opinion, it is only when the loss becomes acutal and certain that there can be an accrual of a loss and till then, it was merely a civil liability, of the clerk to pay back that amount based on tort. Until it is found that the liability though enforceable, it could not be materialised, it cannot be said that loss had occurred. I wish to make it clear that I do not by any means suggest that there was an unascertained loss at its inception which became certain and definite when the litigation was settled. But the point I wish to lay stress on is that until the settlement of the case by way or compromise, there was no loss at all. It was only then that the loss came into existence and accrued. It was then with definiteness and certainty the amount was known. I do not wish to refer to the other decisions which have been cited at the bar as in my opinion they are not of assistance in the solution of the questions which have been raised in the case. I am therefore of opinion differing from the Appellate Tribunal that there was a trade loss and that the loss had accrued only during the relevant accounting period. It follows that the first question referred to us must be answered in the negative and in favour of the assessees and the second question in the negative and against the assessees. As the assessees have succeeded in the main question, they are entitled to their costs which we fix at Rs. 250.

(25) RAGHAVA RAO J.: The only way, worth serious consideration, in which Mr. Subbaraya Aiyar represented his case was that the charging part of S. 10 of the Indian Income-tax Act which is sub-s. (1) operates only on profits and gains, in assessing which, as observed by Lord Russel of Killowen in the Privy Council in the case Sir S. M. Chitnavis', 59 Ind App 290 (PC) "account must be taken of all losses incurred as otherwise you would not arrive at the true profits and gains". That case related to a claim of deduction by the assessee of bad debts for which there was no provision in the statute as it stood at the time and would, in the submission of learned counsel, govern the present case with reference to the assessee's claim of deduction of the loss in question here as a trade loss even on the footing of the inapplicability of S. 10(2)(xi) and (xv) of the Act. Whatever the difficulty in the way of such interpretation of S. 10, sub-s. (1), in the absence at the opening of sub-s. (2) of words like "without prejudice to the generality of the provision of the foregoing sub-section" which might, if the matter were 'res integra', suggest that the allowances specified in the section cannot be added to, authority of the highest tribunal leaves us in the position that though there are several provisions in the Act relating to allowances and deductions, profits have still to be computed to some extent on general principles followed in commercial practice, subject to such modifications as are laid down in the cases decided in the realm of income-tax law.

(26) It seemed to me even in the initial stages of the argument on the bare statement of relevant facts by counsel that the position that the loss in question here was not a trade loss was so thoroughly unarguable that it would not be taken up by Mr. Ramarao Saheb. The position however was not only taken up but persisted in by him with his usual force by emphasis on the consideration that there had been no abstraction of funds here by means of wrong entries in the account books in the course of the business before the funds actually reached the till. Learned counsel urged that the till remained intact according to the account books which correctly reflected the receipts and disbursements notwithstanding the defalcation and that what loss the company sustained was incidental to the misconduct of the employee 'de hors' the trade. The argument is, in my opinion, clearly fallacious and, far from deriving any warrant from 'Curtis v. Oldfield Ltd.', (1925) 9 Tax Cas 319 relied on by learned counsel, rests on a total misapprehension of the decision as I shall presently show.

(27) The argument lays too much of emphasis on the appearances of correctness and too little of emphasis on the realities of incorrectness about the truth and fact of the financial condition of the company so far as it stands prejudiced by the misconduct of the employee. It overestimates the form and underestimates the substance of the defalcation. It identifies the resultant balance which the account books reveal with the till itself by a fiction which imports that if the former are correct the latter must be treated as sound and that all monies which have got into the make up of

the former must be deemed to have necessarily got into the contents of the latter. It overlooks too that the process of short totalling of receipts and overtotalling of items of expenditure by the employee as shown by slips of paper written on by him so as to mislead the manager and help himself to defalcation was resorted to by him in the ordinary course of his duties in connection with the company's business although in violation of such duties. It proceeds, in other words, on the assumption that no trade loss in the sense of a loss connected with and arising out of the trade can, for the purpose of deduction from profits under the Income-tax Act, be postulated so long as the account books maintained by the company suffer from no errors with reference to its receipts and disbursements, although, in fact, loss has been sustained by the company by reason of things done by the subordinates of the company dishonestly or negligently.

(28) Rowlatt J. was concerned in 'Curtis's case', (1925) 9 Tax Cas 319 with the question whether certain monies which had been passing through the company's accounts and "which were not the company's business but which were Mr. Oldfield's business" — Oldfield being the Managing Director of the company in charge of the whole thing could be allowed as either a bad debt or an expense connected with and arising out of the trade. As to the former head of allowance, the learned Judge rejects it holding that

> "when the Rule speaks of bad debt it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question and that is bad".

The learned Judge proceeding further observes:

> "It does not really mean any bad debt which when it was good debt would not have come in to swell the profits."

(29) Dealing next with the claim of allowance as an expense connected with and arising out of the trade, the learned Judge draws attention to a business in the course of which

> "you have to employ subordinates and owing to the negligence or the dishonesty of the subordinates some of the receipts of the business do not find their way into the till or some of the bills are not collected at all or something of that sort".

In each one of these cases, says the learned Judge, the expense may be one connected with and arising out of the trade in the most complete sense of the word. The abstraction of receipts while on their way to the till, it will be noticed, is not the only instance of negligent or dishonest conduct of the subordinates which justifies an allowance on the ground of "an expense connected with and arising out of the trade".

(30) In my opinion, the learned Judge must be taken, so far as his observation last extracted goes, to consider all losses attributable to the negligence or dishonesty of subordinates acting in the course of their employment in the trade as being deductible trade losses. The learned Judge then proceeds thus to distinguish the case before him from the illustrations referred to by him in that observation:

> "But here that is not the case at all. This gentleman was the Managing Director of the company and he was in charge of the whole thing, and all we know is that in the books of the company which do exist it is found that monies went through the books into his pocket. I do not see that there was any evidence at all that there was a loss in the trade in that respect."

Pausing there, I am of opinion that the learned Judge's reference to Oldfield's position as Managing Director does not imply that only trade losses for which subordinates and not Managing Directors, are responsible can come in for deductions. It was an accident of fact in that case that Oldfield was Managing Director. It was likewise an accident of fact that monies went through the books into his pocket. This does not involve that the loss cannot be regarded as a trade loss if monies did not go through account books as in that case but through slips of paper as here, into the pocket of the defalcator.

(31) The essence of the reasoning of the learned Judge is that there was on the evidence in that case no loss in the trade "in that respect", that is, in respect (a) that some of the receipts of the business did not find their way into the till, (b) that some of the bills were not collected at all, and (c) or something of that sort. Having said that, the learned Judge proceeded to observe thus:

> "It simply means that the assets of the company, monies which the company had got and which had got home to the company got into the control of the Managing director of the company and he took them out. It seems to me that what has happened is that he has made away with the receipts of the company 'de hors' the trade altogether in virtue of his position as Managing Director in the office and being in the position to do exactly what he likes".

A loss in the trade may befall a person or company carrying it on, although the account books by themselves may not reveal the loss, and no authority has been cited before us to the effect that if the loss is due to an embezzlement by an employee it cannot come in for deduction, because the mischief has been done in a manner incapable of detection by a mere scrutiny of the books. The process of embezzlement may sometimes be too highly refined or too cleverly veiled to be readily suspected or easily detected. It may, as here, be due to the implicit faith reposed in the integrity of the subordinate by the superior which keeps the latter off the track of vigilance which he ought to treat; but however practised and wherever proved the consequent loss must in ordinary fairness be allowed for.

(32) If a debt not collected by a subordinate who was bound to collect it can according to Rowlatt J. be treated as a loss in the trade, although the account books are quite in order, I am unable to see why a loss by embezzlement is not liable to be regarded as such loss merely because the accounts are, as to receipts and disbursements, apparently open to no exception. The learned Judge after instancing the two cases of failure of funds to reach their destination, the till of the company, and non-collection of debts due to the company mentions the third category in terms of "something of that sort", something 'ejusdem generis', it may be, with the two cases mentioned earlier but in terms sufficiently comprehensive to take in a case of loss due to negligence or dishonesty on the part of the subordinate, however occurring, if only occurring in the course of his employment and as incidental to the business, and not, as was the factual position in 'Curtis's case', (1925) 9 TC 319 'de hors' the trade.

(33) The way in which I am reading 'Curtis's case', (1925) 9 TC 319 is indeed the way in which the law is stated by Beasley C. J. though in different language to that of Rowlatt, J., at page 906 of the report of the Full Bench case in 'Ramaswami v. Commissioner of Income-tax, Madras', 53 Mad 904 which was a case of a theft of money used in a money lending business by persons who were not at the time of the offence employed as clerks or servants in the business of the assessee. Says the learned Chief Justice:

"If anyone is paid a sum due to him as profits and he puts that in his pocket and on his way he is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more so when he has reached his home and put those profits in a strong room or some other place regarded by him to be a place of safety. I can well understand that, in cases where the collection of profits or payment of debts due is entrusted to a gumastah or servant for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such servant may prove to be dishonest and, instead of paying the profits over to him, convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to his business".

(34) Curgenven J. in the same case observes as follows at pages 918 and 919 of the Report:

"That such a loss might be classed as a form of expense arising out of the trade was recognised in 'Curtis v. Oldfield Ltd.', (1925) 9 TC 319, although in the particular circumstances of that case, as I read it, the money lost no longer formed part of the stock-in-trade. The test whether the loss was, in the language of the English rule, 'connected with or arising out of trade' was applied in two other English cases, 'Strong and Co., Ltd. v. Woodifield', (1906) 5 TC 215 and 'Inland Revenue Commissioners v. Warnes and Co.', (1919) 12 TC 227. The former related to damages claimed from an inn keeper in respect of injuries caused to a customer by the falling of a chimney; the latter to a penalty incurred by a trading firm for negligently failing to observe certain conditions imposed during war time on the export of goods to neutral countries. The loss was held, in the language of the English rule, to be a loss 'not connected with or arising out of trade'. These cases do not help us further than to show what manner of test should be applied."

The view of law taken by the majority of the Judges in 'Ramaswami v. Commissioner, Income-tax, Madras', 53 Mad 904 is, in my judgment, perfectly correct, and applying it to the facts of the present case I have no doubt but that the loss under consideration now is an admissible deduction whether regarded as in the nature of unobstruction of monies before they reached the till or regarded as in the nature of "something of that sort" within the language of Rowlatt J. in 'Curtis's case', (1925) 9 TC 319 as explained by me earlier. I regret I cannot in these circumstances find myself in agreement with Mr. Ramrao Sahib's contention which proceeds, as I think, on much too narrow a view of what is or is not a trade loss liable to deduction from profits, viz., that it must be a loss which, on the face of the accounts, is so.

(35) Before parting with 'Curtis's case', (1925) 9 TC 319 it seems to me pertinent to observe that possibly the loss in question in the instant case can be regarded as "an expense connected with and arising out of the trade" in the language of Rowlatt J. so as to attract S. 10 (2) (xv) of the Indian Statute which is much to the same effect. The language of the learned Judge has not however left me happy, and with all respect I have felt that there is somewhat of a strain on expression involved in His Lordship's equation of "loss" with "expense" which cannot be easily appreciated or assented to. I do not desire therefore to express any final opinion on this point on which I do not feel quite so clear as that learned Judge, especially because it is unnecessary for me to do so for the decision of this case.

(36) I may remark too that though the principles underlying the deduction of business loss and business expenditure are almost the same, there is some difference in their nature. Loss is not deducted under any statutory authority but under commercial principles ordinarily adopted in arriving at profits. As Warrington L. J. has observed in 'Commr. of Inland Revenue v. Alexander Von Glehn & Co. Ltd.', (1919) 12 TC 232

"Trade loss is not always, — one may go further and say is not in general — measured by definite expenditure of money. Loss in trade may arise in many ways — from the depreciation of goods, from the increase or decrease of prices in the market and from many cases of that kind — which is not generally measured by some definite sum expended by the person carrying on the trade".

(37) Then as to the question in what year the loss must be taken to have occurred in the present case which I must confess has occasioned some doubt in my mind, I have after careful consideration arrived at a decision in favour of the assessee, firstly because that is more consonant on the whole to rules of practical expediency as well as fundamental justice, secondly because I find nothing in the language of the statute forcing me to a different result and thirdly because I think I must give the benefit of the doubt, wherever it exists, to the assessee. The argument for the Commissioner of Income-tax, is that for the purpose of computing income each year is a self-contained period of time as ruled by the Privy Council in the case of 'Sir S. M. Chitnavis', 59 Ind App 290 (PC) that the allowance of any expenditure incurred must therefore be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. So far, there is no quarrel on the part of counsel for the assessee.

(38) What next Mr. Ramarao Saheb contends is that the disappearance of cash from the company in the year in which that took place must be shown by the assessee as a deduction for that year, while if later the money came back the assessee would have to show it as a gain. This no doubt is perfectly intelligible process of reasoning in itself. What however Mr. Subbaraya Aiyar urges is that merely because the disappearance occurred in a particular year the assessee would not be bound to treat that as an irrecoverable loss for ever. He would be entitled, counsel urges, to wait for a reasonable time in order to take all steps open to him in law for the recovery of the amount. Should he be penalised, asks counsel, for taking all those steps in order to satisfy himself that the loss which occurred with the original disappearance was a permanent loss and if so to define for himself the exact quantum of the loss which he must face after all his efforts? The consideration by which the matter has to be reasonably judged is pithily put in 'Burnett v. Huff', 288 U. S. Rep. 156: 77 Law Edn. 670, at p. 783 in the passage quoted by my learned brother in his judgment, in this way, viz., "that the requirement that losses be deducted in the year in which they are sustained calls for a practical test."

(39) For the reasons given in the foregoing as well as in my learned brother's judgment I agree that the answer to the reference must go in favour of the assessee on the first question. I also agree in the order as to costs proposed by my learned bro-

ther I express no opinion on the second question, as I find it unnecessary to do so, in view of my answer to the first.

C.R.K./D.H. *Answers accordingly.*

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* A. I. R. (39) 1952 Madras 245 *[C. N. 105 (1).]*

SATYANARAYANA RAO AND RAJAGOPALAN, JJ.

Aravamudha Iyengar, formerly a minor since declared major and his guardian discharged, Appellant v. Ramaswami Bhattar and another, Respondents.

Appeal No. 731 of 1947, D/- 24-9-1951.

(a) Hindu Law — Adoption — Widow — Assent by sapinda given in belief that widow had authority given by her deceased husband — It is not valid assent.

The assent of a sapinda to an adoption should be one given by him in the exercise of an independent judgment irrespective of the question whether or not the widow had also authority to adopt from her husband. The sapinda has to decide for the widow the propriety and the expediency of introducing an heir to the deceased husband. Where a sapinda gave his assent believing that the husband also gave an authority to adopt, such an assent is not valid to support an adoption. 2 Mad 270 (PC); 30 Mad 50 (PC) and 26 Mad 627, Relied on. (Para 4)

†* *(b) Hindu Law — Adoption — Power to adopt Minor under Hindu Law cannot give authority to adopt or himself adopt — Minority ends on completion of 16th year whether male or female — (Hindu Law — Minority.)*

Minority under Hindu Law comes to an end on the completion of the 16th year. This rule applies to males and females, to the act of adoption as well as to an authority empowering the widow to make an adoption. If the person giving the authority to the widow to adopt or the person adopting is below the age of majority recognised and established by Hindu law, the adoption will be invalid. (Para 24)

It is impossible to accept the test of deciding the question on the facts of each case in order to come to a conclusion whether or not the person making the adoption was capable of understanding the nature of the act and of forming an independent judgment uninfluenced by extraneous pressure. It will be introducing an uncertain element into the law of adoption which, if possible, should be avoided. AIR (5) 1918 Mad 1072; 1 Cal 289 (PC), Relied on. Case law and Texts reviewed. Bombay view not followed. (Para 23)

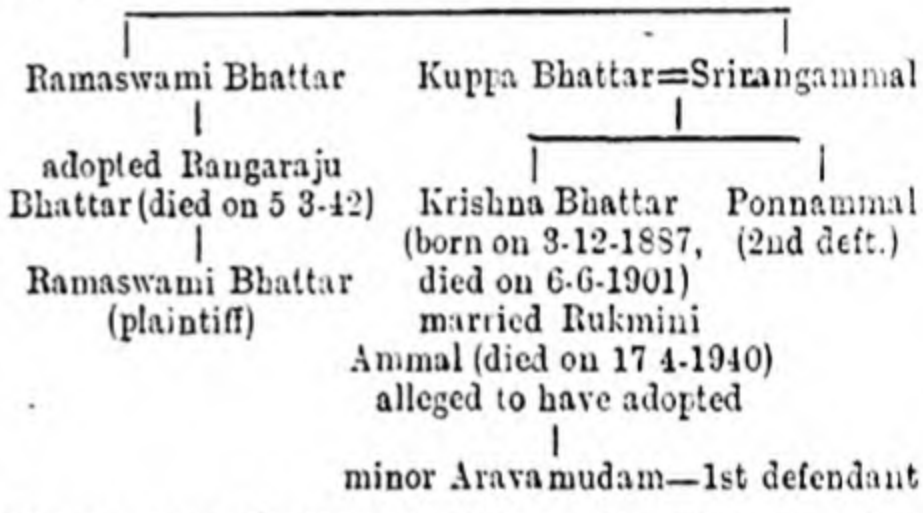
T. M. Krishnaswami Iyer and R. Rangachari, for Appellant; T. V. Muthukrishna Iyer, T. A. Anantha Iyer, D. Ramaswami Iyengar and P. S. Srinivasa Desikan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('63-66) 10 Moo Ind App 279: (3 W R 15 PC) (Prs 10, 11)
('75-76) 1 Cal 289: (3 Ind App 72 PC) (Prs 14, 15, 16, 18, 19, 23)
('76-78) 1 Mad 69: (3 Ind App 154 PC) (Pr 4)
('78-80) 2 Mad 270: (7 Ind App 173 PC) (Pr 4)
('81) 6 Cal 381: (7 Ind App 250 P C) (Pr 12)
('07) 30 Mad 50: (34 Ind App 22 PC) (Pr 4)
('18) 41 Mad 855: (AIR (5) 1918 PC 74) (Pr 11)
('33) 12 Pat 642: (AIR (20) 1933 PC 155) (Prs 7, 12)
('47) 1947-2 Mad L J 39: (AIR (34) 1947 PC 124) (Pr 12)
('91) 15 Bom 565 (Pr 16)
('02) 26 Bom 526: (4 Bom L R 315) (Pr 11)
('19) 43 Bom 481: (AIR (6) 1919 Bom 107) (Pr 16)
('20) 44 Bom 327: (AIR (7) 1920 Bom 354) (Pr 16)
('22) 46 Bom 307: (AIR (9) 1922 Bom 105) (Pr 16)
('42) ILR (1942) Bom 782: (AIR (29) 1942 Bom 284) (Prs 17, 19)
('68) 1 Beng L R 49: (10 W R 36 FB) (Pr 19)
('71) 15 W R 548 (Prs 14, 15, 16)
('75-76) 1 Cal 108 (Pr 19)
('91) 18 Cal 69 (Prs 15, 16, 19)
('82) 5 Mad 358 (Pr 12)
('88) 11 Mad 5 (FB) (Pr 12)
('90) 13 Mad 214 (Pr 19)
('95) 18 Mad 397: (5 Mad L J 66) (Pr 12)
('03) 26 Mad 627: (13 Mad L J 239) (Pr 4)
('17) 40 Mad 925: (AIR (5) 1918 Mad 1072) (Pr 19)
('46) ILR (1946) Mad 755: (AIR (33) 1946 Mad 308) (Pr 12)

JUDGMENT.: The first defendant whose adoption has been declared invalid by the Sub-Court, Tiruchirapalli, is the appellant before us. The following pedigree explains the relationship between the parties:



Ramaswami Bhattar and Kuppa Bhattar were two brothers. The plaintiff is the grandson of Ramaswami Bhattar. The plaintiff's father Rangaraja Bhattar died on the 5th March 1942. Kuppa Bhattar had a son Krishna Bhattar and a daughter Ponnammal, the second defendant. Krishna Bhattar was married to Rukmani Ammal. Krishna Bhattar was born on the 3rd December 1887 but died on 6th June 1901. On the date on which he died, he executed what purports to be a will but what was in fact an authority to adopt, a registration copy of which has been marked as Ex. P. 3 in the case. At the time of his death, Krishna Bhattar was below 14 years of age. The will was presented for registration after his death by Srirangammal, his mother, on 6th August 1901. There was an elaborate enquiry after due notice to the parties by the Sub-Registrar, who however, by his order dated 30th October 1901, refused to register it. There was an appeal to the District Registrar, and on 22-2-1902, he directed registration of the will as a result of a compromise between the parties. On the 18th March 1940 by Ex. D. 5, there was an attempt to settle the dispute between Rangaraja Bhattar and Rukmani Ammal, and on that date, an unregistered family settlement deed was executed. It is common ground that the terms of that settlement however were not carried into effect and the settlement did not become effective. On the 22nd March 1940, Rukmani Ammal adopted the first defendant, purporting to act on the authority conferred on her by her husband under the will Ex. P. 3. She in her turn executed a will on 12-4-1940. She died on 17-4-1940. The father of the plaintiff was alive for about two years and the present suit was instituted by the plaintiff for a declaration that the adoption of

the first defendant by Rukmani Ammal was invalid and never in fact took place.

(2) In the Court below the genuineness of Ex. P. 3 was disputed and it was also contended that Krishna Bhattar was not in a sound disposing state of mind at the time of the execution of the deed on 6th June 1901. The factum of adoption was also denied. The main question, however, on which the controversy centred was about the validity of the authority conferred by Krishna Bhattar at the time when he was below 14 years of age. The learned Subordinate Judge found that the factum of adoption was established, and that Krishna Bhattar executed Ex. P. 3, with a full knowledge of its conents, and that it was genuine. He, however, declared the adoption invalid on the ground that Krishna Bhattar was a minor and was not competent to confer an authority to adopt on his widow. An attempt was made on behalf of the appellant in the Court below to support the adoption on the ground that Rangaraja, as the nearest sapinda then alive, consented to the adoption; but this attempt failed.

(3) In this appeal by the first defendant, the main question argued by Mr. T. M. Krishnaswami Aiyar, his learned Advocate, was that the authority conferred by Krishna Bhattar was valid. He made a faint attempt to support the adoption also on the ground that irrespective of the authority of Krishna Bhattar, the adoption was on that (?) ground valid. The respondents did not challenge before us the findings of fact which were against them. The argument, therefore, proceeded on the ground that the findings of fact of the lower Court regarding the genuineness of Ex. P. 3 and the factum of adoption are correct.

(4) We may dispose of the contention that Rangaraja consented to the adoption first as it does not present any difficulty. The unregistered family settlement deed, Ex. D. 5, dated 18th March 1940, was relied on in support of the contention. That document sets out the previous disputes regarding the will and that Rangaraja agreed not to dispute the will in consideration of Rukmani Ammal giving him property worth Rs. 4,000 out of the properties of Krishna Bhattar. In consideration of that Rangaraja promised not to put forth "any claim to the other movable and immovable properties belonging to the said Krishna Bhattar" and consented:

> "that the 2nd individual shall take all the steps necessary for the propagation of her family in accordance with the terms of the will left by Krishna Bhattar and that he would also be present and assist in the accomplishment of that object."

It is common ground that the terms of this family settlement were not carried out; but it was contended that the passage above extracted amounts to an independent consent on the part of Rangaraja to the adoption. It is impossible to accept this contention. All that Rangaraja agreed to do under that clause was that he would help the lady in carrying out the terms of the will of Krishna Bhattar by taking all necessary steps for the propagation of the family and to accomplish that object. There is no language suggesting that Rangaraja intended to assent to the adoption independently of the existence of the authortiy contained in the will of Krishna Bhattar. It has now been authoritatively established that the assent of a sapinda to an adoption should be one given by him in the exercise of an independent judgment irrespective of the question whether or not the widow had also authority to adopt from her husband. The reason for this is obvious. As has been pointed out repeatedly by the Judicial Committee, the sapinda has to decide for the widow the propriety and the expediency of introducing an heir to the deceased husband. Where a sapinda gave his assent believing that the husband also gave an authority to adopt, it was held that such an assent was not valid to support an adoption; See 'Sri Virada Pratapa Deo v Brozo Kishoro', 1 Mad 69 (PC), 'Ganesa Ratnam Iyer v. Gopalaratnam Iyer', 2 Mad 270 (PC); 'Venkamma v. Subramaniam', 30 Mad 50 (PC); affirming 'Subramaniam v. Venkamma', 26 Mad 627. It is impossible to infer from the language of Ex. D. 5 that there was an independent assent of Rangaraja to the adoption of the first defendant by Rukmani Ammal. We have no hesitation therefore in rejecting this connection.

(5)) The only important question therefore that arises for serious consideration in this appeal is whether the authority of Krishna Bhattar, a boy below 14 years of age at the time, was valid. Krishna Bhattar was undoubtedly a minor as he was under the age of 18 on the date he gave the authority to adopt, if minority is to be determined with reference to the Indian Majority Act, IX of 1875. S. 2 of that Act however contains exceptions. The section enacts that:

> "Nothing herein contained shall affect:
> (a) the capacity of any person to act in the following matters, (namely) — marriage, dower, divorce and adoption."

In respect of marriage, dower, divorce and adoption therefore, the capacity of a person to act has not to be determined with reference to the age of majority fixed by the Indian Majority Act. The personal law of the parties must therefore determine the age at which a person is entitled to act in the matter of adoption. This position was admitted by the appellant.

(6) The argument, however, strenuously pressed before us was that adoption under Hindu law being essentially a religious institution, if a person is qualified to perform a religious act or partake in a religious ceremony, or in other words, "attained ceremonial competency", he is entitled to adopt or even give an authority to adopt irrespective of his mental capacity; that is, irrespective of the question whether he is able to comprehend or not, the import and the consequences of the act he is performing. In the case of 'Dwijas' (twice born person), the right to perform a religious act or partake in a religious ceremony, competency is acquired by the performance of upanayanam. Krishna Bhattar before his death had not only his upanayanam performed but also his marriage, and therefore he was perfectly competent to do a religious act such as the adoption by himself, notwithstanding his age and was equally competent to confer an authority to adopt on his wife Rukmani Ammal. So ran the argument. When pressed with the question, whether he would draw the limit at any particular age, learned counsel for the appellant stated that this competency would synchronise with the age at which upanayanam is to be performed among 'dwijas.' As stated by various Smriti writers, this age of upanayanam is eight years computed from the date of conception in the case of Brahmins, 11 years in the case of Kshatriyas and 12 years in the case of Vysias. As Sudras are not entitled to have upanayanam performed and partake in any religious ceremony, this limit would not apply. As a last resort, counsel for the appellant stated that without drawing any arbitrary line and fixing any particular age as the age of discretion, it must be decided as a question of fact in each case whether or not the boy or the minor widow was capable of understanding and appreciating the act he or she was performing. If he had attained sufficient maturity of under-

standing to comprehend the nature of the act he was performing irrespective of the age, he was entitled either to take a boy in adoption or confer an authority to adopt on his wife, and on the evidence it was contended that there was no difficulty in the case of Krishna Bhattar as he was undoubtedly of mature understanding.

(7) We may now examine the authorities cited by learned Counsel for the appellant to see whether they lend any support to the position taken up by him. The decision on which strong reliance was placed by him as supporting his position is that of the Judicial Committee in 'Amarendra Mansingh v. Sanatan Singh', 12 Pat 642 (PC). This decision, it was claimed, revolutionised the law of adoption and has once for all firmly and clearly established that the adoption under Hindu law is a religious institution in which no secular element enters. It is true that according to Hindu conception of religion, there is life after death which makes it incumbent upon those living in this world and related to the deceased to perform such daily and annual ceremonies as are conducive to the spiritual welfare of the deceased. It is not enough merely to perform, but it is also obligatory to provide if possible for the continued performance of such ceremonies without break by leaving a person, natural or adopted, who would carry on the religious duties. A text of Sruti says:

जायमानो ह वै ब्रह्मभिर्यि त्रिभि ऋनवान् जायते ब्रह्मचर्येण ऋषिभ्यो यज्ञेन देवेभ्यः प्रजया पितृभ्यः एषो अनृणी यः पुत्री यज्वा ब्रह्मचारी च ॥

(A Brahmana on being born becomes a debtor in three obligations: to the Rishis (who are propounders of the sacred books) for Studentship (to peruse the same); to the Gods for Sacrifices; to the Paternal ancestors, for progeny; he is free from the debts, who has son, who has performed sacrifices and who has studied the Vedas.)

(8) If a person has not the fortune of having a son of his own loins (an aurasa son), the law permits the adoption of a son. A text of Atri says:

अपुत्रेणैव कर्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदकक्रियाहेतोः यस्मात् तस्मात् प्रयत्नतः ॥
पितापुत्रस्य जातस्य पश्येत् चेत् जीवतो मुखम् ।
ऋणं अस्मिन् समर्पति अमृतत्वं च गच्छति ॥
जात मात्रेण पुत्रेण पितृणां अनृणीभवतः
तदर्हि मुक्तिमाप्नोति नरकात् त्रायते हि सः ॥
एतस्याः बहवः पुत्राः यद्येकोपि गयां व्रजेत् ।
यजेतवाश्वमेधेन नीलं वा वृषभुत्सृजेत् ॥

(by a sonless person only, should always a substitute of a son be anxiously made, for the sake of funeral oblations liberations of water and obsequial rites. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born, the father becomes absolved from the debts to paternal ancestors; on that day he acquires purity, since the son saves from the infernal regions. Many sons are to be secured, if even one may go to Gaya, or celebrate the horse sacrifice or dedicate a Nila bull.)

(9) It is this religious basis of the adoption which is referred to by Sir George Lowndes at page 649 of the report.

(10) In order to correctly appreciate the importance of the decision and the principles enunciated by the Judicial Committee, it may not be out of place to notice the background of the decision. Ever since the decision of the Judicial Committee in 'Bhoobun Moyee v. Ram Kishore', 10 Moo Ind App 279 (PC), Courts in India were unable to evolve a satisfactory limit to the power of adoption which a widow possessed either under the authority of her husband or with the assent of sapindas. It was thought that if the estate was not vested in the adopting widow but in a collateral, the limit to the power had been reached, though even there an exception was recognised in the case of vesting of property in a coparcener after the death of the deceased husband of the widow. This point of view undoubtedly emphasised and attached too much importance to the secular aspect of the adoption. Some of the pronouncements of the Judicial Committee themselves lend support to that view. The whole question was elaborately and critically examined by Sir George Lowndes in the decision under consideration. The dispute in that case related to the succession to the Dompara Raj: an impartible zamindari in Orissa. The parties were Kshatriyas and were governed by the Benares School of Mitakshara law. One Raja Brajendra was the holder of the estate till 1903. On 20th July 1898, the said Raja executed a deed of authority in favour of his wife Indumati. After the execution of the deed, the said Raja had a son Bibhudendra who succeeded to the estate of his father after his death in 1903. As he was then a minor, the estate came under the Court of Wards. Bibudendra died on 10th December 1922 unmarried and was about the age of 20 years and six months at that time. He was a minor as the estate was under the Court of Wards and he did not complete the 21st year. Immediately after the death of the natural son, Indumati adopted the appellant Amarendra in pursuance of the authority conferred upon her by her husband. The adoption was disputed by a sapinda of Bibhudendra on various grounds. But we are now concerned only with the contention that the Rani's power of adoption came to an end and became extinguished with the death of Bibhudendra inasmuch as he had attained full legal capacity to continue the line and therefore the adopted son Amarendra could not divest the estate which became vested in the reversioner, the collateral heir. The two lines of argument were advanced before the Judicial Committee on behalf of the reversioner. The first was that with the vesting of the estate by devolution in Banamali the reversioner, the power of the widow terminated and became extinguished. In any event, as Bibhudendra attained full legal capacity to continue the line, the power of the widow Indumati terminated.

(11) As regards the first contention, the decisions beginning with 'Boobhun Moyee's case', 10 Moo Ind App 279 (PC), were considered by their Lordships of the Judicial Committee. The conclusion arrived at was that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family or an outsider claiming by reverter, or, their Lordships added, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. It was observed that the Hindu law itself did not set any limit to the exercise of the power and that there was no warrant in any of the texts of Hindu law to justify the imposition of a restriction based on considerations of property. The necessity, however, of drawing the line was imperative and the question was where the line should be drawn. Here

again, religious importance of the son, natural or adopted, enters into consideration. None of the decisions examined by the Judicial Committee, it was stated by Sir George Lowndes, warrant the assumption made in some of the decisions that the limit is reached when the property passed to another.

"The true reason must be: to quote their Lordships: "that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the moher's power is gone. But if the son die himself sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive."

It is not enough merely to leave a son behind in order to terminate the power of the mother to make the adoption. In that case Bibhudendra was 20½ years and undoubtedly attained the age of discretion; but the continuance of the line by him became impossible as he himself left no son as he was unmarried and did not even leave a widow who could have continued the line by making an adoption to her husband. The limit therefore would be reached unless and until there is in existence a person capable of continuing the line either by birth of by a son to himself or if he left a widow, by an adoption by her. The "full legal capacity test" enunciated by the Judicial Committee in the second Berhampore case 'Madanamohana v. Purushotham', 41 Mad 855 (PC), which was based upon the view of Chandavarkar, J., in 'Ram Krishna v. Shamrao', 26 Bom 526, does not mean mere mental capacity and it is not enough to terminate the power of the widow to establish that the last male person in the line attained the full age of discretion and therefore acquired the full legal capacity. Nor can the expression "full legal capacity" be equated to ceremonial competence, i.e., an expression vague enough but probably meant to convey the idea of competency to perform a religious act or the acquisition of necessary qualification to perform it. "Full legal capacity" therefore according to the Judicial Committee means something more than mere age of discretion or even ceremonial competence. The full legal capacity to continue the line means continuance of the line in one of two ways (i.e.,) either by leaving natural or adopted son, or a widow capable of bringing into existence a son by adoption. The test is to find out whether these conditions existed at the time of the son's death. If they did not exist, the power did not terminate. If they existed the power came to an end and may in certain circumstances, e.g., if the son's widow dies without making an adoption, the mother's power may be revived. If the object of adoption is the religious one of perpetuating the line with a view to make a permanent arrangement for the administration of the spiritual wants of the deceased, the object is not achieved when the continuance of the line came to a standstill. There must be some power somewhere to continue the line and if the person lower down dies without providing for the continuance of the line, the power of the person higher up revives and continues. Extinction of a line is considered by the Hindus as something very ignominous. The necessity to continue the line is the necessity of the future not of this world but of the other world. This decision, therefore, in our opinion emphasis the importance of adoption from a religious point of view but does not altogether exclude the secular element in it.

(12) The object of adoption is one and the act of adoption itself is another. If the object of adoption is religious it does not necessarily follow that the act of adoption is also entirely religious without secular element in it. We are not now concerned with the object of adoption but with the act of adoption itself and the question whether any and if so to what the extent mental capacity is required to perform the act of adoption. Ceremonial competence does not, in our opinion, warrant the assumption that the Judicial Committee intended to do away with any requirement as to mental capacity in the matter of adoption. Bibhudendra in that case was more than 20 years old but the power of adoption of Indumati did not terminate as Bhibhudendra did not leave a son or widow. The view that the adoption is more a temporal than a spiritual institution was again reiterated by the Judicial Committee in 'Ramasubbayya v. Chenchuramayya', 1947-2 Mad LJ 39 (PC) following the opinion of Sir George Lowndes in 'Amarendra Mansing v. Sanatan Singh', 12 Pat 642 (PC.) These two decisions, however, were not concerned with the question which we have now to decide. There is no particular rule laid down under Hindu law relating to adoption either with reference to mental capacity required or to the age of majority. The whole of the law of adoption, it may be observed, was evolved from a few texts and a metaphor. The texts are those of Manu, Vasishta, Bahudayana, and the metaphor is that of Saunaka who laid down that the adopted boy must bear the reflection of a son ('putra chhaya.) Most of it has been evolved by judicial decisions. It cannot, however, be gainsaid that the act of adoption consists of two elements, 'the giving and taking' (i.e.,) the giving of the boy by the parents and the taking of the boy by the adopter and the performance of 'datta homam.' Giving and taking imply that the filial relationship in one family is snapped and is created in another. The act of adoption is the act of creating the relationship of son by satisfying the requirements of Hindu law. Of these, it cannot be disputed that the giving and taking of the boy is the most essential part of adoption. The religious ceremony of 'datta homam' is not obligatory in all cases, as for example in the case of Sudras, who are not competent to perform any religious ceremony, and even in the case of Brahmins if they belong to the same gotra, it is not essential as laid down in 'Govindayyar v. Doraiswami', 11 Mad 5 (FB). In that case, the decision of the Judicial Committee in 'Shoshinath Ghose v. Krishnasundari Dasi', 6 Cal 381 (PC) was taken as authority for the proposition that any overt act is not sufficient to constitute adoption. There must be a corporeal delivery of the child by the person "competent to give to a person competent to take accompanied by the declaration on the one side, 'I give the child in adoption' and on the other 'I take the child in adoption." At page 7 it is furher observed that that:

"decision shows further that in laying down the rules the Judicial Committee had before them what actually takes place when a formal adoption is made with ceremonies and that they rejected as superfluous the merely ceremonial observance as contra distinguished from the specific 'secular act' and declaration which constitutes the form in which the intention to give and take is manifested during the ceremonial."

That the acceptance of the child is a secular act is further emphasised by the fact that even during pollution though a person cannot perform a religious ceremony, he is entitled to accept a gift of a child and where 'datta homam' is necessary, it may be supplemented after the period of pollution

Muthuswami Iyer and Best, JJ., observed in 'Santapayya v. Rangapayya', 18 Mad 397 that pollution is only:

"a bar to a religious act and renders religious ceremonies inefficacious but a gift and acceptance are secular acts and may therefore be supplemented by 'datta homam' after the expiration of the period of pollution."

Among Sudras, no religious ceremony is necessary and an adoption even during pollution is valid. In their case all that is necessary is the gift and acceptance of the child to bring about the filial relationship of an adopted son; see 'Thangathanni v. Rama Mudali', 5 Mad 358 and 'Annapurnamma v. Manikyamma', ILR (1946) Mad 755.

(13) The view taken in the above decisions is in accordance with the rules laid down for adoption by the texts. Baudhayana lays down (पुत्रपरिग्रहविधिम्) (Putra Parigraha vidhim), i.e., the rules for the adoption of a son. The adopter goes to the giver of the child and addresses a request to them "give me thy son." The other answers "I give" and the adopter accepts the gift परिगृह्णाति (Parigrihati) saying धर्मेवित्वा परिगृह्णामि (for the fulfilment of religious duties I receive), सन्ततयैत्वा परिगृह्णामि (to continue the line I take), see pages 24 to 28 of Yagnavalkya Smriti, Book I Achara Adhyaya, translated by Srisa Chandra Vidyarnava; see also, the ritual of 'datta homam', in 2, Stranges Hindu Law, p. 218 taken from Datta Mimamsa of Savara Swami communicated by the late Mr. Ellis. The secular act, therefore, of acceptance of a gift of the child to bring about the filial relationship is an essential element of the act of adoption. The object no doubt is a spiritual object and it should not be however confounded with the act itself. The essentials of the act are distinct from the object of the act. It is this failure to draw the distinction between the two that has enabled learned counsel for the appellant to contend that as the Privy Counsel have said that adoption is a spiritual institution, no requirement of any mental capacity is laid down or is enjoined.

(14) Of the other decisions cited, at the bar a brief notice of them is all that is required. In 'Rajendro Narain v. Sarada Soondaree', 15 W R 548 Dwarkanath Mitter, J., laid down that the adoption by a person who had attained the age of discretion though he was a minor, was valid. He does not however lay down the age at which according to Hindu law, a person attains years of discretion. He also emphasises that the adoption is a religious act and the necessity for the adoption is as stated by him, that as every childless Hindu is deemed sure to go to hell called "put" there was an obligation to adopt a son which is almost imperative as a matter of religious duty among Hindus. In 'Jumoona Dassya v. Bamasoondari Dassaya', 1 Cal 289 (PC), the Judicial Committee held that adoption by a lady of the age of 15 or 16 and therefore of an age, which according to the law prevalent in Bengal is to be regarded as the age of discretion, was valid. They did not however decide whether the age of discretion is to be taken as the completion of the age of 15 or 16 as in either view, the requirement as to the attainment of the age of discretion, was satisfied in that case. It is contended, however, that this decision is no authority for holding that a person making an adoption even though a minor should have attained a particular age in order to establish that he had attained the age of discrtion. The authority is reduced by this argument as merely deciding the case on the facts and evidence in that case and as not enabling us to evolve any rule of law. It is difficult, however, to accept this contention in view of the categorical statement of the Judicial Committee at page 295 of the report.

(15) In 'Mondakini Dasi v. Adinath Dey', 18 Cal 69, the person who gave the authority to adopt was a man of full age but the person who exercised that authority, that is the widow, was a minor within the meaning of the Indian Majority Act. In fact, she was about 11 or 12 years old. If the authority to adopt by the husband specified the boy to be adopted, there is nothing further to be done by the widow which required the exercise of her judgment; but she had only to carry out her husband's wishes by making the adoption. Reference was made in that case to the decision in 'Rajendro Narain v. Sarada Soonduree', 15 W R 548. 'Jumoona Dassya v. Bamsoondari', 1 Cal 289 (PC), and the omission in those decisions to indicate the meaning of the age of discretion. The learned Judges, however, observed that there is nothing to indicate that the widow had not attained sufficient maturity of understanding to comprehend the nature of the act. The decision in Mac-Naghten's Precedents of Hindu Law in which the Pandits' opinion was to the effect that the adoption by the widow, in pursuance of the express permission of her husband was a perfectly valid adoption was referred to. In upholding the adoption, emphasis was laid on the fact that the boy taken in adoption was definitely named in the authority given by the husband as the person to be adopted and that therefore the minority of the widow who exercised the authority could not affect the legality of the adoption. This decision may perhaps be supported on the ground that though the widow making the adoption was only 11 or 12 years old, no exercise of discretion on her part was required in the circumstances of the case.

(16) Some decisions of the Bombay High Court on this point were also referred to by learned counsel for the appellant. The first was the decision in 'Vandravan Jekisan v. Manilal Chunilal', 15 Bom 565. The husband to whom the adoption was made by the widow was below the age of 16 years at the time of his death. The widow who made the adoption was a major. Under the law obtaining in Bombay a Hindu widow is entitled to make an adoption to her husband without his permission and even without the consent of sapindas unless the adoption was expressly prohibited by the husband. The adoption was contested on the ground that the authority could not be implied in the case of a husband who died while yet a minor in the eye of the law. The decision of Mitter, J., in 'Rajendro Narain v. Sarada Soonduree', 15 W R 548 approved by the Privy Council in 'Jumoona Dassya v. Bamsoondari', 1 Cal 289 was relied on as laying down that if the person adopting, though a minor under the Indian Majority Act, if he had attained the age of discretion which enabled him to perform religious ceremonies prescribed for his salvation, he would be competent to make an adoption and in the case before the learned Judges, they presumed such a discretion on the part of the husband as he died two months before he attained the age of 16 when he would have ceased, even in the eye of the law, to be a minor. The reference in this observation to majority in the eye of the law is necessarily to the majority under Hindu law and not under the Indian Majority Act. 'Basappa v. Sidramappa', 43 Bom 481, was a case which raised the question of the competency of a girl of 15 years of age to make an adoption to her deceased husband. Here, the question was not with reference to the age of the husband making the adoption or giving the authority to adopt but a case of a widow making

an adoption for her husband. With reference to the determination of the question, it was considered immaterial whether it was the husband that made the adoption or the widow. It was pointed out that the decisions in 'Bajendro Narain v. Sarada Soonduree', 15 W R 548, 'Jumoona Dassya v. Bamasundari Dasya', 1 Cal 289 (PC) and 'Mondakini Dasi v. Adinath Dey', 18 Cal 69, did not indicate the meaning of the expression "age of discretion" used in those cases. The adoption was however upheld on the ground that there was nothing to show that at the date of the adoption, the widow had not attained sufficient maturity of understanding to comprehend the nature of the act and that in fact she was about 15 years of age. Under these circumstances, there was no reason to presume that a girl of that age who had been married for two years or more and lived with her husband did not realise what was meant by taking a son in adoption. This decision again proceeds on the peculiar facts of the case and enunciates no definite test except to say that if the person making the adoption was of sufficient age to comprehend the nature of the act that he or she was performing, it would be sufficient, to validate the adoption. In 'Murugappa v. Kalawa', 44 Bom 327 the adoption was held invalid when made by a widow 12 years of age who did not reach the age of puberty. Macleod, C. J., emphasised the necessity of the requirement that the adopting widow should reach such an age of discretion as to be able to realise the importance of the act and to make up her mind as to the person sought to be adopted. As the act of adoption was of considerable importance, the actual age of the widow, says the learned Judge, may be another test and probably the most important one. If she was unable to understand the nature of the act and if adoptions made by such people were to be upheld, it would open the door to all sorts of intrigue so that the older members of the family would be in a position to induce widows of tender age to make adoptions in their own interests and not in the interests of the widow. The learned Chief Justice clearly attaches great importance of the requirement regarding the mental capacity of the person adopting to comprehend the nature of the act and to be in a position to select the boy. The observations of Heaton J. in the judgment may not be correct in the light of later decisions but he also concurs with the learned Chief Justice in holding that the person making the adoption must be in a position to exercise his or her volition. Macleod C. J. and Justice Shah had to consider again the same question in 'Parvatava v. Fakirnaick', 46 Bom 307, in which case the widow was 12½ years of age at the time she made the adoption. The learned Chief Justice referred to his earlier decision in 'Murugappa v. Kalava', 44 Bom 327, and added that it is not sufficient that the girl was exceptionally intelligent to comprehend the nature of the act, but that she must also be in a position to resist the influence which the elders would exercise and naturally exercised upon her actions. The adoption by a girl of 12½ years was held to be not valid. This decision again is important as emphasising the necessity of the person making the adoption to exercise an independent judgment in the matter of the adoption and if so exercised, there should be a maturity of understanding.

(17) Lastly, there is the recent decision of the same Court in 'Kashinath Balkrishna v. Anant Murlidhar', ILR (1942) Bom 782 decided by Broomfield and Sen JJ. The adoption was by a person who was 14 years and 7½ months of age at time of the adoption. The validity of that adoption was in issue. Broomfield J. who delivered the leading judgment in the case after a consideration of the earlier authorities of that and other Courts, expressed himself thus at page 795 on the effect of the decisions:

> "I think it is clear from these cases that according to the view taken by this High Court, there is no hard and fast rule that an adoption by a youth or girl who has not completed the age of 15 years is necessarily invalid. On the contrary this Court has regarded the question of the possession of the necessary understanding and discretion as a question of fact to be determined on the evidence in the particular case. Since we have found in the present case that Bhanudas had sufficient maturity of understanding to comprehend the nature of the act of adoption and its consequences, we think there is no rule of law which requires us to hold that the adoption was invalid."

The Bombay High Court, has not considered whether under the Hindu law, there is an age of majority fixed as no reference was made in any of the decisions of the texts bearing on the question. They considered it sufficient to lay down that the decision in each case must rest upon the evidence relating to the capacity and the power of understanding of the person making the adoption whether it is a boy or a girl. The Bombay decisions, however, do not support the extreme contention urged on behalf of the appellant that a consideration of the mental capacity of the person making the adoption was wholly irrelevant and that all that is required is competency to perform a religious ceremony. If that is established, according to the appellant, the adoption would be valid irrespective of the power of understanding of the person making the adoption.

(18) No doubt the decisions of the Bombay High Court support the contention of the appellant to this extent that the question of the capacity should be determined on the facts of each case, of course taking into consideration the age and the other factors bearing on the question. The Bombay High Court did not treat the decision in 'Jumoona v. Bamasoondari', 1 Cal 289 (P C), as laying down the limit of minority at 15 or 16 and according to the decisions, there is no such limit prescribed under Hindu law.

(19) In our Court, Sadasiva Aiyar J. considered the question in 'Sathiraju v. Venkataswami', 40 Mad 925. The facts in that case were: One Subbarayudu died in 1907 having executed a registered will shortly before his death under which he gave authority to his widow Viyyamma then 11 years old to make an adoption. A few months after the death of Subbarayudu, the widow, while yet a minor, made an adoption. It was found in that case that in the matter of adoption, Viyyamma did not exercise any discretion of hers as she was only 11 years old and her father acted on her behalf and practically gave her no opportunity to exercise her own discretion and did not even consult her about the desirability of adopting a boy. Both the learned Judges, Oldfield and Sadasiva Aiyar JJ. agreed in finding that Viyyamma was not consulted in the matter of the adoption. Both the learned Judges were also agreed on the atuhority of the decisions in 'Ranganayakamma v. Alwar Setti', 13 Mad 214 and 'Mondakini Dasi v. Adinath Dey', 18 Cal 69, that there should be a sufficient maturity of understanding to enable the widow to comprehend the nature of her act; but Oldfield J. did not deal with the question of the age of majority under the Hindu law. The point was considered further by Sadasiva Aiyar J., though obiter elaborately. According to the learned Judge, the age of majority under

the Hindu law, for both males and females commences at the age of 16 प्राप्ति तु षोडशेवर्षे i.e., on the completion of the 15th year and reliance was placed for this position on the decision in 'Mothoomohun Roy v. Soorendra Narain Deb', 1 Cal 108 at p. 114 and 'Madhusudhan Manji v. Deb Govinda Newgi', 1 Beng L R 49. The learned Judge relied also on the decision of the Privy Council in 'Jamoona Dasya v. Bamosoondara Dasya', 1 Cal 289 and the opinion of Jogeshchandra Ghosh in Hindu Law at page 851 where the learned author points out the difference of opinion between the Bengal and Benares writers regarding the age of majority under Hindu Law. According to the Bengal writers, the age of majority is the beginning of the 16th year or the completion of the 15th year while according to the Benares writers it is the end of the 16th year. The opinion of Mr. Ghose at page 584 was also quoted to establish that the act of taking in adoption is not only a religious act but also a legal transaction, vyavahara and one who has not attained the age of 16 is incapable of validly entering into such a transaction. He then quotes from Gopalachandra Sarkar Sastri's Tagore Law Lectures on Hindu Law of Adoption where the learned author also expressed the view in consonance with the opinion of the writers of Bengal. The observation of the learned Judge, though obiter, is entitled to highest respect though on one point there is room for difference of opinion. In 'Mayne's Hindu Law, latest edition at page 193 the law thus summarised:

> "It is well settled that a person who is a minor under the Indian Majority Act can adopt or authorise his widow to adopt when he has attained the age of discretion according to Hindu Law. In 'Jamoona v. Bamasoondari', 1 Cal 289, the Privy Council held that the age of 15 or 16 was, according to the law prevalent in Bengal, to be regarded as the age of discretion. It corresponds to the age of majority which is fixed by the Dayabhaga School at the completion of the fifteenth year. According to the Mitakshara School, it is completion of he sixteenth year. It may be the same for the Mitakshara School also, as it is quite possible to interpret the relevant rule as meaning the completion of the fifteenth year."

Then occurs a passage in that paragraph which it is very difficult to reconcile with the earlier statements in that paragraph. If the Hindu Law had fixed the majority at 15 or 16 as the case may be, there is no room for fixing the age of discretion arbitrarily or with reference to other considerations. The learned author says in the same paragraph:

> "The age of discretion cannot certainly be fixed earlier than the completion of the fourteenth year since the Legislature now treats a girl below 14 as a child for purposes of marriage. The age of discretion must be fixed by the Law. Where it is not so fixed, it can only be treated as a question of fact in each case."

The last sentence is apparently based on the view taken by the Bombay High Court in 'Kashinath Balakrishna v. Anant Murlidhar', ILR (1942) Bom 782.

(20) In our opinion, the age or majority under Hindu Law is fixed either at the completion of the 15th year or at the completion of the 16th year as the case may be whether one accepts the Bengal view or the view of other text writers which will be adverted to presently. In the present case the boy was below 14 and therefore it is really immaterial whether the age of majority is taken as the completion of the 15th year or the 16th. The act of adoption contains the most essential element of the selection of a boy and the acceptance of the gift of the boy which are undoubtedly acts of a secular nature. The adoption no doubt also is a religious act; but the 'vyavahara' or the secular element in it cannot be ignored. In order to perform a legal transaction, Hindu law requires that the person should have attained the age of majority without which there is no validity for the transaction. Whether the adoption is made by a male or whether he gives an authority to adopt to his widow or even if the widow makes the adoption either under the authority of her husband or after obtaining the assent of the sapindas, the act can be done and the authority can be given only if the person attained majority according to Hindu Law. Otherwise, the act is invalid.

(21) No doubt there is no text of Hindu Law specifically dealing with the act of adoption and laying down the limit for the age of minority. But there are indications in other branches of Vyavahara law fixing the age of majority. The leading authority which has been quoted with approval by most of the commentators is that of Narada. In dealing with the question of the liability to pay debts he says:

> गर्भस्थैः सदृशो ज्ञेयः आष्टमाद्वत्सराच्छिशुः ।
>
> बाल आषोडशाद्वर्षात् पौगण्डश्चति शब्द्य ।
>
> परतो व्यवहारज्ञः स्वतन्त्रः पितराऋते ।

"(A child is comparable to an embryo up to his eighth year. A youth, who has not reached the age of sixteen, is called Poganda. Afterwards he is no longer a minor and independent, in case his parents are dead)."

(22) The dictionary meaning of the word Pouganda is "not full grown, a boy under sixteen years of age". पोगेण्ड means "infant, not under sixteen years of age". In the text of Narada cited above आषोडशात् वर्षत् is used. The expression आषोडशात् is also used by Gauthama in defining the limit of the age for upanayanam. According to Smriti writers, upanayanam for a Brahmin should be performed in the 8th year from conception. Gautama says (upanayanam Brahmanasya shatame.) उपनयनं ब्रह्मणस्य अष्टमेand 11 years for Kshatriyas and 12 years for Vysias. Then it is stated by Gautama (A Shodashatbrahmansya Apatita Savitri) आषोडशात् ब्राह्मणस्यापतिता सा वत्री. Haradatta in commenting on this verse states that the letter आ in आषोडशात् denotes आभिविधि i.e., the limit i.e., upanayanam can be performed till the last day of the 16th year. The expression therefore in Narada's text आषोडशाद्वर्षात् must receive a similar interpretation and must include the 16th year as well and not until the 16th year or up to the 16th year i.e., the completion of the 15th. In commenting on verse 50 of Yagnavalkya's Smriti "Rina Dana Prakarana", Vignaneswara points out that the debt need not be paid before the arrival of vyavaharakala अप्राप्त but it should be paid after the vyaharakala had arrived. Then in order to fix the vyavaharakala he cites the text of Narada already quoted. In commenting on this commentary Subodhini says पौगण्डश्चेति शब्दत इति। षोडशवर्षानन्तरं स्वतन्त्र इत्यर्थः।
After the expiry of 16 years स्वतन्त्र भवति इति and Balambhatti says that पौगण्ड is the same as बालः and he also adds Shodasavarshaturdhwam षोडशवर्षात् उर्ध्वं that the son attains independence if there is no father. It is therefore clear from these texts that a person attains competence for vyavarhara according to Hindu law after the completion of the

16th year. Mr. Ganapathi Aiyar in his book on Hindu law at page 415 and the following pages has collected the texts bearing on the question. The attention of the learned Judge Sadasiva Aiyar J. was not apparently drawn to some of these texts and he was willing to accept the view of the Bengal writers. Colebrooke in his Digest of Hindu law, refers to the text of Narada and agreeable to the Bengal view, he thinks that the minority must end with the 15th year as declared by Katyayana. Priyanath Sen a very eminent authority on Hindu law in his jurisprudence deals with this question at pp. 299 and 300 and states as his opinion:

"Having regard to the context, the best interpretation seems to me to lead to the conclusion, that minority extends till the end of the sixteenth year, although Srikrishna Tarkalankara in his commentary on the Dayabhaga appears in one place to take the opposite view."

A person who is minor under Hindu law is considered incapable of entering into any legal transaction as stated by the learned author. The opinions of Ghosh and Sarkar Sastri on Adoption have been cited in extenso by Sadasiva Aiyar J.

(23) Ceremonial competency or the qualification to perform a religious rite can never be the test. In the case of 'dwijas', after upanayanam is performed a person becomes competent to perform religious rites though he may not be qualified to perform religious sacrifies until marriage. The lower limit of the age for upanayanam, i.e., 8, 11 and 12 according as the person is a Brahmin, Kshatriya or a Vysia. It is rather difficult to assume that a boy of that age would be capable of understanding the legal implications of affiliating a son to himself. After upanayanam, studentship commences and continues until the period when he becomes a snathaka fit to enter into a married life. His studies are then finished. Though it is now settled by decisions that a bachelor is entitled to adopt, according to strict conception of Hindu law, it would be illogical to think of a bachelor producing a son of his own or entering into a grahasthasrama as it were, by adopting a son to himself. During the period of studentship, he is incompetent to perform even 'datta homam' puthreshti, as it is a sacrifice which requires the presence of a wife. The ceremonial competency does not carry with it the necessary mental equipment for a person to form an independent judgment in the matter of affiliating a son to himself. It is therefore difficult to accept the extreme contention urged on behalf of the appellant without any binding authority for this view if accepted would lead, as pointed out by Sarkar Sastri in his Law of Adoption, "pushed to its logical consequences this theory would justify the adoption even by a boy of eight years and the Hindu legislators were not 'devoid of commonsense as to contemplate such an absurdity.'" No doubt the learned author added an addenda at page 215 A citing instances of adoptions by minors which came to his knowledge during his professional career but that contains only a passionate plea for reform in that direction and does not in any way alter or affect the opinion already expressed by him in his lectures. The age limit, therefore, cannot be drawn at the point where a 'dwija' becomes competent to have the upanayanam performed and this contention does not suggest any limit of age in the case of sudras who are not qualified to perform any religious ceremony involving the recitation of sacred texts. To accept the text so strenuously pressed by learned advocate would lead to the serious consequences of young people being brought under the influence of elders who, to further their own interests, would force adoptions upon them. Such a danger must necessarily be avoided. In view of the above texts and of the opinions of text writers and also the obiter dicta of Sadasiva Aiyar J. in 'Sathiraju v. Venkatasami', 40 Mad 925 and the decision of the Judicial Committee in 'Jumoona Dassya v. Bamasoondari Dasya', 1 Cal 289 it is impossible, in our opinion, to accept as did the learned Judges of the Bombay High Court the test of deciding the question on the facts of each case in order to come to a conclusion whether or not the person making the adoption was capable of understanding the nature of the act and of forming an independent judgment uninfluenced by extraneous pressure. It will be introducing an uncertain element into the law of adoption which, if possible, should be avoided.

(24) In our opinion, therefore, minority under Hindu law comes to an end on the completion of the 16th year. This rule applies to males and females, to the act of adoption as well as to an authority empowering the widow to make an adoption. If the person is below the age of majority recognised and established by Hindu law, the adoption will be invalid.

(25) For these reasons, in our opinion, the view taken by the learned Subordinate Judge in the Court below that the authority given by Krishna Bhattar when he was below 14 years of age was invalid and that the adoption of the first defendant by Rukmani Ammal is also invalid was correct. The decree, therefore, of the lower Court must be confirmed and the appeal is dismissed with costs of the first respondent.

C.R.K./R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 252 *[C. N. 105 (2).]*

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Chenna Satyavathi and another, Petitioners v. The State of Madras, represented by the Collector of West Godavari.

Writ Petn. No. 429 of 1951, D/- 16-10-1951.

Constitution of India, Art. 31 — 'Public purpose' — Acquisition for providing house sites for Adi Andhras is for public purpose.

Acquisition of land by Government for making provision for house sites for the houseless section of the community (Adi Andhras) would be an acquisition for a public purpose within the meaning of Art. 31 of the Constitution. *(Para 2)*

T. S. Narasinga Rao and E. Balachandrudu, for Petitioner.

ORDER: The petitioners attack the validity of the proposed acquisition of lands including lands of an extent of 95 cents belonging to them for the purpose of providing house sites for the Adi Andhras, of a village in West Godavari District. The only point pressed before us is that provision of house sites for Adi Andhras is not a public purpose within the meaning of Art. 31 of the Constitution, because in effect the result of the acquisition is to transfer property belonging to a certain individual to certain other individuals. We do not agree with this contention. From several provisions of the Constitution, it is clear that making provision for the advancement and development of the Harijan community is one of the avowed objects of the Government, both of the States and of the Union.

(2) It follows that making provision for house sites for the houseless section of the community would be a public purpose within the meaning of Art. 31 of the Constitution. The application is therefore dismissed.

C.R.K./K.S. *Application dismissed.*

A. I. R. (39) 1952 Madras 253 *[C. N. 105 (3).]*

RAJAMANNAR C. J. AND
VENKATARAMA AIYAR J.

S. Ramakrishnaiah, Petitioner v. The President, District Board, Nellore and others, Respondents.

Civil Misc. Petn. No. 12219 of 1950, D/- 19-10-1951.

Constitution of India, Art. 19(1)(c) — Madras G. O. 416 Education D/- 24-2-39 — Validity.

The rules contained in G. O. 416 Education dated 24th February 1939, in so far as they empower the Director of Public Instructions to forbid the existence of, and dissolve, any Teachers' Union not conforming to the rules and compelling teachers in Local Board or Municipal service to obtain the permission of the Board or Council concerned before forming unions and in so far as they prohibit teachers in recognised elementary schools from becoming members of teachers unions or other teachers' organisations not constituted in accordance with the orders of the Government are void as constituting an arbidgment of the right of freedom of asscciation guaranteed by Art. 19(1)(c) of the Constitution. 318 U. S. 418 Applied. Case law referred. (Para 7)

K. V. Venkatasubramania Iyer for Row and Reddy, for Petitioner; The Advocate General for the State Counsel, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950 SCJ 418: (AIR (37) 1950 SC 124: 51 Cri L J 1514) (Pr 6)
274 U S 367: 71 Law Ed 1095 (Pr 4)
278 U S 63: 73 Law Ed 184 (Pr 4)
303 U S 444: 82 Law Ed 949 (Pr 5)
307 U S 496: 83 Law Ed 1423 (Pr 5)
308 U S 147: 84 Law Ed 155 (Pr 5)
318 U S 418: 87 Law Ed 873 (Pr 5)
330 U S 74: 91 Law Ed 754 (Pr 4)

RAJAMANNAR, C. J.: The applicant in this case is a citizen of the Indian Union, a teacher by profession and employed as Junior Assistant, Board High School, Kurichedu from 16th January 1950 and from August 1950 employed as Junior Assistant, Board High School, Singaroyakonda. An association called "The Andhra Rashtra Elementary Teachers' Federation" was formed in 1947 with certain objects which related to educational and cultural advancement. One of the objects was to organise Taluk and District Teachers' Unions and to affiliate them to the Federation. The applicant became a member of the Federation in 1947. He was elected as the Secretary of the Darsi Taluk Federation in the same year and in 1948 he was Joint Secretary of the Nellore District Federation, and in 1949 he was elected as the Secretary of the main federation itself. On or about 23rd April 1950 the applicant was served with an order of the President, District Board, Nellore which ran as follows:

"It is learnt that the Nellore District Board Elementary School teachers noted in the margin are working as members and office bearers of the Nellore District Elementary Teachers' Federation and of the various Taluk Elementary Teachers' Federations in the District as noted against their names. As the above associations are not the usual departmental associations, they ought not to have accepted the above posts without obtaining previous permission from the executive authority of the District Board. They are therefore directed to submit their explanations within a week from the date of receipt of this communication for not obtaining such previous permission. As it is objectionable to continue as members and office bearers of the above unrecognised Federations, they are directed either to cease their connection with the said Federations at once or resign their appointments as District Board teachers and report the fact to this office by 30 April 1950 the latest; failing which disciplinary action will be taken against them.

(Signed) N. Chenchurama Naidu,
President."

(2) The applicant states that this action was apparently taken by the District Board, President in accordance with what was contained in G. O. Ms. No. 416, Education, dated 24th February 1939 (printed as Appendix 5 at page 162 of the Madras Elementary Education Manual). The material portion of this order is as follows:

"The Government consider that provision should be made for the departmental recognition of Elementary School Teachers' Unions with a view to ensure their working on useful lines. They have accordingly framed the rules set out in the annexure to regulate the working of these Unions. The Director of Public Instruction is empowered to accord recognition to unions functioning in accordance with these rules, and to forbid the existence of, and dissolve, any Teachers' Union not conforming to these rules.

2. Teachers in Local Board/Municipal service should obtain the permission of the Board/Council concerned before forming unions and should apply to the Director of Public Instruction for recognition through the President of the District Board/Executive Authority of the Council concerned.

3. Teachers in recognised elementary schools are prohibited from becoming members of teachers' unions or other teachers' organizations not constituted in accordance with the orders herein contained."

Admittedly, neither the Federation nor any of the Unions of which the applicant is a member is a recognised union. The applicant states that he along with other teachers who were served with similar notices waited on deputation on the President in May 1950 and requested him to withdraw his order. On or about 17th August 1950 the applicant was served with another order bearing date 8th August 1950. It runs as follows:

"The teachers noted in the margin have neither submitted their explanations nor even cared to submit replies till now. If no replies are received from them by 15th August 1950 the latest, regular charges will be framed against them, for removal from service. They cannot be continued in service if they want to continue as members of the unrecognised federation."

The applicant was under the circumstances compelled to resign his membership and post as office bearer of the District and Taluk Federations already mentioned. There is the reference to another communication from the Divisional Inspector of Schools, Anantapur, but Mr. Venkatasubramania Aiyar the learned counsel for the applicant represented to us, that he was not dealing with that communication in this application and that he was confining himself to an attack against the validity of the rule in the G. O. of 1939 which prohibited teachers in recognised elementary schools from becoming members of Teachers' Unions or Teachers' organisations not constituted in accordance with that order.

(3) The attack is based on Art. 19(1)(c) of the Constitution which guarantees to every citizen the right to form associations or Unions. The contention in brief is that the rule which prevents the applicant from becoming a part member of an un-

recognised teachers' union save at the risk of suffering dire consequences is inconsistent with the fundamental right of freedom of association. In any event it is an unreasonable restriction on the exercise of such freedom. On this point the counter-affidavit filed on behalf of the respondents does not meet the objection. The Assistant Secretary to Government (Education Department) who has sworn to the affidavit is merely content to state that the applicant's action was in direct contravention of the provisions of the G. O. and the first respondent, i.e,. the President, District Board, was within his rights and justified in the action taken by him. In another part of the affidavit, however, dealing with the later communication of the Divisional Inspector of Schools which was issued in pursuance of a memorandum by the Government the following enunciation of the general policy of the Government is to be found:

"The basic and fundamental rights referred to by the petitioner are not absolute and can never be so in practice. Reasonable restrictions in the interest of the profession have to be imposed, especially in a case like the teachers' profession whose primary duty is to educate along correct lines and form the character and conduct of the future generations of this country. While freedom of thought and action are necessary to develop the inherent virtues, certain amount of discipline also is necessary to develop them along right lines. The teachers' profession which is dedicated to the correct education of the young men of the country must therefore like any other profession throw themselves wholeheartedly into its work and not indulge in political ideologies."

(4) We do not propose to discuss the very important and large question as to how far the employees of the State can be prevented either by legislation or by executive orders from taking part in active politics. Much can be said on both sides of the question as is evident from the differing judgments in 'United Public Workers v. Mitchell', 330 P.C. 74; 91 Law Ed 754 in which the validity of an Act of Congress making it unlawful for employees in the executive branch of the Federal Government to take any active part in political management or in political campaigns out of as well as in working hours, and a regulation of the Civil Service Commission making such conduct ground for removal of civil service employees came up for consideration before the Supreme Court of the United States. The point which arises for decision in the present case lies within a narrow compass. The question is whether any employee of the State or a local body could be prevented from becoming a member of an association which is not recognised by the Government, whether the previous permission or approval of the Government could be made a condition precedent for the exercise of the employee's right to become a member of an association. Of course, it is obvious that the Government as employer may choose to recognise only one association as representative of a particular class of employees; but can the Government prohibit an employee from becoming a member of any association other than the recognised association? Here again, we are not concerned with the complication of such an association being an unlawful one. In that case really, the employee voluntarily runs the risk of being penalised for becoming a member of an unlawful association. It has been held in 'Whitney v. California', 274 U.S. 367: 71 Law Ed. 1095 and 'New York Ex. Rel. Byrant v. Zimmerman', 278 U.S. 63: 73 Law Ed 184 that the constitutional right of freedom of association is not infringed by a statute providing punishment for one who knowingly becomes a member of or assists in organising, an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes or by a statute prohibiting, under penalty, membership in a secret, oath-bound organisation which has not filed its constitution, by-laws, rules, regulations and oath of membership. It was not contended by the learned Advocate General that the associations of which the petitioner before us happened to be a member were unlawful associations.

(5) It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of administrative or executive authority which can grant or withhold permission to exercise such right at its discretion It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is the nature of administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by the exercise of official discretion. It suffices to give a few leading instances to illustrate this well established rule. In 'Lovell v. Griffin', 303 U S 444: 82 Law Ed 949 a municipal ordinance prohibiting the distribution of circulars, handbooks etc., without permission obtained from the City Manager was held to be invalid because it struck at the very foundation of the freedom of the press by subjecting it to license and censorship. In 'Hague v. Committeee for Industrial Organisation', 307 U S 496: 83 Law Ed 1423, a municipal ordinance requiring the obtaining of a permit for a public assembly in or upon the public streets, highways etc., was held to be unconstitutional. It was observed by Mr. Justice Roberts in that case that uncontrolled official suppression of the privilege of free speech should not be made a substitute for the duty to maintain order in connection with the exercise of the right. In 'Schneider v. Irvington', 308 U.S. 147: 84 Law Ed 155, a municipal ordinance which prohibited canvassing, soliciting and the distribution of circulars or calling from house to house without first having received a written permit from the chief of police was held to be bad, because the liberty of free speech was made to depend upon the exercise of the police officer's discretion. In 'Largent v. Texas', 318 U S 418: 87 Law Ed. 873, a municipal ordinance making it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residential portion of a city without first obtaining a permit from the municipal authority was held to be an unconstitutional abridgment of the freedom of the press and of speech. It was observed in the opinion of Mr. Justice Reed:

"Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form."

(6) Indeed we do not understand the learned Advocate General to controvert this position which has also found favour with our Supreme Court, See 'Romesh Thapper v. State of Madras', 1950 SCJ 418.

(7) Applying this principle we must hold that the rules contained in G. O. 416, Education, dated 24th February 1939, in so far as they empower, the Director of Public Instructions to forbid the existence of, and dissolve, any Teachers' Union not conforming to the rules and compelling teachers in Local Board or Municipal service to obtain the permission of the Board or Council concerned before forming unions and in so far as they prohibit teachers in recognised elementary schools from becoming members of teachers unions or other

teachers' organisations not constituted in accordance with the orders of the Government should be declared to be void as constituting an abridgment of the right of freedom of association guaranteed by Art. 19(1)(c) of the Constitution. The application is to this extent allowed; but there will be no order as to costs.

C.R.K./V.K.B. *Application partly allowed.*

A. I. R. (39) 1952 Madras 255 *[C. N. 105 (4).]*

SATYANARAYANA RAO AND RAJAGOPALAN JJ

Commissioner of Income-tax, Excess Profits Tax, Madras, Applicant v. Modern Theatres, Ltd. Salem, Respondent.

Case Ref. No. 29 of 1949, D/- 21-9-1951.

(a) *Excess Profits Tax Act (1940), S. 5, Proviso 3 — Film producing and distributing company — Profits of business accruing in Indian States — Taxability.*

Where the assessee, a film producing and distributing company having its registered office in British India distributed the films to exhibitors in the Indian States under two classes of contracts, namely, either for a fixed sum agreed to be paid by the exhibitor, or for a percentage of the collections made by the exhibitor at the time of the exhibition of the picture and whichever method was adopted, until the picture was delivered to the exhibitor, he did not pay a single pie to the assessee,

'Held', that in respect of both the types of contracts the profits of the business accrued wholly in a native State, and they were therefore exempt under the third proviso to S. 5. *(Para 3)*

Anno: Excess Profits Tax Act, S. 5 N. 1.

(b) *Income-tax Act (1922), S. 66(1) — Question not covered by questions referred — If can be raised for first time.*

The High Court has to understand the questions referred to it in the light of the statement of facts and the statement of the case which have been the basis of the reference to the Court. The question must arise out of the order of the Appellate Tribunal. It can arise out of the order of the Appellate Tribunal only if the order of the Appellate Tribunal discloses that the question was raised before it. It will be wholly inconvenient to allow a question which does not arise out of the order of the Appellate Tribunal and which is not covered by the questions referred to be raised for the first time before the High Court. *(Para 4)*

Anno: I. T. Act, S. 66 N. 21.

C. S. Rama Rao Sahib, for Applicant; K. Rajah Aiyar, for S. Ramayya Nayak, for Respondent.

Case referred to:

('47) 1947-2 Mad L J 215: (AIR (35) 1948 Mad 181) (Pr 4)

SATYANARAYANA RAO, J.: The two questions that were referred to us by the Income-tax Appellate Tribunal under S. 66(1) of the Indian Income-tax Act are as follows:

"1. Whether, on the facts and in the circumstances of the case, the film hire derived by the assessee under agreements which provided for fixed hire charges in respect of exhibition of films in Indian States is not exempt from Excess Profits Tax as profits accruing or arising in the Indian States within the meaning of the third proviso to S. 5 of the Excess Profits Tax Act.

"2. Whether, on the facts and in the circumstances of the case, the films hire derived by the assessee under agreements which provided for hire at a percentage of the collections in respect of the exhibition of films in Indian States is not exempt from Excess Profits Tax as profit accruing or arising in the Indian States within the meaning of the third proviso to S. 5 of the Excess Profits Tax Act."

(2) The assessee is a public limited company whose registered office is at Salem and is incorporated in British India. It carried on the business of producing and distributing films. The films are distributed to exhibitors within, and also without, British India under two classes of contracts, specimen copies of which are annexed to the case stated by the Appellate Tribunal as A and B. The films are given on hire for exhibition either for a fixed sum agreed to be paid by the exhibitor, or for a percentage of the collections made by the exhibitor at the time of the exhibition of the picture. The assessee claimed that under the third proviso to S. 5 of the Excess Profits Tax Act, the income he received by exhibiting films in the Indian States under both the types of contracts was exempt from liability to pay excess profits tax. This contention was upheld by the Tribunal, differing from the Appellate Assistant Commissioner. Hence this reference. The crucial question that falls to be determined is whether the whole of the profits accrued, or arose, in an Indian State or not.

(3) It is obvious, as found by the Appellate Tribunal, that in respect of contracts entered into on percentage basis the share of the profits due to the assessee was not payable until the picture was exhibited and collections were made in the presence of a representative of the assessee. The percentage was then paid to the representative of the assessee at the place where the picture was exhibited, i.e., in the native state. So far as the lump sum contracts are concerned, it is also found that the assessee did not part with the picture until the amount was paid to him at the time of the delivery of the picture in the native State, either by sending the railway receipt by V.P.P. or by tendering the film directly to the exhibitor, or perhaps even by sending the railway receipt to a bank for collection. Whichever method was adopted by the assessee, it leaves no room for doubt that until the picture was delivered to the exhibitor, the exhibitor did not pay a single pie to the assessee. On these facts it was contended strenuously on behalf of the department by Mr. Rama Rao Sahib, the learned counsel for the Income-tax Commissioner, that, as the contracts which are the source of the profit were entered into in British India, it must be held that in respect of both the types of contracts, the profits accrued in British India and not in a native State. Having regard to the terms of the contracts and the findings of the Appellate Tribunal, it is difficult, if not impossible, to accept this contention. Under the contract, the assessee gets practically nothing except an obligation on the part of the exhibitor to receive the film when tendered to him and to exhibit it subject to the conditions of the contract. Money does not become payable and the assessee had no right to demand any payment before the film was actually delivered to the exhibitor. In these circumstances nothing accrues to the assessee until the film was put in the possession of the exhibitor with a view to exploit the same, and that was done wholly in a native State. It therefore follows that in respect of both the types of contracts the profits of the business accrued wholly in a native State, and they are therefore exempt under the third proviso to S. 5 of the Excess Profits Tax Act. It is unnecessary for us to consider whether really the second question was, or was not, pending before the Income-tax Commissioner at the time of the reference, a question which was attempted to be argued by Mr. Rajah Aiyar, the learned counsel

for the respondent, as in our view under both the types of contract the profits accrued entirely in a native state.

(4) Mr. Rama Rao Sahib then attempted to raise the further question, that in any event the profits should be apportioned between British India and the native State under the third proviso to S. 5 of the Excess Profits Tax Act. We searched in vain to find any trace of this argument before any of the Income-tax authorities who had to deal with this matter. It is not a question which has been referred to us by the Appellate Tribunal, nor did the Income-tax Commissioner ask for a reference of this question to this Court. It is further claimed by the learned counsel for the Income-tax Commissioner that the questions actually referred to us are wide enough to cover the question of apportionment, for it is said that it is open to us to find that not the whole of the profits but only a part of the profits accrued and arose in a native State. That may be so; but we have to understand the questions referred to us in the light of the statement of facts and the statement of the case which have been the basis of the reference to this Court. As pointed out by this Court in 'Abboy Chetty v .Commissioner of Income-tax, Madras', 1947-2 Mad L J 215 the question must arise out of the order of the Appellate Tribunal. It can arise out of the order of the Appellate Tribunal only if the order of the Appellate Tribunal discloses that the question was raised before it. In the present case a perusal of the order of the Appellate Tribunal discloses that the only question that was argued was with reference to the place of accrual of the profits, whether they were wholly in a native State or they accrued in British India. The question of apportionment was not raised before the Appellate Tribunal, not to speak of the Appellate Assistant Commissioner. In these circumstances it is impossible to hold that it is a question which arises out of the order of the Appellate Tribunal and which is covered by the questions that are actually referred to us. It will be wholly inconvenient to allow such a question to be raised for the first time before us without an investigation of the facts and also without an apportionment of the profits by the department. In these circumstances we must answer the questions referred to us by the Tribunal in favour of the assessee and in the affirmative. As the commissioner of Income-tax has failed in this reference, he must pay the costs of the assessee which we fix at Rs. 250.

C.R.K./V.R.B. *Reference answered.*

A. I. R. (39) 1952 Madras 256 *[C. N. 105 (5).]*

RAGHAVA RAO, J.

Mepatti Sambayya, Petitioner v. The Official Receiver, Guntur and others, Respondents.

Civil Revision Petitioner No. 1655 of 1949, D/- 19-3-1951.

Provincial Insolvency Act (1920), S. 51 (1) — 'Realised' — Meaning — Money sent for is not realised.

There is nothing intelligible in legal principle or in the ordinary meaning of the words "realised" such as would render the mere order sending for the moneys of the judgment-debtor tantamount to an order realising the assets within the meaning of sub-section (1) of S. 51. AIR (31) 1944 Mad 389; AIR (28) 1941 Mad 575 and AIR (18) 1931 Sind 164, Disting. (Para 5)

Anno: Pro. Insol. Act S. 51, N. 3.

A. V. Krishna Rao, for Petitioner; N. Subramanayam, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('41) AIR (28) 1941 Mad 575: (1941-1 Mad L J 405) (Pr 4)

('44) AIR (31) 1944 Mad 389: (1944-1 Mad L J 333) (Pr 4)

('31) AIR (18) 1931 Sind 164: (26 Sind L R 41) (Pr 4)

JUDGMENT.: This case is thoroughly unarguable for the petitioner, Mr. Krishna Rao, however, has done his job neatly and fairly.

(2) The material facts are these. There was a suit filed by the petitioner before me on 16-9-1948 and an attachment before judgment was then and there obtained by him. On 2-12-1948 a decree followed and the Court made the attachment absolute. Then there was an execution petition filed on 7-12-1948 against certain money of the judgment-debtor lying to his credit with the I. L. T D. Company at Guntur. The Court on 9-12-1948 made an order in these terms "send for',' apparently a compendious expression which the Court used for what might well have been 'send for the money attached." On 14-12-1948, five days after the order of the Court just mentioned, there was an insolvency petition presented against the judgment-debtor in this suit by a creditor of his. The question which arises for determination is whether the order of 9-12-1948 has the effect of bringing into operation the exception referred to in sub-section (1) of S. 51 of the Provincial Insovency Act.

(3) The question turns upon whether the amount which was sent for by the Court can be said to be in the nature of assets realised in the course of the execution within the meaning of sub-section (1) of S. 51 of the Provincial Insolvency Act. That the money was not in fact received by the Court by the date of the admission of the petition for adjudication of the judgment-debtor as an insolvent is not denied. What is urged is that according to the true meaning of the word "realised" in Sub-section (1) of S. 51, such receipt is unnecessary. It is argued that the order of 9-12-1948 is itself tantamount to realisation although there was not even receipt of the money by the Court pursuant to its order and prior to the date of the admission of the petition for insolvency of the judgment-debtor. I cannot agree with this contention.

(4) My attention has been drawn by the learned Advocate for the petitioner to three decisions, none of which really helps him. The first decision cited by him is 'Official Receiver Cuddapah v. Subbamma', AIR (31) 1944 Mad 389. That is a case of nothing done at all on the execution petition before the date of the admission of the petition for insolvency. That is a clear case and the only conclusion possible was that there was no realisation within the meaning of the sub-section (1) of Section 51 of the Provincial Insolvency Act. The next case referred to by the learned Advocate is 'Jooluri Guruvayya v. Official Receiver, Guntur', AIR (28) 1941 Mad 575. There, there was receipt of the money prior to the date of the admission of the petition for insolvency. So also is the position on facts in 'Firm of Tekchand v. Official Assignee', AIR (18) 1931 Sind 164, the only other case relied upon by the learned Counsel.

(5) The argument is not borne out by the decisions cited; nor is there anything intelligible in

legal principle or in the ordinary meaning of the words "realised" such as would render the mere order sending for the moneys of the judgment-debtor tantamount to an order realising the assets within the meaning of Sub-section (1) of Section 51 of the Provincial Insolvency Act. In the result, the civil revision petition fails and is dismissed with costs.

C.R.K./D.R.R. *Revision dismissed.*

A. I. R. (39) 1952 Madras 257 *[C. N. 105 (6).]*

BALAKRISHNA AYYAR J.

Andavar and others, Plaintiff-Appellants v. Periathambi Padayachi and others, Defendants-Respondents.

Second Appeal No. 1882 of 1947, D/- 14-2-1951.

(a) Trusts Act (1882), S. 6 — Transfer of trust property.

Where a deity has no property of its own and the expenses of any celebration have to be met from collections and contributions provided by the villagers, obviously it would be impossible for the poojari or trustee to do anything without their active co-operation and assistance. But this does not mean that the villagers become the trustees. It is more material to consider what amount of control the villagers exercised over the moneys they placed in the hands of the poojaris or trustees. ('92) 2 MLJ 247, *Ref.* (*Para 4*)

Anno: Trusts Act, S. 6 N. 7.

(b) Madras Hindu Religious Endowments Act (II (2) of 1927), S. 84 (1)—Mere claim for declaration as trustee.

Where all that is asked for is that the plaintiff be declared a trustee; and no declaration or relief is asked as regards the hereditary character of the office of trustee, S. 84 (1) does not apply. (*Para 8*)

K. Rajah Ayyar and V. Seshadri, for Appellants; K. S. Desikan, for Respondents.

Case referred to:

('92) 2 Mad L J 247 (Pr 7)

JUDGMENT: The plaintiff is the appellant. He sued for a declaration that he is the trustee and pujari of six deities mentioned in the plaint and for an injunction to restrain the defendants from obstructing him from enjoying the suit property and from exercising the rights and performing the duties of his office. It may, be mentioned at once that though in the plaint six deities are mentioned it has been found that the sixth of them namely, the deity called Thangammayee Amman is, if one may use that expression, a private deity and outside the scope of this litigation.

(2) The defendants pleaded that the plaint deities have no temple, that there are not even idols for them, although pooja was being performed for them under a tree and that the management of the affairs of the plaint deities has been for a long time in the hands of the second defendant and his ancestors acting "in consultation with the people of Paranam village and according to their advice."

(3) The learned District Munsif found that the plaintiff was the poojari and trustee and decreed the suit as prayed for with costs. On appeal the learned Subordinate Judge found that the plaintiff was only the poojari and that the village community was the trustee and in that view he modified the decision of the learned District Munsif.

(4) On this matter, I am inclined to prefer the conclusion of the learned District Munsif. The immovable properties owned by the temple consist of only the melwaram due from three cawnies of land with an annual yield of Rs. 9/- and another piece of land purchased in 1918 under Ex. D-1 (a) for a sum of Rs. 19. The moveable properties of the deities are however said to be worth Rs. 3000. The principal income of the temple consists of the collections and contributions made by the villagers and worshippers at the time of the annual festival in Masi. P. W. 2 deposed that the annual pooja was performed by the villagers, that before the festival the villagers would assemble, collect subscriptions and arrange for the performance of the pooja; and if the villagers do not arrange for it, the poojari could not do it on his own responsibility. To a like effect was the evidence of P. W. 3. This circumstance, the learned Subordinate Judge was inclined to regard, as inconsistent with the claim of the plaintiff that he was the trustee. I find it difficult to agree. Where a deity has no property of its own and the expenses of any celebration have to be met from collections and contributions provided by the villagers, obviously it would be impossible for the poojari or trustee to do anything without their active co-operation and assistance. But this does not mean that the villagers become the trustees. It is more material to consider that amount of control the villagers exercised over the moneys they placed in the hands of the poojaris or trustees. Dealing with this aspect of the matter the learned District Munsif observed:

> ".....there is no evidence at all to show that they (villagers) have control over the collections at the poojas or have the ordering of the disposal of it. On the other hand, the evidence is that the offerings are handed over to the plaintiff and that too without counting the collections. In my view, the villagers' activities are more in the nature of rendering assistance for the peformance of this big festival than exercising control over it ....."

No doubt, an assertion was made that the plaintiff was liable to account to the general body of the villagers. But this is a theoretical liability which attaches to everybody who receives moneys collected from or contributed by others. More to the point is the fact, remarked on by the learned District Munsif that there is scarcely any evidence worth the name to show that the plaintiff has ever been called on by the villagers to render accounts. If the villagers were the trustees and the poojari was only their agent, he would normally have been called on to account, in however perfunctory a manner.

(5) It has been already stated that the immovable properties owned by the deities consist in part of the melwaram from three cawnies of inam lands. About two cawnies of this property are in the possession of defendants 2 and 5. The remaining cawni is in the possession of one Govinda Padayachi. The defendants adduced evidence to show that the second defendant used to collect the money payable by Govinda Padayachi and with the money which he had himself to pay supplied the articles necessary for the "Sakthi Azhaippu" ceremony at the annual festival. The learned Subordinate Judge thought that this circumstance supported his view that the plaintiff could not have been the poojari. Now, the second defendant appears to be the 'nattamaikar' of the place and therefore a person of some consequence in the village. If such a person instead of directly paying his dues to the plaintiff leaving him to use that money to purchase the necessary fruits, cocoanuts and the like, himself also collected the money due from Govinda Padayachi and provided the articles necessary, that would be nothing more than an ordinary act of co-operation in the celebration of the festival by a villager of some consequence.

(6) One item of the suit property belonging to deity No. 1 was purchased in 1918 under Ex. D-1 (a). In that document the second defendant's father is described as a trustee of the deity. The learned Subordinate Judge considered that the money for the purchase came out of the funds of the village and that the purchase was an act of the village community in the exercise of its functions as trustee. Undoubtedly, the circumstance that in this transaction the father of the second defendant represented the deity and that in the sale deed he was described as trustee of the deity is certainly an important piece of evidence inconsistent with the case of the plaintiff. But then if that recital were correct and the father of the second defendant were really the trustee of the deity, the possession of the property must have continued in him; but that did not happen. On the other hand possession was always with the plaintiff. As the learned District Munsif remarked the only immoveable property of the deities (other than the manyam lands) has been in the possession of the plaintiff. The kist receipts for the properties were also produced by the plaintiff. The clear fact that the second defendant's father did not attempt to retain or was not allowed to retain possession of this property and that instead possession remained with the plaintiff clearly affects, as the learned District Munsif himself remarked, the value of the recital in Ex. D-1 that the second defendant's father was the trustee of the deity. It is also of interest to remark that the patta for the property which originally stood in the name of the deity was during the period 1938 to 1943 transferred in the name of the plaintiff as the manager of the deities and not to the 2nd defendant's father or the 2nd defendant or any other villager. In 1944 the pattas were re-issued in the names of the deities. This was apparently done because the poojaris of other temples wanted their names also to be mentioned in the respective pattas and thereupon the Dewan of the Udayarpalayam estate wherein the land lies ordered that pattas should be issued in the name of the deities alone. It has been stated that the moveable properties of the deities are worth about Rs. 3000 and their custody was clearly and always in the hands of the plaintiff. The defendants attempted to explain away this circumstance by alleging that they were kept in a building belonging to the villagers as a whole, that as the building had to be repaired, these articles were entrusted to the plaintiff as a temporary measure. Obviously, if a situation arose in which it became necessary to entrust articles of such value to one of the villagers, I would have thought that the villagers would have preferred the second defendant who was the 'nattamaikar', to the plaintiff who would have been only a poojari. The explanation itself is shown to be untrue by the admission of D. W. 1 that the key of the building in which the properties are locked up has been with the plaintiff for 16 or 17 years. The learned Subordinate Judge was impressed by the evidence of D. Ws. 1, 3 and 4 to the effect that the plaintiff was paying the kist for the suit land from out of the common funds left with him. Now, so far as I can see, D. W. 1 says nothing on the matter. So far as D. Ws. 3 and 4 are concerned, it is difficult to understand how they could possibly say from what source the plaintiff paid the kist money. In considering the question whether the plaintiff was only a poojari or was also a trustee, it is useful to bear in mind the circumstance that the immoveable properties owned by the deities are only of inconsiderable value, that the only act of management that could be exercised in relation to them namely the payment of kist was being done by the plaintiff, that all the moveable properties which are of considerable value had been in the custody of the plaintiff and that there is nothing to show that any control was exercised over him as regards the manner in which he disposed of the collections and contributions made for the annual festival.

(7) In 'Paningappali Ramaswami v. Pentakota Ramaswami', 2 Mad L J 247 it was observed that where an archaka has been managing the affairs of a temple with the knowledge and privity of the worshipers, the presumption is that he is the dharmakartha as well as the archaka. In the present case both the offices appear to me to have been combined in and held by the plaintiff.

(8) Mr. Desikan, the learned advocate for the respondents raised another point. He read out that portion of the plaint in which it is alleged:

> "My grandfather, after his death my father, after his death, my junior paternal uncle and after his death myself, have been doing pooja to the plaintiffs-deities for a period of over 12 years."

and argued that this amounted to a claim that the plaintiff was the hereditary trustee and that S. 84 (1) of the Madras Hindu Religious Endowments Act bars the action. That section enacts that where a dispute arises as to whether a trustee is a hereditary trustee or not, such a dispute shall be decided by the Board and no Court in the exercise of its original jurisdiction shall take cognizance of any such dispute. In respect of this argument, it is sufficient to say that though this averment does occur in paragraph 3 of the plaint, no declaration is asked for that the plaintiff is the hereditary trustee. All that is asked for is that he be declared a trustee; and no declaration or relief is asked as regards the hereditary character of the office of trustee.

(9) In the result, the appeal is allowed and the suit decreed with costs throughout. Leave refused.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 Madras 268 [C. N. 105 (7).]

CHANDRA REDDI, J.

Marimuthammal and another, Appellants v. Thandarayanaicken and others, Respondents.

Second Appeal No. 2636 of 1947, D/- 9-7-1951.

Civil P. C. (1908), O. 21, R. 95 — Suit by stranger purchaser to recover property from trespasser — Competency of.

A stranger purchaser of propetry at Court auction held in execution of a decree can bring a suit to recover the property from a trespasser. O. 21, R. 95 has no application to such a case as the trespasser is neither a judgment-debtor nor a person who claims title created by the judgment-debtor. AIR (10) 1923 Mad 160 (2) and 14 Cal 644. Ref. (Para 3)

Anno: C. P. C. O. 21, R. 95, N. 8.

N. Sivaramakrishna Iyer and N. S. Raghavan, for Appellants; D. Ramaswami Iyengar and P. S. Srinivasa Desikan; for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('87) 14 Cal 644 (Pr 3)

('26) 50 Mad L J 183: (AIR (10) 1923 Mad 160 (2) (Pr 3)

JUDGMENT: The only point that arise for consideration in this appeal is whether the suit is barred under O. 21, R. 95, Civil P.C. The facts that give rise to this question are the following:

(2) The plaintiff who purchased two items of property at a Court auction held in execution of

the decree in O.S. No. 1677 of 1926 on the file of the Salem District Munsiff's Court on a mortgage dated 24-6-1925 brought the suit out of which this second appeal arises for recovering the said two items of property from defendants 2 and 3. But we are now concerned only with Item No. 2 of the property as the respondent has given up his claim to item No. 1 of the suit property. One of the contentions raised on behalf of the defendants was that the plaintiff's remedy by way of suit is barred by reason of the provisions of O. 21, R. 95, Civil P. C. Both the Courts below held against the defendants on this question. It looks to me that the decision of the lower appellate Court is correct and that the contention of the appellants-defendants is untenable.

(3) The position that a suit does lie by a stranger purchaser for recovery of properties from a trespasser cannot be disputed having regard to the decision in 'Sundara Iyer v. Thiagaraja Pillai', 50 Mad LJ 183. Further at p. 910 of Mullah's Civil Procedure Code' the following passage occurs:

> "It may be observed that a purchaser at a Court auction is not bound to apply for possession under R. 95 of O. 21. He may at his option bring a regular suit for possession the period of limitation for the suit being 12 years as stated above. The remedies by way of application and that by way of suit are concurrent."

In support of this statement of law reliance is placed on the decision 'Kishori Mohun v. Chunder Nath', 14 Cal 644. Even apart from these authorities it looks to me that the contention of the appellants has no force at all. It must be observed that O. 21, R. 95, Civil P. C., has no application to the facts of the case having regard to the fact that the appellants are neither the judgment-debtors nor persons who claim title created by the judgment-debtor but only trespassers. It follows that the contention of the appellants based upon the provisions of O. 21, R. 95, Civil P.C., must be rejected. Though an attempt was made to argue another point, namely, that the suit is also barred under S. 47, Civil P.C., it was ultimately given up and not pressed before me having regard to decided cases.

(4) For the aforesaid reasons the second appeal fails and is dismissed with costs. No leave.

C.R.K./V.S.B. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 259 *[C. N. 105 (8).]*

SATYANARAYANA RAO AND VISWANATHA SHASTRI, JJ.

Commissioner of Income-tax and Excess Profits Tax, Madras. Applicant v. The Palani Andavar Mills Ltd., Udumalpet and another, Respondents.

Cases Referred Nos. 73 of 1946 and 63 of 1947, D/- 14-12-1949.

Excess Profits Tax Act (1940), Sch. II R. 5 — Profits — Meaning — Profits for purposes of R. 5 should be calculated in manner prescribed by Sch. I.

The word "profit" which occurs in R. 5 of Sch. II must be interpreted in the light of the definition in S. 2, Sub-s. (19), that is, profit as calculated under Sch. I. There is nothing either in the subject or in the context to indicate that the word "profit" mentioned in R. 5 should receive a different interpretation than the one given to it in the definition. If so the provisions in Sch. I relating to the calculation of profits are made applicable and R. 2 of that schedule definitely states that in calculating the profits the provisions of the amended Income-tax Act, 1939, should be applied. Further, there is no reason why a different mode of calculating the profits should be adopted, one for the purpose of calculating the standard profits and a different method for the purpose of arriving at the average amount of capital employed. It stands to reason that for purposes of both, the same method should be employed. (*Para 12*)

Hence for the purpose of computing the capital employed in the business as at the beginning and the end of the standard period, the value of the depreciable assets should be determined with reference to the depreciation allowable under the Indian Income-tax Amendment Act, 1939. (*Para 1*)

C. S. Rama Rao Sahib for Applicant — M. Subbaraya Aiyar and S. Swaminathan, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

(1946) 1 All E R 546 (Pr 14)
(1947) 1 All E R 608: (176 L T 486) (Prs 14, 16)

SATYANARAYANA RAO J.: These references though they relate to different assessees arise under the Excess Profits Tax Act, 1940, & the question referred is substantially the same in both except for the dates.

"Whether in the circumstances of the case, the Tribunal was right in law, in holding that, for the purpose of computing the capital employed in the business as at the beginning & the end of the standard period 1-10-1935 to 31-12-1936 (31-1-1936 is a mistake) the value of the depreciable assets should be determined with reference to the depreciation allowable under the Indian Income-tax Amendment Act, 1939".

(The standard period in R. C. No. 63 of 1947 is from 1-1-1936 to 31-12-1936).

(2) In view of the arguments addressed in these cases we had to alter the question & it was agreed that the following question brings out clearly the real bone of contention between the parties: "Whether the profits for the purpose of R. 5 of Sch. II should be calculated in the manner prescribed by Sch. I" For the disposal of these two references it would be sufficient to refer to the facts in one of the cases, & the facts are confined to R. C. No. 73 of 1946. The chargeable accounting period in the case of this assessee commenced on 1-9-1939 & ended with 31-12-1939. As the business of the assessee was an old business, the standard year selected is the period from 1-10-1935 to 31-12-1936. The Central Board of Revenue fixed the standard profits at Rs. 45,000. The proportionate standard profits for the chargeable accounting period of four months will be Rs. 12000. The average capital in the chargeable accounting period is Rs. 8,78,134. The capital of the standard period was Rs. 4,49,549 according to the excess profits tax officer. As there was increase of the capital in the chargeable accounting period over the capital of the standard period by Rs. 4,28,585, the additional profits for the standard period was arrived at by taking the statutory percentage of 8 per cent. on the increase of capital namely, Rs. 4,28,585, which yielded Rs. 34,287. The proportion of this for the four months is Rs. 11,429 and adding this figure to the Rs. 12000 the total of the adjusted standard profits in proportion to the chargeable accounting period is Rs. 23,429.

(3) The dispute relates to the calculation of the capital in the standard period. According to the assessee the capital during the standard period should be Rs. 4,22,186. The difference between

the two figures is due to the fact that in the calculating the depreciation of the fixed assets, the excess profits tax officer applied the rules for depreciation provided under the Income-tax Act of 1922 before it was amended in 1939, while the assessee applied the amended Act. The question for consideration is whether the assessee is right or the contention of the Crown should be upheld. The Appellate Tribunal accepted the contention of the assessee. Hence the Reference.

(4) In the other case, the decision in this case by the Appellate Tribunal was followed and therefore a Reference was made in that case also of the same question.

(5) It will be seen that the difference in the standard capital according to the two calculations is Rs. 27,363. If the average capital during the standard period decreases, the increase of the average capital in the chargeable accounting period will be more than Rs. 4,28,585 by Rs. 27,363 according to the assessee. The result of such an increase is, in calculation the profits during the standard period for adjustment by applying the statutory 8 per cent., the figure arrived at will be more than Rs. 34,287 & for the four months, a larger amount has to be added to the sum of Rs. 12,000. In other words, the standard profits will increase if the average capital during the standard period decreases. From the assessee's point of view, if the average standard profits increase, the profits during the chargeable accounting period which would be subject to excess profits tax will decrease. The attempt of the Crown therefore is to decrease the average profit during the standard period. It is for this reason that the matter has been brought up before this Court.

(6) The scheme of the Excess Profits Tax Act may now be shortly stated in order to appreciate the respective contentions of the Crown & the assessee. The Excess profits tax is payable on the excess of the profits during any chargeable accounting period over the standard profits. "Standard profit" is defined in S. 6. If more capital is employed during the chargeable accounting period by the assessee than the capital employed during the standard period, it is but legitimate that the necessary adjustment in the standard profits which are taken for comparison should also be made. If the business was an old business in the sense of its having been started before 1-3-1936, the owner of the business is given the option to select a period as provided under S. 6. There are also other standards provided under the section but as in the present references the business was an old one it is unnecessary to refer to the details of the other standards. It will be sufficient to mention however that in no case can an assessee select a period less than nine months as standard period & the standard profits are subject to a minimum of Rs. 36000 in cases in which the standard profits computed in accordance with Sub-s. (1) are less than that sum.

(7) How is the adjustment to be made if more capital was employed during the chargeable accounting period? The adjustment is made by working out a proportion as provided under S. 6 & in case of an increase or decrease in the average capital during the chargeable accounting period, the standard profits are increased or decreased as the case may be by an amount calculated by applying the statutory percentage to the amount of such increase or decrease. Sch. I to the Act provides the mode of determining the profits for the purpose of excess profits tax Act as under the definition in S. 2(19) "profits" means profits as determined in accordance with Sch. 1; & S. 2(20) defines "standard profits" as meaning standard profits as computed in accordance with the provisions of S. 6. S. 2(3) defines "average amount of capital" as meaning the average amount of capital employed in any business as computed in accordance with Sch. 2. For the purpose of computation of the profits, R. 2 of Sch. I provides:

"The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period".

(8) This provision applies for purposes of calculation of profits and attracts the rules of depreciation provided by S. 10(5), Indian Income-tax Act, 1922, as amended in 1939; & this provision for the first time introduces the definition of written down value which means (a) in the case of assets acquired in the previous year the actual cost will be received; (b) in the case of assets acquired before the previous year the actual cost of the assessee less all depreciation actually allowed to him under this Act or any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886, was in force.

(9) Before this amendment the depreciation was calculated every year on the actual cost of the asset at the time of its acquisition & not on the written down value. The difference between the two methods may be elucidated by an illustration. If the asset was acquired at a cost of Rs. 100 during the year 1934, the depreciation, say 5 per cent., will be allowed during that year which leaves the value of the asset at Rs. 95. During the next year 1935 in allowing further depreciation 5 per cent. is again calculated not on Rs. 95 but on Rs. 100 the original cost. The Amending Act 1939 provided that the written down value of Rs. 95 should be taken for the subsequent year 1935. Therefore the 5 per cent is calculated on Rs. 95 and not on Rs. 100. The rates of depreciation under the rules framed under the Act of 1939 are progressively increasing rates. The Crown & the assessee are agreed that so far as the calculation of the profits during the standard period is concerned, the rules provided for depreciation by the Income-tax (Amending) Act, 1939, were properly applied & that is the only permissible method by which the profits should be computed both for the standard period & also for the chargeable accounting period. R. 1 of Sch. II which contains the rules for computing the average amount of capital provides:

"Subject to the provisions of this schedule, the average amount of the capital employed in a business shall be taken to be (a) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified; (b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions; (c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets the business, subject to the said deductions.

'Sub-cl. (2): The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value & to such other deductions in respect of reduced values

of assets as are allowable in computing profits for the purposes of income-tax; &, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes."

R. 5 of the same schedule further provides:

"For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits & losses made in that period shall, except so far as the contrary is shown, be deemed:

(a) to have accrued at an even rate throughout the period, &

(b) to have resulted, as they accrued, in a corresponding increase or decrease as the case may be, in the capital employed in the business".

(10) In order, therefore, to arrive at the average amount of capital employed in the business whether for purposes of ascertaining the capital during the standard period or the chargeable accounting period, the profits or losses made during that period are deemed to have accrued at an even rate & to have resulted, as they accrued, in a corresponding increase or decrease, in the capital employed.

(11) The question is how are these profits to be calculated? If there are assets subject to the depreciation in what manner & under what principles should the depreciation be determined? In arriving at the profits, the value of the asset which is not a debt has to be determined by applying the provisions of R. 1(1) Sub-cl. (2) which says that the asset should be valued subject to deductions for depreciation as are necessary to reduce the asset to its written down value. "Written down value" is defined in S. 2 Sub-s. (22) as having "the meaning assigned to that expression in Sub-s. (5) of S. 10, Income-tax Act, 1922". No reference however has been made in this definition to the Amending Act, 1939; & it is on this basis that the Crown contends that the depreciation should be determined only by applying the provision in S. 10 (5), Income-tax Act, as it stood before the amendment in 1939.

(12) The word "profit" which occurs in R. 5 of Sch. II must be interpreted in my opinion in the light of the definition in S. 2 Sub-s. (19), that is, profit as calculated under Sch. 1. The Act gives the definitions of words which have been employed in it; & the opening words of S. 2 of the Act say: that the definition in the section apply: "Unless there is anything repugnant in the subject or context" . There is nothing either in the subject or in the context to indicate that the word "profit" mentioned in R. 5 should receive a different interpretation than the one given to it in the definition. If so much follows, the provisions in Sch. I relating to the calculation of profits are made applicable & R. 2 of that schedule definitely states that in calculating the profits the provisions of the amended Income-tax Act, 1939, should be applied. Further, there does not seem to be any definite reason why a different method or mode of calculating the profits should be adopted, one for the purpose of calculating the standard profits and a different method for the purpose of arriving at the average amount of capital employed. It stands to reason that for purposes of both, the same method should be employed. The definition in S. 2 (22) no doubt refers to S. 10(5) of the 1922 Act, but all amendments are carried in the Act of 1922 & it can always be cited & should be cited only as the Income-tax Act of 1922 & not as the Act as amended in 1939. Stress is laid on behalf of the Crown that wherever the Legislature intended in the Excess Profits Act to apply the amended Income-tax Act of 1939, it stated so in specific terms as in rule 2 of Sch. I. No doubt it has stated so. But if profits are to be understood in the sense defined in the Act, there is no reason to repeat it wherever the word "profit" occurs in the Act.

(13) Mr. Rama Rao Sahib, on behalf of the Crown, strenuously argued that "profits" in this R. 5 should be understood in the commercial sense, & that all that is not taken out of the business remained and formed part of the capital. From this argument it would follow that according to the learned counsel even the deductions admissible under the unamended Act, 1922, would not be permissible. This was not, however, the stand taken either by the Excess Profits tax Officer or by the appellate authority. It cannot be seriously maintained assuming that the contention is correct that stock-in-trade, doubtful debts & allied deductions even in a business sense which have not actually gone out of the business, continued to form part of the profits because they were not taken out of the business. This extreme contention of the learned advocate is not supported by any authority & is opposed to the definition of profits as given in the Act itself & cannot be accepted. The Appellate Tribunal expressed the view that for calculating the profits either for purposes of R. 5 of Sch. II or under Sch. I, the principles applicable in respect of deductions must be uniform & that it would be unreasonable to adopt a different basis for different purposes. This view in my opinion is correct.

(14) Reference was made by Mr. Rama Rao Sahib to the decision of the Court of Appeal, particularly the decision of Lord Greene, M. R. in 'Northern Aluminium Co., Ltd. v. I. R. C.', (1946) 1-All E R 546 which was affirmed on appeal by the House of Lords in I. R. C. v. Northern Aluminium Co., (1947) 1-All E R 608. In that case the assessee company who were manufacturers of aluminium products sold certain aluminium goods at fixed prices to customers & these articles were utilised in the manufacture of aeroplanes which were purchased by the Ministry of Air Craft Production. The sale by the company of the products was at a fixed price & there was no variation of the price in the contracts. The company was a member of an association called the Wrought Light Alloys Association. On 16-12-1939, the Air Ministry addressed a letter to the Association which confirmed an agreement which was reached to the effect that during the period from 1-7-1939 to 30-6-1940, the prices fixed for certain products manufactured by the members of the Association should be reduced in the manner specified in the list appended. There was also a reference in that letter to an attempt at further negotiations between the Air Ministry & the Association in regard to the price for the aluminium products & alloys but actually the negotiations started in November 1941. On 12-10-1942. certain preliminaries were agreed & an agreement was reached regulating the prices of the products for the years 1941, 1942 & 1943 & it was also provided that a rebate in respect of the prices at which the goods had been supplied by the members of the association to customers, should be paid over to the Ministry. The result of this was that the profit made by the company calculated for purposes of assessment to excess profits tax for the calendar year 1941 was reduced by a large amount by reason of the payment made under the rebate clause by the Company to the Ministry in the 1943. For purposes of income tax, accounts were reopened and the smaller figure of profit ascertained on the basis of the rebate was substituted for the original profit of the year. The

Crown thereafter raised the contention that in calculating the profits of 1941 for purposes of excess profits tax, a new calculation of the capital employed in the business of the company must be made in the corresponding chargeable accounting period which would result, of course in a reduction of the standard profits and a consequent increase of the profits during the chargeable accounting period. The contention of the Crown prevailed, with Macnaghten J. but on appeal the Court of Appeal reversed this decision & this decision was affirmed by the House of Lords. The main argument in the case turned upon the question whether or not the amount paid as rebate to the Ministry ceased to be part of the capital even in 1941 though it was actually paid in 1943. The section corresponding to the R. 1 in Sch. II of the Indian Act was the subject-matter of consideration and as there was not even the liability incurred during the chargeable accounting period in respect of the payment to the Ministry it was held that the amount which was until then in the hands of the company & utilised in the business did not cease to be capital of the company; & that it was not a debt under clause (b) of Sch. VII part 2, para 2(1) which corresponds to R. 1(b) of Sch. II of the Indian Act. The judgment of Green M. R. contains a useful exposition of the scheme underlying the Excess Profits Tax Act & the principles applicable in determining the profits & the capital employed. At page 550 in 'Northern Aluminium Co., Ltd., v. I. R. C.', (1946) 1-All E. R. 546 Lord Greene M. R. observed as follows:

"Its general structure is well known, & I need not go into it. For present purposes, it is sufficient to say that a standard period was taken. The profits of that standard period were ascertained. Where the profits in a chargeable accounting period exceeded those standard profits, tax was imposed upon the excess. The standard profits were ascertained by reference to a standard period during which the undertaking, of course, earned those profits, by means of the capital which, during that period, it had available in its business. It was obviously just that, whenever the capital of the undertaking was increased or decreased during subsequent period, some adjustment should be made in the level of profits above which the tax was to be imposed. If a Company during the standard period was earning profits on a capital of £. 100,000 & its standard profits were fixed by reference to that period, and if, in a later period, it was employing a capital of £. 200,000, obviously justice required that the level of its standard profits should be adjusted upwards by reference to the increase of capital. Similarly, if the company had during the standard period employed a capital of £. 100,000 to earn the standard profits, and subsequently, for some reason, withdrew or lost part of its capital, so that the capital in the subsequent period was only £. 50,000 an adjustment downwards would have to be made".

(15) Then the learned Lord refers to S. 13(3) proviso, corresponding to the proviso to S. 6 of the present Act & proceeds to observe with reference to that proviso;

"There are one or two things about that language which are worth noting. First of all, it refers to the 'capital employed'. That seems to me quite clearly to refer to capital actually employed, not to some item which is artificially going to be written back into the capital in some future year, but capital which is in fact being employed for the purpose of earning profits. You earn profits with real capital, not with something which, on a subsequent reopening of the accounts, is going artificially to be attributed to a particular period. It is to be noticed that what the proviso refers to is the amount of the capital employed in a chargeable accounting period; that is to say, you must find a state of facts in which you can say that the company is employing the capital in an accounting period. If the capital it is employing in that period is greater, it is entitled to a revision upwards of the level of its profits. On the other hand, if it is employing less than it did during the standard period, the net profit level must be scaled down. That is obvious & in accordance with common sense".

Mr. Rama Rao Sahib laid stress upon the expression "capital actually employed" used by the learned Lord in this passage, & from this he argued that the profits in R. 5 must be understood in the sense of including the entire assets & money utilised in the business during the period as an accretion to the capital, irrespective of permissible deduction in the nature of depreciation.; The learned Lord was referring with reference to the facts of that case that the money in the hands of the Company was actually utilised & employed in the business during the year & did not go out till 1943. He was not attempting to define the word "profits" in a provision similar to our R. 5 & therefore the reference to this passage does not support the contention of the learned advocate.

(16) When the case went up to the House of Lords, Viscount Simon referred to the provision corresponding to R. 5 of Sch. II in the Indian Act & defined the scope of the rule in the following words at p. 612 '(I. R. C. v. Northern Aluminium, Co.,' (1947) 1-All E. R. 608 at p. 611),

"That para does, indeed, imply that profits or losses made in a chargeable accounting period may affect the calculation of average amount of capital employed in the period. But the important words for the present purpose are 'except so far as the contrary is shown'. If the contrary is not shown then, for the purpose of ascertaining the average amount of capital, profits or losses made in the relevant period shall be deemed to have resulted, as they accrued, in a corresponding increase or decrease in the capital employed. But in the present case the contrary is conclusively shown, for whatever may be the correction ultimately arrived at in the figure of profits in 1941, the mere expectation that negotations to be entered into might result in an agreed variation of the prices charged did not & could not result in a change in the capital employed in the year 1941".

Relying on this last sentence the learned counsel for the Crown contended that as the presumption in the case is not rebutted by any facts it must be assumed that the whole of it was capital & no allowance for depreciation should be allowed. It must be however observed that the fact stressed for the purpose of inferring that the presumption was rebutted in the particular case was that during the period 1941 when the capital was employed in the business there was nothing to indicate in the facts that the assets, part of the capital, went out from the business & that it was merely at the stage of an expectation of entering into negotiations which might or might not result in a variation of the prices. It is this circumstance that is emphasised to show that the presumption was rebutted & that the capital continued in the business.

(17) In my opinion, therefore, the decision of the appellate Tribunal in both the cases is correct & the question should be answered in the affirmative & in favour of the assessee. The assessees are entitled to their costs which we fix at Rs. 250 in each case.

C. R. K./V. B. B. *Answer in affirmative.*

A. I. R. (39) 1952 Madras 263 *(C. N. 105(9).]*

PANCHAPAGESA SASTRY, J.

Nallamuthu Pillai and others, Appellants v. R. Aravamudhu Iyengar and another, Respondents.

Appeal No. 256 of 1947, D/- 4-1-1951.

T. P. Act, (1882), S. 73 — Portion of property acquired by Municipality and distinct property substituted as compensation — Entire property brought to sale in execution and purchased by decree-holder — No reference to substituted property either in sale proclamation or sale certificate — S. 73 or doctrine of substituted security — Applicability — Auction-purchaser if entitled to claim title to substituted property.

Where, notwithstanding the acquisition by the Municipality of a portion of the property and its substitution by a distinct plot as a compensation to the owner, a decree is passed purporting to create a charge over the entire property making no mention of the substituted property and the entire property is proclaimed for sale and purchased in execution by a decree-holder, the sale certificate making no reference to the substituted property, neither S. 73 in terms nor the principle of substituted security are applicable and the decree-holder, auction-purchaser is not entitled to claim any title to the substituted property. It is unsafe to extend the doctrine of substituted security to cover cases where altogether different and distinct items are allotted and a sale of one cannot be treated as 'ipso facto' a sale of the other. Sale certificates are not to be ignored or construed so lightly. (Para 5)

Anno: T. P. Act, S. 73, N. 1, 10.

K. Bhashyam and R. Desikan; for Appellants; K. Krishnaswami Iyengar and N. C. Raghavachari, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('73-74) 1 Ind App 106: (21 W R 233 P C) (Pr 4)

('48) I L R (1948) Mad 454: (A I R (35) 1948 Mad 1 FB) (Pr 4)

JUDGMENT: Defendants are the appellants. Plaintiffs-respondents brought the suit for a declaration of their title to the suit property and for recovery of possession of the same from the defendants with past and future profits. According to the plaint they became entitled to the suit property plot No. 19 in what is known as the eastern extension scheme, Madhurai, in the following manner. Originally the first defendant was the owner of Town Survey No. 2512/1 of about 32 cents and 2512/2 of 73 cents. He had borrowed from the plaintiff's father a sum of Rs. 5,000 on the 1st September 1923 and had agreed to give a mortgage over the above properties, in addition to the promissory note which he executed. It was stated by the plaintiffs that without giving the mortgage as agreed to, the first defendant conveyed the properties to one Kuthuva Rangachari by a deed of sale of March 1924 directing him however to discharge the promissory note debt in favour of the plaintiff's father. As the amount was not so paid the plaintiffs' father filed a suit O. S. No. 119 of 1926 Sub-Court, Mathurai, on the basis of the promissory note and on the agreement to give a mortgage and prayed for a decree for recovery of the amount both personally and by way of a charge on the properties. He obtained a decree accordingly and in execution of the charge portion of the decree he brought the above properties to sale, purchased them himself and also obtained delivery through Court. It, however, happened that these survey numbers and others had been acquired by the Municipality for an extension scheme even in 1943. Instead of paying compensation in money there appears to have been an agreement between the Municipality and the various owners that the latter should be allotted sites in the areas acquired after providing for roads, streets, etc. In pursuance of the scheme aforesaid plot No. 19 had been allotted to the first defendant in lieu of about 23 cents of land taken away from town survey No. 2512/1. The plaintiffs' case is that by virtue of this transaction his title to plot No. 19 is made out and he had been in possession thereof peacefully and the first defendant trespassed upon it sometime in 1946. Hence the suit.

(2) The first defendant's defence was that he was in possession of the property in his own right and not in any sense as a trustee or agent of the plaintiffs or in any fiduciary capacity for them. He has been so in possession for over the statutory period as well. He had executed a sale-deed in favour of the 2nd defendant for valuable consideration. The 2nd defendant pleaded that he was a purchaser in good faith for consideration and had no knowledge of any infirmity of title on the part of the 1st defendant or of any claim or right in the plaintiffs. The 3rd defendant was merely a lessee of the properties in his possession. The defendants denied the trespass. The lower Court framed appropriate issues and ultimately found in favour of the plaintiffs. The defendants have therefore filed this appeal.

(3) The point for determination is whether the plaintiffs have title to plot No. 19 in the circumstances set out and found and whether the 2nd defendant is a 'bona fide' purchaser for value.

(4) It appears from the documents filed and it is not really challenged now that town survey Nos. 2512/1 and 2512/2 of about 32 cents and 73 cents were made a charge for the amount due to the plaintiffs' father in O. S. No. 119 of 1926 and the properties were brought to sale and purchased by the decree-holder who also claims to have obtained delivery of possession of the property. Admittedly the plaintiffs are in possession of Town S. Nos. 2512/1 and 2512/2 except to the extent of 23 cents which were taken away by the Municipality. In lieu of these 23 cents they claim that they have got a title to plot No. 19 which according to them became really substituted for the 23 cents taken by the Municipality. Their case is put forward under different heads. It is urged that S. 73 of the Transfer of Property Act is applicable and thereby plot No. 19 became their property. It was urged again that the principle underlying it would apply in any event as also the principle recognised by the decisions of the Court in relation to what is known as substituted security doctrine recognised by the Judicial Committee in 'Byjnath Lall v. Ramoodeen Chowdry, 1 Ind App. 106 and 'Koru Issaku v. Seetharamaraju', I L R (1948) Mad 454. It is also argued that the principle of the Trusts Act recognised in Ss. 88 and 90 would also apply.

(5) S. 73 of the Transfer of Property Act cannot in terms apply. It must be remembered that this acquisition by the Municipality and the accrual of title to the Municipality was as admitted by the respondents, in 1927 at the latest. Even in 1913 the properties would seem to have been acquired and the arrangement between the Municipality and the various owners had become finalised by about 1922. All the properties that were to be allotted to the respective owners had been settled and referred to in a schedule even before 1922. It was according to this scheme that plot No. 19 was finally allotted to the first defendant. The agreement to give a charge was only in 1923 and the decree of the Sub-Court, Mathurai, was in

1927. Notwithstanding this substitution the decree purported to create a charge over the entirety of the town survey numbers 2512/1 and 2512/2 and made no reference at all to plot No. 19. The sale proclamation followed the description in the decree and the entirety of the two plots of 32 and 73 cents were proclaimed for sale and purchased. Delivery also purports to be of the said extents. The sale certificate in particular mentions only the town survey numbers 2512/1 and 2512/2 of 32 and 73 cents respectively and makes no reference at all to plot No. 19 which is in a different survey number altogether. Notwithstanding these things it is urged that plaintiffs are entitled to plot No. 19. S. 73 of the Transfer of Property Act not being applicable in terms the next contention was that the principle of substituted security should apply. What exactly is this principle? It has been recognised that where an undivided share belonging to a coparcener or to a co-owner in some or all items of joint property is sold and subsequently a bona fide partition takes place between the coparceners or the co-owners the alienee would not be entitled to the properties actually sold where they are allotted to other persons than his own vendor but only to follow the properties allotted to the share of the vendor in part or in whole as the case may be. This principle would apply not merely to cases of sales but also to mortgages and charges. In the case of a mortgage the right to follow the substituted security and claim an interest in it will not be a mortgage in the strict sense but would only be a charge. A bona fide purchaser for value may not be affected by such a right in the mortgagee to claim a charge over substituted property. The present case is one where originally there was only a charge created or rather an agreement to give a charge on the part of the 1st defendant, the borrower. It was the Court that declared the charge and that enforced it in execution proceedings. What the Court put up for sale was only the particular survey numbers 2512/1 and 2512/2 in their entirety. The decree-holder was apparently not aware of the acquisition by the Municipality and of the allotment of plot No. 19 to the 1st defendant in lieu of a portion of the two survey numbers over which a charge was agreed to be given and was given by Court. Whatever may be the cause actually the properties brought up for sale had no relation to plot No. 19. The sale certificate also made no mention of plot No. 19. The right to have a charge over the substituted security is now sought to be extended into a right to the property itself when the property as such was not sold but the original mortgage properties were sold and purchased and taken delivery of. I am not aware of any authority for extending the principle to this extent. It may be that the decree-holder was entitled to have a modification of the decree by getting a charge over the remaining portions of 2512/1 and 2512/2 and also over plot No. 19 and then bring them to sale. I cannot agree with the contention that a sale of items 2512/1 and 2512/2 must be taken to amount to a sale of plot No. 19 also in lieu of a portion of the said two items. This seems to be an unwarranted extension which is not justified by the authorities and, in my opinion, it is unsafe to extend the doctrine of substituted security to cover such cases. Considerable inconvenience will be caused in the investigation of title if that should be recognised. I am aware that there are decisions which go to the extent of holding that where notwithstanding a partition, an undivided share in some item or items purports to be sold and purchased, delivery may however be taken of the separated share in these items although the partition had taken place earlier than the proclamation of sale, or sale. But that is as far as one can conveniently or safely go. It would be dangerous to extend that to cases where altogether different and distinct items are allotted and a sale of one cannot be treated as 'ipso facto' a sale of the other. Sale certificates are not to be ignored or construed so lightly. I cannot therefore agree with the contention that the mere fact of purchase of the two town survey numbers would automatically amount to make the purchaser the owner of plot No. 19.

(6) It was urged that in any event the first defendant must be deemed to be in the position of a trustee or at any rate in a fiduciary capacity towards the plaintiffs and his acquisition of plot No. 19 was or must be deemed to be on behalf of the plaintiffs' father. In this case the acquisition was very much earlier. Why the parties made no reference to this during all the relevant periods from the inception of the loan down to its final realisation is rather strange and is really unexplained. Assuming that there is a fiduciary relationship, it cannot be held that it would justify a declaration of title to the property straightaway in favour of the plaintiffs' father or of the plaintiffs. They had only a right to have a charge over those properties established either by the application of the doctrine of substituted security or the principles underlying S. 73 of the Transfer of Property Act or Ss. 88 and 90 of the Trusts Act but I cannot go so far as to say that the title itself is transferred or compulsorily transferable at the instance of the plaintiffs by the 1st defendant to them. It may be that the 1st defendant is having an advantage which is undeserved or unmerited. But that cannot be a ground for declaration of plaintiffs' title to the property in question as owners. What other rights they may have over this plot it is not necessary to canvass in this litigation.

(7) Mr. Bhashyam for the appellants contended that probably they might have had a right to a charge over this property but at the same time he hastened to add that the plaintiffs had really realised the full amount due to them after exhausting the hypotheca by proceeding against other properties of the 1st defendant and bringing them to sale. Those matters are not in evidence before me in the record. That may or may not be so. I am not now called upon to define the rights of parties except to the extent of finding out whether a right of ownership is established in plot No. 19. In my opinion, it is not so established.

(8) Reliance was placed on the fact that the plaintiffs were in possession and in enjoyment of the plot and that the 1st defendant himself had given a letter Ex. P. 19 in 1940 to the effect that the plaintiffs' father was in possession of this plot and that he the first defendant had no manner of right therein. The first defendant sought to deny the genuineness of this letter but the lower Court found it to be genuine and on the evidence read out to me I see no reason to dissent from that conclusion. This however is not the same thing as an operative document of sale and cannot by itself amount to a transfer of title. On the question of possession I agree with the lower Court that possession was at any rate with the plaintiffs' father from 1942 possibly even from 1940. The payment of tax by the first defendant for a number of years down to 1942 is in favour of the first defendant's contention that he was in possession even after the so called delivery proceedings of 1934. Plaintiffs' case was that even in 1934 plot No. 19 was taken delivery of. This in my opinion is not established. The utmost that can be said is they must have got possession by about 1940. At any rate after 1942 the 1st defendant would seem to have acquiesced in plaintiffs'

possession. On the strength of this possession alone no decree could be given. I answer point 1 accordingly.

(9) Point 2. The 2nd defendant claimed to be a bona fide purchaser for value, the lower Court has found against him. A perusal of his evidence is sufficient to show that the conclusion cannot be otherwise. I do not believe that he paid consideration or that he is a bona fide purchaser. If plaintiffs were otherwise entitled to plot No. 19 the 2nd defendant cannot succeed on the ground of his being a bona fide purchaser for value.

(10) In the result in view of my finding that the plaintiffs have no title to plot No. 19 the suit for a declaration of title and possession fails. The appeal is therefore allowed with costs here. The decree of the lower Court is set aside. There will be no order as to costs of the trial Court as the conduct of the 1st and 2nd defendants is far from being bona fide.

C.R.K./V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 Madras 265 *[C.N. 105(10).]*

BALAKRISHNA AYYAR, J.

Parvathathammal, Appellant v. Sivasankara Bhattar and others, Respondents.

Second Appeal No. 2106 of 1947 D/- 11-1-1951.

T. P. Act (1882), S. 3 — Notice — Mortgage with possession—Agreement to sell property to mortgagee —Subsequent sale to stranger — Omission of purchaser to inquire if mortgagee had any other right — Imputation of notice.

When a person other than the vendor is in actual possession of the property it behoves a prospective purchaser to ascertain what all rights the person in actual possession really has in respect of the property. And if he omits to do so and if equities exist in favour of the person in possession the prospective purchaser would be bound by them. (*Para 5*)

Hence, where a mortgagor agrees to sell the property to the plaintiff, a mortgagee in possession, but subsequently sells it to a third person and the mortgagee brings a suit for specific performance of agreement to sell, the purchaser cannot contend that the possession of the plaintiff would put him on notice only of his rights as a mortgagee and of no more. Omission by the purchaser in such a case to make inquiries of the mortgagee whether he has any rights other than as a usufructuary mortgagee amounts to wilful abstention or gross negligence and is therefore bound by the existing equities in favour of the plaintiff and cannot obtain the benefit of the principle of the proviso to S. 27 A, Specific Relief Act: A I R (8) 1921 Bom 459, Foll. (*Para 5*)

Anno: T. P. Act S. 3, N. 28, 29, 39, 40.

S. Ramchandra Iyer, for Appellant; T. M. Ramaswami Iyer; for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('03) 27 Bom 452: (5 Bom L R 144) (Pr 5)
('21) 45 Bom 910: (A I R (8) 1921 Bom 459) (Pr 5)
('23) 45 Mad L Jour 157: (A I R (10) 1923 Mad 563) (Pr 3)
('23) 45 Mad L Jour 175: (A I R (11) 1924 Mad 67) (Pr 5)
(1794) 2 Ves Jr 437: 2 R R 278 (Pr 5)
(1809-11) 16 Ves 249: 17 Ves 433: 10 R R 171 (Pr 5)
(1816) 1 Mer 282: 15 R R 113 (Pr 5)
(1854) 9 Moo P C 18 (Pr 5)
(1901) 1 Ch 45 (Pr 5)

JUDGMENT: The third defendant, a woman is the appellant. The property in suit at one time belonged to the first defendant. On 14th October 1926 he executed a usufructuary mortgage over it in favour of the plaintiff for a sum of Rs. 1,250. Some sixteen years later, that is to say on 29th September 1942, the first defendant purported to sell the property to his daughter, the second defendant, for a sum of Rs. 1,500. On 29th September 1943, defendants 1 and 2 entered into an oral agreement to sell the property to the plaintiff for a sum of Rs. 2,050, out of which Rs. 1,250 was to be adjusted towards the usufructuary mortgage which the plaintiff held. There were certain execution proceedings in connection with this property which are not of present interest. On 3rd May 1945, the first defendant sold the property to the third defendant for a sum of Rs. 2,000. The very next day the plaintiff's advocate sent a telegram to the third defendant informing her that she had made her purchase with notice of the contract of sale in favour of the plaintiff and intimating that a suit would be filed. Four days later, the plaintiff brought the suit out of which the present second appeal arises for specific performance of the agreement of sale.

(2) Both the Courts below have found that the oral agreement set up by the plaintiff is true. On the question whether the appellant had notice of the agreement in favour of the plaintiff the trial Court recorded a finding in the affirmative. The lower appellate Court did not record a clear finding on that point but concluded that the appellant must be deemed to have had notice and in this view dismissed the third defendant's appeal. She has now come to this Court.

(3) Mr. Ramachandra Aiyar, the learned Advocate for the appellant based his principle argument on S. 3 of the Transfer of Property Act:

> "'a person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it."

Three explanations follow, the second of which reads thus:

> "Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title if any, of any person who is for the time being in actual possession thereof."

Now, argued Mr. Ramachandra Aiyar the circumstance that the plaintiff was a usufructuary mortgagee of the property and as such in possession of it would put the appellant on notice only of his rights as a mortgagee and of no more and in consequence it will not be right to impute to her notice of any other rights which the plaintiff may have in the property, rights arising from a source other than as a usufructuary mortgage. He sought support for this argument in certain observations appearing in 'Babasah v. Hajee Mahomed Akbar Sahib', 45 Mad L Jour 157 at p. 158 regarding cases where the property is in the possession of tenants or lessees.

> "He is by their occupation not affected with notice of more than the terms on which they hold including any agreement collateral to their leases, but he is not bound to enquire, nor are they bound to answer, to whom they pay rent, so that the purchaser is not in such a case affected with notice of the tenant's lessor's title or rights ..... The principle has been embodied in India in S. 27 of the Specific Relief Act and S. 3 of the Transfer of Property Act."

(4) The appellant admitted that she did not make any enquiry of the usufructuary mortgagee in order to ascertain from him whether he had any rights in the property other than as a usufructuary mortgage. The real question in this

case, therefore, is whether her omission to do so can be said to amount to wilful abstention from an enquiry which she ought to have made or whether it amounts to gross negligence. The argument of Mr. Ramachandra Aiyar on this matter was that once it was known that the property was in the possession of a usufructuary mortgagee, there was nothing further that a prospective purchaser of the property need have enquired about. The property was in the possession of the plaintiff. The appellant was bound to ascertain why he was in possession. To that enquiry the answer would turn out to be that he was a usufructuary mortgagee. That would dispose of the question of possession. It would hardly occur to anybody to pursue the matter any further and the omission cannot therefore be said to amount to wilful abstention or gross negligence; it would hardly occur to anyone to suppose that the mortgagee had any other rights or interests in this property.

(5) I do not consider that a prospective purchaser can be held to have made the sort of enquiry he should if he does not pursue the matter further. When a person other than the vendor is in actual possession of the property it behoves a prospective purchaser to ascertain what all rights the person in actual possession really has in respect of the property. And if he omits to do so and if equities exist in favour of the person in possession the prospective purchaser would be bound by them. In Parthasarathi Aiyar v. Subbaraya Gramany', 45 Mad L Jour 175 at p. 178 after extracting the relevant passage in S. 3 of the Transfer of Property Act, which I have quoted, the learned Chief Justice observed:

"In England as here it has been held that constructive notice of all the rights of a person in possession of property sold or mortgaged is to be imputed to purchasers or mortgagees who made no enquiry of the person in occupation."

The English law on the subject is stated in 'Hunt v. Luck', (1901) 1-Ch. 45 where Farwell, J., quotes from the earlier decision in 'Barnhart v. Greenshields', (1854) 9 Moo P C 18 at p. 32:

"With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in 'Taylor v. Stibbert', (1794) 2 Ves Jr 437: 2 RR 278, but also to interest under collateral agreements, as in 'Daniels v. Davison', (1809-11) 16 Ves 249:-17 Ves 433: 10 R R 171, 'Allen v. Anthonh', (1816) 1 Mer 282: 15 RR 113, the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be."

The decision in 'Faki Ibrahim v. Faki Gulam', 45 Bom 910 was given on facts scarcely distinguishable from those in the present case. The plaintiff there was in possession of the property as mortgagee from the first defendant. On 4th March 1917, the first defendant agreed to sell the property to the plaintiff. Subsequently he refused to do so and sold the property to the 2nd defendant on 19th January 1918. The plaintiff then sued for specific performance of the agreement. The 2nd defendant relied upon the sale-deed in his favour though he admitted he knew that the plaintiff was in possession and that he made no enquiries as to the nature of the plaintiff's possession. The trial Court and the lower appellate Court dismised the suit on the ground that the second defendant had no notice actual or constructive of the contract of sale between the first defendant and the plaintiff although the second defendant might be fixed with notice of the plaintiff's possession as mortgagee. On second appeal a Bench of the Bombay High Court set aside the decision of the Courts below and ordered specific performance. The learned Judges followed the earlier decision in 'Sharfuddin v. Govind', 27 Bom 452 and the English decision in 'Daniels v. Davison'. (1809) 16 Ves (Jun) 249 at 254; 17 Ves (Jun) 433 in which the Lord Chancellor held that:

"Where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to inquire on, what terms, that person is in possession, that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity. repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession."

Mr. Ramchandra Aiyar argued that the decision in 'Faki Ibramim v. Faki Gulam', 45 Bom 910 cannot be now regarded as current law in view of the amendment made in the Transfer of Property Act after that judgment was rendered. I do not however consider that the amendment made in the Transfer of Property Act affects the correctness of that decision in any manner. The omission of the appellant in the present case to make enquiries of the plaintiff or about his right must be treated as wilful abstinence or gross negligence, which means, that the appellant is bound by the existing equity in favour of the plaintiff and cannot obtain the benefit of the proviso to S. 27 A of the Specific Relief Act. The appeal is dismissed with costs. No leave.

C.R.K./G.M.J. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 266 *[C.N. 105(11).]*

PANCHAPAGESA SASTRY, J.

Boggrapu Venkatasubbiah and another, Appellants v. Chenchupalli Peeriah and others, Respondents.

Second Appeals Nos. 2241 and 2325 of 1947, D/- 18-4-1951.

Madras Co-operative Societies Act (6 (VI) of 1932), Ss. 47 and 48 — Sale in execution of award —Jurisdiction of Civil Court to set aside — Civil P. C. (1908), S. 9.

A civil Court has no jurisdiction to entertain a suit for declaration that certain sales in execution of an award by the Co-operative Society are invalid either on the ground of illegalities or irregularities in the conduct of sale, irrespective of the fact whether the liability sought to be enforced is created under the Act or arises under a contract: A I R (32) 1945 Mad 370, Foll. (Paras 2, 3)

The Co-operative Societies Act itself provides for the higher authorities of the department setting aside the sales on any ground and there is also the power of revision to the local Government for which even a long period of about a year has been provided for. The powers of interference do not seem to be confined to cases where there has been a fraud or irregularity only. They are wide enough to include cases where the sale is vitiated by what may be called irregularity as distinguished from mere illegality. (Para 3)

Ann: C. P. C., S. 9, N. 50.

Government Pleader and Ch. Suryanarayana Rao, for Appellants; K. Umamaheshwaram, for Respondents.

Case referred to:
('46) I L R (1946) Mad 330: (A I R (32) 1945 Mad 370) (Pr 2)

JUDGMENT: These appeals arise out of a suit instituted by the plaintiff for a declaration that certain sales in execution of an award by a Co-operative Society are invalid. The award was passed in 1931. Some amounts were realised through the agency of the Collector in 1934 and an execution application was filed in 1936. There were sales of certain properties which on objection was set aside. There was a direction for re-sale of the items already brought to sale and also two other items being mortgaged properties which were originally not brought to sale. These items were again put up for sale in 1934. The sales were confirmed by the Department and the objections filed by the judgment-debtor were disallowed. He took the matter to the higher officials. That was also dismissed. Finally he brought the present suit. The lower appellate Court has now found that there were certain irregularities in the conduct of the sale and there has been an injury caused to the plaintiff because the price realised was inadequate. The lower appellate Court decreed the suit holding that the civil Courts had jurisdiction to decide the matter. The second appeals are now filed questioning the correctness of the decision of the lower appellate Court which had reversed the decree of the trial Court.

(2) The point argued in second appeal is that the civil Court has no jurisdiction. Reliance was placed on a Bench decision in 'Ramayya v. Chittoor District Co-operative Deputy Registrar', ILR (1946) Mad 330. The lower appellate Court tried to distinguish the decision but in my opinion, the attempted distinction is not tenable. The lower appellate Court thought that this decision should be confined to cases where liability sought to be enforced was created under the Act or by virtue of some section of the Act. It cannot govern the case like the present one, where the liability arose under the contract. I do not think that this distinction is supportable. It would follow that the civil Courts have no jurisdiction.

(3) Mr. Umamaheswaram, however, contended that that decision of the Bench should in any event be confined to cases only where the sales were attacked on grounds of fraud or irregularities in the conduct of the sale. But where as in the present case, the sales are attacked on the ground of illegality the civil Courts can go into the matter. Having regard to the reasoning of the Bench I am not satisfied that this distinction could be made. The Co-operative Societies Act itself provides for the higher authorities of the department setting aside the sales "on any ground" and there is also the power of revision to the local Government for which even a long period of about a year has been provided for. The powers of interference do not seem to be confined to cases where there has been a fraud or irregularity only. They are wide enough to include cases where the sale is vitiated by what may be called irregularity as distinguished from mere illegality. I cannot, therefore, say that the distinction, which was sought to be drawn by Mr. Umamaheswaram, necessarily follows.

(4) Moreover, in this case, it is not clear that there has been any illegality as distinguished from mere irregularity. No doubt, it was argued that the execution petition was itself barred by limitation and some demand notices were not served upon the parties. I have not been satisfied, however, that the so-called illegalities have been made out. On many points relevant documents are not before me. There seems to be no clear finding either on any of the points now characterised as illegalities. It is however unnecessary to go into this matter further as I am satisfied that the Division Bench decision is applicable to the case, in any event.

(5) The result is that these appeals should be allowed and the suits dismissed with costs throughout. No leave.

C.R.K./K.S. *Appeals allowed.*

A.I R. (39) 1952 Madras 267 *[C N. 105/12).]*

PANCHAPAKESA AYYAR, J.

In re Arulanandu and others, Accused-Appellants

Criminal Appeal No. 660 of 1950/ D-23-8-1951.

(a) Criminal P. C. (1898), S. 342 — Examination of accused in Sessions trial — Several accused — Nature of examination.

The provisions of S. 342, Criminal P. C. are mandatory and the mere fact that the case is one of rioting involving a large number of accused will not aosolve the Sessions Judge to whom the accused are committed for trial, from his duty to compiy strictly with the provisions of S. 342. Merely putting a general question after reading over the accused's statement before the committing Magistrate (even if there was complete and full questioning before the Committing Court.), and his admitting it to be correct, whether he wished to add anything to it is not sufficient. It is obligatory on him to put every piece of evidence relied upon by him against every one of the accused to that particular accused in order to enable him to explain away those pieces of evidence, if he liked. 1951-2 Mad L Jour 423, Rel. on. (Para 5)

Anno: Cr. P. C. S. 342, N. 20, 28.

(b) Penal Code (1860), Ss. 146, 147 — Mammoth rioting involving large number of persons — Evidence and proof — Principles to be borne in mind by Court.

In a case of rioting involving a large number of accused the Court should bear in mind the following five fundamental principles.

(i) Notwithstanding the large number of the rioters or of the persons put up in Court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to such of the accused, the Court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting that particular accused. (Para 6)

(ii) Spectators, wayfarers, etc., attracted to the scene of the rioting by curiosity, as generally happens in the country-side when a riot or affray is going on, should not be, by reason of their mere presence at the scene of rioting and with the rioters, held to be members of the unlawful assembly or rioters. But, of course, if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under S. 106 of the Indian Evidence Act. (Para 7)

(iii) It will be very unsafe, in the case of such large mobs of rioters to rely on the evidence of a 'single witness' speaking to the presence of an accused in that mob for convicting him, especially, when no overtact of violence or shouting of slogan, or organising the mob, or giving orders to it, or marching in procession with it, or other similar thing is proved against him. In a big riot, by hundreds of persons, it is very easy even to mistake one person for another, and implicate

honestly really innocent persons, and even to mistake persons seen elsewhere as having been seen there. An ordinary rule of caution and prudence will require that an accused identified only by one witness, and not proved to have done any overt act etc., as described above, should be acquitted, by giving him the benefit of the doubt. (*Para 8*)

(*iv*) *Where there are such acute factions, one based on agarian disputes and troubles, another on political wrangling and rivalry, and a third on caste division or the division of the haves and the have-nots, the greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite views. This principle becomes of special importance when there are no overt acts, etc., proved, and when there are only one or two witnesses speaking to the presence of the accused among the rioters, and they belong to the classes or factions opposed to the accused.* (*Para 9*)

(*v*) *Mere 'followers' in rioting deserve a much more lenient sentence than leaders who mislead them into such violent acts, by emotional appeals, slogans and cries.* (*Para 10*)

(*c*) *Penal Code, (1860), S. 147 — Mammoth rioting — Merely because some rioters have received gun shot wounds at the hands of police they cannot be presumed to have been more aggressive than others.* (*Para 14*)

Anno: Penal Code S. 147, N. 1.

A. Ramachandran for Messrs. Row and Reddy, for Appellants; Public Prosecutor; for the State.

Case referred to:
('50) C A No. 894 of 1950: (1951-2 Mad L Jour 423) (Pr 5)

JUDGMENT: This is an appeal by 76 accused (alleged to be the 'residuum of 1,000 rioters) in S. C. Nos. 41 and 42 of 1950 on the file of the Court of Session, West Tanjore division. In these two cases, popularly known as the Nanalur Rioting Case, there were in all 122 accused before the Court of Sessions. The charges against them were as follows:

"1. That you, accused 1 to 122, on or about the 14th day of April, 1948, at 'Singamangalam and 'Vadakku Nanalur', were members of an unlawful assembly, and in prosecution of the common object of such assembly, viz., preventing the arrest of persons and rescuing of arrested persons concerned in the rioting at 'Thuvarankollai Odai,' 'Singamangalam,' on 12th April 1948; and assaulting and murdering the Police party stationed at 'Vaddakku Nanalur' and wresting by force the rifles of the Police, committed the offence of rioting, that you accused 44, 47 and 49 were armed with deadly weapons and thereby committed an offence punishable under S. 148 of the Indian Penal Code, and the rest of you under S. 147, I. P. C., and within my cognizance.

2. That you, accused 1 to 122, at or about the same time and place, and in the course of the same transaction, did an act, to wit, armed yourselves with sticks, 'aruvals' and other deadly weapons, and attacked the Police party with stones, causing injuries to the Policemen with such intention and under such circumstances that if by that act, you had caused the death of the Policemen you would have been guilty of murder, and thereby committed an offence punishable under S. 307 of the Indian Penal Code, and within my cognizance.

3. That you accused 1 to 122, at or about the same time and place, attempted to commit dacoity, an offence punishable under Section 395 of the Indian Penal Code, and within my cognizance.

And I hereby direct you to be tried before me on the said charges.

Dated, this the 31st Day of July, 1950.

(Sd) K. SRINIVASAN,
Sessions Judge."

The learned Sessions Judge convicted 73 of the appellants under Section 147, I.P.C., and 3 of the appellants, namely accused 44, 47 and 49, who had been armed with deadly weapons during the course of the riot, under Section 148, I.P.C., and acquitted the rest. In view of the fact that all these accused had been in remand for more than two years during the pendency of this long-drawn-out trial, he sentenced accused 44, 47 and 49 to undergo rigorous imprisonment for one year each and the other 73 accused to undergo rigorous imprisonment for 9 months each. He directed all the sentences to run along with any other sentences which they might be undergoing.

(2) I have perused the records and heard the learned counsel for the appellants, Mr. Ramachandran, and the learned Public Prosecutor 'contra.' The facts were brifly these. In that locality there were three kinds of troubles and factions slowly growing, as is only natural in these post-war days of furious ferment.

(3) One was between the 'landlords' or 'Mirasidars' (many of the P.W.s' are 'Mirasidars') and landless labourers' to which class most of the accused belong. The second faction was between 'Congressmen' like P.Ws' 13, 29, etc.,and 'Communists' to which class most of the accused are said to belong. Some of the accused, like Accused 37, were "rival congressmen" or "ex-Congressmen." The third faction was between 'cast Hindus' to which class many of the P.Ws belong, and 'Harijans and Pallas' to which class many of the accused belong. The three-fold faction came to a head in April, 1948. On 12-4-1948, some Congress leaders going round on their propaganda work were waylaid and attacked by a huge hostile mob near the outskirts of North Nanalur village. The car by which they were travelling was stopped and smashed and overturned, and it lay by the side of the road at a place call 'Thuvarankollai Odai', a couple of furlongs to the north of the village. In connection with the investigation into this case of rioting,, a police party proceeded to Nanalur. Two constables, P.Ws 1 and 2, had been stationed near the overturned car for the purpose of watching it. On the 14th of April the date of the present occurrence, the Deputy Superintendent of Police took a photographer, P.W. 21, and directed him to take photographs of the damaged car. Leaving P.W.s. 21, 26, 7 and 8 at the spot, the Deputy Superintendent proceeded to North Nanalur. From there he took a party of reserve police and went to 'Sendamaraikkan' in order to apprehend the persons who had taken part in the rioting on the 12th. At North Nanalur a small police force consisting of a Sub-Inspector, Ramiah Pillai, a Head Constable, P.W. 12, and four constables were left. The police arrested two persons, Kalyanasundaram and Subramaniam, and kept them in their custody at North Nanalur. By about 5 P.M. on 14-4-1948, P.W. 21 finished taking his photographs of the wrecked Congress car. Then the damaged car was taken out of its rut and placed on its wheels in order to take it on to the road. A driver who had gone in another car to take the photographer there was examining and setting right the mechanism of the wrecked congress car with a view to take that car to North Nanalur. By this time a hostile mob about 600 or 700 strong went there shouting slogans like, "Long live the Revolution" "Victory to the Red

Flag" "Down with the Congress" "Cut the Policemen!" "Beat the policemen!" "Snatch their muskets" etc.", and pelting stones freely, and rather aimlessly, more with an intent to intimidate the police to release the arrested people, and not to arrest more people, than with a specific intent to hurt any specific police officer or Congressman or 'Mirasidar.' P.Ws 1 and 2 warned the crowd not to raise such slogans, and not to pelt stones. As the crowd did not stop shouting slogans or pelting stones, P.Ws 1 and 2 fired a round each. But this did not stop the crowd which kept rushing forward. So the two constables, P.Ws. 1 and 2, retreated backwards. The onrushing crowd caught hold of the two cars, the previously wrecked Congress car and the photographer's relief car, and damaged both of them, and then gave chase to P.Ws. 1 and 2. A portion of the mob tried to prevent P.Ws. 1 and 2 from reaching North Nanalur. P.Ws 1 and 2 fired some more shots, with a desire to create terror in their pursuers, and finally succeeded in fleeing to North Nanalur, the crowd chasing them close. At North Nanalur, P.Ws 1 and 2 told the police stationed there about the incidents. The police party then stationed itself underneath a stout tamarind tree. When the crowd rushed to that tree, the Sub-Inspector warned the crowd several times not to shout slogans or throw stones. Stones continued to be pelted by members of the crowd, but most of them fell harmlessly on the tamarind tree instead of on the police. The mob was by then one thousand strong; and some of the members were armed with sickles, axes and sticks. Some had also baskets filled with stones. One Natesan, who was armed with a sickle and a stick, was at the head of the mob, and he incited the members of the mob to attack the police and beat them soundly. The shouting of slogans went on; so too the pelting of stones. As the situation became dangerous, the police opened fire. Natesan had his head blown off by a rifle shot in that police firing. He died on the spot. Accused 58 and 59 also received serious rifle shot injuries. But they were removed by the other members of the mob and were arrested only later on when they presented themselves before P.W. 33, the doctor of the Thirutharaipundi hospital, for treatment. After the firing, the crowd retreated a little but later on reformed itself and surrounded the village, threatening to set fire to the houses and destroy the police party. But some resourceful individual, not named, managed to go on a cycle to 'Sendamaraikkan.' He informed the reserve police there about this attack by the mob. Immediately, the Deputy Superintendent of Police, accompanied by the reserve force rushed to North Nanalur. The mob was thus caught between the Police party at the tamarind tree and the reserve party under the Deputy Superintendent of Police. It began to disperse. The reserve police made a 'lathi' charge and arrested accused 32, 42 to 51, 118 and two others on the spot. Accused 44, 47 and 49, all of them Harijans,, were armed with sickles and axe when they were found among the rioters and arrested. Two constables received trifling injuries due to stone hits during this riot. In all, 274 persons were put up before the Special 1st Class Magistrate, Tiruchirapalli, in P.R.C. Nos 2 and 4 of 1949 on his file. He committed only 122 out of them to Sessions.

(4) The learned Sessions Judge acquitted all the 122 accused before him on the charge under Section 307, I.P.C., holding that there was absolutely no evidence to show that the rioters ever intended to 'murder' any constables, or to attempt to murder any constables, and that the prosecution evidence had only proved that the common object of the unlawful assembly was only to assault and beat the police or to use such small force against them. The charge under Section 395 has been split up and laid aside for future action, if necessary, under Section 240 Criminal Procedure Code and Rule 156 of the Criminal Rules of Practice.

(5) Mr. Ramachandran, for the appellants, contended that the learned Sessions Judge was wrong in convicting the appellants under Sections 147 and 148, I.P.C., without sufficient and individual proof against each of them that he had been a member of the unlawful assembly with the common object of beating or causing hurt to the police when it committed this rioting. He urged, quite correctly, that there is no such thing like "constructive liability" for the offence of being a member of an unlawful assembly, or liability for conviction under Section 147 by being merely proved to have been found with known or proved rioters. and that the requirements of the law under Sections 141, 146 and 148, I.P.C., must be strictly proved before any of the appellants can be convicted for rioting or other offence covered by these sections. He also urged that the convictions of all the appellants were 'vitiated', as the learned Sessions Judge acted 'illegally' in not putting all necessary questions under Section 342, Criminal Procedure Code, to each accused regarding the facts appearing against him in the evidence, in order to enable him to explain away those facts, as he was bound to do, and that the mere fact that there was a complete and full questioning in the committal Court would not cure the illegality. He relied on a recent ruling of Govinda Menon and Ramaswami, JJ., 'In re Soloman', C A No. 894 of 1950 (Mad) to the effect that the mere fact that the accused is asked by the Sessions Judge whether he wishes to say anything more in addition to what he has stated in the committing Court (even if there was a complete and full questioning in that Court) is 'not sufficient', and that it is obligatory upon the Sessions Judge (the 'Court' trying the case, to which the word 'shall' in Section 342 applies) to 'comply strictly' with the provisions of S. 342 of the Criminal Procedure Code and to put every piece of evidence relied upon by him against every one of the accused to that particular accused and get his explanation, if he cares to offer it at the peril of the conviction and sentence being set aside, as 'vitiated', and re-trial ordered. His contention was that the learned Sessions Judge did not comply with the provisions of Section 342 of the Criminal Procedure Code in this case and merely put a general question, after reading over the accused's statement before the committing magistrate and his admitting it to be correct, whether he wished to add anything to it, without putting to him all the evidence he relied on against him, like the persons identifying him among the rioters, the acts attributed to him etc., in order to enable him to explain away those pieces of evidence, if he liked. This contention is correct in law. The terrible number of the accused before the Sessions Judge was no excuse for him to depart from the provisions of Section 342 Criminal Procedure Code. But, happily, no re-trial was asked for finally in this elephantine case, for reasons stated later.

(6) Before proceeding further, in general interests, and after hearing the learned counsel for the appellants and the learned Public Prosecutor, I enunciate five fundamental principles which a Court will have to observe in such cases of mammoth rioting which are becoming more and more common in our own country nowadays. The first is that notwithstanding the large number of the rioters or of the persons put up in Court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to each of the accused, the

Court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting that particular accused. The fact that there were a thousand rioters, and 122 accused before the Sessions Judge, will not take away from the prosecution even an iota of the responsibility of proving them. It may be the misfortune of the prosecution. But the misfortune of the prosecution should never be allowed to become the misfortune of the accused. Just as the culprits in undetected crimes escape punishment, these unproved persons also must be unhesitatingly acquitted.

(7) Secondly, spectators, wayfarers, etc., attracted to the scene of the rioting by curiosity, as generally happens in the country-side when a riot or affray is going on, should not be, by reason of their mere presence at the scene of rioting and with the rioters, held to be members of the unlawful assembly or rioters. But, of course. if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under Section 106 of the Indian Evidence Act.

(8) The third is that it will be very unsafe, in the case of such large mobs of rioters to rely on the evidence of 'a single witness' speaking to the presence of an accused in that mob for convicting him, especially, when no overt act of violence, or shouting of slogans, or organising the mob, or giving orders to it, or marching in procession with it, or other similar thing is proved against him. In a big riot, like this, by hundreds of persons, it is very easy even to mistake one person for another, and implicate honestly really innocent persons, and even to mistake persons seen elsewhere as having been seen there. An ordinary rule of caution and prudence will require that an accused identified only by one witness, and not proved to have done any overt act, etc., as described above, should be acquitted, by giving him the benefit of the doubt.

(9) The fourth principle to be observed in such cases is that where there are such acute factions, one based on agrarian disputes and troubles, another on political wrangling and rivalry, and a third on caste division, or the division of the haves and the have-nots, the greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite views. This principle becomes of special importance when there are no overt acts, etc., proved and when there are only one or two witnesses speaking to the presence of the accused among the rioters, and they belong to the classes or factions opposed to the accused.

(10) The fifth principle to be observed is that mere 'followers' in rioting deserve a much more lenient sentence than leaders like Natesan, who mislead them into such violent acts, by emotional appeals, slogans and cries.

(11) Now, I shall apply the above five principles to this case. Overt acts have been proved in an aggravated form only against three persons, namely, accused 44, 47 and 49, who were found marching in the riotous procession with sickles and axe, when the rioters were uttering the violent slogans against the Congress, Police, etc., I have absolutely no doubt that the convictions of accused 44, 47 and 49 under Section 148, I.P.C., were correct. There was abundant evidence on record to prove it. Though the learned Sessions Judge did not put the question regarding the sickles and axe to them, under Section 342 Criminal Procedure Code, as he should have, they themselves stated in their replies to his general question, that they did not have these sickles or axe with them and that they were not even present at the rioting. So, the failure of the learned Sessions Judge to put the question pointedly to them did not result in any prejudice to them, and did not vitiate their convictions. But, their sentences deserve reduction, as they did not use the deadly weapons against any one, and as they have been in remand for more than two years during the trial. I reduce their sentences into rigorus imprisonment for six months each. These sentences will run along with any other sentences which they might be undergoing.

(12) The learned Public Prosecutor admitted that only one witness each has spoken to the presence of 28 appellants namely accused 1, 5, 11, 13, 17, 21, 25, 28, 38, 64, 66, 70, 71, 73, 75, 77, 79, 96, 97, 98, 99, 101, 102, 120 and 122, at the scene of the rioting, and that none of those accused were also alleged, even by this single witness, to have done any violent act, or carried any weapon, or shouted any slogans, or organised the rioters, or marched in procession with the rioters for any distance when they were shouting their slogans or expressing their common intention to beat the police or pelting stones. So, applying one of the five principles I have laid down above, all these accused are given the benefit of the doubt and acquitted of the offence under Section 147, I.P.C., and their convictions and sentences are set aside, and their bail bonds cancelled.

(13) I now come to the remaining 48 accused. There are two or more witnesses who have spoken to the presence of each of them among the rioters that day, and I have absolutely no doubt that they were among the rioters that day. No doubt they were not proved to have themselves done any overt act of violence or shouted any slogans etc., but they were proved to be marching with the rioters when they were shouting slogans and pelting stones. It was not the case of any of them that they had gone to the spot attracted by curiosity, like a school-master, or a doctor or a lawyer or a government servant or other citizen to see impelled only by curiosity what the matter was. It is obvious that the presence of such innocent men at the spot, not being secret, would be spoken to by a number of persons who saw them there, though it would not prove any criminal intention shared in the common with the rioters. But, where a man's case is that he went to the scene of rioting and stood there out of curiosity alone, and not with any unlawful object, but he is proved to have marched with the rioters, it is for him to state and prove his innocence as it is a matter within his special knowledge under Section 106 of the Indian Evidence Act. In my opinion, it is his duty, once the prosecution has proved his marching along with the rioters, to show that though he was found marching with the rioters he was with that group not with any unlawful common object of committing rioting, but only out of curiosity. As none of these accused did so, I confirm their convictions under Section 147, I.P.C., as there is plenty of credible evidence to show that they marched in procession with the rioters when they were shouting slogans and pelting stones, and it was up to them to prove their innocence, the prosecution having 'prima facie' proved them to be guilty under Section 147, I.P.C., The failure of the learned Sessions Judge to question them in detail about the pieces of evidence against them was, no doubt, irregular. But it has not actually prejudiced them in any way in this case and the learned counsel does not want a re-trial as I am for reducing the sentences of these accused to the periods already undergone, considering the fact that they carried no weapons and committed no overt act of violence, and only marched in procession for some distance with the

other rioters, in these days of democratic activity and processions of all kinds, and were misled by Natesan and others. I consider that the periods of imprisonment already undergone by them would amply meet 'the end of justice', especially in view of their having been in remand during the trial for more than two years. So, I reduce their sentences to the periods of imprisonment already undergone. Happily, this decision has also prevented the ugly need for a re-trial of this mammoth case, as these accused do not want any re-trial now.

(14) The learned Public Prosecutor wanted to distinguish the case of accused 58 and 59, who received severe gun shot wounds, and wanted them to be treated more severely, like accused 44, 47 and 49, and not like the other accused whose convictions I have confirmed. I cannot agree. Merely because they received gun-shot wounds, they cannot be presumed to have been more aggressive than the other 43 appellant rioters of this group. It often happens, in police firing of this kind, that it is the less clever and the less prominent people who stand and shuffle about and receive the bullets, while the more clever and more forward people scamper away and escape the bullets. So, I do not consider that accused 58 and 59 deserve any higher sentence than the 43 appellant rioters of their group.

C.R.K./K.S. *Order accordingly.*

A.I.R. (39) 1952 Madras 271 *[C. N. 105 (13).]*

SATYANARAYANA RAO AND RAGHAVA RAO, JJ.

S. N. A. S. Annamalai Chettiar; Applicant v. The Commissioner of Income-tax, Madras; Respondent.

Case Referred No. 64 of 1947, D/- 2-1-1951.

(a) *Income-tax Act, (1922), S. 25 (3) (Before its amendment in 1939) — Hindu joint family carrying on business — Business split up by partition — Old business whether "discontinued."*

The word "discontinued" in S. 25 (3) means a complete cessation of the business and does not include transfer of business. Mere change of ownership, therefore, without cessation of business does not amount to discontinuance of such business. The conception of "continuance" as excluding and the conception of "discontinuance" as warranting, the operation of Sub-s. (3) are alike judicial and not physical. A IR (32) 1945 P C 137; A I R (30) 1943 Mad 504, Foll. (Paras 4, 8)

Thus where a Hindu joint family consisting of the father and his son and carrying on money lending business under four different styles is split up by a partition whereby the assets of the business are split up, the joint family business no longer continues its existence but terminates. The mere fact that the father continues the same books of account and the customers of the money lending business are to some extent identical will not make the business of the father a continuation of the old business when once what was a single unit is split up into various component parts. The parts separated are distinct and separate parts of a unified whole but the unity and the integrity between the parts are no longer possible unless there was reunion or partnership. This is not a case of mere transfer of ownership. It is a case of disintegration of a unit into its component parts so as to annihilate the unity of the business. AIR (33) 1946 Nag 54; Dissent. A I R (21) 1934 Rang 13 (SB), A I R (24) 1937 Mad 316 (SB); A I R (27) 1940 Rang 281 (SB) and (1935) 19 Tax Cas 121, Ref. (Para 5)

Anno: I. T. Act, S. 25, N. 2.

(b) *Income-tax Act, (1922), Ss. 25, 26 — Scope of.*

Ss. 25 and 26 of the Act form part of a single scheme and their interaction should not be ignored. S. 26 is primarily concerned with the apportionment of the tax where relief under S. 25 is not possible. A I R (32) 1945 P C 137, Rel. on. (Para 6)

Anno: I. T. Act, S. 25, N. 1; S. 26, N. 1.

K. Rajah Aiyar and K. Srinivasan, for Appellant; C. S. Rama Rao Sahib, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('45) I L R (1945) Bom 938: (A I R (32) 1945 PC 137) (Prs 4, 5, 6, 8)
('37) 1937-5 I T R 49: (A I R (24) 1937 Mad 316 SB) (Pr 6)
('44) 1944-12 I T R 226: (A I R (31) 1944 Mad 398 (1)) (Pr 3)
('44) I L R (1944) Mad 166: (A I R (30) 1943 Mad 504) (Prs 4, 5)
('46) 1946-14 I T R 191: (A I R (33) 1946 Nag 54) (Pr 6)
('34) 1934-2 I T R 85: (A I R (21) 1934 Rang 13 SB) (Pr 6)
('40) 1940-8 I T R 531: (AIR (27) 1940 Rang 281 SB) (6)
(1935) 19 Tax Cas 121 (Pr 6)

SATYANARAYANA RAO, J: The Income-tax Appellate Tribunal referred the following question of law for the opinion of this Court:

"Whether on the facts and circumstances of the case the Tribunal was right in holding that the Hindu undivided family was not entitled to the benefits of S. 25 (3) of the Indian Income-tax Act, after partition on 28-3-1939."

(2) The applicant was a member of a Hindu undivided family till the date of the partition on 28-3-1939. The family consisted of Chockalinga, the father and Annamalai the son, the assessee. The family was carrying on money-lending business at Penang under four different vilasams or styles (1) S. N. A. S. (Penang), (2) A. N. (Penang), (3) S. N. A. S. A. (Penang) and (4) S. N. A. S. A. (Trust.) It had also a share in S. N. A. S. Bagan Datoh. In the partition of the family properties S. N. A. S. (Penang) and the family's share in Bagan Datoh was allotted to the father and the son took the remaining three assets or activities, i.e., S. N. A. S. A. (Penang), A. N. (Penang) and S. N. A. S. A. (Trust.) During the assessment year 1939-40, with which this reference is concerned, the assessee claimed that the joint family was not liable to be taxed for the period between 13-4-1938 and 28-3-1939, the date of the partition on the basis that it was entitled to the benefit of Section 25 (3), Income-tax Act. The accounting year for the assessment year is from 13-4-1938 to 13-4-1939.

(3) The assessee claimed that the joint family business became "discontinued" by reason of the partition in March 1939 and that therefore Section 25 (3) applied. It was originally held by the Appellate Assistant Commissioner that the business under different vilasams represented five distinct and separate businesses of the Hindu undivided family which were divided between the two members the father taking two businesses in their entirety and the son taking over the other three remaining businesses. It was therefore thought that there was no "discontinuance" within the meaning of Section 25 (3). That this was an error was pointed out by the Appellate Tribunal by its order dated 13-9-1943 and it was held that it was only one single business of money lending carried on by the family the assets of which were divided amongst the two coparceners and as the assessment proceeded on an entirely wrong basis, the

Appellate Tribunal remitted the matter to the Income-tax Officer for making a fresh assessment with a direction that the claim of the assessee under Section 25 (3) should be examined afresh in the light of the finding of the Tribunal. The Income-tax Officer purporting to follow the decision of this Court in 'Commissioner of Income-tax v. Annamalai Chettiar', 1944-12 I T R 226 held that there was no discontinuance within the meaning of Section 25 (3). On appeal, however, the Appellate Assistant Commissioner differed from this view on the ground that as a result of the partition the entire assets of the family belonging to one single business were divided and were allotted to the father and the son separately and that it was difficult to hold that the joint family business continued after partition. The Appellate Tribunal reversed the decision of the Appellate Assistant Commissioner holding that there was no discontinuance of business as it was not established that the son continued to carry on the business with the assets allotted to him after partition though it was proved that the father was carrying on the business, the same old business in the same old vilasam though with the assets allotted to him at the time of the partition. We have to decide in this reference as between the two views which is correct.

(4) The partition between the father and the son on 28-3-1939 was accepted as genuine. The father, with the assets allotted to him, continued the business of money lending. The assets allotted to the son comprised mostly the properties acquired in the course of the money lending business which were acquired under different vilasams. The decision of the question turns on the interpretation of the words "discontinued" and "discontinuance" occurring in Section 25 (3) of the Act. As the amending Act VII of 1939 which introduced Sub-section (4) to Section 25 came into force only on 1st April 1939 the assessee would not be entitled to the benefit of that provision on the ground that there was "succession" as the partition took place prior to the date of the coming into force of the Amending Act. It has now been authoritatively settled by the Privy Council in 'Commissioner of Income-tax, Bombay v. P. E. Polson', I L R (1945) Bom 938, which approves the decision of this Court in 'Meyyappa Chettiar v. Commr. of Income-tax, Madras, ILR (1944) Mad 166, that the word "discontinued" in the Sub-section means a complete cessation of the business and does not include transfer of business. Mere change of ownership, therefore, without cessation of business does not amount to discontinuance of such business. In 'Meyyappa Chettiar v. Commr. of Income-tax, Madras, ILR (1944) Mad 166, there was no splitting of the business in the partition which occurred in the family but the business which was a long standing one and which was carried on till the date of the partition was continued after partition by the members of the family as partners. The continuity of the business was kept up by continuing it at the same place and perhaps in the same accounts. The case before the Privy Council, 'Commissioner of Income-tax, Bombay, v. P. E. Polson', ILR (1945) Bom 938, was one of assignment of the business carried on by an individual to a company. The integrity and identity of the business in both the cases was not altered or affected in any manner by the change of ownership and therefore there was no complete cessation of the business at any point of time and no new business emerged by virtue of the alteration in the ownership of the business.

(5) The business, the discontinuance of which is in question under the Sub-section is the business which was charged to income-tax under the Act of 1918 and which has been later discontinued. Which was the business that was assessed up to the date of discontinuance under the income-tax Act? It was undoubtedly the joint family business which was a single business, as now finally decided by the Appellate Tribunal and which was carried on under the various vilasams and acquired assets during the course of such business under different names. Can it be said that after partition such business did not terminate but continued by reason of the fact that the father, with the assets allotted to his share after the disruption of the family, carried on a similar business with such assets. It cannot be gainsaid that the integrity of the business was broken and its identity was lost. The process of partition involves the restriction of what was a joint right of a member extending to the entirety of the properties to some of the assets of the family which were allotted at the partition. It is not quite correct to treat a partition as involving a change of ownership in the sense of a transfer of ownership from one to the other. The father, under the partition acquired an exclusive right to some of the assets as did the son to the other assets. The son, therefore, has no interest in the business of the father and 'vice versa.' In other words, the business of the father is a totally different business in the eye of the law though of a similar or same nature as the business which was previously carried on by the joint family. In my view, the legal position of the assessee and his father after partition in relation to the business was correctly stated by the Appellate Assistant Commissioner who held that, after splitting up of the assets of the business, the joint family business no longer continued its existence but terminated. The mere fact that the father continued the same books of account and the customers of the money lending business were to some extent identical would not make the business of the father a continuation of the old business when once what was a single unit was split up into various component parts. The parts separated are distinct and separate parts of a unified whole but the unity and the integrity between the parts are no lonegr possible unless there was a reunion or partnership. This is not a case of mere transfer of ownerhsip as in 'Commissioner of Income-tax, Bombay v. P. E. Polson', ILR (1945) Bom 938 or in 'Meyyappa Chettiar v. Commr. of Income-tax, Madras', ILR (1944) Mad 166. It is a case of distintegration of a unit into its component parts so as to annihilate the unity of the business.

(6) Several decisions have been cited on both sides, particularly decisions in which the word "succession" had been interpreted. Sections 25 and 26 of the Act form part of a single scheme and as observed by Lord Simonds in Commr. of Income-tax, Bombay v. P. E. Polson', ILR (1945) Bom 938 their inter action should not be ignored. Section 26 is primarily concerned with the apportionment of the tax where relief under Section 25 is not possile. But Section 26 (2) provides for the case of succession and apportionment of tax in cases not falling under Section 25 (4). That section also was amended in 1939, In Commr. of Income-tax Burma, v. N. N. Firm', 1934-2 IT R 85 the Rangoon High Court had to consider and interpret the word "succession" in Section 26 (2) of the Act before its amendment and the question was whether after a partition inthe family where one member was cut off with a one-fifth share in the assets of the business and the other four carried on business with the remaining assets at the old premises in the manner in which it was carried on before partition, it can be said that by carrying on the business after partition there was a succession to the business of the joint family within the

reasoning of Section 26 (2)., Rupa, C.J., pointed out, that, in order to constitute succession, it must be succession to the business as a whole and when the business was split up and another person carries on part of the business it is impossible to hold that there was a succession. The learned Judge further says that the business carried on by the transferee cannot be a new business wholly distinct, nothing, that is to be carried or with the assets before and with the same conditions and even in the same premises as the old business. The importance of this case is that the learned judge has held that, in the case of a sale of a part of the business, the transferee cannot be said to carry on

matters the Court's jurisdiction is not excluded. Under S. 18 there is no prohibition against the filing of a suit. This section comes within the category explained in 69 MLJ 695, and the suits filed by the plaintiffs against the State of Madras alleging that sales-tax was illegally levied against them and excessive amounts were collected from them as sales-tax are maintainable. A I R (23) 1936 Mad 269, Rel on. Case Law referred.

(Paras 2, 4)

Anno: C. P. C., S. 9, N. 50, 53.

Government Pleader; for Appellant; D. Suryaprakasa Rao, M. S. Ramachandra Rao, and M. Krishna Rao; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('90) 17 Cal 590: (17 Ind App 40 P C) (Pr 2)
('40) ILR (1940) Mad 599: (A I R (27) 1940 P C 105) (Pr 2)
('47) 1947-2 Mad L Jour 16: (A I R (34) 1947 PC 78) (Pr 2)
('51) 64 Mad L W 366: (A I R (38) 1951 S C 115) (Pr 2)
('89) 12 Mad 105 (Pr 2)
('15) 38 Mad 41: (A I R (3) 1916 Mad 1119) (Pr 2)
('31) 54 Mad 928: (A I R (18) 1931 Mad 574) (Pr 2)
('35) 69 Mad L JOUR 695: (A I R (23) 1936 Mad 269) (Prs 3, 4)
('37) 45 Mad L W 394: (A I R (24) 1937 Mad 536) (Pr 2)
('41) I L R (1941) Mad 850: (A I R (28) 1941 Mad 530 FB) (Pr 2)
('46) I L R (1946) Mad 330: (A I R (32) 1945 Mad 370) (Pr 2)
('50) I L R (1950) Mad 799: (A I R (38) 1951 Mad 473) (Pr 2)
('49) 27 Pat 820 (Pr 2)
(1859) 141 ER 486: (6 CB (NS) 335) (Pr 2)

GOVINDA MENON, J: All these three appeals raise the same question of law, though the respondents are different. The suits were filed by the respondents plaintiffs against the State of Madras alleging that sales-tax was illegally levied against them and excessive amounts were collected from them as sales-tax. Various defences were raised in the trial Court of which one was that the civil Court has no jurisdiction to entertain the suits. The District Munsiff found in favour of the defendant and dismissed all the suits. On appeal, the learned Subordinate Judge came to a contrary conclusion and remanded the suits for disposal on merits. Hence these appeals.

(2) The only question is whether the Madras General Sales-tax Act, 1939, with its subsequent amendments has ousted the jurisdiction of the ordinary civil Courts when a party is alleged to have been aggrieved by the administration of the Act. For this purpose it is necessary to refer to the relevant portions of the Act of which Sections 11 and 12 are the most important. The earlier sections deal with the levy of sales-tax on various commodities and the method of levying the same. Section 11 lays down that an assessee objecting to an assessment made on him under the provisions of this Act, may, within thirty days from the date on which he was served with notice of assessment, appeal to such authority as may be prescribed. The appeal shall be in the prescribed form and shall be verified in the prescribed manner. The appellate authority may, after giving the appellant an opportunity of being heard, pass such orders on appeal as such authority may think fit. Sub-section (4) of Section 11 states that every order passed in appeal, under this section by the appellate authority shall, subject to the powers of revision conferred by the next section be final. Section 12 contemplates that the Revenue Board may, in its discretion, call for and examine the record of any order passed, or proceeding recorded, by any authority, officer or any person under the provisions of the Act, for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceeding, and may pass such order in reference thereto as it thinks fit. Both these sections therefore lay down that if a tax collecting authority levies sales-tax, any assessee aggrieved by such assessment is entitled to file an appeal to an appellate authority whose decision will be final subject to a revision by the Board of Revenue. In deciding the revision it is open to the Board to find out whether the order was legal or proper and whether the proceedings were regular. The powers conferred under Section 12 are more or less in the nature of the power conferred upon the High Court in exercise of its revisional jurisdiction under Sections 435 and 439 Criminal Procedure Code. That is, the powers are sufficiently wide as to entitle the Board to interfere in suitable cases. Sections 17 and 18 are also relevant for the present controversy. Section 17 prohibits the filing of a suit, or prosecution, or other proceeding, against any officer or servant of the State Government for any act done of purporting to be done, under the Act, without the previous sanction of the State Government. Sub-section (2) says that no officer or servant of the State Government shall be liable in respect of any such act in any civil or criminal proceeding if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under the Act. Section 18 reads as follows:

> "No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the State Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of."

If Sections 11 and 12 of the Act are in the nature of a complete Code so that any relief which an aggrieved person may have can be obtained only by way of an appeal and a revision, then it is urged that the civil Courts have no jurisdiction. For that purpose well-known cases were brought to our notice. The earliest of them is in 'Ramachandra v. Secretary of State', 12 Mad 105 wherein the Court held that where, by an Act of the Legislature, powers are given to any person for a public purpose, from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the ordinary jurisdiction of civil Courts is ousted and in the case of injury the party cannot proceed by action. This decision has been later on considered and discussed in many cases, the most important of them being 'Iswarananda Bharathi v. Commissioners, Hindu Religious Endowments Board', 54 Mad 928. There the learned Judges, Curgenven and Cornish, JJ., referred to a large body of case law and held that so far as the Hindu Religious Endowments Board was concerned, a finding given by the Board that a particular building is a math or a temple can be agitated by means of an application before the Court and that a suit for a declaration under the ordinary law is not maintainable. They also referred to cases which held that the jurisdiction of the Court will not be ousted unless it is expressly or impliedly excluded by the enactment

creating the special tribunal. In 'Secretary of State v. Mask & Co.', ILR (1940) Mad 599 (PC), the Privy Council held that under the Sea Customs Act (VIII of 1878), and Land Customs Act (XIX of 1924), the jurisdiction of civil Courts is ousted and resort only be had to the remedies provided by the particular statutes. Their Lordships discussed Sections 188 and 191 of the Sea Customs Act and the provisions of the Land Customs Act and held that the jurisdiction of the civil Courts has been ousted by means of those statutes. Reference may also be made to 'Bhivandiwalla & Co. v. Secretary of State', 45 Mad L W 394, Raleigh Investment Co. Ltd. v. Governor-General in Council', 1947-2 Mad L Jour 16, 'Ramaswami v. Board of Commissioners', H R E., Madras', I L R (1950) Mad 799, a recent decision of the Supreme Court in 'Brij Raj Krishna v. S. K. Shaw & Bros.', 64 Mad LW 366 and to 'Raja Visweswar v. Province of Bihar', 27 Pat 820. In the Patna case, the learned Judges reviewed the case law in great detail and came to the conclusion that with regard to the Bihar Sales-tax Act of 1944 a suit for a declaration and injunction under Section 42 of the Specific Relief Act was not maintainable because the plaintiff had a complete remedy under the provisions of that Act itself. On the other hand there are cases which have held that in order that jurisdiction of the civil Courts should be deemed to have been ousted, the exclusion must be clearly expressed or clearly implied and without any such provision the ordinary law of the land could not be departed from. In the 'Secretary of State v. Jagannadham', ILR (1941) Mad 850 (FB) Leach, C.J., delivering the judgment of the Full Bench referred to the decision in 'Wolverhampton New Waterworks Co. v. Hakesford', (1859) 141 E R 486 as well as the decision in 'Secretary of State v. Mask & Co.', ILR (1940) Mad 599 (PC.) Other cases of this Court, viz., in 'Ramchandra v. Secretary of State 12 Mad 105' and 'Iswarananda Bharathi v. Commissioner, H. R. E. Board, 54 Mad 928' were also referred to it page 860, the learned Chief Justice observes as follows:

> "Therefore we have here two principles clearly established. The first is that, to exclude the jurisdiction of the civil courts the exclusion must be explicitly expressed or clearly implied. The second is that, where the liability is statutory as opposed to liability under the common law the party must adopt the remedy given to him by the statute."

Under the Madras Co-operative Societies Act (VI of 1932) the question again arose and it was decided in 'Ramayya v. Chittoor District Co-operative Deputy Registrar ',ILR (1946) Mad 330 that a suit does not lie to set aside a sale held by the officers of the Co-operative Department in execution of an order passed by a liquidator under Section 47 of the Act against a debtor in respect of a debt due to a Co-operative Society which is in liquidation. The special procedure prescribed by the Act and by the Rules for the execution of orders passed under the Act and for setting aside the sales implies necessarily that the jurisdiction of the civil Courts is ousted in such cases. Section 48 of the Act which expressly excludes, subject to specific exceptions the jurisdiction of the civil Courts in matters connected with the winding up of a society is a bar to the suit. One instance of such exclusion is found in Section 64 of the Income-tax Act. The principle therefore is that where a statute specifically excludes the jurisdiction of a civil Court, or by necessary intendment such exclusion implied, then ordinary Courts cannot have any right to entertain the suits. But there is another class of cases where the statute recognises that a suit can be filed but puts a restriction upon the filing of such suits or prescribes a period of limitation for the filing of a suit of that nature, or, as a necessary prerequisite to the filing of a suit requires the sanction of an authority. In such matters the Court's jurisdiction is not excluded. In this connection, reference might be made to the City Municipality Act, Section 287, District Municipalities Act, Sections 93 and 354, Local Boards Act, Sections 79 and 228. With regard to the City Municipality Act we have the case in 'Valliammal v. The Corporation of Madras', 38 Mad 41 where the principles have been discussed in detail. This decision was considered in 'Ishwarananda Bharathi v. Commissioners, H. R. E. Board', Madras, 54 Mad 928. In this connection we may also refer to the Privy Council decision in Secretary of State v. Fahaminidannissa Begum', 17 Cal 950.

(3) But the most important decision which has to be considered for the purpose of the present discussion is that of Varadachariar, J., in Kamaraja Pandia Naicker v. Secretary of State' 69 Mad L Jour 695.

The learned Judge states the law as follows at page 700 of the report:

> "The ordinary rule is that where a person's liberty or property is interfered with, under colour of statutory powers he has a cause of action which the civil Courts are bound to entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication. Where there is no question of a common law right and an infringement thereof, the position may be different, for in such cases, the ordinary Courts had 'prima facie' no jurisdiction therefore there is no question of any ouster of their jurisdiction ..... Even where rights of property are involved, the legislature may point a particular modes of redress. But in dealing with this class of cases a distinction has to be borne in mind between the general right of resort to the Civil Court and any particular form of procedure in seeking the aid of the civil Court. So long as the statute provides for a decision by a civil Court, it is immaterial whether the civil Court is approached by means of a suit or by an appeal or petition .....It will be scarcely right to speak of the Revenue Board in a case like the present as a "special tribunal." ..... The Board acts only as part of the executive machinery and not as an independent body settling a dispute between the tax payer and the taxing authority."

(4) The question therefore is whether in this case there is any such exclusion expressly or by necessary implication. When Section 18 of the Act provides that no suit shall be instituted against the State unless the same is done within six months from the date of the Act complained of it necessarily implied that there is no prohibition against the filing of a suit. The section is couched in the negative form; but if it is paraphrased and expressed in a positive form, the result comes to this that a suit can be instituted against the State Government for an act done or purporting to be done under the Act if the same is done within six months from the date of the Act complained against. In our opinion this section comes within the category explained by Varadachariar, J.. in 'Kamaraja Pandia Naicker v. Secreary of State', 69 Mad L Jour 695 and the suits are therefore maintainable.

(5) The civil miscellaneous appeals are dismissed with costs.

C.R.K./D.H.

Appeals dismissed.

A. I. R. (39) 1952 Madras 276 *[C. N. 105 (15).]*

SUBBA RAO, J.

A. Vedachala Mudaliar, Petitioner v. The State of Madras, represented by the Secretary to Government, Home Department, Fort St. George, Madras and another—Respondents.

Writ Petn. No. 171 of 1951, D/- 14-8-1951.

(a) Constitution of India, Art. 226 — Writ of Certiorari — Power to issue when to be exercised.

Whenever anybody of persons having legal authority to determine questions affecting the rights of subject and having the duty to act judically, act in excess of their legal authority, they are subject to the controlling jurisdiction of the High Court exercised in issuing writs under Art. 226. (1924) 1 K B 171; (1931) 2 K B 215; A I R (37) 1950 S C 222, Foll. (*Para 2*)

Anno : C. P. C., App. III; Const. of India, Art. 226, N. 13.

(b) Motor Vehicles Act (1939), Ss. 47 (2), 64, (and Mad.) 64A — Authorities in issuing permit whether act judicially.

The Regional Transport Authority and the Central Road Traffic Board in issuing permits for motor vehicles or refusing them perform quasi judicial functions. Further the Regional Transport Authority acts judicially when it varies the conditions of a permit by fixing new timings. Therefore the Central Road Traffic Board and the Government also function judicially in fixing the timings. A. I. R. (38) 1951 All. 257 F B, Rel. on. (*Para 4*)

(c) Motor Vehicles Act (1939), S. 64 (b) — Scope.

Section 64 (b) is not confined to the permit holder the conditions of whose permit have been varied but to any person who is affected by the variation of the conditions in the permit issued to another. (*Para 4*)

(d) Motor Vehicles Act (1939), (as amended in Madras) S. 64A — Scope — Order of subordinate tribunal set aside by Government — Order should 'ex facie' show reasons for setting aside order.

The Legislature who must be presumed to know the scope and the exercise of revisional jurisdiction by Courts designedly conferred a similar power on the Government. A comparison of the provisions of S. 115, C. P. C., and S. 435, Cr. P. C. with that of S. 64A of the Motor Vehicles Act indicates that the Legislature did not intend to make a departure in the manner of the exercise of the jurisdiction. The conception of exercise of revisional jurisdiction and the limits laid down for such exercise in S. 64A are indicative of nature and scope of the Government's jurisdiction. There is no reason to attribute to the Legislature an intention that in conferring revisional jurisdiction on Government they intended them to use the same in a manner inconsistent with the well established practice of judicial tribunals. From the stand point of fair name of the tribunals and also in the interests of the public they should be expected to give reasons when they set aside an order of an inferior tribunal. The order of a tribunal exercising judicial functions should 'ex facie' show reasons in a succinct form for setting aside the orders of the subordinate tribunals. To say that an order is illegal or improper or irregular is a mechanical repetition of the words in S. 64A and is not a judicial disposal of a revision petition. (*Para 5*)

(e) Motor Vehicles Act (1939), S. 64 and (Mad.) S. 64A — Elementary duty of tribunal.

Where an Act empowers a tribunal to act judicially in passing orders affecting the rights of parties, it is the elementary duty of the tribunal to give reasons for its orders, reasons which would show that the tribunal has applied its mind. (*Para 5*)

S. Rangaswami Aiyangar and N. Subramania Iyer for Petitioner; Advocate General assisted by V. V. Raghavan, for the Govt. Pleader and K. Bhashyan, for R. Rajeswara Rao, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950 S C J 451 : (A I R (37) 1950 S C 222) (Pr 2)
('51) A I R (38) 1951 All 257 : (I L R (1951) All 269 F B) (Pr 4)
('51) C M P 625 of 1951 (Mad) (Pr 5)
('51) C M P Nos. 13610 of 1950, 1942 of 1951, 1954 of 1951 and 1865 of 1951 (Mad) (Pr 5)
(1924) 1 K B 171 : (93 L J K B 390) (Pr 2)
(1931) 2 K B 215 : (100 L J K B 760) (Pr 2)
(1948) A C 87 : (1947-2 All E R 289) (Pr 2)

ORDER : This is an application for issuing a writ of 'certiorari' to quash the order of the Government of Madras dated 5-7-1951. The petitioner is the proprietor of Sri Gandhibam Bus Service, Chingleput. He was granted two stage carriage permits for running two buses on the route from Vanangupet to Madras. One of the two buses MDH. 1144 starts from Madras and the other from Vanangupet every morning at 7 a.m. The schedule of timings in respect of two buses was fixed some years ago and the said schedule has been in existence for over six years. The 2nd respondent is the owner of bus MDH. 1166 running between Vanangupet and Madurantakam as shuttle service with six singles. Timings for this bus also were fixed some years ago. He was starting his bus service at Vanangupet at 8-5 a.m. He moved the Regional Transport Authority, Chingleput for the revision of timings for his bus. The Regional Transport Authority by its order No. 2505/B-1/50 dated 21-7-1950 fixed the timings for his bus at 6-40 a.m. instead of 8-5 a.m. Against the decision of the Regional Transport Authority, the petitioner preferred an appeal to the Central Road Traffic Board and the Central Board Traffic Board by its order dated 30-8-1950 directed that the petitioner's bus should leave Vanangupet at 7 a.m. and the 2nd respondent's bus at 8-5 a.m. that is they restored the previous timings. Thereupon the 2nd respondent preferred a revision to the Government at Madras who set aside the order of the Central Road Traffic Board without giving any reasons for the same. The petitioner filed a writ of certiorari for quashing that order and the High Court quashed that order on the ground that the order on the face of it did not disclose the defect which vitiated the order of the subordinate authority. The 2nd respondent moved the Government on 5-5-1951 for revision of the Central Road Traffic Board's order. The Government passed the following order :

"The High Court quashed the G. O. on the ground that no reason was given in it for setting aside the Central Road Traffic Board's order. The High Court however made it clear that by quashing the G.O. the order of the Central Road Traffic Board was not confirmed and that the Government were not pre-

vented from passing fresh and valid orders if they thought fit.

The Government have accordingly examined afresh under S. 64-A of the Motor Vehicle Act, the legality, regularity and propriety of the Central Road Traffic Board's proceedings, R. No. 24538/A-2/50 dated 30-8-1950, with reference to the connected records and the representation of Sri A. Vedachala Mudaliar dated 6-6-1951. The Government consider that in the circumstances of the case, the order of the Regional Transport Authority, Chingleput passed at its meeting held on 21-7-1950 directing that the time of the departure from Vanangupet of bus M D H. 1166 owned by Sri M. Kali Mudaliar should be 6-40 a.m. is the proper one and that the order of the Central Road Traffic Board in upsetting the Regional Transport Authority's order to this extent is not proper. They therefore direct that the Central Road Traffic Board's order referred to above be set aside and the Regional Transport Authority's order be upheld".

The present application is filed to quash that order, the main ground being that the statement of the Government that the order of the Central Road Traffic Board is not proper is not a compliance with law.

(2) The learned Advocate General appearing for the Government and Mr. Bhashyam appearing for the 2nd respondent took the preliminary objection against the maintainability of the present application. They contended that the order of the Regional Transport Authority in fixing the timings is an administrative act and therefore the order of the Central Road Traffic Board made in appeal against that order and that of the Government passed in the exercise of their revisional jurisdiction are all administrative acts not liable to be quashed by a writ of 'certiorari'. At this stage, it will be convenient to notice some of the cases which lay down the limits of the High Court's jurisdiction in issuing writs. The leading case on the subject is 'Rex v. Electricity Commissioners', 1924-1-K.B. 171 where Atkin L. J. stated the law as follows:

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

Slesser L. J. in the King v. London County Council', (1931) 2-K.B. 215 gave the following four conditions before a Writ of 'Certiorari' would issue. At page 243 it is observed as follows :

"There remains only the question whether here the remedy which has been sought by the respondents is or is not an appropriate remedy, that is, the remedy of certiorari. Atkin L. J. (as he then was) in 'Rex v. Electricity Commissioners', (1942) 1 K B 171, lays down four conditions under which a rule for a certiorari may issue. He says 'wherever any body of persons' (first) 'having legal authority' (secondly) 'to determine questions affecting the rights of subjects and thirdly having the duty to act judicially' (fourthly) 'act in excess of their legal authority' the sub-divisions are my own—'they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

The same principle was accepted and applied by the Supreme Court of India in 'Province of Bombay v. Khushaldas S. Advani', 1950 S.C.J. 451. The question in that case was whether a writ of certiorari was available to an aggrieved party to remove or quash an order made by the Government of Bombay requisitioning certain premises under S. 3 of the Bombay Land Requisition Ordinance V of 1947. The Supreme Court applied the principle laid down by Atkin L.J. and held, having regard to the facts of that particular case that the order sought to be quashed therein was only of an administrative nature. At page 459 the learned Chief Justice says :

"It seems to me that the true position is that when the law, under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi judicial. Prescribed forms of procedure are not necessary to make an enquiry judicial provided in coming to a decision well recognised principles of approach are required to be followed. In my opinion, the conditions laid down by Slesser L.J. in the judgment correctly bring out the distinction between a judicial and quasi judicial decision on the one hand and the administrative decision on the other".

The next decision relied on by the learned Advocate General in 'Franklin v. Minister of Town and Country Planning', (1948) A C 87 does not carry the discussion any further for it applies only the aforesaid principles to the facts of that particular case.

(3) Bearing the aforesaid principles in mind I shall proceed to consider whether the act of the Regional Transport Authority in modifying the time-table is a quasi judicial act or an administrative act. To put it in other words whether the said order satisfied the conditions laid down by Slesser L.J. The powers and duties of the Regional Transport Authority and the character of the disposal of the proceedings of that authority can only be gathered by a scrutiny of the provisions of the Motor Vehicles Act, 1939, which will be referred to hereinafter as the Act. Under S. 44 of the Act, the Provincial Government is empowered to constitute :

"For the province a Provincial Transport Authority to exercise and discharge the powers and functions specified in sub-s. (3), and shall in like manner constitute Regional Transport Authorities to exercise and discharge throughout such area (in this chapter referred to as regions) as may be specified in the notification in respect of each Regional Transport Authority, the powers and functions conferred by or under this Chapter on such authorities".

Section 45 lays down that "every application for a permit shall be made to the Regional Transport Authority of the region or of one of the regions in which it is proposed to use the vehicle". Section 46 prescribes the form of such an application and the particulars to be contained therein. The application shall contain (a) the type and seating capacity of the vehicle in respect of which the application is made, (b) the route or routes on which or the area within which it is intended to use the vehicle, (c) the time table if any, of the service to be provided and (d) such other matters as may be prescribed. Under S. 47 the Regional Transport Authority shall in deciding whether to grant or refuse a stage carriage permit have regard to the matters described therein. Under S. 47 (2)

"A Regional Transport Authority shall refuse to grant a stage carriage permit, if it appears from any time table furnished that the provisions of the Act relating to the speed at which vehicles may be driven are likely to be contravened".

The proviso to that sub-section lays an obligation on the Regional Transport Authority to give an opportunity to the applicant for amending the time table so as to conform to the said provisions. Section 47 also prescribes that the Regional Transport Authority shall take into consideration any representations made by persons already providing road transport facilities along or near the proposed route or routes or by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lies or by any association interested in the provision of road transport facilities. After hearing the representations so made and after taking into consideration the matters prescribed under S. 47 the Regional Transport Authority may make appropriate orders mentioned in S. 48. The relevant provisions of S. 48 are :

A Regional Transport Authority may, after consideration of the matters set fourth in sub-s. (1) of S. 47 : (a) limit the number of stage carriages or stage carriages of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region; (b) issue a stage permit in respect of a particular stage carriage or a particular service of stage carriages; (c) regulate timings of arrival or departure of stage carriages whether they belong to a single or more owners ; (d) attach to a stage carriage permit any prescribed condition or any one or more of the following conditions, namely : (i).....(ii)... (iii) that copies of the fare table and time table shall be exhibited on the stage carriage and that the fare table and time table so exhibited shall be observed.

Section 48-A says :

"Any conditions attached to a stage carriage permit in pursuance of clause (d) of S. 48 may, at any time be varied, cancelled or added to by the Provincial Authority, provided that this power shall not be exercised to the prejudice of the holder of the permit without giving not less than three months' notice to him".

Section 57 prescribes the procedure in applying for and granting of permits. Section 57 (3) says :

"On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application of the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which the application and any representations received will be considered".

Under S. 57 (4) :

"no representation in connection with an application referred to in sub-s. (3) shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation".

Under S. 57, sub-s. (6), in the circumstances mentioned therein the Regional Transport Authority is also empowered to take any steps as it considers appropriate for the hearing of the representation in the presence of any persons likely to be affected thereby. Section 64 gives a right of appeal against the orders of the Regional Transport Authority to the prescribed authority. The prescribed authority is the Central Road Traffic Board. Section 64 (b) enacts that any person "aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof" may prefer an appeal to the prescribed authority. Under S. 64-A.

"the Provincial Government may of its own motion or on application made to it, call for the records of any order passed or proceeding taken under the Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and after examining such records, may pass such order in reference thereto as it thinks fit".

In the exercise of the rule making powers conferred upon the Provincial Government His Excellency the Governor of Madras made the rules. Under Rule 269 the transport authority may from time to time (i) by a general order, prescribe a schedule of timings for stage carriages running on specified routes or by (ii) a special order prescribe a schedule of timings for each stage carriage. Under Rule 147 :

"from every original order of the Road Traffic Board, an appeal shall lie to the Central Board within thirty days of the date of receipt of such order by the person aggrieved".

(4) It will be seen from the aforesaid provisions that the Regional Transport Authority has the legal authority to determine the questions affecting the rights of subjects. Though superficially it may appear that the powers of the Regional Transport Authority are confined only to issuing permits for plying buses they really affect substantially the rights of parties. An illegal refusal of a permit or permits to a person who is running buses on a particular route may completely ruin his business and reduce the erstwhile prosperous business man to an impoverished condition. Likewise new permits issued to an applicant may completely change his financial status. Having regard to the soaring prices of the cars and buses and the thriving business the bus owners are carrying on, one can imagine the effect of the orders of the Regional Transport Authority in regard to the fortunes of this class of people. It may also be mentioned that a mere change of the timings or the route or rate of fare may also affect the rights of the parties very appreciably and sometimes such changes may transform a flourishing permit-holder into a chronic debtor. It cannot, therefore, be disputed that the Regional Transport Authority is empowered to determine the questions affecting the rights of subjects. Having regard to the effect of such orders on the rights of parties the Legislature designedly introduced provisions in the Act to compel them to act judicially. The proceedings start with an application to the Regional Transport Authority containing particulars. Section 57 (3) provides a machinery by which the Authority should notify finally all such applications and call for representations from the person interested. Under S. 47 (1) the Regional Transport

Authority has to hear the representations made by the persons interested and also such of the representations made by the police, local authority or by any association. The Regional Transport Authority makes an order under S. 48 after hearing all the parties concerned. It is manifest that the procedure prescribed is certainly a judicial one. A Full Bench of the Allahabad High Court in 'Motilal v. Utter Pradesh', AIR (38) 1951 All 257 held after considering the various provisions of the Act that the Regional Transport Authority is a quasi judicial body. Indeed neither the learned Advocate General nor Mr. Bhashyam denied the fact that the Regional Transport Authority or the Central Road Traffic Board in issuing permits or refusing them were performing quasi judicial functions. But they contended that the Regional Transport Authority or other tribunals in the heirarchy are not exercising the function as quasi judicial bodies in regulating timings in respect of the buses. They argued that the said authority in fixing the timings or modifying them later on is only performing an administrative act. I regret my inability to agree with their contentions. I have already pointed out that the change of timings though superficially appear to be innocuous may lead to the results which may affect the parties financially to a substantial degree. There cannot therefore be any distinction in principle why the Legislature should have made a distinction in regard to the character of the enquiry between the issue of a permit and the change of timings. Indeed one of the important particulars to be mentioned in the application is the time table if any of the service to be provided. When that application containing that particular is given notice of to the persons interested or other authorities mentioned in S. 47 they are entitled to make their representations in respect of that time table. Section 47 (2) empowers the Regional Transport Authority to reject a permit if it is satisfied that the time table furnished may affect the speed limit prescribed by the provisions of the Act. But before it could do so it has to give an opportunity to the applicant to amend the time table. After hearing the representations made and considering the matters contained in S. 47, the Regional Transport Authority can regulate the timings under S. 48. It could also make it a condition to the permit issued to any person that the time table should be exhibited on his bus and its terms observed. Presumably in this case the observation of the time table must have been made a condition of the permit. If fixing the time table in the first instance could be made only by adopting judicial procedure, it is unreasonable to hold that under Rule 269 the Regional Transport Authority could modify the time table in an administrative capacity for if that be so the safeguards provided by the Legislature would be defeated. Mr. Bhashyam made an attempt to make a distinction between the orders under S. 48 (a) (b) and (c) and the orders under S. 48 (d). I cannot appreciate the distinction for those orders under whatever clause they are made only after the necessary judicial enquiry provided in S. 47. He also relied upon S. 64 and contended that a third party cannot file an appeal against the variation of a condition and therefore the sub-section gives a clue that the order varying the condition is not a judicial order. But to my mind the terms of that section are wide enough to confer a right of appeal even on third parties if the variation of a condition in the permit issued to another affects his rights. Section 64 reads :

> "Any person (a) aggrieved by the refusal of "the Provincial or a Regional Transport Authority to grant a permit or by any condition attached to a permit granted to him....."

Under S. 64 (b) any person aggrieved by any variation of the conditions of a permit can prefer an appeal from the order of the Regional Transport Authority. The petitioner is certinly aggrieved by the variation of the condition as by the change of the timings his financial interests would suffer. But it is stated that I must read the words "the permit" along with the words "a permit granted to him" found in clause (a) and if so read any person can only be the person the conditions of whose permit have been varied. Though this argument has some force, I am inclined to hold that S. 64 (b) is not confined to the permit holder the conditions of whose permit have been varied but to any person who is affected by the variation of the conditions in the permit issued to another. The rules under the Motor Vehicles Act were also framed on that basis. I therefoore hold that the Regional Transport Authority is acting judicially when it varies the conditions of a permit by fixing new timings. If so the Central Road Traffic Board and the Government are also functioning judicially in fixing the timings.

(5) The next question is whether the order of the Government is liable to be quashed. The first order of the Government dated 12-12-1950 reads as follows :

> "The Government uphold the decision taken by the Regional Transport Authority, Chingleput at its meeting held on 21st July 1950 ordering that the time of departure from Vanangupet to Bus MDH 1166 owned by Sri M. Kali Mudaliar should be at 6-40 a.m. To this extent the Central Road Traffic Board's order No. R. 24538/A. 2/50 dated 30th August 1950 is hereby set aside".

The present order of the Government after narrating the circumstances under which the High Court set aside that order says :

> "The Government have accordingly examined afresh under S. 64-A of the Motor Vehicles Act the legality, regularity and propriety of the Central Road Traffic Board's proceedings R. No. 24358/A2/50 dated 30-8-1950 with reference to the connected records and the representation of Sri A. Vedachala Mudaliar, dated 6-6-1951. The Government consider that in the circumstances of the case, the order of the Regional Transport Authority, Chingleput passed at its meeting held on 21-7-1950, directing that the time of the departure from Vanangupet of Bus MDH. 1166 owned by Sri M. Kali Mudaliar should be 6-40 a.m. is the proper one and that the order of the General Road Traffic Board in upsetting the Regional Transport Authority's order to this extent is not proper. They therefore direct that the Central Road Traffic Board's order referred to above be set aside and the Regional Transport Authority's order be upheld".

A comparison of the two orders shows that the Government only added the words found in S. 64A to its previous order. It is only a formal and technical observance of the provisions of the section. It does not 'ex facie' disclose why the Government viewed that the order of the Central Traffic Board is not proper and that of

the Regional Transport Authority is proper. Learned counsel appearing for the respondents contended that the Government are entitled under S. 64A to set aside the order of inferior tribunals if it is illegal, irregular and improper and if they set aside the order on one or other of those grounds, there is no duty cast on them by the Act or any provision of law to give reasons for their holding a particular order as bad for one or other of the aforesaid reasons. To put it in other words, if the Government set aside the order of the Central Road Traffic Board simply stating that it is improper or illegal or irregular, the order would be good and unimpeachable. They relied upon the judgment of a Bench of this Court consisting of Govinda Menon and Chandra Reddi JJ. in 'C.M.P. No. 625 of 1951' in support of their contention. The learned Judges in that case quashed the order of the Government on the ground that the order 'ex facie' did not show why they were setting aside that order of the inferior subordinate tribunal. One of the learned Judges says :

"It is to the satisfaction of the Government as to one of the three matters mentioned in S. 64 (A) that is the foundation of its jurisdiction and the Government cannot go beyond the three categories in S. 64-A in revising the order of a subordinate authority. It necessarily follows that the order must 'ex facie' show that the Government was satisfied that the order it was revising fulfilled any of the conditions contemplated in S. 64-A. Otherwise it is not sufficient compliance with the provisions of the Act. The absence of such a recital would, in my opinion, render the Government's order irregular and the order has to be quashed".

Though they set aside the order on the aforesaid ground they made observations in the course of that judgment which certainly help the contentions of the respondents but these observations are only in the nature of obiter, for the learned Judges decided the case on the other point namely that the order in question did not disclose 'ex facie' either of the three heads under which the Government are empowered to interfere with the orders of the subordinate tribunals. Another Bench consisting of the Chief Justice and Somasundaram J. who set aside the previous order of the Government in 'C.M.P. No. 13610 of 1950, 1942/51, 1954/51 and 1865 of 1951' observe in their judgment as follows :

"We have quashed them (the orders) because they do not show on their face why the orders were passed and because they failed to show any ground which would sustain the validity of the interference, having regard to the conditions laid down in S. 64-A of the Act".

The learned Judges did not consider the question namely whether the Government should also give reasons why in their view the order of a subordinate tribunal is illegal, irregular and improper. The order of the Government in my view is only a formal and technical observance of the provisions of the section. Where an Act empowers a tribunal to act judicially in passing orders affecting the rights of parties, it is the elementary duty of the tribunal to give reasons for its orders, reasons which would show that the tribunal has applied its mind. In my experience I have not come across a single case where a Judge in the exercise of his revisional jurisdiction set aside an order of a subordinate tribunal without giving reasons. The Legislature who must be presumed to know the scope and the exercise of revisional jurisdiction by Courts designedly conferred a similar power on the Government. A comparison of the provisions of S. 115, C. P. C., and S. 435, Cri. P. C. with that of S. 64-A of the Act indicates that the Legislature did not intend to make a departure in the manner of the exercise of jurisdiction. The conception of exercise of revisional jurisdiction and the limits laid down for such exercise in S. 64-A are indicative of nature and scope of the Government's jurisdiction. When the policy of the Legislature is to confer powers on administrative tribunals with a duty to discharge their functions judicially I do not see any reason why they should be exempted from all those safeguards inherent in its exercise of that jurisdiction. It is true that the Legislature may specifically exempt a particular tribunal from following the well recognised principles of judicial disposal of cases, but so long as the Act does not exempt them and does not provide an alternative procedure, there is no reason to attribute to the Legislature an intention that in conferring revisional jurisdiction on Government they intended them to use the same in a manner inconsistent with the well established practice of judicial tribunals. From the stand point of fair name of the tribunals and also in the interests of the public, they should be expected to give reasons when they set aside an order of an inferior tribunal. If tribunals could set aside the considered orders of subordinate tribunals without any reasons such a power may in the hands of unscrupulous and dishonest persons,—I do not say that there are any such people in the tribunals we are now concerned with —turn out to be a potent weapon for corruption, manipulation and jobbery. Further if reasons for an order are given, there will be less scope for arbitrary or partial exercise of powers and the order 'ex facie' will indicate whether extraneous circumstances were taken into consideration by the tribunal in passing the order. The public should not be deprived of this only safeguard, unless the Legislature expressed otherwise. I would therefore hold that the order of a tribunal exercising judicial functions should 'ex facie' show reasons in a succinct form for setting aside the orders of the subordinate tribunals. To say that an order is illegal or improper or irregular is a mechanical repetition of the words in S. 64-A and is not a judicial disposal of a revision petition.

(6) In the present case the latest order of the Government is only a mechanical repetition of the words in S. 64-A of the Act. It is not a judicial determination of the conditions laid down in S. 64-A which entitles them to interfere with the order of the subordinate authorities. I have therefore no alternative but to quash the order of the Government. The respondents will pay costs of the petitioner. One set advocate's fee Rs. 100.

C.R.K./V.S.B. *Order quashed.*

A. I. R. (39) 1952 Madras 280 *[C. N. 105 (16).]*

KRISHNASWAMI NAYUDU, J.

Mir Mohamed Bahauddin, Petitioner v. Mujee Bunnisa Begum Sahiba, Respondent.

O. P. No. 329 of 1950, D/- 24-1-1951.

(a) Muhammadan Law — Guardianship — Custody — Minor daughter — Divorced mother's remarriage with stranger — Father's right to custody.

The custody, or what is called 'hizanat' of a minor girl until she attains puberty and of a minor boy until he attains the age of 7 years is with the mother. But even then the legal guardian is only the father. The right to the custody of the minor girl until she attains puberty continues with the mother, though she is divorced by the father of the child. However, the mother cannot continue to have the custody of the child, if she marries a second husband, in which case the custody belongs to the father. A I R (14) 1927 All 581, Relied on. A I R (29) 1942 Cal 281, Dist.

Unless the father is totally unsuitable, or there is any other relation who would take charge of the child, the mother who has married a second husband, is not at all the person to whom the child of the first marriage should be entrusted. It would be impossible for her under her changed circumstances to look ofter the child and care for her well being.

(Paras 3, 7)

(b) Guardians and Wards Act (1890), S. 17 — Appointment of guardian — Preferential right under personal law.

The paramount consideration in cases coming up under the Guardians and Wards Act for appointment of guardian should be the welfare of the minor. But it must be as far as possible consistent with the personal law relating to the parties. The preferential right of any person to the guardianship under the personal law cannot be ignored unless he is totally unfit to be appointed as guardian and Courts must necessarily consider his claims in preference to any others. *(Para 8)*

Anno : G. W. Act, S. 17, N. 2.

(c) Guardians and Wards Act (1890), S. 39 (j) — Removal of guardian — Remarriage of Muhammadan mother having custody of minor daughter — Effect.

Under S. 39 of the Guardians and Wards Act a guardian may be removed by reason of the guardianship ceasing or being liable to cease under the law to which the minor is subject. Where, therefore, under the personal law of the minor the right of Hizanat of the Muslim minor girl ceases on the divorced mother marrying a second husband it is sufficient ground for her removal from the guardianship of the minor. *(Para 11)*

Anno : G. of W. Act, S. 39, N. 12.

Syed Mohammad, for Petitioner; S. Azizuddin, for Respondent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('27) 49 All 773 : (A I R (14) 1927 All 581) (Prs 3, 7)

('44) ILR (1944) All 368: (A I R (31) 1944 All 202) (Pr 6)

(43) 76 Cal L Jour 303: (AIR (29) 1942 Cal 281) (Prs 3, 5)

JUDGMENT: The father of the minor applies for removal of the present guardian Mujeebunnissa Begum, who is the mother of the minor, from guardianship, and for appointment of himself as the guardian of the person of the minor. The present guardian, who is the Respondent, was married to the Petitioner and owing to certain differences there was a divorce of this marriage. She applied in O. P. No. 59 of 1947 for appointment of herself as the guardian of the person of the minor, who was then a child of about two years of age. The Petitioner consented to her being appointed and by an order of this Court dated 20-3-1947 made in the said O.P. No. 59 of 1947, the present Respondent was appointed as the guardian of the person of the minor. Subsequent to this, there were certain proceedings in the Presidency Magistrate's Court under Section 488 of the Criminal Procedure Code for orders as maintenance of the minor and a sum of Rs. 12/- was fixed as the monthly maintenance to be paid to the Petitioner. The said order is still in force.

(2) It is now stated that the Respondent has married a second husband and by him she has now a female child and that under the Muslim Law, the mother is not the natural guardian, while the father is alive, and that by virtue of the second marriage, she has forfeited her right to be the guardian of the person of the minor and to have her custody. The present application is for removal of the Respondent from the guardianship on the ground that she has forfeited her right to be the guardian under the personal law applicable to the parties.

(3) The custody, or what is called 'hizanat' of a minor girl until she attains puberty and of a minor boy until he attains the age of 7 years is with the mother. But even then the legal guardian is only the father. The right to the custody of the minor girl until she attains puberty continues with the mother, though she is divorced by the father of the child. However, the mother cannot continue to have the custody of the child, if she marries a second husband, in which case the custody belongs to the father. This is the proposition that has been laid down in 'Ulfat Bibi v. Bafati', 49 All 773, Mulla in his book on Principles of Mahomedan Law's 13th Edition, page 295 states as follows:

> "The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

The principle laid down in 'Ulfat Bibi v. Bafati', 49 All 773 has been approved by the author in his book referred to. There is no dispute as to the Petitioner being the legal guardian. But it is contended on behalf of the Respondent that the mother is entitled to hizanat or custody until the minor attains puberty and that this right is not taken away, even if she marries a second husband. That is contrary to what is laid down in 'Ulfat Bibi v. Bafati', 49 All 773. But the learned counsel relies on certain observations made in 'Jumina Khatun v. Gaharajan Bibi', 76 Cal L Jour 303 at p. 305. In that case a maternal aunt was held to have a preferential right to the custody of the minor over that of paternal grandmother. It was held that having regard to the welfare of the minor, a maternal aunt who has married a stranger, in the absence of any preferential person, is not disqualified from being appointed guardian of the minor, that the Mahomedan Law does not lay down that a woman who had married a stranger to the minor is disqualified from being appointed a guardian under any circumstances and that it merely lays down that such a woman loses any preferential right which she had by virtue of her relationship to the minor. The question that arises in this case is not whether by reason of the marriage to a stranger the mo-

ther loses the right to continue to have the custody of the minor, but whether she has forfeited her right to be the guardian by virtue of her second marriage. That is not the point that was considered in that decision.

(4) The Mahomedan Law fixes the order of preference as regards custody in the case of a boy under the age of seven years and of a girl who has not attained puberty as follows : failing the mother, mother's mother, how high soever; father's mother, how high so ever; full sister; uterine sister; consanguine sister and so on in the order prescribed; and only such female relation in the said order of preference would be entitled to the custody of the minor. But she loses the right to custody under certain circumstances—if she marries a person not related to the child within the prohibited degrees e.g. a stranger; or, if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or, if she is leading an immoral life, as where she is a prostitute; or if she neglects to take proper care of the child.

(5) The question that arose for decision in 'Jumina Khatun v. Gaharajan Bibi', 76 Cal L Jour 303, was whether by reason of her marriage to a stranger, the maternal aunt was disqualified to be the guardian, and Sen J. observed as follows :

"The Mahomedan Law nowhere directs that a woman having minor relations should always marry the relations of such minors or that the marriages of such a woman with strangers are looked upon with disfavour. It laid down this rule regarding the custody of the minors by females in order to protect them as far as possible from harsh treatment by strangers. Further the passages in Baillie and the Hedaya stating a woman loses the right of Hizanit by marriage with a stranger to the minor occurs where the question of the preferential right of guardianship is being discussed. It is nowhere suggested that where there are no other eligible relations the Judge cannot appoint a woman who has lost her right of hizanit by her marriage to a stranger. The word 'disqualified' is nowhere used. I do not consider therefore, that the Mahommedan Law lays down that a woman who had married a stranger to the minor is 'disqualified' from being appointed a guardian under any circumstances."

Considering the welfare of the minor, the maternal aunt was held to be not disqualified from being appointed guardian of the minor, in the absence of any preferential person, though she has married a stranger.

(6) To a similar effect is the decision in 'Sami-un-nissa v. Saida Khatun', I L R (1944) All 368, relied on behalf of the Respondent. In that case the learned Judge relied on section 17 of the Guardians and Wards Act and held that the primary consideration for the Court is the welfare of the minor, that it is open to the Court to appoint a stranger, if it cannot find a more suitable person and that there is no provision of Muhammadan Law, which forbids such appointment.

(7) In 'Ulfat Bibi v. Bafati', 49 All 773, as in the present case, the mother married a second husband, and she was held disentitled to have the custody of the child. The learned Judges observe as follows :

"We are of opinion that a woman who has been divorced, if this appellant has been divorced, and has married a second husband, is not a person either herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable. She has abandoned her home and husband either by her own free will, or as the result of her conduct, and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal."

Though it cannot be stated that however unsuitable the father may be, he may be appointed in preference to the mother, or any other near relation or stranger, certainly the mother, who has chosen to leave the father—though in this case under alleged ill-treatment—is not the person to whom the child could be entrusted, since it is unlikely that a woman who has married a second husband would be in a position to pay as much attention to the upkeep and well-being of the child as she would, if she had not taken to a second husband. It cannot be denied that she is answerable to the husband primarily and to look after his comforts and answer his behests and whatever attention she may bestow on the child could only be after she has been of such service to the second husband as he would require. In my view, unless the father is totally unsuitable, or there is any other relation who would take charge of the child, the mother who has married a second husband, is not at all the person to whom the child of the first marriage should be entrusted. It would be impossible for her under her changed circumstances to look after the child and care for her well-being.

(8) Section 17 of the Guardians and Wards Act provides that the Court should be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. The paramount consideration in cases coming up under the Guardians and Wards Act for appointment of guardian should be the welfare of the minor. But it must be as far as possible consistent with the personal law relating to the parties. The preferential right of any person to the guardianship cannot be ignored unless he is totally unfit to be appointed as guardian and Courts must necessarily consider his claims in preference to any others. If in this case, keeping in view, the welfare of the minor, no other person than the father could be considered as a fit person to be appointed as guardian there is no reason why the father should be passed over as he is also guardian under the personal law.

(9) It is argued strenuously on behalf of the Respondent that the Petitioner is unfit to be the guardlan, since he has brutally treated the mother and it is not likely that he will have any affection for the child, that the child is of indifferent health and often put to medical treatment and that the Respondent alone can bestow the necessary attention. Further, his character is attacked as being loose. But it must be noticed that apart from the treatment which he is alleged to have meted out to the mother, there is nothing against the father personally otherwise. He is an official in Government service employed as a Lecturer in Government Central Polytechnic, Madras, drawing a decent salary. He has also married a second wife; but he has no issue by the second wife. That, however, is not a very material circumstance in

considering his claims for the guardianship. I do not find on the allegations made in the affidavits filed in this case that he is a person who could not be thought of for the guardianship of the minor. I consider him as a fit and proper person to take charge of the custody of the minor. It is also the duty of the legal guardian to look after the child, maintain her, educate and arrange for her marriage all at his cost. To take away the child from his custody and keep her with the mother until she attains puberty and then send that minor to him would be to deprive him of the attachment to the child, which must be cultivated by association and such association must commence at a very early age. It cannot be said that the child is of such tender years that she could not leave the mother's care. The child is about 7 years of age and could very well live with the father and it is stated that the father's mother is in the family to look after the child.

(10) It was also argued that the application is not maintainable and that it is filed only with a view to escape the liability to pay maintenance, which the Petitioner is already paying under the orders of the Criminal Court, and that it is an attempt to dispute his liability in a suit which is said to have been instituted in the City Civil Court for the maintenance of the minor. I am not satisfied that the Petitioner has an ulterior motive in filing this Petition. Naturally, he wants to have the child as he is the rightful guardian and is entitled to custody.

(11) An argument was advanced that no grounds had arisen for removal of the mother, who has already been appointed as the guardian and unless she could be validly removed, no fresh guardian could be appointed. Section 39 of the Guardians and Wards Act lays down the grounds and circumstances under which a guardian could be removed. One of the grounds on which a guardian may be removed is "by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject." I have already held that by reason of the marriage with the second husband, the Respondent has forfeited her rights to be the guardian. I therefore remove her from the guardianship and appoint the Petitioner as the guardian of the person of the minor. He will be entitled to the custody of the minor and the Respondent will deliver custody of the minor on or before the 15th February 1951. No order as to costs.

C.R.K./D.R. *Application allowed.*

A. I. R. (39) 1952 Madras 283 *[C. N. 105 (17).]*

RAJAMANNAR C. J.
AND SOMASUNDARAM J.

Manepalli Sitaramanjaneyalu, Petitioner v. Pachigolla Krishnayya and another, Respondents.

Civil Misc. Petn. No. 1875 of 1951, D/- 15-3-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 (XV) of 1946), S. 7 (6) — Prior application for eviction on ground of non-payment of rent dismissed — Second application in respect of subsequent default during pendency of prior application — Maintainability.

Where an application for eviction of a tenant on the ground of default in payment of rent is pending, the landlord cannot file a second application for eviction in respect of a subsequent default if the prior application has been eventually dismissed; the reason is that the tenancy must be deemed to have continued till the dismissal of the prior application by virtue of S. 7 (6) of the Act. 'C. M. P. No. 4996 of 1949 (Mad), Rel. on. (*Paras 2, 3*)

C. Venugopalachari, T. T. Srinivasan and A. N. Rangaswami, for Petitioner — D. P. Narayana Rao, for Respondent No. 1.

Case referred to:

('49) C M P No. 4996 of 1949 (Mad) (Pr 2)

RAJAMANNAR C. J.: This application arises out of a proceeding under the Rent Control Act. The tenant is the petitioner. The respondent landlord filed a petition for eviction on the ground of default in payment of rent for the month from 10th August 1949 to 9th September 1949 (H. R. C. 395 of 1949). This petition was not disposed of till 6-2-1950 when it was dismissed. Meanwhile on 11-12-1949 the respondent filed another petition for eviction on the ground of default in payment of rent for the month from 10th September 1949 to 9th October 1949. This petition was allowed by the Rent Controller and the decision of the Rent Controller was affirmed by the appellate tribunal and the tenant seeks to have the order of eviction quashed.

(2) Mr. Venugopalachari for the petitioner argued that till the disposal of the first petition for eviction, a second petition for eviction could not be filed, because if the first petition was eventually rejected, then, under the provisions of section 7 (6) of the Act, the tenancy shall be deemed to continue. He relied on an unreported judgment of this Court in 'C. M. P. No. 4996 of 1949', in which a Division Bench to which one of us was a party construed section 7 (6) of the Act. In that case an application for eviction was rejected. A subsequent application for eviction was made on the allegation that default had occurred and the tenancy became terminable before the date of the prior application for eviction. It was held that the second petition by the landlord was not maintainable having regard to the provisions of sub-s. (6) of Section 7. The 'ratio decidendi' of that decision was,

> "Once the application is rejected, the tenancy is deemed to continue. The landlord cannot allege in a subsequent application that the tenancy has come to an end before the date of the rejection. That would be in the teeth of the express provisions of the enactment."

We think it follows from this construction of that provision that in support of a second application for eviction, the landlord can only rely upon default or other grounds committed or available after the date of the rejection of the first application. In this case, the second petition was filed before the prior application had even been dismissed. The prior application was actually dismissed on 6-2-1950 and therefore the tenancy must be deemed to have continued at least up to that date. In effect, the landlord in the second petition alleges that from the 24th October 1949, the tenancy must be deemed to have come to an end. This he cannot be permitted to say.

(3) We asked the learned counsel who appeared for the landlord-respondent to give us some intelligible meaning of section 7 (6)

of the Act which would be of assistance to him, but he was unable to give any such explanation. Evidently the reason why such a provision was enacted was because once a landlord had exhibited an unequivocal intention to terminate the tenancy and the matter was 'sub judice' he should not be entitled to avail himself of the benefit of any default or other act of the tenant to serve as a foundation of a second application for eviction in case he failed to obtain the requisite relief in the first application.

[4] The order of the appellate tribunal confirming the decision of the Rent Controller must be, and is hereby, quashed and the application for eviction dismissed. There will be no order as to costs.

C.R.K./K.S. *Order quashed.*

A. I. R. (39) 1952 Madras 284 *[C. N. 105 (18).]*

KRISHNASWAMI NAYUDU J.

Zynab Bi alias Bibijan — Petitioner v. *Mohammad Ghouse Mohideen — Respondent.*

O. P. No. 100 of 1951, D/- 17-5-1951.

Guardians and Wards Act (1890), Ss. 25 & 4 (2) — Guardian, meaning of — Hanafi Muslim mother — Right to custody of minor children — Extent of — Mother if entitled to apply under S. 25 — (Muhammadan Law — Guardianship).

To entitle a guardian to apply for custody of a minor under S. 25 of the Guardians and Wards Act, it is not necessary that she should show that she is a legal or natural guardian of the minor. It is sufficient according to the definition in S. 4 (2) of the Act, if she shows that she is a person having the care of the person of the minor and as such guardian of the person within the meaning of the Act. Under the Hanafi law a mother is entitled to *Hizanat* or custody of the male child until he completes 7 years of age and of the female child until she attains puberty and though she is not the legal guardian of the children she is the "guardian" within the meaning of S. 4 (2) of the Guardians and Wards Act and therefore entitled to apply under S. 25 of the Act for the custody of the children : A. I. R. (5) 1918 P. C. 11 ; A. I. R. (21) 1934 Bom. 311 and A.I.R. (37) 1950 Mad. 320, *Ref.*]Para 5]

Where due to disputes in regard to properties belonging to the mother, she, the mother, is necessitated to live away from the father the mother cannot be prevented from exercising the right of *Hizanat* over her minor children so long as there is no misconduct or improper behaviour on her part. [Para 9]

In a petition by the mother for the custody of the minor children of the age of 1 year and 10 months, and 5 years, the paramount consideration to be taken into account is the welfare of the minors. That the children are of tender age is sufficient to hold that they should be entrusted to the custody of the mother. [Para 10]

Anno. Guardians and Wards Act, S. 4, N. 1 ; S. 25, N. 1, 5 and 8.

B. Pocker and G. Maheswaran — for Petitioner ; *K. Vallabheswara Rao — for Respondent.*

Cases referred to : —

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('18) 45 Ind. App. 73 : (A. I. R. (5) 1918 P. C. 11). [Pr. 4]

('34) 1934 All. L. Jour. 399 : (A. I. R. (21) 1934 All. 722 (2)). [Pr. 9]

('48) A.I.R. (35) 1948 All. 198 : (I. L. R. (1948) All. 194). [Pr. 9]

('34) A. I. R. (21) 1934 Bom. 311 : (58 Bom. 724). [Pr. 7]

('49) 1949-2 Mad. L. Jour. 802 : (A. I. R. (37) 1950 Mad. 320). [Pr. 7]

Judgment. — A Muslim mother of her two infant minor children, a female and a male of the ages of about five and two respectively applies in this petition for custody of her two infants from the Respondent, who is her husband, and the petition is laid under S. 25, Guardians and Wards Act. Parties were married on 14-12-1941 and have four children, Mumtazunnisa aged about seven years, Ghiasunnisa aged about five years, Jameelunnisa aged about three years, and Ravoofuddin aged about one year and ten months. Ghiasunnisa and Ravoofuddin are the minors concerned in this petition. The said minor children are admittedly at present in the custody of the Respondent, the other two Mumtazunnisa and Jameelunnisa being with the petitioner. The petitioner was living with the respondent till about two months after the birth of the minor boy, Ravoofuddin, and it is stated by the petitioner that for about two years after the marriage there have been some disputes between the husband and wife regarding the properties of the wife and the allegation is that the husband, the respondent herein, wanted to have these properties for himself, that he therefore persuaded the wife to mortgage the same, that, in fact, a mortgage for Rs. 2,000 was executed and that on account of these differences there have been certain ill-feelings and for some time they have been living separately. It is alleged that the respondent married for the second time on 13-1-1949 and lived with his second wife separately for some time and that the said marriage was dissolved by Khula through a Khazi on 2-9-1949. It is stated that the Respondent came to the Petitioner's residence when she was residing with her uncle, and took away three of the children forcibly, but subsequently the children were brought back to the petitioner. The petitioner states that eventually, on 30-1-1951, the respondent came to her residence when no male member was present and took away the two minors, Ghiasunnisa and Ravoofuddin, that the petitioner raised an alarm and cried aloud for assistance and that before any assistance could be available the respondent took away the children and has been retaining them till now.

[2] The contention of the petitioner is that both under Mahommedan law and in the interests and the welfare of the children, she is entitled to their custody. Certain allegations are made in the petition that the respondent is of bad character, that he is involved in debt, that the children cannot be properly taken care of by him and that in the interests of the children it is essential that they should be restored to their legal guardian, the petitioner. The allegations as to his character, financial position, and unemployment are denied by the respondent in his counter affidavit. The

respondent's case is that he has always been kind to his wife and children. that he has been anxious to have his family with him, but due to the evil advice of the uncle of the petitioner, she is refusing to live with him, with her children. There were also criminal proceedings between the parties. As regards the removal of the children on 30-1-1951, respondent denies that he took them away forcibly, but says that he went to her uncle's house where she was staying, had a talk with her and persuaded her to come away with him so that they could live happily, that she promised to join him with the children in a short time. He then told her that in that case he would have two children, the two minors concerned in this petition, with him and the other children would remain with her to which she agreed; and under that arrangement, the respondent says, that the two children came away with him and that they are now being well looked after and treated properly by the respondent's step-mother and his sisters.

[3] The main attack of the respondent is against the uncle of the petitioner who is stated to be an unscrupulous person and the respondent says that it is on account of his evil advice all these troubles are stated to have arisen. It is not necessary for the purpose of this petition to go into the truth or otherwise of the several allegations and counter allegations that are made by the parties excepting those which would be necessary and relevant for considering the question of custody of children and their welfare. The fact that the respondent married another woman and divorced her is not denied and there is no doubt that the relationship between the parties has not been very happy, at any rate after two years after the marriage and that it continues to be so upto now, the disputes being mainly relating to the question of properties. The suggestion of the petitioner is that the respondent and his father are anxious to deprive her of her two immovable properties which she is possessed of, that on account of her failing to accede to their request they are trying all means to make her unhappy and that their keeping the children with them is also one of the modes by which they are trying to enforce their will on the petitioner. The existence of disputes having been found, it appears, that without finding at this stage as to whether either party is absolutely to be blamed, there have been differences on account of the properties of the petitioner and though there are allegations by the petitioner of bad treatment by the respondent, the main trouble seems to arise from the question of the properties. Whatever the reason is, the husband and wife have not seen their way to join. I tried in the course of this enquiry to persuade the mother to live apart for some time with her children, when the respondent would be allowed to visit her, but she is not willing to do so as she has stated in her affidavit that she apprehends that he will treat her cruelly. It has therefore become necessary to decide as to whom the custody of the children should be given.

[4] The petition is also cpposed on the ground that a petition under S. 25, Guardians and Wards Act in the circumstances is not maintainable, since the respondent, being the father and not the petitioner who is the mother, is the natural guardian as well as the legal guardian; and as such S. 25, Guardians and Wards Act, 1890, which makes provision for the restoration to the guardian's custody of a ward who has left or been removed from the guardian's custody, can have no application in this case, and the mother, who is entitled only to Hizanat or custody of a minor child, cannot be the natural and legal guardian and therefore no question of removal of the custody of the minor from the natural or legal guardian arises. The observations of their Lordships of the Privy Council in *Imambandi* v. *Haji Mutsaddi*, 45 Ind. App. 73 are relied upon to show that the mother is not the natural guardian, but the father alone is the legal guardian and that under the Mahomedan law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. Comment is made on these observations of their Lordships of the Privy Council by Mulla in his book "Principles of Mahomedan Law" at page 296 in these terms:

"It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations in S. 257 below is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship. If so, the right of *hizanat* does not carry with it all the powers which a guardian of the person of a minor has under the Guardians and Wards Act, 1890".

[5] This seems to be the correct position in so far as the right to custody of male and female children of a Muslim upto certain ages is concerned. S. 25, Guardians and Wards Act provides that:

"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion, that it will be for the welfare of the ward to return, to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Relying on the language of S. 25, it is contended that there must be leaving or removal of the ward from the custody of the guardian, when alone the Court can take into consideration the welfare of the child and decide as to whether the custody should be restored. But in this case the mother not being the guardian of the person of the minors, the father alone being the guardian, it is contended, that an order under this section cannot be made. It is therefore necessary to see whether, even though the mother is not the legal guardian under the Mahomedan Law, she is, for purposes of the Guardians and Wards

Act a guardian who is entitled to the custody of her minor children, in view of the definition of 'guardian' under S. 4 (2), Guardians and Wards Act, is 'a person having the care of the person of a minor or of his property,' or of both his person and property." In my opinion, it is not necessary for a person, as in this case of a Muslim mother, to show that she is legal or natural guardian in order to entitle herself to the relief given under S. 25. It is sufficient if she is a person having the care of the person of the minors. It is therefore for consideration whether a Mahomedan mother, under her personal law, is entitled to the care of the person of the minors—in this case, the minors are a girl of five years old and a boy of the age of two years Parties being Hanafees, the mother is entitled to *hizanat* or custody of the male child until he has completed the age of seven years, of the female child until she has attained puberty. Obviously therefore the mother, under Mahomedan law, is entitled to the care of the person of her minor daughter until she attains puberty and of her minor son until he attains the age of seven years. In this view, a Mahomedan mother comes within the definition of a guardian under the Guardians and Wards Act. If she comes within the scope of the definition of 'guardian' under the Guardians and Wards Act, the petition under S. 25 of the Act is maintainable. What all the Privy Council has laid down in the case cited is that by reason of the mother being entitled to the custody, she cannot claim to be the legal guardian Though the mother has got the right to custody, the right of supervision and control is with the legal guardian, who is the father. But that would not deprive the mother from having the care of the person, viz. custody of the children upto certain age, according to the faith to which the parties belong—whether they are Hanafees, Shiyas or Shafees. In view of this, the petition under S. 25 of the Act is maintainable if there has been removal by the respondent of these two children from her custody.

[6] As regards this point the evidence is conflicting, the mother contending that taking advantage of the absence of any male members in the house, the respondent took away the children forcibly, while the respondent contends that the children came away with him under an arrangement. It is quite unlikely that the boy who is stated to be aged one year and ten months would have come willingly with the father. It is also doubtful whether the children could have been brought under any arrangement since, if the respondent's case has to be accepted, one would have expected him to have taken suitable steps to implement the arrangement. It is therefore not possible to hold that there was any such arrangement.

[7] The question of maintainability of a petition of this nature has been considered in the decisions: *Noshirwam Manekshaw* v. *Sharaoshbanu Noshirwan*, A. I. R. (21) 1934 Bom 311 and *Venkataram Ayyangar* v. *Thulasi Ammal*, 1949-2 Mad L. Jour. 802. Both the decisions hold that the word 'guardian' in S. 4 is used in a wide sense and does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural guardian or even a *de facto* guardian. In view of this, the correct conclusion that could be arrived at on a reading of S. 4 (2) is that the petitioner is a guardian as defined in the Act. I therefore find that the petition is maintainable.

[8] The other objection is that even though the mother is entitled to hizanat, she has lost that right by reason of her having gone and resided during the subsistence of the marriage at a distance from the father's place of residence. There is no dispute that the petitioner and the respondent are living apart, the petitioner near Mount Road and the respondent in Triplicane, both suburbs in the City of Madras. They therefore reside separately during the subsistence of the marriage. But the question is whether the Petitioner resides at a distance from the father's place of residence. It is necessary to find as to what is meant by the words "residing at a distance from the father's place of residence". This disqualification is mentioned as one of the disqualifications in Mulla's Mahomedan Law at page 297, the other disqualifications being:

"(1) if she marries a person not related to the child within the prohibited degrees, for example, a stranger; or

(2) if she is leading an immoral life, as where she is a prostitute; or

(3) if she neglects to take proper care of the child."

Wilson in his Anglo Mahomedan Law mentions the same four categories of disqualifications. Wilson says at page 185 of his treatise:

"A woman otherwise entitled to the custody of a boy or girl is disqualified—by going to reside at a distance from the father's place of residence except that a divorced wife may take her own children to her own birth place, provided it be also the place at which the marriage was contracted."

Reference is made by Mulla in his book to Hedaya and Baillie's "Digest of Muhammadan Law". A translation of the Hedaya is found in vol. I of Hamilton's Mussalman Laws. In Hedaya the disqualification consequent on the mother living at a distance from the father's place of residence is not specifically mentioned. In dealing with the place of Hizanut, Baillie in his "Digest on Muhammadan Law" Part I, second edition at page 439 states:

"Where the husband and wife are residing is the proper place of hizanut, while the marriage subsists. So that the husband cannot leave the city where they are residing, and take the child with him out of the custody of the woman to whom it properly belongs until the child is independent of her care; and if the wife should desire to leave the city he can prevent her, whether she have the child with her or not."

Though this is not mentioned as a disqualification in 'Hedaya' it is not possible to disregard the mention of it in the wellknown and accepted

treatises on Muhammadan law by Mulla and Wilson and by Baillie in his "Digest on Muhammadan Law", and it may be taken for granted that residing at a distance from the father's place of residence is a circumstance against, though not strictly a disqualification to the mother's right to have the custody of the child. The reason behind this rule appears to be that the mother should not choose to reside at such distance from the father, so as to deprive the father or prevent him from having access and exercising the necessary supervision over the child of which he is the legal guardian. Syed Ameer Ali in his Mahomedan law at page 300 states as follows:

"The right of hizanat or custody, according to all the schools, is lost—

(1) by the subsequent marriage of the *hazina*, with a person not related to the infant within the prohibited degrees;
(2) by her misconduct;
(3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child; and
(4) apostasy from Islam."

It is therefore not open to the mother, taking advantage of the right of *hizanat*, to take away the children to whichever place she pleases and thus deprive the father of his natural and legal right to have the control and supervision over his children to which he is entitled. In the present case, the distance is not such as could be stated to prevent the father from going and seeing the children and doing his duty as the guardian.

[9] It is contended on behalf of the respondent that the mere separation of the wife from the husband would amount to living at a distance from the father's place of residence and that therefore the petitioner has become disqualified from exercising her right of *hizanat*. It could not have been intended that the right of *hizanat* should be taken away, if for instance, the mother lives away from her husband and that the right of *hizanat* which was granted to her should be deprived to her for a cause for which she may not be solely responsible. The language used by Ameer Ali as to residing at a distance would only mean residing at such distance as to make it impossible for the father to go and supervise his children. If the mother lives apart at a distance and leads a life of open immorality or misconducts herself, the latter ground would be sufficient to prevent her from exercising the right of *hizanat*, irrespective of whether she is residing at a distance or not. Learned counsel has been endeavouring to show that the respondent was not responsible for the petitioner's living away from him, that he did not treat her cruelly and that there was no justification for her residing separately. The decision of that question is not really necessary in this case as no charge of misconduct has been levelled against the petitioner; and the only charge is that she is living separately, which, by itself, is not sufficient to disqualify her from exercising the right of *hizanat*. If in fact the intention had been to deprive the mother of the right if she lived separately from the father's place, it would have been so expressed. But it has not been done. The loss of the right of *hizanat* by reason of living at a distance was considered in *Mt. Haidri Begam* v. *Jawwad Ali*, 1934 ALL. L. Jour 399 where the mother was living in Lucknow and the father in Gorakhpur and it was held that the mother had the preferential claim under the Hanafi Law. In *Mt. Sakina Begam* v. *Malka Ara Begum*, A.I.R. (35) 1948 ALL. 198 a Bench of the Allahabad High Court held as follows:

"According to the Hanafi Law as between a mother and a father, the mother has a preferential claim to the custody of their children. It cannot be laid down as an absolute proposition that she loses the right of custody if she goes and resides at a distance from the father's place. It all depends upon circumstances. If the stay is only temporary or is forced or is due to circumstances beyond her control, it is difficult to hold that she should even then be deprived of the custody of her own children. She loses the right of custody of her children only if she has any defect of character such as would render her unfit to have the custody of her own child."

There can be no doubt that due to certain circumstances this living separately had become necessitated, the circumstances mainly being disputes over the properties of the petitioner. The petitioner states that circumstances compelled her to live away from the respondent. In view of those circumstances and so long as there is no misconduct or improper behaviour on the part of the mother, it cannot be said that such living apart would disentitle her from exercising the right to which she is entitled under the Mohammadan law to which the parties belong.

[10] Apart from all these, in a petition of this nature, the paramount consideration to be taken into account is the welfare of the minors. The boy being less than two years, it is ordinarily necessary that he should have the benefit of the mother's milk and the one circumstance that the children are of tender years is sufficient to hold that it is desirable that they should be entrusted to the custody of the mother.

[11] In Hamilton's Mussalman Laws at p. 388, dealing with the length of the term of *Hizanat*, Hamilton says as follows:

"The right of *Hizanat*, with respect to a male child, appertains to the mother, grandmother, or so forth, until he becomes independent of it himself, that is to say, become capable of shifting, eating, drinking, and performing the other natural functions without assistance; after which the charge devolves upon the father, or next paternal relation entitled to the office of guardian because, when thus far advanced, it then becomes necessary to attend to his education in all branches of useful and ornamental science, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified: (Kasak says that the *Hizanat*, with respect to a boy, ceases at the end of seven years, as in general a child at that age is capable of performing all the necessary offices for himself, without assistance) but the right of *Hizanat* with respect to a girl appertains to the mother, grandmother, and so forth, until the first appearance of the

menstrual discharge, (that is to say, until she attains the age of puberty) because a girl has occasion to learn such manners and accomplishments as are proper to woman, to the teaching of which the female relations are most competent; but after that period the charge of her property belongs to the father because a girl, after maturity, requires some person to superintend her conduct, and to this the father is mostly completely qualified."

This statement of law, though applicable to those professing the Hanafi faith among Mussalmans can, in view of its reasonableness and practicability, be usefully treated as of general application and as affording valuable guidance in considering questions relating to custody of minors in this country.

(12) After careful consideration, I find that the proper person under whose custody these minors should be is the mother. I therefore direct the respondent to hand over the two minors, viz. Ghiasunnissa and Ravoofuddin to the petitioner. Respondent will be entitled to visit his children twice a week, preferably on Sundays and Wednesdays. Respondent will pay the costs of the petitioner and her Advocate's fee, which I fix at Rs. 100.

C.R.K./K.S. *Application allowed.*

A. I. R. (39) 1952 Madras 288 *[C. N. 105(19).]*

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

A. M. M. Srinivasan Chettiar and others, Appellants v. Ar. Rm. Ar. Arunachalam Chettiar and another, Respondents.

O. S. Appeal No. 21 of 1949, D/- 29-8-1951.

Limitation Act (1908) S. 13 — Suit against joint family — Manager out of India.

Under the law, the manager is the person who has got authority to represent the joint family in all its transactions and the plaintiff is entitled to file a suit against the manager of the family and obtain a decree against the entire assets of the joint family in his hands. It is sufficient that the suit against the manager is in time because that will enable the plaintiff to obtain a decree against the entire joint family property through its manager. Where the manager has gone out of British India the period during which he was so absent might be excluded in computing the period of limitation though other members of the family were residing in British India and there was no legal impediment to the plaintiff filing the suit against them. *(Para 3)*

Anno: Lim. Act, S. 13 N. 5.

R. Kesva Iyangar, V. Ramaswami Iyer and S. R. Krishnamachariar and M. Natesan, for Appellants; R. Rangachari, for Respondents.

VENKATARAMA AYYAR, J.: This is an appeal against the judgment of Bell J. decreeing O. S. No. 124 of 1944. The plaintiff is a Nattukottai Chettiar carrying on banking business. The defendants are members of a joint family called A. M. M. family. One Meyyappa Chettiar was the manager of the joint family at the relevant period. From 1-11-1939 to 3-3-1941 he, as manager of the joint family, borrowed various amounts from the plaintiff's firm. He died on 21-10-1942. The family has thereafter continued joint and the defendants are the members of that family. The suit is to recover the amounts due on account of these borrowings. The suit was originally laid only against the first defendant on the footing that he was the manager of the family. But he pleaded that he was not the manager of the joint family and an application was thereafter made for impleading the second defendant as the manager and other members of the family. The second defendant has appeared and has contested the suit along with the other defendants. Two of the pleas put forward in defence alone are material for the purpose of this appeal. One is that the suit is barred by limitation and the other is that the debt was not borrowed for joint family purposes and therefore it will not be binding on the brothers of Meyyappa or his nephews.

(2) Bell J. held that the suit was not barred by limitation and that the debt was binding on the family and has granted a decree. The defendants 1, 2 and 4 to 8 appeal.

(3) The first point that has to be considered is the plea of limitation. The borrowings were from 1-11-1939 to 3-3-1941 as we have already mentioned. The suit was filed on 28-4-1944, i.e., more than three years from even the last borrowing. If the case is treated as one purely to recover a loan, the suit would be obviously barred under Art. 57 of the Limitation Act. Bell J. overruled the plea of limitation on the ground that the defendants had really an overdraft accommodation with the plaintiff up to a limit of Rs. 10,000 and that as that had not been reached, there was no cause of action until that limit was reached and until a demand was made. We are unable to agree with this view of the question. But all the same we agree that the suit is not barred by limitation for a different reason. The second defendant is the manager of the joint family. He was away from British India from at least 1942 and it was only during the pendency of the suit that he came to India. Then he entered appearance and contested the suit. S. 13 of the Limitation Act provides that where the defendant has gone out of British India, the period during which he was so absent might be excluded in computing the period of limitation. It is not denied that if this section applies the suit will be in time so far as the second defendant is concerned. But what is contended is that other members of the family were residing in British India and there was no legal impediment to the plaintiff filing the suit against them. But under the law, the manager is the person who has got authority to represent the joint family in all its transactions and the plaintiff is entitled to file a suit against the manager of the family and obtain a decree against the entire assets of the joint family in his hands. In our opinion, it is sufficient that the suit against the second defendant as manager is in time because that will enable the plaintiff to obtain a decree against the entire joint family property through its manager, the second defendant. In this view, we hold that the suit is in time and the plea of limitation ought to be accordingly overruled.

(4) The next point that is urged is that the plaintiff has not established that the debt was borrowed for a purpose binding on the other members of the family. The fourth defendant is the son of Meyyappa who borrowed the amount and the eighth defendant is the grandson; but the other defendants are the brothers of Meyyappa and his nephews. The argument on behalf of the appellants is that there is no satisfactory proof that the amounts were borrowed by Meyappa on behalf of the joint family. But the family of the defendants is a banking family. They are doing banking business in Saigon, Malaya and other places. P. W. 1 speaks to an adathi agreement between the plaintiff and the defendants' family and further deposes that Meyyappa represented that amounts were borrowed for the purpose of this business. The defendants have not produced their account books to show that these amounts have not been brought into their

business. The learned Judge has accepted the evidence on the side of the plaintiff and we agree that it has been sufficiently established that the debt is binding on all the members of the family.

(5) In the result, both the contentions of the appellants fail and this appeal is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A.I.R. (39) 1952 Madras 289 *[C. N. 105(20).]*

MACK AND SOMASUNDARAM, JJ.

In re Rajagopala Aiyangar, Accused.

Ref. Trial No. 35 of 1951 and Criminal Appeal No. 249 of 1951, D/- 28-9-1951.

(a) Penal Code (1860), Ss. 302, 84 — Multiple murders — Accused not insane — No motive — Sentence — (Criminal P. C. (1898), S. 401) — Criminal P. C. (1898), S. 367).

In cases of multiple murders where an accused is clearly not insane in the sense that he did not know what he was doing, and clearly knew what he was about, the mere absence of motive, the apparent senselessness of the murders and the fact that he murdered persons in his own family in cold blood can furnish no extenuating circumstances which the Courts can take into consideration in mitigation of the sentence. In such cases, Courts cannot take upon themselves the responsibiity of recommending for a comparatively short period of imprisonment a man who has once been a victim to homicidal frenzy of this description and expose other innocent persons to a similar attack after his release from prison. In cases of this kind the law must take its course, and the only sentence that a criminal Court can pass is the extreme penalty. 'Case law reviewed.' *(Para 8)*

(Court refused to reduce sentence to transportation for life or recommend the case under S. 401, Criminal P. C., to Govt.) *(Para 8)*

Anno: Penal Code S. 302, N. 11, S. 84, N. 11, Cr. P.C. S. 401, N. 1.

(b) Penal Code (1860), S. 84 — Uncontrollable impulse is no defence. *(Para 7)*

Anno: Penal Code, S. 84, N. 1.

K. S. Naidu, for Accused; The Assistant Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('86) 10 Bom 512 (Prs 6, 7)
('96) 23 Cal 604 (Pr 6)
('50) 1950 Mad W N Cri 95: (AIR (37) 1950 Mad 592:51 Cri L Jour 1491) (Pr 6)
('37) 16 Pat 333: (AIR (24) 1937 Pat 363:38 Cri L J 846) (Pr 6)
(1920) 15 Cri A R 10 (Pr 7)
(1925) 19 Cri A R 50 (Pr 7)
Med Chir Rev. Vol. 28 P. 84 (Prs 6, 7)

JUDGMENT: This is a most tragic case in which the appellant, one Rajagopala Aiyangar aged 30, has been found guilty of clubbing his wife and four children shortly after midnight in their house in Kivalur. The four children clubbed murderously on their heads with an iron pestle succumbed to their injuries, but his wife Mathuravalli survived. She had eight injuries mainly on the head and face with suspected fracture of the skull. After sometime in hospital she was discharged with the wounds healed, but her mental faculties impaired, and, according to Dr. Mrs. Mathew, unable to say anything about her family or what happened to her children. She was not examined as a witness in this case. The learned Sessions Judge of East Tanjore has found the appellant guilty of the quadruple murder of his four children and sentenced him to death. He also found him guilty under S. 307, I.P.C., of attempting to murder his wife and sentenced him to transportation for life.

(2) The facts of this distressing case are perfectly clear. Two neighbours, P. Ws. 1 and 2, were awakened after midnight by noises and grons from this house and came out to find appellant standing at the threshold of his house with an iron pestle, M. O. 1. in his hand. They both say he told them "I have closed all, but I cannot bring myself to kill the small child" and pointed to his youngest daughter aged 2 standing near him. P.Ws. 1 and 2 immediately went to the police station. The Sub-Inspector, P.W. 12, found one of the children dead and sent Mathuravalli and the three other children who were alive to the Negapattinam hospital, where the children succcumbed to their injuries. Their heads were all crushed by blows from this pestle.

(3) Appellant made no attempt to deny his guilt. In the lower Court he merely said that all the evidence against him was true. At the Sessions trial he also said he had nothing to say and made no attempt to explain his horrifying conduct.

(4) Appellant was a clerk in the Indian Bank drawing Rs. 120 a month. He also had some property — lands and a house said to be worth about Rs. 25,000. The evidence shows that he was to all outward appearances happily married to his wife by whom he had no less than six children. The eldest daughter was fortunately staying with a relation. The other five children, a son aged 10 and four daughters aged 8, 6, 4 and 2 were sleeping in their house that night. Not a vestige of suspicion in the evidence attaches to Mathuravalli's chastity. Absolutely no motive is disclosed as to why the appellant should have suddenly at midnight set about clubbing his wife and all his children with the obvious intention of doing away with them. The evidence of P. Ws. 1 and 2, we see no grounds for rejecting in any single particular, that when they saw him standing outside his threshold with this pestle he told them words to the effect that he had killed them all, but could not bring himself to kill his youngest daughter. This conduct by itself clearly shows that appellant knew what he was doing and it makes any plea of insanity under S. 84, I.P.C., out of the question. The conviction of the appellant under S. 302, I.P.C., is correct and is confirmed.

(5) As regards motive we have laboured in this case to find anything suggestive of any motive for these ghastly and apparently inexplicable murders. We have even searched the case diary and we find there this record of what the accused said to the police when first examined to see if it contains anything which could be used in his favour. The case diary extracts reads as follows:

"The accused was examined in detail. He stated that he is living in Kivalur for the last two years and he was originally godown keeper at Kivalur and he is now transferred to Tiruvarur and he handed over charge of the keys of the godowns and there was some shortage and so he was in trouble over the shortage of keys and he stopped there and did not speak anything coherently afterwards. He is not communicative and he does not speak properly."

Further investigation brought nothing to light as regards any irregularity in his Bank work. We

are even prepared to assume that he was worried over some bank affairs, but we cannot find in this anything by way of extenuating circumstances.

(6) The learned Advocate for the appellant has drawn our attention to a series of decisions in not dissimilar cases on the basis of which in cases of multiple murders of this kind the most lenient treatment has been accorded to them on the basis of an inference of temporary mental derangement from the motiveless nature of the crime committed. As we were unable to agree with this treatment accorded to such cases we have traced them to their source which appears to be a judgment of 1886 in 'Queen Empress v. Lakshman Dagdu', 10 Bom 512 by Birdwood and Jardine, JJ., of the Bombay High Court. That was a case in which an accused person brutally killed his two young children with a hatchet after having been ill with fever for several days. His wife who gave evidence said he became bewildered and unconscious when fever came on. The Sessions Judge sentenced him to death. In appeal the learned Bombay Bench referred to a case in 'Reg v. Greensmith', Med Chir. Rev. Vol. 28 p. 84, in which Greensmith was charged with the murder of four of his children. Reference was made to 'Taylor's Jurisprudence, 6th Edition, page 926', as authority for Greensmith being subsequently respited on the ground of insanity on the active interference of a Dr. Blake and others. There was reference in that judgment to an observation by Dr. Taylor to the following effect:

> "It may be a dangerous doctrine to adduce the 'crime' or the mode of perpetrating it, as 'evidence' of insanity; but such cases as these incontestably prove that there are some instances in which this is almost the only procurable evidence."

Holding that the case before them was similar to that in Greensmith's case the learned Judges made a recommendation to Government for commutation while passing the lesser sentence of transportation for life. This decision was followed with approval in 1896 in Queen Empress v. Kadar Nasyer Shah', 23 Cal 604 in the case of a man who had strangled a boy aged 8 whom he was bringing up. In a case decided by a learned Bench of the Patna High Court in 1937 in 'Emperor v. Gedka Goala', 16 Pat 333, Goala attacked his own family with a knife and killed his wife, two daughters and a son. In that case he was acquitted by the Sessions Judge in agreement with the assessors who accepted his plea of insanity. In appeal he was found guilty of murder and transported for life with a recommendation made under S. 401, Criminal P. C. Rowland, J., in his judgment followed 'Queen Empress v. Kadar Nasyer Shah', 23 Cal 604, describing it as a leading case which has been repeatedly followed. With the greatest respect we are in complete agreement, so far as the question of the plea of insanity is concerned. The next decision placed before us in 'Kulandai Thevar v. Emperor', 1950 Mad W N Cr. 95, a learned Bench of our own High Court in which an accused person who was described as tired and hungry suddenly and without any cause or motive attacked a Muslim who accosted him, with an aruval and when pursued ran amock and slaughtered four innocent children. The learned Judges referred to the three decisions to which we have adverted and following those precedents reduced the sentence to transportation for life and made a recommendation to Government under S. 401, Criminal P. C.

(7) With the greatest respect we are unable to follow this trend of judicial decision, but have not thought it fit to make any reference to a Full Bench as it relates only to the question of sentence which is one which must rest on the facts of each case. We have examined the decision 'Queen Empress v. Lakshman Dagdu', 10 Bom 512, of the year 1886 and find that it was based on the decision in Greensmith's case reported in the 6th Edn., of Taylor on the basis of which on the alleged ground of insanity a reprieve was granted on a representation led by a doctor of that day. We have looked into the 6th Edn. of Taylor's Medical Jurisprudence which came out in the year 1910 and can find no reference there to the case of 'Reg. v. Greensmith', Med. Chir. Rev. Vol. 28, p 84, at all. The 6th Edn., of Taylor referred to in the Bombay decision appears to be the 6th Edn., of a Manual of Medical Jurisprudence by Dr. Taylor which ran into at any rate 12 editions. We have been able to obtain a copy of the 12th Edn., of this Manual published in 1891. Even in this edition there is no reference to Greensmith's case and the opinion of Dr. Taylor on which the Bombay decision was founded. It is obvious that the Bombay case of 1886 referred to the 6th Edn., of Taylor's Manual of Medical Jurisprudence, and that even by 1891 it was thought fit to exclude Greensmith's case and the opinions expressed in the 6th Edn., altogether. Dr. Taylor himself had died in 1880 after being for 40 years Professor of Medical Jurisprudence in Guy's Hospital Medical School. In the 9th Edn., of Taylor's Medical Jurisprudence published in 1934 with a complete revision of the legal aspect by Mr. W. G. H. Cook, L.L.D., London, we find some scathing judicial references to the doctrines of irresistible impulse, impulsive insanity and temporary mental derangement on medical theories. There is reference at page 817 to Mr. Justice Wightman's reference in 'R. v. Burton', to the doctrine of uncontrollable impulse as a most dangerous doctrine fatal to the interests of the society and the security of life. We think it only necessary to quote this paragraph from this Edition of Taylor's Medical Jurisprudence at pages 817-818:

> "This defence has been raised in several cases in recent years, and in R. v. Holt', (1920) 15 Crl A R 10 the Court of Criminal Appeal declined to extend the test laid down in 'M'Naughten's case', so as to include 'uncontrollable impulse.' The Lord Chief Justice said: 'It is not enough for a medical expert to come to the Court and to say generally that in his opinion the criminal is insane. There must be some evidence of insanity within the meaning of the rule in M'Naughten's case'. In 'R. v. Kopsch', (1925) 19 Crl AR 50, the Court of Criminal Appeal laid down that the defence of uncontrollable impulse is unknown to English law. The Court expressed the view that 'the defence of insanity in this case, as in so many cases was "the merest nonsense" and that "if the fantastic theory of uncontrollable impulse were to become part of our criminal law, it would be merely subversive."
>
> "If the law were to be relaxed in the way suggested by some medical men, it is the opinion of the Lord Chief Justice of England that the result might be to transfer to a section of the medical profession the question whether a great number of ordinary criminals should be held responsible by the law."

With great respect we are in complete agreement with this summary contained in Taylor's Medical Jurisprudence itself as to what should be the correct law in multipue murders of this kind and to the extreme difficulty in passing sentence for Courts to infer temporary derangement or hallucination or some uncontrollable impulse from the fact that multiple murders are brutally and senselessly committed by a person without any apparent motive conscious of what he was

doing and to take this into consideration as an extenuating circumstance which would protect him from the extreme penalty of the law. In the tenth and the most recent edition of Taylor's Principles of Jurisprudence, Vol. I, in considering the question of insanity, there is at page 665 the following observation:

"In some respects medical opinion has seemed for many years to have ranged itself on the side of the criminal; but this is due not so much to a desire to preserve the criminal from punishment as from a fundamentally different view in regard to the results obtained from punishment as contrasted with the results which might be obtained from a different form of treatment."

Much has been written in this about the difference of opinion as between the medical and legal approach to the criminal.

(8) We have embarked on this analysis of the history of the trend of Indian decisions in the matter of sentence, widely divergent as it is in English law, as we find it based on a medical opinion which appears to have been expressed by Dr. Taylor some years prior to 1886 which has received the strongest discouragement and criticism from the English Courts so much so that the decision on which he relied, the Greensmith case in which the Court passed the death sentence, has not been cited in any of his subsequent editions. In cases of multiple murders of this kind where an accused is clearly not insane in the sense that he did not know what he was doing, but in the present case where he clearly knew what he was about, the mere absence of motive, the apparent senselessness of the murders and the fact that he murdered persons in his own family in cold blood can, in our opinion, furnish no extenuating circumstances which we can take into consideration in mitigation of the setence. We cannot take upon ourselves the responsibility of recommending for a comparatively short period of imprisonment a man who has once been a victim to homicidal frenzy of this description and expose other innocent persons to a similar attack after his release from prison. In cases of this kind, as it appears to us the law must take its course, and the only sentence that a criminal Court can pass is the extreme penalty. The learned Sessions Judge has done we consider his painful duty in this case. We are unable to reduce the sentence to transportation for life, far less to make any recommendation to Government under S. 401, Criminal P.C. We have no option in the view we have taken but to dismiss the appeal and to confirm the sentence of death passed on the appellant.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Madras 291 *[C. N. 105 (21).]*

RAJAMANNAR, C. J. AND SOMASUNDARAM, J.

Sree Krishna Chaitanya, Petitioner v. Bhanumathi, Respondent.

Civil Miscellaneous Petition No. 5200 of 1951, D/- 26-7-1951.

Constitution of India, Article 228 — Application under Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) — Defence that Act is void by reason of Art. 13 of Constitution, involves substantial question of law involving interpretation of Constitution — Question whether petition is maintainable even if the Act is inconsistent with Constitution, because second marriage took place before Constitution, is also such a question.

Where upon a petition under Section 5 of Madras Act VI of 1949, the Madras Hindu (Bigamy Prevention and Divorce) Act, one of the defences raised is that Madras Act VI of 1949 itself is invalid and inconsistent with the Constitution, the case involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of this case and the case falls under Art. 228.

The question whether even if the Act is inconsistent with the Constitution and therefore void under Art. 13 of the Constitution, the petition is sustainable because the second marriage which furnished the petitioner with a right to obtain a divorce took place before the coming into force of the Constitution, also involves a substantial question of law as to the interpretation of the Constitution, in particular, Art. 13. AIR (38) 1951 S C 128, Ref. (Paras 1, 2)

N. C. V. Ramanujachari, for Petitioner.

Case referred to:

('51) 1951-1 Mad L J 370: (AIR (38) 1951 S C 128: 52 Cri L J 860 S C) (Pr 2)

RAJAMANNAR, C. J.: This is an application made under Article 228 of the Constitution praying that O. P. No. 18 of 1950, pending on the file of the Subordinate Judge's Court at Eluru may be withdrawn to this Court and disposed of after determining the question of law involved therein. The said petition was under S. 5 of Madras Act VI of 1949, the Madras Hindu (Bigamy Prevention and Divorce) Act. The relief claimed was dissolution of the marriage of the petitioner with the respondent on the ground of the second marriage of the respondent. One of the defences raised is that Madras Act VI of 1949 itself is invalid and inconsistent with the Constitution.

(2) In our opinion the case certainly falls under Article 228 of the Constitution and we are satisfied that the case involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of this case. This petition is, however, strongly opposed on the ground that even if we were to hold that the Act is inconsistent with the Constitution and therefore void under Art. 13 of the Constitution, nevertheless, the petition is sustainable because the second marriage which furnished the petitioner in the petition with a right to obtain a divorce took place before the coming into force of the Constitution, and therefore the petition was sustainable. In our opinion, this again involves a substantial question of law as to the interpretation of the Constitution, in particular, Art. 13. Reliance was placed by the learned Counsel for the respondent on the recent decision of the Supreme Court of India in 'Keshavan Madhava Menon v. State of Bombay', 1951-1 Mad L J 370. In that case there were actually proceedings commenced under Section 18 (1) of the Indian Press (Emergency Powers) Act, 1931, before the commencement of the Constitution. The question was whether such proceedings could be proceeded with after the Constitution on the ground that the material provisions of that Act were inconsistent with Art. 19 (1) (a) of the Constitution. Their Lordships by a majority held that the proceedings could be continued. There are observations in the judgment in that case which were relied upon by Counsel for the respondent, but we do not think that their Lordships purported to finally decide the question whether any proceeding could be commenced after the Constitution relying upon the provision in an Act which would be declared by the Court to become void after the coming into force of the Constitution under Art. 13. The following words of Das. J., who delivered the leading judgment appear to suggest that no existing law could be utilised to prevent the exercise of any

fundamental right after the commencement of the Constitution:

"In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights."

In any event we consider that this question also may well be disposed of by this Court.

(3) The application is therefore granted, there will be an order accordingly withdrawing O. P. No. 18 of 1950 from the file of the Court of the Subordinate Judge of Eluru to this Court for the purpose mentioned in this application.

C.R.K./R.G.D. *Application granted.*

A. I. R. (39) 1952 Madras 292 *[C. N. 105 (22).]*

SUBBA RAO J.

T. V. Srinivasaraghava Aiyangar, Petitioner v. M. Narasimha Mudaliar, Respondent.

Civil Revn. Petn. No. 1777 of 1949, D/- 27-4-1951.

Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938) S. 9A — Usufructuary mortgage — Lease back — Suit for rent by mortgagee.

Sub-s. 9(a) does not state expressly or indicate by necessary implication that a lease back by the mortgagee to the mortgagor is invalid. The section is intended only to apply when the mortgagor seeks to redeem the mortgage. As the lease has not been declared to be invalid, if the mortgagor does not apply for redemption there is nothing in the provisions of the section or in the Act which precludes a mortgagee from filing a suit for recovery of the rents legally due to him under the lease deed. The mortgagor can anticipate such a suit and take necessary proceedings for redemption. But so long as the mortgagor does not take any such step the pre-existing rights of parties are intact. The mortgagee in the suit for rent will be entitled to a decree for the entire rent due to him under the lease deed. (*Para 2*)

T. R. Srinivasan, for Petitioner; K. S. Rajagopalachari, for Respondent.

ORDER: This is a revision petition against the judgment of the Subordinate Judge of Chingleput in S. C. S. No. 56 of 1949. The suit was filed by the respondent for recovery of the rent due to him under a muchilika dated 12th June 1948 executed by the petitioner in his favour. The petitioner executed a usufructuary mortgage deed in favour of the respondent and the mortgagee executed a lease back in his favour. The suit was by the usufructuary mortgagee for recovery of the rent on the basis of the said lease. The petitioner contended in the Court below that under S. 9-A (6) (a) of the Madras Agriculturists Relief (Amendment) Act, 1948 (Act XXIII of 1948) he was only liable to pay interest but not the rent agreed to be paid under the lease deed. The learned Subordinate Judge held that the petitioner could avail himself of the said provision only at the time when he would be taking steps to scale down the mortgage debt in its entirety. In the result he gave a decree to the respondent as claimed. The above revision petition was filed against that order.

(2) Learned counsel for the petitioner repeated the contention which his client unsuccessfully raised in the Court below. S. 9-A had been added to Madras Act IV of 1938 by Act XXIII of 1948. Act XXIV of 1950 substituted S. 9-A in the place of the old section. It applies to all mortgages executed at any time before the 30th September 1947, any by virtue of which the mortgagee is in possession of the property mortgaged to him or any portion thereof. Under the explanation to S. 9-A (1) (b) a mortgagee shall be deemed to be in possession of the property mortgaged to him or any portion thereof, notwithstanding that he had leased it to the mortgagor or any other person. S. 9-A (2) confers a right upon a mortgagor to redeem the whole of the property mortgaged notwithstanding that a time was fixed in the mortgage deed. Sub-ss. 3 and 4 provide for scaling down of the debt having regard to the term fixed and other circumstances. Under Sub-s. 5, if the mortgagee had been in possession for more than thirty years, the mortgage shall be deemed to have been fully discharged subject to certain conditions laid down therein. Sub-s. 6 deals with the scaling down of the mortgage debt where the mortgagee has been in possession only of a portion of the property mortgaged. Sub-s. 9 (a) (i) says that except in cases falling under Sub-s. 5(a), where the mortgaged property or, as the case may be, the portion thereof in the possession of the mortgagee has been leased back to the mortgagor by the mortgagee, the rent due to the mortgagee under the lease (after deduction from such rent any revenue, tax or cess paid or payable by the mortgagee in respect of the property) shall be deemed to be the interest on the mortgage debt or the portion thereof attributable to the portion of the property aforesaid and the provisions of S. 8 or 9 read with S. 12, or of S. 13, as the case may be, shall apply to the entire debt. Under Sub-s. 9(b) the mortgagee would be entitled to recover the rents not barred in a case of a mortgage covered by Sub-s. 5(a). It is therefore clear from the aforesaid provisions that Sub-s. 9(a) (i) confers a right on a mortgagor to redeem the mortgage notwithstanding any time fixed under the mortgage deed. The subsequent provisions provide for a scaling down of the decree to enable the mortgagor to redeem the mortgage. The explanation to S. 9-A (1) (b) and Sub-s. 9 (a) (i) introduces a fiction for the purpose of scaling down the mortgage debt. Under the explanation the mortgagee though he leased back the mortgaged property is deemed to be in possession. Under Sub-s. 9(a) (i) the rent payable by the mortgagor shall be deemed to be the interest on the mortgage debt. Sub-s. 9(a) does not state expressly or indicate by necessary implication that a lease back is invalid. Indeed, some of the provisions show that the lease is valid and continues to be in force. Under Sub-s. 9 (b) notwithstanding the fact that the mortgage is deemed to have been discharged under Sub-s. 5 (a), the mortgagee will be entitled to recover arrears of rent from the mortgagor if the claim is not otherwise barred. The scheme of the section leaves no doubt in my mind that it is intended only to apply when the mortgagor seeks to redeem the mortgage. As the lease has not been declared to be invalid, if the mortgagor does not apply for redemption there is nothing in the provisions of this section or in the Act which precludes a mortgagee from filing a suit for recovery of the rents legally due to him under the lease deed. It is no doubt true that the mortgagor can anticipate such a suit and take necessary proceedings for redemption. So long as the mortgagor does not take any such step the pre-existing rights of parties are intact. In this view I agree with the Court below that the mortgagee will be entitled to a decree for the entire rent due to him under the lease deed. In the result the revision petition is dismissed with costs.

C.R.K./D.H. *Revision dismissed.*

A. I. R. (39) 1952 Madras 293 *[C.N. 105 (23).]*

GOVINDA MENON AND CHANDRA REDDI, JJ.

V. Kalyanasundaram Pillai, Appellant v. R. M. L. S. Chockalingam Chettiar, Respondent.

A. A. O. No. 302 of 1950, D/- 18-4-1951.

Central Excises and Salt Act (1944), S. 37 (1) — Rules under—Rr. 103 and 104—Lease of salt pans—Sale of lease-hold interest in execution — Sale, if 'ab initio' void.

A lease of salt pans provided in Clause 12 thereof that "Except with the written consent of the lessor first had and obtained, the lessee shall not assign, underlet or part with the possession of the leased land or any portion thereof and shall not transfer by sale, or otherwise, the powers hereby granted to him". The question was whether the sale of the salt pans in execution of a decree against the lessee was 'ab initio' void.

'Held' (1) that what Clause 12 contemplated was merely an amplification of Rules 103 and 104 under the Act and all that that clause was intended to lay down was that the Collector was not bound to recognise any transfer made without his permission. Moreover, Clause 12 was a term of the contract between the parties and had not the same force as a statute, or any rule framed thereunder having the same force as the Act. S. A. No. 1914 of 1944 (Mad) foll. (Para 4)

(2) that the case was governed by the rules made under the Act which specifically allow transfer and the attempt to curtail the force of those rules by Clause 12 would not detract from the right of the lessee to transfer the rights which he had acquired under the lease deed; (Para 2)

(3) that, therefore, the sale by Court of the leasehold interest in the salt pans was not void 'ab initio' as being against public policy or prohibited under the Salt Act. AIR (37) 1950 Mad 444 F B and AIR (25) 1938 Mad 623; Disting. Case law discussed. (Para 6)

V. Ramaswami Iyer and C. S. Rajappa, for Appellant; T. L. Venkatarama Iyer and N. V. Sundaram; for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('03) 26 Mad 31 (Pr 6)
('05) 28 Mad 84: (14 Mad L J 468) (Pr 6)
('21) 44 Mad 632: (AIR (8) 1921 Mad 292) (Pr 6)
('22) 42 Mad L J 318: (AIR (9) 1922 Mad 106 (1)) (Pr 3)
('27) 50 Mad 441: (AIR (14) 1927 Mad 140) (Pr 6)
('38) ILR (1938) Mad 767: (AIR (25) 1938 Mad 623) (Pr 5)
('44) 1944-1 Mad L J 97: (AIR (31) 1944 Mad 295) (Pr 3)
('44) S. A. No. 1914 of 1944 (Mad) (Prs 3, 4)
('46) L. P. A. No. 3 of 1946 (Mad) (Pr 3)
('49) ILR (1949) Mad 849: (AIR (36) 1949 Mad 860) (Pr 3)
(50) ILR (1950) Mad 987: (AIR (37) 1950 Mad 444 FB) (Prs 2, 3)
('39) 18 Pat 370: (AIR (26) 1939 Pat 598) (Pr 5)

GOVINDA MENON, J.: Ex. B. 2 is an indenture between the Governor-General-in-Council and the appellant herein by which the appellant has been made the lessee of certain salt pans in Tirunelveli district. For the purpose of procuring the lease as well as the payment of the rents due, the appellant borrowed large sums of money from the respondent, as a result of which the respondent filed O. S. No. 42 of 1947 on the file of the Subordinate Judge's Court of Tuticorin for the recovery of Rs. 1,08,229-9-8, with interest etc., from the appellant personally and by enforcement of a charge on all the salt manufactured and gathered in the salt pans. On the 24th June 1949 a compromise decree was passed which provided the payment of the decree amount which was settled at Rs. 90,000, by various instalments. Paragraph 4 stated that if there be any default in respect of payment of even one instalment as described in paragraph 1 of the compromise decree, the plaintiff (respondent) shall automatically be the receiver of the salt pans for the purpose of realising the decree amount as per paragraph 2 of the compromise decree and that the plaintiff shall be entitled to enter into and be in possession of the pans till the decree amount is wiped off. Paragraph 5 provided that the plaintiff was also entitled to enforce the charge that he has on the pans and the salt therein by means of executing the decree according to law. As default was made in the payment of instalments, an application was made for execution of the decree and realisation of the amount by the appointment of a receiver as contemplated in paragraph 4 of the compromise decree as well as by the sale of the salt pans in pursuance of the charge created in the compromise decree. Various objections were raised by the judgment-debtor appellant to the reliefs asked for but the learned Subordinate Judge overruled all of them. Against the automatic provision by which the respondent became receiver of the salt pans, C.M.A. No. 462 of 1950 was filed along with the present appeal but at the time of the hearing, Mr. V. Ramaswami Aiyar for the appellant did not seriously question the validity of the order and therefore that appeal has been dismissed. The present appeal is against the order of the Subordinate Judge by which the salt pans were ordered to be sold in execution. The learned Judge held that though the rules under the Salt Act prevent the licensee from assigning, sub-letting, or alienating on pain of termination of the lease, the sale is not 'ab initio' void but if the Commissioner, subsequent to the sale, accepts the sale as valid, the purchaser gets a title. In the present case, since that contingency has not yet arisen, the learned Judge held that the sale is not prohibited and therefore overruling the objection of the appellant, directed a settlement of proclamation and for fixing the upset price.

(2) The main argument of Mr. V. Ramaswami Aiyar for the appellant is founded upon the Full Bench decision to which one of us was a party reported in 'Velu v. Sivasooriam', ILR (1950) Mad 987. In that case it was held that a partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted, or to be granted, only to one of the persons is void 'ab initio', whether the contract of partnership was entered into before the licence was granted or afterwards. It was further held that such a partnership involves a transfer of the licence which is prohibited under Clause (a) of Rule 27 of the General Sales Notification issued under the Madras Abkari Act (I (1) of 1886), and is punishable under S. 56 of the Act, or a breach of S. 15 of the Act, punishable under S. 55, and that such a partnership would be illegal, either because an offence would necessarily be committed in pursuance of it or because it would be against the general public policy underlying the enactment that only approved persons, specifically licensed, should be allowed to sell liquor. The prohibition against the transfer of a licence is contained in Rule 27, Clause (a) which is as follows:

"No privilege of supply or vend shall be sold, transferred or sub-rented without the Collector's previous permission."

Therefore it is argued that the compulsory sale of the right to manufacture salt granted to the appellant under Ex. B-2, is against public policy and cannot be enforced in execution of the decree. Paragraph 12 of Ex. B. 2 is as follows:

> "Except with the written consent of the lessor first had and obtained, the lessee shall not assign, underlet or part with the possession of the leased land or any portion thereof and shall not transfer by sale, or otherwise, the powers hereby granted to him, provided that nothing herein contained shall prevent the lessee at any time from taking any partners or partner into the business carried on by him under the present lease after obtaining prior approval of the Collector."

If the prohibition contained in paragraph 12 that the lessee shall not assign or part with possession of the leased land without the written consent of the lessor first had and obtained is in the interests of public policy, then it is argued that the sale in execution will also be void. In such circumstances the provisions of the Salt Act and the Abkari Act will have to be considered. In the Madras Abkari Act (I (1) of 1886), S. 12 prohibits the manufacture of liquor or intoxcating drug except as provided by that Act. This section says that no liquor or intoxicating drug shall be manufactured ..... except under the authority and subject to the terms and conditions of a licence granted by the Collector in that behalf or under the provisions of S. 21. S. 13 relates to the prohibition of possession of liquor or intoxicating drugs in excess of the quantity prescribed by Government. S. 15 lays down that sale of liquor or intoxicating drug without license is prohibited. S. 55 provides penalties for illegal import, etc., of intoxicating liquor and other articles. S. 56 provides for the penalty for misconduct by licensees, etc. Before the Central Government passed Act I (1) of 1944 which consolidated and amended the law relating to Central duties of excise and salt, so far as the Madras State was concerned, the legislative enactment which regulated the sale and manufacture of salt was contained in the Madras Salt Act IV (4) of 1889. Section 8 of this Act provided that no person, not being a public servant manufacturing on behalf of the Government, shall manufacture salt unless duly licenced as thereinafter provided; and S. 9 stated that the Commissioner for salt may grant licences for the manufacture of salt and every licence so granted shall relate to specified salt works and shall contain such particulars and conditions as the Governor-General-in-Council may, from time to time, prescribe. There are further provisions regarding the power to call for and alter licences and tender new licenses and if new licenses are refused to cancellation of previous licences, etc. S. 11 is in the following terms:

> "Licenses shall be transferable and may be relinquished; provided that no transfer or relinquishment shall have any effect against the Commissioner unless and until it shall have been registered or accepted under such rules as the Governor in Council may from time to time prescribe."

S. 12 reads:

> "For the purpose of the Act, the licensee shall be taken to be the owner of the license and of the salt works specified therein. Provided that nothing herein contained shall affect the liability of the licensee towards any person who may have an interest in, or lien upon such licence or salt works."

Sections 6 and 7 of the Central Act I (1) of 1944 correspond in many respects to Ss. 8 and 9 of the Madras Salt Act. There are no provisions in the statute resembling Ss. 11 and 12 of the Madras Salt Act but in accordance with the provisions of S. 37 of Central Act I (1) of 1944 rules have been framed regulating the production and the manufacture of salt as well as the grant of licences, etc. Rules 102, 103 and 104 are important in this connection and may usefully be quoted:

> "102. 'Manufacture, etc., of salt prohibited except under a licence'. No salt shall be manufactured and no natural salt and, except under the provisions of Rule 106, no salt earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a licence to be granted by the Collector in this behalf. Provided that no such licence shall be necessary for any process of manufacture of salt on which duty has been paid.
>
> 103. 'Licences to be granted by the Collector': (1) The Collector shall, on application, grant licences for the manufacture, excavation, collection or removal of salt, to any person entitled to the same under Chapter V of the Act, and may in his discretion grant licences for any of the said purposes or for the excavation, collection or removal or salt earth to any other persons.
>
> (2) Every such licence shall relate to specified salt works or factories and shall contain such particulars and conditions as the Collector, subject to the directions of the Central Government may from time to time prescribe.
>
> 104. 'Transfer of and relinquishment of licence': Licences shall be transferable and may be relinquished. Provided that no transfer or relinquishment shall have any effect against the Collector, unless it has been registered or accepted under such regulations as it may from time to time make in this behalf."

It will be seen therefore that Rule 104 allows the licencee the liberty to transfer the licence or to relinquish it, the only prohibition being that the transfer or relinquishment shall not have any effect against the Collector unless it has been registered or accepted under such regulations as he may from time to time make in that behalf. Rule 105 is also important because it speaks of the licensee to be taken as the owner of the license and salt works or factories. It states that for purposes of these rules, the licensee shall be taken to be the owner of the licence and of the salt works or factories specified therein provided that nothing contained in the rules shall affect the liability of the licensee towards any person who may have an interest in, or lien upon, such licence or salt works or factories. On a perusal of the sections of the old Salt Act as well as of the sections and rules of Central Act I (1) of 1944, it will be seen that they are not in 'pari materia'; but still Mr. Ramaswami Aiyar contends that we must apply the Full Bench decision to the facts of the present case and hold that the compulsory sale in Court auction of the salt pans, the question was mooted as to therefore prohibited. As he has raised no objection to the respondent, as receiver, taking charge of the salt pans; the question was mooted as to whether the possession of the receiver is tantamount to a transfer of the right of the licencee. For this his answer is that the receiver represents only the party who is entitled to be in possession and since receiver's possession is 'custodia legis', he is not an assignee or representative of a party and that the property does not vest in him. For this a reference is made to the statement of the

law contained in page 1140 of Mullah's Civil Procedure Code, latest edition. We may take it that for the purpose of the present case it is not necessary to hold that permitting the receiver to take possession of the property and having salt pans in 'custodia legis' is tantamount to any kind of assignment or transfer.

(3) If the salt pans are sold in Court auction in execution of the compromise decree and are purchased by third parties, then certainly there is an assignment of the right of the lessee in favour of such purchaser. That would certainly be an alienation which if the decision of the Full Bench in 'Velu v. Sivasooriam', ILR (1950) Mad 987 is to be made applicable to the present case, would be void and would be opposed to public policy. That Abkari rules cannot be made applicable to licences under the Salt Act has been the subject of certain decisions in this Court. In 'Sitaramamurti v. Guruswami', ILR (1949) Mad 849, the question discussed related to an asset of a partnership in the case of a licence to manufacture salt. The learned Judges held that the earlier lease in question in that case should be deemed to be a partnership asset belonging to all the partners according to their shares. It is clear from this decision that unlike under the Abkari Act, the entering into a partnership under the Salt Act is not illegal. That is also evident from the provisions of Salt Act. In our opinion the Full Bench decision in 'Velu v. Sivasooriam', ILR (1950) Mad 987, cannot be made applicable to the present case for the reason that here there is no question of any partnership being entered into, and moreover the questions of public policy which can be made applicable to intoxicating liquors can have very little applicability to a case of manufacture of salt. A similar question arose in 'Soorampalli Reddi v. Motamarri Seetharamayya & Sons', S. A. No. 1914 of 1944, before Chandrasekhara Aiyar, J. There the suit related to the dissolution of a partnership and for the taking of accounts relating to a business in the manufacture and sale of salt. It was sought to be argued in that case that such a partnership was illegal and was opposed to public policy? The learned Judge considered all the relevant sections of the Salt Act as well as the decision in 'Italia v. Cowasjee', 1944-1 Mad L J 97, which was approved by the Full Bench in 'Velu v. Sivasooriam', ILR (1950) Mad 987, and came to the conclusion that there can be no analogy between cases of partnership arising under the Abkari Act and those under the Salt Act. The learned Judge found great difference in language between the two Acts and expressed the opinion that far from the provisions of the Salt Act being so wide in their scope as regards prohibition as the Akbari Act, they seem to recognise the interest of persons claiming by way of transfer or assignment from the licencee or the lessee. What is prohibited by the Salt Act is that the transfer shall have no effect against the Collector until it has been registered or accepted by him. But there is no prohibition against the transfer and no prohibition that the transferee will not acquire any rights. This decision was affirmed in 'Soorampalli Reddi v. Motamarri Seetharamayya & Sons', L. P. A. 3 of 1946, where the learned Chief Justice agreed with Chandrasekhara Aiyar, J., that there is a vast difference between the Abkari Act and the Salt Act. What we have to bear in mind is that the lease which was the subject of consideration in S. A. No. 1914 of 1944 and was marked as Ex. D. 1 in that case contained a clause (Clause 12) which is very much similar to Clause 12 in Ex. B. 2. That clause provided as follows:

"The lessee shall not assign the site given for lease or any portion thereof, unless there is permission of the lessor in writing in the beginning and unless the same is obtained shall not sublease and shall not give up possession of the same."

On a comparison of this clause with Clause 12 of Ex. B-2 it is clear that according to both the documents the consent of the lessor is a necessary prerequisite before any assignment or transfer is made. In spite of the existence of such a clause in the lease which was the subject-matter of S. A. No. 1914 of 1944, the learned Judges held that the exisitence of a partnership was legal. In our opinion it is difficult to make out any distinction between the clause of the lease in S. A. No. 1914 of 1944 and Ex. B. 2. In addition to this in 'Nagamma v. Secy. of State', 42 Mad L J 318, it has been held that S. 11 of the Madras Salt Act is not confined in its operation to absolute transfers of the entire interest of the licensee but applies to transfers by way of mortgage and consequently a mortgage of a salt pan without leave of the Commissioner is of no effect against him. The learned Judges seem to imply that a mortgage or a transfer of a salt pan, though it may not be binding on the Collector, will be valid as between a transferor and transferee. They also refer to S. 12 which says that as between the licensee and his transferee this section protects the interests of a person who may have an interest in, and lien upon, such licence or salt works. Further it has to be considered that the scope and object of the Abkari Act are entirely different from those of the Salt Act. The Madras Salt Act, which got repealed by Central Act I (1) of 1944, was only a tax collecting statute. So is the Central Act I (1) of 1944 which deals not only with salt but with various other articles on which excise duty has to be levied. It deals in the first schedule with kerosene, matches, mechanical lighters, motor spirit, silver, tobacco and various other things in addition to salt. It is therefore clear that the Act we have to consider is nothing but a fiscal one intended for collecting taxes, whereas the Madras Abkari Act had a public purpose and what is prohibited by the Madras Abkari Act is against public policy.

(4) As has been held in 'S. A. No. 1914 of 1944', what Clause 12 of Ex. B. 2 contemplates is merely an amplification of Rules 103 and 104 under Central Act I (1) of 1944 and all that that clause is intended to lay down is that the Collector is not bound to recognise any transfer made without his permission. Moreover, Clause 12 is a term of the contract between the parties and has not the same force as a statute, or any rule framed thereunder having the same force as the Act.

(5) The alternative contention put forward by Mr. Ramaswami Aiyar is that when there is a prohibition against alienation as is contemplated under Rule 12, there is no property capable of being transferred under S. 60 of the Transfer of Property Act and hence no charge can be created, and any execution sale will be 'ab initio' void. He invited our attention to the observations contained in 'Sundararajulu v. Papiah', ILR (1938) Mad 767 at pp. 781 and 784. What happened in that case was the East India Company had granted an 'inam' on 'shrotriam' tenure to a 'poligar' and the object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office of 'poligar.' Venkataramana Rao, J., on a difference of opinion between Burn and Abdur Rahman, JJ., agreeing with the views expressed by Abdur Rahman, J., held that the intention of the East India Company in conferring the grant was not to make an abso-

lute grant to the grantee but to confer on him a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who would succeed him. In that view the learned Judge held that there was no property which could be alienated or transferred. This decision was considered and approved in 'Upendra Singh v. Meghnath Singh', 18 Pat 370', where the learned Judges held that the Crown grant in question in that case was a limited interest which was not transferable either by operation of law or by voluntary alienation and that the measure of liability to involuntary alienation was the power of voluntary transfer. The learned Judges referred to and approved various other cases in addition to 'Sundararajulu v. Papiah', ILR (1938) Mad 767. We fail to understand how the principles governing Crown grants and such other gifts for services rendered on public grounds can be of any help to the decision of the present case. By no stretch or imagination can it be held that a commercial agreement entered into between the Government on the one side and a private citizen on the other, which is subject to all the rules and regulations in force in the country and the breach of which is liable to be sued for in a Court of law, can be equated to either an 'inam' or a 'jagir' granted on public grounds. We do not feel justified in holding that the principles of the aforesaid decisions can be attracted to the point for decision in the present case.

(6) Mr. T. L. Venkatarama Aiyar for the respondent on the other hand drew a distinction regarding alienability and transferability of 'inams' and grants which were conferred on public grounds as contra-distinguished to those conferred for private services rendered. He relied specially on 'Rajah of Vizianagaram v. Dantavada Chellia', 28 Mad 84, and 'Lakshmanaswami Naidu v. Rangamma', 26 Mad 31, for the argument that if the object of the grant was for a public purpose, then the grant cannot be transferred or alienated; but on the other hand, as held in 'Vaidhianatha Aiyar v. Yogambal Ammal', 50 Mad 441, if the 'inam' was the grant of land and not of land revenue, a suit for partition of such 'inam' is maintainable. Reliance was also placed on the observations at page 635 in 'Venkatarama Aiyar v. Chandrasekhara Aiyar', 44 Mad 632 at p. 635 to the effect that personal 'inams' can be alienated. It is not necessary for us to apply those principles here because in our opinion the case is governed by the rules made under Central Act I (1) of 1944 which specifically allow transfer and the attempt to curtail the force of those rules by Clause 12 in Ex. B. 2 would not detract from the right of the lessee to transfer the rights which he has acquired under the lease deed. The learned Subordinate Judge has therefore taken the correct view in holding that the sale by Court of the lease-hold interest in the salt pans is not void 'ab initio' or prohibited under the Salt Act.

(7) The appeal is dismissed with costs.

C.R.K./V.R.B. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 296 [C. N. 105 (24).]

SATYANARAYANA RAO AND RAJAGOPALAN, JJ.

Parvathaneni Ramakrishnayya Proprietor, Krishna and Co. Vijayawada, Applicant v. The Commr. of Income-tax, Madras, Respondent.

Case Ref. No. 9 of 1949, D/- 20-9-1951.

Income Tax Act (1922), Ss. 10 (2), (i), 10 (2) (XV) —Assessee (director-lessee of company), to pay out of profits received certain percentage of net profits to company — Deduction held could not be claimed.

The assessee carried on business of manufacturing fruit jam, jelly, etc. He was also one of the directors of another company and by a resolution of the company he was granted a lease of the concern subject to two conditions, namely, that he should pay at the rate of Rs. 4,000 to the company per annum and that the company should bear the depreciation of the assets leased out to him, and secondly, that of the net profits remaining and to be wholly enjoyed by him, he should pay 33 1/3 per cent. of them to the company besides Rs. 4,000 mentioned above.

'Held' that the assessee was not entitled to deduct the amount representing 33 1/3 per cent. paid by him, either under S. 10 (2) (i) or S. 10 (2) (XV) in computing the profits received by him in the accounting year. (Para 1)

'Quaere: Whether if the net profits should be arrived at after deducting the 33 1/3 per cent which has to be paid to the company it would have been an expenditure within Section 10 (2) (XV). (Para 2)

Anno: Income Tax Act S. 10, N. 4 and 13.

K. Srinivasan, for Applicant; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO, J.: Under Section 66 (1) of the Indian Income-tax Act, the Income-tax Appellate Tribunal referred the following question for decision of this Court:

"Whether on the facts and circumstances of the case, the applicant in computing the profits of his business is entitled to deduct the sum of Rs. 13,588 paid to the India Canning Industrials, Ltd., either under S. 10 (2) (i) or 10 (2) (xv) of the Income-tax Act."

In the accounting year ending 30th June 1943, the assessee paid this sum to the India Canning Industrials and he claimed that it was either rent for the machinery and the building of the company or an expenditure incurred for the purpose of the business. The assessee carried on the business of manufacturing fruit jam, jelly, etc. He was also one of the directors of the India Canning Industrials and by a resolution of the company dated 7th June 1941, he was granted a lease of the concern subject to two conditions, namely, that he should pay at the rate of Rs. 4,000 to the company per annum and that the company should bear the depreciation of the assets leased out to him, and secondly, that of the net profits remaining and to be wholly enjoyed by him, he should pay 33 1/3 per cent. of them to the company besides Rs. 4,000 mentioned above. In the year of account ending with June 1943 he paid a sum of Rs. 4,000 & also a sum of Rs. 13,588 representing 33 1/3 per cent. of the net profits as per the terms of the resolution. He claimed that the amount of Rs. 13,588 should be allowed as deduction either as rent or as expenditure. This claim was rejected by the revenue authorities and at his instance this reference has been made.

(2) The clause under which his liability to pay 33 1/3 per cent. of the profits arises leaves no room for doubt that it is out of the entire profits that this amount is to be paid to the company. The net profits of his business are treated as profits belonging to him and to be wholly enjoyed by him. It is from that amount that this 33 1/3 per cent. should be paid. If once profits are received by the assessee as his profits their destination is irrelevant. It is not a case where the net profits should be arrived at after deducting the 33 1/3 per cent which has to be paid to the company. We do not suggest thereby that if it was so done, it would

have been an expenditure within Section 10 (2) (xv) of the Act, and it is unnecessary for us to decide that question. It is rather difficult, therefore, in view of the clear language of the resolution to accept the contention urged by Mr. Srinivasan, the learned advocate for the assessee, that it should be treated as a permissible deduction. The view taken by the revenue authorities is, in our opinion, correct and they were right in not permitting this deduction. The answer, therefore, to the question referred to us must be in the negative and against the assessee. As the assessee has failed, he must pay costs of Rs. 150 to the Income-tax Commissioner.

C.R.K./R.G.D. *Question answered in negative.*

A. I. R. (39) 1952 Madras 297 *[C. N. 105 (25).]*

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

The State of Madras represented by the Secretary to Government, Development Department, Appellant v. The Swadesamitran Printers Labour Union representing the workers employed in the Printing and Despatching department of "Swadesamitran Ltd." and others, Respondents.

Letters Patent Appeals Nos. 83 to 85 of 1951, D/-26-9-1951.

(a) *Industrial Disputes Act (1947), S. 12(5)—Non-compliance with S. 12(5) — Power of Court to direct State to make reference to Tribunal — Constitution of India, Art. 226.*

Where the judge holds that the Government had failed to discharge the duty enjoined on them by S. 12(5) of the Act, what the Judge should do is to have directed the Government by a writ of 'mandamus' to discharge their duty, namely, to consider the respective reports made by the Conciliation Officer and, if satisfied that there was a case for reference, to make a reference, and if they thought that there was no case for reference, then to record the reasons for coming to that conclusion and to communicate the reasons to the parties. To straightway direct the Government to make a reference to Industrial Tribunal would be tantamount to usurping a power or jurisdiction conferred on and vested in the Government by the Statute. (Para 2)

(b) *Industrial Disputes Act (1947), S. 10 (1) — "May" — Meaning of.*

Having regard to the language used on the plain reading of S. 10(1) along with the proviso thereto and Sub-s. (2), there can be no doubt that the word "may" in Sub-s. (1) cannot be read as "shall". The word "may" is potential, and when it is employed, there is another question to be decided, namely, whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power. There may be a duty on the Government to exercise their discretion, but there is no duty cast on them to exercise that discretion in any particular way. (1890) 44 Ch D 262 Ref. (Para 3)

The State Counsel for Appellant; N. Nagaraja Rao, N. S. Varadachari, T. T. Srinivasan, A. N. Rangaswami and King and Partridge, for Respondents.

Case referred to:

(1890) 44 Ch D 262: (59 L J C H 661) (Pr 3)

RAJAMANNAR, C. J.: These three appeals under the Letters Patent are against the judgment of Krishnaswami Naydu J. disposing of three applications for the issue of writs of 'mandamus' directing the State of Madras to refer certain industrial disputes between the workers and the managements of the industrial concerns to an Industrial Tribunal for adjudication. These three petitions were filed by the workers of Messrs. Spencer and Co., Ltd., Express Newspapers Ltd., & the Swadesamitran Ltd. The facts which led to these applications are fully set out in the order under appeal and it is sufficient to mention only the material and salient facts which are necessary for the disposal of these appeals. It is common ground that the workers in these companies made certain demands on the respective managements and these demands were not acceded to and the Commissioner of Labour as the Conciliation Officer appointed under the Industrial Disputes Act, XIV of 1947 commenced conciliation proceedings under S. 12(1) of the Act which runs as follows:

> "Where any industrial dispute exists or is apprehended the conciliation officer may, or where the dispute relates to a public utility service and a notice under S. 22 has been given, shall, hold conciliation proceedings in the prescribed manner."

It also appears from the evidence that in respect of these three companies on different dates, namely on 25-1-1951, with respect to Messrs. Spencer and Co., on 7-2-1951, with reference to Express Newspapers Ltd., and 22-2-1951 with respect to Swadesamitran Ltd., the Conciliation Officer addressed communications to the Government giving an account of the result of the conciliation proceedings. In spite of reminders by the workers the Government did not make a reference as requested by the workers. There were also formal applications to the Government purporting to be under S. 10(2) of the Act praying for a reference of the disputes to a tribunal. These later applications, however, were rejected by the Government. Thereupon these three applications from which these appeals arise were filed for the issue of writs of 'mandamus' directing the State of Madras to refer the disputes between the workers and the managements to a tribunal under S. 10(1)(c) or S. 10(2) of the Industrial Disputes Act and to prohibit under S. 10 (3) the lock-out of the employees effected by the managements.

(2) In our opinion, these applications should have been disposed of on a very simple point. As it was common ground that proceedings under S. 12(1) of the Act had been initiated, obviously the further procedure enjoined by the Act had to be followed. It is not disputed that the Conciliation Officer did make attempts to investigate the dispute and try to induce the parties to come to an amicable settlement of the disputes. It is also clear that no settlement was arrived at. In such circumstances, S. 12(4) lays down that the Conciliation Officer shall as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which in his opinion, a settlement could not be arrived at. For the purpose of these appeals, we have to assume that the Conciliation Officer did send his reports, though it is doubtful if he sent them within the time prescribed by Sub-s. (6) of S. 12, namely, within fourteen days of the commencement of the conciliation proceedings. Now, S. 12(5) lays down what should happen on receipt of such a report. It says:

"If, on a consideration of the report referred to in Sub-s. (4), the appropriate Government is satisfied that there is a case for reference to a Board of Tribunal, it may make such reference. Where the appropriate Government does not make a reference it shall record and communicate to the parties concerned its reasons therefor."

Admittedly the Government did not make any reference. Nor did the Government record and communicate the reasons for not making a reference. It is clear therefore that the Government failed to do the duty cast on them by this statutory provision. They seem to have addressed letters to the Commissioner of Labour, but such communications will not amount to a proper compliance with the requirements of the statutory provision. It is not pretended that there was any communication to the parties concerned of any reasons for refusal to make a reference. So far the matter does not admit of any doubt or dispute. We entirely agree with the following statement to be found in the judgment of the learned Judge:

"In these cases after the conciliation officer has made his report under S. 12(4) that a settlement could not be arrived at, the Government have not acted under Cl. (5) by making a reference to a Board or Tribunal; nor have they recorded their reasons and communicated the same for not referring. It is therefore a case where the Government, which are invested with the duty to either refer, or record and give reasons for not referring, have failed to discharge that duty. It cannot be accepted that the Labour Commissioner's intimation to the Express Newspapers Ltd. and the Swadesamitran Ltd. that they may consider the increase of wages would be a compliance with the statutory requirement of S. 12(5). There is inaction on the part of the Government after the Conciliation Officer has submitted his report when there is a duty cast on them to act."

The petitioners therefore were undoubtedly entitled to writs of 'mandamus' directing the Government to do their duty. But we do not agree with the learned Judge that it follows that the petitioners are entitled to writs of 'mandamus' directing the State to refer the disputes for adjudication to an Industrial Tribunal. Having held that the Government had failed to discharge the duty enjoined on them by S. 12(5) of the Act, what the learned Judge should have done, was to have directed the Government by writs of 'mandamus' to discharge their duty, namely, to consider the respective reports made by the Conciliation Officer and if satisfied that there was a case for reference to make a reference, and if they thought that there was no case for reference, then to record the reasons for coming to that conclusion and to communicate the reasons to the parties. To straightaway direct the Government to make a reference would, in our opinion, be tantamount to usurping a power or jurisdiction conferred on and vested in the Government by the Statute.

(3) In this view, it is really not necessary to embark on an enquiry as to the interpretation of S. 10(1) of the Act. Before the learned Judge it was contended on behalf of the petitioners and their contention found favour with him, that under that provision if an industrial dispute existed or was apprehended, the Government was under a duty to refer the dispute to one or other of the bodies mentioned in Cls. (a), (b) and (c) of S. 19 (1). It was successfully urged before him that the word "may" in the provision meant "shall". We may, however, indicate our 'prima facie' opinion that it appears that whatever may be the position in other statutes, having regard to the language used, therein, on the plain reading of S. 10(1) along with the proviso thereto and Sub-s. (2), there can be no doubt that the word "may" in sub-s. (1) cannot be read as "shall'. In marked contradistinction to the use of the word "may" in the main Sub-s. (1) in the proviso we have the use of the word "shall". In the case of public utility services, when a notice under S. 22 has been given, the Government "shall" make a reference unless it considers that the notice under S. 22 has been frivolously or vexatiously given or that it would be inexpedient so to do. Equally under Sub-s. (2) when the parties to an industrial dispute apply in the prescribed form and the Government is satisfied that the persons applying represent the majority, the Government 'shall' make a reference accordingly. It follows that in other cases they are not bound to. Our attention was drawn to cases in which in spite of the expression "may" it has been held that the person or body on whom a power is conferred to do something which is in the interests of the general public, that person or body has no absolute arbitrary discretion to exercise or refrain from exercising that power. On the use of the word "may" we think we cannot do better than to quote the following trenchant observations of Cotton L. J. in 'In re Baker Nichols v. Baker', (1890) 44 Ch D 262 at p 270:

"I think that great misconception is caused by saying that in some cases "may" means "must". It never can mean "must" so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word "may" it becomes his duty to exercise it."

It is true that as Lopes L. J. in the same case points out the word "may" is potential, and when it is employed, there is another question to be decided, namely, whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power. In this case we are unable to see any such duty. There may be a duty on the Government to exercise their discretion, but there is no duty cast on them to exercise that discretion in any particular way. However, as we have pointed earlier in the judgment the statutory provision which directly applies to this case is S. 12, as it is common ground that conciliation proceedings were initiated under Sub-s. (1) of that section. S. 12(5) gives no room for argument. It says in express and unambiguous language that on a consideration of the report of the conciliation officer, the Government may make a reference or may refuse to make a reference. The only requirement is that if it refuses to make a reference it shall record its reasons and communicate the same to the parties concerned. Now the opening words of S. 12(1), namely, "where any industrial dispute exists or is apprehended" clearly show that merely because there is an industrial dispute or there is apprehension of an industrial dispute, it does not necessarily follow that the Government should make a reference. If so, S. 12(5) would be meaningless because that sub-section confers a power on the Government to choose one of the two alternatives either to make or not make a reference.

(4) In the result, the appeals must be allowed to this extent namely, that the writs issued by the learned Judge against the State directing the State to refer the disputes for adjudication to an industrial tribunal should be set aside and in their stead writs of 'mandamus' should issue against the State of Madras directing them to discharge the duty cast on them under S. 12(5) of the Industrial Disputes Act, namely, either to make a refer-

ence or to decide that there should be no reference in which case reasons should be recorded and communicated to the parties concerned. There will be no order as to costs. We trust that the Government will act expeditiously in the matter having regard to the long lapse of time from the receipt of the reports from the Conciliation Officer.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 Madras 299 *[C. N. 105 (26).]*

PANCHAPAKESA AYYAR, J.

In re P. T. Vadivel Goundar, Petitioner.

Criminal Revision Case No. 936 of 1950, D/- 22-8-1951.

(a) *Evidence Act (1872), Ss. 25, 26 — Confession to prohibition officer, styling himself as Inspector of Police Prohibition, is not confession to police in Madras State.*

A Prohibition Officer styling himself as Inspector of Police, Prohibition, is not "a police officer" within the meaning of Ss. 25 and 26 of the Evidence Act, as the law stands now in the Madras State, though he has practically all the powers of a police officer. A confessional statement made to him is not therefore inadmissible in evidence. 1947 MWN (Cr.) 120, Followed. (*Para 3*)

Anno: Evidence Act. S. 25, N. 2.

(b) *Madras Prohibition Act (10 (X) of 1937), S. 4 (1), (a) — Liquor bottles found in car of owner — Liability of owner.*

The owner of a vehicle is held liable for liquor bottles etc., found inside the vehicle and by his side exclusively in his possession, unless he proves that he was not responsible for their presence there and that somebody else introduced them there. (*Para 4*)

(c) *Madras Prohibition Act (10 (X) of 1937), S. 4 (1) (a) — Sentence — Travancorean found carrying two small bottles of brandy for wife's confinement — Habit of giving brandy in confinement very common amongst those people in pre-prohibition days — First offence — Sentence of Rs. 500/- fine reduced to Rs. 50.* (*Para 4*)

K. S. Jayarama Aiyar, for C. K. Venkatanarasimham, for Petitioner. The Asst. Public Prosecutor, for State.

Case referred to:

('47) 1947 Mad W N Cr 120: (AIR (35) 1948 Mad 116:49 Cri L J 100) (Pr 3)

ORDER.: This is a petition to revise the judgment of the Sessions Judge, Mathurai, dated 8-4-1950, in C. A. No. 37 of 1950, confirming the conviction of the petitioner, Vadivel Goundar, a man of Travancore, under S. 4 (1) (a) of the Madras Prohibition Act, but setting aside the sentence of simple imprisonment for one month and the order of confiscation of his motor van in which he was carrying the bag containing the two bottles of brandy.

(2) The facts are briefly these. The petitioner, Vadivel Goundar, is a man of Kottayam, in Travancore-Cochin State, and owns some estates there. He was caught hold of on Gudalur-Cumbum road at 9 p.m., on 28-11-1949, in Indian Union territory, by the Prohibition Inspector of Police, P.W. 1, and his staff, and two bottles of brandy were recovered from a bag kept on the rear set near him by the petitioner who gave a statement to the Prohibition Inspector stating that he was taking those brandy bottles for being given as medicine to his wife during her expected confinement. The question, however, is whether that statement is admissible under Ss. 25 and 26 of the Indian Evidence Act. Both the lower Courts held that it was admissible and convicted the petitioner. The learned Sessions Judge held, however, that the circumstances were such that imprisonment was not justified, and that the confiscation of the petitioner's van was not also justified as it could not be said to have been used for carrying these two small bottles of brandy which simply happened to be carried in it by the petitioner.

(3) Though several contentions were raised before the learned Sessions Judge, and were considered by him and negatived, in this Court, Mr. Jayarama Aiyar, for the petitioner, has raised only one contention before me during the arguments, dropping all the rest. That contention is that a Prohibition Officer styling himself 'Inspector of Police' will be "a police officer" within the meaning of Ss. 25 and 26 of the Evidence Act, and, so, the confessional statement made to him by the petitioner will be inadmissible in evidence and that if it is inadmissible there will be no proof that these two brandy bottles were found in the possession of the petitioner, as there were also some other people travelling in the van then. I cannot agree with either head of the argument. I do not consider that an Inspector of Police, Prohibition, will be "a police officer" within the meaning of Ss. 25 and 26 of the Evidence Act, as the law stands now in this State, though he has practically all the powers of a police officer, and, if the position were not directly covered by authority, the point is quite arguable. Rajamannar, J., (as he then was) has held in 'Venkata Reddi v. Emperor', 1947 MWN Cr. 120, that a Prohibition Sub-Inspector cannot be deemed to be a police officer within the meaning of S. 25 of the Evidence Act and that a confessional statement made to him is not inadmissible in evidence. I will follow that view till the Legislature enacts otherwise, or the Supreme Court or Full Bench, in similar cases, holds otherwise. As the learned Public Prosecutor urged, the only view possible, under the above ruling, in this case, where the officer to whom the confession was made was 'not a police officer at any time' but was only an Excise Officer originally and later on became a Prohibition Inspector, is that the confession is admissible. The mere title of 'Inspector of Police, Prohibition, Sub-Inspector of Police, Prohibition', assumed by P.Ws. 1 and 3, or given to them, is, in my opinion, 'irrelevant', as, in these days of democracy, every one wants a more 'dignified title', 'process-servers' aspiring to be called 'bailiffs', 'clerks' aspiring to be called 'assistants', 'peons' aspiring to be called 'messengers', etc. In fact, nothing much turns on a name, and in view of the above ruling directly covering the point, and in view of the admission of Mr. Jayarama Aiyar that the powers of arrest etc., have not been conferred on Prohibition Inspectors and Sub-Inspectors subsequent to that ruling and making a difference to the view taken therein, the confession is admissible. This is not also a suitable case for reference to a Full Bench on the point as possession of the liquor by the petitioner is proved even otherwise. I hold that the confession in question is admissible. Mr. Jayarama Aiyar at first thought that P.W. 1 was an Inspector of Police "translated" into Inspector of Police, Prohibition, but he had to admit later on that he was wrong, as P.W. 1 was never in the police at any time.

(4) Even apart from the confessional statement, as already said, I hold that the evidence on record is quite enough to prove the possession of these brandy bottles by the petitioner. The petitioner was the owner if the van, which was exclusively his, and the brandy bottles were found in a bag kept by his side and close to where he alone

sat. Just as the head of a house-hold, or the owner of a vehicle is held liable for liquor bottles etc., found inside the house or vehicle exclusively in his possession, unless he proves that he was not responsible for their presence there and that somebody else introduced them there, the petitioner will be held liable for the possession of these brandy bottles found in his van, and by his side, unless he proves otherwise. He never tried to prove anything otherwise except his statement to P.W. 1 (the genuineness of which was proved and has not been disputed before me, only the admissibility being questioned) that he was carrying them for the use of his wife during confinement, and his statement in Court that no brandy was found at all by P.W. 1 in the van during the search, which latter statement is proved to be false by the evidence of P.Ws. 1 to 3. I confirm the petitioner's conviction as the evidence on record is, quite sufficient to warrant it. Mr. Jayarama Aiyar pleaded for a lessor fine. I agree. I see no reason to disbelieve the petitioner's statement that he was carrying these two small half bottles of brandy only for the use of his wife during confinement. A practice of giving brandy to women during delivery seems to have been followed in Travancore in pre-prohibition days. In that view, the sentence of a fine of Rs. 500, especially on a Travancorean unaccustomed to prohibition in those days, and accustomed to take brandy and every other kind of liquor freely in those days, for a first offence, is too heavy. After hearing the Public Prosecutor also on the point, I reduce the fine to Rs. 50. The petitioner is said to have already paid the fine. The excess fine, if paid, will be refunded to him.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. (39) 1952 Madras 300 *[C. N. 105 (27).]*

GOVINDA MENON AND RAMASWAMI GOUNDER, JJ.

M. Ramayya, Appellant v. The State of Madras, represented by the Secy., Home Department and another Respondents.

Letters Patent Appeal No. 77 of 1951, D/- 30-8-1951, against the judgment of Subba Rao, J., in W. P. No. 176 of 1951.

(a) Constitution of India, Art. 226 — Proceedings under, for writ of certiorari are of the nature of Ordinary Original Civil Jurisdiction and not revisional jurisdiction — Orders in such proceeding are judgments — Appeal lies from decision of a Single Judge to Bench of two Judges — Letters Patent (Mad), Cl. 15.

An appeal lies from an order passed by a Single Judge of the High Court, sitting under R. 4 of the Rules framed by the High Court under Art. 225 of the Constitution, and added as Appendix VII to the Appellate Side Rules and published in Fort St. George Gazette, dated 28-4-1951, upon a petition for a writ of certiorari, to a Bench of two Judges under Cl. 15 of the Letters Patent, the order being a judgment. The bar under Cl. 15, that no appeal will lie from the decision of a Single Judge made in the exercise of revisional jurisdiction has no application to proceedings under Art. 226. (Paras 8, 9)

The matter involved in the proceeding for writ of certiorari under Art. 226, is a civil proceeding. It is not a criminal proceeding nor is it in the nature of miscellaneous proceedings such as matrimonial, testamentary, admiralty or other jurisdictions of the High Court. The jurisdiction of the High Court under Art. 226 is in the nature of its Ordinary Original Civil Jurisdiction. (Paras 6, 8, 9)

The revisional jurisdiction contemplated under Cl. 15 of the Letters Patent refers to revisions from Subordinate Courts and not from inferior quasi judicial tribunals. Neither under S. 115, C.P.C., nor under S. 107 of the Government of India Act, 1919, did the High Court have any jurisdiction to interfere in revision against any order passed by a quasi judicial tribunal or authority. Such being the case, when Clause 15 of the Letters Patent speaks of an order made in the exercise of revisional jurisdiction it can only be understood as a jurisdiction exercised by the High Court over a subordinate Court. (Para 9)

(b) Motor Vehicles Act (1939), S. 64-A — Government's revisional powers should not be arbitrary, wanton or mala fide. (Para 10)

(c) Motor Vehicles Act (1939), Ss. 47 (1), 64-A — Section 47 is not exhaustive — State Government can take into consideration for first time, matters not taken into consideration by Regional Transport Authority.

In deciding whether to grant or refuse a stage carriage permit the Regional Transport Authority shall have regard to the matters mentioned in Sub-clauses (a) to (f) of Sub-section (1) of S. 47. One of them is sub-clause (a), namely the interest of the public generally and another is Sub-clause (e), namely, the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services. In addition to these matters, the Regional Transport Authority shall also take into consideration any representations made by persons already providing road transport facilities along or near the proposed route or routes, representations made by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lie or by any association interested in the provision of road transport facilities. It is therefore clear that apart from the objections put forward by individuals against the granting of permits, the Regional Transport Authority shall also consider these matters. The consideration mentioned in S. 47 should be in addition to the objections raised under Sub-section (3) to S. 57.

Section 47 is not exhaustive. Though the authority has no jurisdiction to issue or refuse a permit without taking the matters mentioned therein into consideration, the section does not in terms exclude from the consideration other matters germane to the question to be decided. If it is possible for the Regional Transport Authority to take certain matters into consideration, there is nothing that prevents the Government from considering them for the first time in revision. (It was however held that the matter was before the mind of the Authority when it passed the orders.) (Para 11)

M. K. Nambiar and K. Ramachandra Rao, for Appellant; The Advocate-General for the Government Pleader, D. Narasaraju and K. Mangachari, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('83) 9 Cal 482: (10 Ind App 4 P C) (Pr 8)

('44) ILR (1944) Mad 457: (AIR (30) 1943 P C 164) (Prs 4, 8, 11)

('47) 1947-2 Mad L J 32: (AIR (34) 1947 PC 90) (Pr 8)

('44) 1944-6 F C R 284: (AIR (31) 1944 F C 62) (Pr 8)

('49) 1949 F C R 813: (AIR (37) 1950 FC 71:51 Cri LJ 1035) (Pr 8)

('51) AIR (38) 1951 All 257: (ILR (1951) All 269 FB) (Pr 10)

('40) ILR (1940) Bom 426: (AIR (27) 1940 Bom 216) (Pr 8)
('02) 25 Mad 555: (11 Mad L J 346) (Pr 8)
('12) 35 Mad 1: (8 Ind Cas 340 FB) (Pr 8)
('14) 1 Mad L W 245: (AIR (1) 1914 Mad 87) (Pr 11)
('20) 11 Mad L W 620: (AIR (7) 1920 Mad 165) (Pr 11)
('22) 45 Mad 922: (AIR (9) 1922 Mad 499: 23 Cri L J 614 FB) (Pr 4)
('22) 45 Mad 14: (AIR (9) 1922 Mad 215: 23 Cri L J 490) (Pr 4)
('26) 49 Mad 499: (AIR (13) 1926 Mad 480) (Pr 11)
('30) 53 Mad 979: (AIR (17) 1930 Mad 896) (Pr 8)
('38) ILR (1938) Mad 816: (AIR (25) 1938 Mad 722) (Pr 7)
('39) ILR (1939) Mad 904: (AIR (26) 1939 Mad 511) (Pr 8)
('48) 1948-1 Mad L J 85: (AIR (35) 1948 Mad 400) (Pr 10)
('50) C M P Nos. 3345, 3346 and 3347 of 1950 (Mad) (Pr 4)
('51) W P No. 176 of 1951 (Mad) (Pr 11)

GOVINDA MENON, J.: This is an appeal under Clause 15 of the Letters Patent against the judgment of our learned brother Subba Rao, J., in W. P. No. 176 of 1951 by which he refused to set aside the order of the State of Madras, dated 1-6-1951, which in its turn set aside the order of the Regional Transport Authority, East Godavari, and granted a stage coach permit to the 2nd respondent for the route Rajahmundry to Tuni via Pithapuram.

(2) On 22nd June 1949, the Regional Transport Authority, East Godavari, by notification under S. 57 (3) of the Motor Vehicles Act, 1939, notified a new route Rajahmundry to Tuni via Pithapuram, and invited applications for the grant of one pucca stage carriage permit for operating on the said route. The appellant and the 2nd respondent herein, along with a number of other people, applied for the permit. The Regional Transport Authority granted the permit to the Appellant, which order was confirmed on appeal, by the Central Road Traffic Board. Under S. 64-A of the Motor Vehicles Act, an application to revise the order of the Regional Transport Authority was made to the Government who set aside the order of the Regional Transport Authority and issued a permit to the second respondent. Thereupon the appellant applied to this Court for issuing a writ of certiorari quashing the order of the State of Madras. Our learned brother, Subba Rao, J., held that there were no grounds for interfering with the order of the State Government and dismissed the application. Hence this appeal against that order.

(3) A preliminary oojection is taken by Mr. D. Narasaraju for the 2nd respondent that no appeal lies against an order of a single Judge either issuing, or refusing to issue, a writ of certiorari, and that Clause 15 of the Letters Patent has no application. This is controverted by the learned counsel for the appellant. While contending that the order appealed against should not be interfered with, the learned Advocate-General controverts the position taken by the 2nd respondent that in matters like this no appeal lies. We have therefore to decide whether the contention put forward on behalf of the 2nd respondent can be acceded to or not.

(4) The old Supreme Court of Madras, which was the predecessor of this High Court, inherited the jurisdictional powers of the King's Bench of England under the Charter of 1800, and as such it could issue such prerogative writs within the ordinary original jurisdiction of the High Court. The view once held as laid down in 'In re Kochunni Elaya Nair', 45 Mad 14 and 'In re Govindan Nair', 45 Mad 922, that this Court can issue such writs throughout the entire ambit of its appellate jurisdiction has been held to be unsustainable by the Judicial Committee in 'Ryots of Garbandho v. Zamindar of Parlakimedi', ILR 1944 Mad 457, where Viscount Simon, L.C., in delivering the judgment of the Board held that the High Court at Madras had no power to issue a writ of certiorari beyond the limits of the Presidency Town of Madras except in a limited manner as regards British subjects. But this position has been altered by the enactment of Art. 226 of the Constitution which gives power to the High Court, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them. It need therefore hardly be said that this Court has got the power to issue such writs. Under Art. 225 the jurisdiction of, and the law administered in, any existing High Court and the respective powers of the Judges therefore in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the suittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution. Under this provision therefore this High Court framed rules regulating the proceedings under Art. 226 of the Constitution which is added as Appendix VII to the Appellate Side Rules and is published in the Fort St. George Gazette on the 28th April 1951. Rule 4 therein is as follows:

"Petition involving an interpretation of the Constitution, or questioning the validity of any Act of Parliament or of the Legislature of any State, shall be posted before a Bench of two Judges. All other petitions shall be posted before a single Judge. Provided that the Judge may direct any petition posted before him to be posted before a Bench of Judges."

It is in pursuance to Rule 4 that this writ petition came on for hearing before a single Judge with the result which we have mentioned above. The learned Counsel contends that since Art. 226 provides for the issuing of a writ by the High Court and since the power was already exercised by a single Judge of the High Court in accordance with the rules framed under Art. 225, the power of the High Court to issue a writ in this case has been exhausted and there can be no appeal to the High Court from the decision of the High Court. In other words, what he contends is, the High Court, when once a single Judge has disposed of the matter, has become functus officio because the order must be deemed to have been passed by the High Court as such and not by any single Judge. In this connection our attention was invited to Arts. 132 and 133. Art. 132 deals with the appellate jurisdiction of the Supreme Court in appeals from High Courts in certain cases and this Article provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution and Art. 133 deals with the appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters. Pointed reference was made to Clause 3 of Art. 133

wherein it is laid down that notwithstanding anything in this article, no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court. The contention that is put forward is that in the case of ordinary civil proceedings where the judgment, decree, or final order is made by a single Judge of the High Court, there shall be no appeal to the Supreme Court. But under Art. 132 even where a single Judge decides a question which involves a substantial question of law as to the interpretation of the Constitution, an appeal shall lie to the Supreme Court. Therefore the learned Counsel wants us to hold that the proceeding regarding the issuing of or the refusal to issue, a writ of certiorari is not a proceeding under Art. 133 but should be deemed to be a proceeding as envisaged under Art. 135, the residuary article regarding appealability, or might come under Art. 132, and such being the case it should be held that when an appeal lies from the decision of a single Judge straight to the Supreme Court, it will be anomalous to hold that an appeal lies to a Bench of this Court. We have to exclude from consideration Art. 132 because it is admitted that the proceedings in question do not involve any substantial question of law as to the interpretation of the Constitution for, if it involved, the matter would have been heard by a Bench of this Court under Rule 4 and this vexed question regarding appealability would not have therefore arisen. Does Art. 133 relating to the appellate jurisdiction of the Supreme Court in appeals from High Court regarding civil matters include writs of certiorari where no question regarding the interpretation of the Constitution is involved? In C. M. P. Nos. 3345, 3346 and 3347 of 1950', to which one of us was a party, the scope and ambit of Arts. 132 and 136 have been considered by this Court and the portion of the judgment relating to this aspect of the matter is as follows:

"By a process of reasoning based upon necessary and explicit exclusion, if we are to consider the meaning of the word "matter" in Art. 135, it seems to us that the word "matter" used in Art. 135 should not be understood as meaning a civil or criminal proceeding, because both these subjects were specifically dealt with under Arts. 133 and 134. Art. 132 refers to civil, criminal or other proceeding and is all comprehensive and therefore in whatever nature of proceedings, be it civil, criminal, admiralty, intestate or matrimonial, a question regarding the interpretation of the Constitution arises, then an appeal will lie under Art. 132. So far as other proceedings are concerned, Art. 133 lays down the scope and limit of the right of appeal in civil appeals. In the same way, does Art. 134 provide for the scope and limit of the right of appeal in a criminal proceeding? Therefore it seems to us that the matter referred to in Art. 135 should be understood as meaning a matter which is neither civil nor criminal and by the application of the maxim 'expressio unius est exclusio alterius, — the express mention of one thing implies the exclusion of another — it seems to us that the word "matter" in Art. 135 should be deemed to exclude both civil and criminal proceedings."

(5) It therefore becomes evident that if the subject-matter of a writ of certiorari is a civil proceeding, then Art. 133 is the provision of law which provides for an appeal to the Supreme Court and in such a case from the decision of a single Judge of a High Court there will be no appeal to the Supreme Court unless Parliament by law otherwise provides in such a matter. Clause 15 of the Letters Patent will apply and there will be an appeal to a Bench from the decision of a single Judge.

(6) We do not feel any doubt regarding the question as to whether the matter involved in this appeal is a civil proceeding or not. It is not a criminal proceeding nor is it in the nature of miscellaneous proceedings such as matrimonial, testamentary, admiralty or other jurisdictions of the High Court. At page 874 of Vol. IX of Halsbury's Laws of England, 2nd Edn. it is stated as follows:

"The House of Lords has jurisdiction to issue a writ of certiorari to any Court in which an indictment has been found against a peer for treason or felony, requiring such indictment to be removed into the High Court of Parliament or into the Court of the Lord High Steward.

All other original jurisdiction to grant the writ of certiorari now resides in the High Court of Justice, any division of which may exercise any part of the jurisdiction of the High Court, subject, however, to any express provision of the rules of the Supreme Court or of the Crown office.

There is a right of appeal to a Judge in chambers from the decision of a master in the King's Bench division granting or refusing the writ of certiorari and to a divisional Court from a Judge in chambers in the King's Bench Division.

An appeal lies to the Court of appeal and thence to the House of Lords from a decision of a Judge of the Chancery Division granting or refusing the writ of certiorari in an equity action or matter.

An appeal to the Court of Appeal and thence to the House of Lords lies from a decision of the King's Bench division granting or refusing the Writ of Certiorari except in cases which are of a criminal character."

(7) When once it is conceded that it is a civil proceeding, the question may then arise as to whether it is the original jurisdiction or appellate jurisdiction. In 'Ryots of Garabando v. Zamindar of Parlakimedi', ILR (1938) Mad 816, Leach, C. J. and Madhavan Nair, J., at page 818 observes as follows:

"Under Clause (b) a litigant has the right of appeal to His Majesty from any decree or final order passed by a High Court in the exercise of its original civil jurisdiction. It is conceded by the learned Advocate for the respondent that the issue of a writ of certiorari means the exercise of original jurisdiction, but he says that it does not mean the exercise of "original civil jurisdiction" within the meaning of the clause. The distinction here is between "civil" and "criminal." The order complained of referred to a civil matter as opposed to a criminal matter, namely, a decision of a Revenue Court in a revenue case. It was admittedly passed in the exercise of original jurisdiction and in the circumstances it could only have been passed in the exercise of civil jurisdiction. Therefore it was an order passed in the exercise of original civil jurisdiction."

(8) Therefore, unless the matter expressly relates to criminal jurisdiction, it must be taken that the issuing of writs of certiorari will ordinarily be an original civil proceeding. Observations of a like nature can be found at page 497 in the judgment of the Privy Council in 'Ryots of Garabando v. Zamindar of Parlakimedi', ILR (1944) Mad 457. In 'Hamid Hasan v. Banwarilal Roy', 1947-2 Mad L J 32 PC at p. 35, their Lordships of the Judicial Committee in dealing with the jurisdiction to issue a wrt of 'quo warranto' observe as follows:

"It cannot be disputed that the issue of such writs is a matter of original jurisdiction."

Again at page 36 it is stated:

"It is plain that in a matter coming before the Court on a high prerogative writ there could be no local Court having jurisdiction."

In 'Venkataratnam v. Secy., of State', 53 Mad 979 at p. 999, it is observed that since the jurisdiction to issue a writ of certiorari is original it cannot be directed against the Government. These authorities make it plain that the power to issue the writ is original and the jurisdiction exercised is original jurisdiction. It may be that under S. 205 of the Government of India Act, 1935, an appeal lay direct to the Federal Court from the decision of a single Judge of a High Court where the matter involved was one regarding the interpretation of the Constitution. But even in such a case it has been held that if the appellant preferred to exercise his right of appeal to the Federal Court in preference to first exercising a right of appeal to a Division Bench of the High Court, then he loses the right to raise any other questions which he is allowed to argue under Sub-section (2) of S. 205. (See 'Kunwarlal Singh v. C. P. & Berar', 1944 FCR 284 at pp. 291 and 292.) This decision has been followed in 'Iqbal Ahmed v. Bench of the High Court, Allahabad', 1949 FCR 813, where it is observed that the judgment of a single Judge of the Allahabad High Court was capable of being challenged in the Federal Court without taking an appeal in the first instance to a Division Bench of the same High Court. But all these would not show that where the matter is one which comes under Art. 135, the prohibition regarding an appeal direct to the Supreme Court without having recourse to a Bench of the High Court can be nullified. The reason for prohibiting an appeal from a single Judge's decision to the Privy Council has been considered in 'Hurish Chunder v. Kali Sundari Debi', 9 Cal 482 at p. 558 (PC) and these observations have been followed in 'Sabapathi Chetty v. Narayanaswami Chetti', 25 Mad 55 at p. 558. In this connection we may refer also to 'Vaman Ravji v. Naghesh Vishnu', ILR (1940) Bom 426. We may also refer to the circumstances that in 'Emberumanar Jeer Swamigal v. H. R. E. Board, Madras', ILR (1939) Mad 904, an appeal was entertained against the decision of a single Judge under Cl. 15 of the Letters Patent refusing to issue a Writ of Certiorari and it is noteworthy that eminent lawyers like the present Chief Justice and the late Mr. B. Sitarama Rao who appeared for the respondents did not think it worthwhile to raise even a contention that no appeal lies under Cl. 15 of the Letters Patent. That the order appealed against is a "judgment" is clear from the definition of the word "judgment" in 'Tuljaram Row v. Alagappa Chettiar', 35 Mad 1, and we need not elaborate on that aspect of the matter any further.

(9) It is further contended that even if the power to issue a writ of certiorari is a civil proceeding, still it is in the nature of a revisional proceeding and therefore Clause 15 of the Letters Patent cannot be made applicable. According to the amended Clause 15 of the Letters Patent no appeal lies from the decision of a single Judge made in the exercise of revisional jurisdiction. We have already expressed the opinion that the exercise of jurisdiction is in the nature of original civil jurisdiction and not revisional. In order that the jurisdiction should be revisional, there must be judicial proceedings against which a revision is preferred. It cannot be said that the Government of the State, when acting or refusing to act under S. 64-A of the Motor Vehicles Act, is acting as a judicial tribunal though the marginal note to the section refers to the jurisdiction as revisional jurisdiction. The Regional Transport Authority and the Central Road Traffic Board cannot be called Courts of law though they exercise quasi judicial functions and when the Government purports to act under S. 64-A either confirming or setting aside an order of the Central Road Traffic Board or the Regional Transport Authority, it might be exercising a revisional jurisdiction but not functioning as Court of law. The revisional jurisdiction contemplated under Caluse 15 of the Letters Patent refers to revisions from Subordinate Courts and not from inferior quasi-judicial tribunals. Neither under S. 115, C. P.C., nor under S. 107 of the Government of India Act, 1919, did the High Court have any jurisdiction to interfere in revision against any order passed by a quasi-judicial tribunal or authority. Such being the case, when Clause 15 of the Letters Patent speaks of an order made in the exercise of revisional jurisdiction it can only be understood as a jurisdiction exercised by the High Court over a subordinate Court. We are therefore of opinion that the preliminary objection is devoid of merits and should be overruled.

(10) Turning now to the merits of the appeal, we are pressed with the argument that the State in the order of the Government under S. 64-A, dated 5th July 1951 that the grant of the permit in question to the 2nd respondent will enable him also to have two permits on the route Rajahmundry to Tuni via Pithapuram and therefore the appellant and the 2nd respondent who are in all other respects on the same footing will be similarly placed, is based upon an objection not put forward before the original tribunal, viz., the Regional Transport Authority. Subba Rao, J., was of opinion that this circumstance that the appellant was plying two busses on the route Rajahmundry to Tuni via Jaggampeta was before the Central Road Traffic Board in the grounds of appeal. That being the case, it is not quite correct to say that the matter was then taken into consideration by the Government for the first time. The procedure to be followed by the Regional Transport Authority in considering applications for state carriage permits is laid down in S. 57 of the Motor Vehicles Act which should be taken to be the substantive law regarding such matters. S. 57 speaks of the procedure in applying for and granting permits. Sub-section 3 of that section postulates that on receipt of an application for a stage carriage permit from a person the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received will be considered. Sub-section 4 lays down that no representations in connection with an application referred to in Sub-section 3 shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation. What is contended here is that the 2nd respondent did not make any representation in answer to the appellant's application for a stage permit to the Regional Transport Authority as contemplated by Sub-ss. (3) and (4) of S. 57 and therefore it was not competent for the Regional Transport Authority to consider the existence of such an objection in granting or refusing to grant a permit to the appellant. If that is so, the Re-

gional Transport Authority should not have taken notice of such an objection. 'A fortiori' the Central Road Traffic Board should not have considered the objection, and much more so is the Government prevented from considering the objection under S. 64-A in revision. Since the Government has taken into consideration a circumstance which the Regional Transport Authority and the Central Road Traffic Board are prevented from considering under S. 57, Sub-s. 4 the fact that the basis of the reversing order of the Government is such a new fact which it is precluded from considering renders the order of the Government as one made without jurisdiction and therefore ought to be quashed. This is the gist of the argument of the learned counsel for the appellant. Our attention was invited to S. 12, Cl. (3) of the Madras Buildings (Lease and Rent Control) Act wherein there is a provision that the appellate authority has the power to make further enquiry; whereas, under the Motor Vehicles Act S. 64 does not confer upon the appellate authority any power other than what the original tribunal had. S. 43 of the Madras Buildings (Lease and Rent Control) Act was also brought to our notice. By it the Government is empowered to act in certain circumstances. No useful purpose can be served by comparing the powers vested in the Government or subordinate quasi-judicial authorities arising under circumstances which are not similar to the conditions necessary for the grant of stage carriage permits and we, therefore, do not wish to elaborate that aspect of the question. The Full Bench decision of the Allahabad High Court in 'Motilal v. Uttar Pradesh Government', AIR (38) 1951 All 257 interpreting the various sections in the Motor Vehicles Act and laying down that it was open to the State Government to take upon itself the task of restricting the use of highways and other allied subjects was very much relied upon by the learned counsel for the appellant. Even here, it seems to us that for the decision of the present dispute nothing much useful can be obtained from that decision. The substance of that decision is that it is open to the Government to restrict the use of the highways by particular individuals or bodies, by which act the Government is empowered to run its own stage carriages. As the decision in 'Sri Ramavilas Service Ltd. v. The Road Traffic Board, Madras', 1948-1 Mad L J 85, was prior to the enactment of S. 64-A of the Motor Vehicles Act, wo do not think it necessary to consider the points of law elaborately discussed in that judgment. It is now settled that the power of the Government in exercising its revisional functions should not be arbitrary, wanton or 'mala fide'. The only question is whether in the present case the Government has acted in that manner.

(11) On behalf of the 2nd respondent it has been contended before us that there is nothing in the Motor Vehicles Act which prohibits the Regional Transport Authority or the Central Road Traffic Board from taking into consideration matters other than the representations contemplated by S. 57, sub-cl. (c). In this connection we have to carefully consider the implications of S. 47 of the Act which, as we have already stated, lays down the substantive law regarding the procedure of the Regional Transport Authority in considering the application for stage carriage permits. In deciding whether to grant or refuse a stage carriage permit the Regional Transport Authority shall have regard to the matters mentioned in Sub-cls. (a) to (f) of Sub-s. (1) of S. 47. Sub-s. (1) of S. 47 is in the following terms:

"A Regional Transport Authority shall in deciding whether to grant or refuse a stage carriage permit have regard to the following matters, namely:

(a) the interest of the public generally;

(b) the advantages to the public of the service to be provided, including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken;

(c) the adequacy of existing road passenger transport services between the places to be served, the fares charged by those services and the effect upon those services of the service proposed;

(d) the benefit to any particular locality or localities likely to be afforded by the service;

(e) the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services; and

(f) the condition of the roads included in the proposed route or routes:

and shall also take into consideration any representation made by persons already providing road transport facilities along or near the proposed route or routes or by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lie or by an association interested in the provision of road transport facilities.

Therefore the Regional Transport Authority should consider matters mentioned in these sub-clauses before granting or refusing to grant a permit. One of them is Sub-cl. (a), namely, the interest of the public generally and another is Sub-cl. (e) namely, the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services. In addition to the matters, the Regional Transport Authority shall also take into consideration any representations made by persons already providing road transport facilities along or near the proposed route or routes, representations made by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lie or by any association interested in the provision of road transport facilities. It is therefore clear that apart from the objections put forward by individuals against the granting of permits, the Regional Transport Authority shall also consider these matters. In our opinion, the consideration mentioned in S. 47 should be in addition to the objections raised under Sub-s. (3) to S. 57. On behalf of the State Government various decisions where the meaning of the expression "having regard to" occurring in other statutes were considered and decided were cited before us. In 'Venkanna v. Receiver, Medur Estate', 1 Mad L W 245 the expression "having regard to" in S. 40, Sub-s. 3 of the Estates Land Act had to be discussed. In this case the expression was "due regard to the consideration in Sub-cls (a) to (c) of Cl. (3)", and this was interpreted by Sadasiva Aiyar and Spencer JJ. as "not restricting the authority to the three considerations referred to in those sub-clauses and that it does not mean that any one of the considerations is entitled to more weight than the others." That is, the trend of the learned Judge's observations is to the effect that when the authority or a Court is directed to pay due regard to certain consideration it does not necessarily mean that such authority or Court cannot take into consideration matters other than those specifically mentioned therein. All that the direction necessitates is that these considerations should not be left out of account. There is no inhibition against the taking into consideration of matters other than these considerations. To the same effect is the decision in 'Samigadu v. Srinivasalu Reddi', 11 Mad L W 620. Similar observations that the authority or Court is not

strictly bound to adhere only to such considerations where the expression used is "having regard to" or "due regard" can be found in 'Valluri Narasimha v. Ryots of Eddamamidipalli', 49 Mad 499 and 'Ryots of Garabandho v. Zamindar of Parlakimedi', ILR (1944) Mad 457 P.C. This aspect of the matter has been recently considered by Subba Rao J. in a 'Writ Petition' No. 176 of 1951 on the 14th instant, and we are in entire agreement with the observations made by the learned Judge. As the matter has been elaborately discussed in that judgment, we do not propose to restate them again. As observed by the learned Judge:

> "one of the principles is that under S. 47 of the Act, the Regional Transport Authority, in issuing or refusing to permit shall have regard to all matters mentioned in the section. The section is not exhaustive. Though the authority has no jurisdiction to issue or refuse a permit without taking the matters mentioned therein (into consideration), the section does not in terms exclude from the consideration other matters germane to the question to be decided."

It cannot be disputed that the fact that the appellant had two stage carriage permits on the route Rajahmundry to Tuni via Jaggampet on that date when the Regional Transport Authority considered the grant of permit, now under consideration was a circumstance existing on that date and known to the Regional Authority and therefore could be taken by it into consideration apart from representations under S. 57(3) as well as matters referred to in sub-cls. (a) to (f) of sub-s. 1 of S. 47 of the Act. If it is possible for the Regional Transport Authority to take these matters into consideration, in our opinion, there is nothing that prevents the Government from considering them. But Mr. Nambiar argues that there is nothing to show that the Regional Transport Authority considered this aspect of the case, and if it did not, for the first time it is not open to the Government to refer to a matter of this kind in setting aside the order of the Central Road Traffic Board. We are not satisfied that the existence of a fact so well known to the Regional Transport Authority was not before its mind when it granted the permit to the petitioner. The following observations of Subba Rao J. in 'W. P. No. 176 of 1951' from which this Letters Patent Appeal has arisen have our entire concurrence:

> "It is a question of fact and also of opinion in each case whether the grant of a particular permit to an individual will be in the interests of the public or not. It may be, one tribunal may think that issuing permits to the same individual may be in the interests of the public. Another tribunal may come to a different conclusion. The Government obviously thought that giving equal opportunities to the two competing applicants would avoid unnecessary competition between them which ultimately might be in the interests of the public."

We are, therefore, of opinion that the action of the Government in considering the fact that the appellant had two carriage permits between Rajahmundry and Tuni via Jaggampeta can fall within Sub-cl. (a) or (e) of Sub-s. 1 of S. 47.

(12) It is next contended that there is an obvious error on the face of the record because at the time the Government passed the order the appellant had only one permit, the other permit having already been transferred after the order of the Regional Transport Authority. The second respondent contends that the said transfer was benami because the transferee is the son-in-law of the appellant. We are not called upon to decide that question in this appeal because at the time the Regional Transport Authority passed its order, the appellant was in possession of two permits and whatever happened subsequent to that date is not a matter relevant for consideration when the Government passed its order. It seems to us, therefore, that the order of the learned Judge is perfectly correct and cannot be interfered with.

(13) This appeal fails and is dismissed. Since the preliminary objection has failed we direct each party to bear his own costs.

C.R.K./R.G.D. *Appeal dismissed.*

A. I. R. (39) 1952 Madras 305 [*C. N. 105 (28).*]

SATYANARAYANA RAO AND VISWANATHA SASTRI JJ.

Commissioner of Income-tax, Madras, Applicant v. Messrs. K. R. M. T. T. Thiagaraja Chetty and Co. Madura, Respondent.

Case referred Nos. 76 and 78 of 1946 & 32 and 56 of 1947, D/- 2-2-1950.

† (a) *Income-tax Act (1922), S. 13 — Managing agent maintaining account for purpose of mills — Accounts no indication of method of accounting of assessee.*

(Per Satyanarayana Rao J.): The method of accounting contemplated by the section is the method of accounting employed by the assessee, managing agent, in respect of his income, profits and gains; and not an account maintained by him for the purpose of the mills. What is material under the section is an election by the assessee between the two systems of accounting as to which system he decides to adopt as the proper method of accounting in respect of his transactions. It cannot be said with any propriety that the managing agents' choice on behalf of the mills in adopting a particular method of accounting for the purpose of the mills is also an indication of their method of accounting for the purpose of their individual transactions. Merely because in the previous years cash was paid to the assessees by the mills as shown by their accounts, it would not justify a finding that the method of accounting adopted by the assessees was on cash basis. (Para 6)

Anno: Income-tax Act S. 13 N. 2, 3.

(b) *Income-tax Act (1922), S. 13 — Scope — Assessee's choice for a particular year.*

(Per Viswanatha Sastri J.): It is the method of accounting adopted by the assessee, it is his system of book-keeping, it is his choice of the cash basis or the mercantile system of accountancy as his habitual mode of keeping accounts that is relevant under S. 13. The assessee's choice for a particular year does not determine the method of accounting. (Para 26)

Anno: Income-tax Act, S. 13 N. 2, 3.

(c) *Income-tax Act (1922), S. 4 — Income — Meaning of — Money kept in suspense account.*

The assessees were the managing agents of Sri Meenakshi Mills, Ltd. Madura and under the terms of the Managing Agency agreement then in force the managing agents were entitled to 1/2 per cent. commission on sales of yarn, waste cotton etc., made by the mills and 10 per cent. commission on the nett profits of the mills before allowing for depreciation. The amounts which the assessees were entitled to under these two heads during the account year were shown in the accounts of the mills and in the assessment of income of the mills, the mills claimed this amount as deduction which was allowed. This income however was not admitted by the assessee in the return they submitted during the assessment year as the amount was not actually re-

ceived by the firm in the year of account. The managing agents wrote to the mills requesting the mills to write off their previous indebtedness and pay the amount earned by them in full. But the attitude taken by the directors of the mills was that they would not pay the amount unless the question of writing off the indebtedness was decided either by arbitration or by the general body. They had kept the money in suspense and resisted the claim made by the managing agents.

Held (Per Satyanarayana Rao J., Viswanatha Sastri J., Contra): that in the present case the test of an income as defined by the Act was not satisfied. The amount was money which was not available and which was at the disposal of the managing agents. They could not have called up the money as if it was money lying in their bank account or money held by an agent on their behalf and for their benefit and use. The sum in question was therefore, not income assessable to tax.

(Viswanatha Sastri J.): The mere entry of a sum in the "suspense account" of the tax-payer is not conclusive of the real nature of the receipt and the revenue authority can ignore a "suspense account" if it is not 'bona fide'. The gratuitous reminder to the directors about the ancient indebtedness of the firm, at the end of the year of account, the invitation of a suspense account entry with regard to the managing agency commission, and the self-imposed restraint on the withdrawal of the managing agency commission by the firm were all ineffective proceedings resorted to for the purpose of obscuring the real position. The fact that the sum had not been drawn by the assessees did not affect the question when it was indubitably established that the sum had been earned by the assessee and had been appropriated to it by the Mills. The sum was therefore assessable to income-tax as part of the profits and gains that had accrued to the assessee during the year of account.

(As the opinion of Satyanarayana Rao J. agreed with that of the Appellate Tribunal it prevailed under S. 66A (1). Case law discussed).
(Paras 16, 41, 44)

Anno: Income-tax Act, S. 4 N. 2, 4.

(d) Income-tax Act (1922), S. 13 — Commercial accountancy — Effect.

(Per Satyanarayana Rao J.): Where the commercial accountancy prevails, it is an exception to the normal rule that the income must be some money which is at the disposal of the assessee and which he could call and use at any time. Section 13 of the Act introduces this exception. AIR (32) 1945 All 102 (FB), Rel. on. *(Para 15)*

Anno: Income-tax Act, S. 13 N. 2, 3.

(e) Income-tax Act (1922), S. 4 — 'Suspense account" — Meaning of — Words and Phrases.

(Per Viswanatha Sastri J.): Suspense account is an expression in common use in banking business where a person whose money is held in suspense is entitled to withdraw it any moment he likes, though he neither gets a pass book nor is entitled to draw any cheques or to be paid interest in respect of the amount. 33 Mad 299; 36 Mad 499 FB; AIR (1) 1914 PC 230 Referred. *(Para 44)*

Anno: Income-tax Act, S. 4 N. 2.

(f) Income-tax Act (1922), S. 14(2)(c) — Income arising in Indian State.

Under the arrangement entered into between the assessee firm and the directors of the Mills, a private limited company controlled by one of the partners of the firm was appointed as the sole buying agent of the Mills and another private limited company controlled by another partner of the firm was appointed as the sole and selling agent of the Mills and the commission payable on purchases and sales was payable, and paid, to these two private limited companies. What the firm did was merely to supervise the work of these limited companies and to attend to the business of the Mills at Madura. It was for this work and this work alone that the firm was paid a monthly remuneration of Rs. 1,000/- and a commission calculated at 5 per cent. of the entire profits of the company. The managing agency agreement was entered into at Madura, the managing agency business was carried on at Madura and the profits were earned and payable at Madura. The purchases and sales of goods were not effected by the firm but by the two limited companies controlled and managed by two of the individual partners of the firm.

'Held' that the firm was not entitled to exemption from tax in respect of a sum alleged as representing its earnings attributable to the supervision work done in Indian States. In the year of account on the basis of the sales of goods effected in those states during that year no part of the managing agency commission arose or accrued to the firm in any Indian State and therefore the exemption from tax granted by S. 14, sub-s (2), Cl. (c) was not attracted. *(Para 45)*

Anno: Income-tax Act S. 14 N. 7.

C. S. Rama Rao Sahib, for Applicant in Case Referred Nos. 76 of 1946 and 32 and 56 of 1947, and for the Respondent in Case Referred No. 78 of 1946, and Alladi Krishnaswami Ayyar, for M. Subbaraya Ayyar, for Respondents in Case Referred Nos. 76 of 1946 and 32 and 56 of 1947 and for Applicant in Case Referred No. 78 of 1946.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1914) AC 1001: (AIR (1) 1914 PC 230) (Pr 44)
('32) 59 Cal 1343: (AIR (19) 1932 PC 138) (Prs 28, 40)
('32) 59 Ind App 290: (AIR (19) 1932 PC 178) (Prs 28, 30)
('33) 60 Cal 1029: (AIR (20) 1933 PC 145) (Pr 40)
('35) 14 Pat 552: (AIR (22) 1935 PC 143) (Prs 28, 40)
('37) ILR (1937) Bom 388: (AIR (24) 1937 PC 139) (Pr 33)
('38) ILR (1938) Mad 1: (AIR (24) 1937 PC 261) (Pr 40)
('38) ILR (1938) Bom 239: (AIR (25) 1938 PC 1) (Pr 31)
('38) ILR (1938) Bom 752: (AIR (25) 1938 PC 232) (Pr 40)
('40) ILR (1940) 2 Cal 215: (AIR (27) 1940 PC 124) (Pr 40)
('43) 22 Pat 713: (AIR (30) 1943 PC 153) (Pr 28)
('45) ILR (1945) Bom 153: (AIR (31) 1944 PC 88) (Pr 40)
('35) 57 All 737: (AIR (22) 1935 All 378) (Pr 30)
('45) ILR (1945) All 577: (AIR (32) 1945 All 102 FB) (Prs 15, 29, 30)
('31) 5 ITC 108: (AIR (18) 1931 Bom 236) (Pr 45)
('37) 1937-5 ITR 261 (Bom) (Pr 35)
('43) 1943-11 ITR 128: (AIR (30) 1943 Bom 98) (Pr 45)
('10) 33 Mad 299: (8 Ind Cas 138) (Pr 44)
('13) 36 Mad 499: (6 Ind Cas 383 FB) (Pr 44)
('21) 44 Mad 65: (AIR (8) 1921 Mad 427 FB) (Prs 9, 14, 30)
('41) 1941-2 Mad L J 172: (AIR (28) 1941 Mad 677 SB) (Pr 41)
('29) 3 ITC 321: (AIR (16) 1929 Nag 50 FB) (Prs 14, 30)
('42) 1942-10 ITR 177: (AIR (29) 1942 Pat 491) (Pr 41)

(1883) 8 AC 891: (53 L J Q B 4) (Pr 28)
(1888) 13 AC 418: (58 L J P C 8) (Pr 28)
(1892) AC 309: (62 L J Q B 41) (Pr 28)
(1901) AC 26 (Pr 27)
(1902) AC 287: (71 L J K B 618) (Prs 10, 37)
(1910) AC 143: (79 L J P C 41) (Pr 33)
(1915) AC 433: (84 L J K B 417) (Pr 34)
(1924) AC 508: (93 L J P C 212) (Prs 11, 13, 15, 35, 37, 38)
(1937) AC 185: (106 L J K B 70) (Pr 28)
(1944) AC 204: (113 L J K B 369) (Prs 28, 34)
(1948) AC 459: (1948-2 All E R 379) (Pr 28)
(1943) 1 All E R 474: 25 Tax Cas 200 (Prs 14, 39)
(1946) 1 All E R 476: (27 Tax Cas 136) (Prs 14, 15, 39)
(1928) 1 K B 73: (96 L J K B 853) (Prs 12, 37, 38)
(1934) 1 K B 178: (103 L J K B 69) (Prs 13, 38)
(1935) 2 K B 351: (104 L J K B 645) (Prs 13, 14, 15, 16, 38, 39)
(1905) 5 Tax Cas 502 (Pr 37)
(1912) 6 Tax Cas 34: (1912 SC 452) (Pr 37)
(1922) 12 Tax Cas 427: (1922 S C (HL) 112) (Pr 33)
(1928) 12 Tax Cas 1017: (138 LT 593) (Pr 28)
(1929) 14 Tax Cas 580: (45 T L R 581) (Pr 37)
(1930) 15 Tax Cas 613: (1930 SC 878) (Pr 34)
(1936) 20 Tax Cas 673: (80 S J 705) (Prs 13, 39)

SATYANARAYANA RAO, J.: By an order of this Court in C. M. P. No. 2928 of 1947 dated 25th August 1947, the Appellate Tribunal was directed under S. 66(2) of the Indian Income-tax Act to refer to this Court the following two questions and they have been accordingly referred to us. They are:

"1. Whether there is any material for the Tribunal's finding that the appellants (Respondents in this case) were being assessed on cash basis in the prior years?

2. Whether on the facts and in the circumstances of the case the Appellate Tribunal's finding that the sum of Rs. 2,26,850/- could not be assessed for the assessment year 1942-43 is correct in law?"

The assessment year with which we are now concerned in this reference is the year 1942-43, corresponding to the accounting year ending with 31st March 1942. The assessees are the firm of Messrs. K.R.M.T.T. Thiagaraja Chetty and Company. They were originally members of an undivided Hindu family and after partition in the family they constituted themselves into a firm. They are the managing agents of Sri Meenakshi Mills, Ltd., Madura and under the terms of the Managing Agency agreement then in force the managing agents were entitled to remuneration of Rs. 1000/- per mensem and ½ per cent. commission on sales of yarn, waste cotton etc., made by the mills and 10 per cent. commission on the nett profits of the mills before allowing for depreciation. There is no dispute now with reference to the remuneration of Rs. 1000/- per mensem and with regard to the sum of Rs. 12,000/- the remuneration earned at that rate per mensem, during the accounting year and the assessees do not dispute their liability to pay Income-tax. The dispute is confined to the commission on sales and the 10 per cent. commission on the nett profits of the mills. The amounts which the assessees were entitled to under these two heads during the account year amounted to Rs. 2,26,850-5-0. There is no dispute regarding the amount. The amount was shown in the accounts of the mills and in the assessment of income of the mills, the mills claimed this amount as deduction which was allowed. This income however was not admitted by the assessees in the return they submitted during the assessment year as the amount was not actually received by the firm in the year of account.

(2) On the 30th March, 1942, the managing agents wrote to the mills (the reference is to the Sri Meenakshi Mills, Ltd., Madura) requesting the mills to write off their previous indebtedness and pay the amount earned by them in full. It would appear that the managing agents were indebted to the mills from a long time even when their family was joint in a sum which amounted in the accounting year to Rs. 2,04,058-11-8. On receipt of this letter the Board of Directors of the Mills met and passed a resolution on that date in these terms:

"Read the letter dated 30-3-1942 from the managing agents to the Board of Directors regarding the debt due by the former to the Company and decided that until the Board of Directors came to a final decision on this matter, the commission due to the Managing Agents for 1941-42 on the purchases and sales and the 10 per cent. commission on the net profits should not be paid but should be kept in suspense. As the amount involved is large, without the approval of the general body, the Board thinks that it will not be proper to debit it as an expenditure.

As the managing agents object to the withholding of their remuneration and want the matter to be settled by arbitration it has been decided to take up that question in the next meeting."

As a result of this resolution the mills kept the amount in suspense and did not pay it over to the managing agents as they did in the previous years. On the ground therefore, that this amount was not paid over to the managing agents and was not even credited in the Mills' accounts to the managing agents the assessees claimed that they were not liable to pay tax on this amount. It has now been found conclusively that the assessees themselves maintained no accounts of their own with regard to the commission and remuneration payable by the mills to them; and, in fact, they have not followed any method of accounting in respect of this source of their income. The Income-tax Officer rejected the claim of the assessees. He was of opinion that the resolution of the Board of Directors passed at its meeting on 30th March 1942 was collusive and that the income which accrued to the assessees whether received or not was chargeable to income-tax, particularly as there was no dispute regarding the actual amount payable to the assessees' firm under the terms of the managing agency agreement and in respect of the working for 1941-42.

(3) When once the income had accrued, as it did, according to the Income-tax Officer, its disposal did not affect the liability of the income to assessment under the Act. The refusal of the mills to permit the managing agents to withdraw the amount was not on absolute refusal or denial of their right but the Board of Directors while admitting the right of the managing agents to receive the income claimed that they were entitled to apply it for the discharge of the prior indebtedness of the managing agents. On appeal this decision was affirmed by the Appellate Assistant Commissioner. On a further appeal to the Tribunal by the Assessees the Tribunal disagreed with the view of the Income-tax Officer and the Appellate Assistant Commissioner. The Tribunal on a consideration of the facts and circumstances came to the definite conclusion that the resolution of the Board of Directors was not at all collusive but was 'bona fide', that in the previous years the income was assessed on cash basis as the commission and remuneration were paid to the assessees by the mills and that as in the present year the amount was not paid by the mills, the managing agents had acquired only a right to receive the income

and the income itself had not accrued to the assessees. According to the Tribunal the assessees were definitely assessed in the previous years on cash basis for this income and that as no cash was paid during the accounting year and received by the assessees they were not liable to pay tax on the amount.

(4) The Income-tax Commissioner thereafter applied to the Tribunal for a reference under S. 66(1) of the Indian Income-tax Act and he formulated in his application three questions. The second of the questions related to the finding of the Appellate Tribunal that the resolution of the Board of Directors was not collusive. The Tribunal by their order referred only two questions and declined to refer the question relating to the bona fide nature of the resolution for the reason that that question was a question of fact and raised no question of law. The Tribunal therefore omitted question No. 2 and referred the other two questions which were substantially on the same terms as the questions which had been formulated by the Court. On this the Income-tax Officer applied to this Court in C. M. P. 2928 of 1947 for directing the Tribunal to refer all the questions including the question relating to the 'bona fide' character of the resolution of the Board of Directors. This Court modified the language of the two questions which were already directed by the Appellate Tribunal to be referred to this Court but the second of the questions relating to the collusive nature of the resolution was not referred. That question was abandoned at the time of the hearing of the application for reference before this Court and the two questions as set forth above were directed to be referred to this Court after altering the language of the questions as formulated by the Appellate Tribunal.

(5) From this it follows that this reference must be dealt with on the footing that the finding of the Tribunal that the resolution of the Board of Directors was not collusive but 'bona fide' is final and it cannot now be reopened by the Income-tax Commissioner.

(6) The first question relates to the point whether the previous assessments were on cash basis. It is now beyond dispute that the assessee himself mainatined no accounts. Under S. 13 of the Act

> "Income, profits and gains shall be computed for for purposes of Ss. 10 and 12, in accordance with the method of accounting regularly employed by the assessee provided that if no method of accounting has been regularly employed or if the method employed is such that in the opinion of the Income-tax Officer, the income, prifits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

If, therefore, the assessee himself had maintained any accounts and had adopted either the method of mercantile system or cash basis the Income-tax Officer will be bound to compute his income on a particular basis adopted in the accounts unless the conditions of the proviso are satisfied in which case liberty is given to the Income-tax Officer to assess the income in any manner he deems proper. From an examination of the accounts of the mills it no doubt appears that in the prior years the amount was paid to the assessees in cash; and the cash books of the mills bear out the fact. The argument on behalf of the assessees by Mr. Alladi Krishnaswami Ayyar was that under the terms of the managing Agency agreement, the assessees as managing agents of the mills were bound to maintain proper and complete books of account in respect of all the transactions of the mills and such accounts in so far as they related to the assessees may by treated as really their accounts as there is no magic in insisting on the managing agents to maintain a duplicate set of accounts relating to their managing agency's commission and remuneration. The method of accounting contemplated however by the section is the method of accounting employed by the assessee in respect of his income, profits and gains; and not an account maintained by him for the purpose of the mills. What is material under the section is an election by the assessee between the two systems of accounting as to which system he decides to adopt as the proper method of accounting in respect of his transactions. It cannot be said with any propriety that the managing agents' choice on behalf of the mills in adopting a particular method of accounting for the purpose of the mills is also an indication of their method of accounting for the purpose of their individual transactions. They hold two capacities, one, as managing agents of the mills and the other their own individual right as partners of a firm. When there are no accounts of their own, it is impossible to determine that they had unalterably indicated their mind regarding the choice of the method of accounting which they would adopt in respect of their dealings. I am, therefore, unable to accept the argument of the learned counsel on behalf of the assessees that the accounts of the mills are also the accounts of the assessees and the method of accounting adopted in those accounts should be treated also as a method of accounting for the purposes of the assessees' income. It follows, therefore, that the view of the Appellate Tribunal that merely because in the previous years cash was paid to the assessees by the mills as shown by their accounts, it would justify a finding that the method of accounting adopted by the assessees was on cash basis is wrong. Of course, if cash basis was adopted in the accounts maintained by the managing agents for purposes of their transactions, unless cash was received they would not be liable to pay tax on the amount which admittedly was not received by the assessees. The first question therefore must be answered in the negative and against the assessees.

(7) This leads me on to the consideration of the more difficult question raised by the second of the two questions above set forth.

(8) The main argument advanced on behalf of the assessees by their learned counsel, Mr. Alladi Krishnaswami Iyer is that the amount in dispute was not 'income' of the assessees which had accrued or arisen in the accounting year. It is no doubt true, says the learned counsel, that under the terms of the managing agency agreement the amount was earned by the assessees during the accounting year but as the directors refused to pay the amount until the question of writing off the prior indebtedness of the assessees to the mills was decided and kept the amount in suspense without even crediting it to the assessees it cannot be treated as income of the assessees which would be chargeable to Income-tax under the provisions of the Income-tax Act. In support of this contention the learned counsel drew our attention to the scheme learned counsel drew our attention to the scheme underlying the provisions of the Act and also to the decisions, English and Indian, which have construed the word 'income' which is assessable to tax under the income-tax laws.

(9) The connotation of the words 'income, profits and gains accruing and arising' has therefore to be considered. Under S. 3 of the Act which is the charging section, income-tax shall be charged for any year in accordance with, and subject to the provisions of the Act, in respect of the total

income of the previous year of every individual, Hindu undivided family etc. S. 4 enumerates the heads of income that should be included in the total income of an assessee which is chargeable to tax, from whatever source it may be derived. There are three categories indicated in the section. It is either income which is 'received' or which is 'deemed to be received' or which 'accrues or arises.' "Received" means actual receipt or constructive receipt. 'Deemed to be received' is statutorily defined in some of the provisions of the Act. 'Income which accrues or arises' has nowhere been explained in the Act though in 1947 by S. 2 of the Income-tax Act and Excess Profits Tax (Amendment Act) 1947, (Act XXII of 1947), an inclusive definition of income was introduced into the Act by sub-s. 6(c) of S. 2 of the Act. In the present case the amount under consideration is not profits of a business falling under S. 10 and must necessarily fall under S. 12 which relates to 'income, profits and gains from other sources'. All the heads of sources are indicated in S. 6. S. 13 was introduced for the first time by the Act of 1922 so as to fill up the lacuna which was noticed in the Full Bench decision of this Court in 'SECY. to the Board of Revenue Income-tax Madras v. Arunachalan Chettyar', 44 Mad 65 (FB). When there is no method of accounting employed by the assessee and when there are no accounts maintained by him, the Income-tax Officer has to compute the income of the assessee by recourse to other material that is available for him to arrive at the Income of the assessee. In the present case, therefore, in order to arrive at the income the Income-tax Officer relied on the accounts maintained by the Mills and the managing agency agreement and arrived at the figure that the remuneration and commission amounted to Rs. 2,26,850-5-0. In order to constitute income, according to the learned counsel for the assessees, it must be established that the assessees had dominion over the sum and that it lay to their order in the hands of their agent or banker. It must be money available, for the assessees' use and deposited at their direction and under their control either with a bank or with another person who holds the money on their behalf. Actual receipt may not be necessary but there must be potential receipt in the sense that it was at their disposal and they were at liberty to enjoy it. A mere 'right' to receive an amount from a third person would not, according to the learned counsel, be 'income' though it may be a 'debt'. There must be an incoming to constitute an income and it is not a mere debt which could be reduced to possession by appropriate proceedings. In other words, it must be possible to predicate that the sum was as good as receipt though not actually received and was not a mere claim to receive something from a third person. On the facts of the present case it was argued on behalf of the assessees that the Board of Directors 'bona fide' refused to pay the amount to the assessees and kept it in suspense account though they admitted that it was money of the assessees in their hands. They resisted payment and prevented the managing agents from withdrawing the amount which they were entitled to do under the terms of the managing agency agreement. The claim was resisted by the mills on the ground that they had a counter claim or a cross claim against the agents, thereby making it impossible for the managing agents to call the money. The money was not therefore at their disposal and they could not have called the money if they wanted to utilise it and enjoy it.

(10) It may now be convenient to deal with the decisions that have been relied on in support of these contentions. In 'GRESHAM Life Assurance Society v. Bishop', (1902) A C 287 Lord Lindley considered the meaning of receipt of a sum of money. The Learned Lord observed:

> "My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by businessmen. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt whatever else it may be worth."

If the mills had adjusted the amount towards the debt due to them and made an entry to that effect in the accounts instead of keeping the amount in suspense there would undoubtedly have been a receipt of the money and apart from any other question the assessees would have been liable. But until such adjustment is made and an entry to that effect in the accounts was made by the mills, it cannot be said that in the present case there was a receipt of the money in the sense in which it is understood under the Income-tax law.

(11) The leading case, which in my opinion, strongly supports the contention urged on behalf of the assessees is the decision of the Judicial Committee in 'ST. LUCIA Usines and Estates Co. v. St. Lucia (Colonial Treasurer)', 1924 AC 508 (PC). The Judicial Committee were there construing the Income-tax Ordinance of 1910 of St. Lucia. In that case the assessees sold their property situated in St. Lucia and ceased to reside and carry on business in that State. Under the deed of sale of one of the properties part of the purchase price was left unpaid and was secured by a vendor's lien and the purchaser covenanted to pay in November 30, 1921 the sum with interest at 6 per cent. He did not pay the interest and the assessee was obliged to sue and obtain a judgment. The interest was not paid. The company, i.e., the Assessee, was held by the revenue authorities of St. Lucia liable to pay tax for the year 1921 on the interest which accrued due but was not paid. Under S. 3 of the Ordinance every person receiving income or to whom income shall accrue shall in respect of such income pay an annual income-tax at certain defined rates; and S. 4 Sub-s. (1) of the Ordinance provided that the income in respect of which income-tax is imposed shall include (a) certain income arising or accruing to any person residing in the colony, (b) certain income arising or accruing to a person not residing in the colony but derived from profits of property in the colony or from profession or trade carried on in the colony, and (c) income arising or accuring to any person residing in the colony derived from a source in or out of the colony and income arising or accruing to a person not residing in the colony derived from a source in the colony with a proviso that 'in respect of income derived from sources out of the colony so much of such income as is received in this colony shall be chargeable with income-tax'. The assessee ceased to reside in the colony from 1920 but the source of the income was in the colony; and the question that had to be considered was whether the company had received an income or income accrued to it in that year in respect of

interest under S. 3 of the Ordinance. The revenue authorities contended that as the interest became payable it was an accrued income even though it was not paid in that year. This contention was rejected by the Judicial Committee. Lord Wrenbury who delivered the judgment considered the meaning of the words 'income arising or accruing' at page 512 of the report in the following words:

"The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word 'income'. This is a sense which is assisted or confirmed by the word 'received' in the proviso at the end of S. 4, Sub-s. 1. If the tax-payer be the holder of stock of a foreign Government carrying say 5 per cent interest, and the Government is that of a defaulting State which does not pay the interest, the tax-payer has neither received nor has there accrued to him any income in respect of that stock. A debt has accrued to him but income has not. It does not follow that income is confined to that which the tax-payer actually receives. Where income-tax is deducted at the source the tax-payer receives the sum deducted but it accrues to him. It is said, and truly, that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts—does not prepare a mere cash account — but values its book debts and its stock-in-trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so. But this is far from establishing that income arises or accrues from (as above instanced) an investment which fails to pay the interest due."

This passage it may be noticed really deals with two situations. One, income arising or accruing from sources other than business such as investments, and second, profits of a business which is calculated in accordance with the practice of commerce and of accountants. The relevancy of this distinction would presently be adverted to when examining the effect of the introdcution of S. 13 by the Act of 1922. As the present case is not one which relates to profits of a business computed on the method of accounting regularly employed by the assessee the definition of 'income arising or accruing' in the first part of this quotation is relevant for the purpose of the present discussion.

(12) Rowlatt, J. in 'LEIGH v. Inland Revenue Commissioners', (1928) 1 KB 73, observed at page 77 that:

"for income-tax purposes 'receivability' without receipt is nothing; and before a good debt is paid there is no such thing as income-tax upon it. The meaning of the section must be 'receivability' speaking of a debt which has been received, and means the date on which it is paid as distinct from the date on which it was accruing."

No doubt in that case the language of the statute which the learned Judge was construing contained the word 'receivable'.

(13) In 'LAMBE v. Inland Revenue Commissioners', (1934) 1 KB 178, Finlay J. defined income in the following words, at page 182:

"Looking at the matter quite generally, one would suppose that income means that which comes in, and that it refers to what is actually received. Income may be of various sorts, income under Schedule A and various Schedules, but none the less the tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket. That is the general principle."

The more important decision in my opinion on this point after the decision of the Privy Council in 'ST. LUCIA Usines and Estates Co. v. St. Lucia (Colonial Treasurer) (1924) A C 508 (P C), is the decision in 'DEWAR v. Inland Revenue Commissioners', (1935) 2 KB 351, a decision of the Court of Appeal. The facts in that case are somewhat extraordinary. Under a will of the testator who died on April 11, 1930, the assessee was entitled to a legacy of £1,000,000/-. The executor's year expired on April 11, 1931, and the legacy became payable and carried thereafter interest at 4 per cent per annum. The estate of the testator was solvent and was quite able to meet all the legacies. In 1932 the legatee under the advice of his accountant allowed the question of interest on the legacy to stand ever and he did not at any time receive any sum in respect of interest. He was assessed to sur-tax in the sum of £5,0180 for the year ending April, 5, 1933, which included a sum of £40,000 representing interest at 4 per cent on the legacy. It was held that assessment on the amount of interest was not justified as the assessee did not receive the interest & therefore had no income in respect of it which he could have been charged to tax. In that case, there was not even a default on the part of the executor to pay the legacy or any part of it and the legatee wilfully abstained from making a demand and receiving the amount. If he had even made a formal demand, the executor would have readily paid the amount or, at any rate, appropriated the amount to his use and deposited it at his discretion, either in a bank or elsewhere. Notwithstanding these circumstances which point to the conclusion that it is income, the Court of appeal held the contrary. Lord Hanworth M. R. after referring to S. 100 of the Indian Income-tax Act which contains the words that the assessee should submit a correct statement in writing containing the amount of the profits or gains 'arising' to him, from each and every source chargeable according to the respective schedules, observed:

"If the interest on the legacy in this case has not arisen to the respondent, if he has not become the dominus of this sum, if it does not lie to his order in the hands of his agent, can it be said that it has arisen to him? I think the answer definitely upon the facts must be; No, it has not."

The decision in 'ST. LUCIA'S CASE' (1924) A C 508 (P C), and the test laid down by Lord Wrenbury was applied and at page 366, the Master of the Rolls concluded by observing:

"The Attorney General had said that it is a tax not only on income but on capital, and Lord Macnaughten, answering that, said that income-tax is a tax on income and not meant to be a tax on anything else. Again that is not intended to be an exhaustive definition and must be treated in the sense in which it is used. But all those observations tend in this direction, that you must find something which is in the enjoyment of the subject. He could make use of the money which lies abroad to his use. It is in that sense in his enjoyment. Upon the present facts there is no enjoyment by him, there is no gain by him, he has derived no profit and there is nothing in his hands which will answer the test of what you mean by 'income'."

Maugham L. J. at page 371 refers to the fact that there was no default in payment and also adverts to the circumstance that the assessee voluntarily gave up his right to receive the payment of interest. Yet the conclusion of the learned Lord Justice is:

"For my part, I accept the view that there has been no default in payment, but I understand the finding in para 11 (5) of the Special case

'the appellant has for the present for reasons of his own 'voluntarily' waived his right to receive the payment of interest', as meaning no more than this, that he has not claimed such interest. For the reasons given, in particular by the Master of the Rolls, who has dealt with those authorities in some detail, I am of opinion that the cases were correctly decided and that they do not depend or relate solely to cases where there has been a default in payment by a debtor. I think they have a wider range than that and include cases where the debtor, if there is a debtor for some reason other than default, and without any act on behalf of the creditor which might be alleged to amount to an exercise of dominion over the debt, has not in fact paid the sum of interest in question during the year of assessment."

This principle was again applied by Lawrence J. in 'WOODHOUSE v. Commissioners of Inland Revenue', (1936) 20 Tax Cas 673, which related to a case of annuity and as the annuity was not paid to the appellant-assessee though the company was solvent and was in a position to meet the investments in full, it was held that the amount not paid was not chargeable to income-tax. The distinction between commercial accounts and other cases was adverted to by Lawrence, J. in the judgment where he observed:

"In this case in my judgment the matter is governed by the decision of the Court of Appeal in DEWAR v. Commissioners of Inland Revenue', (1935) 2 KB 351. The Court is dealing in this case with an annuity, and not with 'Commercial accounts'. The Commissioners have decided the case against the appellant on the ground that he, the taxpayer, could have obtained payment of this annuity had he wished but he voluntarily left the money with the company, and he could have obtained it at any time if he so desired. It is clear from the decision in 'DEWAR'S CASE' (1935) 2 KB 351, that that is not sufficient. The Commissioners have not found in this case that the annuity was paid to the appellant, or that he received it, or that he enjoyed it, or that he exercised dominion over it."

(14) The decision in 'COMMISSIONER OF INLAND REVENUE v. HAMILTON RUSSEL'S EXECUTORS', (1943) 1 All E R 474: 25 Tax Cas 200, on which reliance was placed on behalf of the Income-tax Commissioner may be considered here in order to follow the chronological order of the decisions. There the decision in 'DEWAR'S CASE', (1935) 2 K B 351, was distinguished. The question really was concerned in that case with the ownership of the income which was admittedly in existence, (i.e.) whether it belonged to A or B and not whether, as in the 'DEWAR'S CASE' (1935) 2 KB 351, the income 'existed at all' which could be brought for assessment. It is unnecessary to burden this judgment by a detailed examination of the facts of that case as in the judgment of Luxmoore, L. J. at page 476 in the concluding paragraph on that page, the distinction between the two classes of cases, i.e., between the 'DEWAR'S CASE', (1935) 2 K B 351, and the case which arose for decision before him was clearly pointed out. It was stated:

"The question determined in 'DEWAR'S CASE' (1935) 2 KB 351, was in effect whether income existed which could be brought into assessment. That question was answered in the negative because the interest, although admittedly exigible in law, was never paid or claimed and, therefore, had no existence. In the present case there was unquestionably income in existence, namely, the interest which accrued due on the trust investments and the accumulations during the period from April, 5, 1938, and January 18, 1939. Consequently the question is not 'Is there any income?' but 'To whom did the income, which admittedly existed, belong'. In our judgment there can only be one answer to this question. It belongs to G. L. Hamilton-Ressel."

The decision in 'COMMISSIONERS of Inland Revenue v. Lebus', (1946) 1 All E R 476, also applies the principle of 'DEWAR'S CASE' (1935) 2 KB 351, and distinguishes the decision in 'COMMISSIONERS of Inland Revenue v. Hamilton-Ressel's Executors', (1943) 1 All E R 474. The facts were: a partner of a firm bequeathed to his trustees one quarter share of the profits of the business on trust to pay what they received in respect of it to the widow. The widow's share of the profits amounted to a large sum during the year of assessment but as the business was not in a flourishing state owing to financial stringency it was unable to pay the amount. The widow was assessed to surtax on the amount though it was not received by her. The Court of Appeal held that the amount was no assessable. Lord Greene, M. R., drew a distinction at page 480 between the possession of profits of the remaining partners to carry on the business from the point of view of assessability and the profits to which the widow was entitled to receive from the firm. The widow was entitled to an equal one-quarter share of the profits from the partners and receive it. The argument of the Crown was that the partners carried on the business as trustees for her. The Master of the Rolls dealt with this contention in the following passage:

"It is said they are trustees for her of one-quarter share of the profits of the business. What does that mean? If it means that she is beneficially interested in the business and its assets, that is one thing; but, with all respect, it is quite untrue. She is not. If on the other hand, all it means is that she is entitled to call for one-quarter share of the profits and receive it, it means something totally different. If it means only the latter, then I cannot myself see how she can be said to have received any income, unless and until she has received her share of the profits. The Crown puts her, in substance, in exactly the same position as if she had been a partner for these purposes. The argument failed to realise why it is that a partner has not received his share of profits nevertheless is liable to taxation in respect of those profits. It is because he is a joint owner of the business and its assets. As soon as the accounts show a profit the partnership has made a profit for income-tax purposes. On the other hand, a person who is only entitled to payment by the partners of a share of the profits has no proprietary interest in anything whatsoever unless and until it is paid over."

These decisions fully support the position taken up on behalf of the assessees. A similar view was taken in Indian Courts in 'S. M. CHITNAVIS v. Commissioner of Income-tax C. P. & Berar', (1929) 3 ITC 321 (Nag)FB, and by Sadasiva Ayyar J. in his dissenting judgment in 'SECRETARY to the Board of Revenue, Income-tax, Madras v. Arunachalan Chettiar', 44 Mad 65.

(15) It has been strenuously argued by Mr. Rama Rao Sahib on behalf of the Income-tax Commissioner that this test would not apply to the case of profits of a business which are computed on the basis of accounts maintained by an assessee on mercantile accountancy system. In such a case very often the receipts and the expenditure are not actual receipts or actual expenditure but are

notional. If that be the case and if the profits of a business were assessed even though not received and are merely notional receipts how could it be justified as income and as chargeable to tax on the principle of the decisions above referred to? The answer to this contention in my opinion has been foreshadowed by Lord Wrenbury in 'ST. LUCIA's CASE', (1924) A C 508, and by Greene, M. R. in 'COMMISSIONERS of Inland Revenue v. Lebus', (1946) 1 All E R 476, and even by Lord Hanworth M. R. in the 'DEWAR's CASE', (1935) 2 K B 351. Where the commercial accountancy prevails, it is an exception to the normal rule that the income must be some money which is at the disposal of the assessee and which he could call and use at any time. Section 13 of the Act introduces this exception and the scheme of Ss. 3, 4, 6 and 13 was critically examined by Iqbal Ahmad, C. J. in a Full Bench decision in 'COMMISSIONER of Income-tax v. Shingari Bai', ILR (1945) All 577. The Learned Judge explained the difference between the two systems of accountancy at page 577 in the following passage:

"Under this system (the mercantile accountancy system) the net profit or loss is calculated after taking into account all the income and all the expenditure relating to the period, whether such income has been actually received or not and, whether such expenditure has been actually paid or not. That is to say, the profit computed under this system is the profit actually earned, though not necessarily realised in cash, or the loss computed under this system, is the loss actually sustained, though not necessarily paid in cash. The distinguishing feature of this method of accountancy is that it brings into credit what is due immediately it becomes legally due and before it is actually received; and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed. The 'mercantile accountancy system' is the opposite of the 'cash system of book-keeping' under which a record is kept of actual cash receipt and actual cash payments, entries being made only when money is actually collected or disbursed. In actual business practice, however, the systems of book-keeping followed in many cases are such that they can be called neither the full 'mercantile accountancy system' nor the cash basis of book-keeping. They are simply mixtures of the two systems and are styled as 'Hybrid Systems of Book-keeping'."

Bearing these considerations in mind, the learned Judge, after examining in detail all the provisions of the Act summarized his conclusion at page 584 in these terms:

"From an examination of Ss. 3, 4, 6, 10 and 13 the conclusions that I draw are these. The charge of Income-tax is, in accordance with and subject to the provisions of the Income-tax Act, a charge on all income, profits and gains of the assessee of the year by reference to which it is to be calculated. The income, profits and gains of an assessee are taxable, subject always to the provisions of the Act, from whatever source they are derived, whether as a matter of origin or of geography, provided they accrue or arise to or are received by the assessee in British India, or are deemed so to accrue or arise or to be received. Receipt, either actual or deemed as such is not made by income-tax law a condition precedent to taxability. Under the head of source 'business' what are charged are the profits and gains of the business; and that profit and those gains do not escape tax by reason only of the fact that they are not received in the accounting year in money or the equivalent of money, or are not 'deemed' to be so received. They are taxable, if they have arisen 'or accrued', or are under the Act 'deemed' to have 'arisen' or 'accrued', to the assessee in the accounting year, just as much as if they had been 'received' or were 'deemed' to have been 'received' in that year. Finally, so far as is material for our present purpose, the assessee is given a choice of the manner in which the calculation of his profits and gains shall be made by reference to the system of accounting which he has himself adopted for the purpose of his own business. Where the assessee has himself chosen a 'mercantile' basis, then the Income-tax Officer is 'bound' to concede that basis to the assessee, provided the assessee's accounts, regularly kept on that basis, afford a proper and sufficient means of deducing what the profits or gains on that basis have been. In such a case the Income-tax Officer has no option but to do what he has done in the present case, that is to say, to take the assessee's own method of accounting and to compute from it what profits or gains had 'arisen' or 'accrued' to (not merely been 'received by) the assessee according to it. For the purpose of reaching these conclusions, I have deliberately excluded from my mind S. 10 (2) (xi) which was only added to the section by the Income-tax (Amendment) Act, 1939. If it should be the case that the 1922 Income-tax Act, as unamended in this respect, left it open for a case possibly to arise, in spite of S. 48-A of the Act, in which the assessee might become liable to pay tax on profits or gains of his business which he never ultimately received, I should still be unable to find in that circumstance a sufficient reason for confining the operation of the charge of tax only to money or its equivalent actually received or deemed to have been actually received by the assessee, in the face of the plain language of the Income-tax Act to the effect that the receipt of money is not the sole test of chargeability."

Of course, S. 10 (2) (xi) which was added by the Amending Act, 1939, makes it clear that where the accounts are maintained on cash basis deduction for bad debts is permissible to the extent provided by that sub-clause. I respectfully agree with the reasoning and conclusion of the learned Judge Iqbal Ahmad, C. J. and I am also of opinion that the principle of S. 13 stands on a different footing and is really an exception to the rules contained in the earlier sections regarding the income which is chargeable to tax.

(16) In the light of these principles it is clear that in the present case the test of an income as defined by the Act and as interpreted by the decision examined is not satisfied. The learned counsel for the Income-tax Commissioner does not seriously dispute the principle of those decisions but he strongly presses upon us the argument that even applying that test the sum in question was really owned by the assessees and was in fact admitted by the mills and admitted by them also that they were holding the moneys for the benefit of the assessees since the claim of the mills was that they were entitled to apply the amount for the discharge of the debts due by the managing agents to the Mills; and, he, therefore, argued that under those circumstances it is money really in the hands of the Mills and at the disposal of the managing agents which they could have called upon either to pay it to themselves or to adjust it towards the debts. But the attitude taken by the directors was that they would not pay the amount unless the question of writing off the indebtedness was decided either by arbitration or by the general body. They had kept the money in suspense and

resisted the claim made by the managing agents. It is, therefore, money which was not available and which was at the disposal of the managing agents. They could not have called up the money as if it was money lying in their bank account or money held by an agent on their behalf and for their benefit and use. This case on the facts, if any, is stronger from the point of view of the assessee than the facts in 'DEWAR's CASE', (1935) 2 K B 351. There the assessee voluntarily abstained from calling the money which he would have got readily as the estate was solvent. As there is conclusive finding in the present case, that the resolution of the board of directors was not collusive in nature, it must be held that the sum in question was not income assessable to tax.

(17) The second question therefore must be answered in the affirmative and in favour of the assessee.

(18) The decision in this case, it has been agreed, governs the decision also in Referred Cases Nos. 32 and 56 of 1947. The assessee is entitled to his costs in R. C. 76/46 which we fix at Rs. 250/- and no costs in R. C. 32 and 56/47.

(19) 'Referred Case No. 78 of 1946': This case relates to the assessment year 1943-44 and also relates to the commission and remuneration of the managing agents which amounted to a sum of Rs. 2,20,702. Two questions were referred to us and are set out in the statement of the case. As there is no impediment for drawing this amount from the mills as in the other case, the Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal decided the claim against the assessee. The amount seems to have been credited also in the accounts of the mills to the credit of the assessee. I have already found that no accounts were maintained by the assessee and there is no cash basis for the previous assessment. In these circumstances, the amount was rightly assessed to tax. There is another question in this case which relates to a sum of Rs. 81,023. That is covered by the second question referred to us in this reference. This sum it was claimed is exempt from taxation on the ground that it represents really commission on sales carried on in a native state. But this claim was rejected by all authorities concerned and on an examination of the facts it turned out that it does not really represent commission on sales but really remuneration fixed by a later arrangement for the managing agents on the nett profits earned by the mills at 5 per cent. The argument therefore that it was really commission on sales does not arise as the facts are not as assumed by the assessees.

(20) The result therefore is that the first question referred to us in this case must be answered in the affirmative and against the assessees and the second question in the negative and against the assessees. The assessees have failed in this reference and are bound to pay costs to the Income-tax Commissioner which we fix at Rs. 250/-.

(21) VISWANATHA SASTRI J.: These four references have arisen out on the assessment of the firm of K. R. M. TT. Thyagaraja Chetty & Co., hereinafter referred to as the firm", to income-tax for the assessment years 1942-43 and 1943-44, and to excess profits tax for the year 1942-43.

(22) The firm, consisting of a father and his two sons, is the managing agent of a limited company running a cotton mill known as the Sree Meenakshi Mills, Ltd., Madura. Under Art. 130 of the Articles of Association of the Company, the management of the business of the company, vested in the firm as managing agent, subject to the general supervision of the directors. Under Art. 135, the managing agent was empowered to exercise all such powers and do all such acts and things as might be exercised or done by the company which were not expressly directed or required to be done by the directors. Under the terms of the managing agency agreement, the firm was empowered to have charge and custody on behalf of the company of all the property, the books of account and papers and documents of the company. The firm was given full

> "liberty to retain, re-imburse and pay themselves out of the funds of the company all charges and expenses and all the costs and expenses of providing and maintaining offices for the company .....and all monies expended by them on behalf of the company and all sums due to the said firm for commission or otherwise."

(23) During the year of account ending 31-3-1942, the firm was entitled, as managing agent, to a monthly remuneration of Rs. 1,000/- and a commission of 10 per cent. of the net profits of the company and a small percentage on sales of yarn effected by the company. The commission earned by the firm and payable to it during the year of account ending 31-3-1942 amounted to Rs. 2,26,850-5-0. The firm was indebted to the company in the sum of Rs. 2,04,058-11-8 at the end of the year of accounting ending 30-3-1942. On 30-3-1942 it is stated that the firm wrote a letter to the directors of the company to the effect that the debt due by the firm should be remitted and written off the books of the company and the commission of 10 per cent. of the profits and the percentage on sales of yarn should be paid over to the firm. This letter is not part of the printed record and was not placed before us. A further communication bearing date 30-3-1942 from the firm to the company contained a proposal that the firm should hold a general supervision of the affairs of the company and that the purchase of cotton and raw materials and the sale of yarn and other products should be entrusted to other agencies from 1-4-1942, the firm foregoing a half of the 10 per cent. commission on net profits and the entire percentage of commission in regard to sales of goods. On 30-3-1942 the directors resolved that the sum of Rs. 2,26,850-5-0 earned by, and payable to, the firm as managing agency commission for the account year 1941-42 should be kept in suspense till the question of writing off the debt due by the firm to the company was decided, which matter was directed to be placed before the next meeting of the directors. By another resolution dated 30-3-1942, the Board of Directors accepted the proposal of the firm and agreed that Sundaram and Company, Ltd., of which Sundaram Chettiar, one of the sons of Thyagaraja Chettiar and a partner of the firm, was the managing director, should be paid the commission of 1/2 per cent. on all purchases and a commission of 5 per cent. of the profits of the Company even before allowing for depreciation and that Manickavasagam and Company, Ltd., of which Manickavasam Chettiar, another son of Thyagaraja Chettiar and a partner of the firm, was the managing director, was to get 1 per cent. commission on all sales effected on behalf of the company. With regard to the year of account ending 31-3-1943, a sum of Rs. 2,20,702/- was earned by the firm as its managing agency commission of 5 per cent. on the profits of the company, the remaining 5 per cent. of the profits and the percentage commission on sales and purchases having gone to the limited companies, each managed by a partner of the firm. This sum of Rs. 2,20,702/- was credited to the firm in the accounts of the company while the sum of Rs. 2,26,850-5-0 earned in the year of account 1941-42 was meant to be kept in what was styled a "sus-

pense account", in the proceedings of the directors. Out of the sum of Rs. 2,20,702/- representing the profits of the managing agency commission earned by the firm in the year of account 1942-43, the firm claimed that a sum of Rs. 81,023/- was earned in Indian States outside British India, for work done in connection with the business of the company in those places. The firm had other sources of income besides the managing agency commission, in the shape of an insurance agency and a ginning factory run in the name of the wife of one of the partners. There is now no controversy regarding the taxation of the income of the firm from these other sources.

(24) In the proceedings for the assessment of the firm to income-tax for the assessment years 1942-43 and 1943-44, the firm claimed (1) that no part of the sum of Rs. 2,26,850-5-0 earned in 1941-42 and purporting to be kept in "suspense account" represented the firm's income, profits and gains of that year; (2) that the above income had neither accrued nor arisen, nor had it been received by the firm in the year of account 1941-42; (3) that therefore, neither income-tax nor excess profits tax was payable in respect of the said sum; (4) that the sum of Rs. 2,20,702/- earned by the firm as its managing agency commission in the year of account 1942-43 was not assessable as the income of that year by reason of the crediting of the sum to the firm in the books of account of the company without its actual receipt by the firm; and (5) that in any event the sum of Rs. 81,023/- out of the sum of Rs. 2,20,702/- was not assessable to tax by reason of S. 14, sub-s. (2) Cl. (c) of the Income-tax Act as the income of the year of account 1942-43, as it accrued or arose to the firm in Indian States and was not remitted to, or received in, British India. The Income-tax Officer and the Appellate Assistant Commissioner negatived these contentions of the firm and assessed it to income-tax for the assessment years 1942-43 and 1943-44 and to excess profits tax for the year 1942-43 on an amount which included the aforesaid sum of Rs. 2,26,850-5-0 in the income, profits and gains of the year of account 1941-42 and to income-tax for the year 1943-44 on a sum which included the sum of Rs. 2,20,702/- in the profits and gains of the year of account 1942-43. The Appellate Tribunal held that the sum of Rs. 2,26,850-5-0 was not assessable either to income-tax or to excess profits tax as the income profits and gains of the firm for the year of account 1941-42, but rejected the other contentions of the firm. The questions referred to us have been set out in the judgment of my learned brother and need not again be repeated.

(25) The contention of Mr. Alladi Krishnaswami Ayyar for the firm is that there must be an actual or constructive receipt of money as 'income' by the tax-payer before he could be charged with income-tax and that in this case there was no arising or accrual of 'income' to the firm, much less a receipt thereof, in either of the two account years 1941-42 and 1942-43. He argued that the firm's accounts had been kept only on a cash basis and therefore only such sums as were received by the firm either in each or by adjustment in the accounts, could be considered to be its income, profits and gains liable to be assessed to tax and not debts which had become due but had not been paid ever to, or received by, the firm. With reference to the year of account 1941-42 he argued that whatever be the basis of accounting, the sum of Rs. 2,26,850-5-0 kept in suspense by the company in the year of account could, in no sense, be considered to be the income of the firm, as it had no control or dominion over the money and it could not have drawn out the money at its will. This sum, it was said, was in no event liable to income-tax or excess profits tax. Lastly he contended that the sum of Rs. 81,023/- out of the sum of Rs. 2,20,702/- earned by the firm in the year of account 1942-43 accrued or arose, in Indian States outside British India and not having been brought into, or received in British India, was not liable to tax. This last contention was confined to the year of account 1942-43. Mr. C. S. Rama Rao Sahib, for the Revenue authority, disputed the correctness of every one of these assertions. The arguments before us have covered a very wide ground and have centred round the concept of "income, profits and gains," and the mode of ascertaining or computing them for purposes of income-tax. Before dealing with the legal contentions, it is desirable to clear the ground by a reference to certain features of the case relating to the accounts on the basis of which the income, profits and gains of the firm have to be ascertained.

(26) Though the managing agency of the Sree Meenakshi Mills, Ltd., is its main source of income, the firm has an insurance agency and a ginning factory at Rajapalayam run 'benami' in the name of the wife of the managing partner, as additional sources of income. In the assessment order for the year 1942-43, the income tax officer stated that the firm maintained and produced some account but it does not appear whether it related to the firm's business as a whole or only to a portion of its business. In this Court, however, the firm's learned counsel stated that it was the company that kept the accounts of the firm by opening ledger pages for the remuneration and commission paid to the firm and that this account showed that only cash payments were made to the firm except for adjustment entries in respect of a few minor items. It was stated that the firm had no accounts of its own except the entries relating to the firm in the books of account kept for the company by the firm. It is argued that the method of accounting regularly adopted by the firm was on a cash basis. Unfortunately for this argument, which appears to have been implicitly accepted by the Tribunal, a perusal of the assessment orders based on the returns furnished by the firm, for the assessment years 1940-41 and 1941-42, shows that the firm's method of accounting accepted by the department was the mercantile basis. No accounts of the firm were produced in respect of the managing agency business and the return of income made by the firm was accepted in the assessment year 1940-41 and also in the year 1941-42 subject to the disallowance of certain deductions claimed. Though no accounts were kept by the firm for its business receipts from all sources, still, since the firm was the managing agent of the company and kept the accounts of the company which included payments made to, or amounts drawn by, the firm as managing agent from time to time, the ledger folio of the firm in the books of the company, would be accounts of the firm and these accounts were kept on a cash basis. So ran the argument of the learned counsel for the firm. It is clear that the accounts of the company were not kept on a cash basis. Indeed, this very sum of Rs. 2,26,850-5-0 which has not been paid to the firm has been debited as a revenue expenditure of the company and as having been paid to the firm in the accounts of the company kept by the firm and has also been allowed as a deduction in computing the profits and gains of the company for purposes of income-tax for the year of account 1941-42. The mere fact that the firm drew its monthly remuneration and managing agency commission from the company in cash, subject to a few adjustment entries, does not mean that the company, or the firm, kept its accounts on a cash basis. Even in an account kept on a mer-

cantile basis it is not unusual to find cash credits and debits. There is no material or evidence in support of the assertion of the firm accepted by the Tribunal that the firm was being assessed on a cash basis in the prior years. Such evidence as there is in the case leads to the contrary conclusion. It is the method of accounting adopted by the assessee, it is his system of book-keeping, it is his choice of the cash basis or the mercantile system of accountancy as his habitual mode of keeping accounts that is relevant under S. 13 of the Act. Neither the mode of accounting adopted by the company nor the assessee's choice for a particular year determines the method of accounting of the firm under S. 13 of the Act. The answer to the question referred to us in Referred Case No. 56 of 1947 must be in negative and against the assessee. I hold that there is no material for the finding of the Tribunal that the firm was being assessed on a cash basis in the years prior to the year of account 1941-42. Indeed, the findings of the Tribunal on this point with regard to years of account 1941-42 and 1942-43 are mutually inconsistent and self-contradictory. On a cash basis it is clear that the calculation must be based on actual receipts in the year of computation. In respect of the year of account 1942-43, the Tribunal has held that the sum of Rs. 2,20,702/- earned as managing agency commission by the firm was assessable to income-tax, though the amount merely stood as a credit to the firm in the books of the company and had not been drawn by the firm.

(27) Even so, it is contended by the learned advocate for the firm, that no income in the shape of managing agency commission accrued or arose to the firm during the two years of account now in question. In his characteristic style, Lord Macnaghten begged to remind people half a century ago, that income-tax was a tax on 'income' and was not meant to be a tax on anything else: 'LONDON County Council v. Attorney General', (1901) AC 26 at p. 35. The same exhortation has now been repeated by the tax-payer's learned counsel, though Lord Macnaghten was merely repelling the contention of the Attorney General that income-tax could be levied on capital.

(28) The word 'income' used in S. 3 of the Income-tax Act of 1918 has been expanded into 'income, profits and gains' in S. 4 of the Act of 1922. Income-tax is levied in respect of the total income of the previous year under S. 3 of the Act subject to the provisions of the other Sections. Section 4 refers to the total income of any previous year of any person as including all "income, profits and gains" from whatever source derived, the rest of the section not being now material. The legislature has not defined the term "income, profits and gains" and the task of definition has baffled the Courts. The Judicial Committee, after a not very successful attempt at definition by recourse to figures of speech in 'COMMR. of Income-tax v. Shaw Wallace & Co.', 59 Cal 1343 (PC) and after making a tautologous observation that "anything which can properly be described as income is taxable under the Act unless expressly exempted" in 'GOPAL NARAIN SINGH v. Commr. of Income-tax B & O', 14 Pat 552 (PC) had finally to reconcile itself in 'KAMAKSHYA NARAIN SINGH v. Commr. of Income-tax, B & O', 22 Pat 713 (PC) to the position that the word "income" was a word of the broadest connotation and impossible of definition in any precise formula. The English Courts, however, had evolved, many years ago, a working rule that the term "profits and gains" in connection with income-tax, was to be understood in its natural and ordinary sense, in a sense which no commercial man would misunderstand. "Profits and gains" were ascertained on ordinary principles of commercial trading by setting off against the receipts, the expenditure or obligations to which they have given rise and which were necessary for earning the receipts. See per Lord Selbourne L. C. in MERSEY Docks and Harbour Board v. Lucas', (1883) 8 AC 891 at pp. 903-904; per Lord Herschell in 'RUSSEL v. Town and County Bank', (1888) 13 AC 418 at p. 424, per Lord Halsbury L. C. in 'GRESHAM Life Assurance Society v. Styles', (1892) A C 309 at p. 315; per Lord Buckmaster in 'NAVAL Colleiry Co., (1897) Ltd. v. Inland Revenue Commrs.', (1928) 12 Tax Cas, 1017, at pp. 1047, 1048. The expression "receipts" in the above context does not mean only cash receipts; or even sums which are receivable immediately. In ordinary commercial practice where goods are sold on credit, say of three or six months, or even more, traders are in the habit of treating the debt so created as part of the profits of the year in which the debt is incurred. The obligations so incurred are treated as firm obligations and as good as cash in hand. If expectations are disappointed, an allowance for bad debts, if claimed, will be granted. 'ABSALOM v. Talbot', (1944) AC 204, at p. 215. Thus, apart from any express provision, a deduction for debts proved to be bad is implicit in the very idea of profits & gains according to this mode of accounting. See 'COMMR. of Income-tax C.P. & Berar v. S. M. Chitnavis', 59 Ind App 290 (PC). Similarly, where a trader, in the course of his trade, acquires, or receives, a new and valuable asset other than cash which is not immediately realisable, that asset, for the purpose of computing the annual profits or gains accruing or arising to him from his trade, should be valued as at the end of the accounting period in which it was acquired or received, even though it be neither realised nor is realisable till at a later date. GOLD Coast Selection Trust Ltd., v. Humphreys', (1948) AC 459; 'HARRISON v. Cronk & Sons, Ltd.' (1937) AC 185. Conversely, an item becomes a debt due from the business and an admissible set-off against the receipts side of the account on the day on which it becomes a debt due from the business, though the date of its actual payment has not arrived. This method of accountancy is generally known as the "mercantile accountancy system" or "the book profits system" as distinct from the cash system of book-keeping.

(29) The distinction between the two methods of accounting is well brought out in the following passage from the judgment of Sir Iqbal Ahmad C. J. in 'COMMISSIONER of Income-tax v. Shingari Bai', ILR (1945) All 577 F. B.:

> "Under this system (Mercantile Accountancy System) the net profit or loss is calculated after taking into account all the income and all the expenditure relating to the period, whether such income has been actually received or not and, whether such expenditure has been actually paid or not. That is to say, the profit computed under this system is the profit actually earned, though not necessarily realised in cash, or the loss computed under this system is the loss actually sustained, though not necessarily paid in cash. The distinguishing feature of this method of accountancy is that it brings into credit what is due immediately it becomes legally due and before it is actually received; and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed. The 'mercantile accountancy system' is the opposite of the 'cash system of book-keeping' under which a record is kept of actual cash receipts and actual cash payments, entries being made only when money is actually collected or disbursed."

There was nothing in the Income-tax Act of 1918 against the adoption of this system of mercantile

accountancy by a trader in computing his income for purposes of assessment to income-tax. Section 13 of the Income-tax Act of 1922 expressly recognises this system as a basis for the computation of profits and gains.

(30) Reliance was placed by the learned Advocate for the assessee on the decision of the Full Bench of this Court in 'SECRETARY to the Board of Revenue, Income-tax Madras v. Arunachalam Chettiar,' 44 Mad 65 F.B., where Wallis C. J. who delivered the leading judgment of the Court observed that S. 9 of the Income-tax Act of 1918 was identical with the corresponding provision in Sch. D of the English Act relating to taxation of business profits and purporting to follow the decisions of the English Courts, held that interest becoming due to a money lending business in the year of account but not realised in cash or by adjustment in the accounts was not liable to tax. With greatest respect to the learned Chief Justice, he was under a misapprehension as to the English Law and practice with reference to the computation of business profits and gains for purposes of income-tax. I have already referred to the leading English decisions. In any case, this decision is no longer of any authority in view of the assessability of "profits and gains" under the Act of 1922 and the provision contained in S. 13 of the Income-tax Act of 1922. The case of 'S. M. CHITNAVIS v. Commissioner of Income-tax, C.P. & Berar', 3 ITC 321 (Nag) FB decided by a Full Bench of the Nagpur High Court was next relied upon. This decision was reversed on appeal by the Judicial Committee in the case reported in 'COMMISSIONER of Income-tax, C. P. & Berar v. S. M. Chitnavis', 59 Ind App 290 (PC). Further, I am of opinion that the decision was erroneous in so far as it decided that unrealised interest, though credited to the interest 'katha' in the accounts of a money lending business kept on a mercantile basis, could not be "income, profits and gains" of the money-lending business under the Act of 1922. The decision in 'JAGMANDAR DAS v. Commissioner of Income-tax', 57 All 737 cited by the learned counsel for the assessee to the effect that interest unrealised in the year of account can never be taken into account for the purpose of income-tax, has been rightly overruled by the later decision of the Allahabad High Court in 'COMMISSIONER of Income-tax v. Shingari Bai', ILR (1945) All 577 F. B.

(31) The Indian Legislature has, in recognition of the system of mercantile accountancy as a proper basis for the computation of the income, profits and gains for income-tax purposes, enacted S. 13 of the Act of 1922 and superseded the decisions cited by the learned counsel for the assessee. It is significant that in S. 10 of the Act, relating to "business, profession or vocation", the words "profits and gains" alone are used without the word "income", thereby indicating that the system of mercantile accountancy is more appropriate to reflect the true income in such cases than a cash system of book-keeping, though the latter method is not prohibited. Under S. 13 of the Act it is incumbent on the income-tax Officer to compute the profits and gains of the assessee in accordance with the method of accounting regularly employed by him. Even when there is such a method of accounting, it is the duty of the Income-tax Officer to consider whether the income, profits and gains can be properly deduced therefrom and to proceed according to his judgment on the question. 'COMMISSIONER of Income-tax v. Sarangpur Cotton Manufacturing Co., Ltd.', ILR (1938) Bom 239 (P.C.).

(32) I have held that the firm's contention that its accounts were regularly kept on a cash basis is without any foundation. No accounts of the firm for the years of account 1941-42 and 1942-43 were produced. The entries in the books of the company showed that the accounts of the company were kept by the firm on the mercantile accountancy basis. The assessments of the firm for the years 1940-41 and 1941-42 were based on the returns sent by it and these assessments proceeded on the basis of the mercantile accountancy system. In these circumstances, the Income-tax Officer and the Appellate Assistant Commissioner, came to the conclusion that the mercantile accountancy system would truly reflect the income, profits and gains of the firm during the years of account now in question and assessed the firm, to income-tax on the profits and gains computed according to that system. On the footing that no accounts were maintained, or that no method of accounting was regularly employed by the firm, the Income-tax Officer was entitled, under the proviso to S. 13, to make the computation of the income, profits and gains of the firm upon such basis and in such manner as he might determine to be just and proper in the circumstances. As a result of the combined operation of Ss. 3 and 4 of the Act, all income, profits and gains accruing or arising to the firm in the years of account 1941-42 and 1942-43, though not received, are assessable to tax in the succeeding assessment years. The revenue authority considered that the sums of Rs. 2,26,850-5-0 and Rs. 2,20,702/- were profits and gains of the managing agency that had accrued to the firm in the two years of account above referred to. This position is contested by the learned counsel for the assessee on the ground that no "income, profits or gains" had accrued to the firm but only a debt or liability of the company to the firm had come into existence and that tax was not attracted.

(33) In a taxing enactment which selects the income, profits and gains of a tax-payer as the measure of his liability, it stands to reason that only the true income, profits and gains should be included in his assessment and income is not to be attributed to a tax-payer by a fiction unless the Act sanctions such a course. It is true that mere expectations, anticipations or possibilities cannot be cashed in for the purpose of charging the tax. At the same time, the right of the State to charge tax cannot be made to depend solely on the way the tax-payer chooses to frame or exhibit his accounts for purposes of income-tax. 'EDINBURGH Life Association Co. v. Lord Advocate', (1910) A C 143, at p. 165; 'GLENBOIG Union Fire Clay Co., Ltd. v. Inland Revenue', (1922) 12 Tax Cas 427. There is nothing in sections 3 and 4 of the Act which makes "receipt" (either actual or "deemed") a necessary condition of chargeability. Section 10 of the Act deals with the "profits and gains" of a business, profession or vocation, on the same footing. Section 10 (2) (xi) of the Act recognises the mercantile accountancy system as a proper mode of computation of the profits and gains of a business or vocation. The assessee is a firm consisting of a father and his two sons, formed for the purposes of making profits by carrying on a business (Compare S. 4 of the Partnership Act). One of the firm's business, perhaps its main business, was the managing agency of the company. As managing agent, the firm ran the mills, bought and sold goods and kept accounts on behalf of the company. It is no doubt true that, as pointed out by my learned brother during the arguments, a managing agency is spoken of as an office in Ss. 87-A to 87-C of the Companies Act. It is however significant the company has not deducted the tax even on the monthly remuneration of Rs. 1000/- paid to the firm, which it would be bound to deduct under S. 18 of the Act if the remuneration were regarded as a salary. On the other hand the monthly remu-

neration of Rs. 1,000/-, the commission of 10 per cent. on the nett profits and the percentage of commission on sales of goods, have all been treated as profits of the managing agency business both by the company and the firm. If the remuneration is viewed as a salary then, under the provisions of S. 7 of the Act, the managing agency commission would be liable to tax in addition to the monthly salary. In TATA Hydro Electric Agencies Ltd. v. Commr. of Income-tax Bombay Presidency & Aden', ILR (1937) Bom 388 at p. 399 (PC) Lord Macmillan treated the profits and gains of a managing agent remunerated by a percentage of the profits of the company as business profits to which S. 10 of the Income-tax Act would be applicable and the managing agency itself as a business. That the remuneration of a managing agent can be considered to be part of the profits of the managing agent's business for the purpose of excess profits tax is recognised in S. 7(2)(b) of Act XV of 1940. In the case of traders carrying on business and even in respect of persons pursuing a profession or vocation, S. 10 read with S. 13 allows the computation of profits on an earnings basis that is to say, the trade debts which fall due to the tax-payer during the year are credited and allowance is made for bad debts. This method of accounting is permissible even in the case of profits and gains which do not fall under S. 10 but under the residuary S. 12 which, according to my learned brother, would apply to the managing agency profits. Where the accounts of a trader are not systematically kept on a cash basis so as to constitute it his method of accounting within the meaning of S. 13, it is open to the revenue authority to take into account book debts owing to him as part of his income, at least where the book debts fall due during the year in respect of which he is making his return, subject to the allowance for bad and doubtful debts. Subject to such allowance, book debts can properly be regarded as part of a trader's income. Section 13 of the Act recognises the legality of such a mode of computation of income, profits and gains even in cases to which S. 12 of the Act applies.

(34) There is no rule in the English statute corresponding to S. 13 of the Act. Rule 3(1) of the rules applicable to cases I and II of Schedule D of the English Act provides that in computing the amount of profits and gains to be charged, no sum shall be deducted in respect of any debts except bad debts proved to be such. The rule that traders must include book debts owing to them but still unpaid, depends on the taxation of their income in the sense of the profits and gains of their trade or business, and upon the terms of R. 3(1) above referred to, which imply that book debts must be included in the return with a corresponding deduction for bad debts. The ascertainment of the profits and gains of a trade or business necessarily involves an account with credit and debit items and in order to ascertain the profits of any trade or business such an account has to be taken. 'USHER'S Wiltshire Brewery Ltd. v. Bruce', (1915) AC 433 at p. 458. Where tax is levied upon a definite sum which is ascertained and without deduction of any amount, as for example, upon interest of money under Schedule D, Cl. (1), Sub-Cl. (b) of the English Act, no such account need be taken, specific sum of money alone being the subject of taxation. It is open to the tax payer to treat such a sum of interest as part of his income only when it has been actually received by him. Where trade debts are concerned it has been held by the House of Lords in the decisions already referred to, that trade debts which have accrued due in the year of account and which have not been paid, must be included for the purpose of ascertaining whether or not the person has earned a profit for the year, just as stock-in-trade at the beginning and end of the year is taken into account for the same purpose. The general principle is that an item becomes a trade receipt at the date on which it becomes due to the business irrespective of the date of its actual payment. 'ABSALSOM v. Talbot', (1944) AC 204, at p. 215. This principle has been extended not only to monies due for goods sold out even for services rendered. In 'DAILUAINE-TALISKER Distilleries Ltd. v. Inland Revenue', (1930) 15 Tax Cas 613 a case not cited before us, Lord Clyde observed:

> "It is elementary that a profit and loss account is not an account of receipts and expenditure 'in cash' only; its purpose is to show how the business stands, for better or for worse, on the operations of the year. Thus, if goods have been sold or delivered to a customer within the year, the sum due by the customer is credited into the business and debited to the customer and enters the profit and loss account at the end of the year, whether payment in cash (or otherwise) has been received within the year or not".

Lord Sands added the following observations:

> "In the present case we are not dealing with the price of goods but with payment for services rendered, but, as it appears to me, the same principle must apply. If there is a book debt for such services rendered during the year standing in the books of the business, this falls to be taken into account in estimating the profits of the year. In neither case does it matter whether non-payment is the result of default or of agreement to postpone payment. The book debt comes into account in estimating the profits of the year. The debt has accrued, and in estimating profits which have accrued, the debt must be taken into account".

If these principles are correct and are applicable to the present case, they determine the answers to the questions that arise for reference against the firm.

(35) Mr. Alladi Krishnaswami Ayyar for the assessee strongly combated this position by relying upon certain decisions, English and Indian, to which reference should now be made. In St. LUCIA Usines and Estates Co. v. St. Lucia', (1924) AC 508, the Judicial Committee had to consider whether a company was liable to pay income-tax upon "income" accruing and arising in the year 1921. The sum in question was interest on the purchase price of land which fell due in 1921 but was not paid in that year. The Judicial Committee held that the amount was not chargeable to income-tax in respect of the year 1921. Lord Wrenbury delivering the judgment of the Board observed as follows:

> "The words 'income arising or accruing' are not equivalent to the words 'Debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word 'income'."

It is obvious that the learned Lord was not attempting a general definition of assets under the Income-tax law and was alive to the distinction between "income" as used in S. 4 of the Ordinance in question in that case and the "profits and gains" of a trade or business. It is elementary that the profits and gains of a trade or business are taxable although they do not, in the true sense, come in as money; and Lord Wrenbury himself recognised this rule and observed:

> "It does not follow that income is confined to that which the tax-payer actually receives. Where income-tax is deducted at the source the tax-payer never receives the sum deducted but it

accrues to him. It is said, and truely, that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts — does not prepare a mere cash account — but values its book debts and its stock in trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so. But this is far from establishing that income arises or accrues from (as above instanced) an investment which fails to pay the interest due."

It will be seen that the Judicial Committee was dealing with a case where the only provision under which the tax could be charged was a provision relating to "income" arising or accruing. There was no provision for the ascertainment of profits and gains and for taxation of profits and gains when so ascertained. On the other hand there was a proviso to S. 4 Sub-s. (1) of the Statute that

"in respect of income derived from sources out of the colony only so much of such income as is received in the colony shall be chargeable to tax"

and this proviso was relied upon by the Board to assist and confirm their interpretation of the body of the Section as referring to monies "coming in" to the tax payer. The words of the Judicial Committee show that where it is necessary to calculate profits, it is necessary to take into account book debts. Under the Indian Income-tax Act, profits and gains as such are expressly included as the subject of tax whether they fall under S. 10 or under S. 12. In 'RAMAKUMAR KEDARNATH v. Commissioner of Income-tax', 1937-5 ITR 261 (Bom) it was held by the Bombay High Court that the decision in 'St. LUCIA case', 1924 AC 508 turned on the language of the Ordinance under construction in that case and was not an authority governing the assessment of profits and gains under the Indian Income-tax Act.

(36) Before I consider the other cases cited by the counsel for assessees which arose under the English Income-tax Act, it is necessary to analyse briefly the statutory provisions on whose construction the decisions turned. Under S. 100 of the English Income-tax Act of 1918, every person chargeable under the Act

"shall submit a return of the amount of profits or gains arising to him, from each and every source chargeable according to the respective schedules."

This provision is and has been interpreted as being subject to the schedules. Schedule D Cl. (1) omitting portions not relevant to the present case, runs as follows:

"Tax under this schedule shall be charged in respect of (a) the annual profits or gains arising or accruing (1) to any person residing in the United Kingdom from any kind of property whatever, etc. (2) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be carried on in the United Kingdom or elsewhere, (b) All interest of money, annuities and other annual profits or gains not charged under Schedules A, B, C or E."

Under the rule applicable to Schedule D, case I

"the tax shall extend to every trade carried on in the United Kingdom or elsewhere.....and shall be computed on the amount of the balance of the profits or gains" etc.

Under R. 1(a) of the rules applicable to case III

"the tax shall extend to any interest of money, whether yearly or otherwise, or any annuity or other annual payment.....whether the same is received and payable half-yearly or at any shorter or more distant periods."

Under R. 2 of Sch. D Case IV — Interest arising from foreign securities fell to be treated on a remittance basis and the tax had to be computed

"on the full amount so far as the same can be computed, of the sums which have been or will be received in the United Kingdom."

Observe that the words "accruing or arising" are used in connection with profits and gains of a trade and not in connection with interest, annuities or other annual payments which are all charged only if "received".

(37) The observations of Lord Lindley in 'GRESHAM Life Assurance Society v. Bishop', (1902) AC 287, 296 were relied upon by the counsel for the assessee particularly the following off-quoted passage in the judgment:

"But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

The case turned on the construction of the words "sums received in the United Kingdom" within the meaning of Rule 2 of the Rules applicable to case IV Schedule D of the English Income-tax Act, 1842 cited above. This was not a decision with reference to the assessment of the gains and profits of a business, profession or vocation. The question arose with reference to a liability to tax based on a remittance of foreign income and all that was decided was, that there could not be a remittance of income unless there was an actual receipt, which need not necessarily be in the shape of money or goods in value, but might consist of a settlement or adjustment of mutual accounts, without money passing and repassing. Income or profits arising abroad from foreign securities and retained or expended there might be shown in the accounts of a company in the United Kingdom, to which the income or profits accrue, but such mention in the accounts was in no sense a receipt of these profits and involved no liability to taxation under R. 2 of the Rules applicable to case IV Schedule D. This was all that 'GRESHAM Life Assurance Society v. Bishop', (1902) AC 287, at p. 296 decided. See the observations of Lord Halsbury at page 292 of the report. In such cases the income is assessed to tax in the year of receipt of the remittance in the United Kingdom even though the income might have accrued or arisen abroad earlier and might have been accumulated there by the assessee. 'SCOTTISH Widow's etc., Society v. Farmer', (1905 5 Tax Cas 502; 'SCOTTISH Provident Institution v. Farmer', (1912) 6 Tax Cas 34. It is here necessary to point out that in 1914 the necessity for receipt in the United Kingdom of income from foreign possessions, including stocks and securities, was done away with and thereafter the only words descriptive of income were "arising or accruing". In a case not cited to us, but which arose after the above change in the law, the Court of Appeal held that income from foreign possessions in the shape of stocks and shares may "arise", though the tax-payer is not in a position to enjoy it and may in fact, be prevented by law from drawing the money from abroad. It was a case of interest and dividends arising to a British tax-payer from investments in Germany consisting of securities, stocks or shares. The interest and dividends had been paid to the credit of the British Tax-payer in a German bank but owing to the War and for the duration of the war, the money could not

legally be drawn out by him. Nevertheless the Court held that the income arose during the year when the money was paid into the German Bank to the credit of the tax-payer and not in the year when they were remitted to England after the end of the war. The following observations of Lawrence L. J. are pertinent:

"It is also important to bear in mind that this is not a case where there has been a default in payment on the part of the persons or body liable to pay the interest and dividends as in the 'ST. LUCIA Case', (1924) AC 508 and 'LEIGH'S Case', (1928) 1 KB 73. What has happened here is that the interest and dividends have been duly paid to an agent of the owners competent to give a valid discharge to the payers, but the owner's right of disposal over such interest and dividends has been suspended or restricted during the war". 'SIMPSON v. Maurice's Executors', (1929) 14 Tax Cas 580.

(38) In 'LEIGH v. Inland Revenue Commissioner', (1928) 1 KB 73. Rowlatt J. referring to the chargeability of interest income, under the particular provisions of the English Act above referred to, observed that "receivability" without receipt was nothing for income-tax purposes. 'LAMBE v. Inland Revenue Commrs.', (1934) 1 K B 178, was a case similar to the previous one and Finlay J. held that where interest on a loan had not been paid and might never be paid, the amount of interest due ought not to be included in computing the tax-payer's income for income-tax purposes during the year during which it was payable. In 'DEWAR v. Commissioner of Inland Revenue', (1935) 2 KB 351 the tax-payer was entitled to claim payment in a particular year of interest on a legacy from the executors but did not claim and did not receive any interest. The Court of Appeal held that the legatee had not "received" any interest in respect of which he could be taxed. The legatee decided not to press for payment of interest and to allow the question to stand over though there was enough money in the estate for payment of interest, if it had been demanded. Mr. Alladi Krishnaswami Ayyar claims that this decision is decisive in favour of the assessee in this case, but I am unable to accept this contention. The case had to be decided not under Schedule D Cl. (1) Sub-cl. (a) but under Schedule D Cl. (1) Sub-cl. (b) which did not contain the words "profits or gains arising or accruing" but limited the charge to "interest received and payable". The leading judgment was that of the Master of Rolls whose reasons may thus be summarised. The legatee made no demand for payment of the legacy. The money representing the sum of interest had not been appropriated to the legatee or to his use by the executors. No personal debt or obligation had arisen as it could not be said that there was a debt when there had been no demand on the executors. The words of the charging provision were "received and payable" and these words could not be expanded into "accruing or arising". The following passage from the judgment of the Master of the Rolls bring out the reasons for his conclusion.

"The word 'payable' there does not mean; if you like to put out your hand and ask for the money it will then be payable to you; it is dealing with a sum which, whether yearly or otherwise, is in fact received, whether it is payable and in fact received half-yearly or at any shorter or more distant periods. That is the rule which applies here. Can it be said here that there has arisen a personal debt or obligation? Something more is required than the mere fact that there is a capacity on the part of the estate to pay the money if it should be demanded. The rule does not say, and it cannot be said, that there is a debt when there has been no demand." (Page 363)

Earlier in the judgment occurs the following passage:

"If the interest on the legacy in this case has not arisen to the respondent, if he has not become the dominus of this sum, if it does not lie to his order in the hands of his agent, can it be said that it has arisen to him? I think the answer definitely 'upon the facts' must be: No, it has not". (Page 362).

The learned Master of the Rolls was quite alive to the distinction between trade profits and gains and interest income, in the matter of chargeability, when he discussed the case of 'St. LUCIA USINEA and Estates Co. v. St. Lucia', (1924) A C 508 at p. 512. Romer L. J. observed that for purposes of income-tax, one does not take an account of income on the footing of wilful default, and the only question in the case was what income had been received by the assessee. These observations, of course, must be taken with the context of the case which referred only to the chargeability of interest income received by the assessee. Maugham L.J. after referring to some of the cases cited above, expressed his conclusion in these words:

"I do not regard those decisions as limited to cases where there is a debt and the debtor has committed default. I think in the present case two circumstances may be accurately stated in regard to the sum of £40,000 which, it is said, can be brought into charge. The first is that the sum of £40,000 was not, during the year of assessment, a debt due by the executors to Mr. Dewar, and secondly, that the sum in question may never be paid or received at all."

No liability and no debt had arisen in the absence of demand and in those circumstances no interest could be said to have been received by the legatee on the debt so as to make him chargeable. DEWAR's Case', (1935) 2 KB 351, in my opinion, goes no further.

(39) It is unnecessary to refer at length to the case of 'WOODHOUSE v. Inland Revenue Commr.', (1936) 20 Tax Cas 673 where Lawrence, J. merely purported to follow 'DEWAR's Case', (1935) 2 K B 351. But the following observation of the learned Judge is significant: "The Court is dealing in this case with an annuity, and not with commercial accounts". The next case cited was 'COMMISSIONER of Inland Revenue v. Hamilton-Russell's Executors', (1943) 1 All E R 474, where it was held that the accumulations of a fund by the trustees of a settlement for the benefit of a legatee who had attained the age of 21, represented the income of the legatee and were assessable to tax. The Testator's direction as to accumulation of income was legally unenforceable after the beneficiary attained the age of 21 and though the income accumulated by the trustees had not been paid over to the beneficiary, still the income of the fund was held to be the income of the beneficiary and assessable to tax. Referring to 'DEWAR's Case', (1935) 2 KB 351 the Court observed:

"The question determined in 'DEWAR's Case', (1935) 2 KB 351 was in effect whether income existed which could be brought into assessment. That question was answered in the negative because the interest, although admittedly exigible in law, was never paid or claimed and, therefore, had no existence. In the present case there was unquestionably income in existence, namely, the interest which accrued due on the trust investments and the accumulations during the period from April 5, 1938, and Jan. 18, 1939. Consequently the question is not "Is there any income?" but 'To whom did the income, which admittedly

existed, belong?' In our judgment there can only be one answer to this question. It belongs to G. L. Hamilton-Russell (the beneficiary)."

The last of the cases to be noticed in this connection is the decision in 'COMMISSIONER of Inland Revenue v. Lebus', (1946) 1 All E R 476. There the widow of a deceased partner was entitled to an one-fourth share of the profits of a business carried on by the surviving partners. The deceased partner bequeathed to the trustees of his Will one quarter share of the profits of the business on trust to pay what they received in respect of it to his widow. During the year of account the firm's profits were declared at a considerable sum, but owing to financial stringency, the firm was unable to pay the widow a one-fourth share or any part of the sum due. It was held that the widow could not be said to have received her share of the profits and she was not liable to sur-tax in respect of the amount of such profits. The Court of Appeal followed 'DEWAR's Case', (1935) 2 K B 351 and distinguished the case in 'COMMISSIONER of Inland Revenue v. Hamilton-Russel's Executors', (1943) 1 All E R 474. The reasons for the conclusion of the Court might thus be summarised. Mrs. Lebus was not a partner in the business; none of its assets belonged to her; nor were the surviving partners trustees of the business or any of the assets for her. All that she was entitled to was to call upon the partners to pay her a share of the profits. The partners, on the other hand, owned the entirety of the assets and realised the profits in the sense that the profits resulted in an accretion to the value of the assets which belonged to them. The fact that the profits were not released and paid over in cash to the partners did not affect the revenue. As soon as the accounts show a profit, the partnership has made a profit for income-tax purposes. The widow of the deceased partner cannot be said to make a profit if the partners default to pay her. She could not go to the partnership till and take her share of the profits. She is an outsider 'vis a vis' the partnership assets. She has not realised a profit unless and until the profit is paid to her. She cannot be put in the same position as if she were herself a partner. It must be remembered that Mrs. Lebus was assessed under Schedule D Cl. 1(b) and Case III, R. I Cl. (a) quoted above, where receipt of income, actual or constructive, was essential to attract tax, while the partners would be assessed under Schedule D Cl. (1) (a) Sub-cl. (2) and the rule applicable to Schedule D case I, on the profits and gains of the business arising or accruing to them irrespective of receipt.

(40) The English decisions cited above have no bearing on the computation of the profits and gains accruing or arising to a person. It is necessary, in this connection, to bear in mind the warning repeatedly given by the Judicial Committee that English decisions given on the language of the English Statute, which is not 'in pari materia' with the Indian Income-tax Act, are not useful guides in this country. Vide 'COMMISSIONER of Income-tax v. Fletcher', ILR (1938) Mad 1. (PC) 'GOPAL NARAIN SING's Case 14 Pat 552, at p. 559; 'SHAW Wallace and Co's Case', 59 Cal 1343 (PC); 'BEJOY SING v. Commr. of Income-tax', 60 Cal 1029 (PC); COMMR. of Income-tax, Bombay Presidency Aden v. Chunilal B. Mehta', ILR (1938) Bom 752 (PC); 'ALL India Spinners Association, Mirzapur v. Commr. of Income-tax, Bombay Persidency and Sind & Baluchistan', ILR (1945) Bom 153 (PC); 'COMMISSIONER of Income-tax v. Mahaliram Ramjidas', ILR (1940) 2 Cal 215 (P. C.).

(41) Reference has also been made by the learned Advocate for the assessee to two Indian decisions 'NARAYANAN Chettiar v. Commissioner of Income-tax', (1941) 2 Mad L J 172 and 'KAMAKSHYA NARAIN SING v. Commissioner of Income-tax, B & O', (1942-10) ITR 177 in support of his contention that actual receipt was necessary to attract tax. In the Madras case, this Court held that an adjustment or remittance of money representing foreign profits, to an account or to a place, against the wishes of the assessee and in spite of his objections, could not be said to be payment or remittance to, or receipt by, the assessee of the foreign profits in the year in which the money was so adjusted or remitted. Four years later, the assessee accepted the arrangement that had been made previously against his wishes and it was held that the sum must be held to have been received by the assessee in the year in which he accepted the arrangement and not previously. The case was one of remittance or receipt of foreign profits. In the Patna case, royalties had been paid by a lessee into the banking account of his lessor as directed by the Court of Wards on behalf of the lessor. The sum so paid got mixed up with other monies of the lessor in the hands of his bankers. The bank account was operated upon by the lessor only in the subsequent year. The lessor had entered the royalties in a suspense account as he claimed to enforce a forfeiture of the lease. It was contended on behalf of the lessor that the royalties paid by the lessee into the bank account did not constitute his income in the year of such payment. The Court negatived the contention and held that, for purposes of income-tax, the royalties were income of the lessor in the year in which they were paid into his bank account, though the rights of parties, which were in dispute and which had to be decided by the Civil Courts, would not be affected by the decision in the income-tax proceedings. This decision is an authority for the position that the mere entry of a sum in the "suspense account" of the tax payer is not conclusive of the real nature of the receipt and the revenue authority can ignore a "suspense account" if it is not bona fide. The first case related to foreign remittance and the second, to rents or royalties payable and paid under mining leases.

(42) The position in the present case has now to be analysed. The firm carried on business which actually yielded profits in the two years of account now in question. Its main source of income was the managing agency commission earned from the mills. It had other sources of income as well. It kept the accounts of the mills and had plenary powers of management of the affairs of the company subject to the general supervision of the directors. It operated upon the funds and bank accounts of the company. It had the right, expressly conferred upon it by the managing agency agreement, to retain, re-imburse and pay itself out of the funds of the company all sums due to it for commission and remuneration. It was drawing the monthly remuneration of Rs. 1,000/- in cash, sometimes in advance and sometimes on the due dates. It was paying itself the commission earned in the previous years. In 1941-42, the first year of account with which we are concerned, the commission at the rate of 10 per cent. of the company's profits amounted to the unprecedented figure of Rs. 226,850--5-0 and the conditions of the market were such that the commission was expected to swell higher in the next year. Indeed, the managing agency commission for the next year payable only on the basis of 5 per cent of the profits of the company amounted to Rs. 2,20,702/-. The firm debited the company with the sum of Rs. 2,26,850-5-0 as an outgoing of the company's business and as an item of revenue gains of the company after deducting this sum. The company was assessed to income-tax for the account year 1941-42 on the profits arrived at after such deduction. Similarly, in the year of account

1942-43, the sum of Rs. 2,20,702/- was debited in the company's accounts as an outgoing and as a revenue expenditure of that year and the profits and gains of the company were computed after deducting the said sum from the receipts. The profit and loss account of the company prepared on the above basis by the firm as managing agent, was accepted by the directors of the company and by the income-tax authorities for the years of account 1941-42 and 1942-43.

(43) The firm had to bear a heavy burden of income-tax on the profits and gains of its managing agency in the year of account 1941-42. On 30-3-1942, the penultimate date of the year of account, the firm is stated to have written a letter to the directors of the company — letter itself has not been placed before us — to the effect that the firm's indebtedness to the company amounting to Rs. 2,04,058-11-8 should be written off and that the commission of Rs. 2,26,850-5-0 earned by the firm in 1941-42 would be drawn by them in full. With a view to split up the mounting profits of the managing agency, another proposal was made by the firm in a letter 30-3-1942, that the managing agency commission of 10 per cent. on the profits of the company and a percentage on all sales and purchases of goods effected on behalf of the company, should be divided between the firm and two other agencies. The two agencies in contemplation were two private limited companies managed and controlled by two of the partners of the firm, who are, as already stated, a father and his two sons. With remarkable alacrity the directors purported to decide at 10 a.m. on 30-3-1942 itself that the commission of Rs. 2,26,850-5-0 earned by, and payable to, the firm, should be kept in suspense pending a decision on the question of the writing off of the debt due by the firm to the company and that the question should be taken up for consideration at the next meeting. It was also noted that the firm objected to the postponement of payment. It is significant that though on 30-3-1942 the directors resolved to consider the question of writing off the debt due by the firm to the company, nothing further was done with reference to this matter till 1945. About what happened later on, we have no information. As regards the other proposal of the firm with reference to the division of the managing agency commission, the directors promptly accepted the proposal and agreed to distribute the managing agency commission between the firm and the two private limited companies controlled and managed by two of the partners of the firm. The managing agency commission payable to the firm for the year of account 1942-43, after the splitting up of the commission into three parts, amounted to Rs. 2,20,702/-. This sum is credited to the firm in the accounts of the company and, for no apparent reason, has not been drawn. The firm had not taken in previous years, and was under no obligation to take in the years of account now in question, the permission of the directors to draw the managing agency commission earned by it. It is only when the managing agency profits swelled in magnitude and at the very end of the year of account 1941-42 that the firm took it into its head to remind the directors about the firm's ancient indebtedness and invited a suspense account entry. That these ingenious devices have been purposely resorted to for the purpose of reducing the liability of the firm to income-tax is obvious and it is not surprising that the Income-tax Officer and the Appellate Assistant Commissioner came to the conclusion that these proceedings were all a collusive make-believe. Indeed the Appellate Tribunal was of this opinion when it dealt with the assessment for 1943-44 though they came to a different conclusion in respect of the year 1942-43.

(44) In this Court, however, it is argued for the assessee that a tax-payer is not bound to continue in the same condition of things as would always subject him to tax and that this case must proceed on the basis that the finding of the Appellate Tribunal that there had been no collusion between the company and the managing agent in respect of the year 1942-43 is not open to challenge. I am not sure whether this is the case in view of the terms of the reference in Referred Case No. 76 of 1946 which are wide and comprehensive. Assuming this to be the true position, how does the matter stand? The company became a debtor to the firm in the respective sums of Rs. 2,26,850-5-0 and Rs. 2,20,702/- during the years of account 1941-42 and 1942-43. There was no doubt or dispute about the quantum of the managing agency commission. The respective amounts had been earned and debited as an item of revenue expenditure in the accounts of the company during the two years. The company had unequivocally admitted its liability to pay these sums to the firm. These sums had been earned by the firm and had accrued to it as the profits and gains of the managing agency in the two years of account. With regard to the sum of Rs. 2,26,850-5-0 earned in the year of account 1941-42, taking the proceedings of the directors dated 30-3-1942 at their face value, the company admitted liability for this sum to the firm, earmarked this sum as belonging and payable to the firm and even agreed to pay it as soon as the question of writing off the debt due to the company by the firm was settled. The directors did not have and did not even claim, a right to have a set off of the managing agency commission against the debt due to the company by the firm but merely desired to keep the amount of the managing agency commission in suspense for a short time till the question of writing off the debt due to the company by the firm was settled. The firm had asserted its right to, and demanded payment of, the full amount of the managing agency commission which had finally been ascertained and fixed and which had become a debt payable to the firm by the company. The firm could have drawn the amount without reference to the directors once the sum had been earned and entered in the company's accounts and accepted by everybody concerned, including the directors, as a proper item of revenue expenditure. The gratuitous reminder to the directors about the ancient indebtedness of the firm, at the end of the year of account, the invitation of a suspense account entry with regard to the managing agency commission, and the self-imposed restraint on the withdrawal of the managing agency commission by the firm, are all, in my opinion, ineffective proceedings resorted to for the purpose of obscuring the real position. I have already repelled the contention that the firm kept its accounts on a cash basis and pointed out that the firm had been assessed on a mercantile basis in the years 1940-41 and 1941-42 and that the firm produced no accounts in the two years of account now in question. In these circumstances, the income-tax officer who had the duty of charging to tax the profits and gains of the firm under sections, 3, 4, 10 and 12 of the Act was entitled to treat these two sums of Rs. 2,26,850-5-0 and Rs. 2,20,702/- as business profits and gains that had accrued to the firm in the years of account 1941-42 and 1942-43. The fact that the sums had not been drawn by the firm does not affect the question when it is indubitably established that the two sums have been earned by the firm and had been appropriated to it by the company. The company was a debtor to the firm in respect of these sums and was under

a legal obligation to pay the sums to the firm whenever demanded. Indeed, the firm as managing agent could, but for the self-denying role assumed by it, have perfectly legitimately drawn, at its will, these sums. The company had no legal right to claim, and in fact did not claim, a set off of the managing agency commission towards the debt due by the firm to the company in the proceedings of the directors dated 30-3-1942. The reference to a "suspense account" in respect of the sum of Rs. 2,26,850-5-0 is, in my opinion, misleading. There is nothing to show what was meant by the parties themselves. It is an expression in common use in banking business where a person whose money is held in suspense is entitled to withdraw it any moment he likes, though he neither gets a pass book nor is entitled to draw any cheques or to be paid interest in respect of the amount. 'OFFICIAL ASSIGNEE OF MADRAS v. Rajam Iyer', 33 Mad 299 at p. 300, affirmed on appeal in 36 Mad 499 (F B). In other businesses, sums received are sometimes kept in a suspense account in order to meet possible claims or losses in connection with a particular transaction. 'TAXES COMMISSIONER v. Melbourne Trust', (1941) AC 1001. There is nothing of the kind in the present case and all that we have is the application of a nick-name to what was in truth and in fact the money of the firm. The company, or rather the firm, which kept the company's accounts, had already entered this sum as an item of revenue expenditure and had cast the profit and loss account of the company on that footing. The company had given this sum the final impress of an expenditure properly incurred and stamped it with the character of an outgoing of the business. The sum had irrevocably entered the debit side of the company's account as a disbursement of managing agency commission to the firm and had been appropriated to the firm's dues and the same sum could not again be entered in a suspense account at a later date. The sum, therefore, belonged to the firm and had to be included in the computation of the profits and gains that had accrued to it unless the firm had regularly kept its accounts on a cash basis, which is not the case here. There is no analogy between the present case and a case where a sum of money received or realised but the title to which is in dispute, is kept in suspense pending decision or adjudication as to the title. There is not even this apparent obstacle of a suspense account so far as the sum of Rs. 2,20,702/- earned by the firm as its managing agency commission in the year of account 1942-43. This sum is duly credited to the firm in the accounts of the company of that year. For these reasons I hold that the two sums of Rs. 2,26,850-5-0 and Rs. 2,20,702/- were assessable to income-tax as part of the profits and gains that had accrued to the firm during the years of account, 1941-42 and 1942-43.

(45) The only question that yet remains to be considered is the second question referred to us in Referred Case No. 78 of 1946, viz., "Whether on the facts and circumstances of the case, the applicants are entitled to exemption of the sum of Rs. 81,023/-. It is claimed by the firm that the managing agency commission at the rate of 5 per cent on the profits of the company under the terms of the altered arrangement agreed to between the firm and the directors on 30-3-1942, amounted to Rs. 2,20,702/- for the year of account 1942-43 and that the firm is entitled to exemption from tax in respect of Rs. 81,023/- out of this sum as representing its earnings attributable to the supervision work done in Indian States. Mr. Alladi Krishnaswami Ayyar relied on the cases in 'SARUPCHAND HOOKUMCHAND v. Commissioner of Income-tax', 5 ITC 108 (Bom) and In re: 'HIRALAL KALYANMUL 1943-11 ITR 128 (Bom), and argued that the businesses of the company and the managing agent were transacted in different places including Indian States and that the manging agency commission was earned as and when and where, the transactions by way of sale of the goods manufactured by the company took place. He argued that the profits of each branch and the commission due to the firm on the basis of such profits, were all kept separately in each branch and that the profits earned by the firm in Indian States had not been brought into, or received in, British India. He claimed that the sum of Rs. 81,023/- represented the managing agency commission earned in Indian States in the year of account 1942-43 on the basis of the sales of goods effected in those states during that year. This argument fails on the facts. Under the arrangement entered into between the firm and the directors on 30-3-1942, a private limited company controlled by one of the partners of the firm was appointed as the sole buying agent of the company and another private limited company controlled by another partner of the firm was appointed as the sole selling agent of the company and the commission payable on purchases and sales was payable, and paid, to these two private limited companies. What the firm did was merely to supervise the work of these limited companies and to attend to the business of the company at Madura. It was for this work and this work alone that the firm was paid a monthly remuneration of Rs. 1,000/- and a commission calculated at 5 per cent of the entire profits of the company. The managing agency agreement was entered into at Madura, the Managing agency business was carried on at Madura, and the profits were earned and payable at Madura. The purchases and sales of goods were not effected by the firm in the account year 1942-43 but by the two limited companies controlled and managed by two of the individual partners of the firm. No part of the managing agency commission arose or accrued to the firm in any Indian State and therefore the exemption from tax granted by Section 14, Sub-section (2) Clause (c) of the Act is not attracted.

(46) I would answer the questions referred to us in Referred Case No. 76 of 1946, Referred Case No. 32 of 1947 and Referred Case No. 56 of 1947 in the negative and against the assessee. I would answer the two questions referred to us in Referred Case No. 78 of 1946 in the affirmative and against the assessee. Though I differ from my learned brother in the answer to the second question referred to us in Referred Case No. 76 of 1946 and the only question referred to us in Referred Case No. 32 of 1947, his opinion, which happens to agree with that of the Appellate Tribunal, prevails under S. 66-A (1) of the Income-tax Act.

C.R.K./D.H. *Answers accordingly.*

A. I. R. (39) 1952 Madras 322 *[C. N. 105 (29).]*

PANCHAPAKESA AYYAR, J.

In re Vellai Pillai, Petitioner.

Criminal Revision Case No. 1301 of 1950 & Criminal Revision Petition No. 1229 of 1950, D/- 28-3-1951.

(a) Evidence Act (1872), S. 106 — Onus of proof — Facts with special knowledge.

Where certain corrugated sheets are delivered to the accused, a carrier, for booking them by signing in a requisite form and he fails to book them and the sheets are missing, the matter is within his special knowledge and he is bound to explain the missing under S. 106; AIR (23) 1936 P C 169, disting. *(Para 1)*

Anno: Evidence Act, S. 106, N. 2.

(b) *Penal Code (1860), S. 407 — Sentence — Accused a carrier entrusted with corrugated sheets for booking — Sheets not booked and found missing — Sentence of imprisonment reduced as accused was also civilly liable for goods.* (Para 2)

Anno: Penal Code, S 407, N. 1.

V. Rajagopalachariar and B. Santhalingam, for Petitioner; State Prosecutor, for the State.

Case referred to:

('36) 44 Mad L W 86: (AIR (23) 1936 P C 169: 37 Cri L J 628) (Pr 1)

ORDER: I have perused the records and heard Mr. V. Rajagopalachariar, for the petitioner and the State Prosecutor 'contra'. Mr. Rajagopalachariar urged that the lower Court erred in applying S. 106 of the Indian Evidence Act to the facts of this case and relied on the ruling of the Privy Council in 'Attyagalle v. The King', 44 Mad L W 86. I have looked into that ruling. It relates to an illegal operation on a woman for abortion by a doctor called Attygalk and says that merely because the doctor was alone with the lady in the same room where the abortion took place, he cannot be asked to prove that he did not perform an illegal operation for abortion on her. But it is obvious that the facts, here, are quite different. A woman usually delivers her own baby or has her own abortion. Any person, even a doctor, present alone with her at the time of the abortion, cannot be said to have that fact specially within his knowledge, as she is the person having the fact especially within her knowledge. Here, corrugated sheets are in question, and they cannot disappear by themselves. So the petitioner, to whom they had been delivered and which he wanted to book by signing in the requisite form and eventually failed to book, was in especial knowledge and was bound to explain their missing, under S. 106 of the Indian Evidence Act. As he failed to explain, and as he was a 'carrier', the presumption was rightly applied against him and he was convicted properly under S. 407 I.P.C. I confirm the conviction. I may add that the Privy Council itself did not give leave to appeal in the Attygalk case.

(2) It was urged next that the sentence was too severe, under all the circumstances, & that as there is an independent civil liability on the part of the petitioner for the goods, I might reduce the sentence. After hearing the learned State Prosecutor also on the point, I reduce the sentence to the period of rigorous imprisonment already undergone and a fine of Rs. five hundred (Rs. 500), or, in default, further rigorous imprisonment for three months. Time is given till 3 p. m. on 20th April 1951 to pay the fine into the lower Court.

C.R.K./D.R. *Order accordingly.*

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*A.I.R. (39) 1952 Madras 323 [C. N. 105 (30).]

FULL BENCH

SATYANARAYANA RAO, VISWANATHA SASTRI AND RAGHAVA RAO JJ.

Periannan and others, Appellants v. Airabadeeswarar Soundaranayagi Amman Kovil of O'Siruvayal by its trustees M. A. R. Periannan Chettiar and others, Respondents.

Second Appeals Nos. 1735 and 1865 to 1878 of 1944 and Civil Revn. Petn. Nos. 1518 to 1546 of 1944, D/- 2-12-1949.

(a) *Madras Estates Land Act (I (1) of 1908 as amended in 1936), Ss. 3 (2) (d) and (e) — "Recognised" in S. 3 (2) (d) — Meaning — Village subject-matter of pre-settlement inam included later in assets of Zamindari at time of Permanent Settlement — General direction in Inam Rules of 1859 not carried out in relation to suit village — Collection of road cess by Government — Applicability of Ss. 3 (2) (d) and (e).*

It is sufficient under S. 3 (2) (e) that the grantee holds the village on a permanent under-tenure even though the grantee at the time of the grant might have owned the Kudiwaram interest in the lands of the village. (Para 12)

If the grant consisted of less than a village and the grantor remitted a portion of the rent payable in respect of the land it may be a case which would fall within S. 26 of the Act and the successor of the grantor would not be bound by the grant at a lower rate of rent except in cases falling under S. 26 (1); but if a village is granted at a lower rate of rent payable to the grantor the case would be governed by S. 3 (2) (e) and it would be a permanent under-tenure within the meaning of that clause. (Para 12)

The village in question at the time of the grant before Settlement was part of the Sivaganga Zamindari, which was permanently settled in 1802. The grantee and his descendants were liable to pay to the grantor and his descendants the 'poruppu' of Rs. 299/- and odd annually. The village was included in the assets at the time of the Permanent Settlement and was not excluded. It was not treated as an alienated land or 'lakhraji' land within the meaning of S. 4 of the Permanent Settlement Regulation.

Held that the grant consisted of a village which was now part of the permanently settled estate of Sivaganga falling under Clause (a) of S. 3 (2) of the Act. It was held on a permanent under-tenure. Therefore as the grant was not a grant of an inam but the grant of an under-tenure it would fall under S. 3 (2) (e) of the Estates Land Act and would be an "estate" within the meaning of that clause. (Paras 12, 54)

Per Raghava Rao J.: The mere general direction in the Inam Rules framed in 1859 not carried out at any Inam Settlement in relation to the suit village cannot be regarded as a 'recognition' of the suit village by the Government as an inam for the purpose of S. 3 (2) (d) of the Madras Estates Land Act. Nor can the mere collection of road cess by the Government in respect of the suit inam village is such a recognition — a recognition of the validity of the original grant. (Para 82)

Recognition implies something more than acquiescence, something done by the Government, as for instance by acceptance of service, jodi, etc.: AIR (4) 1917 Mad 281 and 24 Mad L J 538, Rel. on. (Para 82)

(b) *Civil P. C. (1908), Ss. 100 and 115 — Question whether land is private or ryoti under Madras Estates Land Act — Interference by High Court in second appeal or revision — Madras Estates Land Act (I (1) of 1908), Ss. 185 and 192.*

Per Satyanarayana Rao J.: The question whether the lands are the "private" lands or "ryoti" lands as defined by the Madras Estates Land Act is essentially one of fact to be decided on the evidence in the lights of the principles laid down by the Estates Land Act as interpreted by the various decisions. If the lower Courts have applied the correct test and come to the conclusion that on the evidence the land is private land, it would not be open to the High Court either in second appeal or in

civil revision petition to interfere with such a finding of fact. But if the lower Courts have not applied the correct test in determining the nature of the land, the finding is vitiated and would not be accepted either in second appeal or in revision. (Para 13)

Where the jurisdiction of the Court to entertain the suits depends upon the decision of the question relating to the character of the land and where by an erroneous decision the lower Court assumes jurisdiction to decide the dispute, it would be a ground for interference under S. 115, Civil P. C. The jurisdiction of the High Court in a matter of that kind to interfere is not taken away by S. 115 if a proper case for interference is made out. AIR (37) 1950 Mad 158, Approved. (Para 13)

Anno: C. P. C., S. 115 N. 10.

†✠ *(c) Madras Estates Land Act (I (1) of 1908, as amended in 1936), Ss. 3 (10) (a) and 185 — What is private land — Tests — Direct cultivation by land-holder though important piece of evidence, is not conclusive test — Burden of proof.*

Per Satyanarayana Rao and Viswanatha Sastri JJ. (Raghava Rao J. dissenting): Where land proved or admitted to be once ryoti land is claimed to have been converted into private land, the claim is untenable unless the land-holder proves direct cultivation for a period of 12 years before 1st July 1908. No other mode of conversion is permissible. Where you have to find out whether a land is private or ryoti its original character not being known, proof of direct cultivation of the land by the land-holder for 12 years before 1st July 1908 would without other evidence, conclusively establish its character as private land, but this is not the only mode of proof permitted to land-holder. Other evidence may be adduced and looked into and might consist, among other matters, of direct cultivation of the land at some period anterior to 12 years preceding 1st July, 1908 but this is not indispensable. Direct cultivation may be valuable and weighty evidence and may be inferred from accounts and other records usually kept by large land-holders. If, owing to lapse of time or other reasons, evidence of direct cultivation is not forthcoming its absence is not fatal to the claim that the land is private. Section 185 of the Act does not shut out, but on the other hand allows all evidence that would be relevant and admissible under the law of evidence, to prove the fact in issue, namely, whether the land is private or ryoti. Local usage or custom and the letting of the land as private land in leases before 1898 are specifically mentioned in Ss. 185 (1) and (2) as being relevant evidence but other evidence is also expressly made admissible under S. 185 (3).

The classification of lands as private lands at the time of the permanent settlement or in the early records of zamindaries, the terms of the grant of an undertenure, the assertion and enjoyment by the land-holder of the right to both the warams, the intention to retain with himself the kudiwaram right and the consequent right to resume direct cultivation if he chooses, leases of the lands as private lands or with terms and conditions inconsistent with any right of occupancy in the leases, admissions by tenants that the land-holder is the owner of both warams and that they have no rights, changes in the personnel of the tenants, variations in the rates of rent payable by the tenants — these and kindred matters would be relevant and admissible in evidence to prove that the lands are private lands. The probative value of such evidence depends on the facts and circumstances of each case.

The burden of proof that a particular land in an estate is private land rests on the land-holder, the statutory presumption being the other way. This burden is not discharged merely by proving that both the warams were granted to or enjoyed by the land-holder once upon a time. There must be evidence of the treatment of the lands as private lands by the land-holder, either by direct cultivation or otherwise in the manner above stated. AIR (37) 1950 Mad 158 and C. M. A. No. 311 of 1943 (Mad), Approved; AIR (13) 1926 P C 79 and 36 Mad 168, Rel. on; AIR (2) 1915 Mad 750 (2) Explained. Observations in AIR (33) 1946 Mad 214 and App. Nos. 176 to 178 and 493 of 1946 (Mad), about private and home farm lands, held did not lay down correct test. Case law reviewed. (Para 76)

The payment of swamibhogam by the tenants is a clear admission that the landlord is the owner of both the melwaram and the kudiwaram right in the land. i.e. that he was the absolute proprietor of the soil. (Para 77)

Per Raghava Rao J.: - (1) Domain land which is one category of private land is land about the dwelling house of the land-holder and in his immediate occupancy. (2) There must be proof that at some time or other and for some time or other there was direct cultivation by the land-holder before cultivable land in an estate can be claimed to be "home-farm" land and hence "private land" within the definition of "private land" in the statute; (3) The evidence may be direct and positive or indirect and circumstantial. (4) The mere existence in the land-holder of both the warams in a land in an estate does not per se make of it private land. (5) Where there is any letting of any private land, as there may well be, the letting must be on terms and conditions consistent with an intention on the part of the land-holder to resume direct cultivation or personal use. (6) Local custom may well define and demarcate private land in an estate in accordance with customary notions of people of the locality although in a manner different sometimes to what the statutory definition of private land may justify. (7) Otherwise, any evidence admissible under S. 185 of the Madras Act must be such as satisfied the requirements of the definition of "private land". (8) Cultivable land in an estate must be presumed to be ryoti, unless the contrary is shown, and the contrary is not shown by the circumstance of the existence of both warams in the landholder. (Para 124)

The word "Swami bhogam" in lease emphasises nothing more than the existence of the kudiwaram as well as the melwaram in the land-holder. It is no doubt a payment in separate recognition of the landholder's right to the kudiwaram, but cannot afford any evidence however indirect, of direct cultivation of the lands by the land-holder at sometime or other and for sometime or other, proof of which by means of some species of evidence or another within the intendment of S. 185 of the Madras Estates Land Act is a condition prerequisite for the recognition of the lands in suit as private lands. (Para 128)

A. Sundaram Aiyar, for Appellants; V. Ramaswami Aiyar, R. M. Halasyam and K. Umamaheswaram, for Respondents.

Cases referred to-

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('17) 40 Mad 793: (AIR (4) 1917 PC71) (Pr 13)
('19) 42 Mad 400: (AIR (5) 1918 P C 182) (Prs 28, 36, 43, 45, 65, 72, 73, 85, 89, 90, 97, 115, 117, 118, 120, 130).
('22) 45 Mad 586: (AIR (9) 1922 PC 292) (Prs 13, 61, 108, 111, 112, 130)
('24) 47 Mad 337: (AIR (11) 1924 P C 65) (Pr 50)
('26) 5 Pat 634: 53 Ind App 164 (AIR (13) 1926 P C 79) (Prs 27, 48, 51, 62, 68, 85, 86, 90, 97, 111, 114, 123)
('29) 52 Mad 549: 57 Mad L J 1 (AIR (16) 1929 P C 156) (Prs 50, 77)
('49) 1949-2 Mad L J 6: (AIR (36) 1949 P C 239) (Pr 13)
(71) 3 N W P H C R 203 (Prs 36, 65, 75, 101, 107, 115, 117)
('70) 6 Mad H C R 164 (Pr 36)
('71) 7 Mad H C R 53 (Prs 20, 32, 60, 101, 107, 109)
('86) 9 Mad 142 (Prs 60 98, 107)
('93) 16 Mad 271 ((Pr 59)
('97) 20 Mad 299: (7 Mad L J 251) (Prs 13, 59, 108)
('98) 21 Mad 310 (Pr 82)
(1900) 23 Mad 318 (Prs 21, 26, 32, 33, 59, 60, 109)
('12) 24 Mad L J 538: (17 Ind Cas 373) (Pr 82)
('12) 25 Mad L J 248: (20 Ind Cas 952) (Pr 34)
('13) 36 Mad 168: (17 Ind Cas 353) (Prs 27, 34, 42, 46, 48, 62, 68, 114)
('14) 1914 Mad W N 766: (AIR (2) 1915 Mad 722) (Prs 27, 35)
('14) 1914 Mad W N 798: (AIR (2) 1915 Mad 356 (1)) (Pr 35)
('16) 39 Mad 195: (AIR (2) 1915 Mad 1223) (FB) (Pr 13)
('16) 39 Mad 341: 27 Mad L J 718 (AIR (2) 1915 Mad 750 (2)) (Prs 28, 29, 31, 32, 36, 38, 39, 42, 43, 46, 62, 65, 66, 67, 68, 70, 71, 72, 73 75, 85, 89, 90, 95, 96, 97, 113, 115, 117, 118, 119, 120, 121)
('17) 40 Mad 389: (AIR (5) 1918 Mad 435 F B) (Pr 72)
('17) 40 Mad 664 : (AIR (4) 1917 Mad 281) (Pr 82)
('17) 33 Mad L J 84: (AIR (5) 1918 Mad 932) (Prs 50, 77)
('18) 41 Mad 109: (AIR (6) 1919 Mad 990) (Prs 50, 78, 129)
('18) 7 Mad L W 271: (AIR (5) 1918 Mad 93) (Prs 27, 62)
('18) 34 Mad L J 234: (AIR (5) 1918 Mad 44) (Prs 50, 77)
('20) 39 Mad L J 277: (AIR (7) 1920 Mad 996) (Prs 28, 36, 65, 67, 70, 85, 118)
('21) 41 Mad L J 175: (AIR (8) 1921 Mad 233) (Pr 77)
('22) 45 Mad 39: (AIR (9) 1922 Mad 281) (Prs 21, 28, 65)
('27) 50 Mad 201: (AIR (14) 1927 Mad 41) (Prs 27, 28, 37, 62, 65, 68)
('35) AIR (22) 1935 Mad 789 (Prs 38, 70, 98, 104, 115, 120, 121, 127)
('39) 1939 2 Mad L J 778: (AIR (27) 1940 Mad 40) (Prs 39, 71)
('41) ILR (1941) Mad 720: (AIR (28) 1941 Mad 367 F B) (Prs 39, 71)
('43) CMA No 311 of 1943 (Mad) (Prs 40, 42, 43, 70, 73, 85, 97, 115, 117, 120, 122)
('46) Appeal No 53 of 1946 (Mad) (Prs 44, 66, 74, 85, 118)
('46) AS Nos 176 & 178 & 493 of 1946 (Mad) (Prs 44, 75, 85, 118)
('46) ILR (1946) Mad 181: (AIR (32) 1945 Mad 468) (Prs 44, 71)
('46) SA No 847 of 1946 (Mad) (Prs 44, 71)
('46) ILR (1946) Mad 687: 1946-1 Mad L J 23: (AIR (33) 1946 Mad 214) (Prs 43, 44, 46, 48, 66, 72, 74, 75, 85, 116, 117, 118, 119, 120)
('48) ILR (1948) Mad 223: (AIR (35) 1948 Mad 55 FB) (Prs 27, 29, 37, 64, 65, 74, 85 112, 119)
('49) 1949-2 Mad L J 623: (AIR (37) 1950 Mad 158) (Prs 13, 31, 46, 57, 66, 74, 95, 96, 97, 98, 118, 130)
('23) 2 Pat 414: (AIR (10) 1923 Pat 276) (Pr 48)
(1857) 6 HLC 61: (10 ER 1216) (Pr 87)

SATYANARAYANA RAO, J.: These second appeals and the civil revision petitions arise out of a batch of suits relating to the village of Manamelpatti, a Dharmasanam village, in the Ramnad District. The suits out of which these second appeals arise were instituted by the trustees of Airabhadeswarar Soundaranayagi Amman Temple for ejectment of the defendants from the lands in their respective possession and for recovery of rent for faslis 1349 and 1350 and for future profits. The village comprises 80 pangus out of which the plaint temple in this batch owns 23½ pangus purchased from the original owners and one pangu taken on othi from the owner. The plaintiffs in the batch of suits out of which the civil revision petitions arise are the managers of the Devasthanam of Nagara Vairavanpatti Valaroleeswaraswami Nagara Vairavaswami Devasthanam. This temple owns 54 and 5/8th pangus or shares in the village and suits were instituted for recovery of the balance of amounts due as 'iru bogam' for faslis 1349 and 1350. In both the batches of suits the plaintiffs claimed that they were the owners of melwaram and kudiwaram interest in the lands which were being enjoyed as "pannai" lands or "private lands" that they were leasing the lands from time to time changing tenants and were also collecting "swami bhogam" in recognition of their full proprietary rights in the lands. They claimed that the tenants had no occupancy rights in the lands; and in the second appeals batch a relief for ejectment of the tenants is also claimed. The defence of the defendants-tenants in both the batches is common. They claimed that the temples owned only the melwaram interest and that they, the tenants, are the owners of the kudiwaram which they have been enjoying hereditarily paying half waram in respect of the nanjas and a fixed money rent for the punja or dry lands according to the "tharam" (classification) of the lands. They denied that they ever paid "swami bhogam" to the temple. In all the suits there is the common plea that the village is an "estate", under S. 3(2) (d) of the Madras Estates Land Act, as amended by the Madras Estates Land (Amendment) Act, 1936 (Act XVIII of 1936), that they had therefore acquired occupancy rights under the Act;

that the lands were ryoti and that, therefore, the civil Court had no jurisdiction to try these suits.

(2) Appropriate issues covering the contentions of the parties were raised in the two sets of suits and they were disposed of by the same District Munsif in the Court of first instance by similar judgments though not by a common judgment and the same procedure was adopted by the learned Subordinate Judge in appeals. The plaintiffs raised an alternative contention that on the footing that the village is an "estate", the suits lands are private lands or pannai lands of the temples and therefore the defendants acquired no occupancy rights in the lands under the statute and that the civil Court alone had jurisdiction to entertain and try the suits.

(3) The main questions that had to be considered by the Courts below were whether the village was or was not an estate under the Madras Estates Land Act, &, if so, whether the lands were private lands as claimed by the plaintiffs or ryoti lands as claimed by the tenants. The further question that even apart from the Estates Land Act whether the defendants had acquired occupancy rights by prescription was also raised and considered. The jurisdiction of the civil Court to entertain the suits depended upon the decision of the question whether the village was or was not an estate. There were also some other questions of subordinate importance in these suits which were considered and disposed of by the trial Court but they are no longer in issue in these proceedings now before us. They may, therefore, be left out of consideration.

(4) On the main question the concurrent findings of the Courts below were that the village was an "estate" under S. 3(2) (d) of the Madras Estates Land Act as amended in 1936, that the plaint temples owned the melwaram and the kudiwaram interests in the lands; that the lands were private lands as defined by the Madras Estates Land Act, that the defendants had acquired no occupancy rights in the lands either under the Act or by prescription and that the suits were properly laid in the civil Court which had undoubted jurisdiction to try the suits. In the second appeals batch the trial Court granted a decree in ejectment, decreed arrears of rent for the two faslis and also decreed future mesne profits until delivery of possession. In the other batch rent was decreed as claimed by the plaintiff.

(5) There were appeals by the defendants to the Subordinate Judge of Sivaganga who agreed with the findings of the District Munsif in all the suits; but he refused the plaintiff relief for ejectment in the second appeals batch on the ground that the tenancy which subsisted between the plaintiff and the defendants was not terminated by a proper notice to quit. He therefore modified the decrees in ejectment granted by the trial Court by disallowing relief for delivery of possession but confirmed it in other respects.

(6) The learned Subordinate Judge however while confirming in other respects the decrees of the District Munsif in this batch overlooked the fact that in view of his refusal to confirm the decree for possession he could not confirm the decree for future profits and this relief should have been deleted from the decree. It is now contended on behalf of the respondents that this is a mistake and should be rectified. In the rent batch the learned Subordinate Judge confirmed the decrees of the District Munsif 'in toto'. These second appeals and the revision petitions were preferred by the unsuccessful tenants.

(7) When these second appeals and the revision petitions came before me and my learned brother, Raghava Rao, J., in the first instance we directed that these cases should be heard by a Bench of three Judges in view of the conflict of judicial opinion on the question of the test to be applied to determine what constitutes private lands under S. 3(10) of the Madras Estates Land Act. They have accordingly been posted for hearing before us.

(8) The questions raised in both sets of cases being common and as the lands in dispute are situated in the same village of Manamelpatti we have heard the cases together.

(9) The finding of the Courts below that the temples owned the melwaram and kudiwaram interest in the lands and that the defendants had not acquired permanent rights of occupancy in the lands apart from the Act have not been disputed before us on behalf of the tenants. The dispute is confined therefore to two questions and two questions alone, the first, whether the village is an estate under the Madras Estates Land Act and secondly, whether the concurrent finding of the Courts below that the lands are private lands of the temple is correct or not.

(10) The first question therefore for consideration is whether the village of Manamelpatti is an "estate" or not. Both the learned District Munsif and the learned Subordinate Judge were of opinion that it was an estate under S. 3(2)(d) of the Act, notwithstanding the fact that the grant to the village was not confirmed by the British Government in the view that the grant must be deemed to have been "recognised" by the Government as it was entered in the Government register and as Government never disputed the title of the temple to the suit lands and also collected road cess under the Local Boards Act from the plaint temples.

(11) In dealing with this question reference is made in this judgment to the exhibits as they are marked in the second appeal batch. The same documents have also been filed and exhibited in the rent batch but they were given different exhibit marks.

(12) The grant is not forthcoming though it appears from Ex. P. 26 an extract from the register of Manibams forwarded by the District Collector, Madura, to the Board of Revenue in 1815 that there was a grant which was registered in the Collector's office. The earliest document on record which throws any light on the nature of the grant is this extract from the register of manibams. It does not purport to be a register of lands held exempt from payment of revenue as required to be maintained in each District by S. 15 of Regulation 31 of 1802. At the time of the Permanent Settlement 1802, 'Lakhraji' lands were excluded from the settlement by S. 4 of Regulation 25 of 1802 known as the Permanent Settlement Regulation.

On the same day on which that Regulation was passed by the Governor-in-Council, namely, the 13th July, 1802 there were other Regulations which were also passed and one of them is Regulation 31 of 1802. Under this Regulation power was reserved by Government to

deal on a future date with the alienated lands or 'Lakhraji' lands which have been excluded from Permanent Settlement. For that purpose the Regulation enacted various provisions, one of which, S. 15, required that in each Zilla or district a register should be kept of the lands held exempt from the payment of the revenue and the register, it is directed by that section, should be denominated "register of lands exempt from payment of revenue under grants not being badshahi or royal." This Ex. P. 26 is not a register maintained under that section as was wrongly assumed by the learned Subordinate Judge.

The extract shows that the village Manamelpatti was granted for subsistence to one Ramaswami Aiyar and others on 3rd Margali of the year Kalayukthi, 1720. The year 1720 is not the A.D. year but the year of Salyavahana Saka which commenced in 78 A.D. The learned Subordinate Judge thought that the reference is to the A.D. year 1720 but it does not correspond to the year Kalayukthi. The reference must be to the Kalayukthi of the year 1798 A. D. There is an earlier Kalayukthi in the A. D year 1738. The grant is hereditary.

Column 4 of the register gives the estimated annual value of the village as 85 — 22 — 70. It is not known whether the reference is to pagodas or some other coin or grain measures. Whatever it be, column 10 of the register reveals that the annual rent payable for the village was 80 — 0 — 43. This means, whatever the unit may be, that Ramaswami Aiyar the grantee for whose subsistence the grant was made was getting only an income of 85 and odd units and was liable to pay 'as rent' and not 'as revenue' for the village 80 and odd units, leaving to him the insignificant balance of about 5 units. The present extent of the lands in acres as now admitted before us is about 140 acres wet and 86 acres dry making a total of 226 acres.

From the entries in this register it will be a legitimate inference to draw that this Ramaswami Aiyar and others were holding the lands on condition of paying 80 units of rent to the grantor. This register was prepared nearly 13 years after the date of the Permanent Settlement. The village was once part of the Ramnad Zamindari but now it is part of the Sivaganga estate. There does not seem to be any grant of inam as is evident from the entries in this register except it be that five units over and above the rent were treated as inam.

There are, however, two important documents which throw some light as regards the tenure on which the village was held by the grantees. They are Exs. P. 23 and P. 24 of the year 1882. Ex. P. 23 is a copy of the plaint in O. S. No. 25 of 1882 on the file of the Sub-Court, Madura East. That was a suit by the Zamindar of Sivaganga Estate and the receiver appointed for the estate as plaintiffs against the representative of the grantee for recovery of a sum of Rs. 968-7-11 representing profits for three faslis. The allegation in the plaint was that the village was an 'ayan' village before the Permanent Settlement, that at the time of the faisala in F. 1211 (istimirar feisal), it was assigned as dharmasanam by his predecessor-in-title over which the grantees were paying annually at the rate of Rs. 229-2-0 as 'poruppu', while the Zamindar had to pay to the Government under the Permanent Settlement for their 3/5ths share a sum of Rs. 559-7-7 per year, that this grant by his predecessor at a lower rate which is far less than the rate fixed by the fysal arrangement did not bind the plaintiffs and that, therefore, they were entitled to recover the difference of Rs. 260-5-7 per year for the three faslis with interest thereon.

Ex. P. 24 is the judgment in that case which shows that the defence of the defendants was that the village was a 'dharmasanam' from before the faisal and that the plaintiffs had no right to question the act of the 'Isthimirar' Zamindar, that is the Zamindar to whom the zamin was granted under the Permanent Settlement and that the suit was barred by limitation. The finding of the Court was that the grant was not subsequent to the Permanent Settlement but was prior to it and that even if it was granted subsequent to the Permanent Settlement, the grant was binding on the plaintiffs as it was the self-acquired property of the grantor who could make a grant at a low fixed rent.

From this it is clear that the grant was a presettlement grant but the income was taken into consideration and was included in the assests of the Zamindari at the time of the Permanent Settlement and the peishcush was assessed on that basis. By converting it into dharmasanam village the rent was reduced to Rs. 299 and odd which is payable to the zamindar, the grantor.

It is fairly clear from the evidence now adduced in the case that this 'poruppu' is being paid by the two temples in some proportion. The village therefore was not a 'Lakhraji' village at the time of the Permanent Settlement and was not treated as inam grant which was excluded from the assets of the zamindari in 1802. It was treated as an undertenure held by the grantee and his descendants under the zamindar on payment of the 'poruppu' of Rs. 299 and odd every year. It is for this reason I think that the Government abstained from dealing with this village at the time of the inam enquiry of 1860.

The grant was not the subject-matter of investigation at the time of those proceedings and the grant was not confirmed or recognised and no title deed was granted to the then holders of the village. The Government must be deemed to have recognised that the reversion had vested in the Zamindari.

The learned Subordinate Judge adverted to the question whether the village is held as permanent undertenure within the meaning of S. 3 (2)(e) of the Madras Estates Land Act; but in his opinion there was no evidence to establish that the income of the village was included in the assets of the Sivaganga zamindari at the time of the permanent settlement and he also opined that it was 'lakhraji' land which must have been therefore excluded at the time of the Permanent Settlement from the computation of the assets.

The village, at the time of the grant was part of the Sivaganga Zamindari which was permanently settled in 1802. The grantee and his descendants are liable to pay to the grantor and his descendants the 'poruppu' of Rs. 299 and odd annually. The village was included in the assets at the time of the Permanent Settlement and was not excluded. It was not treated as an alienated land or 'lakhraji' land within the meaning of S. 4 of the Permanent Settlement Regulation. The grant therefore consists of a

village which is now part of the permanently settled estate of Sivaganga falling under Cl. (a) of S. 3(2) of the Act. It is held on a permanent undertenure. Therefore as the grant was not a grant of an inam but the grant of an undertenure it would certainly fall under S. 3(2)(e) of the Estates Land Act and will be an "estate" within the meaning of that clause.

It is sufficient under this clause that the grantee holds the village on a permanent undertenure even though the grantee at the time of the grant might have owned the Kudiwaram interest in the lands of the village. Ex. P. 26 shows that what was payable to the zamindar in respect of the village was treated as rent. If the grant consisted of less than a village and the grantor remitted a portion of the rent payable in respect of the land it may be a case which would fall within S. 26 of the Act and the successor of the grantor would not be bound by the grant at a lower rate of rent except in cases falling under S. 26(1); but if a village is granted at a lower rate of rent payable to the grantor the case would be governed by S. 3(2)(e) and it would be a permanent undertenure within the meaning of that clause. I am therefore, clearly of the opinion that the village is an estate, not falling under S. 3(2)(d) but under S. 3(2)(e). In this view it is unnecessary to consider the question whether there is and if so what constitutes "recognition" of a grant under S. 3(2)(d) of the Act.

(13) The next question is whether the lands involved in the suits are the "private" lands of the plaintiffs (temples) or "ryoti" lands as defined by the Estates Land Act. The question essentially is one of fact to be decided on the evidence in the light of the principles laid down by the Estates Land Act as interpreted by the various decisions. If the lower Courts had applied the correct test and come to the conclusion that on the evidence the land is private land, it would not be open to us either in second appeal or in civil revision petition to interfere with such a finding of fact.

It is however contended on behalf of the appellants that the Courts below did not apply the correct test to determine the nature of the land and that, therefore, the finding is vitiated and should not be accepted either in second appeals or in the civil revision petitions. As the jurisdiction of the Court to entertain the suits depends upon the decision of this question and if by an erroneous decision the Court assumed jurisdiction to decide the disputes it would be a ground for interference even under S. 115, C. P. C. No objection was therefore taken on behalf of the respondents that in the civil revision petitions it is not competent for us to go into the correctness of the findings of the Courts below.

Indeed in the light of the decisions in 'ATCHAYYA v. SEETHARAMACHANDRA RAO', 39 Mad 195; 'BALAKRISHNA v. VASUDEVA', 40 Mad 793; 'JOYCHAND LAL v. KAMALAKSHA', 1949-2 Mad L J 6 (PC), such a contention would be untenable. This aspect of the matter was considered by Viswanatha Sastri J. in NARAYUDU v. VENKATARAMANAMURTHI', 1949-2 Mad L J 623, and if I may say so with respect he held correctly that the jurisdiction of this Court in a matter of that kind to interfere is not taken away by S. 115, C. P. C., if a proper case for interference is made out.

(14) It has now been found by the Courts concurrently that the temples owned both the warams and this finding has not been challenged before us. The learned Subordinate Judge agreeing with the learned District Munsif has found that in the present case the temples purchased the entire ownership in the lands, that the tenants had executed leases dating from 1886 for short periods admitting the right of the temple to both the warams and also containing surrender clauses agreeing to surrender the land on the expiration of the period of the tenancy. They also paid what is called "Swami bhogam" in recognition of the absolute ownership of the temple to the lands. Sometimes there was also change of tenancy though the tenants have also continued in some cases for a longer period in possession of the lands and the tenants had never asserted the kudiwaram interest in the lands till very recently, that is, some time from or after 1930. There is however, no evidence that the plaintiffs ever cultivated the lands. The leases did not contain the expression "pannai" or any similar terms indicating that the lands are the private lands. On these facts and in view of the opinion of the author of the Ramnad Manual of the year 1890 that in that part of the country the loose expression "iru bogam" or both the warams indicated that the land was owned as pannai or private land, particularly in the case of dharmasanams, the learned Subordinate Judge held that the lands were proved to be private lands.

(15) I shall deal with the evidence in detail later but on behalf of the appellants it was urged that even if the facts as found by the learned Judge were correct the inference that they are private lands is not warranted as according to the learned advocate for the appellants the test to determine whether the land is private land or not is to see whether the Zamindar had cultivated the lands himself or by hired labour at some time or other and whether there was indication that the landlord intended to retain the lands as resumable for cultivation for himself even though he might have leased them from time to time for a season. As this test is absent in this case, it is contended, that we should not accept the finding of the Courts below that the lands are private lands. The point therefore for consideration is whether this view is correct.

(16) Before referring to the sections of the Act and the decisions bearing upon the question, it will be useful to have a correct picture of what was considered to be private land before the Estates Land Act of 1908 was passed and what the origin and the incidents of the private land were before 1908.

(17) Both under the Hindu Kings and later during the time of the Moghul administration the status of a cultivating tenant in a village was defined by usage. The cultivating tenant always rendered to the State a portion of the produce of the land varying with the nature of the crop which is called "melwaram" while the share left to the cultivator was known as "kudiwaram." The words "melwaram" and "kudiwaram" were in vogue in the Tamil country.

In the Sircars the share payable to the Government was known as "Ambaram" or 'Raja bhagam" and what was left to the cultivator as palu. In some of the dowls or annual accounts by which settlement was made, reference was made in the documents to 'Sirkar

hissab' or the share of the Government (sometimes the Zamindar also was referred to as Sirkar) and the ryot's 'hissab' or the share of the ryot. Sometimes the share of the ryot is ½ or 9/20 varying according to the nature of the crops raised on the lands.

By common understanding and usage the cultivator was allowed to remain in the land without disturbance so long as he continued to pay the share due to the State. The cultivating tenant was treated as a co-owner with the melwaramdars, whoever he may be, and not as a mere lessee. The Board of Revenue was charged with the duty of investigating and reporting upon the nature of the rights of ryots in this presidency about the year 1817 or 1818 and the proceedings of the Board of Revenue dated 5th January 1818, quoted in extenso in Diwan Bahadur Srinivasa Raghava Aiyangar's Fifty Years Progress in Madras Presidency contains an exhaustive survey of the relations between the land-holders and the ryots under the customary law of this country. Those proceedings were referred to by Subramania Aiyar J. in 'VENKATANARASIMHA NAIDU v. D. KOTAYYA', 20 Mad 299 and 'CHIDAMBARA SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586.

The collection from the ryots of the share of the revenue was entrusted both by the Hindu Kings and later by the Muhammadan rulers to officers variously described as Chowdrie, crorie, zamindars. This procedure was not peculiar to this presidency but it was also common in Bengal. These officers were appointed very often by sanads which defined their duties. They had also other functions to discharge and very often were entrusted with the duty of looking after the peace of the country. These officers by whatever description known were remunerated by various methods. They were paid a portion of the melwaram, very often about 1/10th and were also allowed to collect russooms or fees. To make up the deficiency special grants of lands were very often made to them which were denominated in Bengal, Naunkar (subsistence) and Soverum in the Sircars.

With a view to make their presence necessary everywhere in the district in their charge these lands were not granted at one place but were distributed very often to each village to make the supervision effective. These lands formed the property and the absolute property of those persons who later came to be called the Zamindars and they could let them out to tenants or cultivate them personally by themselves or through their servants. But if let to tenants, the tenants had no security of tenure in the sense in which it was understood under the customary law regarding other lands, that is to say, the tenant could not say as in the case of other lands that so long as he paid the rent due to the Zamindar he should not be disturbed from possession of the property. This usage which applied to other lands did not apply to the lands so granted.

Reference may be made in this connection to the fifth report of the Select Committee on the affairs of the East India Company, 1812, Firmingol's Edn. Vol. 1 pages 25, 149, and 151 and also to Mr. Grant's Political Survey of Northern Sirkars, 1786, which is printed as Appendix to Vol III at page 22. Mr. Grant says that "Nancar" is a Persian term. The Deccan Soverum was derived from a Turkish word with the common Telinga termination "um" signifying in both cases subsistence in bread or livelihood being to arise from small allotments of land freed from any public encumbrances & conveniently dispersed throughout the district so as to make his presence necessary everywhere, give him local attachment and greater effect to general superintendence in attending to his own private interest.

Baden Powell on Land Systems in British India Vol 1, pages 514 and 515 refers to the emoluments received by the Zamindar and points out three sources from which the Zamindar derived his private lands. First, NIJJOT, the Hindu equivalent of the Persian term "Khudkast" the same as "Sir" of other parts, that is, the lands of his family which he cultivates with his own labour and personal superintendence from which the State might or might not take revenue; secondly, lands which the Zamindar reclaimed from waste for his own benefit in which there were no pre-existing ryots and which were cultivated by contract with tenants. Such kind of land was known under the name of Khamar, the Oriya or Bengali word, used for thrashing floor, and indicating lands the produce of which is divided on the thrashing floor between the cultivator or the soil owner. These lands as pointed out by the learned author bad necessarily to be subject to the sharing system as they were waste lands newly brought into cultivation and are subject to depreciations by deer, pigs and wild beasts, from the neighbouring jungles. The loss, if any, would be borne, equally under this system of sharing the produce by both the Zamindar and the tenant. Yet a third category of land is included in it which is 'Nankar' which I have attempted to explain already. If these lands are granted free of revenue the Zamindar absorbs them into his own property. At page 515 the learned author states. "This custom of 'nankar' spread wide, and in the Northern Sirkars of Madras was found enjoyed under the local name of "Savarum".

From this short summary it would be evident that private lands were not always cultivated by the Zamindar himself. He let them out on contract of tenancy under the sharing system to persons who had no security of tenure and the lands were not around his house or residence but were purposely distributed throughout the district so as to secure effective supervision by him of the entire district. These lands were not subject to the usage of the tenant acquiring a right to occupy it so long as he paid the rent due to the land-holder as per custom. Various descriptions of these lands were adopted both in Bengal and in this presidency and in other provinces having regard to the purposes for which the lands were granted. They really constituted emoluments or compensation to the Zamindar for the discharge of his duties which were defined and enumerated in the Sanad appointing him as Zamindar.

(18) The Permanent Settlement of Madras practically followed and applied the principles of Permanent Settlement in Bengal contained in the Decennial Settlement Regulations, 1793, (Regulation 8 of 1793) as appears from the fifth report a copy of this regulation and the other regulations bearing upon the question were sent to Madras to enable the Madras Government

to formulate the principles upon which the Permanent Settlement in Madras should be effected.

These principles were embodied in the instructions issued to the Collectors on the 15th of October 1799 by the Special Commission embodying the principles on which the income for purposes of settlement of the Zamindari should be ascertained and the addition and subtractions to be made from that income to arrive at the final figures.

(19) Paragraph 25 of the instructions relates to private lands and is modelled on S. 37 of the Bengal Decennial Settlement Regulations 1793. It states:

"all private lands at present appropriated by the Zamindars and other landholders to the subsistence of themselves and families as well as all lands held by private servants and dependents will be considered as forming part of the Sirkar land, they are responsible for the public 'Zama'"

meaning thereby that the private lands along with other lands in the estate should be liable for payment of the public 'Zama' or peishcush fixed upon the estate. But these lands it will be noted were sirkar lands appropriated by the Zamindar for their subsistence. It is not clear from the instructions whether in the collections made by the Zamindar which formed the basis of the settlement the income received by the Zamindar from private lands was or was not included. Whatever that may be, private lands were treated as part of permanent settlement as is clear from instruction No. 25 (vide also S. 2 of Regulation 25 of 1802).

(20) The earliest of the decisions before the Estates Land Act which throws some light as to what constituted private lands or 'pannai' land is the decision in 'NAGAYASAMI KAMAYYA v. YIRAMASAMI KONE', 7 MHCR 53. That case arose under S. 12 of the Rent Recovery Act, VIII of 1865, which enabled a tenant ejected by a land-holder without due authority to institute a suit before the collector to obtain reinstatement with damages. The defendant in that suit was the Zamindar of Saptur, in the Ramnad District, who ejected the tenant who was the plaintiff in the action from lands which the defendant claimed to be his 'pannai' or private lands. The defendant contended that the tenant voluntarily relinquished the lands and that in any event the Collector had no power of interference under S. 12 of the Act in respect of the 'pannai' lands, as in such a case the Zamindar would be the tenant of the lands and the plaintiff would be his undertenant. The Zamindar also raised an alternative contention that 'pannai' lands were not part of the Zamindari and therefore S. 12 had no application. The suit was dismissed by the Deputy Collector as he was of the opinion that the relationship between the plaintiff and the defendant was that of a subtenant.

This decision was reversed by the Civil Judge on appeal. The Civil Judge in his judgment considered the nature of the 'pannai' land. According to him

"they are lands to which the proprietor had an exclusive right, that is to say, a right to receive the kudiwaram produce, and the right to receive the melwaram; lands regarding which landholders can arrange their own terms of rent as they can with respect to the waste or unoccupied lands alluded to in para 4 of the preceding section. Sometimes these lands are cultivated under the Zamindar's own ploughs, and sometimes they are let out for cultivation by others."

He found that the lands formed part of the Estate and that under S. 12 of the Act the tenant was entitled to relief as claimed by him. This decision was affirmed by the High Court. Kindersley J. observed in the course of the judgment that the tenure of the tenant was something more than the tenure of an ordinary ryot; and the Zamindar cannot be said to be a tenant of his own lands. Even if the lands had not the incidents of being originally in the hands of the tenant it would not prevent the lessee when such a land was let from being a tenant of the Zamindar. The contrast, therefore, is between the lands which were originally in the hands of the tenants and lands to which the proprietor had an exclusive right, a right to receive the kudiwaram produce and the right to receive the melwaram. This is the distinction recognised as early as 1872 between the two categories of lands in Zamindari. As pointed out by the Civil Judge, it may be that sometimes the 'pannai' lands were cultivated under the zamindar's own ploughs or sometimes they may be let out for cultivation by others. But the essence of the matter seems to be the distinction between the absolute property of the proprietor and lands in which the proprietor has got only the right to receive the melwaram.

(21) Besides waste lands, porombokes, 'grama nathams', that there are two broad categories of lands in a village is also made clear by the very illuminating and exhaustive judgment of Subramania Aiyar J. in the well-known 'Cheekati' Case 'CHEEKATI ZAMINDAR v. RAMASOORU DHORA', 23 Mad 318. He there pointed out that the presumption of tenancies from year to year obtaining under the English Law has no application to conditions in this presidency where the ryots hold the land under no derivative title but hold them as co-owners with the landholders. The payment made by the ryots to the Zamindar, in the absence of a contract, is regulated by custom in the last resort, as laid down by S. 11 of the Rent Recovery Act. The ryots are entitled to hold the land for an unlimited time so long as they wished to retain it, but, of course, subject to the discharge of the obligations by them incident to the tenure. This applied according to the learned Judge not only to lands in the hands of the ryots but even to lands relinquished by former occupants or which were lying waste from time immemorial. If a ryot takes up the land again his tenure is treated exactly on the same footing as land into the possession of which it was not shown that he was inducted by the Zamindar. He pointed out the distinction between home-farm lands and the ryoti lands. The treatment accorded by the Zamindar to the two categories of lands is entirely different.

The learned Judge cited from a 'NUZVID CASE', AIR 1922 Mad 281 the evidence of the 'kurnam' who deposed to the distinction observed in the treatment accorded to the two categories of lands. The ryoti land in the Kistna District is known as 'seri' which in some other Districts is used in an opposite sense meaning private land. For ryoti lands 'seri' pattas are granted for long periods. If a tenant dies the names of his heirs are substituted. If the lands are transferred pattas are granted to the trans-

ferees. The lands are alienable by sale and mortgage but in respect of home-farm lands the pattas are different. They are usually for one year with "quit" clauses to vacate the land at the end of the year. Usually 'khats' are taken in respect of the private lands and the home-farm lands are leased out to the highest bidder. The rent in the case of 'seri' land will never vary except when there is conversion from dry into wet and even that with the consent of the tenant. In the case of home-farm lands the transfer of the holding or succession is not recognised.

The description given by the karnam of the Nuzvid estate in the earlier case is as stated by the learned Judge whose knowledge of the land tenures in this presidency was intimate and unique is a fair description of what goes on in most zamindaris in this presidency and shows very clearly that

> "the prevalent permanent form of agricultural holding in Zamindari tracts extends not only to lands held by ryots immemorially but also to what they take up under Zamindars, provided the lands so taken up do not form part of the home-farm lands of the Zamindars."

According to the learned Judge, lands which are home-farm lands of the Zamindar may be under his direct cultivation or they may be let to tenants but the treatment accorded as evidenced by the entries in the accounts and in the engagements entered into with the tenants as well as in the incidents is entirely different from that accorded to a ryoti land.

(22) The position in Bengal regarding the nature of the private lands seems to be also similar. The expressions there in vogue to describe private lands are usually, 'Khamar, Nij, Nijjote'. 'Nijjote' is from 'Neech' (under) and 'jote' (to plough) that is land reserved by the zamindar and set apart for his own cultivation. According to the other authorities the expression is derived from 'nij' — own, and means the lands in the zamindar's own cultivation. The terms denote the ownership of the land as private land, as distinguished from those let out to the tenants. 'Khamar' lands have always been recognised as being in a special and exclusive sense the private property of the zamindar as distinguished from all the rest of the cultivated or cultivable area which may be called 'ryoti' land, and in respect of which the zamindar's rights were merely to receive a share of the produce or an equivalent in money. Under the rules of the Decennial Settlement, 'khamar' was understood to signify lands appropriated to the subsistence of the zamindar and their families. Under the Permanent Settlement regulation no land was recognised as "khamar" which was not such on the 12th of August 1765, the date of the grant of the 'Dewani' and there is no law recognising the creation as 'khamar' subsequent to that date (vide Guha's land Systems in Bengal and Bihar, 1915, at page 432).

(23) Before the introduction of the Estates Land Act, 1908 under the common law of the country, therefore, private land was the absolute property of the zamindar he being the owner of the melwaram and kudiwaram which he could cultivate directly or let out to tenants on his own terms and the rights of the zamindar and his tenant to private lands were regulated by contract and by contract alone and not by custom. In ryoti lands the zamindar had only the right to receive the melwaram which is governed either by the contract or by custom as recognised under S. 11 of the Rent Recovery Act. He could not ordinarily enhance the rent and the rent had to be determined when there is a dispute in accordance with the principles laid down by S. 11 of the Rent Recovery Act. He had no right to eject the tenant though the tenant was at liberty to relinquish the land. But notwithstanding the relinquishment the character or nature of the land remained unaltered. There was the duty to exchange the pattas and muchilikas and the mode of enforcement of pattas and mulchilikas was also prescribed by the Statute. Cultivation therefore by the zamindar of private lands was not treated and recognised as the sole or exclusive test by which the character of private land could be determined.

(24) In order to see whether any change was introduced in this behalf by the Estates Land Act of 1908, it is necessary to examine the provisions relating to the private land. S. 3(10) of the Act contains the definition of private land. "Private land" means "the domain or home-farm land of the landholder by whatever designation known, such as 'khambattam', 'khas', 'sir', or 'pannai'. "Khas" and "sir" are not so far as I am aware in vogue in this presidency to denote private land.

The Act was somewhat modelled on the Bengal Tenancy Act and some of the expressions were borrowed from the corresponding section of the Bengal Tenancy Act. Even there the word "khas" does not occur in the section. S. 3(16) contains the definition of "ryoti land" which excludes private lands and also tank-beds thrashing floors and other communal lands and lands granted on service tenure. Section 8(3) provides that the merger of the occupancy rights under sub-secs. (1) and (2) of that section shall not have the effect of converting ryoti land into private land. Section 19 excludes from the purview of the Act the relations between a land-holder and his tenants of private land which implies that private land could be let to tenants.

Section 134 extends the provisions of the Act relating to the recovery of rent by distraint and sale of movable property, to the recovery of rent by the land holder from a tenant of his private land in the estate provided pattas and muchilikas have been exchanged between them, which is also a clear indication that not only the landlord is entitled to let the private land to tenants and need not necessarily keep it always under his cultivation but that even pattas and muchilikas as defined by the Act could be exchanged in respect of such lands to enable the landholder to enforce payment of rent by distraint and sale of movable property. Of course, the sale of the holding is not possible in such a case as the tenant had no interest at all in the lands as in the case of a ryoti land.

Lastly, there is chapter XII relating to private lands of the landholder. S. 181 (before amendment in 1934) excluded the operation of Ss. 6, 8, 10, 11, 12 and 46 of the Act to private lands and stated that: "Nothing contained in these sections would confer a right of occupancy on the tenants of private lands." The landholder's right to convert private land into ryoti is recognised by the proviso to the section.

Provision is made in Ss. 182, 183 and 184 for recording private lands & S. 185 provides rules for the determination of the landholder's private land. This section was subsequently altered in 1934 and 1936 but the unamended section was as follows:

"When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to local custom and to the question whether the land was before the first day of July 1898, specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown: Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act shall be deemed to be the landholder's private land."

The Act, therefore, recognises two categories of lands in the estate. Ryoti land in which the tenant who was then in possession or was let into possession subsequently automatically acquired a right of occupancy in the land. Under S. 8 acquisition of occupancy right by the landholder by the modes indicated in that section has not the effect of converting what was once ryoti into private land. The tenant of a private land has no heritable or transferable right as in the case of ryoti land under S. 10 and he has also no right to use the land in his lease in any manner he pleased. Nor has he any right to the trees in the holding. This is the effect of excluding the applicability of Ss. 6, 8, 10, 11 and 12 by Section 181 to private land. S. 46 which is also excluded provided for the acquisition of occupancy right by non-occupancy ryot as defined under the Act but this distinction between occupancy and non-occupancy ryot in ryoti land which was old waste and ryoti land which was not old waste has been abolished by the Amending Act, 1934. There is no mode recognised by the Act by which a tenant of a private land could acquire occupancy right except under a grant by the landholder. Their relations are entirely governed by the contract between them.

(25) After the Act the question of determining whether the land in suit is private land or ryoti land came up for consideration in several decisions before the Act was amended in 1934 and 1936. The definition of "private land" did not give any clear indication of the essence of private land. It merely stated that private land means the domain or home-farm land of the landholder — whatever be the description by which the land was known, whether it was styled "khambattam, khas, sir, or pannai. The Act did not define anywhere the words "domain" or "home-farm" land.

When we turn to S. 185 which contains rules for determination of the land-holder's private land some light is thrown on the question. Under the proviso to that section there is one definite and conclusive test to determine the land-holder's private land; and that test is the proof that the land was cultivated as private land by the land-holder himself by his own servants or by hired labour with his own or hired stock for a period of twelve years immediately before the commencement of the Act. It requires therefore proof of cultivation of the land. If that is proved then the land is deemed to be private land whether in fact it was private or not. Even if it was once known to be ryoti according to this test of continuous cultivation for twelve years it is open to the land-holder to convert what was once ryoti into private land. Even if it was ryoti land at sometime, if he proved continuous cultivation within the meaning of the proviso, that is also a mode by which the land could be established to be private land. The proviso applied to cases where the origin of the land or the nature of the land was known to be ryoti and to cases where the origin was not known.

(26) But what if the land-holder is unable to prove continuous cultivation and the nature of the land that it was ryoti or private is not known? In such an event resort must be had to the body of the Sec. 185. Three tests are provided under this part of the section. One is local custom, the second is whether the land was before 1st July 1898, specifically let as private land and the third is any other evidence that may be produced. Here again the three rules are not definite in themselves and create difficulty in gathering the intention of the legislature. By local custom, as I understand it — and the legislature must have had in mind — is meant the usage in the village of the estate whereunder the lands which were dealt with in a particular manner were recognised by the community or by the tenants as lands in which they could acquire no occupancy rights by usage or custom and which are in the absolute disposal of the land-holder. The treatment by the zamindar in his estate accounts giving separate patta numbers, exchanging pattas and muchilikas or obtaining 'khats' for short periods with surrender clauses and leasing it to tenants at varying rents and changing tenants from time to time may be a usage which distinguishes ryoti land from private land as pointed out by Subramania Aiyar J. in the 'CHEEKATI CASE', 23 Mad 318. In some cases it may be that in respect of private lands the zamindar always leased out the land on sharing system while all the other ryoti lands were let out for definite money rents. All this applies of course when we start with no knowledge that the land was once ryoti.

The section next refers to specifically letting of private land before the first day of July, 1898, that is, the date on which the first Estates land Bill was introduced. What is meant by specifically letting as private land is by no means clear. Is it meant that in the leases the landholder should describe the land as private land and let it as such? Or placing the emphasis on the word "let" that the letting must be on terms which differed entirely from the terms of letting of ryoti land? Perhaps it is meant to include both. Thirdly, it refers to any other evidence that may be produced. What exactly is the nature of the other evidence that is contemplated by the section is also difficult to understand. It may be proved that the land holder was cultivating the lands himself or was leasing it to tenants according to his convenience; or it may be proved that the tenants themselves had made admissions in the leases and 'khats' that the zamindar, the land-holder is the absolute proprietor of the land in question. It may be that in recognition of his ownership of the kudiwaram interest he was levying from the tenants more rent which is described by

various terms such as 'swami bhogam', etc., over and above the melwaram that is payable to him. It is significant that while under the proviso direct cultivation by the land-holder is insisted upon as the sole and exclusive test to determine that the land is private land in none of the three categories of evidence contemplated by the body of the section this test was specifically adopted.

(27) There was some conflict of opinion both under the corresponding provision of the Bengal Tenancy Act and in Madras as to whether leases subsequent to 1st July 1898 could at all be considered to determine the question whether the land is private land or not. Sadasiva Aiyar J. in 'LAKSHMAYYA v. VARADARAJA APPARAO BAHADUR', 36 Mad 168, at p. 185 was of the opinion that under S. 185 of the Act leases granted on the 1st July 1898 are wholly shutout as evidence either for the purpose of proving the character of the tenure of the land or even to show that the land was treated in the same manner after July 1898. (Sundara Aiyar J. was of a different view). This was also the view of Wallis and Ayling JJ. in 'CHINTAM REDDI v. APPALANARASIMHA', 1914 M W N 766, and of Venkatasubba Rao J. in 'VEERABADRAYYA v. ZAMINDARS OF NORTH VALLUR', 50 Mad 201, at p. 214.

But this view was not shared in by Abdur Rahim and Oldfield JJ. in 'APPUROW v. KAVERI', 7 Mad L W 271, who ruled that an admission of the land-holder's title contained in a document executed by a tenant after 1st July 1898 is admissible to prove the character of the land and it was not excluded by the provisions of S. 185. They followed the view of Sundara Aiyar J. in 'LAKSHMAYYA v. VARADARAJA APPARAO', 36 Mad 168, and dissented from the view of Sadasiva Aiyar J.

The question in my opinion has now been set at rest by the Privy Council in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634 (PC), a decision under S. 120 of the Bengal Tenancy Act, the language of which is in 'pari materia'. It was there held that admissions in the 'kabuliat' regarding the character of the land after March 2, 1883, which is the date fixed under the Bengal Act, were admissible evidence regarding the character of the land. I shall have occasion to deal with this decision more elaborately later but it is sufficient now to refer only to this point which was settled by the Judicial Committee. (see also the observations of Gentle. C. J. in 'BANDHARU JOGI v. C. SEETHARAMAMURTI', ILR (1948) Mad 223, at pages 246 and 247 FB).

(28) The policy underlying the Act is that the Zamindar is not entitled to increase the extent of his private land by encroaching upon the ryoti land and converting it into private land. He cannot obviously do so after the coming into force of the Estates Land Act in 1908. On the question whether he could do so retrospectively there was a difference of opinion in this Court between Sir John Wallis C. J. and Seshagiri Aiyar J. in the 'CHELLAPALLI CASE' 'ZAMINDAR OF CHELLUPALLI v. RAJALAPATI SOMAYYA', 39 Mad 341. The only extent to which under the Act retrospective conversion was permitted is under the proviso to S. 185 by the land-holder proving that he had continuously cultivated the land himself or through his servants for a period of 12 years before the commencement of the Act. Under S. 8(3), the mere merger did not bring about a conversion of ryoti land into private land. If the merger was followed however by continuous cultivation for a period of 12 years before the commencement of the Act, it would be open to the land-holder to claim that the land is private land notwithstanding that it was once ryoti. This was the view of Seshagiri Aiyar J. in the 'CHELLAPALLI CASE', 39 Mad 341. The Privy Council did not resolve this conflict when the decision in the 'CHELLAPALLI CASE', 39 Mad 341, was taken up in appeal in 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 (PC). Since the decision in the 'CHELLAPALLI CASE', 39 Mad 341, the view of Seshagiri Aiyar J. was followed in 'MALLIKARJUNA PRASAD v. SUBBIAH', 39 M L J 277, by Abdur Rahim and Burn JJ. and by Sadasiva Aiyar J. in the 'ZAMINDAR OF NUZVID v. LAKSHMINARAYANA', 45 Mad 39. The opinion of Sir John Wallis C. J. was followed by Krishnan and Venkatasubba Rao JJ. in 'VEERABADRAYYA v. ZAMINDAR OF NORTH VALLUR', 50 Mad 201, at page 214.

(29) In this state of conflict the question came up for consideration before a Full Bench in 'BANDHARU JOGI v. C. SEETHARAMAMURTI', ILR (1948) Mad 223 (FB), which upheld the view of Seshagiri Aiyar J. in 'CHELLAPALLI CASE', 39 Mad 341. The effect of the Full Bench decision then is that even if the land was shown to be ryoti land at some remote past, it is not open to the land-holder by proving either letting it to tenants as his absolute property or by any other means to show that he has since converted the land into private land after acquiring the kudiwaram interest in such land except by establishing that for a continuous period of 12 years prior to the commencement of the Act, he cultivated the land himself. In other words, the land-holder is not permitted to increase the extent of his private land even prior to the Act except by showing continuous direct cultivation for a period of 12 years. The test of cultivation is the sole and exclusive test in the case where the land is known to be ryoti. Even if the land is not known to be ryoti and its character is unknown if the landlord is able to establish his continuous cultivation for a period of 12 years before the commencement of the Act, the conclusion may be reached that the land is private land. So far, the position is perfectly clear and is well settled.

(30) If the character of the land is not known what are the essential characteristics of private land and what is the nature of proof required to establish that the land is private land when the landlord is not able to prove continuous cultivation for a period of 12 years? Is it necessary even in such a case to prove that the land-holder cultivated the land personally though not continuously and that he always retained his intention to resume cultivation or is it enough to show that by usage and treatment the land was recognised as private land? Some of the observations in the judgments of this Court lend support to the view that without proof of cultivation at some time and without proof that the land-holder intended to resume cultivation even though he had let the lands now and then, it is impossible to establish that the land is private land. This is the position that is taken up by the learned Advocate for the appellant in these cases and has given room for attacking the finding of

the Courts below that the land has been proved to be private land.

(31) An examination of the decisions which I propose to do presently, would establish that the test of cultivation and intention to resume cultivation is not the only mode by which the land could be proved to be private land. The essence of private land as understood before the Estates Land Act and under the provisions of the Act in my opinion as I have indicated already is that the land is the absolute property of the zamindar in which the tenant is not entitled to acquire occupancy right except by a grant and not by mere letting into possession.

By the amending Act, 1934, the proviso to S. 185 was transferred to the definition in section 3(10) of the Act, and is divided into two parts Cl. (a) and Cl. (b); and it was further altered by Act XVIII (18) of 1936 and as the section now stands, Cl. (a) applies to private lands in estates specified in sub-ss. (a) and (b), (c) or (e) of Cl. (2) of S. 3 and Cl. (b) applies to estates within the meaning of sub-clause (d) of Cl. (2) of S. 3. As we have held that the suit village is an estate under S. 3(2)(e) the definition in Cl. (a) of S. 3(10) is applicable to the present case. The amendments of 1934 and 1936 have also altered S. 185 and here again the division is between the rules applicable to estates under (a), (b), (c) or (e) of Cl. 2 of S. 3 and estates in sub-cl. (d) of Cl. (2) of S. 3. There is no substantial variation in S. 185 which contains rules of evidence, except that the old proviso is omitted and is transferred to Cl. (10) of S. 3 as sub-cl. (a). By continuous cultivation for a period of 12 years under the present definition the land is not deemed but is treated as private land. That is also a change effected by the amendments.

The omission, therefore, of the old proviso in S. 185 is also an indication in my opinion that the test of cultivation is not required where the origin of the land is not known. When the proviso formed part of S. 185 the argument was advanced in the 'CHELLAPALLI CASE', 39 Mad 341, that the existence of the proviso was an indication that cultivation though not continuously for 12 years at some time or other is indicated but there was no room for such a suggestion or contention as the proviso is now altogether omitted from S. 185. In none of the clauses in S. 185 is cultivation insisted on to prove the character of the land. It is therefore difficult to see on what basis the test of cultivation in cases falling under the first part of the definition is insisted on.

The attempt in some of the decisions is to deduce the test from the use of the expressions 'kambattam, khas, sir and pannai' in the definition and also from the words domain or home-farm land. The words "domain" and "home-farm" lands are not defined in the Act. Wallis C. J. in the 'CHELLAPALLI CASE', 39 Mad 341, adopts the dictionary meaning of the word as given by Webster citing Shemtore. According to Webster it means "the land about the mansion home of a lord and in his immediate occupancy." Seshagiri Aiyar J. in the same case quotes from the Encyclopaedia Brittanica, Vol. III (3): "Domain" as synonymous to "Demesne" and is explained in the Encyclopaedia Brittanica as follows:

"Domesne — (Domeine, Demain, Domain etc.) that portion of the land of a manor not granted out in the freehold tenancy, but (a) retained by the lord of the manor for his own use and occupation, or (b) let out as tenamental land to his retainers or "villani." The domesne land originally held at the will of the landlord, in course of time came to acquire fixity of tenure, and developed into the modern copyhold. It is from domesne as used in sense (a) that the modern restricted use of the word comes, i.e.," land immediately surrounding the mansion or dwelling house, the park or chase."

The modern restricted use of the word as given in the Encyclopaedia was accepted by Seshagiri Aiyar, J. and he concludes that the private land is confined to the lands surrounding the mansion or dwelling house of the Zamindar. As observed by Viswanatha Sastri J. in a recent case 'PENTAKOTA NARAYUDU v. VENKATARAMAMURTI', 1949-2 Mad L J 623- to adopt the dictionary meaning of these English words:

"as confined to 'land immediately surrounding the mansion or dwelling house, the park or chase of a lord' which would be the dictionary meaning of these English words, is to import feudal ideas of medieval England into a system of land tenure in this country without adequate justification. The English draftsman of the Bill which afterwards became the Madras Estates Land Act as well as the English Revenue Member of the Executive Council of the day who piloted the Bill through the legislature employed the expressions "domain" and "home-farm" as the nearest English equivalents of the tamil and telugu words "Pannai", "Khambattam" "Seri" etc. It is all very well when talking of the demesne lands of an English Duke or Marquis to use the term as denoting land appurtenant to the mansion of the lord of the manor. The manorial system was not prevalent in this country. Zamindars lived in cities and forts for reasons of security and their private lands were not confined to the vacant spaces surrounding their palaces or residence. It is a far-fetched construction to impute to the Madras Legislature an intention to incorporate the English conception of "demesne land" as a test for differentiating the public domain from private land in a zamindari."

(32) I respectfully agree with this criticism of the learned Judge and I do not interpret the words in the Act in that restricted sense. In fact, in the arguments before us no attempt was made to restrict it in the manner in which it was done in the 'CHELLAPALLI CASE', 39 Mad 341. In referring to the origin of these private lands I have attempted to show that the grantors of private lands took pains to see that the lands were dispersed throughout the District in order to secure effective superintendence by these zamindars over the various places in the District. There is no reason, therefore, to restrict the private lands to lands surrounding the residence of the landholder. One's experience of these zamindars shows that these private lands are distributed and are to be found in each village comprised in an estate. If there were 150 villages private lands were very often to be found in the most of the villages or at least in a major number of the villages. This is what obtains in the Northern Sirkars and also in the Southern Districts. The framers of the Act could not have been ignorant of this simple fact when the definition was

framed. In fact even Mr. Forbes who piloted the bill in the Legislature did not explain the terms in the manner in which it is now sought to be construed. As even in the arguments before us this restricted meaning of the term is not insisted upon, it is not necessary to pursue it further.

Even the word "home-farm" is not defined in the Act and in some of the decisions from this expression it was concluded that it must be the land which at some time or other was under the direct cultivation of the land-holder or at any rate even if it were let to tenant he intended to resume cultivation. This conception of home-farm land is negatived and there are clear indications in the Act itself to show that that was not the intention of the Legislature in using these expressions. Section 19 and S. 134 of the Act clearly contemplate leasing of the land to tenants by the land-holder of his private land and even exchange of pattas and muchilikas are permitted which negatives the idea of cultivation by himself.

Further, the very classification of the lands into two categories, lands in which occupancy rights could be acquired under the statute and lands in which occupancy rights could not so be acquired is a clear indication that the test to determine is not cultivation but the nature of the land at its inception and also the subsequent treatment accorded to it by the landlord and by the tenants of the village.

The decision in 'NAGASAMI KAMAYA NAICK v. VIRAMASAMI KONE', 7 M H C R 53 and 'CHEEKATTI CASE', 23 Mad 318, clearly bring about the essential distinction between the two categories of land and it is that that has to be established by the evidence. Of course, it does not shut out proof of cultivation and ordinarily cultivation may be a proper and even a good test but it cannot be sole and exclusive test to determine the nature of the land.

(33) The attempt on the part of the learned advocate for the appellant is to deduce from the use of the expressions 'kambattam', 'khas', 'sir', or 'pannai' in the definition that in order to constitute the land in an estate a private land, it should be the land which the land-holder himself cultivated and cultivation at some time or other must be proved. This it is claimed is derived from the meaning of the expressions used.

The definition says that private land means "the domain or home-farm land of the land-holder by whatever designation known, such as 'khambattam' etc". It does not say that the land would be private land if it is 'khambattam', 'khas', 'sir' or 'pannai' or if it is known to be such. These words are not explanatory of home-farm land as is evident from the expression by "whatever designation known" all that is stated is that the land goes by the name of those expressions 'khambattam' etc.

Under the corresponding section of the Bengal Act, S. 120 in Cl. (a) it is stated that private land is "land which is proved to have been cultivated as kamar, zirat, etc." by the proprietor himself with his own stock or by his own servants or hired labour for 12 continuous years immediately before the commencement of the Act. This definition insists cultivation as 'kamar' etc., and corresponds to the second part of the definition in the Madras Act which requires continuous cultivation for a period of 12 years immediately before the commencement of this Act. The first part therefore does not mean that it should have been cultivated as 'kambattam', 'khas', 'sir' or 'pannai'.

Under the second part of S. 120 (b) of the Bengal Act, private land is cultivated land which is recognised by village usage as proprietors, 'kamar', 'zirat', 'sir' etc. The expression by whatever designation known in the definition in S. 3 (10) must have reference to a recognition in the village as 'kambattam' etc. The attempt on the part of the learned advocate is to make these words and their import as defined by Wilson in his Glossary, the essence of the definition and deduce therefrom that proof of cultivation of the lands is the sole test for determining private land. I am not prepared to read the section in the manner suggested by the learned advocate for the appellant and whatever may be the meaning to be attached to these expressions at present the definition has not made the meaning of those words the essential part of the definition.

"Kambattam" according to Wilson's Glossary at page 254 is used in two senses. One is cultivation which a cultivator carries on with his own stock, but by the labour of another, the other is the land which a Zamindar, Jagirdar, or Inamdar keeps in his own hands, cultivating it by labourers, in distinction to that which he lets out in farm. 'Khas' applies according to that Glossary to lands held by zamindars and cultivated by themselves for their own benefit. "Sir" is the name applied to lands in a village which are cultivated by the hereditary proprietors or village zamindars themselves as their own especial share, either by their own labourers and at their own cost, or by tenants at will, not being let in lease or farm; these lands were sometimes allowed to be held at a favourable assessment, or were unassessed so as to provide 'Nankar', or subsistence for the proprietor. The term is also sometimes applied to lands cultivated on account of the state, or to those in which the revenue is paid by the cultivators without any intermediate agent. "Pannai" at page 398 means a field, a rice field; cultivated ground; tillage, husbandry". The two expressions "khas" and "sir" are not in vogue in this presidency so far as my knowledge goes. "Pannai" as defined by Wilson does not import personal cultivation by the zamindar. The only two words that are used in this presidency are therefore 'kambattam' and 'pannai'. The word "kambattam" is used in a general sense also to denote a man's personal cultivation.

It is difficult to infer from the meaning of these words as given by Wilson in 1855 that the words have the same meaning and must be understood in the same sense even at the present day or at any rate in 1908 when the Estates Land Act used that expression. As regards "pannai" as pointed out by the Civil Judge in 'NAGASAMI KAMAYA NAIK v. YIRAMASAMI', 7 M H C R 53, already referred to it is used to denote land in which the tenants acquired no occupancy rights. It is therefore not possible to infer from these expressions particularly from the meaning as given by Wilson in 1855 that these words have the same meaning and have the common feature of personal cultivation of the lands by the land-holder (see also the meaning of the words as given by Baden Powell cited above).

When in the second part of the definition the Legislature definitely insisted upon the test of continuous cultivation, to determine whether a given land is private land or not it is difficult to see if the intention of the legislature even in the first part was to insist upon test of cultivation why it did not expressly say so. The reason is according to me that these lands in estates have acquired a different character by reason of a continuous course of treatment and could easily be ascertained by reference to the documents such as village accounts, pattas and muchilikas and the other mode or manner in which the land-holder enjoyed these lands whether the lands were or were not private lands. The same idea is contained in the Bengal Act. In the village the tenants know with certainty which lands are private lands and which lands are ryoti lands in which they acquire occupancy rights.

It is therefore difficult to infer from the first part of the definition that cultivation is the test and is the exclusive test and the sole test for determining the nature of the land. Further, this view receives support from S. 185 which deals with evidence. If what is to be established under the definition is cultivation, it is difficult to understand why the Legislature permitted specific letting before 1898 as a test or as admissible evidence to prove the character of the land. The idea of letting is diametrically opposed to the idea of cultivation. Again local custom which is permissible under the first clause of S. 185 is also unnecessary and could not afford evidence of proof of cultivation. If according to the usage in the village the land was recognised as private land that is also a factor which goes to establish according to the section that the land is private land. The only clause under which cultivation may be proved is under Cl. (3) of S. 185 which contemplates any other evidence that may be produced. Reading therefore the definition with S. 185, it is impossible to infer from the definition of the first part that the legislature intended to lay down the test of cultivation as the sole and exclusive mode of determining the character or nature of the land.

(34) This leads me to a consideration of the decisions reported and unreported which have been placed before us in the course of arguments by either side. The decision in 'Lakshamayya v. Varadaharaja Apparao,' 36 Mad 168 is a decision relating to the Nuzvid estate of which the Gannavaram estate was a part. The suit was instituted by the Zamindar to eject the defendants from certain lands in a village which he claimed to be soverum or private lands in which he possessed both the kudiwaram and the melwaram rights. The defendants, the tenants, denied the right of the plaintiff to kudiwaram and claimed occupancy rights in the lands and contended also that the civil Court had no jurisdiction to entertain the suits as the lands were not private lands but were ryoti. The tenants were successful in the first Court, but on appeal the District Judge reversed that decision holding that the lands were the private lands of the Zamindar in which he owned both the warams. He relied upon the use of the words "soverum" in the accounts and in some of the muchilikas which according to him indicated that the Zamindar was the owner of both the warams. There was also other evidence which established that the Zamindar treated the lands on a different basis from "seri" or ryoti lands in his estate. In the survey of 1870 the two classes of lands were differently numbered and in the accounts the zamindar was shown as owner of the lands and not the cultivating tenants. The pattas of 1897 contained express admissions by the tenants that the lands were "soverum" lands & that they had no jeroyati or occupancy rights. The Zamindar also paid the water rates himself while in the case of "seri" lands or ryoti lands, the water cess was collected by the Government directly from the ryots. There was an assertion by the zamindar in 1892 that the lands were private lands and the ryots admitted the full proprietary right of the zamindar in the lands. From this evidence the District Judge concluded that the lands were private lands. There were second appeals by the ryots against the decision of the District Judge.

The main argument on their behalf was that the interpretation of the word "soverum" given to it by the District Judge that it comprises both the warams was not correct and this argument found favour with the learned Judges, Sundaram Aiyar and Sadasiva Aiyar JJ. who heard the appeals. "Soverum" denoted either the ownership of both the warams or of melwaram alone and so the use of the word in the documents was inconclusive to establish the ownership of both the warams by the zamindar. The learned Judges, however, were of opinion that this error on the part of the District Judge did not vitiate the finding as there was undoubted evidence afforded by the treatment of the lands by the Zamindar, and the admission of the tenants that they had no occupancy rights in the land. On the basis of this evidence, the finding of the learned District Judge was upheld by the High Court and the appeals were dismissed. Sundaram Aiyar J. at page 172 adverted to the origin of private lands and observed:

> "Sometimes the zamindar was a descendant of a royal family that enjoyed demesne or private lands and remained in possession of them after the family ceased to exercise sovereign powers, but continued to have zamindari rights under the Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to the State and partly also in consideration of his being responsible for the collection and payment of the State revenue. The private land in his own occupation was itself exempt from the payment of any revenue."

This description of the origin of private lands agrees with what was stated in the fifth report and by Baden Powell. The learned Judge treats private land as equivalent to "domesne" lands and what is more significant is that the inference of the lands being private was drawn from the treatment and the conduct of the parties in respect of the land extending over a long period of years. The treatment referred to is the mode of dealing with the lands as separate from ryoti lands in the survey and also in the village accounts. Admissions by the ryots before 1898 were also taken into consideration to determine the character of the land. There is no proof in that case that the lands were ever cultivated by the Zamindar nor was there any specific reference to an intention to resume cultivation at any future date. The case definitely falls under the first

part of S. 3 (10) and is clear authority for the view that there may be other modes of proof other than cultivation by which an inference that the lands were private may be drawn.

This decision it must be mentioned was never questioned or disputed or doubted in this Court and is good law. The decision was pronounced by two eminent Judges who had considerable experience and intimate knowledge of land tenures of this presidency and is entitled in my opinion to the greatest weight.

The decision in 'ARTHORAMA PAHU v. ARTHOPADHI', 25 Mad L J 248, is also a claim by a purchaser from a zamindar lands which were claimed to be private lands. All that is stated in the course of the judgment at page 250 is that the burden of proving that the lands are home-farm lands is on the Zamindar or his representatives. This is clearly laid down by S. 185 of the Estates Land Act; and then it is added that

> "the quetstion of possession, that is, whether the zamindar had been in direct possession through his private servants is the most important fact to be considered in such cases".

This decision is not an authority for holding that cultivation is the test.

(35) There are two decisions in 'CHITAM REDDI v. APPALANARASIMHA', 1914 Mad W N 766, and 'MARKAPULLI REDDIAR v. THANDAVA KONE', 1914 Mad W N 798, which have been referred to but they do not throw any light on the question under consideration.

(36) I now come to the decision in 'ZAMINDAR OF CHELLAPALLI v. RAJALAPATI SOMAYYA', 39 Mad 341, on which strong reliance was placed by the learned advocate for the appellants and which is the basis in the later decisions for holding that the test of cultivation or at any rate an intention to resume cultivation at a future date should be applied. In that case the lands were definitely proved to be ryoti lands to start with. The Zamindar was not able to prove continuous cultivation for a period of twelve years before the commencement of the Act. He relied upon the treatment of these lands in his accounts and also admissions in muchilikas executed by tenants in proof of the conversion of the lands from ryoti into private. Both the learned Judges agreed on the question that even assuming that retrospective conversion was permissible under the Act such conversion could be proved by other means than that of cultivation for a continuous period of 12 years prior to the commencement of the Act. Both the learned Judges agreed on the finding of fact that the Zamindar failed to prove conversion even by such evidence. Seshagiri Aiyar J. took the view that retrospective conversion was not permissible except to the extent to which it was recognised by the proviso to old S. 185 which is now the second part of the definition in S. 3 (10). Wallis C. J. differed from that view. In the result both the learned Judges agreed in holding that the lands were not shown to be private lands.

The discussion by Wallis C. J. of the question whether actual conversion from ryoti into private land has been established by the evidence commences at page 345. He starts the discussion by formulating the question that it is necessary in order to prove actual conversion from ryoti into private land, there should be very clear and satisfactory evidence; and then he proceeds to examine whether the evidence adduced in the case was sufficient for the purpose.

The learned Judge adverts to the attempt of the Zamindars after 'CHOCKALINGAM PILLAI v. VYTHEALINGA PUNDARA', 6 M H C R 164, to introduce in pattas and muchilikas clauses negativing the existence of occupancy rights and to achieve this object they very often introduce the description of the lands as Kambattam or home-farm lands even though the lands were never cultivated by the zamindar and he had no intention of so cultivating it. He also pointed out that the Zamindar in that case increased the extent of his private land from what it was in 1936 namely 102 acres to about 800 acres by the date of suit which is definite evidence that the Zamindar was endeavouring his level best to withdraw public land and convert it into private land so as to prevent acquisition of occupancy rights by the ryots. It was found that the lands were always cultivated by the tenants. The learned Judge observed at page 346 that it was necessary for the Zamindar to establish that the lands were at some time domain or home-farm lands and the acquisition of kudiwaram right by the zamindar at a subsequent date would not by itself have the effect of converting what was once ryoti into private land. In that connection he observed at the bottom of page 346:

> "It does not seem to me that calling the lands kambattam and letting them on terms which negative occupancy right with a view to prevent the assertion of such right is sufficient to convert them into private lands within the meaning of the definition."

In other words, the sentence in the context means that if the zamindar once knew the nature of the land to be ryoti, by mere introduction of the description of the land as 'kambattam' in pattas and muchilikas which in the very nature of things must be a colourable description would not convert the land into private land. It must be remembered that even according to the proviso to S. 185 the only test that is permissible to prove conversion of what was once ryoti into private land is the test of cultivation. Having this in mind I should think the learned Judge observed at page 347:

> "The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the zamindar as part of his home-farm lands, and it seems to me that his treatment of them as 'kambattam was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as 'sir' lands, and this is one of the terms mentioned in the definition. In 'BUDLEY v. BUKHTOO', 3 N. W. P. H. C. R. 203 it was held that 'sir' land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs."

This paragraph is the foundation for the argument of the learned advocate for the appellant in the present case and is also responsible for some of the observations in the

later cases for concluding that the test to determine the character of the land and the sole test is proof of cultivation by the zamindar himself and proof that he intends to retain or resume for cultivation by himself even when from time to time he demises it for a season. The learned Judge was called upon to decide the question as to what should be established in order to prove conversion of the land into private land. He was not called upon to decide upon the language of S. 3(10) the essentials as to what constitutes domain or home-farm lands. Reference to colourable description in the pattas and muchilikas of the lands as 'kambattam' is a clear indication that what the learned Judge had in mind was what was definitely known to be ryoti land and not a case where the character of the land is unknown and for the first time the Court is called upon to determine its nature on the evidence adduced. In the last sentence in the paragraph extracted above the learned Judge is careful enough to say that "this test" that is, the test of cultivation and the intention to retain may well be applied here, that is in the present case, in which the question of conversion and conversion alone is under consideration. In my opinion this passage cannot be treated as an authority for the interpretation by the learned Judge of S. 3(10).

Seshagiri Aiyar J. after referring to "domain" or "home-farm" land at page 350 refers to the proviso and observes:

> "The object of the proviso is to enable the landlord to say that although the land was 'seri', he has by his own servants, or by hired labour cultivated the land for 12 years preceding the Act and that consequently it should be regarded as his home-farm land. An irrebuttable presumption should be drawn from such a conduct. If one remembers that a home-farm land is that which has been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservation in favour of the landholder will be apparent. This conclusion carries out the scheme of the legislature which seems to be opposed to the augmentation of the private land of landholders, except in the special instance mentioned in the proviso to S. 185."

The learned Judge here uses very guarded language and says that home-farm land is that which has been 'ordinarily' cultivated personally by the landlord at the outset, thereby implying that it need not necessarily be always under cultivation and that at the time of the determination of the question there should have been proof that there was cultivation and the reservation in the proviso to old S. 185 was intended to benefit the landholder to the extent of the cultivation which he continuously carried on at or about the time of the commencement of the Act.

It is somewhat curious that the decision in 'BUDLEY v. BUKHTOO', 3 N.W.P.H.C.R. 203 which is referred to by Sir John Wallis, in his judgment is also a case of attempted conversion of land in the occupation of cultivating tenant into 'sir' or 'pannai' land. The appellant who was the tenant in that case asserted that the land in his holding was held by him for over 12 years as an ordinary cultivator. The lands were however entered later in the revenue papers as "sir" land. He therefore applied to the Settlement Officer for the correction of the record and for registering him as a tenant with rights of occupancy. This application was opposed by the Zamindar who claimed that the land was his "sir" and had actually been cultivated by him until the preceding year when it was let by his son to the appellant. The Settlement Officer after enquiry found that the case of the tenant was true, that the land was cultivated for more than 12 years by him and that while under his occupation the Zamindar had recorded the land as 'sir' although it was never cultivated by him. He therefore directed that the appellant should be recorded as tenant with rights of occupancy. The Zamindar instituted a subsequent suit contesting the correctness of the decision of the Settlement Officer and claiming that the land was his "sir" land. The Zamindar failed before the Munsif but was successful before the Subordinate Judge who reversed the decision of the Munsif dismissing the suit and upholding the contention of the Zamindar as the land was registered in the revenue papers as 'sir' for more than 12 years. There was a further appeal to the High Court which pointed out that the proposition applied by the Subordinate Judge was wholly unsound and that the:

> "mere entry of land as 'sir' will not make it a 'seer' land. Were this so, it would be in the power of every zamindar to convert the whole of the land of the village into 'seer' by simply recording it as such. Sir land, as we understand it is land, which at sometime or other has been cultivated by the Zamindar himself, and which although he may from time to time for a season demise to shikmees, he designs to retain as resumable for a cultivation by himself or his family whenever his requirements or convenience may induce him to resume it. The Settlement Officer had ruled that seer land must be land which had been cultivated by the proprietor and the Subordinate Judge was in error when he denounced this ruling as erroneous."

Just as there was colourable description of the lands in the decision in the 'CHELLAPALLI CASE', 39 Mad 341, in the pattas, negativing occupancy rights of the tenants, in this case also the zamindar got the entries in the revenue records as seer land which of course, would not have the legal effect of changing the character of the land. The test of cultivation, therefore, was applied in both cases to establish conversion of ryoti land into private. The two decisions are not certainly authorities for interpreting the language of the definition.

There was an appeal in the 'CHELLAPALLI CASE', 39 Mad 341, to the Privy Council and the decision of the Judicial Committee is 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 (PC). Their Lordships of the Judicial Committee accepted the concurrent findings of fact as to the lands being ryoti which is the opinion of both the Judges, Sir John Wallis, C. J. and Seshagiri Aiyar J. though they differed on the question of law. The Zamindar as pointed out by the Privy Council attempted to prove that by custom the lands were his private lands but failed in his attempt. Their Lordships of the Judicial Committee quoted the passage from the judgment of the Chief Justice just cited above and observed at p. 405 "that the test is obviously suggested by S. 185 of the Act and was rightly applied by the Chief Justice."

Upon this observation of the Privy Council the argument was based that the sole test of cultivation as the essence of the definition of private land in S. 3 (10) was accepted by the Privy Council and therefore must be taken as final. In my opinion this proceeds on a total misapprehension of the remarks of the Judicial Committee. The test suggested by section 185 must necessarily refer to the proviso to S. 185 where alone "cultivation" is referred to. In the three categories of evidence referred to in the body of the section no reference is made to cultivation. Their Lordships, therefore, must have meant when they approved the test laid down by Sir John Wallis C. J. that in order to establish conversion "you must prove cultivation or intention to retain as resumable for cultivation these lands." They were not considering the definition of private land in S. 3(10). It is a clear case in which to start with the land was known to be ryoti land and S. 185 had no application except the proviso which relates to cultivation for a period of 12 years in which case the land according to the old section was deemed to be private land even though it is known to be ryoti land at its inception.

'MALLIKARJUNA PRASAD v. SUBBIAH', 39 Mad L J 277, is a case in which the question of conversion of ryoti land into private land arose for consideration. Both the learned Judges Abdur Rahim and Burn JJ. accepted the view of Seshagiri Aiyar J. that retrospective conversion was not permissible except to the extent recognised by the proviso to S. 185. There was no proof of direct cultivation in that case. Abdur Rahim J. at page 281 states the effect of the decision as follows:

"The question what is home-farm land and what is ryoti land within the meaning of this Act has been discussed in a number of cases of this Court and the general conclusion arrived at is that ryoti land is land which is in the occupation of the cultivating ryot in contrast with the home-farm land which the Zamindar is entitled to deal with in any way he chooses by contract without being hampered by the provisions of the Estates Land Act."

And then the learned Judge refers to the decision in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, which was confirmed by the Privy Council in 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 (PC), and the test laid therein. The main object of S. 185 was considered as laying down rules of evidence showing whether the land in question is ryoti or private land and that by mere letting out on lease the land which was once ryoti was not enough to convert the land into home-farm land. Burn J. examined the scheme of the Act and at page 291 observed:

"The scheme of the Act appears to me to be to divide all cultivable land into two categories (1) private land — the entire interest in such land is vested in the land-holder. The temporary rights of cultivators of such land are based on contract. They cannot acquire occupancy rights except by the deliberate action of the land-holder. (2) Ryoti land — in all such land two separate interests exist — the melwaram and Kudiwaram interest —the former is vested in the land-holder and the latter in the ryot. It seems to me that one main object of the tenancy law is to preserve these two interests and keep them separate. The kudiwaram interest may be in abeyance but it can never be destroyed. The land-holder cannot prevent the acquisition of the right of a ryot. This is so even where a decree had been obtained before the passing of the Act.....A land-holder can hold the kudiwaram interest in one case only, i.e. where he possessed it before he became the land-holder — (Vide Exception to S. 6) and even then the two interests remain separate."

The learned Judge construes the decision in 'ZAMINDAR OF CHELLUPPALI v. R. SOMAYYA', 39 Mad 341, and 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 (PC), as laying down the test to be applied in deciding whether conversion has really taken place or not (vide page 293 bottom). Even if there was letting, if there is intention on the part of the lessor to resume direct cultivation the land may be presumed to be private land.

(37) The decision in 'VEERABHADRAYYA v. ZAMINDAR OF NORTH VALLUR', 50 Mad 201, is no longer good law in view of the decision of the Full Bench in 'BANSHARU JOGI v. SEETHARA AMURTI', ILR (1948) Mad 223 (FB). The learned Judges were of opinion that retrospective conversion of ryoti land into private land was permissible under the Act even apart from proof of cultivation for a continuous period of 12 years before the commencement of the Act. The only importance of this decision is in dealing with evidence to determine the nature of the land. Venkatasubba Rao J. points out the distinction between the two species of lands (1) Immemorial 'Kamatam'; (2) lands relinquished by ryots and absorbed into zamindar's kamatam lands. He adverts to the distinction that is kept in the records maintained by the estate between the two categories of lands and the lands in dispute in that case were lands falling under the second category that is lands which were originally ryoti but subsequently added to the Zamindar's private land. On the evidence the conclusion of the learned Judge was that the zamindar has established conversion and with this conclusion Krishnan J. also agreed. There was a specific finding in that case that the Zamindar failed to establish direct cultivation by himself and the question was decided mainly on the documentary evidence in the case. Here again even for inferring conversion the test of direct cultivation was not insisted on.

(38) There is the decision of a single Judge of this Court by Madhavan Nair J. (as he then was) reported in 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, which deals with a case of private land. In that case the land was not known to be ryoti land to start with and the question had to be decided on the evidence whether the land was private land or not. The lands in the village were known as "khas" "khas Bhagayat" which indicated that the lands were cultivated by the zamindars themselves. The learned Judge considers the question as one which falls to be decided under S. 185 of the Estates Land Act, the burden of proof undoubtedly being on the plaintiff, the zamindar. The evidence in the case showed that from 1877 onwards the land was let to tenants and it was not known how it was dealt with prior to that date. There were leases from 1877 to 1891 which contained a description of the land in various ways as 'Kambattam, Samastanam Khanigi' and also

contained surrender clauses. The pattas issued to the tenants were described as 'Sagupadi' pattas, in contra-distinction to pattas given to tenants who possessed occupancy rights in the lands. There was a change of tenancy and the rates of rent also varied from time to time. Sometimes rent was collected in kind and sometimes according to the varied cash rate in the village. The ryots were allowed in some cases to continue in possession of the lands from year to year. On this evidence it was held that the finding of the Courts below that the land was private land was justified. Reference was made in the judgment to the 'CHELLAPALLI CASE', 39 Mad 341, and to the test of cultivation by the Zamindar that was laid down in that case. The evidence of direct cultivation was of course lacking in the case but all the same having regard to the dealing by the zamindar of the lands in a manner as he liked, it was held that that was sufficient proof that the land was private land.

No doubt in that case it was not contended that the test of cultivation alone is the determining factor but 'CHELLAPALLI CASE', 39 Mad 341, was distinguished on the ground that it related to a land which was originally ryoti and the zamindar attempted to prove that there was conversion. This decision in my opinion establishes that apart from the test of cultivation there may be other modes by which the character of the land may be determined; and in doing so the evidence referred to in S. 185 as permissible evidence may be taken into consideration. The treatment of the land by the zamindar under leases, the terms of which were determined by him at his pleasure and the recognition by the tenants that they had no occupancy rights in the lands were considered as sufficient to warrant the inference that the land was private land. Ryoti lands were treated in a different manner from the private lands.

(39) 'KONDAYYA RAO v. NAGANNA', 1939-2 Mad L J 778, a decision of Wadsworth J. related to conversion of private land into ryoti under a document by which conversion was brought about. The learned Judge defines at page 781 "home-farm" land as land regarding which the land-holder at least retains an expectation that he will at some not too distant a date use it for his own cultivation and enjoyment. This test, it is claimed, follows from the decision in the 'CHELLAPALLI CASE', 39 Mad 341. The learned Judge, however, in laying down this test does not insist upon proof of direct cultivation at some time or other to establish that a land is home-farm land. A mere intention or an expectation to cultivate it even if it be at a distant date was enough according to the learned Judge to constitute the lands home-farm land.

This decision was carried in appeal under Cl. 15 of the Letters Patent in 'KONDAYYA v. NAGANNA', ILR (1941) Mad 720, which was heard by Sir Lionel Leach C. J..... Venkataramana Rao and Krishnaswami Aiyangar JJ. The majority of the Judges, Krishnaswami Aiyangar J. dissenting, confirmed the decision of Wadsworth J. that the land was converted effectively into ryoti land, as the land-holder sold the kudiwaram right under the document but retained only the melwaram right and they also further held that some of the terms in the sale-deed which were inconsistent with the land being ryoti would not alter the nature and effect of the conversion of the land into ryoti.

The only importance of this decision in my opinion, so far as it throws any light in the present discussion, is stated at page 726, by the learned Chief Justice that the essential characteristic of ryoti tenure is the permanent vesting in the tenant of the kudiwaram interest and the permanent retention by the land-holder of the melwaram right. It would follow from this definition of the nature of ryoti tenure that if there is no such permanent vesing of the kudiwaram right in his tenant in a particular piece of land and both the rights were retained by the land-holder it would be private land if otherwise the land is not shown to be ryoti land to start with. Krishnaswami Aiyangar J. who dissented from the majority view differed from them and held that a mere conveyance of the kudiwaram interest did not amount in that particular case to a creation of a ryoti tenure in the land conveyed. This decision really lays down the test for determining what constitutes in law a conversion of private land into ryoti which is really the converse of the conversion of ryoti land into private.

(40) The next decision which is of importance is the unreported judgment of Krishnaswami Aiyangar and Somayya JJ. in 'THIAGURAJASAMI DEVASTANAM v. MUTHUSWAMI', C. M. A. No. 311 of 1943. The lands in that case were in an inam village which became an estate under the Estates Land Act (Amendment Act XVIII (18) of 1936); and the sole question for decision was whether the lands in suit were or were not private or home-farm land of the land-holder.

(41) It would not be out of place at this stage to advert briefly to the position of an inamdar who owned the kudiwaram in an inam village prior to the Estates Land Act, 1908, and thereafter. Before the Act of 1908, the only question in an inam village was whether the inamdar owned or not the kudiwaram interest in the lands. In many villages the distinction between what was known as private land in permanently settled estates did not obtain. The tenant in the land could acquire occupancy rights either by grant or by prescription. Section 3(2)(d) of the Estates Land Act, 1908, converted some of the inam villages into estates by enacting that if melwaram in a village was granted in inam to a person who did not own the kudiwaram right thereof and if the grant was either made or confirmed or recognised by the Government it was an estate. If the inamdar owned the kudiwaram in the village on the date of the grant the grantee of the melwaram would not be a holder of an estate. In respect of inam villages which became estates under this definition the legislature consciously or unconsciously applied the broad division of the land into private land and ryoti land and an exception was however recognised under S. 8 that if before or after the commencement of the Act, the inamdar acquired the kudiwaram interest in any land comprised in an estate falling within Cl. (d) of sub-s. 2 of S. 3 such lands ceased to be part of the estate.

It followed therefore that under the old Act even after the date of the grant if the inamdar acquired kudiwaram interest in any particular land whether the acquisition was before the Act or after the Act it did not matter, the

land ceased to be part of the estate and therefore ceased to be part of the ryoti land. In such cases it was not necessary for the inamdar to show that in respect of such lands the test in S. 3 (10) of the lands being private is fulfilled in order to prevent the acquisition of occupancy rights in such lands by a tenant who is let into possession after the Act.

When we come to the Act of 1936, the situation however was completely altered and inam villages were made estates irrespective of the question whether the grant was of melwaram alone or not and also irrespective of the question whether the grantee owned the kudiwaram interest at the date of the grant or not. Under the definition of private land in estates falling under S. 3 (2) (d) of the Act, a special definition of private land was embodied in Cl. (b) of S. 3 (10); the inamdar or land-holder could prove that the land is private land within the meaning of the definition if he proved continuous cultivation for a period of 12 years either before 1st July 1908 or before the 1st November 1933, but in either case he must further prove that he had since retained his kudiwaram interest without converting it into ryoti land. The first clause of S. 3 (10) (b) is the same as the first clause of Cl. (a) of S. 3 (10). Under sub-cl. (b) (iv) a further exception was recognised in the case of lands in which the land-holder had acquired the entire kudiwaram interest in a land before the 1st November 1933, for valuable consideration; but if the purchase was at a sale for arrears of rent, it is further necessary for the land-holder to establish that there was continuous cultivation for a period of 12 years since the acquisition of the land and that he had not converted the land into ryoti. Section 8 (5) recognises a limited right of letting of land in respect of which there is a prior adjudication that the tenant had no occupancy rights which adjudication was before the 1st November 1933, to let the land for a period of 12 years, from the commencement of the Amending Act, 1936 on his own terms. The rules of evidence in S. 185 were also altered as a consequence of the alteration of the definition in S. 3 (10); in the second proviso to that section two sub-clauses were added. Under the first subclause the expression in a lease or patta of the land executed or issued on or after 1st July 1918 implying that a tenant has no right of occupancy shall not be admissible in evidence for the purpose of proving that the land concerned was private land at the commencement of the tenancy; and under the second clause such expressions would not by themselves be sufficient for proving the land concerned as private if contained in leases executed or issued before the 1st July 1918.

(42) In C. M. A. No. 311 of 1943 the learned Judges had to consider whether the lands in suit were home-farm or private lands within the meaning of the first clause in S. 3 (10) (b), i.e., "domain" or "home-farm" land of the landholder by whatever designation known such as kambattam, khas, sir, or pannai; and it is the same word for word as the first part of the Cl. (a). There was proof that the land-holder was the owner of both the warams, but he was not able to establish direct cultivation. The learned Judges held that mere proof that the land-holder was the owner of both the warams would not be sufficient to constitute the land private land. The question had to be decided on the documentary evidence in the case and the other facts established by documents and leases produced in the case. It was argued in that case on behalf of the tenants that the test of actual and direct cultivation by the landholder even though he might let it on leases for some season, or an intention of cultivating it himself should be proved to satisfy the requirements of the definition relying upon the decision in the Chellapalli case, 39 Mad 341. This decision it was held by the learned Judges and the tests propounded therein apply only to cases where the land was admittedly ryoti land to start with and was inapplicable to cases where the chafacter of the land in its origin was unknown. The definition is not confined to lands which are known as khas or sir and they are given only as examples. If the lands are known by these expressions they would be domain or home farm land.

But even in the case where these expressions are not shown to have been applied to the lands in dispute it did not follow that by that reason alone they are not domain or home farm lands. If the land is continuously cultivated for a period of 12 years it is unnecessary to go to Cl. (i) to determine the character of the land. The very fact that the definition recognises and includes in it lands which are shown to have been cultivated as private lands is a clear indication that there may be other lands which need not satisfy the test of cultivation. The leases in the case established that there was a change in the personnel of the tenants from time to time, the rent was varying and that the tenants had a right only to enjoy the produce from fruit bearing trees other than 'iluppai' trees but had no right to cut them, that the 'iluppai' trees exclusively belonged to the landholder and that the lands were leased out by public auction to the highest bidder. The cumulative effect according to the learned Judges of all these circumstances is to establish that the lands are home farm or private lands. There were also other circumstances showing that the landholder treated himself as the absolute owner of the both the warams and the tenants themselves recognised such ownership in unambiguous terms. This case, therefore, is an authority on the construction of the definition of private land and establishes that apart from proof of actual cultivation or an intention to resume cultivation at a distant date, there may be other tests by which the nature & the character of the land could be determined & that the decision in the 'Chellapalli case', 39 Mad 341 and the tests propounded therein are not the sole and exclusive tests in order to determine whether a land is private or home-farm land or not. The learned Judges held that on the evidence it was established that the lands were private lands. This decision more or less is analogous to the decision in 'LAKSHMAYYA v. APPARAO BAHADUR', 36 Mad 168 on facts though no reference was made to it.

(43) I now come to the decision in 'JAGADEESAM PILLAI v. KUPPAMMAL', I. L. R. (1946) Mad 687 on which strong reliance was placed by the learned Advocate for the appellant and which was also considered in some of the unreported decisions of this Court. The case related to lands in a village which is part of the Tanjore palace estate. It is an inam village which was an estate under S. 3(2) (d) of the old Act or in any event under Madras Act

XVIII of 1936 and the question was whether the lands were private lands or ryoti lands. The Tanjore Palace Estate was by treaty ceded in 1799 to the East India Company by the then Raja, under which the company acquired a right to collect revenue of the lands in the Tanjore country. This was continued till 1855 when the Raja died and the villages lapsed to the East India Company. On representations made by the senior widow of the last Raja on 21st August 1862 after she was unsuccessful in the litigation which was finally disposed of by the Privy Council, the estate was made over to the senior widow. There was again litigation in 1866 between the Ranees when a receiver was appointed by the Court to manage the estate. The village in suit was ultimately allotted to one Subbanandaji Bhonsle Sahib; but the properties were subject to a charge and the plaintiff therein purchased them in auction on 2nd September 1940 in execution of the charge decree. The village of Kudavali which was the subject-matter of the suit was the village proper and has a hamlet called Ponavasal.

The earliest document in the case indicated that the lands in the village of Kaduveli and its hamlet Ponavasal were ryoti lands in which the ryots had occupancy rights. During the management by the Government in 1860-61, the accounts showed that from the total beriz the melwaram and service manyam melwaram are deducted and the balance was treated as 'miras thunduwaram'. The lands during the period of management of the receivers were leased to tenants but from a document Ex. P. 16 of the year 1873 it appears that the cultivators received an advance for purchasing seeds for wet lands and that the village was "in amani" which term according to the ordinary meaning denotes that the lands were under direct cultivation, though the learned Judge, Wadsworth, O. C. J. expressed a different opinion. There was no other evidence of any direct cultivation of the lands. The effect of confiscation by the Crown of the lands did not affect the rights of the mirasi proprietors.

The learned Officiating Chief Justice accepted the interpretation put upon the word "Domain" by Wallis C.J. and Seshagiri Aiyar J. in the 'Chellapalli case', 39 Mad 341, as meaning "land immediately surrounding the mansion or dwelling house, the park or chase" and would connote land appurtenant to the mansion of the lord of the manor, kept by the landlord for his personal use and cultivated under his personal supervision as distinct from lands let to tenants to be farmed without any control from the lord of the manor other than such control as is incident to the lease. The learned Judge further observes:

> "It seems to us that the sub-clause (b) (1) of the definition is intended to cover those lands which come obviously within what would ordinarily to recognised as the domain or home-farm, that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use."

I have already shown that this narrow definition of "domain" or "home-farm" land does not fit in with the nature of private land as understood both in Bengal and in this Presidency.

Reference was made in the course of the judgment to the unreported decisions of Krishnaswami Aiyangar and Somayya JJ. but the learned Judge differed from the view expressed in that case that the decision in the 'Chellapalli case', 39 Mad 341 and 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 P. C. were confined to lands which were originally ryoti but which were claimed to have been converted into private land. Apparently from the trend of the reasoning of the learned Judge at page 703 the learned Judge was not inclined to accept this distinction made in the unreported decision. In the opinion of the learned Officiating Chief Justice, Krishnaswami Aiyangar and Somayya JJ. dealt with the definition of private land in a way which was inconsistent with and which was irreconcilable with the decision of the Privy Council in 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 (P. C.). He has however inclined to accept the correctness of the decision in the unreported case on the broad facts and remarked: "but with some of the observations contained in that judgment we must express our respectful disagreement."

The learned Judge does not specify the observations to which exception was taken and from which he expressed his respectful disagreement. It is therefore difficult to see on what ground the 'ratio decidendi' of the unreported decision was not accepted by the learned Judge. At page 705 of the report the learned Judge discusses the nature of home-farm land, but from an examination of the discussion by the learned Judge it is by no means clear what exactly is the test which the learned Judge lays down to determine whether a particular land is home-farm land or not. He observed at page 705:

> "The home farm land is land which the landlord farms himself as distinct from land which he lets out to tenants to be farmed. This first clause therefore is meant to include and signify those lands which are in the ordinary sense of the word home farm lands. The other clauses of the definition appear to deal with those lands which would not necessarily be regarded as home farm lands in the ordinary usage of the term, for instance, lands which are at a distance from the domain or home farm but have been cultivated personally by the landlord for the required period of years, or lands in which the entire tenant's right has been purchased by the landlord from the tenant when the land has never been treated as ryoti land since the purchase; and with reference to those lands there is a proviso that lands purchased at a sale for arrears of revenue shall not be regarded as private lands unless cultivated directly by the landlord for the required period. It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private' land is the test of retention by the land-holder for his personal use and cultivation by him under his personal supervision.
>
> No doubt such lands may be let on short leases for the convenience of the land-holder without losing their distinctive character but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases. There must in our opinion be something in the evidence either by way of proof of direct cultiva-

tion or by some clear indication of an intent to regard these lands as retained for the personal use of the land-holder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights.

It seems to us that there are no materials in the present case to show that these lands have been so cultivated or retained by the land-holder. It is said that they are situated within a mile or two of one of the places in the estate; but they were not in origin home farm lands, before the seizure of the estate from the Raja, and seeing that the estate has been under successive receivers almost continuously since the regrant there is no evidence that the grantee treated these lands as lands kept for his personal use and occupation or cultivated them under his personal supervision. Seeing that the lands cannot come under any other clause of the definition than clause (b) (1) of sub-section (10) of S. 3 and having regard to the fact that the presumption is in favour of the ryoti character of the lands, we must hold that the plaintiff has failed to prove that the lands are private lands."

In this passage he seems to hold and lay down varying tests. In the first place lands which are far away from the residence of the land-holder would not be private lands. He emphasises the distance and adverts to the circumstances that the lands were a mile or two away from the Palace in the estate. Secondly, that home farm lands are lands kept for the land-holder's enjoyment and use; and the test of retention by the land-holder of the land for his personal use and cultivation by him under his personal supervision is also emphasised. But at the same time the learned Judge concedes the right of the land-holder to lease out the lands on short term leases, for the convenience of the land-holder without losing their distinctive character. Thirdly, at another place, the learned Judge emphasises the test of cultivation, and fourthly again emphasises an intention to regard the lands as retained for his personal use and that there should also be an origin for home farm lands.

If the test is one of intention and if the right to lease the lands is conceded, a land-holder who owns both the warams and has always left the lands on short term leases at varying or fixed rates of rent and also had taken something from the tenant in recognition of his ownership of kudiwaram, it is difficult to see why in such a case an intention to retain the lands for personal use cannot be inferred. The retention of the kudiwaram itself without parting with it in my opinion is clear indication of an intention to resume cultivation even if it be at some distant future date. To restrict the definition to lands "appurtenant to the mansion of the manor" is to overlook the essence of the nature of private land as the history of these lands shows. Ss. 19 and 134 of the Act clearly contemplates the leasing of the land to tenants and even the exchange of pattas and muchilikas which is clear indication that the lands need not be shown to have been cultivated at any time. Above all, in the concluding portion of the judgment he emphasises the fact that the lands in suit were not in origin home farm lands before the seizure of the estate from the Rajah. In other words, it means that the lands were shown to be once ryoti and therefore by any possible means they could not be converted into private land except by direct cultivation for a continuous period of 12 years. If this was what was meant in the judgment one need not quarrel with any or all of the observations of the learned Judge. The lands in the case, like the lands in the 'Chellapalli' case, 39 Mad 341 were at their inception ryoti lands and the confiscation did not even affect the rights of the tenants, as held by the learned Judge. If that is so, by any amount of dealing with the property under the leases conversion into private land could not be affected. The actual decision in the case may be right on facts but the narrow and restricted definition of private and home farm lands which the learned Judges have indicated cannot be accepted as laying down the correct test. In my opinion the test was correctly laid down in the unreported decision in C. M. A. No. 311 of 1943.

(44) After this decision in 'JAGADEESAM v. KUPPAMMAL', I L R (1946) Mad 687, there are some unreported decisions of this Court to which our attention was drawn. In 'SWAMI VANNIAR v. NAGARAJU', S. A. No. 847 of 1946 Rajagopalan J. had to consider the test to be applied under S. 3(10) (b) (iv) of the Act to establish retention of the kudiwaram interest in the land after acquisition of the kudiwaram. It was also contended in that case on the strength of the decision in 'JAGADEESAM v. KUPPAMMAL', I. L. R. (1946) Mad 687 that the test of cultivation and retention by the land-holder for his personal use and cultivation should be established to prove the retention of kudiwaram within the meaning of that sub-clause. The learned Judge held that the decision in 'JAGADEESAM v. KUPPAMMAL', I. L. R. (1946) Mad 687 has no application and that the case before him was really covered by the decision in 'RAJAYYA v. LAXMANA AYYAR', I. L. R. (1946) Mad 181. The lease for short periods according to the learned Judge with varying terms would really indicate a definite intention on the part of the land-holder to retain his kudiwaram interest, not that he intended to part with it in favour of the lessee. The fact that the lessee was the same is not enough to prove an intention to part with the kudiwaram interest.

In my view the intention to retain the kudiwaram interest & the intention to retain for cultivation are not different intentions. If a person retains the kudiwaram interest for what purpose does he retain it? Only for the purpose of leasing it on his own terms and if necessary to resume cultivation. The test applied by Rajagopalan J. to establish retention of the kudiwaram interest may equally be applied to deduce an intention to resume cultivation of the kudiwaram interest owned by the landholder.

The learned Chief Justice and Rajagopalan J. in 'RAMAKRISHNA RAO v. SESHAYYA' App. No. 53 of 1946 considered whether on the broad facts of that case the land was private land or not. One peculiar feature in the case before the learned Judges was that practically the whole extent of the estate claimed as the private land of the land-holder. The land-holder however was unable to prove continuous cultivation but he was able to establish by evidence that he was keeping a large establishment of farm-servants in the village, live stock, agri-

cultural implements and was carrying on personal cultivation of lands which were not taken up by the tenants. It was found that the lands were 1500 acres in extent and were more or less around the house of the land-holder. From these facts, it was inferred that the lands were private lands. The decision in 'JAGADEESAN v. KUPPAMMAL', I. L. R. (1946) Mad 687 was referred to in the course of the judgment and the passage from that decision already extracted in this judgment was also cited. The decision proceeded on the facts established in the case & it does not take us beyond the decisions already referred to.

Recently the question was examined by Subba Rao and Chandra Reddi JJ. in 'PARISH PRIEST OF KARAYAR PARISH v. THIAGARAJASWAMI DEVASTHANAM', App. Nos. 176 to 178 and 493 of 1946. The learned Judges accept the test laid down in 'JAGADEESAN v. KUPPAMMAL', I. L. R. (1946) Mad 687.

(45) The legal position is summarised as follows:

"The legal position having regard to the provisions of the Act and the decisions dealing with them in so far as it is relevant for the purposes of this case may briefly be stated thus. Private land as defined under the Madras Estates Land Act comprises two categories, private lands, technically so called and lands deemed to be private lands. In regard to private lands strictly so called, it must be a domain or home farm land as understood in law. The mere fact that particular lands are described in popular province as pannai, kambattam, sir, khas, is not decisive of the question unless the lands so called partake of the characteristics of domain or home-farm lands.

The test to ascertain whether a land is domain or home farm is that accepted by the Judicial Committee in 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400 i.e. land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for a season. Whenever a question therefore arises whether a land is private land technically so called as defined in sub-clause (1) of clause (b) to S. 3 (10) the presumption is that it is not a private land. The recitals in the leases, pattas etc. after 1918 must be excluded and the recitals in similar documents prior to 1918 in themselves are not sufficient evidence. There must be in addition direct evidence that these lands were either domain or home farm lands in the sense that they were in their origin lands directly cultivated by the landlord or reserved by him for his direct cultivation. We are not concerned in this case with the question whether ryoti lands could be converted into private lands."

(46) Reference may now be made to the judgment of my learned brother Viswanatha Sastri J. in 'NARAYUDU v. VENKATARAMAMURTI', (1949) 2 Mad L J 623. It arose out of a suit for rent which was instituted in a civil Court by the land-holder. The tenants pleaded that the lands were ryoti lands and that the civil Court had no jurisdiction to try the suit. The question for determination was whether the lands were or were not private lands. The Courts below upheld the contention of the land-holder that the lands were private lands and decreed the suits for rent. In the revision petition before the learned Judge this finding was canvassed on the ground that the Court below gave themselves jurisdiction by a wrong decision that the lands were private lands and that they did not apply the correct test to determine the question whether the lands were private or not. The lands were admittedly situated in a permanently settled estate and the question was whether they satisfied the definition of private land in the first part of S. 3(10) (a) of the Estates Land Act. The test adopted in the 'Chelpalli case', 39 Mad 341 and by Wadsworth O.C.J. in 'JAGADEESAM v. KUPPAMMAL', I. L. R. (1946) Mad 687 that domain lands are confined to lands appurtenant to the land-holder's residence and kept for his enjoyment and use was rightly rejected by the learned Judge as inapplicable to conditions of land tenure in this presidency and as being opposed to the conception of private lands having regard to its history and nature. The learned Judge makes reference to the decision in 'LAKSHMAYYA v. APPA RAO', 36 Mad 168 and accepts the decision as correct.

The learned Judge examined elaborately the provisions of the Act and the decisions bearing upon the question and came to the conclusion that evidence of direct cultivation was not necessary and was not the only mode by which a land could be proved to be private land. Having regard to the course of the dealing by the zamindar of the lands from 1877 to 1939 which established that the zamindar treated the lands as private land and that the tenants acquiesced in the position that they had no occupancy rights in the land, the learned Judge came to the conclusion that the lands in question were private lands. For the reasons given by the learned Judge in his judgment I respectfully agree with his conclusions and also adopt the test applied by him to determine the character of the land as warranted by the provisions of the Act and the nature and character of private land as understood before and after the Estates Land Act.

(47) This review of the decisions shows the conflict of judicial opinion and that the principle of 'stare decisis' has no application. It is in view of the conflict that these cases were referred to a Full Bench to resolve the conflict.

(48) Lastly, I have to refer to the decision of the Privy Council in 'BINDESHWARI PRASAD v. KESHOPRASAD SINGH', 5 Pat 634 (P. C.) which in my opinion is decisive on the question which we have to decide. It is a decision under S. 120 of the Bengal Tenancy Act and this judgment of the High Court is reported in 'KESHOPRASAD SINGH v. PARAMESHWARI PRASAD', 2 Pat 414. Before dealing with this case it will be convenient to refer to the language of S. 120 of the Bengal Tenancy Act:

"S. 120(1): The Revenue Officer shall record as a proprietor's private land:
(a) land which is proved to have been cultivated as Khamar (zirat, sir) nil, nijjot (or kamat) by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and,
(b) cultivated land which is recognised by village, usage as proprietor's khamar (zirut, sir), nil, nijjot (or kamat).

(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the 2nd day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced, but shall presume that land is not a proprietor's private land until the contrary is shown."

The rest of the clauses of the section are not important. Clause (a) corresponds to the second part of S. 3(10) (a), clause (b) corresponds to the first part. Clause 2 corresponds to S. 185.

In the case in 'BINDHESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634 (P. C.) a suit was instituted by the Maharaja of Dumraon for possession of the lands by ejecting the defendants. The defence was that the defendants had occupancy rights in the lands and therefore they could not be ejected. The Subordinate Judge found that the lands were not zirait lands and that the defendants had rights of occupancy and made a decree dismissing the suit. The plaintiff appealed to the High Court of Patna which reversed the decree of the Subordinate Judge and granted a decree in ejectment to the plaintiff with mesne profits holding that the land was private land. The history of the lands was that they were in the bed of the river Ganga until shortly before 1843, when they emerged from the Ganges and part of it became fit for cultivation. In 1843, the Government who were interested in carrying on a stud farm obtained possession of the land from the Maharaja of Dumaron and cultivated the lands by themselves for a period of 30 years. The fact that the Government held the land under the Maharaja is made clear in the judgment of the High Court in 'KESHO PRASAD v. PARAMESHWARI PRASAD', 2 Pat 414. In 1873, the Government surrendered the land to the Maharaja of Dumaron and vacated possession without claiming any interest in the lands. Thereafter the Maharaja let the lands to a Mr. Fox for a term of years which was extended in 1883 by nine years under a kabuliat executed by Mr. Fox on the 21st June 1883.

In that kabuliat Mr. Fox admitted that under no circumstances could he claim occupancy rights in the lands and that after the expiration of the term the Maharaja was at liberty to keep the said lands as his private lands or to lease them to others. In 1891 the Maharaja granted occupancy rights to Mr. Fox in consideration of the valuable services rendered by him to the Maharaja. Under the Bengal Tenancy Act occupancy right is a statutory right and is not conferred by gift by the land-holder. Mr. Fox defaulted payment of rent as a consequence of which in a suit instituted for recovery of arrears, a decree was obtained and the right, title and interest of Mr. Fox was sold in execution on 2nd March 1896 which was purchased by the Maharajah himself. Mr. Fox's rights in the lands terminated by this sale. On 2nd March 1896 the Maharaja let the lands to two persons for a term of five years who did not however acquire any occupancy rights in the land. In 1902, the Maharani who succeeded to the estate let the lands to the father of the defendants for a term of seven years from fasli 1309 to 1315 which was followed by an exchange of patta and kabuliat between the parties.

Under these documents lands were admitted to be zirait lands and that the lessees had no occupancy rights and that after the expiry of the term the Maharani should be entitled to keep the lands for herself in her possession or let them out to tenants as she pleased. The father of the defendants continued in possession until his death and thereafter the defendant continued in possession. In 1908 the estate was in the management of the Court of Wards. The mother of the defendants who were then minors obtained for their benefit a temporary settlement of the land for a term of nine years from fasli 1316 to 1324 and executed a kabuliat which contained terms by which it was admitted that they had no occupancy rights in the land and that after the expiry of the lease the lands would be surrendered. After the term had expired the defendants refused to surrender possession and a suit was therefore instituted.

In 1910 the mother of the defendants as guardian instituted certain suits in ejectment against trespassers and in the plaints in those suits also she admitted that the lands were private lands of the Dumaron Raja which were also recognised by custom as such. One of the questions raised and argued before the Privy Council was whether the admissions in the kabuliat executed after 2nd March 1883 that the lands were the Maharaja's private lands were admissible in evidence. As already stated by me above, the Privy Council held that the said admissions were admissible. Their Lordships of the Judicial Committee considered the question even apart from the admissions contained in subsequent documents. At page 645 it is observed:

"But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of S. 120, the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the patta of 1902 and the kabuliats of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government for similar purposes as they would have been used by the Maharaja of Dumaron if he had been the owner of a stud farm, that no one claimed any right in any of them as settled zaiyat or, except trespassers without any title, as having an occupancy right in any of them, and to the statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were the plaintiffs in the suits against trespassers to which their Lordships have referred, and to the kabuliat given in 1908 by Mussammat Radha Kuar to the Manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were a zirat of the Dumaron Raj, and that the defendants had no right of occupancy in them."

From a perusal of the reports of this judgment and the judgment of the High Court in 'KESHO PROSAD v. PARAMESHRI PRASAD', 2 Pat 414, which was confirmed by the Judicial Committee it would be seen that from 1843 upto the date of the institution of the suit out of which the appeal arose, there was no trace of any cultivation or of an intention to resume cultivation at a future date in the case. The only evidence to prove that the land was private land was the admissions contained in the leases before 1883 and after and on that evidence and on that evidence alone, the Judicial Committee concluded that the lands were proved

to be private lands. All that is stated in the definition in S. 120 of the Bengal Act excluding the first clause (a) which requires continuous cultivation for a period of 12 years is that the land is cultivated land which is recognised by village usage as proprietor's khamar (zirat, sir) nii, nijjot (or kamat). No indication is given in this definition that the land should be within a particular distance of the zamindar's residence and though the words "kamar" etc. occur which have been interpreted as lands which are in the cultivation of the Zamindar, still the Privy Council held that the lands are private lands, even though cultivation was not proved. From this decision which was pronounced by the highest Tribunal under a section which is in 'pari materia' with that in the Estates Land Act, it follows that the test of cultivation or even the test of intention to cultivate is not the only mode by which a land could be established to be private land. This decision and the decision in 'LAKSHMAYYA v. APPARAO BAHADUR', 36 Mad 168, were not referred to either in the decision in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, by Wardsworth O. C. J. or in the unreported decisions to which reference has already been made.

(49) From the foregoing discussion the following propositions are established:

1. If the land is known to be ryoti at its inception the only mode by which it could be converted into private land is by proof of continuous cultivation for a period of 12 years prior to the commencement of the Act.

2. Even if the nature of the land is not known, continuous cultivation for the required period of 12 years before the commencement of the Act would conclusively establish that the land is private land.

3. If there is no proof of cultivation for a continuous period of 12 years before the commencement of the Act, the land may be proved to be private land by other methods; provided the land was not shown to be once ryoti.

4. Cultivation of the lands or leasing of the lands under short-term leases may be one mode of proof.

5. An intention to cultivate or resume for cultivation is also a test to decide that the land is private land and such intention may be established by any other means, not necessarily by cultivation and by cultivation alone.

6. The essence of private land is continuous course of conduct on the part of the land-holder asserting and acting on the footing that he is the absolute owner thereof and recognition and acceptance by the tenants that the land-holder has absolute right in the land.

7. Mere proof that the land-holder is the owner of both the warams is not sufficient to prove that the land is private land.

(50) It now remains to briefly refer to the evidence in the case on which the finding of the Courts below is based. The evidence in the second appeals batch and in the civil revision petition batch is similar. Between the years 1815 and 1864 there are no documents throwing light on the question in issue. We do not know how the grantee enjoyed these lands from the date of grant upto 1864. Between the years 1864 and subsequently there are the sale-deeds Ex. P. 1 series under which the temples acquired absolute rights in the property. The recitals in the sale-deeds are more or less similar. Under these documents, the rights of the vendor in the nanja, punja, timber, fruit bearing trees, thottam, well, inclusive of the hamlets together with the cocoanut trees and all trees excluding the residential quarters were conveyed. There is specific reference to the transfer of the "iru varams" that is, both kudiwaram and melwaram in all these sale-deeds which indicates that the vendors were in enjoyment of the kudiwaram right in the lands as well.

There are next the leases executed by tenants commencing from 1886 in the second appeals batch and 1873 in the rent batch. The leases in the second appeal batch are Exs. P. 2 series and the clauses in all these leases are more or less similar. The tenants specifically admitted in those documents that the lessor was the owner of both the warams and agreed to harvest the crops under the supervision of the land-holder and measure half of it to the land-holder as melwaram, and in recognition of the right of ownership the Kudiwaram by the land-holder and as lessee thereof they further agreed to pay one pangu of swami bhogam at the rate of 6 Ramalinga Marukkals and two straw bundles including cess for one transplantation at the rate of one anna and take the balances of the produce. There is the further condition that they would render service to the temple in respect of the share. There is also the "quit" clause in all the leases by which the tenants undertook to surrender the lands after the expiry of the term fixed the leases. The leases from 1866 to 1896 were for a period of five years. In 1898 there were two such leases for a period of three years. Then in 1902 there were leases for a period of five years except one which was for a period of four years. In 1919 the leases were all for a period of three years. In the rent batch also the leases were, in some cases for five years, in others, for three years, and there were also some leases for seven and more years.

The documents have been analysed by the Courts below and the effect of the documents is summarised by the learned Subordinate Judge in paragraph 16 of the judgment in the second appeal batch and there is also a similar summary in the rent batch as well. He says that the temple owned the kudiwaram and melwaram rights; that though the tenants were not disturbed from possession of the lands; there were some instances in which there was also a change of tenancy. The right of the temple to both the warams was admitted in the leases and there is the further payment of swami bhogam, a share from out of the tenant's share of the produce in recognition of the ownership of the temple to the lands. The tenants never asserted during the whole course of the period till 1930 that they were entitled to kudiwaram interest. On the contrary in almost all the documents there were clear admissions that they had no kudiwaram rights and that the temple owned the kudiwaram right as well as the melwaram. In some of the leases in describing the boundaries the surrounding properties were described as property owned by the temple and not by the cultivating tenants. The payment of swami bhogam by the tenants a very important circumstance in my opinion indicating that the land is private land of which the temple is the full owner and is treated as a category of land in which the ryots could never acquire occupancy rights.

The meaning of "swami bhogam" and its significance was considered by Sadasiva Aiyar J. in 'Naina Pillai v. Ramanathan,' 33 Mad L J 84 at p. 98,

"The word 'swami bhogam' used in Exs. A. F. F. 1 and other documents has got a settled meaning in the Tanjore and Chingleput districts. Wilson in his Glossary says: 'Swami bhogam in the tamil country means the share of the produce or rent which is paid to the Mirasidar or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period". I think the use of the word swami bhogam in Ex. A in almost conclusive as to the full proprietorship of both the melwaram and kudiwaram rights in the temple."

This decision was affirmed by the Privy Council in 'Naina Pillai v. Ramanathan,' 47 Mad 337. At page 356 of the report the meaning given to local term by the learned Judges of this Court was accepted and their Lordships observed:

"All those learned Judges were, from their local knowledge, in a better position than their Lordships are, to correctly appreciate the meaning of the vernacular terms in use in the tamil country of Tanjore in reference to interest in lands, and all those learned Judges in carefully considered and exhaustive judgments found, to state briefly their findings, that the endowed property of the temple, of which the lands in question formed part was not an 'estate' within the meaning of Madras Act I of 1908 and that the defendants were not, under the Act or otherwise, tenants with a right of permanent occupancy".

(See also the decision in 'Muhammad Ravuthar v. Muthu Alagappa Chettiar,' 34 Mad L J 234 at p. 248).

In 'Subramania Chettiar v. Subramania Mudaliar,' 52 Mad 549 (P C) the Privy Council considered the meaning of "Tirwa swami bhogam" which was paid by the tenants to the land-holder. "Tirwa" according to the Judicial Committee is the share of the rents payable to the Government and "swami bhogam" is the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax.

In 'Sivanpandia Thevar v. Zamindar of Urkaud,' 41 Mad 109 "swami bhogam" was treated as part of the rent though it is something which is paid over and above the melwaram. It is unnecessary in this case to consider the correctness of that view. If a tenant is called upon to pay more than the lawful rate of rent payable in respect of ryoti land, the excess would be an enhancement. It is however unnecessary to decide whether swami bhogam in such circumstances would not be an illegal enhancement. The payment of swami bhogam therefore is a clear indication of not only the admission by the tenant of the ownership of the land-holder of the kudiwaram interest in the land but also an indication on the part of the land-holder of his intention to retain the kudiwaram and the object of such a retention can only be that at some future date he intends to resume for cultivation if necessary.

(51) The learned Subordinate Judge points out that according to the Ramnad District Manual prepared by Mr. T. Rajaram Rao, Dewan of Ramnad Samasthanam, under the orders of the Court of Wards in 1890 "pannai" lands in the district are those in which the Zamindar or Inamdar owns both the landlord's and tenants' right and that he can lease out the lands to any one he likes for cultivation and obtain from him "swami bhogam" or Thunduvaram, a rent obtained in acknowledgment to the landlord's tenancy right in the soil, in addition to the melwaram or landlord's share, and that most of the Dharmasanams in the zamindari were held under "pannai tenure". This indicates that in this district these incidents are understood by usage as establishing that the tenure is pannai tenure and therefore it follows that the lands are treated by usage as private lands of the land-holder. The evidence therefore establishes in this case that for nearly a period of 80 or 90 years to which the documents relate, the lands are treated as lands in which the tenants under no circumstances acquire occupancy rights. In other words, the land is treated as private land and not ryoti.

Apart from the execution of the leases, there are admissions by the tenants themselves even after the Act and even after 1898 establishing that the lands are the absolute property of the land-holder which can only mean that they are private lands. Such evidence is admissible and it would be legitimate to draw from such admissions that the lands are private lands as has been laid down by the Privy Council in 'Bindeshwari Prasad v. Kesho Prasad,' 5 Pat 634 P C already referred to.

The leases were for short terms and contained surrender clauses; and the obligation to pay swami bhogam is also enjoined by the leases. This treatment of the lands by the land-holder and the exercise of the rights by him as the absolute owner of the lands which was acquiesced in and acknowledged by the tenants is clear and cogent evidence from which to infer that the lands were private lands. The usage in the district as recorded in the Ramnad District Manual is also to treat the lands with such incidents as private land. Such usage will be local usage and local custom within the meaning of S. 185 of the Estates Land Act, which again is permissible and relevant evidence when the question of determination of the character of the lands arises. There is also similar evidence and similar findings in the rent batch also and it is unnecessary to refer to them in detail. There is one additional circumstance in the rent batch namely that repairs to the nanja lands were effected by the plaint temple which is also an indicative of the lands being private lands.

(52) Apart from the ownership of the two warams by the temples we have the undisputed conduct of the parties, recognising the lands as private lands in which the tenants had no occupancy rights. The Courts below in my opinion were alive to the question that had to be decided and approached the evidence in the case from a proper perspective and the finding reached concurrently is not vitiated by any legal flaw so as to justify interference by this Court in second appeal. I have no hesitation therefore in confirming the decision of the Courts below and dismissing the second appeals and the revision petitions with costs. In the second appeals the decree will be modified by deleting the direction to pay future mesne profits.

(53) VISHWANATHA SASTRI J:- The desion of these second appeals and civil revision

petitions turns upon the answer to the question whether the lands which formed the subject-matter of the suits were the "private lands" of the plaintiffs land-holders, as defined in S. 3(10)(a) of the Madras Estates Land Act, I of 1908, hereinafter called "the Act", or whether they were ryoti lands in which the defendants-tenants had acquired a right of occupancy by virtue of S. 6(1) of the Act. In the arguments before us, title to a permanent tenancy by prescription, pleaded and found against in the Courts below, has not been relied on and the tenants rested their case entirely on the Act.

(54) The essential facts relating to the history of the land have been set out in the judgment of my learned brother, Satyanarayana Rao J. and I therefore forbear from summarising them on my own account. I agree that the village of Manamelpatti which was originally part of the Sivaganga zamindari is an "estate" falling within S. 3 (2) (e) of the Act. The plaintiffs are therefore "land-holders" as defined in S. 3 (5) of the Act. The defendants would be "ryots" if the lands in their occupation are "ryoti" as defined in S. 3 (16) and the lands would be "ryoti" unless proved to be "private lands" as defined in S. 3 (10) (a) of the Act.

(55) The lands in question have been purchased by the plaintiffs and their predecessors-in-title under a series of sale-deeds ranging from 1864-1914 with both waram rights. In vernacular conveyancing it is customary to speak of the absolute ownership of land as consisting of iruwaram rights, i.e., of both melwaram and kudiwaram, even though there are no distinct, independent and co-existing interests in the land like melwaram and kudiwaram in the lands conveyed. In the case of ryotwari lands and "private lands" as defined in the Act the distinction between melwaram and kudiwaram is notional and the rent payable to the absolute proprietor of the land is called "melwaram" and the tenant's share of the produce "kudiwaram" though the tenant has no permanent right of occupancy in the lands and his rights are regulated solely by the contract of lease between him and the proprietor.

The lands in question have been leased in parcels to tenants from time to time under terminable leases for periods ranging from three to ten years. The leases are not continuous but they cover the entire lands. All the leases contain a provision for the payment of 'swamibhogam' to the lessors in addition to the melwaram. Under the leases of 1873 the tenants agreed to surrender the land to the lessors whenever required by the latter at the beginning of the Tamil New Year. In the leases of the years 1885 to 1891 there are provisions for surrender of the land after the expiry of the term in the Tamil month of Chitrai. In the leases of 1905 there is a stipulation that if the conditions of the leases are not observed, the lessors would be at liberty to cancel the leases and let out the lands to other tenants even before the expiry of the term. In the leases for the period from 1919 to 1922 there is a provision for surrender of the lands by the tenants at the end of the term.

In all the leases there is a stipulation for rendering service to the two temples to which the lands belong. The leases are described as 'swamibhogam' leases and the title of the lessor to both warams in the lands is admitted. The leases range from 1873 to 1922. It has been found by the Courts below that though there has sometimes been a change in the personnel of the tenants, in the majority of cases the lands have continued to be in the occupation of the families of the tenants hereditarily. Before 1930 none of the tenants asserted or claimed a right of occupancy in the lands. During the years 1930 to 1935 two or three tenants purported to sell or mortgage their holdings under Ex. D. 4 to Ex. D. 7 but the plaintiffs were not parties to or aware of these transactions. There is no evidence of direct cultivation of any of the lands by the land-holders by their own servants or by hired labour with their own or hired stock at any time.

(56) The crucial question may now be posed. Are the lands in question the "private lands" of the land-holders as defined in S. 3 (10) (a) of the Act? Mr. Sundaram Aiyar for the appellants contends—and this is the pinch of the case—that direct cultivation by the land-holder for an appreciable period of time must be proved in every case where a land is claimed to be the "private land" of the land-holder. He says that direct cultivation is implicit in the very definition of private land in S. 3 (10) (a) and that this is the view taken in the decisions of this Court and the Judicial Committee. He conceded the concession being both self imposed and allowed by decisions that occasional or sporadic leasing of the lands with the intention of resuming direct cultivation by the land-holder would not be fatal to a claim that the lands are "private lands". He relied on a number of reported and unreported decisions which will be referred to later. The contention of the respondent is that direct cultivation is only an evidentiary fact, may be an important piece of evidence, but is not a touchstone of the character of land as private land.

(57) The draftsman of Act I (1) of 1908 has assumed a certain amount of knowledge of the history and the incidents of land tenures in zamindar areas in this Presidency on the part of those who have to interpret the Act. Of recent years views have been advanced by some learned Judges of this Court which have introduced an element of doubt and perplexity in the interpretation of Ss. 3 (10) (a) and 185 of the Act. The arguments in this case fully reflected the uncertainty and conflict discernible in the decisions, attributable, in my humble opinion, to the Judicial embroidery of the language of the Act.

In my recent judgment in 'NARAYUDU v. VENKATARAMANAMURTHI', 1949-2 Mad L J 623, I ventured to protest, though alone, against the wrong approach to the question now under debate in some of the earlier decisions. I am loath to rely on my own decision as a precedent and I take this opportunity of expressing my views with great deference to those who have held differently and with more elaboration than I thought necessary on the previous occasion.

The topic now under discussion has been darkened, rather than illumined, by a false analogy which has been drawn with feudal tenures and manorial customs in England. The substitution of extracts from judgments dealing with cases of conversion of ryoti land into private land for the language of Ss. 3 (10) (a) and 185 of the Act and the wholesale adoption of expressions used by learned Judges in that connection, as if they were the words of the

Statute itself, have also been responsible for much of the uncertainty in this corner of the law.

(58) My own researches have not been as wide as those of my learned brother Satyanarayana Rao J. and in any case I need not cover the same ground. It is necessary, however, to sketch briefly the background of the Legislation which became Act I (1) of 1908. The whole of the lands, whether cultivated or cultivable or waste in the country have been from time immemorial apportioned to a particular village, so that all lands are within the known boundary of some village. Even today the village is the unit of revenue administration.

Under what may be called the common law of this part of the country, there are two main beneficial interests in cultivable lands, viz., the melwaram and the kudiwaram. Melwaram belonged to the State or to its assignee who might be zamindar, poligar jagirdar or inamdar and the kudiwaram to the ryot or cultivating occupants of the land who had a right to remain in possession of the land so long as he paid the rent or revenue exigible. These were the only principal and independent interests in the land but there might be subordinate interests derived from the one or the other.

Subordinate tenure-holders from zamindars, poligars or jagirdars holding under grants either rent free or subject to the payment of a favourable rent to the superior landlords, were themselves in the position of landlords or persons entitled only to the melwaram. Persons holding as sub-tenants under the ryot or kudiwaramdar had no right of permanent occupancy in the lands.

So far I have referred to two distinct and independent interests in the cultivable lands. There were also two distinct classes of such lands, viz., one the pannai, kambattam, homefarm or to use the phraseology of the Act "private lands" of the Zamindar, Poligar or Jagirdar and the other, the ayan, zeroyati, seri, or peasant lands, styled as "ryoti" lands in the Act. In the first class of lands both the melwaram and kudiwaram rights belonged to the zamindar, poligar or jagirdar and in the second, the melwaram alone. The bulk of the lands belong to the latter class. The former rulers of the country had made special grants of land to the farmers of revenue or rent collectors who later on came to be known as zamindars, poligars, or jagirdars for the subsistence of themselves, their families, followers, retainers and dependants. These dignitaries were also brought under cultivation with their own servants or hired labour waste lands in which there was no right of occupancy. These lands constituted the private lands of the zamindar in which the cultivating tenants had no occupancy rights as contrasted with the public lands in which they could acquire such rights. This was the state of affairs at the time of the Permanent Settlement in 1802.

(59) Both in the instructions issued to the Collectors for the purpose of carrying out the Permanent Settlement and under S. 2 of Regulation XXV (25) of 1802 the pannai or homefarm lands of the Zamindar, Poligar or Jagirdar were treated as lands liable to pay revenue to the Government. They were taken into account in calculating the assets of the Zamindari and fixing the peishcush payable to the Government. The position is thus stated in the first report:

> "All private lands at present appropriated by the Zamindars and other land-holders to the subsistence of themselves and families as well as all lands held by private servants and dependants will be considered as forming part of the circar land and therewith responsible for the public Jama."

Section 2 of the Regulation recognised and vested the proprietary right of the soil at least in the pannai or private lands, in the zamindar, though its language was much more sweeping and all embracing and inappropriate with reference to the public lands in respect of which he was, under the customary law, entitled to the melwaram. Regulation IV (4) of 1822 was passed declaring that Regulation XXV (25) of 1802 was not intended to define, limit, infringe or destroy the rights of any description of tenants, but as these rights were nowhere defined, there ensued much litigation and controversy regarding the respective rights of zamindars and tenants in public lands.

It is unnecessary, for the purposes of this case, to refer to the course of decision in this Court resolving such disputes. Suffice it to say that the first two Indian Judges of this Court, whose knowledge of the land tenures of this Presidency was only equalled by the lucidity of their exposition of legal principles were largely responsible for according judicial recognition to the permanent occupancy rights of ryots of public lands in zamin areas by their bold declaration that "contractual relations and competitive rents" were incompatible with the status of such ryots. This principle applied not only to lands in the occupation of ryots but also to lands relinquished by former ryots as well as unoccupied but cultivable lands which were all considered to be public lands. See 'VENKATA MAHALAKSHMAMMA v. RAMAJOGI', 16 Mad 271; 'VENKATANARASIMHA v. KOTAYYA', 20 Mad 299; 'CHEEKATI ZAMINDAR'S CASE', 23 Mad 318.

But it was only in respect of the "public domain" later on defined in the Act as "ryoti lands" that the cultivating tenant in possession or occupation acquired a permanent right of occupancy. This right was not extended to the kambattam, pannai, or homefarm land, the "private domain" of the zamindar. In the respect of such lands, the tenants did not acquire a permanent right of occupancy by reason of their cultivation of such lands, the relationship between the zamindar and the tenants being regulated by the terms of the contract between the parties.

(60) Reference may here be made to a few decisions of this Court dealing with the rights of Zamindars in pannai lands before the passing of Act I (1) of 1908. Referring to pannai lands in a zamindari in the Madura District (of which the suit village and the Sivaganga zamindari once formed part) the District Judge observed in an early case as follows:

> "They are lands to which the proprietor has an exclusive right, that is to say, the right to receive the kudiwaram produce and the right to receive the melwaram; lands regarding which land-holders can arrange their own terms of rent. Sometimes these lands are cultivated under the Zamindar's own ploughs and sometimes they are let out for cultivation of others."

This view was affirmed by a Bench of this Court, Kindersley J. remarking:

"The Judge says that they are lands to which the proprietor has an exclusive right, a right to the kudiwaram and to the melwaram. This is certainly something more than the tenure of an ordinary ryot, who is not entitled to the melwaram. And it appears to me from this and other cases which I have met with in this Court, that we cannot say that the defendant would have held these pannai lands if he had not been the zamindar."

The case was decided by the District Judge in 1870. The decision on appeal is reported as 'NAGAYASAMI KAMAYYA v. VIRASAMI', 7 M H C R 53. In a later decision in 'VENKATAGIRI ZAMINDAR v. RAGHAVAN', 9 Mad 142, Turner C. J. stated the characteristic feature of "private" or homefarm lands in a zamindari in these terms:

"They are lands which according to a very general custom of the country the Zamindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue."

That private lands in Zamindari areas were often leased to tenants for cultivation on contractual terms, without the tenants acquiring any right of occupancy, is also clear from the discussion of the evidence of Sir S. Subramania Aiyar J. in the 'CHEEKATI ZAMINDAR'S CASE', 23 Mad 318, at pages 325 and 326.

(61) Though the kambattam, pannai, homefarm or private lands of the zamindar were distinct from the zeroyati, seri or ryoti lands in a village and the bulk of the lands belonged to the latter class, it was found in practice that the zamindars were gradually extending the area of their private lands by incorporating ryoti lands therein. In a contest between a rich and powerful zamindar and ignorant and poor ryots the odds were of course, immensely in favour of the former. The rights too, whose origin, had to be traced to remote times, were not capable of easy proof.

According to contemporary testimony, ryots in the southern Districts held their own against zamindars and even defied them, while in the Northern sircars the zamindars were more grasping and were generally masters of the situation. The Estates Land Act was passed in 1908 in order, as its preamble states "to amend and declare the law relating to the holding of land in estates in the Presidency of Madras". Its general effect may be stated in the words of the Judicial Committee:

"In declaring the rights of the occupancy ryots and emphasising the distinction between the landlord's 'private lands' and the 'ryoti' lands, the new Act affirmed the old customary law that had always been recognised by the British administration. Apart from rules relating to procedure and jurisdiction of the revenue Courts, it created one new right in order to settle the constant disputes beween landlords and tenants which had been going on for nearly a century, it gave occupancy rights to all 'ryots' in occupation of lands within an 'estate' at the time of the passing of the Act. It also gave some security to non-occupancy ryots in the enjoyment of their lands. In other respects, generally speaking, it declared and gave statutory recognition to existing rights and status.....The existence in a village of 'pannai' lands in which the tenant cannot acquire occupancy rights except by contract, connotes the existence of lands in which he can acquire such rights by prescription." ('CHIDAMBARA SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586 (PC)."

"Ryoti land" and "private land" are mutually exclusive categories under S. 3 (16) of the Act though they may both form component parts of the same village. The distinction between the two classes of lands is maintained throughout the Act in respect of the rights and liabilities acquired or incurred and in respect of the jurisdiction of the Courts that have to adjudicate upon them. The fundamental difference is that the land-holder is the absolute owner of "private land" of both the melwaram and the kudiwaram, though the distinction between the two warams is notional in such a case. Nobody else has an interest except such as the land-holder might create under a contract or grant. The land-holder has a right to enjoy the land as he pleases either by direct cultivation or through tenants. He can lease out the lands at competitive rents and enforce the other terms of the contract of tenancy. The tenant does not acquire a permanent right of occupancy by being admitted to possession of such land. In the case of ryoti land there exists two separate and independent interests the melwaram and kudiwaram the former being vested in the land-holder and the latter in the ryot and the relations between the land-holder and the ryot are governed by the Act.

(62) We are concerned in the present case to find out the true character of the land, whether it is ryoti or private land. Section 3 (10) (a) defines "private lands." The reference to Khambattam, khas, sir or pannai is only by way of illustration. The test of direct cultivation prescribed in the second part of S. 3(10) (a) is not laid down for private lands falling within the first part of the clause. It is conceded by all the decisions that lands retained by a zamindar as resumable for direct cultivation by him would be private lands.

Section 185 of the Act deals with evidentiary matters that have to be considered in arriving at a conclusion whether a particular land whose origin is not known is private land. The two provisions have to be read together. The first proviso is to S. 185 lays down a presumption that a land is ryoti unless the contrary is shown, thereby casting the onus of proof on the landholder. S. 185 does not profess to enumerate or exhaust all the heads of relevant evidence and does not shut out any evidence that would be admissible under the Evidence Act to prove a relevant fact or fact in issue except a particular category of evidence in connection with major inams.

The reference to "local customs" in clause 1 of S. 185 is somewhat vague and indefinite. It evidently contemplates cases where, according to the consciousness of the village community, certain lands are always regarded as the private lands of the zamindar as distinct from serai, zeroyati or ryoti land.

It is well known that ryoti lands are treated differently from private lands in many respects. In the case of private lands the rents vary from time to time; the tenants change, periodical leases with provision for eviction or surrender are granted; and the land-holder is recognised and admitted to be the owner of both the warams. In the case of ryoti lands the rents are uniform

and fixed; the tenants have hereditary rights and the right of alienation; and pattas and muchilikas do not provide for surrender of possession by tenants. In these and other ways the villagers recognise private lands as distinct from ryoti lands.

Section 185(2) requires the Court to have regard to the question whether the land was specifically let as private land before the first day of July 1898, that being the date when the proposal for legislation which became Act 1 of 1908 was first mooted. It cannot be that the legislature required that the expression "private land" which was defined for the first time in Act 1 of 1908 should have been used in that sense in leases granted before 1898. The word "let" emphasises the importance of the terms and the conditions of the tenancy and requires attention to the substance of the contract rather than the nomenclature of the land.

If the land-holder, had dealt with the lands as an absolute owner and with the tenant as a person who had no higher or other rights than those conferred by the contract of lease, and the tenant had admitted the absolute ownership of the land-holder and his own position as a person without any right of occupancy, evidence of such letting is relevant.

Notwithstanding the opinions to the contrary expressed in this Court, it must now be held on the authority of the decision of the Judicial Committee in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634 P. C. decided under the corresponding provisions of S. 120 of the Bengal Tenancy Act that leases subsequent to 1898 negativing a right of occupancy in the tenants are also admissible to prove the character of the land.

This was also the view of Sundaram Aiyar J. in 'LAKSHMAYYA v. APPARAO BAHADUR', 36 Mad 168, of Wallis C.J. in the first 'CHELLAPALLE case', 39 Mad 341 and of Krishnan and Venkatasubba Rao JJ. in the 'NORTH VALLUR case', 50 Mad 201, and of Abdur Rahim and Oldfield JJ. in 'APPUROW v. KAVERI', 7 Mad L W 271.

Indeed S. 185(3) requires the Court to consider "any other evidence" that may be produced and is wide enough to allow the reception of leases after 1898 in evidence though their probative value might not be as great as those of leases granted before 1898.

There was a provision in S. 181 of the Act that Ss. 6, 8, 10, 11, 12, 19 and 46 do not apply to a land-holder's private land but this provision was deleted by the amending Act of 1934 on the ground that those sections applied only to ryoti lands and the provision was otiose. The other provisions of the Act clearly also recognise that private lands could be let out by the land-holder without the risk of the lands losing their character as private lands. See Ss. 19, 134, 158, and 161. Neither leases nor the exchange of pattas and muchilikas impair the character of lands as private lands.

To arrive at the conclusion that though S. 185 authorises the reception in evidence of leases containing admissions of tenants negativing their rights of occupancy in order to prove that a land is private land, such leasing is an informative circumstance and that the character of the land as private land could in no case be established without proof of the land-holder's direct cultivation, is a feat of mental gymnastics beyond my capacity. It is not in my opinion, legitimate to write into S. 185 limitations and qualifications which the Legislature has not thought fit to insert.

(63) Section 185(3) permits the production of "any other evidence". It is not without significance that in a section dealing with the evidence that has to be considered in arriving at a conclusion as regards the character of the land as private land, no specific reference is made, to what, according to the appellants, is a primary and indispensable evidentiary fact, viz., direct cultivation by the land-holder. I do not say that it is not a relevant or weighty consideration but it comes in only under the omnibus provision allowing "other evidence".

(64) The further argument of Mr. A. Sundaram Aiyar for the appellant is that the requirement of direct cultivation by the land-holder is obvious from or at any rate plainly implicit in the definition of "private land" in S. 3(10) (a) as the domain or home farm land of the land-holder. Occasional leasing with an intention to resume direct cultivation being permissible it is said that S. 185(2) must be read as referring only to such leases. He says that S. 185 which deals with evidentiary matter should not be construed so as to abrogate the substantive provision found in S. 3(10) (a).

The argument has been sought to be sustained by reference to glossaries and dictionaries interpreting the words sir, khas, kambattam and pannai and the authority of prior decisions of this Court and the Privy Council. My learned brother Satyanarayana Rao J. has discussed the dictionary or glossary meaning of these expressions and I need not traverse the same grounds.

Section 3(10) (a) deals with two categories of lands (a) private lands properly so-called i.e., home-farm lands of which kambattam and pannai are given as examples, (b) lands whose origin or character is not known or which were once ryoti lands. The enumeration of different kinds of private lands in Cl. (a) is only illustrative and not exhaustive. In the case of lands coming under Cl. (b) above described, proof of direct cultivation by the land-holder with his own servants or by hired labour with the own or hired stock for a continuous period of 12 years before 1st July, 1908 without any other evidence, constitutes the lands "private lands". Ryoti land however could be converted into private land only in this manner and no other, and direct cultivation by the land-holder for the requisite period, is an indispensable considition of such conversion as held by this Court in 'BANDHARU JOGI v. SEETHARAMAMURTI', I L R (1948) Mad 223 F.B.

In the case of lands falling under class (b) above stated proof of direct cultivation for twelve years before 1st July 1908 would without more, conclusively establish they are private lands. In respect of lands once ryoti, direct cultivation for the specified period is the only mode by which they can be deemed to be private lands. The insistence on direct cultivation in the case of one species of lands deemed to be private lands is a clear indication that there might be other private lands which need not satisfy the test of direct cultivation and these are included in the first part of the definition in S. 3(10) (a).

In respect of lands whose character as ryoti or private land is in dispute, direct cultivation for 12 years before 1908, is not the only mode

by which their true character can be established. S. 185 renders admissible not only leases before 1898 showing that the lands were specifically let as private lands but also such other evidence as would be relevant under the Evidence Act. If in respect of such lands there is relevant evidence other than direct cultivation is is open to a Court to find on such evidence that the lands are private lands.

(65) Before I consider the cases cited at the Bar I wish to clear the ground by stating that we are not concerned in this case with conversion of ryoti land into private land but only with the nature of the evidence required to establish the original character of the land as private land. Before S. 185 was amended in 1934, it contained a proviso that land directly cultivated by the land-holder as private land for 12 years before 1st July 1908 shall be deemed to be private land even though the land was originally ryoti. It has always been the law that mere merger of the kudiwaram interest in the melwaram does not convert ryoti land into private land.

Before the amendment of 1934 conflicting views were expressed by learned Judges as to whether the proviso to S. 185 was exhaustive and retrospectively prohibited other modes by which conversion of ryoti land into private land has been effected before the Act. Wallis C.J. in 'CHELLAPALLI case', 39 Mad 341 and Krishnan and Venkatasubba Rao JJ. in the NORTH VALLUR case, 50 Mad 201 took the view that the proviso to S. 185 was not exhaustive and that such conversion was not retrospectively affected by Act 1 of 1908 while Seshagiri Aiyar J. in the 'CHELLAPALLI case', 39 Mad 341, Abdur Rahim and Burn JJ. in 'MALLIKARJUNA v. SUBBIAH', 39 Mad L J 277 and Sadasiva Aiyar J. in the 'NUZVID case', 45 Mad 39 took the opposite view.

A reference to this past controversy is necessary in order to appraise the value of the decision relied on by the appellants. Wallis C.J. who was of the opinion that the proviso to S. 185 (before amendment) did not retrospectively prohibit conversion of ryoti land into private land before the Act or the recognition of such conversion as legal by the Court after the Act, even though direct cultivation for 12 years before 1-7-1908 under the proviso to S. 185 (as it then stood) was not proved observed that the test of direct cultivation found in the proviso might well be applied as a test even to other cases of conversion claimed to have been effected in other modes before the Act came into force. 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341. On appeal the Judicial Committee approved of the application of the test suggested by the proviso to S. 185 even to cases of conversion not falling within the proviso. See 'MALLIKARJUNA PRASAD v. SOMAYYA', 42 Mad 400, P. C.

The force of this observation is considerably weakened by the deletion of the proviso to S. 185 in 1934. Though Wallis C.J. started by observing that the case "raises a question of importance as to what constitutes private land under the Act" the further discussion shows that the learned Chief Justice was considering only a case of conversion of what was once admittedly ryoti land into private land. He found that the zamindar had at no time directly cultivated the lands which he claimed to have converted and that his treatment of the lands as kambattam in his accounts was merely colourable for the purpose of defeating the occupancy rights of tenants. He referred to 'BUDLEY v. BUKHTOO', 3 NWPHCR 203, itself a case of colourable conversion of ryoti land merely by means of entries in records as sir or private land, where the Court had observed that

> "sir land was land which a zamindar had cultivated himself and intended to retain as resumable for cultivation by himself even when from time to time he demised it for a season."

Seshagiri Aiyar J. referred to home farm land as land that "has been ordinarily cultivated personally by the landlord at the outset". The policy of the Act is to prevent an extension of private land in a zamindari by a process of conversion or even by legitimate acquisition of the ryoti interest as shown by S. 8 of the Act.

The proviso to S. 185 was deleted and a corresponding provision inserted in S. 3(10) (a) in 1934 to emphasise the position that direct cultivation for 12 years before 1-7-1908 is the only method of conversion of ryoti land into private land recognised by the Act, thereby overruling the views of Wallis C.J. in the 'CHELLAPALLE case', 39 Mad 341 and Krishnan and Venkatsubba Rao JJ. in the 'NORTH VALLUR case', 50 Mad 201, and Sadasiva Aiyar J. in the NUZVID case', 45 Mad 39.

That this is the effect of S. 3(10) (a) after the amendment of 1934 has now been held by the Full Bench in 'BANDHRU JOGI v. SEETHARAMAMURTI', ILR (1948) Mad 223. The stringent requirement of direct cultivation imposed by law to discourage conversion of ryoti land and to prevent a land-holder from increasing his stock of private land at the expense of ryoti interests need not be imported into a consideration of the question whether a particular land whose origin is not known, is ryoti or private.

(66) In the course of their judgment in the 'CHELLAPALLIE case', 39 Mad 341 Wallis C.J. and Seshagiri Aiyar J. interpreted the word "domain" in S. 3(10) (a) of the Act as denoting land immediately surrounding the mansion house, park or chase of a lord of the manor and in his immediate occupancy and applied the same test to determine the private land of his Indian counter part, the zamindar.

Wadsworth O.C.J. and Koman J. in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687 observed that the word "domain" or home farm would connote land appurtenant to the mansion of the lord of the manor kept by the lord for his personal use and cultivated under his personal supervision.

In the 'TEDLAM case, RAMKRISHNARAO v. SESHAYYA', A. S. 53 of 1946 decided by the learned Chief Justice and Rajagopalan J. the latter under the impact of these two decisions, felt bound to refer to the unprententious village house of an absentee mokhasadar as answering the description of the "mansion of the lord of the manor" and the lands in the village of an extent of 1500 acres as laying round about the "mansion" house.

The decisions in the 'CHELLAPALLI Case', 39 Mad 341 and 'JAGADEESAM PILLAI'S case', I. L. R. (1946) Mad. 687 were cited, the latter at great length ,and followed In my judgment in 'P. NARAYADU v. VENKATARAMANAMURTI', (1949) 2 Mad L J 623 I have expressed my dissent from this narrow interpretation of this term and pointed out that it

has no relation to the actual conditions prevailing in this Presidency. "The mansion house" test would not be applicable to this country except in rare cases. It is a matter of common knowledge that Zamindars, Poligars, Jagirdars and major inamdars owned considerable extents of private land in several villages far removed from their dwellings.

In England manorial lands were not contiguous and often lay scattered about amongst and intersected by other lands having nothing to do with the manor. The demesne lands fell into three classes (a) lands occupied by the lord of the manor himself (b) lands which the lord allowed his velliens to occupy and cultivate upon certain terms corresponding to the copyhold lands of later times (c) lands allowed to lie waste or common in which free tenants and copyholders had important rights along with the lord of the manor. The English country side is not organised on the same lines as Indian villages where by reason of facilities for irrigation, cultivable lands usually form a block separated from the inhabitants' houses which lie close together usually in the village natham.

(67) 'YARLAGADDA MALLIKARJUNA v. SUBBIAH', 39 Mad L J 277, decided by Abdur Rahim and Burn JJ. was also a case where lands admittedly once ryoti were claimed to have been converted into private lands by the zamindar of Chellapalle. Abdur Rahim J. referred to home farm land as land which the zamindar is entitled to deal with in any way he chooses by contract without being hampered by the provisions of the Act". Burn J. referred to private land as land in which the entire interest is vested in the land-holder and the rights of tenants are based on contract in contrast with ryoti land in which two separate and distinct interests known as melwaram and kudiwaram exist, the former vesting in the land-holder and the latter in the ryot.

The learned Judges agreed with the opinion of Seshagiri Aiyar J. in the earlier 'CHELLAPALLI CASE', 39 Mad 341, that the only mode recognised by the Act for converting ryoti into private land was direct cultivation by the land-holder for 12 years before 1908. They also applied the test of direct cultivation or retention of land for direct cultivation adopted by Wallis C. J. in the earlier case and held that as there had been no direct cultivation by the land-holder at any time, the lands retained their original character as ryoti lands. The mere description of ryoti lands as kambattam in leases granted by the zamindar during comparatively recent times and the transfer of ryoti lands to the category of kambattam lands in the zamindari accounts without any change in the tenure of the lands and without any idea of taking up direct cultivation were held to be mere colourable transactions. This case went on the same lines as the first 'CHELLAPALI CASE', 39 Mad 341.

These two decisions do not compel us to hold that where the question is not whether land once ryoti has since been converted into private land but whether the land is ryoti or private land, it must be considered to be ryoti land in every case where there is no proof of direct cultivation by the land-holder for a substantial period. The test of direct cultivation was not insisted upon even for a conversion of ryoti land into private land in the NORTH VALLUR CASE, 50 Mad 201, overruled by a Full Bench on another point.

(68) I shall now proceed to consider the decisions where the question was not one of conversion but of the ascertainment of the true character of the lands as ryoti or private lands. The earliest reported case after Act I of 1908, so far as I know, is the decision in 'LAKSHMAYYA v. APPARAO BAHADUR', 36 Mad 168, where this Court held that the lands in dispute were the private lands of the Gannavaram Zamindar. There was apparently no evidence in that case of direct cultivation and certainly no such evidence was referred to, or relied upon, in the High Court. The lands had been leased to tenants under muchilikas from 1892 onwards, the lands being described as 'savaram' lands of the Zamindar, a description which, this Court differing from the District Judge, held to be one of ambiguous and uncertain import. Savaram lands which are analogous to 'nankar' lands in Upper India connote lands kept by the zamindar for the support of himself and the members of his family and would 'prima facie' be his private lands according to the notions prevalent in the Northern Sircars.

This Court posed the real question as being "whether the evidence was sufficient to establish that the zamindar was the owner of both the melwaram and the kudiwaram in the lands" and answered it in the affirmative relying on the following circumstances. The lands were treated in the accounts of the zamindar as different from 'seri' or ryoti lands and were held by tenants on rates of rent different from those prevailing for 'seri' lands. Water cess on the lands was paid by the Zamindar while ryots lands. Water cess on the lands was paid by the Zamindar while ryots paid the cess in respect of ryoti lands. In the leases granted since 1892 the zamindar asserted, and the tenants admitted, his full proprietary rights in the lands. In the leases of 1896 and 1897 the lands were let as private lands. Grain rents had been substituted for money rents and the leases had been granted by auction to the highest bidder.

This decision is a clear pronouncement that the character of a land as a private land could be established by the modes than by proof of direct cultivation by the landholder. Sundara Aiyar J. held that the Act did not lay down any definite rule as to all the kinds of evidence that might be produced to prove that the lands were private lands and the leases granted subsequent to July 1898 were not shut out by S. 185 of the Act, a view which was affirmed by Wallis C. J. in the 'CHELLAPALLI CASE', 39 Mad 341, and Krishnan and Venkatasubba Rao JJ. in 'NORTH VALLUR CASE', 50 Mad 201, and the Judicial Committee in 'BINDESHWARI PRASAD'S CASE', 5 Pat 634 (PC).

(69) The decision of the Judicial Committee in 'BINDESHWARI PRASAD'S CASE', 5 Pat 634 (PC), has in my opinion a very important bearing on the topic now under consideration. The case arose under S. 120 of the Bengal Tenancy Act corresponding to S. 3 (10) (a) and Ss. 185 (1) (2) and (3) of our Act. It is a matter of common knowledge that our Act was modelled on the Bengal Tenancy Act, the Permanent Settlement having proceeded on the same lines in both provinces.

In that case the Maharaja of Dumraon, the land-holder, sued for eviction of his tenants

from the large extent of lands situated in the zamindari alleging that they were his 'zerait' or private lands. The tenants pleaded that they were ryoti lands in which they had acquired a statutory right of permanent occupancy under Ss. 20 and 21 of the Bengal Tenancy Act corresponding to S. 6 of our Act. The lands in question were 225 bighas in extent and had emerged in 1843 by the fiuvial action of the Ganges and become part of the zamindari. The bulk of the lands was suitable for cultivation. The entire lands had been leased from time to time by the Maharaja to the Government from 1843 till 1873 when the Government surrendered possession to him. The lands were again leased in 1873 to a Mr. Fox for ten years, the lease being renewed in 1883 for a further term of nine years under a kabuliat which recited 'inter alia' that the lands were 'zerait' (private lands) of the lessor. In 1891 the Maharaja even granted permanent occupancy rights in the lands to Mr. Fox in consideration of his services. Mr. Fox fell into arrears of rent and the Maharaja filed a suit, obtained a decree and purchased the right, title and interest of Mr. Fox in the lands in 1896. Thereafter the lands were leased by the Maharaja to one Akauri Ram for a period of five years.

In 1902 the proprietrix of the Dumraon Raj granted a lease of the lands to Keshav Prasad, the father of the defendants, for a term of 7 years, the lands being described in the kabuliat as the zerait lands of the lessor. The lessee agreed that the lessor would be at liberty to lease the lands to anybody he liked at the end of the term. The lessee, and after his death, his sons, remained in possession for the full term of seven years except during a temporary dispossession from some of the lands by trespassers who had no title and who had set up an untenable claim of occupancy right.

In the suits filed by the heirs of the lessee for eviction of the trespassers they had described the lands as zerait lands of the Dumraon Raj. Under a fresh kabuliat executed on 8-12-1908 by the heirs of Keshava Prasad, the original lessee, the term of the lease was extended till 1925. This kabuliat also contained admissions by the lessees that the lands were the zerait of the lessor and there were also stipulations to the effect that the lessees would not claim rights of occupancy and that the lessor would be at liberty to take and keep possession of the lands himself or settle the lands on any other person at the expiry of the term. On the expiry of the term of this last kabuliat, the lessees declined to give up possession and asserted that they were ryots who had acquired occupancy rights.

The Judicial Committee held, affirming the decision of the Patna High Court, that the lands were the private lands of the Dumraon Raj in which the lessees could not and did not acquire occupancy rights. Though the lands had never been under the direct cultivation of the zamindar at anytime since their emergence in 1843 and had always been leased to tenants as zerait lands for varying terms, they were nevertheless held to be the private lands of the zamindar. This conclusion was based only on the terms of the several leases referring to the lands as zerait lands and the admissions of the tenants that they had no right of occupancy in them.

The Judicial Committee also held that the admissions in leases executed by tenants after 1883 (the corresponding date under our Act being 1898) negativing a right of occupancy in the lands were admissible in evidence to prove the character of the lands as private lands. In other words, the Judicial Committee did not exclude any evidence admissible under Evidence Act to prove that the lands were the private lands of the Zamindar.

The learned advocate for the appellant distinguished the case as resting on the terms of S. 120 of the Bengal Tenancy Act and as having no application to the construction of our Act. I am unable to find any appreciable difference between the two provisions. Section 120 (1) (a) of the Bengal Tenancy Act corresponds to the second part of S. 3 (10) (a) of our Act; S. 120 (1) (b) corresponds to the first part of S. 3 (10) (a); and S. 120 (2) corresponds to Cls. 1, 2 and 3 and the first proviso to S. 185 of our Act. Not only is there no material difference in the law applicable but the facts in the Patna case were very much stronger against the case of the land-holder who had even gone to the length of creating occupancy rights in Mr. Fox and might therefore well have been presumed to have given up any intention of direct cultivation. He had even purchased the occupancy rights of Mr. Fox at an execution sale for arrears of rent.

Under S. 22 of the Bengal Tenancy Act (corresponding to S. 8 of our Act), an acquisition of occupancy rights by the land-holder at a rent sale does not enable him to hold the land as ryoti. Nevertheless the Privy Council held that the transaction by which the Dumraon Raj conferred permanent tenancy rights on Mr. Fox did not affect the character of the lands as zerait and when they came back to the possession of the Raj by a purchase at an execution sale, they regained the character which they originally possessed. It is somewhat unfortunate that this decision has not been the subject of consideration by this Court on many occasions when its relevancy was beyond dispute.

(70) I shall now deal with the later decisions of this Court. In 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, the question was whether certain land was ryoti or the private land of the zamindar. There was no evidence of direct cultivation by the land-holder at any time. On the other hand, the evidence adduced by the land-holder consisted of periodical leases originating from 1877. The tenants had been given 'sagubadi' pattas which were different from those issued to tenants of ryoti lands. The lands were described as kambattam and there was a provision in the leases granted before 1891 for surrender of the land by the tenants at the end of the term. The tenants however had not been turned out of the land but allowed to continue from year to year. On these facts Madhavan Nair J. held that the lands were the private lands of the land-holder though never directly cultivated by him.

In the unreported case of 'SRI THIAGARAJASAMI DEVASTANAM v. MUTHUSWAMI', C. M. A. No. 311 of 1943 Krishnaswami Aiyangar and Somayya JJ. dealt with a case of private lands in a whole inam village which had been granted with both warams to a temple and which became an estate under S. 3 (2) (d) as amended by Act 18 of 1936.

The Court held that the mere fact that the land-holder was the grantee of both the warams was not sufficient to show that the land was his private land, having regard to the statutory presumption in S. 185 of the Act that land is ryoti and also to the provisions of the Ss. 185-A and 185-B of the Act. There was no proof of direct cultivation of the land by the land-holder at any time, the land having been periodically leased out as required by a scheme framed for the temple. The case fell within S. 3 (10) (b) (1) of the Act, which, in the case of major inams, corresponds to the first portion of S. 3 (10) (a) applicable to the zamindaris; palayams and jagirs.

It was pointed out by the learned Judges that the words "sir", "khas", "khambattam" and "pannal" were given in S. 3 (10) merely as examples of private lands properly so called and that in the case of lands not bearing the particular nomenclature, the Court would still have to find out whether the lands were private lands, i.e., the domain or home-farm land of the land-holder. The Court relied upon terms in the leases granted before 1st July 1918 implying that the tenants had no right of occupancy in proof of the private character of the lands. The changes in the personnel of the tenants, the variations in the rent payable, the restrictions on the rights of tenants to enjoy the trees on the land, the fixing of a term of years with a provision for surrender of the lands at the end of the term and the periodical auction of the leases to the highest bidder, were relied upon in support of the conclusion that the lands were private lands of the temple. The Court distinguished the cases in the first 'CHELLAPALLI CASE', 39 Mad 341, and the second 'CHELLAPALLI CASE', 39 Mad L J 277, on the ground that they were cases where the Court had to consider whether ryoti land had been converted into private land before the Act, in which case the test of direct cultivation might be a crucial test.

(71) 'KONDAYYA v. NAGANNA', ILR (1941) Mad 720, was an appeal from a judgment of Wadsworth J. in 'KONDAYYARAO v. NAGANNA', (1939) 2 Mad L J 778, and dealt with a case of conversion of private land into ryoti land by the grant of a permanent right of occupancy by a Mukhasadar to his tenants. Wadsworth J. referred to home-farm land as land regarding which the land-holder at least retained an expectation that he would at some not too distant a date, use it for his own cultivation and enjoyment following the 'CHELLAPALLI CASE', 39 Mad 341. After examining the relevant provisions of the Act, Leach C. J. on appeal observed:

"There was nothing in the Act as it stood before 1936, nor is there anything in it now, which prevents a land-holder from leasing his private land on whatever terms he may think fit so long as he does not part with the kudiwaram interest."

Towards the end of the judgment the following passage occurs:

"The appellants here could have sold the lands in suit to the first respondent absolutely or they could have leased them at any rent they might have agreed upon without separating the kudiwaram right from the melwaram right, but as they chose to separate the kudiwaram right from the melwaram right and grant a permanent right of occupancy on the basis of the payment of rent relative to the melwaram right, they must, in my judgment, be deemed to have converted the lands into ryoti lands."

Leasing by itself does not, therefore, impair the character of lands as private lands. 'RAJAYYA v. LAKSHMANA AIYAR', ILR (1946) Mad 181, was also a case relating to the conversion of 'isuwaram' land into ryoti land under S. 3(10)(b)(IV) of the Act. There a land-holder had acquired the kudiwaram interest for valuable consideration before 1st November 1933 and had been letting out the land on leases ever since. It was contended that the land had regained its original character as ryoti in the absence of direct cultivation by the land-holder. The Court (Somayya and Patanjali Sastri, JJ.) negatived this contention in these terms:

"The mere fact that the lands have been leased to a tenant for a number of years does not mean that the land-holder has not retained the kudiwaram and that he has converted them into ryoti lands. Proof of intention on the part of the landlord to part with the kudiwaram right is necessary".

In a similar case, 'SWAMI VANNIAR v. NAGARAJA', S. A. No. 847 of 1946 Rajagopalan J. observed as follows:

"Leases for short period with varying terms would really indicate a definite intention on the part of the land-holder to retain his kudiwaram interest, not that he intended to part with them in favour of the lessee. The fact that the lessee was the same is not enough to prove an intention to part with the kudiwaram interest."

I do not see why the same test should not be applied to a case where both the warams originally vested in the land-holder and the question arises whether the lands have become ryoti or where the presumption under S. 185 of the Act is sought to be relied upon.

(72) The next reported case on which considerable reliance has been placed by the appellants is 'JAGADEESAM PILLAI v. KUPPAMMAL', ILR (1946) Mad 687, the judgment of the Bench being that of Wadsworth O. C. J. Stripped of unnecessary detail, the facts of the case were these. The Rajah of Tanjore had, before his death in 1855, acquired the mirasi rights, i.e., absolute ownership in the lands of Kaduveli village. On the death of the Rajah all his landed properties were annexed by the East India Company as an act of State and kept in the possession and management of the company and its successor, the British Crown, till 1862, when they were regranted to the widows of the Rajah. Owing to quarrels among the widows, a permanent receiver was appointed by the Court in 1866 to manage the lands and divide the income among the widows. The receivers successively appointed by the Court were in possession of the lands till 1926. Thereafter the Kaduveli lands were divided among the claimants to the estate of the Rajah. In 1934 one of them granted a lease of the lands allotted to his share to a tenant for a term of three years. At the end of the term the tenant claimed that the lands were ryoti and that he had acquired occupancy rights under S. 6 of the Act. The land-holders sued to evict the tenant on the ground that the lands were private lands. The learned Judges of this Court held that the lands were ryoti in which the tenant had acquired occupancy rights under S. 6 of the Act.

A Full Bench of this Court in 'SUNDARAM IYER v. RAMACHANDRA AIYAR', 40 Mad 389, held that the villages comprised in the Tanjore Palace Estate were "estates" within the meaning of S. 3(2)(d) of the Act, as it then stood, though the case related to the village of Ullikadai with reference to which, as pointed out by Sadasiva Aiyar J. it was conceded that there was a grant only of the melwaram.

The learned Judges in 'JAGADEESAM PILLAI'S CASE', ILR (1946) Mad 687, traced the history of the Kaduveli lands from 1830. The village was then a mirasi village, the lands being owned by the mirasdars as proprietors of the soil. The mirasi rights had thereafter been acquired by the Rajah of Tanjore and on his death in 1855, vested in the East India Company and its successor, the British Crown. In 1856 the Government leased the lands to a purakkudi or outside cultivator for a term of three years. In 1860 the Government leased the lands to a different tenant with a stipulation for payment of 'miras thunduwaram' in addition to the melwaram in recognition of the Government's right as a holder of the mirasi rights in the lands. After the grant of the village by the Government to the widows of the Rajah in 1862, the lands which were styled as "palace miras" were leased to a tenant with a provision for a payment of 'miras thunduwaram' in addition to the melwaram. The receivers who came into the management in 1866 and continued till 1926 went on granting periodical leases of the lands to the highest bidder, the lands being stated to be absolute property of the land-holder in the leases granted before 1908 and to the private lands of the land-holder in leases after 1908. The lands were proved to have been cultivated in 'amani' in 1870 which, with all deference to Wadsworth O. C. J. meant direct cultivation. The Court expressed its conclusion on the facts in these terms:

> "We do not know how the Rajah of Tanjore acquired the mirasi rights in the main village of Kaduveli; but we may take it as established that after the rendition of the estate (1862) there was no recognition of the subsistence of any occupancy right in any tenants of the main village who were holding lands under the receivers or under the actual owners of the estate."

It is somewhat difficult to understand the exact process of reasoning by which the learned Judges reached their conclusion. If their view was that the village was an estate even under S. 3 (2) (d) of the Act, as originally enacted in 1908, then the acquisition by the Rajah of the kudiwaram or mirasi right even though it was made before 1855 would not convert the land into private land, see S. 8 of the Act. Even after the regrant of 1862 the land would continue to be held on the same tenure unless it came within S. 3 (10) (b) (ii) to (v) of the Act which, however, was not the case. The long history of the lands prior to 1862 narrated in the judgment would not be germane unless the learned Judges thought that the Rajah was only a melwaramdar and that by his subsequent acquisition of the kudiwaram interest there was no merger so as to extinguish the kudiwaram right.

In the course of the judgment, however, the Court proceeded on the basis that the confiscation swept away all antecedent rights of the Rajah, that the grant of the village in 1862 was a grant of both the warams to the Ranis and that the village became an estate under S. 3 (2) (d) of the Act as amended by Act XVIII (18) of 1936. They then proceeded to discuss the meaning of the term "private land" in S. 3 (10) (b) (i) of the Act in the light of the observations of this Court and the Judicial Committee in 'THE CHELLAPALLI'S CASE', 39 Mad 341, affirmed on appeal in '42 Mad 400 (PC).

(73) Referring to the earlier judgment of this Court in 'THIAGARAJASAMI DEVASTHAN v. MUTHUSWAMI', C. M. A. No. 311 of 1943, decided by Krishnaswami Aiyangar and Somayya JJ. their Lordships observe:

> "The learned Judges deal with the definition in a way which, with very great respect, we find difficult to reconcile with the decision of the Privy Council just quoted. (CHELLAPALLI CASE', 39 Mad 341, affirmed on appeal in 42 Mad 400 PC). We are not concerned with the correctness of the unreported decision on the particular facts before the learned Judges; but with some of the observations contained in that judgment we must express our respectful disagreement."

It is rather unfortunate that the learned Judges did not point to any passage or any of the reasons contained in the judgment they were criticising but considered it sufficient to express a general feeling of dissatisfaction and disapproval. They, however, laid down the tests for ascertaining whether a land was private land or ryoti in an estate in these terms:

> "It seems to us that sub-cl. (b) (i) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm; that is to say, lands appurtenant to the land-holder's residence and kept for his enjoyment and use. The home-farm is land which the landlord farms himself as distinct from land which he lets out to tenants to be farmed. The definition read as a whole indicates clearly that the ordinary test for "private" land is the test of retention by the land-holder for his personal use and cultivation by him under his personal supervision. No doubt such lands may be let on short leases for the convenience of the land-holder without losing their distinctive character; but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private, those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases.
>
> There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard those lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights."

I have already stated that there is no warrant for confining "private lands" to land adjoining or appurtenant to the residence of the

land-holder or to land that is kept for the personal enjoyment and use of himself and his establishment. The learned Judges themselves seem to concede that proof of direct cultivation is only one method of establishing the character of a land as private and that it can be established by some clear indication of an intent to regard the land as retained for the personal use of the land-holder and his establishment. Why may not this indication be gathered from the terms of the leases themselves under which the lands have been let to tenants? The learned Judges did not give any indication of how "the clear indication" insisted upon by them is to be furnished or gathered. The short term leases granted by the Receivers as well as by the Government were, as their Lordships themselves point out, on the footing that the lessors were owners of both the warams and wholly inconsistent with the recognition of any right of occupancy in any of the tenants who were holding under such leases. Except for one year during which the village was cultivated in 'amani', there was no evidence of direct cultivation by the land-holder in that case. In spite of different tests differently worded and indicated in the different portions of the judgment, perhaps the only basis on which the conclusion of the learned Judges rests is that proof of direct cultivation for a substantial period of time is absolutely essential to prove the character of lands as private lands in cases coming within S. 3 (10) (b) (i) of the Act. If so, I am not prepared to go so far as the learned Judges have gone in that case.

(74) The decision of the Full Bench in 'BANDHARU JOGI v. SEETHARAMAMURTI', ILR (1948) Mad 223 (FB), merely decided that in view of the amendment of S. 3 (10) (a) and S. 185 of the Act in 1934, the only mode of converting ryoti land into private land sanctioned by the Act is by direct cultivation of the land by the land-holder with his own servants or by hired labour and with his own or hired stock for a continuous period of 12 years before 1st July 1908, the date when the Act came into force. Some of the reported decisions which have already been referred to in this judgment were also noticed by the Full Bench but the case was one of conversion of ryoti land into private land. The Court had not to deal with the situation which has now arisen and to ascertain for the first time whether a particular land was private or ryoti.

In 'NARAYADU v. VENKATARAMANAMURTI, (1949) 8 Mad L J 623, I held that the lands there in question were private lands relying on the course of dealing between the zamindar and the tenants as evidenced by leases from 1877 to 1939. I also pointed out that the test of direct cultivation was a useful test but direct cultivation was not an indispensable part of the evidence requisite for establishing that a land, whose character as private or ryoti is under investigation, falls within the former category.

In 'RAMAKRISHNARAO v. SESHAYYA', A. S. No. 53 of 1946, it was held by the learned Chief Justice and Rajagopalan J. that the lands in question in that case were private lands, relying on the evidence of direct cultivation by the land-holder of different portions of the land at different times with his own stock. Passages from the judgment of Wadsworth O. C. J. in 'JAGADEESAM PILLAI'S CASE', ILR (1946) Mad 687, were quoted 'in extenso' and with evident approval and the tests formulated in the judgment were applied. As there was ample evidence of direct cultivation by the land-holder in that case, the further question whether its absence was fatal to the claim of the land-holder had not to be considered.

(75) The last of the cases to be noticed is a decision of Subba Rao and Chandra Reddi JJ. in 'PARISH PRIEST OF KARAYAR PARISH v. KATTALAI OF SRI THIAGARAJASAMI DEVASTANAM', A. S. Nos. 176 to 178 and 493 of 1946, which related to lands in inam villages which had been granted to the Sri Thiagarajaswami Devastanam. The learned Judges held that lands of the extent of about 1000 acres involved in those appeals were not private lands of the temple but were ryoti lands in which a lessee of the lands from the Executive Officer of the temple had acquired permanent rights of occupancy as a result of the amending Act XVIII (18) of 1936. The Court outlined the origin of private lands as lands directly cultivated by tribal chieftains through their farm servants or hired labour and waste lands gradually brought under cultivation by them with their own servants or hired labour. It was pointed out that "even if a land is known as kambattam or pannai, unless it satisfied the characteristics of a domain or home-farm land, it cannot be private land within the meaning of the Act". The description of "domain" land in the Encyclopaedia Brittanica and the definitions of "kambattam", "sir", "khas" and "pannai" in Wilson's Glossary were referred to. The learned Judges relied upon the 'CHELLAPALLI CASE', 39 Mad 341 and 'JAGADEESAM PILLAI'S CASE', ILR (1946) Mad 687, and applied the 'BUDLEY v. BUKTOO', 3 N W P H C R 203, test adopted by Wallis C. J. as a correct test for ascertaining whether a land was ryoti or private land.

They laid down that in addition to the recitals in lease deeds, there must in every case be evidence that the land in its origin was directly cultivated by the landlord or reserved by him for his own direct cultivation. The grant of short term leases with a provision for re-entry by the lessors on the expiry of the term was not sufficient to indicate an intention to resume direct cultivation. They further held that direct cultivation by the land-holder for a few stray years was of no avail as in their opinion such cultivation might have been necessitated by the dearth of persons willing to take the lands on lease. The previous unreported decisions of this Court were not individually referred to or examined but distinguished on the ground that they were all decisions rendered on their own facts. The learned Judges rested their decision against the land-holder Devastanam on various other grounds also which are now not germane.

(76) I may now summarise my conclusion on the legal aspects of the case. Where land proved or admitted to be once ryoti land is claimed to have been converted into private land, the claim is untenable unless the land-holder proves direct cultivation for a period of 12 years before 1st July 1908. No other mode of conversion is permissible. Where you have to find out whether a land is private or ryoti its original character not being known, proof of direct cultivation of the land by the land-holder for 12 years before 1st July 1908, would, without other evidence, conclusively establish

its character as private land, but this is not the only mode of proof permitted to land-holder. Other evidence may be adduced and looked into and might consist, among other matters, of direct cultivation of the land at some period anterior to the 12 years preceding 1st July 1908 but this is not indispensable. Direct cultivation may be valuable and weighty evidence and may be inferred from accounts and other records usually kept by large land-holders.

If, owing to lapse of time or other reasons, evidence of direct cultivation is not forthcoming its absence is not fatal to the claim that the land is private. S. 185 of the Act does not shut out, but on the other hand allows all evidence that would be relevant and admissible under the law of evidence, to prove that fact in issue, namely, whether the land is private or ryoti. Local usage or custom and the letting of the land as private land in leases before 1898 are specifically mentioned in Ss. 185(1) and (2) as being relevant evidence but other evidence is also expressly made admissible under S. 185(3).

The classification of lands as private lands at the time of the permanent settlement or in the early records of zamindaries, the terms of the grant of an undertenure, the assertion and enjoyment by the land-holder of the right to both the warams, the intention to retain with himself the kudiwaram right and the consequent right to resume direct cultivation if he chooses, leases of the lands as private lands or with terms and conditions inconsistent with any right of occupancy in the leases, admissions by tenants that the land-holder is the owner of both warams and that they have no occupancy rights, changes in the personnel of the tenants, variations in the rates of rent payable by the tenants — these and kindred matters would be relevant and admissible in evidence to prove that the lands are private lands. The probative value of such evidence depends on the facts and circumstances of each case.

The burden of proof that a particular land in an estate is private land rests on the land-holder, the statutory presumption being the other way. This burden is not discharged merely by proving that both the warams were granted to or enjoyed by the land-holder once upon a time. There must be evidence of the treatment of the lands as private lands by the land-holder, either by direct cultivation or otherwise in the manner above stated.

(77) There is one feature of these cases which requires special mention. The leases granted from time to time to the tenants are styled "Swamibhogam leases" and there is a stipulation in all of them for payment by the tenant of swamibhogam to the landlords in addition to the melwaram proper. If the tenants had a right of occupancy in the lands they could have objected to the imposition of this liability for swamibhogam in addition to the rent; but they never raised any such objection. It has been pointed out in several decisions that the payment of swamibhogam by the tenants is a clear admission that the landlord is the owner of both the melwaram and the kudiwaram right in the land i.e., that he was the absolute proprietor of the soil 'NAINA PILLAI v. RAMANATAN', 33 Mad L J 84, at p 98; 'MOHAMAD ROWTHER v. MUTHU ALAGAPPA CHETTIAR', 34 Mad L J 234 at p 245; 'SUBRAMANIA v. SIVASUBRAMANIA', 41 Mad L J 175; 'SUBRAMANIA CHETTIAR v. SUBRAMANIA MUDALIAR', 57 Mad L J 1 (P. C.).

At page 285 of the Ramnad District Manual it is stated as follows:

"Pannai lands are those in which the Zamindar or Inamdar owns both the landlord's right and tenant's right. He can lease out the lands to anyone he likes for cultivation and obtain from him "swamibhogam" or "thunduwaram", a rent obtained in acknowledgment of the landlord's tenancy right in the soil in addition to the melwaram or landlord's share."

(78) 'Swamibhogam' is supposed to be taken out of the kudiwaram or cultivator's share of the produce and paid in addition to the melwaram or landlord's share. It consists of a one-tenth or a greater share of the kudiwaram produce which the tenant pays to the landlord along with the melwaram. 'Thunduwaram' resembles very closely the 'swamibhogam' and it is also a portion of the kudiwaram paid by the tenant to his immediate landlord in addition to the melwaram. The 'swamibhogam' is a fixed amount while the 'thunduwaram' may vary in proportion to the amount of crop actually harvested. The description of the leases in the present case as 'swamibhogam' leases as well as the provision in these leases for the payment of 'Swamibhogam in addition to the melawaram by the tenants to the trustees of the temple would indicate an intention on the part of the land-holder not to part with the kudiwaram interest but to retain the lands as resumable by him for direct cultivation in the future.

Mr. A. Sundaram Aiyar relied on the decision in 'SIVANUPANDIA THEVAR v. ZAMINDAR OF URKAD,' 41 Mad 109 where it was held that "swamibhogam" was part of the rent lawfully payable by a ryot to the land-holder. There the lands were admitted to be ryoti and the tenants were ryots. The only question was whether the 'swamibhogam' paid all along to the land-holder was an illegal levy or part of the rent lawfully payable and it was held to be a part of the rent. The origin of the payment in that case was not known and it had been paid for a long time as a component part of the rent.

(79) The evidence adduced in these cases to support the claim of the plaintiffs that the lands are private is somewhat meagre and of a poor quality. At the same time it cannot be said that irrelevant evidence has been admitted or that there is no evidence in support of the findings of the Courts below. Nor have the Courts below misdirected themselves on any point of law. I agree with my learned brother, Satyanarayana Rao J. as regards the result of these second appeals and civil revision petitions.

(80) RAGHAVA RAO J:- These second appeals and civil revision petitions raise two questions of some difficulty (1) whether the village in question is an estate within the Madras Estates Land Act, and (2) whether the land in the possession of the defendants is private land of the plaintiff-land-holders. Both the Courts below have answered both these questions in the affirmative. The defendants are the appellants and the petitioners in these cases.

(81) At the conclusion of the arguments I found myself by no means certain in regard

to the answer to be given to the second question, although in regard to the answer to be given to the first I more or less made up my mind in favour of the appellants. I have had the advantage since of perusing the judgments of my learned brethren in order to arrive at a decision in their light as well as in the light of the arguments.

(82) On the first of questions I agree with my learned brethren that the suit village must be held to be an estate with reference to S. 3 (2) (e) and not S. 3 (2) (d) of the Madras Estates Land Act. The view of the learned Subordinate Judge on appeal in concurrence with the conclusion of the learned District Munsif at the trial holding the village to be an estate with reference to the latter provision of the statute is beset with too much of error to commend itself to my acceptance. The grant which is not badshahi or royal is not of 1720 A. D. as supposed by the learned Subordinate Judge but of 1798 A. D. The year 1720 referred to in Ex. P. 26 does not relate to the era beginning with the death of Christ but to Salivahana Saka as found out by us on our investigation at the hearing. Even on the assumption that the Dindigul referred to in S. 2 of Madras Regulation XXXI of 1802 included the area in which the suit village is situate, the grant does not satisfy the description of a grant made before the 18th day of March 1792 for it to attract the validating declaration contained in that section. Nor does Ex. P. 26 relate to a register maintained under S. 15 of the Regulation. It may be that the character of the grant as that of a village was not disputed in the Courts below and is not unnecessarily belied by the contents of Ex. P. 26.

But the question still remains whether, not having been dealt with by the Inam Commission, the grant can be said to be a village recognised by the British Government as contemplated by S. 3 (2) (d). The declaration in S. 2 of the Regulation not being applicable to the case and the entry in Ex. P. 26 not being one made in a register maintained under the regulation, the only other features remaining for consideration out of those relied on by the lower appellate Court for bringing the suit village within S. 3 (2) (d) of the Act are, firstly the direction contained in the Inam Rules framed in 1859 or so for the guidance of the officers are concerned with the Inam Settlement, that all inams held uninterruptedly for a period of 50 years should be treated as possessed under a valid title whatever may have been the origin and secondly, the collection of road cess by the Government from the inamdars.

As regards the first, the fact remains that the rules never came into effect with reference to suit village which has been left severely alone and not at all touched by the Inam Settlement of the sixties of the last century or in any latter settlement.

I am not satisfied that 'THIRUMALAI v. BANGARU,' 21 Mad 310 which related to the construction of S. 4 of the Pensions Act XXIII of 1871 is of any assistance to the determination of the present point as supposed by the learned Subordinate Judge. The argument in that case was that by confirming the grant of a village by a Sivaganga Zamindar to a Madura Naick at the time of the Inam Settlement the Government must be deemed to have themselves made a regrant, and that a Collector's certificate was therefore required for the suit there in question to be maintainable. The argument was repelled for the reason that assuming that the act of the Government in confirming the inam amounted to a regrant of it, it could not be said that the giving of land free of the revenue is a grant of land revenue so as to bring the case within the provisions of the Pensions Act. The basis of the argument there — namely a confirmation of the grant by the Government at the Inam Settlement — does not exist here, and, in my opinion, the mere general direction in the Inam Rules above referred to not carried out admittedly at any Inam Settlement in relation to the suit village cannot be regarded as a recognition of the suit village by the Government as an inam for the purpose of S. 3 (2) (d) of the Madras Estates Land Act.

Nor am I satisfied that the mere collection of road cess by the Government in respect of the suit inam village is such a recognition — a recognition, I mean, of the validity of the original grant which has so far remained untouched by the Government. If as opined by the late Mr. Ramadoss in his commentary on the Act at pages 53 and 54 the word "recognised" might apply to the case of those inam grants which did not form the subject of the Inam Commissioner's inquiry but which have not been disputed, cancelled or resumed by the British Government i.e., those which have been continued by an implied consent without express confirmation, there would perhaps be some point in the reliance placed by the learned Subordinate Judge on the two features above mentioned.

The question however has been raised in a case decided subsequent to the publication of that commentary in 'SAM v. RAMALINGA,' 40 Mad 664 whether the word "recognised" required something more than acquiescence by the British Government. The inclination of opinion expressed by one of the judges in that case (Srinivasa Aiyangar J. — later Sir K. Srinivasa Aiyangar) is that recognition implies something more than acquiescence, something done by the Government, as for instance by acceptance of service, jodi, etc. From that inclination of opinion of that distinguished Judge, I am not prepared to dissent, supported as it is by the analogy of the decision in 'SECRETARY OF STATE v. BHAMUMURTHI,' 24 Mad L J 538 which was no doubt a case under the Madras Proprietary Estates Village Service Act II of 1894 but which in construing similar words "lands granted or continued by the State" occurring in S. 17 of that Act held that "continuance" in the context of the section implied a recognition by the Government of the right of the inamdar which could have been set up by him in support of his possession, and that mere sufferance by the Government or forbearance from taking steps which it might have been open to the Government to take or collateral expressions of opinion not intended to be recognition or confirmation of the right of the holder would not amount to continuance.

(83) Section 3 (2) (d) of the Madras Estates Land Act being inapplicable for the reasons indicated, the question is whether S. 3 (2) (e) catches the village concerned in this case. I am distinctly of opinion that it does. Exs. P. 23 and P. 24 make it reasonably clear that the village was the subject matter of a pre-set-

tlement inam included later in the assets of the zamindar at the time of the Permanent Settlement as an 'ayan' village in respect of which there was a subsequent reduction of rent payable to the zamindar by the 'inamdar' by way of 'Dharmasanam' grant. That being so, the village is in the nature of an under-tenure falling under Cl. (e) of S. 3(2).

(84) I may state before passing on to the second question arising for determination that I have had to say so much as I have said on the question whether or not the suit village falls within Cl. (d) of S. 3(2) because in answer to an intimation of opinion from the Bench during argument that Clause (e) and not Cl (d) of S. 3(2) would govern the present case—a position which the learned advocates for the respondents accepted without any objection—the learned advocate for the appellants-petitioners stated that he was not prepared to abandon his contention as to the applicability of Cl. (d) whatever our opinion about the applicability or inapplicability of Cl. (e).

(85) On the second question I felt a good deal of doubt as to the true view to take during the progress of the argument which did not by any means stand resolved at its conclusion. The uncertainty in which I was left was because of two conflicting considerations. On the one hand there was the natural feeling of the strong reluctance to overrule a whole catena of decisions beginning with 'ZAMINDAR OF CHELLAPALLE v. SOMAYYA', 39 Mad 341, a decision of Wallis C. J. and Seshagiri Aiyar J. of 1914 and ending with two latest judgments of this year not yet reported of two different Benches — that of Rajamannar C. J. and Rajagopalan J. in 'RAMAKRISHNA v. SESHAYYA', A. S. No. 53 of 1946 and that of Subba Rao and Chandra Reddi, JJ. in 'PARISH PRIEST v. KATTALAI OF SRI THIAGARAJASAMI DEVASTANAM', A. S. Nos. 176 to 178 and 493 of 1946 all prima facie speaking in one voice favourable to the contention of the learned advocate for the appellants and petitioners before us except a solitary decision in 'THIAGARAJASAMI DEVASTANAM v. MUTHUSWAMI', C. M. A. No. 311 of 1943 striking a discordant note.

Further in between 1914 and 1949 there is the decision of the Judicial Committee of the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, which affirmed in appeal the decision of the High Court in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341. Further still there are two decisions of Division Benches in 'MALLIKARJUNA PRASADA NAIDU v. SUBBIAH' 39 Mad L J 277 and 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687 and one decision of a Full Bench in 'BANDHARU JOGI v. SEETHARAMAMURTHI', ILR (1948) Mad 223, in which the test of direct cultivation for ascertaining the character of private land propounded in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, which has been insisted upon for the appellants and petitioners before us has been accepted. On the other hand, there seemed to go against the appellants and petitioners a ruling of the Privy Council in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634, which, if indistinguishable, must needs mean an end of these appeals and revisions.

(86) Before I deal with 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634, I shall deal with the decisions of this Court bearing on the point falling to be decided in order to ascertain their result, and before I deal with them, I wish to draw attention to a few fundamental considerations required to be borne in mind, in my judgment, for a correct construction of the statute with which we are concerned in the light of which I propose to ascertain the true interpretation of the relevant provisions of the statute, as I conceive it.

(87) The Madras Estates Land Act as passed in 1908 is a declaring and amending Act as the preamble shows, and it has since undergone vital changes in the years 1934 and 1936 in several particulars, more especially in regard to the definitions of "estate" and "private land." The original Act & the changes from time to time have, as everybody knows, been dictated by Governmental policies calculated to extend the sphere of "estates" and further the rights of "ryots", to limit the extent and define the character of "private land" and to discourage the growth, and expansion of "private land" by the unjust efforts of land-holders.

It is impermissible, in my opinion, for any Court in construing any statute and much more so in construing a statute of this description passed to amend as well as declare the law relating to the holding of land in estates in the Presidency of Madras, to press into service historical knowledge or to resort to the antecedent state of the law, except for resolving doubts arising on the language of the enactment or for supplementing it in matters not covered or dealt with by it. The Court is not concerned with giving either more or less effect to the policies and purposes of the legislature than is warranted by the letter of the statute except where the golden rule of literal construction as Lord Wensleydale described it in an early English case in the House of Lords 'GRAY v. PEARSON', (1857) 6 H L 61 at p. 106, entails anamolies bordering on manifest absurdities and futilities leading to palpable injustice and infringing all reasons whatsoever.

"Private land" may have meant anything according to Baden Powell or other text book writers or Judges prior to the passing of the Estates Land Act. What "private land" means as defined in the statute is, however, a matter to be ascertained in accordance with the precise language of the Statute as interpreted by decisions rendered subsequent to the enactment of the statute without prepossessions or prejudices derived from or founded upon a knowledge of the prior state of the law. The statute must of course be read as a whole, and S. 3 (10) and S. 185 may have to be taken together so as to harmonise with each other — a matter to which I shall address myself in detail in the sequel. But the well-settled principle is that the language of a statute must not be strained and the scope of any definition therein extended so as to make it apply to a case to which it does not legitimately on its terms apply by invoking consideration of the supposed intention of the legislature or by seeking to assimilate the law under the statute somehow to the law in force prior to the enactment, even if the latter be found to be different in any respect from the former.

(88) Then, again, the construction of a statute couched in English language can only be according to the meanings of the English words used in it, as those meanings can be ascertained from English Lexicons, Law Lexi-

cons preferably and particularly. The employment of English as the vehicle of our statutory enactments had been the inevitable feature of our legislative life so far, and until the day comes when it ceases to be that, it is no good complaining of that feature however unfortunate it may be. It may or may not have been the fault of the legislature to use words belonging to a foreign system of jurisprudence as the best possible approximates or the nearest possible equivalents available in the language of the English Law for giving effect to concepts connected with our own indigenuous system of land tenures. While of course differences in fundamentals between the two systems ought not to be overlooked, affinities where they exist, ought not to be ignored either.

Bearing in mind the affinities as well as the differences, if decisions of this Court have construed the English words of the statute in their English sense so as, it may be, to produce results disharmonious to the antecedent state of the law, such disharmony is, in my opinion, no ground for expanding the scope of the statute so as to accord with such a state of the law. No "judicial embroidery" — to use the figurative phrase used by my learned brother, Viswanatha Sastri J. which by the way as I shall show hereafter is with due respect by no means a correct phrase in which to characterise the decisions relied on by the learned advocate for the appellants and petitioners before us — which has been imported by Judges into the interpretation of the Act need or ought to lure us or confuse us. But no Judge need or ought to reshape the substance at the root, rewrite the language of the enactment itself so as to perpetuate the state of the law prior to the enactment, merely because his notions as derived from that state of the law may stand violated by the English words employed by the legislature understood in their English sense. If there is vice or mischief at the basis of a legislative enactment it is not the province of the Court to remedy it of its own initiative by what is sometimes described as judicial legislation. It is for the legislature itself if it so chooses to intervene to that end and for that purpose.

(89) I may observe further that the rule of 'stare decisis' which is an integral part of every system of administration of justice governed by precedents is a rule not to be lightly regarded or readily departed from. I, for one, see nothing wrong in the adoption by Judges in later cases of a 'locus classicus' in an earlier decision which has expounded the definition in a statute in a correct and exhaustive manner or in their construction of the words used in such an exposition as if they were themselves the words used in the statute. As will be shown hereafter, the topic with which we are concerned has not been as supposed by my learned brother, Viswanatha Sastri J. 'darkened' by any false analogies drawn with feudal tenures or manorial customs but only sought to be dimmed by an attempt made in just a case or two to get away from the authority of a fully considered and binding exposition of the law by distinguished Judges such as is contained in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, which, affirmed, as it has been, by the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, and adopted as it has been in later cases by the learned Judges of this Court, has stood the field and governed the notions of litigants, lawyers and Judges in this Province for three decades and a half.

(90) I have considered it not only proper but necessary to make the foregoing remarks founded on principles of Statute construction so elementary as even to seem platitudinuous in justification of my dissent from the view of my learned brethren on this part of the case. Of course, if the authority of a superior tribunal such as is alleged to exist in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634, of the year 1926 overruled expressly or impliedly the view taken in earlier decisions here which all the same has been followed by learned Judges in later cases the matter would stand on a different footing.

Likewise, should I be satisfied that the statement of law to be found in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, which has been accepted in later cases is not the 'ratio decidendi' but only an 'obiter dictum' I might not hesitate to disturb the course of decisions if I found the dictum to be obviously erroneous, although, even then, there would be the difficulty in my way that the 'obiter dictum' accepted and approved as it has been by the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, in an appeal from the same case must of course be followed by me.

Even viewing my powers as a member of a Bench of three Judges not necessarily bound by any decision of Divisional Benches one way or the other, I should think that I have still to prescribe for my guidance the considerations expressed in the following passage in S. 557 pages 257 and 258 of Lord Hailsham's Halsbury's Laws of England, Vol. 19:

"Apart from any question as to the Courts being of subordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by Courts of higher authority than the Court establishing the rule even though the Court before whom the matter arises afterwards might not have given the same decision had the question come before it originally.

But the supreme appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake; and where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes, at any rate, that tribunal from correcting the error, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say positively that it is wrong and productive of inconvenience. Furthermore, the same considerations do not apply where the decision, though followed, has been frequently questioned, and doubted. In such case it may be overruled by any Court of superior jurisdiction."

After all, this Court is not the supreme appellate Court of the land, although this Bench is of superior authority to that of Divisional Benches. The law laid down in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, has been accepted and acted upon for a long time. Neither the Privy Council (leaving alone for the moment 'BIDHESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634), nor the Federal Court has so far said that it is wrong and productive of inconvenience. It is not as if the law so laid down has been frequently questioned and doubted. It has been questioned and doubted in just a case or two, as I have already observed, there too not on any valid ground, as I shall show hereafter.

(91) Next, before concentrating attention on the view taken in the decisions of this Court I should like to define the exact contentions of counsel before us and to notice the relevant provisions of the Statute.

(92) The contention of the appellants and petitioners as I understood it is not that there should be direct evidence of direct cultivation by the land-holder of the property claimed by him to be his private land at some time or other and for an appreciable or substantial period of time. The contention broadly stated is that there must be some proof—direct and positive or indirect and circumstantial it does not matter — of direct cultivation by the land-holder at some time or other and for some time or other.

It may be proof furnished by any evidence admissible under the Indian Evidence Act consistently with the provisions of the Madras Estates Land Act. But it must be evidence tending to show, except where a local custom to the contrary is proved, that at some time or other and for some time or other the land was actually under the direct cultivation of the land-holder, that is, by himself, his own farm servants or hired labour. If after that, there happens to be any leasing out, as there may well be, the leases must be of such a kind and character as to be consistent with an intention on the land-holder's part to resume direct cultivation in the future.

Such direct cultivation except in cases of local custom to the contrary is a fact to be proved as a requirement implicit in the definition of private land before the presumption that all cultivable land in an estate is ryoti can stand rebutted. Where admittedly ryoti land or cultivable land in an estate not proved to have been of the character of ryoti land or of private land at the inception has been proved to have been the subject of direct cultivation by the land-holder for a continuous period of 12 years it automatically gets impressed with the stamp of private land by force of an express statutory provision. Into the case of ascertainment of the character of land as private land for first time as well as into the case of ascertainment of the conversion of admittedly ryoti land or land; the exact character of which is not known, into private land, the idea of direct cultivation as a 'sine qua non' does in the learned counsel's submission enter; only, in the latter case the period of direct cultivation must be full 12 years before the 1st day of July 1908.

The contention for the respondents, on the other hand, is that direct cultivation is the exclusive test only in cases of conversion of admittedly ryoti land into private or in cases where land whose exact character as ryoti or private is not known earlier but which is proved to have been the subject of such cultivation for a period of 12 years immediately before the commencement of the Act is claimed by the land-holder to be his private land.

It is also urged that reading S. 3(10)(a) with S. 185 (with the second proviso of the latter section excluded), it becomes clear that there may well be other modes of proof of the character of land as private land than proof of its direct cultivation at some time or other and for some time or other.

(93) The relevant provisions of the Madras Estates Land Act are those of S. 3(10)(a) (excluding the inclusive part) and S. 185 (with the second proviso excluded)—one a definition section, the other an evidential section. There are other provisions proving the lettability of private land and providing for exchange of pattas and muchilikas in connection therewith which are not, in my opinion, material, as it is not the contention for the appellants and petitioners that there can be no letting at all of private land which is such by reason of proved prior direct cultivation. The definition section so far as it is plain cannot be controlled in its operation by the evidential section which must accordingly be read except where it contains matter repugnant, in conformity to the definition section. Only when the definition section is ambiguous can such light as may be thrown upon its meaning by the evidential section be carved in aid of the interpretation of the definition section.

(94) The relevant part of S. 3(10)(a) uses two words "domain" and "home-farm" as signifying two categories of private land within the intendment of the statute. The meaning of each one of these two words it is necessary to ascertain in order to arrive at a proper decision in the present case. Neither "domain" nor "home-farm" is defined in the statute; but in regard to "home-farm" in particular, beyond what is implicit in the word itself the legislature gives a further clue to its meaning by use of illustrative terms in the explanatory phrase "by whatever designation known, such as 'kambattam', 'khas', 'sir' or 'pannai". These illustrative terms are popular labels the use of which 'prima facie' connotes the character of the land as "home-farm". The legislature intends them only as interpretative aids by no means either exhaustive or conclusive with reference to the application of the statutory test of "home-farm", the interpretation of which is the primary matter for consideration.

(95) To take up the meaning of the word "domain" it has been defined in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, as "the land about the mansion house of the Lord and in his immediate occupancy." To that interpretation of the word no exception has been so far taken except in a recent decision of my learned brother, Viswanatha Sastri J. reported since the hearing of this case in 'NARAYUDU v. VENKATARAMANAMURTHI', (1949)-2 Mad L J 623, and in his judgment in this case just delivered. The passage in the former judgment which embodies the exception taken is as follows:

> "There has been, in my judgment, some amount of misconception as regards the meaning of the words "domain" or "home-farm" land of the land-holder — expressions found in S. 3(10)(a) of the Act. To interpret these

words as confined to 'land immediately surrounding the mansion or the dwelling house, the park or chase of the Lord' which would be the dictionary meaning of these English words is to import feudal ideas of medieval England into the system of land tenures in this country without adequate justification .....It is a far-fetched construction to impute to the Madras Legislature an intention to incorporate the English conception of "demesne" land as a test for differentiating the public domain from private land in a zamindari."

In the judgment of my learned brother just delivered there are two passages pertaining to this point, one is where the conclusion expressed in the passage just quoted is repeated which I need not reproduce. The other is where the conclusion expressed in the passage just quoted is repeated which I need not reproduce. The other is where my learned brother refers to the three classes of demesne lands existing in England in support of his view that the mansion house test as he compendiously describes it, bears no relation to the actual conditions, prevailing in this presidency.

"It is a matter of common knowledge", says my learned brother, "that Zamindars, Poligars, Jagirdars and major inamdars owned considerable extents of private land in several villages far removed from their dwellings."

The three classes of demesne in England are then described by my learned brother as follows: (a) lands occupied by the Lord of the manor himself; (b) lands which the Lord allowed his villains to occupy and cultivate upon such terms corresponding to the copyhold lands of later times; and (c) lands allowed to lie waste or commons in which free tenants and copy-holders had important rights along with the Lord of the manor".

(96) Of the three classes of demesne property in England the first, in my opinion, does correspondingly exist in this country as well. In most cases of land-holders it is common knowledge that they not only have land immediately surrounding their dwelling houses but also have it in their immediate occupancy. There is no fundamental difference in this respect between conditions in England and in India, and I cannot see how if a meaning had to be given to the English word "domain" occurring in an Indian Statute any other meaning could reasonably be given to it than the one given from Webster's Lexicon by Wallis C. J. in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, namely, "the land about the mansion house of a Lord and in his immediate occupancy" in which Seshagiri Aiyar J. concurred after his own independent reference to the Encyclopaedia Britannica which brought into his judgment more matter, not strictly relevant, about the English feudal tenure of land let out by the Lord of the manor as tenemental land to his retainers or villani — the origin of the modern copyhold tenure in England — and which has apparently provoked the comment of my learned brother on the undesirability of importing conceptions connected with the feudal tenures of medieval England into the interpretation of a Statute like the Madras Estates Land Act.

The comment understood in that limited sense may well stand justified; but in the absence of any alternative interpretation of the word "domain" which certainly has not been vouchsafed by my learned brother and in view of the existence in India of lands about the dwelling house of the land-holder in his immediate occupancy corresponding to such land in existence as demesne in England the meaning of the word as given by Wallis C. J. in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, must, in my opinion, be accepted.

In fact, it will be seen from the passage in 'NARAYUDU v. VENKATARAMANAMURTHI', (1949) 2 Mad LJ 623, quoted above that the exception taken by my learned brother is not to the meaning of the word "domain" as such so much as to the meaning of the two expressions "domain" & "home-farm" which, as he supposes, have been taken together & interpreted, rather misinterpreted, as confined to land immediately surrounding the mansion or dwelling house, park or chase of a Lord. I regret I cannot and do not share this view. In fact in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, while the meaning of the word "domain" is specially noticed it is not that the word "home-farm" has been ignored by the learned Judges. It will be seen from the discussion in that case that the word "home-farm" has not been confused with "domain" but interpreted and given effect to with reference to the land in question in that case.

The question in that case in fact arose with reference to other than domain land, i.e., land situated far away from the dwelling house of the zamindar and actually in a village of the zamindari known as 'Iyanki' different to the village Chellapalli in whcih the dwelling house of the zamindar was situated.

In that case as well as in other cases in which the question of the character of the land as private or ryoti arose with reference to the lands situated far away from the dwelling house or in any other village or villages than the village in which the dwelling house was situate, the work of the Court in the matter of the determination of the character of the land would have stood absolutely simplified, had the mansion house test been applied. In that case it was not the word "domain" but the word "home-farm" that fell to be applied to the land in question, and the test of direct cultivation propounded was really because of what was implicit in the word "home-farm".

It is not correct, in my opinion, to say that the Judges who decided that case treated the words "domain" and "home-farm" together as importing that the zamindar's private land must be confined to land surrounding his place or residence as in the case of demesne land of an English Lord of the manor. I not only feel highly reluctant, I find it in fact wholly impossible to impute to Judges so distinguished and so experienced as those who decided that case any ignorance of the very well known fact that private land in an estate might not only be situate far away from the dwelling house of the zamindari in the same village but might also well lie scattered in different villages throughout the estate, especially when the case before the learned Judges was itself concerned with the latter type of land.

I am surprised to find the remark in 'NARAYUDU v. VENKATARAMANAMURTI', (1949) 2 Mad L J 623, made to this effect:

"So far as I know in no case prior to 'ZAMINDARI OF CHELLAPALLI v. SOMAYYA', 39

Mad 341, was it suggested that the zamindar's private land must be confined to land surrounding his palace or residence as in the case of demesne land of the English Lord of the manor."

But was it so suggested in that case and could it be? I quite agree that the mansion house test which has reference only to the word "domain" is necessarily narrow, for there is the other word "home-farm" in the definition of private land, and land may well be private land if, although not domain land, it is home-farm land.

(97) Before I proceed to consider the meaning of the expression "home-farm" land I have a few more remarks to make on the decision in 'NARAYUDU v. VENKATARAMANAMURTHI', (1949) 2 Mad L J 623, which though not strictly pertinent to the particular point which I am just discussing I may as well make even now and here. In the first place I have no quarrel with the actual decision in the case, and I am not by any means sure that I would not have myself arrived at the same conclusion. There was ample evidence furnished in that case by the descriptions contained in several documents including leases both after and before 1898 that the land in question was 'rajuseri' (zamindar's seri or cultivable land), 'sontaseri' (home-farm) or private 'seri' (private cultivable land of the zamindar). There was also oral evidence of actual personal cultivation at some time or other. My learned brother held that the ruling in 'BINDHESWARI PRASAD v. KESHO PRASAD SINGH', 5 Pat 634, justified the reception in evidence on a question of private land or ryoti land of admissions by tenants in leases subsequent to 1898 whatever their probative value, and virtually, though not in terms, resolved the conflict of judicial opinion on that point in this Court. With this view I perfectly agree.

The second remark that I have to make is that in referring to direct or personal cultivation my learned brother observes that it

"may be and is often a useful test for determining the character of land in an estate, that is to say, whether it is private land or ryoti land but that leasing by itself is not fatal to the claim, that the land in question is private land."

The antithesis in the sentence is between direct cultivation and leasing. The learned counsel for the appellants-petitioners before us has not argued that leasing is 'per se' fatal to any claim of private land. Only he has insisted that the leasing must be of a kind and character not inconsistent with an intention to resume direct cultivation.

The third remark that I should make is that while rightly rejecting the mansion house test as too narrow my learned brother accepted and applied the test of direct cultivation subject to the qualification that leasing by itself is not fatal to the claim of private land. Referring to the test of direct cultivation what my learned brother further says is that it is not an indispensable condition that the private lands should be proved to have been cultivated by the landholder himself or his hired labour, be it noted, 'within recent times'. In other words, the direct cultivation test is accepted as the test of private land qualified however in its application by the consideration adverted to in the judgment.

The fourth remark that falls to be made is that the Privy Council ruling in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400 (PC), is referred to by my learned brother as approving the observations made by Sir John Wallis in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, with reference to the test of direct cultivation as the test for the determination of the character of land as private land.

The fifth and last remark called for is that the case before my learned brother was not a case of conversion of admitted ryoti land or land of unknown character into private land, and yet the test of direct cultivation was applied without regard to any differentiation of the kind attempted by the learned counsel for the respondent and accepted by my learned brother in the present case. It may be that my learned brother has had the chance of a better and fuller consideration of the matter in the light of the arguments before us and has been able to go further than he did in 'NARAYUDU v. VENKATARAMANAMURTHI', (1949) 2 Mad L J 623.

All that I am concerned to point out at this juncture is that while that portion of his judgment in that case whcih imputes the mansion house test to the learned Judges who decided 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, is in my respectful opinion erroneous, the rest of the judgment is by no means adverse to the contention for the appellants and petitioners before us. Why I am concerned to point out this is that there may be and ought to be no mistaking of that judgment as militating against the whole catena of decisions in this Court relied on in support of that contention. The unreported decision of Krishnaswami Aiyangar and Somayya JJ. in 'THIAGARAJASAMI DEVASTHANAM v. MUTHUSWAMI', C. M. A. No. 311 of 1943, is of course no doubt there, in conflict with that catena of decisions, and with that, I shall deal later.

(98) Now to turn to the word "home-farm" land I find that the words "home" and "farm" are separately defined and annotated in dictionaries, and what has to be done in order to get at the meaning of the compound is to combine the meaning of the two words after ascertaining them separately in the manner most suited to the context of the definition so as to make of them a compound calculated to hormonise with the common spirit of the several illustrative terms employed by the legislature in the explanatory phrase attached to "home-farm land of the land-holder" occurring in S. 3 (10) (a), namely, "by whatever designation known as such as 'kambattam', 'khas', 'sir', or 'pannai' ". These terms are no doubt only illustrative and not exhaustive, as the words "such as" preceding them show.

Other terms of a like significance it is not difficult to conceive of. We have them in "Sonta Seri" and "Raju Seri" in 'NARAYUDU v. VENKATARAMAMURTHI', (1949) 2 Mad L J 623 and in 'Nagari Iduva' in 'VENKATAGIRI ZAMINDAR v. RAGHAVAN', 9 Mad 142 and in 'Samasthanam Khanigi' which is found mentiond in the leases discussed in 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, and to which along with 'Nagari Idhuva' Mr. Vendantachari refers in his commentary on the Act. 'Sonta Kamatam' is another expression also in vogue to the same effect a variant of kambattam'.

In my opinion, as I have already indicated, "domain" and "home-farm" are two different expressions, and the explanatory phrase qualifies only the latter expression and not the former.

Pursuing this process for determining the meaning of the compound "home-farm" I find first that the separate meaning of the word "home" suitable to the context is the kind of meaning obtainable from phrases like "at home" and "home-rule", the former of which is explained in the Concise Oxford Dictionary of current English (3rd Edn., Reprinted in 1944) as meaning "in one's 'own' house", and the latter of which is explained in the same Dictionary as meaning "The Government of a country by its 'own' citizens". I find next that the separate meaning of the word "farm" suitable to the context to be found in the same Dictionary is "tract of land used under one management for cultivation". Putting together the meanings of the two words "home" and "farm" as so chosen I hold that the home-farm land of the land-holder means "land of the land-holder in his own cultivation". In fact "home-farm" is also explained in the same Dictionary in the context and under the heading of "farm" itself. "Farm" is first defined in its noun form as meaning "tract of land used under one management for cultivation" (originally of leased land) and then is given the meaning of the word "home-farm" thus—"reserved & 'worked' by 'owner' of an estate containing other farms." I have underlined (here in quotation) the words 'reserved', 'worked & 'owner' from which it seems to me that in the words 'home-farm land of the land-holder' occurring in S. 3(10) (a) of the Madras Estates Land Act is implicit the idea of land reserved & kept in the land-holder's own or direct cultivation—the idea, to borrow words occurring elsewhere in the same clause of the same sub-section of the same section, of cultivation by the land-holder himself by his own servants or by hired labour with his own or hired stock.

(99) This conception of "home-farm land" according to the Statute thus deducible is further emphasised by the legislature by its use of the pharse by whatever designation known such as "kambattam, khas, sir or pannai." These four illustrative words have about them the common idea, the idea, again, of direct cultivation. They are not, as I have already pointed out, conclusive legal labels which themselves constitute the definition of private land. They are significant, popular, Vernacular terms current in the country at the time that the Madras Estates Land Act was passed, which have been specifically mentioned by the Legislature in the explanatory phrase attached to "home-farm land of the land-holder" in the definition of "private land" in order to serve as aids to the ascertainment of the meaning of "home-farm", not itself separately defined by the Statute.

From the mode of treatment accorded by my learned brother, Satyanarayana Rao J. concurred in by my learned brother, Viswanatha Sastri J. wtihout any discussion of his own, to the question of the relevancy of these words used by the Legislature to the construction of the word "home-farm" and to the question of the exact meanings to be assigned to these words so used I must express my unqualified but deferential dissent. Their utility in the context of such construction has been unduly under-estimated by my learned brother, Satyanarayana Rao J.

His Lordship's whole discussion reveals many a point of approach as well as of detail which in spite of my very respectful consideration have unfortunately not commended themselves to me. In the first place, it is said that the Legislature has not made of the four terms and their meanings as given in Wilson's Glossary the essence of the definition of private land. The question is not, in my opinion, precisely that but materially different.

The question rather is whether the legislature has not made of the terms the essence of the explanatory phrase attached by it to "home-farm land" in the definition of "private land" whatever may be the meanings that may be attached to those terms in accordance with Wilson's Glossary or by any other means, which is another matter. Has not the Legislature made of the terms which are manifestly illustrative only and not exhaustive, interpretative aids to the ascertainment of home-farm? On what basis did it conglomerate these terms except the basis of some common concept running through them all, whatever the concept may be, which is another matter? For what purpose did it conglomerate except that of illustrating as evident from the words "such as" the designations by which home-farm land may be known in different areas? Is not what is meant by "home-farm" which is not separately defined by the Act to be gathered from the illustrative words of designation employed in the Act?

(100) Secondly, my learned brother observes:

> "It (i.e., the definition of private land) does not say that the land would be private land if it is 'kambattam, khas, sir', or 'pannai', or if it is known to be such."

The words in brackets are, I may say, mine that is by the way. True, the home-farm part of the definition of private land does not say that land would be "home-farm" land and fall within that category of private land only if it was or went by the names of 'kambattam, khas, sir or pannai'; but that part of the definition does say that the land must be "home-farm" land, i.e., must indeed and in fact be "home-farm land" by whatever designation known such as 'kambattam, khas, sir or pannai' in order to fall within that category of private land.

(101) Thirdly, it is observed in the judgment of my learned brother that it is not possible to infer from these four expressions and particularly from the meanings as given by Wilson in 1855 that they would have the same meaning at the present day or, at any rate, in 1908, when the Madras Estates Land Act was passed. It is hardly necessary for me to point out that the high authority of Wilson's Glossary which has been oft relied upon by the High Courts and the Privy Council is too well known to be disregarded or discountenanced except where statutes since passed or judicial decisions since rendered contain anything in express terms or by necessary implication repugnant to the meanings as given in the Glossary so as to render them obsolete altogether or limit their operation.

I cannot understand too what significance is implied in the contrast between the present day and the date of the passing of the Madras Estates Land Act in the observations of my learned brother. Surely it has not been so far

suggested anywhere that, nor has it been stated by my learned brother why, if the meanings are good today, they were not as good in 1908.

The real question is whether in the Act there is any clear evidence of any legislative departture in 1908 from the meanings of Wilson which would only be possible if there had been a departure from them in popular parlance between 1855 and 1908. I have not been able to find evidence of any such departure either of the latter kind or of the former.

Our attention has been drawn to no authority suggesting such a departure, derived from Statutes in 'pari materia', if they may be so called compendiously, in force in other Provinces so far as they may be relevant or from decisions pronounced under those Statutes or rendered in this Province prior to 1908. The Bengal Tenancy Act VIII of 1885 contains no definition of the words current in Bengal and Bihar to denote private land which are no doubt referred to in S. 120(1) of that Act. The word "sir" used in our Act is not therefore defined by that Act. The word is also the word current in the United North West Provinces of Agra and Oudh and Central Provinces and Berar.

I have looked into the definitions of that word in Acts in force in those Provinces given in S. 4, sub-section (12) of the North West Provinces Land Revenue Act III of 1901, and in S. 4(6) of the Central Provinces Land Revenue Act, XVII of 1881, after calling for the United Provinces Code and the Central Provinces Code not available in the Library of the High Court, from the Library of the Legislatures in the Fort. I have found nothing in those definitions which are partly based on special conditions relating to the previous Revenue Settlements in those Provinces which militates against the ordinary meaning of the word as given in Wilson's Glossary.

On the other hand, the idea of cultivation by the proprietor himself with his own stock or by his servants or by hired labour as of the essence of "sir" seems to be recognised by those definitions also, although adapted to such special conditions in the way that the Legislatures of the Provinces deemed fit so to adopt. I do not consider it necessary to reproduce those definitions here or to pursue this aspect of the matter any further. The meaning of the word "sir" as given in Wilson's Glossary is, it may however be noted, in no way militated against by what is accepted by 'BUDLEY v. BUKHTOO', 3 N W P H C R 203 which is, in fact, based on the same idea as is expressed by the meaning given in the Glossary.

In our Province before the Madras Estates Land Act of 1908, although there was no statute defining any one of the four words 'kambattam, khas, sir and pannai', there was just one decision reported in 'NAGAYASAMI v. VIRASAMI KONE', 7 Mad H C R 53, defining 'pannai' land. The question there was whether a suit before the Revenue Courts under S. 12 of the Madras Regulation VIII of 1865 by a tenant for reinstatement after the zamindar's ejectment in respect of 'panai' lands was maintainable. The argument for the defendant, the Zamindar, was that it was not, because the 'pannai' lands were of their nature not part of the zamindari, and the defendant was not a zamindar in respect of such lands within the definition of the term "land-holders" used in that Act.

The Civil Judge negatived the argument holding that 'quoad' such lands the zamindar could not, as contended, be treated as himself a tenant with the cultivator as his sub-tenant. For so holding the Civil Judge referred to the character of 'pannai' lands as being lands to which the proprietor had an exclusive right, a right to the melwaram as well as the kudiwaram, adding further what is perhaps more material that those lands are sometimes cultivated under the Zamindar's own ploughs and sometimes they are let out for cultivation by others. The High Court after referring to what the Civil Judge had said upheld his view that the suit before the Collector was maintainable notwithstanding that the lands were 'pannai'. I am not able to so read the observations of the Civil Judge accepted by the High Court as to dispense with requirements of proof, if a question of the character of the lands as "pannai" arose, of direct cultivation or in case of letting, of the character of the letting being in its terms in no way inconsistent with an intention on the land-holder's part to resume direct cultivation.

(102) Fourthly, it is remarked by my learned brother that the meanings given in Wilson's Glossary do not have the common feature of personal cultivation. One has only to look at those meanings as conveniently reproduced at pages 75 and 76 of Mr. V. Vedanthachari's Commentary of the Madras Estates Land Act to appreciate aright the correctness or otherwise of the remark. I need only observe to avoid a slight confusion which may otherwise result at first sight of the passage in the commentary that the annotation of the word "pannai" as given in the Commentary corresponds to what is given in the Glossary under the word "pannai" as well as the words "pannaiah", "punna" "punnah" the meaning of which latter words follows closely enough on the meaning of "pannah" separated only by the meanings of two other connected words "pannaikaran" "Pannaissumai" which may also be usefully consulted in this connection, although the meaning given under the words "panniah", "panna", "pannah" taken together is the more relevant.

(103) I propose to reproduce here so far as is relevant the Glossary meanings of the four words used in the Statute, not of the two other words connected with one of those words "pannai", namely, "Pannaikaran" and "pannaissumai".

> Kamatamu or 'kambattam': The land which a Zamindar, Jagirdar or Inamdar keeps in his own hands cultivating it by labourers in distinction to that which he lets out in farm.
> 'Khas': As a revenue term it is applied also to lands held by Zamindars and 'cultivated by themselves for their own benefit'.
> 'Sir': A name applied to the lands in a village which are 'cultivated' by the hereditary proprietors or village 'zamindars themselves' as their own especial share either by their 'own' labourers or at their 'own' cost or by tenants at will not being let in lease or farm.
> 'Pannai': A field, a rice field, cultivated ground, tillage, husbandry.
> 'Panniah, Punna, Punnah': An estate or farm the property of a Rajah and 'cultivated by his slaves'.

(104) It will be seen from the words underlined by me (here in quotations) of each of the Glossary meanings extracted

above, that in all of them the features of direct cultivation of the land-holder is manifestly present. I may add in this connection that in the Tamil Lexicon of 1931 published under the authority of the University of Madras which I have consulted, there are several meanings assigned to the word "panna" at page 2453, column 2 of which the seventh and eighth meanings and more particularly the seventh which are material to the present discussion are "direct cultivation" and "establishment of farm labourers" respectively.

My learned brother further observes that the words "khas" and "sir" are not words at all used in this Presidency. I regret I cannot appreciate the significance of the observation. The words are there in the Statute and unless they are to be regarded as surplusage— which is, obviously impossible—their meaning must be ascertained and applied. Assuming the observation to be relevant, I very much doubt with respect, whether that is right.

So far as the word "khas" is concerned, reference may be made in this connection to 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, a case from the District of Chittoor where in regard to a portion of a village called "khasbagayat" it was held that the expression indicated that the lands in that portion were held by zamindars and cultivated by themselves for their own benefit. Moreover, I may say from my personal knowledge that there is in the Zamindari of Pithapuram adjoining the Fort an extent of 20 or 30 acres of land known as 'kasuthota', i.e., garden in the direct cultivation of the Zamindar which is the only private land comprised in that estate.

It may not also be correct, in my opinion, to suppose that the word "sir" has not been known at any time to be in use in this Presidency. It seemed to me strange that a word not in use in this Presidency, as I too first thought of this word though not of the word "khas", was used in a Legislative enactment of the Province as a description designation of home-farm land which is part of the definition of private land.

After my mind had been somewhat exercised over this thought it occurred to me that it might possibly be an Uriya word in vouge in the Ganjam District which when the Madras Estates Land Act was passed in 1908 was a part of this Presidency, though it has since gone into the separately formed provinces of Orissa consisting of the original Orissa part of the province of Bihar and Orissa and the Ganjam District part of the Madras Presidency. Consulting then at the University Library Poornachandra Ordia Bhasha Kosha complied by G. C. Prahraj, Advocate, High Court, Patna and published by the Utkal Sahitya Press, Cuttack in 1928, I found therein the word "sir" in fact explained at the top of column 2 of page 8519 as meaning a permanent home-farm of a proprietor or maphidar or lakharajadar. That is the meaning of the Uriya word "sir" while the meaning to be found in Wilson's Glossary is that of the Hindi word "sir". The two meanings substantially agree. Only, comparatively the one is compendious while the other is elaborate, and possibly the compiler of the Dictionary took the word "home-farm" from the definition of private land in the Madras Estates Land Act.

Then as regards 'kambattam' my learned brother himself concedes that it is in Telugu used in a general sense to denote a man's personal cultivation. Born to the language like my learned brother I too cannot understand the word in any other sense. That, in my view, is also the meaning as given in Wilson's Glossary and tne meaning of the word as used in the Act. My learned brother has given no reason why the undoubted and undisputed meaning of this word should be excluded from consideration in understanding the word "home-farm" in connection with the explanation of which it occurs in the Act.

Nor am I prepared to treat the word "pannai" used in the Act as being of no assistance, because it means nothing more than a field, a rice field, cultivated ground, tillage and husbandry according to the meaning given by Wilson. As I have shown above, it does mean, according to the Tamil Lexicon something more definite, something clearly in point namely direct cultivation, and it has been applied to the property of a Rajah cultivated by slaves as also pointed out by Wilson himself.

In these circumstances I cannot but conclude that the meaning of the words occurring in S. 3(10) (a) of the Madras Estates Land Act as given in Wilson's Glossary may well be accepted as a safe guide for their interpretation for the purposes of the present case.

(105) Fifthly, my learned brother observes after referring to the words used in S. 120 of the Bengal Tenancy Act, namely, cultivated as 'kamar, zeroyiti', etc., which no doubt do not occur in our Act that the expression "by whatever designation known" in our Act must have reference to a recognition of certain lands in the village as 'kambattam, khas, sir or pannai'. I respectfully doubt whether this view-point is correct for a two-fold reason: first that there is the word "home-farm" in the definition in our Act which sufficiently fulfils the purpose of "cultivated" in the Bengal Tenancy Act, second that while 'kambattam, khas, sir and pannai' are words of popular usage meant in recognition of the character of land they have been chosen by the Legislature as illustrative terms entering into the explanatory phrase attached to "home-farm land of the land-holder" "by whatever designation known such as 'kambattam, khas, sir, or pannai" because of their appropriateness, attributable to their meanings as given in the foregoing, to the context of the legislative explanation of home-farm land as part and parcel of the statutory definition of private land.

(106) It will be seen that my exposition of the definition of private land in the foregoing certainly favours the submission of the learned counsel for the appellants and petitioners. The lines of argument by means of which the learned Counsel for the respondents sought to invalidate are, firstly that according to decisions of this Court prior to the Act which ascertained and applied the comomn law right the expression "private land" is much larger in the scope of its context than is warranted by this narrow view of the statute, which ought not ordinarily to be presumed to interfere with the common law unless and until the contrary is shown beyond doubt; secondly that S. 185 of the Act when carefully scrutinised yields considerations warranting the larger view, that is to say, of the common law in force prior to the Act.

(107) In connection with the first line of argument reference was made by the learned

counsel for the respondents to 'NAGAYASAMI v. VIRASAMI', 7 Mad H C R 53, which I have dealt already. There is also the case in 'VENKATAGIRI ZAMINDAR v. RAGHAVA', 9 Mad 142 referred to by my learned brother, Viswanatha Sastri J. in his judgment in this connection. That case arose with reference to certain lands in the zamindari of Venkatagiri which were the subject matter of a muchilka executed by the father of the defendants. The plaintiff zamindar sued the defendants in ejectment relying on a condition in the muchilika that the lands were to be returned whenever wanted and alleging that due notice to quit had been served on the defendants. The muchilika described the lands as 'Nagari Iduva' (i.e. lands belonging to the Samasthanam). The words in brackets are by the way mine. The defendants denied that the lands were of that character. They further alleged that the lands were 'Ijara Iduva' not liable to be recovered by the plaintiff but liable only to be delivered by them to the 'Ijaradar' if the lands were leased out by the plaintiff on 'Ijara'. The learned District Judge in the appellate Court held that on the construction of the muchilika the defendants could not be ejected unless the lands were let on 'Ijara' by the plaintiff to a stranger. On appeal to the High Court Turner C.J. and Muthuswami Aiyar J. in the judgment of the Court delivered by the former said this:

"The Judge has, in our judgment misunderstood the condition in the muchilika of fasli 1285. If the lands held by the defendants are what are known as home-farm lands of the Zamindari they are lands which according to a very general custom of the country the zamindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue. The Zamindar when he lets such lands has ordinarily a right to resume them at the end of any agricultural year on giving due notice."

On this passage there are two remarks which I desire to make. For one thing it refers to "home-farm land of the land-holder" which is the expression made use of by the Legislature in the definition of private lands in the Act of 1908. For another it recalls to one's mind the passage in the decision in 'BUDLEY v. BUKHTOO', 3 N W P H C R 203 to which Turner C. J. had been while a puisne Judge of the North West Province a party sitting with Pearson J. of that Court. The passage in the decision runs as follows:

" 'Seer' land as we understand it, is land which at some time or other had been cultivated by the Zamindar himself, and which although he may from time to time for a season demise to Shikmese he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it."

I cannot read the passage in 'VENKATAGIRI ZAMINDAR v. RAGHAVA', 9 Mad 142 in the way in which my learned brother seems to read it that is to say, as not making of direct cultivation an essential part of the character of home-farm land. It may be that the test of direct cultivation does not apply to the "domain" land category of private land which may never be cultivated, although cultivable, because all that "domain" means is "land about the mansion house of the Lord and in his immediate occupancy" and not necessarily in his direct cultivation, although when and if let out even the leasing of such land must be on terms not inconsistent with an intention on the part of the Zamindar to take it back for his own direct use. The test of direct cultivation is clearly implicit in the very idea of home-farm lands to which the learned Chief Justice refers in terms of 'resumption' for the land-holder's 'own' cultivation. No question of conversion of ryoti land into private land arose in 'VENKATAGIRI ZAMINDAR v. RAGHAVA', 9 Mad 142 and what the Court did was to enunciate the proposition that home-farm land is land in which a right of occupancy does not necessarily accrue, in contradistinction apparently to ryoti land in which such a right does arise, by letting.

(108) The two broad categories of ryoti and private lands in estates with this feature of distinction have existed from time immemorial. As pointed out by the Rt. Hon. Mr. Ameer Ali in the very passage from the case in 'SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586 at pages 601 (bottom) and 602 quoted by my brother, Viswanatha Sastri J:

"One important feature of the Act is worthy of note. It throws into relief the component parts which from immemorial times go to constitute a village; first the lands in the 'direct cultivation' of the proprietor (called by various names); second lands occupied by tenants or ryots and third old waste lands over which by custom the land-holder possessed certain specific rights now crystallised in the statute".

It will be seen from the words underlined (here in quotation) by me above that in referring to the first of the three categories of lands going to constitute a village, the Rt. Hon'ble Mr. Ameer Ali is referring to the home-farm land with the explanatory phrase attached to it which is part of the definition of private land in S. 3(10) of the Act. It will also be seen that in an earlier page 599, the Rt. Hon'ble Mr. Ameer Ali specifically refers to the definition of "private land" in S. 3 as meaning "the domain or home-farm land" (expressions borrowed from English law) of a land-holder by whatever designation known such as 'kambattam' 'khas' 'sir' or 'pannai'. These words so referred to by him in connection with the definition of "private land" are apparently the words had in mind by him in describing the first of the categories of lands constituting a village at page 602 of the Report.

It is further noticeable that while the Privy Council refer to "domain" or "home-farm" land as expressions borrowed from English Law, they make no grievance of the use of such expressions in the Statute, as in any way inappropriate to an Indian Statute dealing with conceptions sometimes different, it may be, from those which are associated with the system of feudal tenures in England. Far from supporting the view urged for the respondents in regard to what "home-farm land" means, the passage in the judgment of the Privy Council just quoted rather supports the contention advanced by the learned Counsel for the appellants and petitioners that in order that lands may be held to be home-farm lands and therefore private lands it is essential to prove their direct cultivation on the part of the

proprietor at sometime or other. The statement of law in the passage in question, being of the highest tribunal, is binding on us and cannot be whittled down by any process of reasoning whatsoever on the part of any Indian Court.

(109) Tne references which my learned brethren have made to the decisions in 'VENKATANARASIMHAM v. KOTAYYA,' 20 Mad 299 and CHEEKATI ZAMINDARI CASE 23 Mad 318 as indicating the gradual growth and evolution of the rights of ryots in estates are absolutely unexceptionable; but they hardly bear speaking with all respect, upon the point what exactly "private lands" are according to the definition of the Statute. On the other hand, assuming such references to be relevant. one should rather imagine that from the unrighteous attempts which the land-holders had been making prior to the Act to expand their private land by seeking to convert ryoti land into private the Legislature was solicitous to define and limit private land in a straight and simple, if somewhat narrow manner which would not only serve to assist the Courts in their determination of the question, which had become confused and complicated by the conduct of land-holders, whether any particular land claimed to be private or ryoti as such, but also serve to preclude the land-holders from expanding their private land by persisting even after the Act in the course of such conversion or ryoti land into private. The way in which apparently the Legislature chose to achieve the object that it had in view was insisting irrespectively of historical origins which need no longer be probed into, upon proof of the character of the land claimed to be private as either that of domain land or as that of home-farm-lands as explained by the Statute itself by means of the expression "by whatever designation known as 'kambattam' 'khas' 'sir' and 'pannai' inserted in the section.

Judging from this standpoint I wonder how the zamindar's private lands even if they consisted of the three categories referred to by Baden Powell in his Land System of British India, Vol. 1, page 515 as a matter of historical information can be understood in any other sense than what is expressed or implied by or in the definition section of the Madras Estates Land Act 1 of 1908. Had the intention of the Legislature been to impress with the stamp of private land all land in which the land-holder had at the commencement of the Act a right to both the melwaram and the kudiwaram the definition could well have run in very simple terms expressive of such an intention.

The Legislature could have well adopted in that case the language of the Civil Judge in the case in 'NAGAYASAMI KAMIAH NAICK v. VIRASAMI KONE', 7 M H C R 53, which is supposed by my learned brethren to be an accurate judicial definition of private land prior to the Act, for the purpose of the definition of private land in the Statute itself. Nothing could have been easier than that. The private land of a land-holder in Ordinary English may well mean in contradistinction to ryoti land. Land in the ownership of the land-holder which he has kept for himself without creating any rights in the ryots. But if the Legislature has prescribed a method of ascertainment of such land by limiting it to a specified categories — domain land and home-farm land — no Court can in its legitimate function add to the statute so as to restore the expression to its connotation in ordinary parlance. This disposes of the first line of argument of the learned counsel for the respondents in answer to the submission of the learned advocate for the appellants and the petitioners before us so far as it is favoured by my exposition of the definition of private land in the foregoing.

(110) Turning now to the second line of argument advanced by the learned counsel for the respondents it comes to this, shortly stated, firstly that S. 185 of the Act contains nothing to indicate direct cultivation as one of the matters of evidence for the Court to have regard to for determining whether any land is the land-holder's private land; and secondly that the transposition of the proviso of old S. 185 to the second part of Cl. (a) of sub-s. 10 of S. 3 is significant as showing that direct cultivation is not the test of home-farm land in the earlier part of the definition of private land in S. 3 (10) (a).

(111) S. 185, as I have already observed, is an evidential section while S. 3(10)(a) is the definition section. The former cannot except by force of its specific terms be read so as to override the latter. The two sections must, as I have already observed, be read so as to harmonise with each other. The object of S. 185 is only to provide for certain matters as being evidence relevant to determining whether any land is the land-holder's private land. It seems to me illogical or at any rate unnecessary for the Legislature to repeat the essential matter already expressed or implied in the definition section itself. The position might well be different where, as in the Bengal Tenancy Act, the Legislature did not enact a definition of private land and had therefore to use in S. 120 the words "cultivated as 'khamar' etc." For land to be held to be private land, evidence of direct cultivation at sometime or other and for sometime or other being necessary according to the definition section itself of our Act by reason of what home-farm land by whatever designation known such as 'kambattam', 'khas', 'sir' or 'pannai' means, as I have already explained, the Act has in the evidential section only stated that regard shall be had to certain factors bearing on the essential matter of the definition.

Local custom comes in, because proof of that may clear up the difficulty in demarcating how far the land about the mansion or dwelling house of the zamindar and in his immediate occupancy extends or may, where the words used in the Statute, 'kambattam', 'khas', 'sir' or pannai', are not in vogue but other words are in a particular locality, help the Court to decide upon the home farm character of the land by ascertaining the meanings of those other words. Local custom may sometimes even stamp land with the character of private land which does not fall within the definition section at all. To that extent the force of the restrictive definition given in the statute as compared with the larger definition to be found in Baden Powell or in decisions prior to the Act, if any, may well stand cut down so as to bring in under the head of private land waste lands and 'Nankar' savaram lands although regularly leased out without regard to terms and conditions making resumption of direct cultivation possible, 'pro tanto' rehabi-

litating that larger definition which, if it existed was taken leave of by the framers of the Act in 1908 not without reason as already pointed out by me.

Then comes, in S. 185, letting out of land specifically as private land before the 1st day of July 1898, because evidence of that kind relating to a period more than ten years prior to the passing of the Act and relating to a period prior to the publication of the Bill which became afterwards the Madras Estates Land Act of 1908 may well be presumed to be dependable evidence of a conduct on the landholder's part not dictated by an indecent anxiety to create evidence of the character of land as private land in view of the approaching legislation. Any other evidence that may be produced bearing on the character of the land as private land is next referred to in S. 185 and that includes as ruled by the Privy Council in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634, and as not disputed by the learned counsel for the appellants and petitioners, admissions of tenants that the land is private land even in leases subsequent to the 1st of July 1898 whatever their probative value.

It is asked by my learned brother, Viswanatha Sastri J. in his judgment how the definition of private land in the Act which came in only in 1908 could possibly be present to the minds of land-holders and tenants prior to the Act, and how possibly they could describe any land as private land specifically in leases prior to the Act. The answer is firstly that there is no substantial difference between the conception of private land prior to the statute, and the conception under the statute which only throws into relief, to use the language of the Privy Council in 'SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586 the three component parts which from times immemorial have gone to constitute a village and secondly that if there is any difference while the statutory definition cuts out certain classes of land recognised as private land prior to the Act the definition in the Act does not create any category of land for the first time as private land till then unknown. So that, specified letting of land as private land in the usual vernacular terms prior to the passing of the Act is not an impossible species of evidence on the construction of the definition of private land contended for by the appellants and petitioners.

(112) Then on the question whether the transposition of the proviso of old S. 185 of the Act to the definition section makes any difference to the interpretation of S. 3 (10) (a). I am distinctly of opinion that it does not. The idea of the proviso was that continuous cultivation of the kind and of the length of time contemplated by it should raise an irrebuttable presumption that land is private land. It is only natural that when the Act of 1908 was amended in 1934 and 1936 the logically appropriate place for the proviso was considered by the Legislature to be the definition section itself in view of the indistinguishability in practical effect between a provision by way of an irrebuttable presumption that in a certain case the land is private land and a provision by way of inclusion in the definition section itself that the land shall in such a case be private land. What is more, the juxtaposition of the old proviso to S. 185 in relation to the old S. 3 (1) as effected by the transposition is, in my opinion, accounted for by the affinity of ideas between the subject-matter involved in the definition of private land as home-farm land, and the subject-matter of the old proviso to S. 185 raising the irrebuttable presumption that land is private land in a certain contingency contemplated by the proviso.

It seems to me 'non sequitur' to say that the reference to direct cultivation in the proviso to the evidential section which has become part of the definition section by the amendment dispenses with proof of direct cultivation which is a requisite implicit in the home-farm part of the definition of private land as even the dicta of the Privy Council in 'SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586, to which I have already referred go to show. The only effect of the transposition of the old proviso to S. 185 to the definition section is to emphasise the view which was not unanimous in this Court till 'BANDHARIJOGI v. SEETHARAMAMURTHI', ILR (1948) Mad 223, that there is only one mode of conversion of ryoti land into private recognised by the Act, namely, the mode enacted by the old proviso which has now become part of the definition section itself by legislative amendment.

(113) I shall proceed next to a consideration of the decision on the construction of the definition of "private land" in this Court subsequent to the passing of the Act. These decisions may be divided into two categories, decisions pronounced prior to 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, and decisions beginning with that case and coming down to date.

(114) Of the first it is unnecessary for me to refer to any other case than the one in 'LAKSHMAYYA v. APPARAO BAHADUR', 36 Mad 168, in which the two learned Judges who decided it differed on the question as to the admissibility in evidence of leases subsequent to 1898 in aid of the determination of the character of land as private land, a question on which there is now the binding authority of the Privy Council in the case in 'BINDESHWARI PRASAD v. KESHO PRASAD', 5 Pat 634. It is true that private land is contrasted in that case by Sundara Aiyar J. with the public land, as he calls it, held by ryots with occupancy right and that the former kind of land is broadly assumed to be land of which the zamindar is the owner of both the melwaram and the kudiwaram. There is no discussion in that case of the question what the home-farm part of the definition of private land in the Act means, which is the question raised before us. Moreover, there was in that case evidence amongst other things of specific letting of the land as private land before the 1st day of July 1898 specifically mentioned in S. 185 of the Act.

The learned Judges accepted the finding of fact of the lower appellate Court as vitiated by no legal error and well supported by the evidence which, as I have already observed, need not after all be direct evidence of direct cultivation, at some time or other, evidence in the nature of 'Pratyaksha Pramana' but may well be inferential or circumstantial evidence, evidence in the nature of 'Anumana', to use the Sanskrit words of Hindu Sastras employed by Sadasiva Aiyar J. in that case. The evidence of conduct on the part of the zamindar in according to the lands in question there a different kind of treatment to that accorded by

him to ryoti lands in the estate was relied upon by the learned Judges as sufficient to justify the finding of the lower appellate Court that the land was private land.

(115) To turn next to the second category of decisions it is not denied that but for the unreported decision of Krishnaswami Aiyangar and Somayya JJ. in 'SRI THIAGARAJASAMI DEVASTHANAM v. MUTHUSWAMI ODAYAR', C. M. A. No. 311 of 1943, and possibly the decision of Madhavan Nair J. in 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, with both of which I shall hereafter deal, the trend of judicial opinion in this Court has been quite unanimous and in a sense favourable to the contention of the learned counsel for the appellants and petitioners before us. Some of these decisions have been attempted to be distinguished in the course of the argument as decisions relating to the conversion of admitted ryoti land into private land. Others which could not be so distinguished were attacked as wrong.

With reference to these other decisions, reasons have been given by my learned brethren in their judgments for their view that they are erroneous, reasons, which I have already dealt with in my own judgment herein before. I need therefore only show here that the attempt made by counsel to distinguish those other decisions in which the test of direct cultivation has been laid down as confined in their operation to cases of conversion of ryoti land into private land is not warranted either by the reason of the thing or by the course of decisions which have applied that test to cases like the present as well.

In 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, the way in which Wallis C. J. begins his judgment is this:

"This case raises a question of considerable importance as to what constitutes private land under the Madras Estates Land Act, 1908."

and then he proceeds to consider the meaning of the word "domain" and in effect to apply the home-farm part of the definition of private land to the evidence on record about the lands in question before the Court. He winds up the whole discussion with the following remark:

"In some parts of India lands of this kind are known as 'sir' lands, and this is one of the terms mentioned in the definition. In 'BUDLEY v. BUKHTOO', 3 N W P H C R 203, it was held that 'sir' land is land which a Zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here and that as the plaintiff has failed to satisfy it the appeal fails and must be dismissed with costs."

From this it will be seen that the test of direct cultivation accepted by the learned Chief Justice and concurred in by his colleague, Sheshagiri Aiyar J. constitutes the very 'ratio decidendi' and is not in the nature of a mere 'obiter dictum'. The distinction between 'ratio decidendi' and 'obiter dictum' given in Halsbury's Laws of England, Vol. 19, at pages 251 and 252 is as follows:

"It may be laid down as a general rule that that part alone of a decision of a Court of law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the 'ratio decidendi'. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose on hand (usually termed 'dicta') have no binding authority on another Court, though they may have some merely persuasive efficacy."

Bearing this distinction in mind I have no doubt but that what the learned Judges in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, have said with reference to the test of direct cultivation is really the basis for their decision in that case and not something which went beyond the occasion. The statement of the law laid down in the case has been accepted by the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400 (PC), in appeal against the decision in the same case. After setting forth the passage in Wallis C. J.'s judgment which I have myself extracted above, Sir John Edge, delivering the judgment of the Judicial Committee observed that "that test is obviously suggested by S. 185 of the Act and was rightly applied by the Chief Justice".

It is said for the respondents that because of the reference to S. 185 of the Act by the Privy Council in accepting the test propounded by the Chief Justice it follows that the decision must be confined only to cases of conversion of ryoti land into private covered by the proviso to S. 185. I think that is a wrong view to take of the meaning of the decision of the Privy Council. Although the test of direct cultivation is not specifically referred to by the Privy Council as a test adopted by the Chief Justice from the language of the definition section, and although the facts of the case before the High Court and before the Privy Council pertained to evidence bearing upon the conversion of ryoti land into private, it is clear that the passage in the learned Chief Justice's judgment which enunciates the test derived from 'BUDLEY v. BUKHTOO', 3 N W P H C R 203, has not been understood by the Privy Council as a test derived only from the proviso to S. 185 of the Act. Clearly, S. 185 of the Act and not the proviso to S. 185 of the Act alone and in particular is what is referred to generally by the Privy Council in their acceptance of the test of Wallis C. J. as one suggested by that section. The section itself being one which had to be read with the definition of private land in the statute which the learned Chief Justice interpreted and applied by reference to 'BUDLEY v. BUKHTOO', 3 N W P H C R 203, there is nothing in the general reference to S. 185 of the Act by the Privy Council or in the absence of any reference by them to S. 3 (10) of the Act, which militates against the obvious meaning of the passage in Wallis C. J.'s judgment or confines its operation only to cases of conversion of ryoti land into private.

The definition of private land was obviously before the Privy Council as well as before the High Court, and the way in which the judgment of the High Court had referred to the meaning of the word "domain" and had actually applied the home-farm-part of the definition of private land to the case before the Court, winding up the whole discussion with a refer-

ence to 'BURDLEY v. BUKHTOO', 3 N W P H C R 203, obviously negatives any justification for limiting the test of direct cultivation only to cases of conversion contemplated by the proviso to S. 185 of the Act.

(116) The next important decision to which I wish to refer is 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, which when carefully scrutinised is not really the confused and confusing one that it has been supposed to be by my learned brethren. I regret to have to say that I cannot with all respect to my learned brethren who I know have studied that case with much greater meticulousness than I have done agree with a good deal of the criticism levelled against it by them so far as the exposition of the law there is concerned. With the facts of that case as they were ascertained by the learned Judges in their judgment, I am not so much concerned as with the question how far the law as enunciated by the learned Judges for the purpose of its application to those facts is correct. I do not consider it material to make sure for myself how far the criticism of my learned brethren against the way in which the Court in that case ascertained the relevant facts is correct. I shall assume with respect that that criticism is correct.

I need only say that the Court in that case adopted a two-fold factual basis for its conclusion on the question raised before it whether the lands were private lands within S. 3 (10) (b). The first factual basis was that the lands in question were originally ryoti, and the question which arose for consideration on that basis was whether there was sufficiently effective conversion of the land into private. That was negatived by the High Court in appeal in concurrence with the learned Subordinate Judge at the trial. The second factual basis was that the title of the plaintiff to sue the defendants in ejectment was to be traced solely to the grant of 1862 by the Government after confiscation without reference to the existence of a mirasi tenure in the previous owner.

(117) Since the case was considered by the High Court on both the bases I cannot agree with the contention of the learned counsel for the respondent that the case must be treated only as a case of conversion of ryoti land into private like the case in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, and can be distinguished from the present case on that ground. As I have already pointed out, this kind of distinction attempted by the learned counsel for the respondents is of no substance and cannot be accepted.

The point to note about the decision in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, which is material to the present discussion is that while dealing with the law on the second factual basis, Wadsworth, O. C. J. delivering the judgment of the Court points out correctly how the direct cultivation test of home-farm land had been laid down by Sir John Wallis C. J. in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, with reference to 'BUDLEY v. BUKHTOO', 3 N W P H C R 203, after a consideration of the meanings of "domain" and "home-farm" land, and how that test so laid down was later accepted by the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400.

The learned Officiating Chief Justice then proceeds to apply that test himself to the case before the Court which, be it noted, was a case under S. 3 (10) (b) and not one under S. 3 (10) (a) like the present, after making on the unreported decision in Krishnaswami Aiyangar and Somayya JJ. in 'SRI THIAGARAJASAMI DEVASTHANAM v. MUTHUSWAMI ODAYAR', C. M. A. No. 311 of 1943, an adverse comment to the effect that those learned Judges had dealt with the definition of private land in the statute in a way which with great respect he found it difficult to reconcile with the decision of the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400.

In applying Sir John Wallis C. J.'s test of direct cultivation the learned Officiating Chief Justice proceeds to note that in ordinary English usage the term "domain" or "home-farm" would connote land appurtenant to the mansion of the lord of the manor, kept by the Lord for his personal use (that, so far as domain is concerned, as I think), and cultivated under his personal supervision (this so far as home-farm land is concerned as I think). Having said so with reference to the first clause of S. 3 (10) (b) he proceeds to observe that the other clauses, i.e., (ii), (iii) and (iv), referred to land other than strictly domain or home-farm land within the first clause, and that the definition in S. 3 (10) (b) read as a whole, that is, in all its clauses, indicates clearly that the ordinary test for private land is the test of retention by the land-holder for his personal use and cultivation by him under his personal supervision. Then follow these observations:

> "No doubt such lands may be let on short leases for the convenience of the land-holder without losing their distinctive character; but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the varams in the lands and has been letting them out on short term leases.
>
> There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication, of an intent to regard these lands as retained for the personal use of the land-holder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights.
>
> It seems to us that there are no materials in the present case to show that these lands have been so cultivated or retained by the land-holder."

Two lines of criticisms have been levelled by my learned brethren against this case. First it is said that the adverse reference in this case to the unreported decision of Krishnaswami Aiyangar and Somayya JJ. is only an expression of general dissatisfaction and disapproval giving no exact indication of what the dissatisfaction or disapproval is about. I find no difficulty in understanding what the dissatisfaction or disapproval is about. The dissatisfaction or disapproval is about the way in which the learned Judges in the unreported decision confined the test of direct cultivation propounded in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, and accepted by the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, to cases of conversion of ryoti land into private.

Nor — and here comes the second line of criticism — do I read the passage quoted above from 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, and the preceding discussion as betraying the mansion house test, as my learned brother Viswanatha Sastri J. calls it, as the sole test propounded by the learned Officiating Chief Justice in that case for the ascertainment of the character of private land or as betraying confusion on account of a series of varying tests appearing from place to place and not easy to reconcile with each other or one another. The learned Officiating Chief Justice accepts, in my opinion, the test of domain and home-farm as interpreted according to the ordinary English meanings of those words by Sir John Wallis C. J. in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, so far as the Cl. 1, S. 3 (10) (b) (i) is concerned, and reading the other clauses (ii) to (iv) of S. 3 (10) (b) along with clause (i), the learned Officiating Chief Justice proceeds to wind up by saying that the definition read 'as a whole' indicates clearly the test of retention by the land-holder for his personal use and cultivation by him under his general supervision.

It is impossible for me to believe that a Judge of such long revenue experience in the Presidency as the learned Officiating Chief Justice restricted home-farm land to land lying about the dwelling house of the land-holder or thought that there could be no home-farm land beyond the precincts of the domain attached to the mansion. I hold that the decision in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, states the law with substantial if not literal accuracy and in loyal and respectful conformity to 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341 and 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, so far as concerned the meaning of domain or home-farm land of a land-holder by whatever designation known such as 'kambattam', 'khas', 'sir' or 'pannai'.

(118) This view of private land and of home-farm land in particular as defined in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, on the basis of the decisions in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341 and 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, has been accepted in the till-now unreported judgment of the learned Chief Justice and Rajagopalan J. in 'RAMAKRISHNA RAO v. SESHAYYA', A. S. No 53 of 1946 which related to the case of a village in the Tedlem estate falling within S. 3 (10) (b). Rajagopalan J. delivering the judgment of the Court, and after referring to the finding of the learned Subordinate Judge that there was no proof that the mokhasadars actually cultivated the suit lands continuously for a period of 12 years before the commencement of the Estates Land Act observed that in the circumstances of the case before the Court there could be no question of any statutory 12 years period for cases falling under S. 3 (10) (b) (i) 'even taking S. 185 of the Act into account'.

The learned Judges proceeded to say that the test laid down in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341, and approved by their Lordships of the Privy Council in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 42 Mad 400, was applied in 'MALLIKARJUNA PRASAD v. SUBBIAH', 39 Mad L J 277, as pointed out by the learned Subordinate Judge. It was the same test, says the learned Judge, that was applied by a Bench of this Court in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, from which the relevant passages are thereafter quoted by him 'in extenso'. Then follows a discussion of the facts of the particular case which is not material to the present discussion. It will be seen from this that the conclusion expressed by the Court that there could be no question of any statutory 12 years period for cases falling under S. 3 (10) (b) (i) is on the basis of even taking S. 185 of the Act into account. Section 3 (10) (b) (i) is really the thing corresponding so far as our present case goes to S. 3 (10) (a) first part. I respectfully agree with this decision.

The decision of another Bench of this Court, Subba Rao and Chandra Reddi JJ. — in 'PARISH PRIEST v. KATTALAI OF SRI THIAGARAJASAMI DEVASTHANAM', A. S. Nos. 176 to 178 and 493 of 1946 — which is to the same effect so far as the interpretation of the character of the home-farm species of private land is concerned has not also so far been reported. There is a very careful and detailed discussion to be found in that judgment with reference to the entire case law on the subject as well as with reference to the definitions of 'kambattam', 'khas', 'sir' and 'pannai' in Wilson's Glossary. The decision in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, is in the result accepted by this Bench as it was by the Bench consisting of the learned Chief Justice and Rajagopalan J. in the 'TEDLAM CASE', A. S. No. 53 of 1946, already referred to. I hope that the two unreported decisions will soon be reported, to render our judgments in this case more fully intelligible even as the decision of my learned brother, Viswanatha Sastri J. in 'NARAYUDU v. VENKATARAMAMURTHI', (1949) 2 Mad L J 623, unreported at the hearing of this case has since been reported.

(119) As I have already noted, although not as a matter strictly necessary for their own decision of the particular point which arose in the case in 'BANDHARU JOGI v. SEETHARAMAMURTHI', ILR (1948) Mad 223, the learned Judges of the Full Bench who decided that case (Gentle C. J., Horwill J. and Rajamannar J.) accepted the test laid down in 'ZAMINDAR OF CHELLAPALLI v. SOMAYYA', 39 Mad 341 and 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687: 1946-1 Mad L J 23 at page 245, of the report. There the learned Chief Justice points out:

> "In ZAMINDAR OF CHELLAPALLI'S CASE', 39 Mad 341 and in 'JAGADEESAM PILLAI'S CASE', ILR (1946) Mad 687: (1946) 1 Mad L J 23, the meaning of "domain or home-farm land"—the expressions used in S. 3(10)—and the nature of private land were discussed. It was pointed out that the above expressions would connote land appurtenant to the mansion, kept for personal use and cultivated under personal supervision, as distinct from land let to tenants for farming."

Then the contrast is brought out between the nature of the land before the Court in that case and domain or home-farm land as interpreted in the decisions referred to, in the following terms:

> "That is not a description of ryoti land which a land-holder cultivates for less than twelve years after its reclamation from waste land,

and then lets to tenants as private land at a considerable profit rental."

In the passage just quoted I find a considered comment of approval by the Full Bench of the decisions in 'ZAMINDAR OF CHALAPALLI v. SOMAYYA', 39 Mad 341 and 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687, which, in my opinion, is entitled to very great weight when we are called upon to overrule those earlier decisions.

(120) I do not think it necessary to discuss any more cases subsequent to the passing of the Madras Estates Land Act 1908 except that I have still to deal with the unreported decision of Krishnaswami Aiyangar and Somayya JJ. in THIAGARAJASAMI DEVASTANAM v. MUTHUSAMI ODAYAR', CMA No 311 of 1943 and the decision of Madhavan Nair J. reported in 'CHANNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789.

To take up the first of these two decisions, that pertains, it must be observed, to a case under S. 3(10) (b). The learned Judges negative the applicability to the case before them of clauses (ii) to (iv) and in dealing with clause (i) which was the clause applicable they had, unlike in the present case which refers to a case under S. 3(10) (a) first part, to take into account the second proviso to S. 185 which enacts the admissibility or inadmissibility in evidence of expressions in leases, pattas or the like executed before or after the 1st day of July 1918 to the effect or implying that a tenant has no right of occupancy, or that his right of occupancy is limited or restricted in any manner. The relevancy of that decision to the present case consists in this that the learned Judges rejected the argument for the respondent before them that proof of direct cultivation would according to the decisions in 'ZAMINDAR OF CHELAPALLI v. SOMAYYA', 39 Mad 341 and ZAMINDAR OF CHALAPALLI v. SOMAYYA', 42 Mad 400 be necessary in order to establish the character of land as private land in cases within S. 3(10) (b), clause (i) which corresponds to the first part of S. 3(10) (a) dealing with home-farm land as part of the definition of private land. In so rejecting the argument the learned Judges explain away the decisions in 'ZAMINDAR OF CHELAPALLI v. SOMAYYA', 39 Mad 341 and ZAMINDAR OF CHALAPALLI v. SOMAYYA', 42 Mad 400 as cases where the lands were originally ryoti lands and were claimed by the land-holder to have been later converted into private lands.

It is on this decision that the learned counsel for the respondents before us based his argument in this regard which I have already repelled. I have already dealt with the decision in 'JAGADEESAM v. KUPPAMMAL', ILR (1946) Mad 687 which, in my opinion, also militates against any such manner of distinction. I do not need to say anything more upon this decision except firstly that the learned Judges themselves seem to make it clear that the mere vesting of both the melwaram and the kudiwaram in the land-holder is not sufficient to prove the character of land as private land and secondly that the learned Judges refused sanction for the reporting of their judgment as turning on facts essentially.

(121) There remains for consideration only the case in 'CHAINNARIGADU v. RANGAYYA', A I R 1935 Mad 789. I am not clear that this strikes a note of dissent from the test of direct cultivation on which the argument for the appellants and petitioners before us is founded I am rather inclined to think that it favours the argument. All that that decision in my opinion, says is that there need be no direct evidence of personal cultivation. Referring to the case in 'ZAMINDAR OF CHALAPALLI v. SOMAYYA', 39 Mad 341: 27 Mad L J 718 it is observed by the learned Judge as follows:

> "In the case quoted (ZAMINDAR OF CHALAPALLI v. SOMAYYA 39 Mad 341: 27 Mad L J 718) it was thought that it was necessary that 'direct evidence of cultivation' should be given to prove that the land in question was private land, because it was proved that the land originally was ryoti land."

What the learned Judge had in mind is obviously a contrast between direct evidence of cultivation and indirect evidence of cultivation. In the case before the learned Judge, there was such indirect evidence to support the finding of the lower appellate Court that the land in question was home-farm land which was furnished by the description of the land as 'khasbagayat' in several documents and by the proved fact that the lands in question were let yearwar to different tenants and on different rates of rent. The learned Judge lower down in the judgment observes:

> "It was not contended before me that the only evidence that will prove that the land belongs to the zamindar as his home-farm land is 'evidence of direct cultivation'. For if that is the case there is no such evidence in the case before us."

It is clear therefore that in that case, there was no contention before the learned Judge of the kind which has been advanced before us for the appellants and petitioners, and the case in question even if it is not to be regarded as a decision in their favour cannot certainly be regarded as a decision against them.

(122) That disposes of what I consider to be the material case-law which deserves discussion for the purpose of the present case. I am of opinion that the well-settled authority of this Court on the point under consideration which in the bulk if not entirely is in favour of the appellants and petitioners before us ought not to be departed from and that the conflict introduced into the situation by the unreported decision in 'THIAGARAJASWAMI DEVASTANAM v. MUTHUSWAMI ODAYAR', C M A No. 311 of 1943 should be resolved in favour of that well-settled authority.

(123) But then it is said that there is a decision of the Privy Council reported in 'BINDEHSWARI PRASAD v. KESHO PRASAD', 5 Pat 634, which is inconsistent with the contention for the appellants and petitioners before us and entails its rejection. The facts of that case have been fully set forth in the judgments of my learned brethren and need not be referred to over again by me. It seems to me however that before treating the decision in that case as concluding the contention of the appellants and petitioners before us adversely to them it is necessary to bear in mind in regard to the point under consideration the features of difference as well as of affinity between the Bengal Tenancy Act under which that case arose and the Madras Estates Land Act under which the present appeals and revision petitions have arisen.

I am not certain that the two Acts are strictly speaking in 'pari materia' though it is well-known that in no small measure was our Act based on the Bengal Tenancy Act. The Bengal Tenancy Act deals with a more complex system of land tenures than the Madras Act does, and the treatment of private land in the two Acts is not by any means the same or even substantially similar.

As observed in Volume 31 of Hailsham's Edition of Halsbury's laws of England at pages 486 and 487 it is difficult to define what constitutes being in 'pari materia' and I am by no means clear that the two statutes passed by two different Provincial Legislatures of the country with reference to not altogether similar conditions of land-holding can be regarded as so far as 'pari materia' that a decision under the Bengal statute must necessarily rule a case under the Madras Act.

Even in cases of statutes in 'pari materia' it is laid down at the same place in the same volume of Halsbury's Laws of England that while it may be presumed in the absence of context indicating a contrary intention that similar language is to be similarly interpreted the same word used in different Acts may however have different meanings in each statute according to the intentions of the Acts.

A comparative study of S. 3(10) (a) and S. 185 of the Madras Act on the one hand & of S. 120 of the Bengal Act on the other makes it clear that while home-farm land by whatever designation known as 'kambattam, khas, sir or pannai' of S. 3(10) of the former Act corresponds to S. 120(1) (b) of the latter, private land under the latter Act is, as shown by S. 120, not necessarily cultivated land but may well be other than cultivated land. There are no definitions to be found in that Act of ryoti land and private land as we have in ours. Private land is, in that statute, apparently treated as synonymous with land of which the land-holder is the full owner. That is how their Lordships' reliance upon the facts adverted to by them in the penultimate paragraph of their judgment in support of their conclusion in favour of the private character of the land in question in that case becomes intelligible. "Any other evidence that may be produced" which is the language of S. 120(2) of the Bengal Tenancy Act could therefore well cover such facts.

Similar language in S. 185(3) of the Madras Estates Land Act cannot have the same result because the evidence in question must bear upon the home-farm character, which is part of the statutory definition of private land, of the land claimed to be private, that is, upon the character of the land as land directly or personally cultivated by the land-holder himself or under his supervision by his own servants or by hired labour with his own or hired stock. The Privy Council ruling might be useful and apposite if private land meant here, as held by my learned brethren all land in the absolute ownership of the land-holder. Not otherwise. Since I hold that private land does not mean that, according to the Madras Statute the Privy Council ruling has, in my opinion, no application.

Moreover, in that case it will be seen that of the facts to which their Lordships had regard in upholding the private character of the land there in question even on the basis of the appellants' construction of S. 120 of the Bengal Tenancy Act and even without reference to the patta of 1902 and the kabuliats of 1883 and 1892 one important fact is the admission on defendants' behalf in the plaints of 1910 as to the character of the land as 'zirait'. The admissions as noted by their Lordships at page 640 of the report are that "in the plaints in each of the suits the lands are described as lands the 'milkiat' interest in which belonged to Dumraon Raj and the lands were stated to be 'zirait' lands and to have been recognised as such by village custom". There was therefore before their Lordships indirect evidence, if not direct, of the character of the land as cultivated land falling within clause (b) of subsection (1) of S. 120.

I am not like my learned brother—Viswanatha Sastri J., surprised in these circumstances that this case has not been referred to so far in any case of this Court as bearing upon the matter on hand. Nor do I share his view that it is unfortunate that it has not been so referred to. It is also noticeable that no case under the Madras Estates Land Act was cited to the Board in this Patna case as is made clear by the report of arguments to be found in 'BINDESHWARI PRASAD v. KESHO PRASAD SINGH', 53 Ind App 165: 5 Pat 634, as would have been done had the two Acts in the respect with which we are concerned, been regarded as in 'pari materia'.

(124) Now, to summarise my conclusions on the question of law they are as follows:

1. that domain land which is one category of private land is land about the dwelling house of the land-holder and in his immediate occupancy;

2. that there must be proof that at some time or other and for some time or other there was direct cultivation by the land-holder before cultivable land in an estate can be claimed to be "home-farm" land and hence "private land" within the definition of "private land" in the statute;

3. that the evidence may be direct and positive or indirect and circumstantial;

4. that the mere existence in the land-holder of both the warams in a land in an estate does not 'per se' make of it private land;

5. that where there is any letting of any private land, as there may well be, the letting must be on terms and conditions consistent with an intention on the part of the land-holder to resume direct cultivation or personal use;

6. that local custom may well define and demarcate private land in an estate in accordance with customary notions of people of the locality although in a manner different sometimes to what the statutory definition of private land may justify;

7. that, otherwise, any evidence admissible under S. 185 of the Madras Act must be such as satisfies the requirements of the definition of "private land"; and,

8. that cultivable land in an estate must be presumed to be ryoti, unless the contrary is shown, and that the contrary is not shown by the circumstance of the existence of both warams in the land-holder.

(125) Next in order to apply these propositions of law to the present case I must turn to the findings of fact of the lower appellate Court which are binding on this Court in second ap-

peal and in revision. The question then will be whether those findings in the light of the law, as I have stated above, justify the rejection of these appeals and revisions or require that they should be allowed.

(126) The learned Subordinate Judge holds in paragraph (7) of his judgment that the defendants had never any occupancy right and till recently did not claim any, and points out in paragraph (13) of his judgment that there have been admissions by some of the defendants or their predecessors-in-title touching the existence of both the warams in the land-holders as by their being parties to the description of land as 'iruvaram' land in documents and by their agreeing to the payment of 'swami bogam' to the land-holder. He holds in paragraph (14) that sometimes there has been a change of tenancy though generally the lands have continued to be in the occupation of the same family hereditarily and observes in paragraph (16) that there is no evidence as to when the defendants or their predecessors-in-title were actually let into possession. He says that we have no evidence as to who brought the lands under cultivation but that from 1864 onwards successors-in-interest of the original inamdars have been claiming both the warams in lands by dealing with them and leasing them out. He does not find that varying rates of rent have been charged or paid. These are essentially the findings of fact of the lower appellate Court.

(127) The learned Judge however seems to think, as appears from paragraph (16) of his judgment, that considering the evidence as a whole and having regard to all the circumstances the question for consideration is whether the tenants had any occupancy rights in the land. The question, in my opinion, is not precisely that but rather whether the plaintiffs have established the character of the land as private land and effectively rebutted the statutory presumption that the land is ryoti. He also discusses the case as if it fell under S. 3(2) (d) and S. 3(10) (b) and not under S. 3(2) (e) and S. 3(10) (a) of the Act which are really the relevant parts of the statute for consideration on our conclusion as to the nature of the inam grant. With reference to the law applicable, the learned Subordinate Judge relies on 'CHINNARIGADU v. RANGAYYA', AIR (22) 1935 Mad 789, with which I have already dealt in the foregoing. He also relies on a statement in the Ramnad Manual prepared by Mr. T. Rajaram Rao the Dewan of the Ramnad Samsthanam under the order of the Court of Wards in 1890 which I shall quote and consider presently.

(128) On the findings of the lower appellate Court just referred to, it seems to me that applying the law as laid down in the foregoing I can only reach one result—namely that these appeals and revisions must be allowed—subject of course to what I shall have to say 'infra' on the passage in the Ramnad Manual relied upon by the lower appellate Court. The learning about 'swami bogam' and what it means has been referred to in detail in the judgments of my learned brethren; but that word, as I think, emphasises nothing more than the existence of the kudiwaram as well as the melwaram in the land-holder. It is no doubt a payment in separate recognition of the land-holder's right to the kudiwaram, but cannot in my opinion, afford any evidence however indirect, of direct cultivation of the lands by the land-holder at sometime or other and for sometime or other, proof of which by means of one species of evidence or another within the intendment of S. 185 of the Madras Estates Land Act is a condtion pre-requisite for the recognition of the lands in suit as private lands.

Where there is proof of direct cultivation at some time or other and for some time or other, subsequent letting may not matter, and the respondents can well rely on the leases in the present case as in no way inconsistent with an intention on the land-holder's part to resume direct cultivation. Proof of the direct cultivation required is admittedly lacking in the present case, and the judgment of the lower appellate Court which mistakes the law and also misconceives in a way the rule of 'onus probandi' applicable to the appreciation of the evidence cannot be allowed to stand. After all on the plaintiffs' side the positive evidence adduced to prove the private character of the lands is as rightly remarked by my learned brother Viswanatha Sastri J. poor in quality and meagre in extent and the statutory presumption of the ryoti character of the lands must in my opinion be held not to have been effectively rebutted.

(129) The passage in the Ramnad Manual which has still to be considered is as quoted by the lower appellate Court in its judgment to the effect that

> "pannai lands are those in which the zamindar or inamdar owns both the landlord's and tenant's rights and that he can lease out the lands to any one he likes for cultivation and obtain from him 'swami bogam' or 'thunduvaram' a rent obtained in acknowledgment to the landlord's tenancy right in the soil in addition to the melwaram or landlord's share, and that most of the 'dharmasanams' in the zamindari were held under 'pannai' tenure."

After all, the manual itself has not been produced before us and I am afraid that this passage, standing by itself, cannot if properly read, be of any conclusive assistance to the respondents. It is not stated in it that every land in which the zamindar or inamdar owns both the landlord's and tenant's right is necessairly 'pannai' land irrespective of the requirement of proof of direct cultivation which is implicit in the word "pannai". What all is stated there is that 'pannai' lands are lands in which the zamindar or inamdar owns both the landlord's and tenant's rights. Then again it may be that 'pannai' lands can be leased out by the zamindar or inamdar to any one he likes for cultivation, and that 'swami bogam' or 'thunduvaram' can be obtained in respect of them.

It has not been suggested for the appellants and petitioners or in any of the decisions relied upon by them that 'pannai' lands cannot be leased out at all; nor does the fact that 'swami bogam' or 'thunduvaram' can be obtained by the owner of 'pannai' lands from his tenant necessarily show anything more than that there is a distinct recognition of the existence of the kudiwaram right in the land-holder. It was contended in fact before the lower appellate Court that the fact that in the documents relied upon by the plaintiffs there was reference to both the warams showed that the two interests in the land were kept distinct, which is not possible in the case of pannai lands, and that therefore the lands must be treated as ryoti lands.

Whether a contention going so far as that is well founded or not is another matter; but there is no doubt but that the charging of 'swami bogam' or 'thunduvaram' by the land-holder when leasing out lands is not a necessary indication of the character of the lands as pannai lands.

In fact in a case in 'SIVANPANDIA TEVAR v. ZAMINDAR OF URKAD', 41 Mad 109 to which our attention was drawn by the learned Counsel for the appellants and petitioners it was held that 'swamibogam' was part of the rent lawfully payable by a ryot to the land-holder even in respect of ryoti land. It is remarkable that in none of the documents on record is any description to be found of the suit lands as pannai land, although pannai is a term certainly in vogue in the area from which these cases have come. It is difficult in these circumstances to attach any great importance to the passage in the Ramnad Manual relied upon by the lower appellate Court.

Much less am I prepared to read the passage in question as indicative of a local custom whereby if land is shown to be land belonging in both the warams to the land-holder on which when leased out 'swamibogam' or thunduvaram' is collected, it is 'ipso facto' liable to be treated as home-farm land and as therefore private land according to the definition of "private land" in the statute. In fact, I may observe that no question of local custom as such was at all argued by counsel before us. Nor does it appear to have been raised in the Courts below.

(130) This disposes of all that I consider to be relevant matter for the purpose of the present appeals and revisions, which must, in my opinion, be allowed. I regret that I am obliged to differ from my learned brethren for the reasons indicated in the foregoing, as I am quite alive, to the consideration that the ruling of this Bench in these appeals and revisions cannot of course be quite as authoritative as if would be, if the decision were unanimous. At the same time, I must say that I differ with no sense of diffidence but with every sense of confidence inspired by former judgments of distinguished Judges of this Court which derive support from the dicta of the Privy Council in 'ZAMINDAR OF CHELAPPALI v. SOMAYYA', 42 Mad 400 and 'CHIDAMBARA SIVAPRAKASA v. VEERAMA REDDI', 45 Mad 586 and which have held the field for more or less an unbroken period of more than three decades. Out of the great sense of deference that I entertain for my learned brethren, I have anxiously considered whether I may not bring myself to agree with their conclusions, whatever my view of some of their reasoning; but the points of disagreement in perspective and detail alike have been too marked and too defined to admit of my concurrence at least in the result

Out of the same sense of deference, I have had to deal in great detail than I should have otherwise done in a manner perhaps savouring somewhat of the argumentative with parts of the reasoning of my learned brethren which I could not after the most earnest and anxious consideration accept. Some of those parts of the reasoning relate to points not raised or enlarged upon by learned counsel in the case on whom I mean no remark of disparagement on that account. I have had therefore to make references to these points by making references to the judgments of my learned brethren and not to the arguments of the learned counsel.

I must say further that I have laboured under some slight sense of embarrassment when called upon to deal with the judgment of my learned brethren, Mr. Viswanatha Sastri J. in 'NARAYUDU v. VENKATARAMANAMURTHI', (1949) 2 Mad L J 623 at p. 624, when sitting in his company. His Lordship knows perhaps better than I do to estimate its ambit and explain its import. I have not however felt myself relieved on that account of the responsibility of interpreting that decision in my own way and according to my own lights in the context of the prior case law on the subject. I can only hope that I have performed that rather delicate task with all the success of which the situation admitted.

In conclusion I desire to express my sense of grateful appreciation of the judgments of my learned brethren which I have had the advantage of reading before preparing my own & of the able and exhaustive arguments of learned counsel on both sides, on account of the great assistance which I have derived from those judgments as well as those arguments in reaching, in particular, on the second of the points for decision set forth by me at the opening of this judgment, my own conclusion which, although to my regret a dissident one is the only one which I have found it possible to reach in all the circumstances of the case.

(In accordance with the opinion of the Majority, the Civil revision petitions and the second appeals are dismissed with costs, subject to the modification indicated above of the decree in second appeals. Rupees five hundred is fixed as advocates' fee in each batch).

C.R.K. / V.B.B. Appeals and revisions dismissed.

A. I. R. 1952 Madras 377

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

Seshagiri Aiyar, Appellant v. Valambal Ammal and others, Respondents.

Letters Patent Appeals Nos. 64 and 106 of 1949 D/- 18-1-1951 against the order of Panchapakesa Aiyar J. D/- 20-4-1949 in A A O No. 17 of 1948.

(a) Civil P. C. (1908) S. 47, O. 21, R. 90 — Application to set aside sale — Tests to see whether application falls undr S. 47 or O. 21 R. 90 — Grounds relating to matter in publishing and conducting sale — Application comes under O. 21 R. 90 and is governed by Art. 166 Limitation Act — (Limitation Act, Arts. 165 and 166).

If a party impeaches a sale on grounds which attract the provisions of O. 21 R. 90 he cannot escape from the period of limitation provided by Art. 166, Limitation Act by framing his application as one under S. 47. The substance of the application must be considered in order to determine whether the application is one which falls under S. 47 or under O. 21, R. 90, C. P. C. If the grounds alleged do not relate to matters in publishing or conducting the sale but are anterior or subsequent to the sale the application is outside the purview of O. 21, R. 90.

After the execution petition was filed an order for sale as contemplated by the Code was

made and after service of notice on the defendants under O. 21, R. 66 (2) proclamation of sale was drawn up and settled. The upsent price was fixed, and the date of sale was also fixed. At this stage by reason of a stay order made under S. 20 of Madras Act IV of 1938 the sale was stopped and the petition was closed. The proceeding was revived and was continued without notice to the defendant. The sale was held. The defendant applied to set it aside on the ground that the sale was held without notice to him and was therefore irregular.

Held that it could not be said that the stage which the execution petition had reached after revival was an initial stage and did not relate to "publishing and conducting the sale", within the meaning of O. 21, R. 90. The application was therefore governed by O. 21, R. 90 since the want of notice would be an irregularity in publishing or conducting the sale. The application therefore was undoubtedly governed by Art. 166 of the Limitation Act and if it was filed more than 30 days from the date of the sale, it should be dismissed. The mere fact that the defendant somehow managed to squat on the properties and was dispossessed and that it was thereafter that she filed the application, did not justify an extention of the period of limitation by applying Art. 165 if the application was in substance and in effect within O. 21, R. 90 governed by Art. 166, Limitation Act. (Para 9)

Anno: Civil P. C., S. 47, N. 51; O. 21, R. 90, N. 2. Limitation Act Art. 166 N 7; Art. 165, N. 2.

(b) *Civil P. C. (1908) O. 21, R. 67— "Made" means making announcement by beat of drums.*

The words 'made and published in the manner prescribed by R. 54, sub-rule (2)" seem to indicate that it means an announcement of the sale by beat of drum and by affixing of the proclamation of sale in conspicuous part of the property and a conspicuous part of the Court house and in other places when it is necessary under R. 54(2). It cannot be taken to include the preparation of proclamation of sale. (Paras 10, 19)

Anno. Civil P. C., O. 21, R. 67, N. 1.

† (c) *Civil P. C. (1908) O. 21, R. 69 (2) (Mad) —Adjourned sale —Fresh proclamation— Notice to judgment-debtor and decree-holder is not necessary — Even if necessary, its absence is mere irregularlity — Sale will not be set aside in absence of substantial injury.*

In the case of an adjourned sale, it is provided by sub-rule (2) of R. 69, introduced by the Madras amendment that where a sale is adjourned under sub-rule (1) for a longer period than 30 days, a fresh proclamation under R. 67 shall be made unless the judgment-debtor consents to waive it. Under sub-rule (2) of R. 69 by reference to R. 67 in that sub-rule, the requirements as to notice under sub-rule (2) to R. 66 are not attracted. Sub-rule (2) of R. 69 requires that the proclamation should be under R. 67. Rule 67 does not provide for the drawing up of proclamation but only provides for making a publication of proclamation in the manner provided by R. 54(2). In the case of an adjourned sale therefore it is difficult to hold that a further notice to the judgment-debtor and the decree-holder is necessary. Even the other view that a proclamation of sale should also be settled and drawn up were to be accepted even then the provision in sub-rule (2) of R. 66 regarding the requirements of notice to the decree-holder and judgment-debtor is not attracted by the provision in sub-rule (2) of Rule 69. The Code therefore does not require a notice and the action of the executing Court in proceeding with the sale after due proclamation i.e., after duly announcing it by beat of drum and by affixture is perfectly legal. Even assuming that notice is necessary, non-compliance with that requirement does not make the sale illegal, but would only be irregular and if no substantial injury is established in the case there is no jurisdiction for setting it aside. AIR (30) 1943 Mad 739; 29 All 196 (PC), AIR (29)1942 Pat 238, Relied on. (Paras 10, 11, 12)

In the matters dealt with in the Code, there is little room for the applicability of the rule of natural justice, equity and good conscience and to hold that notice is necessary, the absence of which would amount to fraud in equity. (Paras 10, 17)

Anno: C. P. C., O. 21 R. 69 N. 8.

(d) *Limitation Act (1908), Art. 165 — Applicability to application by person other than judgment-debtor.*

Per Raghava Rao J.: Article 165 does not apply to an application by a judgment-debtor but applies only to an application by a person other than the judgment-debtor as under O. 21, R. 100, Civil P. C. (Para 15)

Anno: Limitation Act, Art. 165 N. 3.

(e) *Civil P. C. (1908), S. 100 — Concurrent findings of fact — Findings on question of substantial injury caused by reason of irregularity in execution sale — No interference in second appeal on a 'priori' notion of suspicion — (Civil P. C. (1908), O. 21, R. 90).* (Para 22)

Anno: Civil P. C., Ss. 100-101 N. 54 O. 21, R. 90 N. 39.

M. S. Venkatarama Iyer and S. Viswanathan (in No. 64) and N. Sivaramakrishna Iyer (in No. 106), for Appellant; N. Sivaramakrishna Iyer and L. A. Gopalakrishna Iyer (in No. 64) and M. S. Venkatarama Iyer and L. A. Gopalakrishna Iyer (in No. 106), for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('07) 34 Ind App 37: (29 All 196 (PC)) (Pr 11)

('16) 23 Cal L J 436: (AIR (3) 1916 Cal 507) (Pr 18)

('17) 44 Cal 454: (AIR (4) 1917 Cal 633) (Pr 18)

('20) 11 Mad L W 59: (AIR (7) 1920 Mad 481) (Prs 9, 11)

('30) AIR (17) 1930 Mad 490: (53 Mad 491) (Pr 18)

('40) 1940-1 Mad L J 537: (AIR (27) 1940 Mad 566) (Pr 6)

('43) 1943-2 Mad L J 295: (AIR (30) 1943 Mad 739) (Pr 11)

('45) 1945-1 Mad L J 380: (AIR (32) 1945 Mad 236) (Pr 6)

('42) AIR (29) 1942 Pat 238: (21 Pat 281) (Pr 11)

SATYANARAYANA RAO, J.: This Letters Patent Appeal is against the decision of Panchapakesa Aiyar J. in C. M. S. A. No. 17 of 1948.

The matter arises out of execution proceedings in pursuance of the mortgage decree in O S. No. 512 of 1936, District Munsif Court, Kulitalai and the appellant in the appeal is the auction-purchaser in those execution proceedings.

(2) One Muthurathnam Iyer filed O. S. No. 512 of 1936, District Munsif's Court, Kulitalai to enforce the security bond dated the 28th May 1928 executed by defendants 1 and 2 in favour of the members of a chit fund. The security was created on three items of property. Item 1 is a wet land bearing S. No. 188/2 of the extent of 1 acre 60 cents. Item 2 is a wet land bearing S. No. 299/1 of the extent of 84 cents and item 3 is dry land bearing S. No. 222/4 & measuring 4 acres 93 cents. The fourth defendant was impleaded in the suit as she claimed to be a puisne mortgagee over items 1 and 2 under a mortgage deed dated the 14th September 1931. It is claimed that the mortgage is a usufructuary mortgage. The fifth defendant was also a puisne mortgagee and was therefore impleaded in the suit. The mortgagee obtained a mortgage decree in the suit on the 19th March 1937 for Rs. 2394. A final decree was passed on the 16th August, 1937. The decree-holder filed the first execution petition 579 of 1937 on the 6th September 1937, for the sale of the property and the sale was ordered. On 15th April, 1939, the decree was scaled down to Rs. 1951-6-9 under Madras Act IV (4) of 1938 at the instance of the first defendant. On 1st May 1940 sale was ordered for the amended amount and costs in E. P. No. 325 of 1939, but the sale was stayed under Madras Act IV (4) of 1938. On 20th February 1941 the decree-holder filed E. P. No. 197 of 1941 but this time the first defendant obtained stay under the Madras Debt Conciliation Act. On 30th January 1942 the decree-holder filed E. P. No. 201 of 1942 and in that execution petition notice was taken to the fourth defendant and she was served by affixture. The fourth defendant did not appear and did not contest the execution. The sale was thereafter fixed to 20th January 1943 and the sale proclamation was also settled by the Court fixing the upset price of the three items of property on the basis of the valuation made by the Amin. For the three items Rs. 1500, 700 and Rs. 500 respectively were fixed as upset price. The sale was again postponed but this time at the instance of defendants 4 and 5 who filed an application under S. 20 of Madras Act IV (4) of 1938. The application was filed on 19th January 1943 and the sale was stayed on 19th February 1943. The order passed on the execution petition on that date was:

"Execution stayed and sale is stopped. Petition closed."

Thereafter, defendants 4 and 5 filed I. A. No. 376 of 1943 under S. 19 of Madras Act IV (4) of 1938 to again scale down the decree . But on that petition the decree was scaled down only to the same amount as before. Against this order there was an appeal by the 4th defendant in A. S. No. 239 of 1944 to the District Court, Trichinopoly, which was finally disposed of in 1945 confirming the order of the lower Court. On 26th July, 1944, the decree-holder filed E. P. No. 277 of 1944 to revive E. P. No. 201 of 1942, to settle the sale proclamation without notice to the defendants to sell the properties under O. XXI (21), Rr. 66 and 72, Civil Procedure Code. The order on that petition was "allowed, proclaim and sell" and is dated 27th September 1944. Thereafter the sale was duly proclaimed and lots 1 and 2 were sold on the 27th September 1944 for Rs. 1501 and 701 respectively. On 28th October 1944 the sale was confirmed. The trouble of the decree-holder did not, however, end with this confirmation of sale.

(3) On the 18th November 1944 the fourth defendant filed E. A. No. 760 of 1944 and E. A. No. 793 of 1944 to set aside the sale and to excuse the delay in filing E. A. No. 760. E. A. No. 760 was filed under Ss. 47 & 151 & O. XLVII, R. 1, C. P. C. and S. 18 of the Limitation Act. The ground on which the sale was impeached in that application was that the decree-holder and the auction-purchaser colluded together and brought about the sale fraudulently without notice to the defendants at a time when the appeal No. 239 of 1944 was pending in the District Court and that the petitioner became aware of the same only a week prior to the date of the filing of the petition. It was claimed in that petition that the defendant 4, the applicant, was entitled to an extension of time under S. 18 of the Limitation Act.

(4) The decree-holder and the auction purchaser opposed the application on the ground that it was barred by limitation and that no fresh notice was necessary as the execution was only a continuation of the previous execution which was stayed under Section 20 of Act IV (4) of 1938. They also denied fraud and collusion alleged in the petition and pleaded further that there was a due proclamation of sale, for the sale held on the 27th September 1944 and that the proclamation was attested by one Muthurathnam Aiyar, a relation of the petitioner. According to them, the price fetched at the sale was proper and there was no substantial loss.

(5) The learned District Munsif who tried the petition raised three substantial points (1) whether the application was in time (2) whether there was material irregularity or fraud in publishing or conduction of the sale and (3) has the petitioner sustained any substantial injury by reason of the alleged irregularity or fraud.

(6) On the first point the finding was that no fraud or collusion of either the decree-holder or auction-purchaser or both was established and that the petition, though expressly filed under S. 47, C. P. C., was in substance and in effect an application under O. XXI (21), R. 90 and that the petitioner could not escape the bar of limitation under Art. 166, Limitation Act as it was filed more than 30 days from the date of the sale. He also held that the petitioner was not entitled to the benefit of S. 18 of the Limitation Act as she did not disclose the source of information and knowledge of the alleged fraud and did not establish any fraud by which she was kept out of her knowledge to set aside the sale. He therefore found that the application was barred, by limitation. On the second point in respect of the two irregularities which were ultimately relied on, the learned Munsif found that no fresh notice under O. XXI (21), R. 66, C. P. C. was necessary as E. P. No. 277 was only a continuation of E. P. No. 201 of 1942 and was an application requesting the Court to proceed with the sale from the point at which it was stopped by the prior order. In support of this view,

he cited two decisions of this Court, 'HANUMANTHA RAO v. OFFICIAL RECEIVER, KRISHNA', 1945-1 Mad L J 380, and 'SIVASUBRAMANIA v. MURUGESA', 1940-1 Mad L J 537. These decisions clearly establish that the legal effect of closing an execution petition was only to stop the proceedings and a subsequent execution petition filed for the same relief is merely a continuation of the previous execution petition which was closed. In the previous execution petition, defendants 1 to 3 were personally served and the 4th defendant was served by affixture which service was duly declared by the Court as sufficient service. The contention that there was no proclamation of sale on the 27th September 1944 was negatived as Ex. D. 3, the proclamation effected by the process server R. W. 1 was attested by a relative of the fourth defendant. The process server gave evidence in support of the proclamation. He therefore found that there was due publication of the sale.

The other irregularity relied on was that the sale held during the pendency of the appeal was illegal. It is in view of a well-established principle of law that the filing of an appeal does not operate as stay of the proceedings that the learned District Munsif had no hesitation in rejecting the contention. On the third point he found that the petitioner was not able to establish any substantial injury. On the other hand, he found that it was amply proved that the price fetched was fair and proper. He was of opinion that the petition should fail on this point alone.

(7) The decision of the learned District Munsif on all the points was confirmed on appeal by the Subordinate Judge. There were thus concurrent findings of fact against the 4th defendant on the question of fraud and collusion and on the question whether there was or was not substantial injury and on the further question whether there was due publication of the sale held on the 27th September 1944. The fourth defendant preferred C. M. S. A. No. 17 of 1948 to this Court against the decision of the learned Subordinate Judge which was allowed by Panchapakesa Aiyar J. The auction-purchaser who is the person affected by the decision of the learned Judge has preferred this Letters Patent Appeal with the leave of the Court.

(8) The learned Judge did not interfere with the concurrent findings of fact of the Courts below and as no flaw enabling the Court to interfere with such findings has been established he would not have had jurisdiction to interfere with such findings. The main ground on which the learned Judge allowed the appeal was that the E. P. No. 201 of 1942 was revived without notice to the fourth defendant and that therefore the sale is illegal. According to the learned Judge though notice in such a proceeding is not required by any rule of the Code, it was a principle of natural justice that a person should not be affected by an order made behind his back and without due notice to him. He was of opinion that justice, equity and good conscience required, in such circumstances that the sale should be set aside. He was also of the view that though the application is governed by Art. 166, Limitation Act and has to be filed within 30 days from the date of the sale, the applicant was entitled to an extended period of limitation by applying the provision in Art. 165, Limitation Act which provides a period of limitation of 30 days where a person is dispossessed of immovable property at the instance of a decree-holder or auction-purchaser at a sale in execution of the decree from the date of dispossession. In allowing the appeal, however, and directing a fresh sale of the properties, he thought that in view of the obstructive tactics adopted by the defendants throughout so as to prevent the sale, the fourth defendant should be made liable to pay to the decree-holder and the auction-purchaser a sum of Rs. 150 each as solatium for the trouble and expense to which they were subjected.

(9) It is difficult to support the judgment of the learned Judge and to uphold the grounds on which the sale was set aside by him. If a party impeaches a sale on grounds which attract the provisions of O. XXI, R. 90, Civil P. C. he cannot escape from the period of limitation provided by Art. 166, Limitation Act by framing his application as one under S. 47, Civil P. C. The substance of the application must be considered in order to determine whether the application is one which falls under S 47 or under O. 21, R. 90, Civil P. C. If the grounds alleged do not relate to matters in publishing or conducting the sale but are anterior or subsequent to the sale no doubt, in that event, the application is outside the purview of O. 21, R. 90. Of course, it is open to a party to get an extended period of limitation by alleging and establishing grounds which would entitle him to claim the benefit of S. 18 of the Limitation Act. In the present case, it has been concurrently found by the Courts below that the fourth defendant was unable to establish facts entitling her to the benefit of S. 18 of the Limitation Act and that finding is not challenged by the fourth defendant. The question therefore narrows itself down to this. Are the allegations in the application outside Order XXI. R. 90 or within it? The only surviving ground on which the sale is now attacked is want of notice to the fourth defendant at the time when the order reviving the previous execution petition No. 201 of 1942 was passed.

It has been held in 'NEELI NEITHIAR v. SUBRAMANIA MOOTHAN', 11 Mad L W 59, that an objection to an execution sale on the ground that before drawing up the sale proclamation notice as required by Order XXI, R. 66 (2), Civil P. C. was not given to some of the judgment-debtors is not a matter relating to publication and conduct of the sale and it is therefore outside the purview of O. 21, R. 90, Civil P. C. The objection in this case is not that at the initial stage of the proceedings for sale in an execution petition the notice under O. 21, R. 66 (2), Civil P. C. was not given. After E. P. No. 201 of 1942 was filed an order for sale as contemplated by the Code was made and after service of notice on the defendants under Order 21 rule 66(2) proclamation of sale was drawn up and settled. The upset price was fixed, and the date of sale was also fixed. At this stage by reason of a stay order made under S. 20 of Madras Act IV of 1938 the sale was stopped and the petition was closed. This proceeding which was closed by an order of the Court was revived and was continued. It cannot be said that the stage which the execution petition reached was an initial stage and did not relate to "publishing and conducting the sale", within the meaning of Order 21, R. 90, C. P. C. It would seem, therefore, that the

application is governed by Order 21 rule 90 since the want of notice would be an irregularity as would be presently shown in publishing or conducting the sale. The application therefore is undoubtedly governed by Article 166 of the Limitation Act and as it was admittedly filed more than 30 days from the date of the sale, it should be dismissed on this short ground as did the Courts below. The view taken by the learned Judge that the period should be extended by applying the period under Art. 165 cannot be supported by any principle or authority There can be no question of interpreting the language of one article by the language of another Article and the extending period of limitation provided by one Article by the period and the starting point of limitation under another Article. It was said that the fourth defendant somehow managed to squat on the properties and she was dispossessed and it was thereafter that she filed this application. It may be so but that does not justify an extension of the period of limitation if the application is in substance and in effect within Order XXI, Rule 90, Civil P. C. governed by Article 166, Limitation Act.

(10) The procedure laid down under Order 21 for execution of decrees and for sale of the properties is a self-contained one and there is no room for engrafting into it the principles of natural justice or adding to it new rules on on the principle of justice, equity and good conscience. Under the Code the proceedings for sale start with an order for sale made by the Court executing the decree under rule 64. After the order for sale there should be a proclamation of the intended sale and a proclamation of sale has to be drawn up and settled by the Court after notice to the decree-holder and the judgment-debtor.The paper so drawn up should be in form No. 29, Appendix E to the Code of Civil Procedure and Form No. 70 of the Civil Rules of Practice which is printed at page 215 of Satyamurthi Aiyar's Code of Civil Procedure and is described as a "proclamation of sale". In the rules 66, 67 and 69 the word "proclamation" is used in two different senses. It means proclamation of sale, i.e., the paper drawn up by the Court under rule 66(2) containing the matters enumerated in that sub-rule and the conditions of sale. The word is also used in the sense of an announcement of the sale, i.e., the act of proclaiming. It is this ambiguity that sometimes leads to confusion. Under rule 66(1) the Court has to cause a proclamation of the intended sale to be made in the language of such Court and under sub-r. (2) the proclamation of sale is drawn up. The proclamation, therefore, in sub-rule (1) of rule 66 might refer to the proclamation of sale (which expression is used in this judgment to denote the paper drawn up in Form No. 29 of Appendix E). Rule 67 prescribes the mode of making a proclamation. It says every proclamation shall be made and published as nearly as may be in the manner prescribed by rule 54(2). The word "made" in this rule might refer to the proclamation of sale as well as announcement of the sale, as it says it shall be made and published in the manner provided by rule 54(2). The word "made" cannot be taken to include the preparation of proclamation of sale as it was already provided by rule 66 and further the words "made and published in the manner prescribed by rule 54, sub-rule (2)" seem to indicate that it means an announcement of the sale by beat of drum and by affixing of the proclamation of sale in a conspicuous part of the property and a conspicuous part of the Court house and in other places when it is necessary under rule 54(2).

In the case of an adjourned sale, it is provided by sub-rule (2) of rule 69, introduced by the Madras amendment, that where a sale is adjourned under sub-rule (1) for a longer period than 30 days, a fresh proclamation under rule 67 shall be made unless the judgment-debtor consents to waive it. Here again the rule requires a fresh proclamation should be made in the case of an adjourned sale for a longer period than 30 days. Does it mean that there should be a fresh drawing up of proclamation and a fresh announcement of the sale by beat of drum and by affixture or would it be sufficient compliance of the rule if there was an announcement of the sale in the manner provided by rule 54(2)? If the interpretation suggested above of Rule 67 is correct, it would follow that when a sale is adjourned during the course of an execution under the same execution petition it would not be necessary to prepare a fresh proclamation of sale and that it would be sufficient compliance with the rule to make a fresh announcement of the sale. In the course of the same execution and under the same petition at different stages the matters to be enumerated in a proclamation of sale under sub-rule (2) of rule 66 would not ordinarily require alteration so as to necessitate a fresh drawing up of the proclamation of sale. But the date of sale and the place of sale whenever the sale is adjourned for a longer period than 30 days should undoubtedly be made known and published as widely as possible so as to attract bidders. In some of the decisions which have considered the rules it is said that a fresh proclamation is necessary; but it is by no means clear whether the learned Judges in using that expression meant that even in the case of an adjourned sale, a fresh settlement of the proclamation of sale every time it is adjourned for more than 30 days in the same execution should be made so as to comply with the requirements of rule 69. In my opinion this matter requires clarification by the alteration of the rules. It seems to me an unnecessary waste of time at different stages of the same execution in the same execution petition to require and insist on the drawing up of a fresh proclamation of sale and that it would be sufficient if the adjourned sale is announced and made public so as to intimate to the public the date and the time and place of the sale.

(11) This digression became necessary as it has to be considered whether under sub-rule (2) of rule 69 by reference to rule 67 in that sub-rule, the requirements as to notice under sub-rule (2) to rule 66 is attracted. Sub-rule (2) of rule 69 requires that the proclamation should be under rule 67. Rule does not provide for the drawing up of proclamation but only provides for making a publication of proclamation in the manner provided by rule 54 (2). In the case of an adjourned sale therefore it is difficult to hold that a further notice to the judgment-debtor and the decree-holder is necessary. If the view above suggested that the sub-rule to rule 69 does not require a fresh drawing up of proclamation of sale is accepted, it would be an 'a fortiori' case and no notice to the judgment-debtor is required. That even

if the other view that a proclamation of sale should also be settled and drawn up were to be accepted even then the provision in sub-rule (2) of rule 66 regarding the requirements of notice to the decree-holder and judgment-debtor is not attracted by the provision in sub-rule (2) of rule 69. The Code therefore in my opinion does not require a notice and the action of the executing Court in the present case in proceeding with the sale after due proclamation i.e., after duly announcing it by beat of drum and by affixture as concurrently found by the Courts below seems to be perfectly legal. Even assuming that notice is necessary noncompliance with that requirement does not make the sale illegal. It has been held that even in a case covered by rule 66 if notice is not given in the manner provided by sub-rule (2) of rule 66 the sale does not become illegal but would only be irregular. See 'NEELU NEITHIAR v. SUBRAMANIA MOOPAN', 11 Mad L W 59 and it is an 'a fortiori case in a case governed by rule 69. See 'SUBBAMMA v. SATYANARAYANA MURTHI', 1943-2-Mad L J 295; 'GAJRAJMATI TEORAIN v. SAYEED AKBAR HUSSAIN', 34 Ind App 37 (PC) and 'SHEO DAYAL NARAIN v. MOTI KUER', AIR (29) 1942 Pat 238.

(12) If the sale is only irregular, as no substantial injury has been established in the case and there is the concurrent finding of fact against the 4th defendant on this matter, there is no justification for setting aside the sale. The 4th defendant is unable to establish that there was substantial injury caused to her by reason of a material irregularity in the publishing and conducting of the sale. In my opinion, therefore, the application was barred by limitation and the sale is not vitiated by irregularity and even if it were so, no substantial injury is caused and must therefore be upheld. The appeal is therefore allowed and the decision of the Courts below is restored with costs throughout.

(13) RAGHAVA RAO, J.: I agree. I have however drawn up a judgment of my own out of respect for the learned Judge of this Court from whom we are differing.

(14) The grounds on which Panchapakesa Aiyar J. has reversed the Courts below on the merits of the application for setting aside the sale are—(1) that there was (a) no notice to the 4th defendant of the revival of E. P. No. 201 of 1942 by E. P. No. 277 of 1944, (b) no settlement of a fresh proclamation of sale in the later E. P. and (c) no grant of leave to bid to the decree-holder by the executing Court at any time, and (2) that "it is idle to pretend", in the words of the learned Judge,

> "that the appellant before him, the 4th defendant, has not suffered substantial injury by the Court not observing the formalities prescribed by law under Order 21, rules 66 and 72, C. P. C. and the rules of natural justice, equity and good conscience requiring parties to be intimated about the legal proceedings stayed years ago which are sought to be resumed and dealt with later."

On the question of limitation 'prima facie' affecting the application, viewed as one for setting aside the execution sale, the learned Judge has reversed the Courts below by holding, firstly, that Art. 165 of the Indian Limitation Act applies, because it is common case, says the learned Judge, that the appellant before him, the 4th defendant, for some reason or other was squatting on the land after the sale and its confirmation and was finally made to quit on 18-11-1944, and, secondly, that Order 47 Rule 1, Civil Procedure Code gave the petitioner a period of 90 days from the date of the sale within which period she came to Court with her application.

(15) Article 165 of the Indian Lim. Act was never suggested in the Court of first instance or in the Court of first appeal as at all applicable to the case. Nor indeed could it be, as authority is well settled to the effect that that article does not apply to an application by a judgment-debtor but applies only to an application by a person other than the judgment-debtor as under O. 21, R. 100, Civil Procedure Code. (Vide Chitaley on the Indian Limitation Act, 2nd Edn. Vol. 3, pages 2551 & 2552). The learned Judge in this Court had thus no warrant whatsoever for inventing this ground of exemption from the bar of limitation given effect to by the Courts below. Nor is it easy to appreciate the relevancy of Order 47, R. 1, Civil Procedure Code to the case on hand even by the farthest stretch of sheer fancy. There is no decree or order to be reviewed or not in the present case, only a judicial sale to be cancelled or not after confirmation. Learned counsel for the respondent did not in these circumstances seek to support the grounds given by the learned Judge for holding the application to be in time.

(16) Counsel's contention is that the application is in time, because it is really one under S. 47, Civil Procedure Code and not under O. 21, Rule 90, Civil Procedure Code, & because the irregularities alleged are in the nature of illegalities attracting Art. 181 of the Indian Limitation Act. Violation of O. 21, R. 72, sub-rule (1), Civil Procedure Code has not been relied on by learned counsel, and the question therefore is whether the sale stands nullified by reason of the remaining two irregularities.

(17) Absence of notice of revival of the earlier Execution petition by the later has been much stressed, not indeed with reference to any express or implied provision of the Civil P. C. which requires such notice—for there is none such to which our attention has been called—but with reference to what Panchapakesa Aiyar J. describes as rules of natural justice, equity and good conscience. It is said that the learned Judge has rightly held, to use his language, that although in asking for further steps without notice of such revival, the decree-holder did not intend to perpetrate any fraud in the strict sense of the term, fraud in equity would be the natural result of his application for such steps being granted without such notice. I cannot agree to this kind of distinction made by the learned Judge between fraud in equity and fraud in the strict sense of the term. In matters dealt with by the Code there is, in my opinion, little room left to Courts for resort to any rule, of natural justice, equity and good conscience, or to any doctrine of fraud in equity as supposed by the learned Judge even as there is no room for resort to inherent powers. Assuming that there is any such room left, the question still remains whether the failure of the Court to issue the notice of revival to the 4th defendant is in the nature of a fundamental jurisdiction defect by itself nullifying the sale altogether or a mere procedural irregularity unavailing for cancellation of

the sale except on proof of prejudice. The latter execution petition is 'ex concessis' only a continuation of the former and not in any sense an independent execution petition; nor does notice of the kind in question stand on the same footing as for instance notice under Order 21, rule 22, Civil Procedure Code, which is the 'sine qua non' for the jurisdiction of the execution Court.

(18) As the learned Judge observes quoting from 'CHATTERJEE v. DURGADUTT', 23 Cal L J 436 at p 439,

"It is obviously just that a man should have notice of any legal proceedings that may be taken against him and a full and fair opportunity to make his defence. As has been well said, the law never acts by stealth; it condemns no one unheard, so that a personal judgment rendered against the defendant without notice to him or an appearance by him is vitiated by the same infirmity as a judgment without jurisdiction."

Then again quoting from 'RAJENDRALAL v. ATAL BIHARI', 44 Cal 454, at page 457, the learned Judge also observes:

"It is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made, unless he has been afforded an opportunity to be heard."

So too, as observed in 'SWAMINATHAN v. LAKSHMAN', AIR (17) 1930 Mad 490 another decision relied on by the learned Judge "the very word 'order' by necessary implication means in law that the party affected has had reasonable notice of it." I have carefully considered these passages which at first sight seem to lend some support to the conclusion reached by the learned Judge. They, however, do not in my judgment, govern the proceedings in E.P. No. 277 of 1944 which were only a resumption of the proceedings in E.P. No. 201 of 1942 or the order "proclaim and sell' which the Court made on E.P. No. 277 of 1944 without fresh notice to the 4th defendant and by way of continuation of the proceedings in E.P. No. 201 of 1942 from the stage at which these latter had to the knowledge of both parties been left by the order of stay under the Madras Agriculturists' Relief Act. The order "proclaim and sell"" in my opinion, is not therefore, vitiated by any radical illegality but at worst only for an irregularity which cannot sustain an application for cancellation of the sale, unless substantial injury is proved to have been occasioned thereby.

(19) Then as regards the failure of the Court to settle a fresh sale proclamation on E.P. No. 277 of 1944, the question whether there is any breach of rule on that account turns on the proper construction of Order 21, rules 66 to 69, Civil Procedure Code and in particular of rule 69, sub-rule (2). Emphasis is laid by Mr. Sivaramakrishna Aiyar on Rule 66, sub-r. (1) as meaning that every time any property is ordered to be sold the provisions of the rest of that rule and of the following rules down to and inclusive of rule 69 operate. No matter, says learned counsel, whether the later Execution petition in which the order is made is or is not a mere continuation of the earlier execution petition in which a proclamation of the intended sale had been drawn up under sub-rule (2) of rule 66 after notice to the decree-holder and the judgment-debtor. The argument, to my mind, overlooks the locus as well as the purpose of rule 66, sub-rule (1) which has obvious reference to a stage at which no proclamation has yet been drawn up as contemplated by sub-rule (2). The relevant provision of law to scan and canvass in this connection is that of rule 69, sub-rule (2) which requires so far as a case like the present is concerned that "a fresh proclamation under rule 67 shall be made". What then is the meaning of this requirement? Does it include the 'drawing up' of a proclamation afresh under sub-rule (2) of Rule 66 or does it refer only to 'the making and publishing' afresh of the old proclamation in the manner prescribed by rule 54, sub-rule (2) which is the mode enjoined by rule 67? I have after careful consideration arrived at the clear and distinct conclusion that the latter is the proper view to take of the matter. Some plausibility is no doubt afforded to the contention of counsel for the respondent by two considerations—(a) that in sub-rule (2) of rule 69 it is said that a fresh proclamation under rule 67 shall be made—not that the old proclamation shall be published afresh under R. 67; (b) that R. 67 provides for the making & publishing and not merely for the publishing 'simpliciter' of the proclamation.

As against these considerations it must be borne in mind that the making of the proclamation as referred to in rule 69, sub-rule (2) can only refer to the mode of making the proclamation as referred to in the side note to R. 67 which is by publishing it in the manner prescribed by R. 54, sub-rule (2) as enjoined by sub-r. (1) of R. 67. "Made and published" in sub-r. (1) of Rule 67 of which "made" in sub-rule (2) of rule 69 is substantially the equivalent must be read as meaning "made by being published". "Made" in relation to proclamation as it occurs with or without "published" in juxtaposition in rules 67 and 69 must not be confused with "drawn up" in sub-rule (2) of rule 66. The "drawing up" has reference to the settlement of details of the proclamation in writing. The "making" of the proclamation on the other hand, has reference to its publication which follows upon the "drawing up". It may be that the use of the two words "made" and "published" in one compound phrase "made and published" in sub-rule (1) of rule 67 suggests at first thought that the two words have two different meanings—one having reference to the drawing up and the other having reference to the publication of the proclamation. A closer canvass of the component rules of the relevant part of the enactment in their mutual context as well as in their several contents leaves no doubt in my mind but that the requirement of a fresh proclamation under rule 67 which is referred to in rule 69, sub-rule (2) has reference only to its publication in the manner prescribed by rule 54, sub-rule (2). In this view of the matter there was no obligation on the executing Court in E.P. No. 277 of 1944 to draw up a proclamation afresh after notice again to the judgment-debtors and the decree-holder and the sale held on the basis of th old proclamation published afresh in the mar ner prescribed by rule 54, sub-rule (2) mus be regarded as perfectly valid and in order.

(20) Even assuming otherwise, if, as judicially held, absence of notice under rule 66, sub-rule (2) is only an irregularity of which no grievance can be legitimately made on an application for cancellation of the sale unless prejudice

is proved, there is no reason why the legal position should differ where the sale is held on the basis of the old proclamation without fresh notice to the judgment-debtor on the later execution petition by which the apparently closed earlier execution petition was sought to be continued after the termination of stay under the Madras Agriculturists' Relief Act.

(21) As regards the amendment of the language of the rules suggested by my learned brother in his judgment in order to make clear still what we consider to be their true meaning and purpose, I am inclined to think that substitution of the words "by being" for "and" in sub-rule (1) of rule 67 and substitution of the words "proclamation shall be made afresh under rule 67" for "a fresh proclamation under rule 67 shall be made" in sub-rule (2) of rule 69 will meet the requirements of the situation.

(22) So far with reference to the first of the grounds of Panchapakesa Aiyar J. for reversing the Court below on the merits as mentioned 'supra' in the opening paragraph of this judgment. As regards the second of the grounds so mentioned, it seems to me that the learned Judge had no jurisdiction to go behind the finding of the lower appellate Court against substantial injury and to substitute for it his own 'a priori' notion of suspicion, as if it was axiomatic good sense, conclusive of each and every case. The question is one of fact which called for judicial determination not on the basis of suspicion however shrewd but on the basis of the legal testimony actually on record, before the Court and so had it been dealt with by the lower appellate Court which in the result concurred in the conclusion reached by the Court of first instance. S. 100, C. P. C. precluded the learned Judge here from reconsidering the question in his own independent way, and his finding therefore falls to be rejected.

(23) For the reasons indicated in the foregoing I agree that this Letters Patent Appeal should be allowed with costs of the appellant throughout.

(24) SATYANARAYANA RAO AND RAGHAVA RAO, JJ.: The connected L. P. Appeal No. 106 of 1949 is dismissed. No costs.

C.R.K./R.G.D. *Orders accordingly.*

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VISWANATHA SASTRI, J.

Samavedam Sarangapani Ayyangar, Appellant v. Kandala Venkata Narasimhacharyulu and another, Respondents.

Appeal No. 302 of 1947, D/- 27-11-1950.

(a) Civil P. C. (1908), S. 11 — Scope — Section, if exhaustive.

Section 11 is not an exhaustive statement of the doctrine of 'res judicata' and the principle has a wider application than is warranted by the strict language of the section. To the extent to which S. 11 goes and in respect of cases falling within the enacted words, the conditions and limitations imposed by the section cannot be overridden or ignored by an appeal to general principles. (Para 3)

Anno: C. P. C., S. 11 N. 3 Pts. 1, 2 and 6.

(b) Civil P. C. (1908), S. 11 — Competent Court — Competency, how to be judged.

The decision of a Court in order to be conclusive in another Court must have been the decision of a Court which would have had jurisdiction to try the subsequent suit in which the question arises. The section requires that the Court which decided the former suit must be a Court of concurrent jurisdiction as regards pecuniary value. The competency of the Court to try the subsequent suit has to be judged with reference to the time when the earlier suit was brought, that is, as if the later suit has been instituted at the time when the earlier suit was filed. If during the interval between the institution of the two suits there has been a rise in the market value of the property and in consequence the later suit had to be filed in a Court of higher pecuniary jurisdiction, the bar of 'res judicata' would apply to the subsequent suit, if on the date of the institution of the earlier suit, the later suit, having regard to the value of its subject-matter on that date, could have been filed in the Court in which the earlier suit was filed. The augmentation of a claim by the subsequent accrual of interest of mesne profits is not similar to a rise in the value of one and the same property and a judgment in a previous suit will not, on a plain reading of S. 11 operate as 'res judicata' in a subsequent suit in respect of the same subject-matter if the value of the relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the Court which decided the previous suit. Case law ref. (Para 4)

Anno: C. P. C., S. 11 N. 73 Pt. 5 N. 78 Pts. 1 to 3 N. 97 Pts. 2 and 4.

(c) Civil P. C. (1908), S. 11 — 'Res judicata' and estoppel — Evidence Act (1872), S. 115.

Estoppel results from the acts and conduct of the parties and therefore the decision of a Court for which a party is not responsible and which might be erroneous, cannot operate as an estoppel. Estoppel by record is what is provided for, in S. 11. It is not within the province of a Court to introduce another kind of estoppel by judgment not covered by S. 11 or the general principles of 'res judicata'. Observation of Sadasiva Iyer, J. in AIR (2) 1915 Mad 1215, not approved; AIR (8) 1921 Mad 248 (FB), Ref. to. (Para 5)

Anno: C. P. C., S. 11 N. 4 Evidence Act, S. 115 N. 1.

(d) Civil P. C. (1908), S. 11 — Matter directly in issue — Question of title.

The question in the previous suit was whether the plaintiff was the then presumptive reversioner and the question in the later suit was whether the plaintiff was the next heir of the last male owner.

Held that the present claim of the plaintiff was based on his own individual right as heir which he could not possibly have included in the earlier suit filed as a presumptive reversioner. The prior decision could not, therefore, be relied upon as 'res judicata' on the question of the plaintiff's title to the property as heir at law. Case law ref. to. (Para 7)

Anno: C. P. C., S. 11 N. 7 Pt. 4.

(e) Specific Relief Act (1877), S. 43 — Section, if to be read subject to S. 11, Civil P. C. — Civil P. C. (1908), S. 11.

Section 43 has not the effect of abrogating the limitation imposed by S. 11, C. P. C., as regards the competency of the Court which passed the previous decree for a declaration. Having regard to the fact that the existence of jurisdiction in a Court to try a suit must be

predicated before its decree can be held to be binding on the parties, S. 43 must be read subject to S. 11, C. P. C. and no exception with regard to declaratory suits and decrees can now be read into S. 11, C. P. C. AIR (23) 1936 Mad 951 and AIR (33) 1946 Nag 277, Not approved. (Para 8)

Anno: C. P. C., S. 11 N. 115 Pt. 3. Spe. Rel. Act, S. 43 N. 1 Pt. 1.

N. Rajeswara Rao, for Appellant; B. V. Ramanarasu, T. V. R. Thathachari and B. S. Ramachandra Rao, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('83) 9 Cal 439: (9 Ind App 197 PC) (Pr 4)
('84) 6 All 269: (11 Ind App 37 PC) (Pr 3)
('85) 11 Cal 301: (12 Ind App 23 PC) (Pr 4)
('02) 29 Cal 707: (29 Ind App 196 PC) (Pr 4)
('16) 39 Mad 634: (AIR (3) 1916 PC 117) (Pr 7)
('21) 48 Cal 499: (AIR (8) 1921 PC 11) (Pr 3)
('22) 45 Mad 320: (AIR (9) 1922 PC 80) (Pr 3)
('25) 47 All 883: (AIR (12) 1925 PC 272) (Pr 7)
('30) 57 Ind App 24: (AIR (17) 1930 PC 22) (Pr 3)
('31) 53 All 103:58 Ind App 158: (AIR (18) 1931 PC 114) (Pr 3)
('32) 10 Rang 322: 59 Ind App 247: (AIR (19) 1932 PC 161) (Pr 3)
('39) ILR (1939) All 460: (AIR (26) 1939 PC 133) (Pr 3)
('46) Jagdish Narain v. Ahmedkhan, (AIR (33) 1946 PC 59) (Pr 8)
('49) 1949-2 Mad L J 493: (AIR (36) 1949 PC 302) (Pr 3)
('40) ILR (1940) All 691: (AIR (28) 1941 All 18) (Pr 4)
('67) 8 W R 175 (FB) (Pr 4)
('31) 35 Cal W N 1203: (AIR (19) 1932 Cal 271) (Pr 4)
('37) ILR (1937) Lah 100: (AIR (23) 1936 Lah 998) (Pr 4)
('46) ILR (1946) Lah 767: (AIR (33) 1946 Lah 1 FB) (Pr 7)
('85) 8 Mad 83 (Pr 5)
('92) 15 Mad 494: (2 Mad L J 262) (Pr 5)
('06) 29 Mad 65 (Pr 4)
('13) 25 Mad L J 379: (21 Ind Cas 15) (Pr 5)
('15) 28 Mad L J 184: (AIR (2) 1915 Mad 1215) (Pr 5)
('15) 38 Mad 203: (AIR (3) 1916 Mad 364) (Pr 7)
('18) 41 Mad 659: (AIR (6) 1919 Mad 911 FB) (Pr 7)
('21) 44 Mad 778: (AIR (8) 1921 Mad 248 FB) (Pr 5)
('27) AIR (14) 1927 Mad 273: (100 Ind Cas 40) (Pr 5)
('27) 50 Mad 646: (AIR (14) 1927 Mad 563) (Pr 6)
('28) 56 Mad L J 52: (AIR (15) 1928 Mad 840) (Pr 4)
('36) 71 Mad L J 619: (AIR (23) 1936 Mad 951) (Prs 4, 8)
('37) ILR (1937) Mad 948: (AIR (24) 1937 Mad 699 FB) (Pr 7)
('46) ILR (1946) Mad 566: AIR (33) 1946 Mad 509 (Pr 3)
('50) 1950-2 Mad L J 501: (AIR (38) 1951 Mad 285) (Pr 7)
('46) ILR (1946) Nag 159: (AIR (33) 1946 Nag 277) (Pr 8)
('43) 18 Luck 683: (AIR (30) 1943 Oudh 338 FB) (Pr 8)
('29) 8 Pat 153: (AIR (16) 1929 Pat 164) (Pr 7)
2 Sm L C 11th Edn. 731 (Pr 4)

JUDGMENT: The first defendant is the appellant. The plaintiff, claiming to be the nearest reversioner to the estate of one Narasimhacharyulu deceased, sued for possession of 2½ acres of inam lands with mesne profits from the first defendant, an alienee of the said lands from the daughter of Narasimhacharyulu. The last male owner died in 1870 leaving a widow who died in 1920, and a daughter who died in 1942. The daughter executed a deed of settlement of the suit lands in favour of the 1st defendant on 4-3-1937, valuing the lands at Rs. 1000/-. The deed of settlement proceeded on the footing that Narasimhacharyulu had bequeathed the lands absolutely to his daughter under his will and that she, in her turn, was making a settlement of the lands in favour of the 1st defendant. Even during the lifetime of the daughter, the plaintiff claiming to be the presumptive reversioner, filed O. S. No. 84 of 1940 on the file of the Court of the District Munsif of Bezwada for a declaration that the settlement deed executed by the daughter in favour of the 1st defendant was not binding on him and the other reversioners of Narasimhacharyulu beyond the lifetime of the daughter. The suit was valued for purposes of court-fees and jurisdiction in the sum of Rs. 1000/- which was the value of the properties as stated in the deed of settlement. Both the daughter and her alienee, the present 1st defendant, were impleaded as defendants to that suit and they set up the will of Narasimhacharyulu dated 7-4-1869 in and by which the suit lands were bequeathed absolutely to the daughter. They also denied that the plaintiff was a reversioner of Narasimhacharyulu. The suit was tried and decreed in favour of the plaintiff. An appeal preferred against the decree by the 1st defendant was dismissed for default. The plaintiff brought the suit out of which this appeal has arisen in the Court of the Subordinate Judge of Tenali for recovery of possession of the lands after the death of the daughter relying upon the previous decision in O. S. No. 84 of 1940 as conclusive of his title to the properties. In the plaint the lands were valued at Rs. 4537-8-0 on the basis of 15 times their net annual rental. A sum of Rs. 952-1-0 was claimed as mesne profits. The total value of the suit being Rs. 5489-9-0, it was filed in the Court of the Subordinate Judge of Tenali. The 1st defendant denied the title of the plaintiff as a reversioner of Narasimhacharyulu and asserted that the will of Narasimhacharyulu and the settlement executed by his daughter were true and valid. He also pleaded that the decision in O. S. No. 84 of 1940 was vitiated by a fraud practised on the Court and by false testimony adduced by the plaintiff as regards his relationship to Narasimhacharyulu. Even otherwise, it was stated that the decision could not operate as 'res judicata'.

(2) The following were among the issues framed by the Court below:

"1. Whether the plaintiff is not the nearest reversioner to the late Narasimhacharyulu?

2 Whether the decree of the District Munsif's Court in O. S. No. 84 of 1940 is binding

on the 1st defendant and operates as 'res judicata' in this suit?

3. Whether the said decree is void for the reasons stated in paragraphs 5 and 7 of the first defendant's written statement?

4 Whether the will dated 7-4-1869 and the gift deed dated 4-3-1937 relied upon by the first defendant are true and valid?"

Beyond exhibiting the plaint, the judgment and a pedigree filed in O. S. No. 84 of 1940 the Court below did not take any other evidence. Relying on certain decisions of the Judical Committee and this Court which will be noticed presently, it held that the defence was barred by 'res judicata' and by S. 43 of the Specific Relief Act, and decreed the suit. Mr. Dikshitulu for the 1st defendant, here appellant, maintains that neither S. 11, C. P. C. nor any general principles of 'res judicata', nor S. 43 of the Specific Relief Act barred the defence and that the decision of the learned Subordinate Judge to the contrary is erroneous. Mr. B. V. Ramanarasu for the respondent contends that on general principles of 'res judicata', if not on the language of S. 11, Civil Procedure Code, the trial of the present suit was barred and that in any case the parties were bound by the decision in O. S. No. 84 of 1940 by virtue of the provisions of S. 43 of the Specific Relief Act.

(3) Learned counsel have referred me to a large number of decisions, but I shall not deal with them individually, for in my opinion, the principles are well settled by the decisions of the Judicial Committee and this Court. S. 11 Civil P. C. is not an exhaustive statement of the doctrine of 'res judicata' and the principle has a wider application than is warranted by the strict language of the section. 'MUNNI BIBI v. TRILOKINATH', 53 All 103:58 Ind App 158; 'MAUNG SEIN DONE v. MA PAN NYUN', 10 Rang 322:59 Ind App 247. The principle of S. 11 applies to decisions rendered in the exercise of a special jurisdiction conferred by statutes and in proceedings other than a suit as for instance, probate proceedings 'KALIPADA DE v. DWIJAPADA DAS', 57 Ind App 24: land acquisition proceedings 'T. B. RAMCHANDRA RAO v. RAMACHANDRA RAO', 45 Mad 320 and 'MT BHAGWATI v. MT. RAMKALI', ILR (1939) All 460 and proceedings under the Madras Hindu Religious Endowments Act 'BALAKOTAYYA v. NAGAYYA', I L R (1946) Mad 566:AIR (33) 1946 Mad 509. The principle of 'res judicata' has also been invoked with reference to decisions given in the course of execution proceedings 'RAM KIRPAL v. RUP KAURI', 6 All 269; SHIVRAJ GOPALJI v. AYISSA BI', (1949)-2-Mad L J 493, or the previous stages of the same suit ('HOOK v. ADMINISTRATOR GENERAL OF BENGAL', 48 Cal 499).

(4) Though S. 11 does not codify the entire law of 'res judicata' it certainly covers a large number of cases calling for the application of the principle. To the extent to which S. 11 goes and in respect of cases falling within the enacted words, the conditions and limitations imposed by the section cannot be overridden or ignored by an appeal to general principles. On any other view S. 11 might as well not have been enacted at all. Dealing with the language of S. 13 of the Code of 1882 (S. 11 of the Code of 1908) the Judicial Committee said:

"A decree in a previous suit cannot be pleaded as 'res judicata' in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. In this repect the enactment goes beyond S. 13 of the previous Act X (10) of 1877, and also as appears to their Lordships beyond the law laid down in 'DUCHESS OF KINGSTON'S CASE', 2 Sm L C 11th Edn 731. They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

In 'GOKUL MANDAR v. PUDUMANAND SINGH', 29 Cal 707 at p 715; 'MISSER RAGHABARDIAL v. SHEO BAKSH SINGH', 9 Cal 439 the Judicial Committee had held that the decision of a Court in order to be conclusive in another Court must have been the decision of a Court which would have had jurisdiction to try the subsequent suit in which the question arises. 'In 'RUN BAHADUR SINGH v. Mt. LUCHOO KOER', 11 Cal 301 the Judicial Committee cited with approval the dictum of Sir Barnes Peacock, in 'MT. EDUN v. MT. BECHUN', 8 W R 175 which was as follows:

"In order to make the decision of one Court final and conclusive in another Court it must be the decision of a Court which would have jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive."

In 'VENKATASUBBA RAO v. VIGNESWARADU', 56 Mad L J 52 a Bench of this Court refused to extend the principle of S. 11 Civil P. C. in a manner implicitly forbidden by its wording so as to treat the decision of an inferior tribunal as binding on a superior tribunal. S. 11 Civil P. C. requires that the Court which decided the former suit must be a Court of concurrent jurisdiction as regards pecuniary value. 'MISSER RAGHOBAR DIAL v. SHEO BAKSH SINGH', 9 Cal 439; 'RAJARAM BAHADUR SINGH v. LACHOO KUER', 11 Cal 301 (P.C.). It is silent as to the point of time with reference to which the competency of the Court that decided the earlier suit to try the subsequent suit is to be determined. The preponderance of opinion in this and the other High Courts is that the competency of the Court to try the subsequent suit has to be judged with reference to the time when the earlier suit was brought, that is, as if the later suit has been instituted at the time when the earlier suit was filed. If during the interval between the institution of the two suits there has been a rise in the market value of the property and in consequence the later suit had to be filed in a Court of higher pecuniary jurisdiction, the bar of 'res judicata' would apply to the subsequent suit, if on the date of the institution of the earlier suit, the later suit, having regard to the value of its subject matter on that date, could have been filed in the Court in which the earlier suit was filed. 'NASIB KHAN v. MT. KUTUBUNNISSA', I L R (1940) All 691; 'SULTAN ASAD JAN v. SECRETARY OF STATE', I L R (1937) Lah 100; SUBBAYYA v. NAGAYYA', 71 Mad L J 619; 'LAL MOHAN v. RAM LAKHMI DASYA', 35 Cal W N 1203. The augmentation of a claim by the subsequent accrual of interest or mesne profits is not similar to a rise in the value of one and the same property and a judgment in a previous suit

will not, on a plain reading of S. 11 Civil P. C. operate as 'res judicata' in a subsequent suit in respect of the same subject matter if the value of the relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the Court which decided the previous suit. 'GIRIYA CHETTIAR v. SABAPATHI MUDALIAR', 29 Mad 65.

(5) The word "suit" in the expression "such subsequent suit or the suit in which such issue has been subsequently raised" occurring in S. 11, Civil P. C., has been construed as meaning part of a suit. This Court has held that when a matter has been decided by a Court of competent jurisdiction, the decision should be regarded as conclusive between the parties when the question arises in a different suit, though that suit as a whole could not be tried by the Court which decided the earlier suit. The effect of the decisions relied on by Mr. Rama Narasu in 'PATHUMA v. SALIMAMMA', 8 Mad 83; 'KUNJIAMMA v. RAMAN MENON', 15 Mad 494; 'RANGANATHAN CHETTI v. LAKSHMIAMMAL', 25 Mad L J 379; 'RAMAN v. MANAKKAL', 28 Mad L J 184; 'PATRACHARIAR v. ALAMELUMANGALAMMAL', AIR (14) 1927 Mad 273 is that if a decision has been given by a competent Court in a previous suit regarding part of the claim in the subsequent suit, and between the same parties, then so much of the claim which is common to the two suits should be excluded from the subsequent suit as barred by the principle of 'res judicata' even though the subsequent suit as a whole could not be tried by the Court which decided the earlier suit. There has been a considerable amount of refinment of the language of S. 11, Civil P. C. and however much one would wish to write on a clean slate, it is not now feasible. I am unable, with great respect, to agree with the observation of Sadasiva Iyer J. in the case in 'RAMAN v. MANAKKAL', 28 Mad L J 184 that even if a decision is not 'res judicata', it nevertheless operates as an estoppel. Estoppel results from the acts and conduct of the parties, and I fail to see how the decision of a Court for which a party is not responsible and which might be erroneous, can operate as an estoppel. If it is a judgment 'in rem' it is binding on all persons whether parties or not. If it is any other kind of adjudiction, it binds the parties if it falls within S. 11. Civil P. C. or the general principle of 'res judicata' recognised by the decisions. Estoppel by record is what is provided for, in S. 11, Civil P. C. It is not within the province of a Court to introduce another kind of estoppel by judgment not covered by S. 11 or the general principles of 'res judicata'. See 'THE SECRETARY OF STATE v. SYED AHMED BADSHA BAHADUR', 44 Mad 778 (F. B.).

(6) The jurisdiction of the District Munsif of Bezwada who tried O. S. No. 84 of 1940, extended upto Rs. 3000. In the case of declaratory suits the market value of the land determines the jurisdiction of the Court. 'VEEREMMA v. BUTCHAYYA', 50 Mad 646. Could the market value of the land now in suit have exceeded Rs. 3000/- on the date of when O. S. No. 84 of 1940 was filed? Its present value on the basis of 15 times the net paddy rent of the land is Rs 4.537-8-0. But the current price of paddy is far higher than what it was in 1940 and this figure cannot be taken as the criterion. The prior suit was valued at Rs. 1000/- but that value, though somewhat low, does not matter because even if the value was anything upto Rs. 3,000/- the Munsif would have had jurisdiction to try the present suit. The Court below dismissed this part of the case with a quotation, taken out of its context, from a decision of the Judicial Committee that "the importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute". I am however unable to accept the appellant's contention that the District Munsif would not have had pecuniary jurisdiction to try the present suit. The 1st defendant raised no objection to the jurisdiction of the District Munsif who tried O. S. No. 84 of 1940 evidently because the value of the land did not then exceed Rs. 3,000. The settlement deed, under which he claimed title to the land, valued it at Rs. 1000. No material has been placed before me to show that the value of the land in 1940 must have been more than Rs. 3,000. The decision in O. S. No. 84 of 1940 would therefore operate as 'res judicata'. There is no substance in the contention that the decree was vitiated by a fraud practised on the Court by the adduction of false evidence of relationship. The fact that the judgment was based on evidence now shown to be incorrect or untrue, assuming but not deciding that it is so, would not render the decree a nullity. 'CHINNAYYA v. RAMAMMA', 38 Mad 203. The further question arises as to whether the trial of all the issues in the present suit or only of some of them is barred by reason of the prior decision. This aspect of the case was not touched upon by the learned counsel. The decision in O. S. No. 84 of 1940 declared that the settlement deed dated 4-3-1937 executed by the daughter of the last male owner in favour of the first defendant was not binding on the then plaintiff and the other reversioners and was inoperative beyond the life time of the daughter. It also negatived the plea of the defendant that the daughter took an absolute estate in the land under the will of her father relying on which she purported to execute the settlement. To this extent the prior decision is 'res judicata', and issue (4) must be decided against he defendant. But the decision in the previous suit is not, in my opinion, 'res judicata' so as to bar the trial of issue (1) raising the question whether the plaintiff is now the next heir entitled to succeed to the state of the last male owner.

(7) It is true that in the prior suit there was an issue as to whether the plaintiff was the nearest reversioner entitled to maintain the suit for a declaration of the invalidity of the settlement deed as against the reversioners. This issue was found in favour of the plaintiff, negativing the claim of a rival reversioner who claimed priority to the plaintiff. But the question then was whether the plaintiff was the then presumptive reversioner and the question now is whether the plaintiff is now the next heir of the last male owner. A decision on the former question cannot conclude the latter. The cause of action for the present suit arose only when the succession opened by the death of the limited owner, and that event took place some years after the decree in the prior suit. It is elementary that during the lifetime of the limited owner the reversionery right is a 'spes successionis' or a bare possibility common to all the reversioners, it being impossible to predicate who will be the nearest reversioner at the time of her death. During

the lifetime of the limited owner a reversioner has no right to sue for a declaration that he is the next reversioner. As a presumptive reversioner he has a right to sue only as representing the body of reversioners for a declaration that an alienation by the limited owner is not binding on the reversion. He is not vindicating his individual right in the action. It may happen, as in this case, that his status as a reversioner is disputed and put in issue, but even so, no declaration can be made that he is the nearest reversioner. As pointed out by the Judicial Committee in 'JANKI AMMAL v. NARAYANASWAMI', 39 Mad 634, such a declaration would be premature during the lifetime of the limited owner and might be futile. The reversioner's suit is brought in a representative capacity to protect the estate against a common injury to all the reversioners, presumptive and contingent alike, and to secure a relief for their common benefit. It is no doubt the general practice of Courts to insist on such suits being brought by the presumptive reversioner. But the rule is subject to exceptions. 'LAKSHMIAMMAL v. ANANTHARAMA', ILR (1937) Mad 948; 'MELARAM v. MT. BHAGI' ILR (1946) Lah 767 and 'MATAPRASAD v. NAGESHAR SAHAI', 47 All 883. The Judicial Committee observed in the case last cited that "the right to sue to set aside that common danger is given for obvious reasons of policy or convenience" to the presumptive reversioner. The rule is rather one of prudence and policy regulating the exercise of judicial discretion than one of jurisdiction. 'VARAMMA v. GOPALADASAYYA', 41 Mad 659; BALMAKUND LAL v. MT. SOHANO KOERI', 8 Pat 153 at p. 159. Any decision, express or implied, that the plaintiff was the presumptive reversioner on the date of the prior suit is liable to be rendered futile and of no effect by the emergence of a nearer heir, either natural or statutory, before the succession opens. The decree in the prior suit has not been filed in the present case, but there is no reason to suppose that the decree contained any futile declaration that the plaintiff was the nearest reversioner. Such a declaration, even if one had been made, is not conclusive of the plaintiff's title as next heir after the death of the limited owner. I may, however, observe that the prayer in the plaint was merely for a declaration that the settlement deed was not binding on the plaintiff, the nearest reversioner, as well as other reversioners. The title now put forward by the plaintiff is different from and independent of the title put forward in the earlier suit, and the bar of 'res judicata' would not apply. The present claim of the plaintiff is based on his own individual right as heir which he could not possibly have included in the earlier suit filed as a presumptive reversioner. The prior decision cannot, therefore, be relied upon as 'res judicata' on the question of the plaintiff's title to the property as heir at law. See 'MADHAVAN WARIAR v. CHATHU NAMBIAR', 1950-2- Mad L J 501.

(8) Another contention based on S. 43 of the Specific Relief Act as interpreted by a decision of this Court in 'SUBBAYYA v. NAGAYYA.' 71 Mad L J 619 may shortly be dealt with. This Court held that though a prior declaratory decree may not operate as 'res judicate' under S. 11, C. P. C., it may still operate as a bar to the trial of a subsequent suit raising the same question between the same parties under S. 43 of the Specific Relief Act, even though the subsequent suit was beyond the pecuniary jurisdiction of the Court which tried the former suit. This decision has been followed by the Nagpur High Court in 'CHATTAR SINGH v. ROSHAN SINGH,' I L R (1946) Nag 159. With the utmost deference, I venture to think that S. 43 of the Specific Relief Act has not the effect of abrogating the limitation imposed by S. 11, C. P. C. as regards the competency of the Court which passed the previous decree for a declaration. The Specific Relief Act was passed in 1877 at a time when the rule of 'res judicata' was found stated in a rudimentary and incomplete from in S. 2 C. P. C. of 1859, which ran thus:

> "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

In cases decided under this action it was held that, where the cause of action for the subsequent suit was different from that of the former suit, the later suit was not barred even if the issue decided was the same. The object of S. 42 of the Specific Relief Act empowering Courts to grant declaratory decrees was to enable disputes as to the legal character of a person or his title to property to be decided before evidence bearing on the question should be lost, even though the cause of action for a suit for possession or other relief may not have risen. Section 43 was a consequential provision enacted so as to make a declaratory decree binding of the parties in a subsequent suit even though the cause of action for the later suit may not be the same as that of the previous suit. It was designed to widen the scope of S. 2, C. P. C. of 1859 to a limited extent. The language of S. 43 of Specific Relief Act was designedly cast in a restrictive form, namely, that a declaration "is binding only on the parties to the suit or persons claiming through them" in order to remove a possible misapprehension that declaratory decrees would have operation in the nature judgments 'in rem' so as to bind even third parties. Section 13, C. P. C. of 1882 and S. 11 of the Code of 1908 substituted the words "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" for the words "The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard, etc" found in the C. P. C. of 1859. The substance of S. 43 of the Specific Relief Act is now incorporated in S. 11, C. P. Code embodying the rule of 'res judicata' subject to certain conditions, one of which is the competency of the Court which tried the earlier suit to try the later suit. Having regard to the fact that the existence of jurisdiction in a Court to try a suit must be predicated before its decree can be held to be binding on the parties, S. 43 of the Specific Relief Act must, in my opinion, be read subject to S. 11, C. P. Code, and no exception with regard to declaratory suits and decrees can now be read into S. 11, C. P. C. Some support for this view is found in the decision in 'MAQSOOD ALI v. HUNTER,' 18 Luck 683. It is, however, unnecessary to pursue this matter further in view of the decree in this case, which must have been one for a

declaration that the alienation by the limited owner was not binding on the plaintiff and the other reversioners of the last male owner. There could not have been an adjudication or declaration that the plaintiff was the presumptive reversioner or that he would be entitled to succeed to the property on the death of the limited owner.

(9) The plaintiff suing in ejectment must prove his title and could only succeed on the strength of his own title. The plaintiff is not relieved of this burden by relying on the decision in the previous suit as concluding the question in his favour. The defendant in the written statement denied the plaintiff's title, and under this plea he could avail himself of any defect which such title discloses. 'JAGADIS NARAIN v. NAWAB SYED AHMED KHAN'. The 1st issue therefore be tried and must be recast as follows:

Whether the plaintiff was the next heir of the late Kandala Narasimhacharyulu when the succession opened to his estate on the death of his daughter in 1942?

I reverse the decree of the Court below and remand the suit for the trial of this issue. The costs will abide and follow the result of the suit. The Court fee paid on the memorandum of appeal will be refunded to the appellant.

C. R. K. / V. R. B. *Decree reversed.*

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RAJMANNAR, C. J. AND VENKATARAMA AIYAR, J.

S. V. Sankaralinga Nadar, Appellant v. P. T. S. Ratnaswami Nadar and others, Respondents.

Appeal No. 416 of 1947, D/- 17-8-1951.

(a) Specific Relief Act (1877), S. 22 — Delay and laches — Waiver.

Mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. It is also well settled that waiver is not to be inferred merely from delay in the institution of the suit. AIR (36) 1949 Mad 265, foll. (Para 5)

Anno: Spe. Rel. Act, S. 22 N. 5 Pt. 9.

(b) Specific Relief Act (1877), S. 22 — Contract for sale by defendants — Defendants sending notice in April 1943 expressing their willingness to to execute sale-deed if indemnity bond was executed by plaintiff — In 1946 defendants repudiating contracts as not binding on them — Soon thereafter suit instituted for specific performance — Repudiation held was only in 1946 and as suit was instituted immediately thereafter there was no waiver or abandonment. AIR (1) 1914 Mad 462, applied; 27 All 678, Not foll. (Para 5)

Anno: Spe. Rel. Act, S. 22 N. 5.

(c) Specific Relief Act (1877), S. 22—Abandoned contract — If can be foundation of any relief.

A contract which has been abandoned has no legal existence for any purpose and it cannot be the foundation for any relief whether it be specific performance or damages. The effect of waiving a contract is not merely to bar any particular remedy under that contract but to extinguish it altogether and the right to any relief thereunder. (Para 5)

Anno: Spe. Rel. Act, S. 22 N. 5.

(d) Hindu Law — Joint family — Manager — Contract for sale by — Subsequent rise in price — Contract, if binds minor member — Specific performance — Specific Relief Act (1877), S. 22(1).

Where a contract for sale of family property entered into by the manager of the family was for proper consideration when it was entered into, but at the time of the suit for specific performance the value of the suit had risen, the contract is binding on a minor member of the family as the validity of the contract should be judged as on the date when it was entered into and, as such, specific performance cannot be refused. AIR (4) 1917 Mad 358, foll. 26 Bom 326, Dissent. from. (Paras 7, 8)

Anno: Spe. Rel. Act, S. 22 N. 2.

(e) Hindu Law — Joint family — Manager — Contract by — Association of minor in contract — Effect on manager's rights to sell.

Where in a contract by a manager of joint Hindu family which 'proprio vigore' is binding on all the members of the family, majors and minors, the association of a minor is by way of abundant caution and it is more a matter of form than of substance, the rights of the manager to sell the joint family properties for proper purposes do not, on the one hand, get enhanced nor do they, on the other, suffer diminution. (Para 9)

(f) Specific Relief Act (1877), S. 22(2) — Hardship — Contract for sale — Subsequent rise in price.

The question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and the hardship should be one collateral to the contract and not in relation to a term of the contract such as the quantum of consideration. The subsequent rise in prices will not therefore be a relevant ground for refusing the plaintiff specific performance of contract for sale. AIR (20) 1933 Mad 736, Foll. 16 All 423, Rel. on. Case lau considered. (Paras 10, 11)

Anno: Spe. Rel. Act, S. 22 N. 3.

(g) Specific Relief Act (1877), S. 22 — Contract valid — Refusal of specific performance — Grounds —Who is to establish.

When once it is found that the contract sought to be enforced is a valid one it is for the defendants to establish legal grounds for refusing relief by way of specific performance. (Para 15)

Anno: Spe. Rel. Act, S. 22 N. 1.

A. V. Narayanaswami Iyer, P. R. Narayana Iyer and R. Venkatachalam, for Appellant; R. Gopalaswami Iyengar and R. Sundaralingam, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('94) 16 All 423: (1894 All W N 161) (Pr 10)
('03) 25 All 407: (30 Ind App 165 PC) (Pr 9)
('05) 27 All 678: (2 All L J 405) (Pr 5)
('02) 26 Bom 326: (3 Bom L R 898) (Pr 7)
('06) 33 Cal 633 (Pr 5)
('21) 34 Cal L J 364: (AIR (8) 1921 Cal 179) (Pr 14)

('29) AIR (16) 1929 Lah 679: (117 Ind Cas 225) (Pr 14)
('98) 21 Mad 42 (Pr 5)
('14) 26 Mad L J 518: (AIR (1) 1914 Mad 462) (Pr 5)
('14) 37 Mad 403: (AIR (2) 1915 Mad 305) (Pr 12)
('16) 19 Mad L T 329: (AIR (4) 1917 Mad 358) (Pr 7)
('33) 65 Mad L J 491: (AIR (20) 1933 Mad 736) (Pr 10)
('48) 1948-2 Mad L J 271: (A I R (36) 1949 Mad 265) (Pr 5)
('21) AIR (8) 1921 Sind 197: (15 S L R 21) (Pr 14)
(1873) L R 5 PC 221: (22 W R 492) (Pr 5)

VENKATARAMA AIYAR, J.: The plaintiff is the appellant. He filed O. S. No. 35 of 1946 on the file of the Court of the Subordinate Judge of Mathurai for specific performance of an agreement to sell certain immovable properties by defendants 1 to 3. Defendants 1 and 2 are brothers and members of a joint family and the 1st defendant is its manager. The 3rd defendant is the mother of defendants 1 and 2. The properties which are the subject-matter of the agreement are two godowns in Mathurai. Under Ex. P. 3 dated 30-6-1937 the defendants had executed a usufructuary mortgage over those properties in favour of one Somasundara Nadar for Rs. 8000/- and a period of ten years was fixed for redemption. On 20-3-1943 the defendants entered into agreement with the plaintiff, Ex. P. 4, which is the subject-matter of the present suit. Under Ex. P. 4 they agreed to sell the two godowns to the plaintiff for a consideration of Rs. 13500/-. A sum of Rs. 750/- was paid as advance. Deducting Rs. 8000/- which had to be paid for the redemption of the usufructuary mortgage, Ex. P. 3, the balance of Rs. 4750/- was to be paid at the time of the registration of the document and the transaction completed within one month. The second defendant was a minor at the date of the transaction and the 3rd defendant signed the agreement as his guardian and also on her own behalf. The case of the plaintiff is that about a week later a draft sale-deed was prepared in consultation with the defendants, that it was approved by the 1st defendant and D.W. 3 and that a fair deed was actually engrossed on stampt paper on 16-4-1943. Ex. P. 5 is the fair deed. It is stated by the plaintiff that this document was presented to the defendants for execution but they were putting it off. On 18-4-1943 the plaintiff sent a wire, Ex. P. 6 and on 19-4-1943 this was followed by a notice, Ex. P. 7. Therein the plaintiff called upon the defendants to execute the sale-deed, register it and receive the balance of consideration. The defendants replied by wire Ex. P. 8 and notice, Ex. P. 10, both dated 19-4-1943. They stated that the plaintiff had also agreed to execute a deed of indemnity in respect of any claim that might be made against them personally by the mortgagee under Ex. P. 3 and that they were willing to execute the sale-deed if the plaintiff would execute the indemnity bond. The plaintiff denied that there was any agreement to execute an indemnity bond and by reason of this dispute the sale-deed remained unexecuted. On 21-1-1946 the plaintiff sent a lawyer's notice to the defendants again calling upon them to execute the sale-deed within two days; Ex. P. 11. The defendants replied by Exs. P. 12, P. 12(a) and P. 12(b) and therein it was alleged that the agreement, Ex. P. 4 was not binding on the 2nd defendant because there was no necessity for the sale and that accordingly the transaction was unenforceable in its entirety; that the consideration mentioned in Ex. P. 4 was inadequate and that the defendants had been duped into entering into the transaction by the plaintiff. The plaintiff replied by filling the suit on 20-2-1946 for specific performance of the agreement Ex. P. 4 or in the alternative for damages.

(2) The suit was resisted by the defendants on the following grounds:

1. It was pleaded that the plaintiff had agreed on 20-3-1943 that he would execute an indemnity bond in respect of any possible claims by the mortgagee under Ex. P. 3 and that as the plaintiff denied the agreement he was in default and the contract had been broken by him.

2. The agreement was not binding upon the 2nd defendant who was a minor, because there was no necessity for sale and that, therefore, the agreement could not be enforced even against the 1st defendant.

3. The plaintiff was guilty of inordinate delay and laches and that therefore the Court should in its discretion refuse him relief by way of specific performance.

4 And lastly the damages claimed were excessive. The Subordinate Judge held that there was no agreement on 20-3-1943 that the plaintiff should execute an indemnity bond and that, therefore, the contract was broken not by the plaintiff but by the defendants; that there was no necessity to sell the joint family properties and therefore the agreement was not binding on the 2nd defendant and under S. 15 of the Specific Relief Act the plaintiff was not entitled to relief even as against the 1st defendant; that there was great delay leading to an inference that the plaintiff had waived or abandoned his rights under Ex. P. 4 and that as the value of the house property had vastly increased by the date of suit it would work great hardship on the defendants if specific performance were to be decreed and accordingly relief by way of specific performance was refused. The Subordinate Judge proceeded to deal with the claim for damages and assessed the same at Rs. 100/- and passed a decree against the 1st defendant for payment of Rs. 952-8-0 made up of advance of Rs. 750/-, stamp charges and the damages awarded. The plaintiff was also directed to pay costs of the 2nd defendant. Against this decree the plaintiff has preferred this appeal.

(3) The first question that arises for determination in this appeal is as to whether the agreement, Ex. P. 4, is binding on the 2nd defendant. As he was a minor on that date, it will be binding only if there was necessity for the sale.

(After discussing the evidence in the case his Lordship proceeded):

* * * *

(4) We are accordingly of opinion that there was necessity for the sale of the joint family properties and that the agreement, Ex. P. 4 is valid and binding on the 2nd defendant and enforceable against all the defendants.

(5) We shall now consider the question as to whether the plaintiff is disentitled to relief on the ground of laches and delay. It is not pleaded in the written statement that the plaintiff did anything to induce a belief in the de-

fendants that the contract had been abandoned or would not be enforced and that the defendants changed their position by reason of such belief. No third parties have acquired any rights in the property. The defence 'simpliciter' is that the plaintiff is not entitled to relief by reason of delay in the institution of the suit. A number of authorities has been cited before us bearing on this question, but as the position is well settled we do not consider it necessary to deal with them at any great length. In a recent decision of this Court in 'ARJUN MUDALIAR v. LAKSHMI AMMAL', 1948-2 Mad L J 271, to which one of us was a party, the result is thus stated:

> "It is now well established that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant."

Reference is then made to the well known observations of Sir Barnes Peacock in 'LINDSAY PETROLEUM Co. v. HURD', (1873) L R 5 PC 221:

> "Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to waiving of it or where by his conduct and neglect he has though perhaps not waiving that remedy yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

As already mentioned there is no plea that the conduct of the plaintiff has in any way brought about a change in the situation of the defendants. The only question, therefore, that arises for consideration is whether on the facts of this case it can be said tnat the plaintiff has waived and abandoned his rights under the contract. The learned Subordinate Judge has held that he has. He observes, "what other inference is to be drawn for such delay if not waiver or abandonment." We are unable to agree with this conclusion. In this case no circumstance has been brought to our notice which will justify this inference. It is well settled that waiver is not to be inferred merely from delay in the institution of the suit. In 'ARJUNA MUDALIAR v. LAKSHMI AMMAL', 1948-2 Mad L J 271 at p. 271 the learned Judge observes:

> "With great respect to the learned Judge we must say that we have not been referred to any authority in which it has been held that from long delay alone without anything further, an abandonment of rights could be inferred."

It is said that the defendants repudiated the contract on 19-4-1943 and that, therefore, any action of the plaintiff thereafter must lead to an inference that he has abandoned the contract. The decision in 'NAWAB BEGAM v. A. H. CREET', 27 All 678, is relied on in support of this position. But that case has been considered in 'SURYAPRAKASARAYADU v. LAKSHMINARASIMHA', 26 Mad L J 518, which on the facts appears to be indistinguishable from the present case. In that case there was an agreement to sell on 4-11-1904. Time for performance was fixed till 4-12-1904. Disputes arose in January 1905 as to the order in which reciprocal obligations should be performed. Thereafter nothing was done and the suit was instituted on 2-12-1907. The Subordinate Judge following the decision in 'NAWAB BEGAM v. A. H. CREET', 27 All 678, refused to grant a decree for specific performance on the ground that as the plaintiff had delayed the action after repudiation by the defendant, the contract must be taken to have been abandoned. On appeal this Court reversed that judgment. It was held that abandonment could not be inferred from the delay because the parties were disputing the terms of the agreement. Sadasiva Aiyar J. observed at page 521:

> "Further having regard to the case in 'ATHIKARATH NANU MENON v. KOMMU NAYAR', 21 Mad 42 and 'KISSEN GOPAL v. KALLY PROSONNO SETT', 33 Cal 633. I am satisfied that the decision in 'NAWAB BEGAM v. A. H. CREET', 27 All 678, has been expressed in rather too wide and general language."

and adds:

> "Then as regards the finding of the Subordinate Judge that the laches itself amounts to a waiver or abandonment, I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to waiver or abandonment of the contract of the plaintiff's part. In this case there are no such circumstances proved."

In this case it may be mentioned that defendants sent a notice on 19-4-1943 expressing their willingness to execute the sale deed if an indemnity bond was executed by the plaintiff. It was only in 1946 in their reply notices, Exs. P. 12, 12 (a) and 12 (b) dated 1-2-1946, 7-2-1946 and 29-1-1946 that they repudiated the contract as not binding on them. Applying the principle of the decision in 'SURYAPRAKASARAYUDU v. LAKSHMINARASIMHA', 26 Mad L J 518 we are of opinion that there has been repudiation only in 1946 and that as the suit was instituted on 20-2-1946 there is no waiver or abandonment. On the other hand there is one circumstance which appears to us to go strongly against the theory of waiver. It will be remembered that on 20-3-1943 the plaintiff paid an advance of Rs. 750 at the time of the agreement. That amount has all along been with the defendants. The plaintiff did not ask for its return. Nor did he abandon his claim to it. Now to hold that the plaintiff waived his rights under the contract would involve the conclusion that he gave up his rights to the advance amount as well for that would be the consequence if he abandoned the contract; he could not then claim return of the advance. But the Subordinate Judge has granted a decree for the return of the advance and even damages for breach of contract. This cannot be reconciled with the notion that the contract had been waived. A contract which has been abandoned has no legal existence for any purpose and it cannot be the foundation for any relief whether it be specific performance or damages. The effect of waiving a contract is not merely to bar any particular remedy under that contract but to extinguish it altogether and the right to any relief thereunder. The grant of relief to the plaintiff for

return of the advance and for damages is inconsistent with the theory that the contract had been waived or abandoned. We are satisfied that in this case the plaintiff has not waived or abandoned his rights and that he is not disentitled to relief by reason of any laches or delay.

(6) A further ground was taken in the lower Court for non-suiting the plaintiff. During the period 1943 to 1946 there was a considerable rise in the value of house property in Mathurai as in other cities. The price of the suit property at the time of the action would be Rs. 20,000 according to the plaintiff and Rs. 30,000 according to the defendants. On this the lower Court has held that the sale price of Rs. 13500 would be grossly inadequate as on the date of the suit and that, it would, therefore, be inequitable to grant specific performance of the agreement.

(7) It may be noted that no such plea was taken by the defendants. They pleaded that the price fixed in the agreement was inadequate, as at the time of the argeement, that the plaintiff had imposed upon the 1st defendant and duped him into entering into a contract on fraudulent representations and therefore, it was unenforceable. The defendants gave evidence in support of these allegations but the lower Court disbelieved them. This is what the learned Subordinate Judge observes:

> "I am not, therefore, satisfied that the price agreed to was inadequate or that the defendants were duped into entering into the agreement on any misrepresentation made by the plaintiff."

This finding has not been challenged before us. The position therefore is this: Here is a transaction which was for proper consideration when it was entered into. At the time of the suit the value of the properties had considerably risen. Could specific performance be refused on this ground? The validity of a transaction should, on principle, be judged as on the date of the transaction. This is well established with reference to alienations by managers of a joint Hindu family. Is there any reason why a different rule should prevail as regards contracts entered into by them? None that we can see. The learned advocate for the respondents relied on certain observations in 'JAMSETJI N. TATA v. KASHINATH', 26 Bom 326 as supporting this distinction. That was a suit for specific performance of a contract entered into by a mother and her son to sell certain properties to the plaintiff. The minor son of the vendor was also impleaded as a party to the suit and declaration sought that the sale was binding on him as well. Russell J. came to the conclusion on the evidence that the sale would not be binding on the minor son and therefore refused the declaration asked for by the plaintiff. On appeal this judgment was confirmed. There is, therefore, nothing in the decision of the case which helps the respondents. What is relied on is the following observation by Starling J. at page 338:

> "To justify the Court in making such a declaration I am of opinion that there should be evidence that there were and still are at the date of the suit certain debts to be paid off and that it was and is the intention of the vendor to apply the purchase money in paying such debts."

From this it is argued that the validity of the transacion should be established both on the date of the contract and on the date of the action. There, the learned Judge was dealing with a case in which the transaction was valid at the date of the agreement. The finding was that it was not valid even at the date of the transaction and therefore, the observations do not amount to a direct decision on this point. The passage above quoted came in for considerable criticism in a decision reported in 'VENKATESWARA IYER v. RAMAN NAMBUDIRI', 19 Mad L T 329 wherein Seshagiri Aiyar J. observed at page 334:

> "I can find no justification in reason or in authority for the proposition that the liability of a Hindu coparcener as regards executory contracts is different from his liability to executed contracts. In either case the same considerations regarding necessity or justifiable purposes would govern the decision. The learned vakil raised the contention that whereas in executed contracts the question would be whether there was necessity at the time of the contract, in executory conracts the binding nature has to be determined with reference to the time at which the contract is to be completed. I see no force in this contention either. One can spell out from the observations of Starling J. in 'JAMESETJI TATA v. KASHINATH', 26 Bom 326 some support for this contention. All that the learned Judge seems to have laid down is, that before a Court is asked to decree specific performance against a minor it ought to satisfy itself that it is for the benefit of the minor that the decree should be passed. I do not think it was intended to declare that this benefit has to be ascertained not as on the date of the contract, but as on the date that the decree is to be passed. If this is the correct view, there can be no question that the enforceability of a contract must be traced back to the date of the agreement. There is nothing in the Hindu law to warrant a departure from this rule."

(8) We agree with these observations and hold that the validity of the contract should be judged as on the date when it was entered into and, so judged, Ex. P. 4 is binding on the 2nd defendant.

(9) It was also urged that as the 2nd defendant was a minor at the date of the contract and at the time of the suit the Court must be satisfied about its validity at the time when the contract is sought to be enforced but we are not concerned here with a contract entered into on behalf of the minor. We are concerned with a contract by a manager of joint Hindu family which 'proprio vigore' is binding on all the members of the family, majors and minors. The association of the 2nd defendant in the contract, Ex. P 4, is by way of abundant caution and it is more a matter of form than of substance. By such association the rights of the manager to sell the joint family properties for proper purposes do not, on the one hand, get enhanced nor do they, on the other, suffer diminution. Vide 'GHARI ULLAH v. KHALAK SINGH,' 25 All 407.

(10) It remains to consider whether the respondents could claim to be relieved from their obligation to perform the contract under S. 22 (2), Specific Relief Act. It is argued that as the price of the properties had risen to Rs. 20,000 according to the plaintiff and

Rs. 30,000/- according to the defendants, it would work a great hardship on the defendants such as they could not have foreseen and that therefore, the Court had a discretion to refuse specific performance. With reference to S 22 (2) it is well settled that the question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and that further the hardship should be one collateral to the contract and not in relation to a term of the contract such as the quantum of consideration. Fry in his work on "Specific Performance" states the law in the following terms (page 199, S. 418):

"The question of the hardship of a contract is generally to be judged of at the time at which it is entered into; if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks the performance of the contract .... It has been determined that the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events and we have already seen that the same principle applies in considering the fairness of a contract' and again "the question of the inadequacy of the consideration must, of course, be decided at the time of the contract and not by the light of subsequent events" (S. 448, P. 214).

In 'SHAIB LAL v. COLLECTOR OF BAREILLY,' 16 All 423 it was held on the strength of the passages quoted above that the validity of the agreement should be judged on the circumstances as they stood on the date of the agreement and not in the light of subsequent events. In that case the defendant agreed to grant some village in consideration of the plaintiff withdrawing the claim which he made against the estate. Before the suit for specific performance was filed it had been held in a connected litigation that the plaintiff had no title. It was accordingly argued that the agreement was not supported by substantial consideration as proved by events, and that therefore specific performance should be refused under S. 22 (2) of the Specific Relief Act. This argument was repelled and it was held that as the agreement was valid and proper at the time it was entered into, the plaintiff had a right to specific performance without reference to subsequent events. In 'PICHAI MOHIDEEN v. CHATHUR BUJA DAS KUSHALDAS AND SONS,' 65 Mad L J 491 at p. 502, Ramesam and Cornish JJ. made the following observations with references to the scope of S. 22(2) of the Specific Relief Act:

"Respondents relied on S. 22, Cl. 2 of the Specific Relief Act but obviously the term 'hardship on the defendant' in this section is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term "hardship" is used in the same sense as it is used in English law (Vide Fry on the Specific Performance Chapter VI)".

(11) On the principle of the above decisions, it must follow that we must have regard to circumstances only as they stood on 20-3-1943 and if that is done the subsequent rise in prices will not be a relevant ground for refusing the plaintiff specific performance. We shall now consider the authorities cited by the advocate for the respondent for the position that such subsequent rise in prices can be taken into account.

(12) In 'GOVINDA NAICKEN v. APATHSAHAYA IYER,' 37 Mad 403 the facts were that the defendants agreed to sell a property in which he had only a half share, the other share belonging to his divided brother. He resisted the suit for specific performance on the ground that a sale deed in respect of the whole property would lead to litigation and cast a cloud on the title of the co-owner. On this ground specific performance was refused. Then with reference to the granting of relief under S. 15 of the Specific Relief Act the learned Judges Sundara Aiyar and Spencer JJ. observe at page 405:

"Even in cases where the conditions of S. 15 are fulfilled, the use of the word 'may' indicates that the granting of a decree for part performance is discretionary with the Court and we should hold that when there has been great delay in attempting to enforce a contract and circumstances have greatly changed either from a rise of prices or other causes in the interval, the Courts would be justified in refusing to give legal effect to an inequitable arrangement".

(13) It is obvious that the learned Judges considered the original arrangement as inequitable or the facts already mentioned. They were not considering the position under S. 22 (2) of the Specific Relief Act. We cannot take this passage out of its context and read into it a general principle that even when the contract was entered into for proper consideration, the Court had discretion to refuse specific performance by reason only of the rise in price at the time of the suit.

(14) Another case relied on by the respondents is the one reported in 'MAHARAJ BAHADUR v. SURESH', 34 Cal L J 364. There it was found that the plaintiff had at one stage abandoned the contract; that the tenants of the defendant agreed to pay higher rent in the belief that the plaintiff had abandoned his contract and thus there was an increase brought about in the value of the property by the conduct of the plaintiff himself. It was held that he was not entitled to specific performance. This would be within the principle enunciated by Fry in S. 418, where an exception is made to the general rule where the subsequent events have been in someway due to the party who seeks the performance of the contract. The learned advocate for the respondents next relied on a case in 'NAROOSHANKER PRANSHAKNAR v. RAJUMAL BHAGAVANDAS', AIR (8) 1921 Sind 197, which does lend some support to his position but for the reasons already mentioned, we are unable to agree with that decision. The advocate for the appellant relied upon the following observations occurring in 'ALLAH DITTA v. JAMNA DAS', AIR (16) 1929 Lah 679 at p 680:

"The respective positions of the parties now before us have remained as they were though there has been a material rise in the price of the land which may explain the conduct of the plaintiffs but does not in any way affect

their rights. The plaintiffs are not debarred by mere lapse of the time from enforcing their remedy."

Though there is no discussion, the decision is in accord with the views which we have expressed. The learned advocate for the respondents also sought to support the decree by contending that the plaintiff had agreed on 20-3-1943 to execute a deed of indemnity and was in default in declining to do so. Ex. P. 4 contains no such term. The 1st defendant as D. W. 1 admitted that at the time of Ex. P. 4 there was no talk or agreement concerning the 'othi'. That is also the evidence of P. Ws. 1 and 2. It is only D. W. 3 who deposes to such an agreement and the lower Court was right in rejecting that evidence and finding this issue in favour of the plaintiff, We accept this finding.

(15) It was finally urged that as the relief is one by way of discretion we should not interfere in appeal with the decree passed by the lower Court. S. 22 provides that the discretion is one to be exercised on "judicial principles and capable of correction by a Court of appeal". When once it is found that the contract sought to be enforced is a valid one it is for the defendants to establish legal grounds for refusing relief by way of specific performance. We have already held that none such has been made out by the defendants and we are of opinion, therefore, that there should be a decree for specific performance in favour of the plaintiff. In this view it is unnecessary to consider the question of damages. Two months time will be granted for performance. The plaintiff will be entitled to his costs both here and in the Court below.

C.R.K./V.R.B. *Appeal allowed.*

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SUBBA RAO J.

Panga Narasayya, Appellant v. Gopavaram Gopal Reddi, Respondent.

A. A. A. O. No. 13 of 1949, D/- 20-4-1951.

(a) Debt Laws — Madras Debt Conciliation Act (XI (11) of 1936), S. 18 — Certificate under — Effect.

There is no provision in the Act giving a certificate issued thereunder the sanctity of a final adjudication between the parties nor is there any provisions excluding the jurisdiction of the Civil Courts from deciding the factum and the extent of the debt in regard to which such a certificate is issued. The certificate issued under the Act would not preclude the creditor from proving the debt and the order of the Debt Conciliation Board would not preclude a creditor from claiming a higher amount on principles of 'res judicata'. *(Paras 2, 3)*

(b) Debt Laws — Madras Debt Conciliation Act (XI (11) of 1936), S. 18(2) — Application by debtor for declaration of amount due.

S. 18 in terms applies to a suit filed by a creditor. Where an application is made for declaration of the amount due by the debtor to the creditor. Obviously that section has no application. *(Para 4)*

(c) Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938), S. 9 — Judge holding that a sum of Rs. 500 should be paid towards interest at the rate agreed between the parties — Direction held was contrary to the express provisions of S. 9. *(Para 5)*

P. R. Ramachandra Rao, for Appellant; V. V. Ramadurai, for Respondent.

JUDGMENT: The appellant, who is a debtor, filed an application under S. 19 (A) of the Madras Agriculturists Relief Act for a declaration of the amount due under the mortgage deed dated 29th July 1936. The appellant executed a mortgage deed dated 29th July 1936 in favour of the respondent for a sum of Rs 1500/- carrying interest at 12 per cent per annum. His case is that he had paid towards that mortgage a sum of Rs. 450 on 7th May 1939. He filed a petition before the Debt Conciliation Board, Rajampet, offering to pay the mortgage amount as scaled down under the provisions of the Act. The respondent did not agree for a settlement and therefore the Board gave him a certificate under S. 18(1) of the Madras Debt Conciliation Act. According to the appellant, under the mortgage only a sum of Rs. 829-14-0 was due to the respondent. The respondent denied that the petitioner was an agriculturist and also the allegation that the mortgage was not supported by consideration to the extent of Rs. 550 and that he paid a sum of Rs. 450 to the respondent. The learned District Munsif held on the evidence that the petitioner was an agriculturist and that the mortgage deed was not supported by consideration to the extent of Rs. 550. He scaled down the decree and gave him a declaration that a sum of Rs. 972 was payable by him to the respondent. The creditor filed an appeal to the District Court of Cuddapah. The District Judge held that the mortgage deed was supported by consideration to the full extent of Rs. 1500. He found that the petitioner paid only a sum of Rs. 500. As regards the amount, he also held that it was paid towards interest and gave a direction that the creditor was entitled to adjustment of the aforesaid amount first towards interest at the rate agreed between the parties and only the balance, if any, towards the principal. The appeal was allowed with costs. The debtor preferred the above second appeal.

(2) The learned counsel for the appellant contended that the creditor is not entitled to claim a larger amount than that in regard to which the certificate was issued by the Debt Conciliation Board. He contends that the order of the Debt Conciliation Board would preclude a creditor from claiming a higher amount on principles of res judicata. A perusal of the various sections of the Madras Debt Conciliation Act (Act XI of 1936) indicates that it was not the intention of the legislature to give any such binding force to the certificates.

(3) Under S. 4 of the Act, a debtor may make an application for the settlement of his debts to the Board. The Board is authorised under S. 10(1) of the Act to call upon every creditor of the debtor to submit a statement of debts owed to such creditor by the debtor if in the opinion of the Board it is desirable to attempt to effect a settlement between him and his creditors. Certain penalties have been provided in case of a default made by the creditor in submitting the statement so required. S. 12 prescribes the procedure to decide disputes between the debtor and the creditor. Under S. 14 of the Act, if creditors to whom more than fifty per cent of the total amount of the debtors' debts is owing come to an amicable settlement with the debtor, such settlement shall forthwith be reduced to writing in the form of an agreement

recording the amounts payable to such creditors and the manner in which the assets from which and the times at which they are to be paid and such an agreement if considered equitable by the Board shall be read out and explained to the parties concerned and shall be signed or otherwise authenticated by the Board and the parties, who have agreed to the amicable settlement. If no amicable settlement was made within 14 months from the date of the application under S. 4 the Board shall dismiss the application. S. 18 provides for the Board issuing a certificate in case the creditors do not come to any adjustment. Under Section 18 (2) in case any such certificate is issued, a creditor who files a suit thereafter will not be entitled to costs and will only be entitled to recover interest at the rate of 6 per cent only after the date of such certificate. S. 19 prohibits any civil Court entertaining a suit in respect of any matter pending before a Board or the validity of any procedure or the legality of any agreement made under this Act or for the recovery of any debt recorded as wholly or partly payable under an agreement registered under sub-s 2. of S. 14 from any person who, as a debtor, was party to such agreement. There is no provision in the Act giving a certificate issued thereunder the sanctity of a final adjudication between the parties nor is there any provision excluding the jurisdiction of the civil Courts deciding the factum and the extent of the debt in regard to which such a certificate is issued. It appears to me that the object of the Madras Debt Conciliation Act is to provide an opportunity to the creditors to come to an agreement with debtors. It also empowers the Board to issue a certificate if the creditor refuses to agree when a reasonable offer is made by a debtor. The only consequence of such a certificate is that in a suit filed by a creditor, he will not be entitled to recover either the costs or interest after the date of the issue of the certificate at a rate higher than 6 per cent. There is neither express exclusion of the Civil Court's jurisdiction nor any such prohibition by necessary implication. In the circumstances I cannot agree with the learned advocate's argument that the certificate issued under the Act precludes the creditor from proving the debt.

(4) It is then argued by the learned counsel for the appellant that by reason of S. 18 of the Madras Debt Conciliation Act, a creditor would not be entitled to costs or to interest higher than 6 per cent. But S. 18 in terms applies to a suit filed by a creditor. The present appeal arises out of an application, for declaration of the amount due by the appellant to the respondent. Obviously that section has no application.

(5) The next point raised by the learned counsel for the appellant is that the learned Judge was wrong in holding that the sum of Rs. 500 paid by the debtor was expressly towards interest. The learned Judge on a consideration of Ex. D. 5 and all the circumstances held that such an amount was paid towards interest. As a question of fact, it will be binding upon me. It is argued then that the learned Judge was wrong in holding that a sum of Rs. 500 should be paid towards interest at the rate agreed between the parties. This direction seems to be contrary to the express provisions of S. 9 of the Madras Agriculturists Relief Act. Under that section interest should be calculated at the rate of 5 per cent and credit shall be given for all sums paid towards interest. The said amount will be credited accordingly. With this slight modification, the appeal is dismissed with costs. No leave.

C.R.K. /D.H. *Appeal dismissed.*

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RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

S. Ananthakrishnan, Petitioner v. The State of Madras.

Civil Misc. Petn. No. 7894 of 1951, D/- 19-10-1951.

(a) Stamp Act (1899), Sch. I, Art. 30; Sch. 1A (Mad) Art. 25 (a) — Leavy of fees for enrolment as Advocate, is not unconstitutional as abridgment of fundamental right to carry on profession — Constitution of India, Art. 19 (1) (g).

The right to plead and act on behalf of suitors in a Court is not a right following from citizenship. It is not only a citizen who is entitled to be enrolled as an advocate of the Madras Court. Even a foreigner, if he fulfils the prescribed qualifications and requirements, can be enrolled as such. The exclusive right to represent suits in Court which an advocate possesses is really in the nature of a privilege, though the fact that it is a privilege does not imply that on the conferment of the privilege, there can be discrimination. Article 14 of the Constitution is a sufficient safeguard against any unequal treatment. The charge of a fee by way of levy of stamp duty for such privilege cannot be invalid as unconstitutional.

Even if the right to act and plead is deemed to be a right comprised in the right to practise the profession guaranteed under Art. 19 (1) (g) there is nothing in the Constitution to exempt such right wholly from the taxing power of the State, (using the word "State" in its larger definition under Art. 12). Article 265 which says "no tax shall be levied or collected except by authority of law" does not provide for any exemptions. Articles 268, 269 and 276 and a number of entries in the three lists in the Seventh Schedule clearly indicate the scope of the taxing power as extending even to rights covered by Art. 19 (1). But any taxation of the exercise of the fundamental right which aims at unduly abridging or destroying such right is unconstitutional ('Grosjean's case', (1936) 297 US 233:80 Law Ed. 660, Relied on). But if the taxation is only for legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would lead room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional. Where it is not even suggested that the object of levying the stamp duty under Art. 30 of Sch. I, Stamp Act or Art. 25 (a) of Sch. 1A of the Act as amended in Madras, on the enrolement entry is to deliberately abridge or destroy the right to carry on the legal profession or that the stamp duty is so excessive and oppressive as to virtually abridge or destroy such right, it must therefore be held that the stamp duty leviable in this case is proper and constitutional.

American Case law reviewed.

(Paras 30, 33, 44, 52, 54)

Venkatarama Aiyar, J. : The power to tax is an attribute of sovereignty; it carries

with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to laws of taxation. The result then is that the Stamp Act being a measure of taxation must be held to be constitutional and valid. (*Paras 49 and 50*)

Anno: Stamp Act, Art. 30, N. 3.

(b) *Stamp Act (1899) Sch. 1, Art. 30; Sch. 1 A (Mad), Art. 25 (a) — Stamp duty under, is not of nature license fee.*

Rajamannar, C. J.: The stamp duty levied under Art. 30 of Sch. 1 or Art. 25(a) of Sch. 1A (Mad) is not of the same nature as the license tax or privilege tax examples of which are to be found in some of the American cases. e.g. 'Grosjean's case' (1936) 297 U. S. 233: 80 Law Ed 660 and 'Murodch's case' (1943) 319 U. S. 105: 87 L. E. 1292. It is not a periodical and recurring levy depending on the practise of the profession or on which the practice of the profession depends. (*Para 25*)

Venkatarama Aiyar, J.: The idea behind the license system is that the State has a right to control trade in the interests of the public and for that purpose impose suitable restrictions on the conduct of the business. The license is a symbol of State regulation and the license fee is intended to cover expenses which the State has to incur in maintaining an establishment for the purpose of regulating the trade. The profession tax differs from the license fee in that it is a fiscal measure intended to bring revenue and not merely to regulate trade. It differs from income-tax in that it is not a levy on incomes earned but is a tax on the carrying on of a profession itself even before any income could be earned. (*Para 39*)

Anno: Stamp Act, Art. 30, N. 3.

(c) *Constitution of India, Art. 13 — Does not apply to Constitution itself — Part 12 is not cut down by Part. 3. (Interpretation of Statutes —Constitution)*

Venkatarama Aiyar, J.: Article 13 does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part 3 and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes, that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. The operation of Part 12 is not cut down by Part 3 and the fundamental rights are within the powers of taxation by the State. (*Para 41*)

K. V. Venkatasubramania Aiyar and P. Anandan Nambiar, for Petitioner; Advocate General for the State Counsel, for the State.

Cases referred to-

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) 1951 14 S C J 1203: (AIR (38) 1951 S C 97) (Pr 44)
(1922) 66 Law Ed 817: (259 U. S. 20) (Pr 15)
(1942) 86 Law Ed. 1691: 316 U S 584 (Prs 9, 10, 11, 12)
4 U S 316: 4 Law Ed. 579 (Pr 42)
(1873) 83 U S 644: 21 Law Ed. 442 (Pr 17)
(1900) 178 U S 41: 44 Law Ed. 969 (Pr 42)
(1901) 181 U S 264: 45 Law Ed 853 (Pr 52)
(1902) 184 U S 608: 46 Law Ed 713 (Pr 52)
(1904) 195 U S 27: 49 Law Ed 78 (Prs 14, 42, 44, 53)
(1928) 277 U S 218: 72 Law Ed 857 (Pr 15)
(1929) 279 U S 644: 73 Law Ed 889 (Pr 18)
(1931) 283 U S 605: 75 Law Ed 1302 (Pr 18)
(1931) 283 U S 697: 75 Law Ed 1357 (Pr 46)
(1934) 291 U S 502: 78 Law Ed 940 (Pr 21)
(1935) 296 U S 404: 80 Law Ed 299 (Pr 17)
(1936) 297 U S 233: 80 Law Ed 660 (Prs 7, 8, 10, 20, 32, 52)
(1937) 300 U S 290: 81 Law Ed 653 (Pr 15)
(1938) 303 U S 444: 82 Law Ed 949 (Prs 13, 46)
(1939) 308 U S 147: 84 Law Ed 162 (Pr 46)
(1940) 310 U S 296: 84 Law Ed 1213 (Pr 46)
(1940) 309 U S 134: 84 Law Ed 656 (Pr 21)
(1942) 316 U S 584: 86 Law Ed 1691 (Prs 44, 47)
(1942) 316 U S 52: 86 Law Ed 1262 (Pr 13)
(1943) 319 U S 105: 87 Law Ed 1292 (Prs 10, 11, 12, 44, 47, 53)
(1944) 321 U S 573: 88 Law Ed 938 (Prs 11, 13)
(1946) 327 U S 178: 90 Law Ed 607 (Pr 8)
(1946) 328 U S 61: 90 Law Ed 1084 (Pr 18)
375 U S 561: 89 Law Ed 1795 (Pr 18)

RAJAMANNAR, C. J.: This is an application made under Art. 226 of the Constitution. The petitioner is a Law Graduate of the Madras University. According to the statements made in his affidavit in support of the application, he has completed the prescribed term of apprenticeship and passed the Bar Council examinations in Practice and Procedure and has complied with all the requirements prescribed under the rules framed by the Madras Bar Council under the Indian Bar Councils Act. He is an applicant to be admitted to the rolls of this High Court as an advocate thereof. His complaint and the relief which he seeks from this Court are thus set out in the following paragraphs in his affidavit:

"3. I am a citizen of India. Art. 19(1) (g) of the Constitution of India secures to me the right to practise any profession. I am desirous of practising the profession of law, and with that view, I have applied to be enrolled as an Advocate of this Honourable Court.

4. Under S. 8 of the Indian Bar Councils Act I will not be deemed to be entitled to practice the profession of law before the High Court unless I have been enrolled as an advocate thereof. The Madras Stamp Amendment Act of 1922, by Art. 25 of Schedule I-A prescribes a fee of Rs. 625 for enrolment as an Advocate

5. I desire to bring to the consideration of this Honourable Court the question whether the right to practise any profession secured to me under Art. 19(1) (g) of the Constitution, can be subjected to restrictions other than those prescribed in clause 6 of the same article, and whether that provision of the Madras Stamp Amendment Act of 1922, prescribing a fee of Rs. 625 could be sustained at all in view of the provisions of the Constitution of India, particularly Art. 19 (1) (g) read with Art. 13 (1). I submit, however, that whatever might have been the legality or

propriety of the impugned provisions prior to the coming into force of the Constitution, the same could not be maintained inasmuch as they seek to regulate enrolment not only by professional qualification or merit but also by consideration as to payment of fees.

7. It is, therefore, just and necessary that this Honourable Court should be pleased to make an order declaring that Art. 25 of Schedule I-A of the Madras Stamp Amendment Act, 1922, is void, ineffective and inoperative, and I be entitled to be enrolled as an Advocate of this Honourable Court, the said article notwithstanding; and to pass such other order or orders as this Honourable Court may in the circumstances deem fit to pass."

(2) The material provisions relating to the enrolment of legal practitioners as advocates of the High Court are as follows. So far as the Chartered High Courts are concerned, one of the clauses of the Letters Patent (clause 9 in the Letters Patent granted to this Court) authorised and empowered the said High Court

"to approve, admit and enrol such and so many advocates, vakeels and attorneys, as to the said High Court shall seem meet."

Such Advocates and Attorneys were authorised to appear for the suitors of the said High Court, and

"to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine and subject to such rules and directions."

By another clause (clause 10 of the Madras Letters Patent) it was provided that

"No person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor."

As regards a High Court established by Royal Charter, S. 41 of the Legal Practitioners Act of 1879, provided that such a High Court may from time to time with the previous sanction of the Provincial Government make rules as to the qualifications and admission of proper persons to be advocates of the Court, and subject to such rules may enrol such and so many advocates as it thinks fit.

(3) The Indian Bar Councils Act of 1926, contains provisions regarding the admission and enrolment of advocates. S. 8(1) says that:

"No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act."

Sub-section (2) of the same section enjoins the High Court to prepare and maintain a roll of advocates. The proviso is important for the purpose of this application. It runs thus:

"Provided that such persons shall have paid in respect of enrolment the stamp duty, if any under the Indian Stamp Act 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a) and in other cases such amount as may be prescribed."

(4) Section 3 of the Indian Stamp Act II of 1899, enacts that the instruments mentioned in schedule I shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor subject to exceptions with which we are not concerned. Item 30 of Schedule I is as follows:

"Entry as an advocate, vakeel or attorney on the roll of any High Court (under the Indian Bar Councils Act, 1926) or in exercise of the powers conferred on such Court by Letters Patent or by the Legal Practitioners Act 1884

(a) in the case of an advocate or vakil—five hundred rupees (b) in the case of an attorney—two hundred and fifty rupees.

Exemption: Entry of an Advocate, Vakeel or Attorney on the roll of any High Court when he has previously been enrolled in a High Court."

By the Madras Stamp (Amendment) Act VI (6) of 1922, the duty was increased from Rs. 500 to Rs. 625 in the case of advocates and in the case of attorneys to Rs. 312-8-0.

(5) The entire argument of Mr. K. V. Venkatasubramania Aiyar, learned counsel for the petitioner was built upon Art. 19(1) (g) which declares the right of every citizen "to practise any profession or to carry on any occupation, trade or business". Clause (6) of the same article no doubt indicates that the exercise of this right may be curtailed by the imposition of reasonable restrictions in the interests of the general public. It also saves laws prescribing professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. But petitioner's counsel contended that the payment of the stamp duty cannot be said to be a qualification necessary for practising the profession. He further contended that the levy of this duty cannot amount to a reasonable restriction on the exercise of the right.

(6) Learned counsel did not deny the power of the State to impose taxes. He even conceded that a citizen could not claim exemption from the taxing power of the State simply because he was exercising one of the fundamental rights guaranteed to him by the Constitution for instance, a citizen could not claim exemption from income-tax simply because the tax is levied on the income derived by practising a profession or carrying on a trade. But he contended that the taxing power of a State could not be used to impose a monetary exaction by way of a condition precedent to the exercise of a fundamental right, though there may be cases in which a system of licensing can be justified and a nominal fee for the grant of a licence may be collected, provided the monetary exaction was a legitimate licence fee and not a tax intended for the augmentation of revenue in the guise of a licence fee. The basic proposition developed in his argument was this that the freedom guaranteed by our Constitution cannot be subjected to advance restraint by the plenary taxing power of the State. For this proposition he sought support mainly in decisions of the Supreme Court of the United States.

(7) The first decision on which he relied is that in 'GROSJEAN v. AMERICAN PRESS CO.', (1936) 297 U S 233:80 Law Ed. 660. The impugned provision in that case was contained in an Act of the Legislature of Louisiana which ran as follows:

"That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for,

advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licences levied and assessed in this State, pay a licence tax for the privilege of engaging in such business in this State of two per cent (2 per cent) of the gross receipts of such business."

The Act required everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business and the resulting tax must be paid when the report was filed. Failure to file the report or pay the tax constituted a misdemeanour punishable with fine or imprisonment or both. The validity of the Act was assailed as violating the Constitution in that it abridged the freedom of the Press in contravention of the due process clause contained in clause (1) of the fourteenth amendment. The first amendment provided that Congress shall make no law abridging the freedom of speech or of the Press. Though this provision did not relate to the States, it was well established that the States were precluded likewise from abridging the freedom of speech or of the press by force of the due process clause of the fourteenth amendment.

Mr. Justice Sutherland delivered the opinion of the Court. He reviewed the history and circumstances which led to the adoption of the abridgment clause of the first amendment which expressed one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". The object of the constitutional provisions contained in the first and the fourteenth amendment was to prevent previous restraints on publication. Liberty of the Press meant principally although not exclusively immunity from previous restraints or censorship. The reasons given for the conclusion of the Court that the tax in question was unconstitutional under the due process clause, because it abridged the freedom of the Press are best given in the words of the learned Judge himself:

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the Government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the Press..... The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because in the light of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free Press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves.....The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalising the publishers and curtailing the circulation of a selected group of newspapers."

(8) I do not understand this case as an authority for the proposition advanced by learned counsel for the petitioner. It will be noticed that the tax was not imposed in advance. The payment of the tax was not a condition precedent to the publication of the journal. Periodical reports had to be filed and along with them the tax was payable according to the receipts. As I understand it, the decision in that case really rested on the circumstance that there was an ulterior bad motive behind the enactment. It was a deliberate and calculated device to penalise a certain group of n wspapers. As pointed out in 'COURTNEY M. MABEE v. WHITE PLAINS PUBLISHING CO', 327 U. S. 178: 90 Law Ed 607 in the 'GROSJEAN CASE', (1936) 297 U. S. 233: 80 Law Ed 660.

"The payment was singled out for special taxation and the tax was graduated in accordance with volume of circulation."

In my opinion the 'GROSJEAN CASE', (1936 297 U S 233: 80 Law Ed 660) is not in point here. I doubt if the Court which decided 'GROSJEAN'S CASE', would have held a non-discriminatory tax on advertisements as such unconstitutional. Even if such a decision was possible on an interpretation of the American Constitution, I do not think it would have application to a case arising under our Constitution, because Art. 269 of our Constitution mentions among the dūties and taxes which shall be levied and collected by the Government of India and assigned to the States "taxes on the sale or purchase of newspapers and on advertisements published therein".

(9) The next set of cases relied on by learned counsel for the petitioner deals with the freedom of religion guaranteed by the American Constitution. In 'JONES v. OPELIKA', (1942) 86 Law Ed 1691: 316 U S 584 the majority of the Judges of the Supreme Court held that a State may without violation of the constitutional guarantees of freedom of religion and freedom of speech and Press exact a reasonable and non-discriminatory licence free from religious adherents engaged in the sale of religious books and pamphlets through the ordinary methods used in commercial canvassing. The 'ratio decidendi' of the decision of the Court is contained in the opinion delivered by Mr. Justice Reed and is thus expressed:

"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propoganda funds, it is natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing."

Chief Justice Stone and Mr. Justice Murphy delivered dissenting opinions in which Mr. Justice Black and Mr. Justice Douglas concurred. The Chief Justice understood the purpose of the ordinances to be suppression of the distribution of religious literature. He said:

"The taxes are insupportable either as a tax on the dissemination of ideas or as a tax on the collection of funds for religious purposes. For on its face a flat licence tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some

laws or all except tax laws.....Freedom of Press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce.....In its potency as a prior restraint on publication the flat licence tax falls short only of outright censorship or suppression."

Mr. Justice Murphy in his dissenting opinion observed:

"But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit. As such they place a burden on freedom of speech, freedom of the press and the exercise of religion even if the question of amount is laid aside.....The exercise without commercial motives, of freedom of speech, freedom of the Press, or freedom of worship are not proper sources of taxation for general revenue purposes."

Mr. Justice Black who also dissented tersely put his point of view thus:

"The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practised by a minority group.....Certainly our democratic form of Government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be."

(10) The majority view which prevailed in 'JONES v. OPELIKA', (1942) 316 U S 584: 86 Law Ed 1691 was overruled shortly after that decision in 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed 1292. In that case he impugned ordinance provided that all persons canvassing for or soliciting orders for goods, paintings, pictures, or merchandise of any kind shall be required to procure from the Burgess a license to transact the said business and shall pay certain sums according to the time for which the said licence shall be granted. The rates were: for one day 1½ dollars, for one week 7 dollars, for 2 weeks 12 dollars and for 3 weeks 20 dollars. The person who impugned the ordinance were members of a sect known as Jehovah's witnesses. They went about from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. Mr. Justice Douglas delivered the opinion of the Court. His approach to the discussion of the question is significant. After referring to the first Amendment which the Fourteenth Amendment makes applicable to the States and which declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press, observed,

"It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the licence tax imposed by this Ordinance is in substance just that."

After dealing with the religious practice of Jehovah's witnesses and their type of evangelism, the learned Judge rejected the contention that when a religious sect uses ordinary commercial methods of sales of articles to raise propoganda funds, it is proper for the State to charge reasonable fees for the privileges of canvassing and said:

"But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evengelism into a commmercial enterprise."

Considerable reliance was placed by petitioner's learned counsel on the following passage in the opinion of the Court:

"We do not mean to say that religious groups and the Press are free from all financial burdens of Government. See 'GROSJEAN v. AMERICAN PRESS CO', (1936) 297 U S 233: 80 L Ed 660. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a flat licence tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment .....In all of these cases the issuance of the permit or licence is dependent on the payment of a licence tax. And the licence tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realised revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat licence tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the first amendment."

(11) Reed and Frankfurter JJ. delivered dissenting opinions. Mr. Justice Frankfurter very forcibly put forth the opposite view. He said:

"Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right.....It is certainly true that the protection afforded the freedom of the press by the first amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspapers publishing for bearing the burdens of taxation or imposed upon them in such ways as to enroach on the essential scope of free press."

According to the learned Judge, the question really turned on the nature of the condition imposed and the extent to which it hinders or restricts the exercise of the privilege. He very lucidly draws the distinction between the use and the abuse of the power to tax. The fact that the power can be perverted does not mean that every exercise of the power is a perversion of the power. If a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course, it is bad. But if it does not, it is irrelevant that some other tax would have that effect. The learned Judge posed the ultimate question thus:

"The ultimate question in determining the constitutionality of a tax measure is — has the

State given something for which it can ask a return."

and answers the question:

"There can be no doubt that these petitioners, like all who use the streets, have received the benefits of Government."

He found that the taxes in question did not actually cramp the activities pursued by the petitioners to promote their religious beliefs. He was therefore of opinion that the ordinance was valid.

In 'FOLLETT v. McCORMIC', (1944) 321 U S 573: 88 Law Ed. 938, the principle laid down in 'MURDOCK'S CASE', (1943) 319 U S 105: 87 Law Ed. 1292, was applied and an ordinance levying a licence tax on the occupation of a book agent from a distributor of religious literature was declared to be unconstitutional as the guarantee of religious freedom precluded any exaction from a person who was engaged in spreading his religious beliefs by the distribution of religious literature although such person s activities were confined to his residential town and he depended for his livelihood on contributions expected in return for the literature distributed. Mr. Justice Douglas who delivered the leading judgment observed 'inter alia' after referring to 'JONES v. OPELIKA', (1942) 316 U S 584: 86 Law Ed. 1691 and 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed. 1292, thus:

"In those cases members of Jehovah's witnesses had also been found guilty of 'peddling' or 'selling' literature within the meaning of the local ordinances. But since they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the s andards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." (MURDOCK v. PENNSYLVANIA'). We emphasised that the 'inherent vice and evil' of the flat licence tax is that 'it restrains in advance those constitutional liberties' and 'invevitably tends to suppress their exercise."

(12) So far as I am able to follow the reasoning of the dissenting judgments in 'JONES v. OPELIKA', (1942) 316 U S 584: 86 Law Ed. 1691, which was practically adopted as the opinion of the Court in the subsequent 'MURDOCK'S CASE', (1943) 319 U S 105: 87 Law Ed. 1292, it is thus: that the freedom of religion guaranteed by the First and the Fourteenth amendments cannot in any manner be curtailed or abridged by any law which imposes a monetary levy on the exercise of that freedom. The exemption is not only from the plenary taxing power which when abused may even destroy the very exercise of the right; the exemption is also from the operation of the licensing power of the State and liability even to a nominal fee. The political history of the United States from its origins in the founding by the Pilgrim Fathers had not a little to do with the views of the Supreme Court on the subject of religious freedom. Though there is no necessary inconsistency between the taxing power & the exercise of the fundamental rights, nevertheless, in the case of religious freedom, it looks as if an exception is made and the exercise of this freedom is deemed to be outside the purview of the power of taxation.

(13) All the cases referred to us demonstrate amply the distinction drawn over and over again by the Supreme Court between the exercise of religious freedom and the exercise of secular rights. Sometimes the lines drawn between God and the pocket book are too fine, but that such lines are accepted is clear from the following passage in the judgment of Mr. Justice Murphy in 'FOLLET v. McCORMICK', (1944) 321 U S 573: 88 Law Ed. 938, at p. 942:

"There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication."

In 'LOVELL v. GRIFFIN', (1938) 303 U S 444: 82 Law Ed. 949, a Municipal Ordinance prohibiting the distribution without a permit of circulars and books advertising, or literature of any kind, whether delivered free or sold was held to be invalid on its face as infringing the constitutional freedom of the press. This case also related to Jehovah's witnesses who followed the practice of distributing pamphlets of a religious nature. Chief Justice Hughes who delivered the opinion of the Court said:

"We think that the ordinance is invalid on its face. Whatever the motive induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to licence and censorship."

In 'VALENTINE v. CHRESTENSEN', (1942) 316 U S 52: 86 Law Ed. 1262, the Supreme Court upheld the constitutionalists of a Municipal regulation prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter, where the affixing of the protest to the advertising circular was with the intent and for the purpose of evading the prohibition of a city ordinance forbidding distribution in the City's streets of commercial and business advertising matter. The learned Judges were clear that the Constitution imposes no restraint on Government as respects purely commercial advertising.

(14) Mr. V katasubramania A yar agrued with considerable force that the exercise of a fundamental right guaranteed by the Constitution cannot be made subject to an advance tax, because the general taxing power is plenary in nature and cannot be controlled by Courts. He referred to the well known dictum of Marshall, C. J. that "the power to tax is the power to destroy" and argued that if advance taxation is permitted, it may result in the total destruction of the right itself. He cited to us 'McCRAY v. UNITED STATES', (1904) 195 U S 27: 49 Law Ed. 78, for the proposition that the motives or purposes of the legislature in enacting a tax are not open to judicial enquiry and the Court has no jurisdiction to enquire into the reasonableness of the rate of tax. In that case artificially coloured oleo-margarine was subject to a higher rate of taxation than oleo-margarine not so coloured. It was held that though the effect of the tax may be to suppress the manufacture of the article that circumstance did not render it invalid and any implied constitutional prohibition which might prevent the destruction of fundamental rights which it is the duty of every free Government to safeguard

could not be invoked to invalidate the said taxation. Though the point was not decided, Mr. Justice White who delivered the opinion of the Court was willing to concede that if by the perverted exercise of the power of taxation, so great an abuse was manifest as to destroy fundamental rights which no free Government could constitutionally violate then it would be the duty of the judiciary to hold such acts to be void.

(15) Mr. Venkatasubramania Aiyar referred us to three decisions of the American Supreme Court which held certain Acts of States to be invalid on the ground that they encroached on the field of the Congress and vice versa. But I do not find them very relevant to a discussion of the questions arising in this case except possibly as instances of the general rule that what cannot be done directly cannot be done indirectly. I shall refer briefly to these three cases. In 'CHILD LABOUR TAX CASE', (1922) 66 Law Ed. 817, the Congress made a law imposing a tax of ten per cent. of the net profits of the year upon an employer who knowingly employed during any portion of the taxable year a child within a particular prescribed age limit which was held to be invalid as being an attempt by the Congress to use the so-called tax as a penalty for the employment of child labour in the States which under the Constitution was exclusively a matter for the State Legislature. As Chief Justice Taft remarked the tax in question was

> "a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter comple ely the business of the State Government under the Federal Constitution."

In 'PANHANDLE OIL CO. v. STATE OF MISSISSIPPI ON RELATION OF R. H. KNOX', (1928) 277 U S 218: 72 Law Ed. 857, the State of Mississippi imposed a tax on a gasoline sold to the Federal Government for the use of its Coast Guard Fleet and its Veteran's hospital. The tax was held to be unconstitutional because it interfered with the rights of United States which had been empowered to operate the fleet and the hospital.

> "The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions." (Per Butler J.)

In 'INGELS v. MORF', (1937) 300 U S 290: 81 Law Ed. 653, a State exaction which burdened and interfered with interstate commerce was declared to be unconstitutional. The state of California passed a statute imposing a permit fee for the movement from without the State over its highways of motor vehicles for the purpose of selling or offering them for sale. It was sought to be justified as intending to reimburse the state for the added expense which it may incur for the administration and enforcement of the Act, and the expense of policing the highways. But the amount of the fee was shown to greatly exceed these expenses. It was therefore held that the permit fee unduly interfered with the right of interstate commerce. It was held that to justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear, either from the statute itself or from the use of the money collected that it is demanded as reimbursement for the expense of providing facilities or of enforcing regulations of the commerce which are within the State's constitutional powers.

(16) As I said before, none of these cases is directly in point. The stamp duty levied on the entry in the roll is not in 'pari materia' with the permit fee or the other taxes with which these cases were concerned.

(17) Learned counsel for the petitioner cited to us 'BRADWELL v. ILLINOIS', (1873) 83 U S 644: 21 Law Ed. 442. In that case the Supreme Court of Illinois refused to grant the plaintiff (Myra Bradwell) a license to practice law in the Courts of that State on the ground that females were not eligible under the laws of that state. It was held that the refusal did not violate any provisions of the Constitution. The ground of the decision was that the right to practise law in the State Courts was neither a privilege nor any immunity of a citizen of the United States within the meaning of the first section of the fourteenth article of the Amendment of the Constitution. Mr. Justice Miller who delivered the opinion of the Court pointed out that the right to admission to practise in the Courts of a State in no sense depends on the citizenship of the United States and has never been made to depend on such citizenship at all. Mention was made of the fact that many prominent and distinguished lawyers had been admitted to practise in the State and in the Federal Courts who were not citizens either of the United States or of any state. No doubt, reference was made to the opinion of the Court in the Slaughter House cases recently delivered in support of the proposition that the right to control and regulate the granting of licenses to practise law in the Courts of a State was one of the powers which are not transferred for its protection to the Federal Government. But we are not really concerned with this aspect of the case.

Mr. Venkatasubramania Aiyar contended that this decision should no longer be deemed to be good law having regard to the change in the attitude of the Supreme Court in construing the fourteenth amendment. There is great force in the contention, because there can be no doubt that it was the construction put forward in Mr. Justice Field's dissenting opinion that subsequently prevailed, Mr. Justice Sutherland speaking for the Court in a later case, 'JAMES C. COLGATE v. ERWIN M. HARVEY (1935) 296 U S 404:80 Law Ed 299 said that the right of a citizen of the United States to engage in business or to transact any lawful business is a privilege attributable to his national citizenship. But so far as I have been able to see there has been no disapproval of this decision either in subsequent decisions of the Supreme Court or even in recognised text books on American Constitutional law. How the principle underlying this decision applies to the case before us will be considered later on.

(18) 'Re Summers', 375 U S 561:89 Law Ed 1795 also deals with lawyers, but it is not of much assistance to us. A state Court (Illionois) refused an application for admission to the Bar on the ground that the applicant, because of a conscientious belief in non-violence, could not take in good faith the required oath to support the state constitution, where such support is construed to include willingness to serve in the state militia when required. It was held that the refusal was proper and did not violate the

freedom of religion which the Fourteenth Amendment secured against the state action. The decision in this case was based to a large extent on two earlier cases, namely, 'UNITED STATES OF AMERICA v. ROSIKA SCHWIMMER', (1929) 279 U S 644:73 Law Ed 889 and 'UNITED STATES v. MACINTOSH', (1931) 283 U S 605: 75 Law Ed 1302 in which it had been held that an alien who refused to pledge military service was not entitled to be admitted to citizenship of the United State as of right. The authority of this decision 'RE SUMMERS', 375 U S 561:89 Law Ed 1795 must be deemed to have disappeared with the subsequent decision of the Court in 'GIROUARD v. UNITED STATES', (1946) 328 U S 61:90 L E 1084 which overruled the two decisions on which it was based.

(19) Mr. Venkatasubramania Aiyar's argument in brief was that any exaction by way of a tax or otherwise as a condition to the exercise of any of the freedoms guaranteed by the constitution would be unconstitutional. A Citizen cannot be compelled to purchase for a price what has been granted to him by the constitution. Whether it be called a privilege tax or a license tax or a franchise tax or occupational tax, if the right to practise a profession is to depend on the payment of a tax, then, it would amount to an abridgment, if not, a total denial of that right. In proper cases the State may introduce a system of licensing in the interests of the general public and incidentally charge a fee for the license which may be granted; but if the license fee is too excessive to be really considered as a license fee and partakes of the nature of plenary taxation, there would be an infringement of the freedom guaranteed by constitution.

(20) The learned Advocate General sought to meet the petitioner's case by taking his stand on the position that here was a tax which the State was empowered to levy and once it is found that the State was competent and within its powers in imposing the tax, there could be no question of any infringement of fundamental rights, though incidentally the enjoyment of such fundamental rights may be more or less affected. He refused to accept the distinction drawn by petitioner's counsel between taxation prior to and as condition of the exercise of the right and subsequent taxation on the exercise of the right. He analysed the cases relied on by the petitioner's learned counsel to show that this distinction was not considered material in any of the decisions relied on. 'GROSJEAN CASE', (1936) 297 U S 233:80 Law Ed 660 really dealt with a tax on advertisements and would not have been held to have been invalid as such but for the fact that the Court knew that the dominant purpose of the ordinance was not the realisation of revenue but the suppression of certain newspapers. The Court found in that case that it was not an ordinary case of tax but had a long history of hostile misuse of state power behind it. The cases dealing with Jehovah's witnesses which revealed the swing of the pendulum in the view of the Supreme Court on the scope and extent of religious freedom turned on the peculiar history of that country and an anxiety to safeguard against religious persecution of any sort whatever.

(21) The learned Advocate General contended that the American Supreme Court did not recognise an unrestricted privilege to engage in a business as guaranteed by the Constitution and on this point it appeared to me that even Mr. Venkatasubramania Aiyar was willing to confess that occupational freedom was not so well established in the United States as the freedom of speech and freedom of religion. In 'NEBBIA v. NEW YORK', (1934) 291 U S 502:78 Law Ed 940 it was held that a State statute establishing a milk control board with power to fix the minimum and maximum retail prices of milk and making it unlawful for any milk dealer to sell or buy milk at a price less or more than that fixed by the Board was valid and did not violate the due process clause of the Fourteenth Amendment. The Court observed (there was no dissent):

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited, and the right to conduct a business, or to pursue a calling may be conditioned."

In 'FEDERAL C. C. v. POTTSVILLE BROADCASTING CO.', (1940) 309 U S 134:84 Law Ed 656 the Court had to deal with the scheme for the regulation of Radio Broadcasting contained in the Federal Communications Act, 1934, as amended in 1937. Apprehending that in the absence of Government Control, the public interest might be subordinated to monopolistic domination in the broadcasting field, the Congress provided for a system of permits and licenses. The Communications Commission was entrusted with the power of granting or refusing licenses, which could not however be granted for longer than three years. In granting or withholding permits for the construction of stations, and in granting, denying, or revoking licences for the operation of stations, public convenience, interest or necessity was to be the guiding factor in the exercise of the Commission's discretion. The learned Advocate-General also cited to us reports of the decisions of the State Supreme Court in which it has been assumed that the State has got a right to say who should enter a particular trade and under what conditions. Even under our constitution, the State can impose conditions and prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, (see Art. 19 (6)).

(22) It was therefore contended by the learned Advocate General that the State could make a law making it incumbent on a person who desired to practise in particular Courts of the land to be enrolled as advocates of that Court. If so much is conceded, then the next step is to recognise that it is the entry of enrolment that is the subject of the stamp levy.

(23-24) Much was not said at the Bar as to what exactly is comprised in the right to practise a profession guaranteed under Art. 19(1)(g). Taking the profession of law, what does this right consist in?Is the effect of Art. 19 (1) to confer on every person who may be otherwise qualified the right to practise in any Court in the land? I see nothing in Art. 19 (1) (g) to justify the conclusion that this Court or any other High Court or Supreme Court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand, the clauses in the Letters Patent granted to the Chartered High Courts to which reference was made

earlier on in this judgment clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors. This power of the High Courts has been continued under Art. 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience. It was not contended before us that all these provisions were invalid. Though Mr. Venkatasubramania Aiyar would not concede in so many terms, he was not willing to challenge the power of the State to make it compulsory that every lawyer should obtain a license before he could be allowed to practise before the Courts of the land. But he contended that there could not be an advance plenary tax on which the right to practise would depend.

(25) I do not consider that the stamp duty levied under Art. 30 of Schedule I of the Indian Stamp Act or Art. 25A of the Act as amended in Madras is of the same nature as the license tax or privilege tax examples of which are to be found in some of the American cases e. g. 'GROSJEAN'S CASE', (1936) 297 U S 233:80 L E 660 and "MURDOCH'S CASE', (1943) 319 U S 105:87 L E 1292. It is not a periodical and recurring levy depending on the practise of the profession or on which the practice of the profession depends. Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled in the rolls of that Court. Enrolment consists in making an entry in the roll. So far it was not suggested there was anything unconstitutional. It is at this point the legislature says that the particular entry should bear a stamp duty. It was not denied that this entry would be an instrument as defined in the Indian Stamp Act. It was not contended that this Court could go into the question as to what is the proper stamp duty leviable. It was not alleged—and there is no evidence to lead us to suppose—that the purpose of this stamp duty was to destroy the practice of the profession of law and that it was prompted by improper motives.

(26) I do not think it necessary in this case to answer the very large and important question as to how far there could be taxation which would virtually destroy any of the fundamental rights. Is the power of taxation subject to the exercise of fundamental rights or is the exercise of fundamental rights subject to the power of taxation? The petitioner's learned counsel said that they were mutually restrictive of each other. I think it is sufficient for the purpose of this case to say that even assuming a tax otherwise lawfully levied can be held to be an unreasonable restriction on the exercise of any of the freedoms guaranteed by Art. 19, it cannot be said in this case that the imposition of the stamp duty is not a reasonable restriction and not in the interests of the general public.

(27) It must be admitted that the State has got power to augment its revenues by the imposition of taxes. Taxes must in great or less degree affect the full enjoyment of rights like the right of property. Let me give an instance. Art. 19 (1) (f) confers on a citizen a right inter alia to dispose of property. But the Stamp Act imposes a duty on every disposition of property. As a citizen cannot lawfully dispose of his property by conveyance except on payment of the prescribed stamp duty, it may be said that to that extent there will be a restriction on the exercise of his freedom of disposition. But surely it cannot be contended that the levy of stamp duty on conveyances is unconstitutional. I am inclined to think that so long as the monetary exaction is, in the opinion of the Court, reasonable, it cannot be said that it is invalid as being unconstitutional. Suppose, for instance, the stamp duty levied on a conveyance of property amounts to 99 per cent of its value then it may become the duty of this Court to hold that there is an unreasonable restriction on the exercise of the right of disposition. There is no material in this case before us to hold that the stamp duty in question is so excessive or oppressive as to be unreasonable.

(28) I agree with the learned Advocate General that the American decisions do not proceed on a distinction between what I may call advance taxation and taxation subsequent to the exercise of any fundamental right. In 'GROSJEAN'S CASE', (1936) 297 U S 233: 80 Law Ed 660 the licence tax was levied periodically after the publication of the journal and depend on its circulation. Nevertheless, the Court held that the ordinance imposing such licence tax was unconstitutional.

(29) I agree with the learned Counsel for the petitioner that any system of permits which eventually depends on the discretion of executive authorities would be bad when the system curtails any fundamental right. But in the case before us, it was not suggested that it is in anybody's discretion to enrol or not to enrol a person otherwise qualified for being enrolled. There is neither discrimination nor any possibility of the exercise of naked arbitrary power. The practice of the profession is not dependent on the will and pleasure of any official.

(30) After consideration of the arguments of counsel and the authorities cited to us, and an examination of the provisions of our Constitution, which after all should govern the decision of this case, I have come to the following conclusion. The right to plead and act on behalf of suitors in a Court is not a right flowing from citizenship. The reasoning in 'BRADWELL v. ILLIONOIS', (1873) 83 U S 644: 21 Law Ed 442 is to this extent not bad law even to this day. It is not only a citizen who is entitled to be enrolled as an advocate of this Court. Even a foreigner, if he fulfils the prescribed qualifications and requirements, can be enrolled as such. The exclusive right to represent suitors in Court which an advocate possesses is really in the nature of a privilege, though the fact that it is a privilege does not imply that on the conferment of the privilege, there can be discrimination. Art. 14 is a sufficient safeguard against any unequal treatment. The charge of a fee by way of levy of stamp duty for such privilege cannot be invalid as unconstitutional.

(31) Even if the right to act and plead is deemed to be a right comprised in the right to practise the profession guaranteed under Art. 19 (1) (g), there is nothing in the Constitution to exempt such right wholly from the taxing power of the State, (I use the word

"State" in its larger definition under Art. 12). Article 265 which says "no tax shall be levied or collected except by authority of law" does not provide for any exemptions. Arts. 268, 269 and 276 and a number of entries in the three lists in the seventh Schedule clearly indicate the scope of the taxing power as extending even to rights covered by Art. 19(1). (Vide entry 92 of List I "Taxes on the sale or purchase of newspapers and on advertisements published therein"; entry 49 of List II "taxes on lands and buildings"; entry 54 of the same list "Taxes on the sale or purchase of goods other than newspapers"; entry 60 of the same list "taxes on profession, trades, callings and employment". The right to levy stamp duty in respect of documents is specifically enumerated both in List I and List II.

(32) The question then is: how to reconcile the fundamental rights guaranteed under Art. 19 and the power to tax contained in several provisions of the Constitution? One way is to hold that a tax otherwise valid does not become invalid merely because it abridged any of the fundamental rights. This way is really not a way of reconciliation; it practically makes the fundamental rights entirely subject to the power of taxation. The other way is to hold any taxation of the exercise of the fundamental right which aims at unduly abridging or destroying such right is unconstitutional (vide 'GROSJEAN'S CASE', (1936) 297 U S 233: 80 Law Ed 660). But if the taxation is only for legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would lead room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional.

(33) In this case, it is not even suggested that the object of levying the stamp duty on the enrolment entry is to deliberately abridge or destroy the right to carry on the legal profession. It was also not suggested that the stamp duty is so excessive and oppressive as to virtually abridge or destroy such right. It must therefore be held that the stamp duty leviable in this case is proper and constitutional.

(34) The application is therefore dismissed. There will be no order as to costs.

(35) VENKATARAMA AYYAR, J.: The petitioner, Anantha Krishnan, is a law graduate of the Madras University. He has completed his term of apprenticeship and has otherwise qualified himself to be admitted as an advocate of this Court. Under the law he has to pay a stamp duty before his name can be entered on the rolls of advocates of this Court. The Indian Stamp Act (II of 1899) Art. 30 of Schedule I prescribes a stamp duty of Rs. 500 for enrolment and under the Madras Act III (3) of 1922, Art. 25(a), it has been fixed at Rs. 625.

(36) The petitioner contends that as a citizen he has a fundamental right to carry on business as an advocate, that the stamp duty imposed a condition on the exercise of that right and that it is, therefore, illegal. He accordingly prays that the provision in the Stamp Act be declared void and that he be enrolled as an advocate without reference thereto.

(36a) The contentions of Mr. K. V. Venkatasubramania Iyer, the learned advocate, who argued in support of the petition may be summed up thus:

(37) Under the Constitution the fundamental rights conferred by Part III, are supreme, that neither Parliament nor the legislatures of the States have the power to enact any law taking away or abridging those rights; that the Stamp Act is a measure of taxation; that the power to tax being the power to destroy, it cannot be exercised over fundamental rights and that the levy of stamp duty is, therefore, illegal. It was also further urged that any previous restraint on the exercise of fundamental rights must be held to be void as amounting to a prohibition of the rights.

(38) The learned Advocate General on the other hand contends that the Constitution does not exempt fundamental rights from the operation of taxation laws, that the provisions of Part III, should be so construed as to effectuate the other parts of the Constitution as well, that the theory of a previous restraint has no application to a measure of taxation and that the Stamp Act is valid.

(39) The substantial point, therefore, which arises for determination in this case is in what relation do the fundamental rights of a citizen under Part III, stand towards the powers of taxation possessed by the State? The question is one of considerable importance as there are other provisions in the Stamp Act which impose duties on the other fundamental rights recognised in Part III and if the contention of the petitioner is well founded they will also have to be declared invalid. There are, for example, provisions in the Stamp Act prescribing stamp duty on sales, gifts, settlements, mortgages, trusts, leases and other conveyance of immovable property. Stamp duties are also prescribed on transfers of other properties. All these taxes must be held to be invalid as being opposed to Art. 19(1) (f) of the Constitution which recognises a fundamental right to acquire, hold and dispose of property. There are provisions prescribing stamp duties on deeds of partnership and Articles of Association of a company and these also must be held to be invalid as opposed to the right to form associations or unions conferred by Art. 19(1) (c). The question thus raised is one involving far-reaching consequences and being 'res integra' it has to be determined on a consideration of the relevant provisions of the Constitution and the conclusions to be drawn therefrom.

It must be mentioned that Mr. K. V. Venkatasubramania Iyer, the learned advocate, for the petitioner while he contended, that a profession tax is illegal conceded that it would be lawful to levy licence fee and income-tax on professions. It may be useful to note the distinction between profession tax on the one hand and licence fee and income-tax on the other. When a person embarks on business the law may require him to take out a licence and charge a fee therefor. The idea behind the licence system is that the State has a right to control trade in the interests of the public and for that purpose impose suitable restrictions on the conduct of the business. The licence is a symbol of State regulation and the licence fee is intended to cover expenses which the State has to incur in maintaining an establishment for the purpose of regulating the trade. It is conceded by the learned advocate for the petitioner that licensing of trades including the profession of law is valid and a reasonable fee can be charged for the issue of a licence. But as no contention

has been urged that the stamp duty in question is in the nature of licence fee this aspect of the matter requires no further consideration. Then there is the income-tax and that is levied in accordance with the provisions of the Income-tax Act on incomes actually earned. The learned advocate for the petitioner concedes that such a tax would be lawful and does not infringe the fundamental rights because what is guaranteed under Part III is freedom of trade and not freedom from taxation of profits made in that trade. The profession tax differs from the licence fee in that it is a fiscal measure intended to bring revenue and not merely to regulate trade. It differs from income-tax in that it is not a levy on incomes earned but is a tax on the carrying on of a profession itself even before any income could be earned. That being the true position of profession tax, the petitioner contends that it is an invasion of his fundamental right to carry on a profession under Art. 19 (1) (g). It is indisputable that the rights conferred by Part III are & were intended to be in a favoured position.

Discarding the theory of parliamentary supremacy of British Jurisprudence, the framers of our Constitution deliberately adopted the American view that the subjects should be protected against the tyranny of legislative majorities and for achieving that purpose they guaranteed certain rights set out in Part III and forbade legislation in derogation of those rights. Art. 13(1) is particularly important. Art. 13(1) enacts that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of fundamental rights shall be void, and Article 13(2) prohibits making of any laws which will take away or abridge the fundamental rights. Thus legislation past and future must give way before fundamental rights. In this connection Art. 33 is also important. Under that article Parliament can pass legislation restricting or abrogating rights conferred in Part III so far as armed forces are concerned. The intention as expressed in these provisions is obviously that apart from Art. 33, the legislatures should not have the power to abridge or abrogate fundamental rights. Art. 32 also provides a special right of direct recourse to the Supreme Court in case of violation of fundamental rights. These provisions clearly put the fundamental rights in a preferred position.

(40) But what follows from this? Does the favoured position granted to the fundamental rights carry with it any immunity from taxation? The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition. On the other hand, there are provisions in Part XII of the Constitution, which clearly recognise the existence of such powers. Art. 269(1) provides that certain duties and taxes shall be levied and collected by the Government of India and assigned to the States in the manner provided and one of such taxes is "taxes other than stamp duties on transactions in stock-exchanges and future markets". (S. 269(1) (e)), Art. 276 is very important for this purpose. Art. 276(1) enacts that no law of the Legislature of a State in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. Art. 276(3) provides that the power of the State Legislature to impose profession tax shall not be construed as in any way limiting the power of the Parliament to impose taxes on incomes. Here is a plain distinction made between profession tax and tax on income earned in the profession and provision is made for imposition of both classes of taxes. Then turning to the 7th schedule we find in the Union List No. 1 item No. 90. "Taxes other than stamp duties on transactions in stock-exchanges and future markets"; and in the State List No. 2 entry No. 60. "Taxes on professions, trades, callings and employments". These provisions establish beyond all doubt that it was the intention of the Legislature to confer on the appropriate Legislative bodies power to impose profession tax.

(41) As against this the learned advocate for the petitioner urges that the fundamental rights are under the Constitution in a paramount position, that under Art. 13 the Legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and that, therefore, part 12 is inoperative in respect of the rights conferred under Part III. I am unable to agree. Art. 13 on which this argument is mainly founded does not support such a wide contention. It applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Art. 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpratation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. For these reasons I must hold that the operation of Part 12 is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the State.

(42) It is contended hat to recognise a power to tax fundamental rights would be to concede a power to destroy them because there could be no limit to the power of the state to impose taxes and the power could be exercised in such a manner as to destroy them altogether. Reliance is placed on the well known observations of Marshall C. J. in 'MACULLOCH v. MARY LAND', 4 U S P 316: 4 L Ed 579. There, the State of Mary Land passed a law imposing heavy taxes on the activities of the Bank of United States which had been chartered by the Congress. The question of the validity of this law came up before the Supreme Court. It was held that the Congress had an implied power to charter banks and that under the Constitution the Congressional powers were supreme. The question then arose as to whether consistently with these conclusions the power in the States to tax the bank could be recognised.

Negativing such a power Marshall C. J. observed as follows:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; and that there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied."

It is doubtful if these observations made in deciding questions of jurisdiction between two independent sovereign bodies would have any application in construing the powers conferred by the Constitution on one and the same body. But apart from this, later decisions of the American Courts have explained these observations as limited to cases where there is no legislative competence over the subject-matter of taxation. Thus in 'KNOWLTON v. MOORE', (1900) 178 U S 41: 44 Law Ed. 969, the Court after quoting the dictum that the power to tax is the power to destroy explained it in following terms:

"This principle is pertinent only when there is no power to tax a particular subject and has no relation to a case where such right exists....."

and again

"But this reasoning has no application to a lawful tax; for if it had, there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied."

These observations were quoted with approval in 'MACRAY v. THE UNITED STATES', (1904) 195 U S 27: 49 L Ed 78 and it was observed:

"As quite recently pointed out by this Court in 'KNOWLTON v. MOORE', (1900) 178 U S 41: 44 Law Ed 969 the often quoted statements of Chief Justice Marshall in 'MACULLOCH v. MARY LAND', 4 U S 316: 4 Law Ed 579 that the power to tax is the power to destroy affords no support whatever to the proposition that where there is a lawful power to impose a tax, its imposition may be treated as without the power because of the destructive effect of the exertion of the authority."

(43) On the finding that the powers of taxation extend over fundamental rights it will follow that the principle of the decision in 'MACULLOCH v. MARY LAND', 4 U S 316: 4 Law Ed. 579, cannot apply to this case. For the same reason, decisions dealing with taxation in relation to interstate commerce must also be held inapplicable to the present issue.

(44) The decision in 'MACRAY v. THE UNITED STATES', (1904) 195 U S 27: 49 Law Ed 78 is also of interest in that it held that fundamental rights are proper subjects of taxation unless they are exempted in the Constitution. The Congress had imposed a tax on the manufacture and sale of oleo-margarine and one of the grounds on which its validity was challenged was that it violated the freedom of trade guaranteed under due process clause in the Fifth amendment. In rejecting this contention the Court observed as follows:

"And the same considerations dispose of the contention based upon the due process clause of the 5th amendment. That provision, as we have previously said does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution."

In this connection the following observations occurring in 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed. 1292, are relevant. In criticising the view of the majority that the sale of the religious literature was an exercise of religion and that was, therefore, protected under Amendment No. 14, Reed, J. observed as follows:

"Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income-taxes, ad valorem taxes even occupational taxes are presumably valid save only a licence tax on sales of religious books....."

and again

"It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First amendment."

Frankfurter, J. observed:

"Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment, of course, protects the right to publish a newspaper or a magazine or a book. But the crucial question is how much protection does the amendment give, and against what is the right to be protected? It is certainly true that the protection afforded the freedom of the press by the first amendment does not include exemption from all taxation..... Nor as I have indicated can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its payment..... ....."

and again

"The petitioners say they are immune as much from a flat occupation tax as from a licensing fee purporting explicitly to cover only the costs of regulation. They rightly reject any distinction between that occupation tax and such a licensing fee. There is no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue."

These passages occur in the minority judgments. A similar observation occurs also in 'JONES v. OPELIKA', (1942) 316 U S 584: 86 Law Ed. 1691, where Reed, J. observed:

"The Constitution draws no line between a payment from gross receipts or a net income-tax and a suitably calculated occupational licence."

As will be pointed out the Judges who took a different view went on a different point. The learned Advocate General has also drawn our attention to the following passages in the judgment of the Supreme Court in 'RAMJILAL v. INCOME-TAX OFFICER, MOHENDAR GARH' 1951-14 S C J 203, at p. 208,

"In our opinion the protection against imposition and collection of taxes save by authority of law directly comes from Art. 265 and is not secured by Cl. (1) of Art. 31....."

and again

"In the view we have taken, namely, that the protection against the imposition or collection of taxes save by authority of law is secured

by Art. 265 and not by Art. 31 (1), the questions urged by Dr. Tek Chand do not really arise."

Thus there is abundant authority for the proposition that fundamental rights are not immune from taxation.

(45) It now remains to deal with the contention of the petitioner that a previous restraint on the exercise of a fundamental right is void and that, therefore, the imposition of a tax as a condition precedent to the exercise of the profession is illegal and opposed to Article 19(1) of the Constitution. Reliance was placed on a number of American authorities as supporting this proposition but they are decisions on the three freedoms, freedom in the exercise of religion, freedom of speech & freedom of the Press, enumerated in amendment No. 1 which have latterly been interpreted as comprised in the due process clause in the 14th amendment. But there is vast difference between those three freedoms and the other freedoms relating to property or trade. Under the English law, a person may not be prevented from speaking or writing what he will on the ground that if permitted to speak or write he might commit a tort or an offence. The remedy is only to proceed against him for any breach of the law which he might commit in his speech or writing. The law is thus stated by Blackstone in his Commentaries:

"The liberty of the Press is indeed essential to the nature of a free State; but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal he must take the consequence of his own temerity." (4 Bl. Com. 151, 152).

(46) Thus freedom of speech and freedom of the press came to be understood as meaning absence of previous restraint or censorship .Vide Dicey's Law of the Constitution, (9th Ed., Chapter 6). When amendment No. 1 provided for freedom of speech and freedom of press it merely embodied this principle which had been well settled in England and American Courts accordingly construed the first amendment and the due process clause in the 14th amendment as requiring that there should be no previous restraint or censorship. Vide 'NEAR v. MINNESOTA EXREAL OLSON', (1931) 283 U S 697: 75 Law Ed. 1357; 'LOVEL v. GRIFFIN', (1938) 303 U S 444: 82 Law Ed. 949; 'SCHNEIDAR v. IRVINGTON', (1939) 308 U S 147:84 Law Ed. 155 and 'CANTWELL v. CONNECTICUT', (1940) 310 U S 296: 84 Law Ed. 1213.

(47) But these freedoms differ by their very nature considerably from freedoms relating to property or trade. While a censorship in the case of the former is tantamount to a prohibition it is otherwise when it relates to property or trade. To apply the theory of previous restraint to the freedom of trade or profession is to ignore the reason behind the rule. "Cessant Ratione Legis, Cessut Ipsa Lex." In America where as already mentioned freedom of trade is one of the liberties recognised in the 5th and 14th amendments, licensing of trades and levying of licence tax have been accepted as valid and constitutional. Whether licence is issued for the first time or it is renewed, it is a case of imposing a condition before a trade could be carried on and if the principle of previous restraint is to be held applicable the imposition of the tax must be held illegal. In this connection the case in 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed. 1292, which is relied on by the petitioner is instructive. There the city of Jeannette had enacted a law that persons who canvass or solicit business within the city must obtain licence before so doing, and penalties were prescribed for breach of the law. Certain persons belonging to a militant religious sect called Jehovah's witnesses distributed religious books for price and they were charged under the Act for not taking out a licence. They pleaded that they were not engaged in commercial activities but were carrying on evangelistic work and that they were protected by the 14th amendment. The facts in 'JONES v. OPELIKA', (1942) 316 U S 584: 86 Law Ed. 1691, were precisely the same. In both these decisions there was a sharp difference of opinion among the Judges and all of them acted on the view that if the activities of Jehovah's witnesses were commercial in character the levy of the tax being an occupation tax would be valid. It was not suggested that as an occupation tax it would infringe the fundamental right to trade under the 14th amendment. The point on which the Judges differed was whether the activities were commercial or religious. The Judges who held that the tax was unconstitutional proceeded on the view that there was no commercial activity but merely exercise of religions and in that view they applied the principle that previous restraint was illegal. This is what Douglas, J. who delivered the majority judgment in 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed. 1292, observed:

"As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets."

I may observe at this stage that considerable emphasis was laid by the advocate for the petitioner on the further observations of Douglas, J. that:

"the State may not impose a charge for the enjoyment of a right granted by the Federal Constitution."

But this remark must be taken along with the observations at page 1300 'freedom of press, freedom of speech and freedom of religion are in a preferred position' and the finding of fact that the acts in question amounted to exercise of religious and not commercial activities. It is, therefore, amply established that under the American law the theory of previous restraint is applied only to the three freedoms mentioned in the amendment No. 1 and not to freedom of trade or occupation.

(48) It was suggested by the learned advocate for the petitioner that in this respect the Indian Constitution proceeds further than the American law because all the seven freedoms are conferred by the same Article 19; that they stand on the same footing and that, therefore, the considerations applicable to them should be

the same. But Art. 19 does not enunciate a general rule that previous restraint is unconstitutional; that rule was evolved in Courts with reference to only to freedom of speech and freedom of press having regard to the nature of those rights; and it cannot be applied as an absolute rule of law with reference to freedom of trade or right to hold property and indeed to any of the freedoms mentioned in Art. 19.

(49) Though I have discussed the scope of this theory of previous restraint with reference to the authorities cited before us, in my opinion, the question does not really arise for determination if it should be held that the Stamp Act is a measure of taxation. The power to tax is an attribute of sovereignty; it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to laws of taxation.

(50) The result then is that the Stamp Act being a measure of taxation must be held to be constitutional and valid.

(51) There is one other aspect of the matter which may require consideration hereafter. Has the Legislature power to impose tax on the fundamental rights without any limit whatsoever? The law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and that it knows of no limitations except what are prescribed by the Constitution. The laws fixing taxes cannot be questioned in the Courts on the ground that the tax is heavy & oppressive and this principle has been applied to Stamp Act as well.

(52) In 'PATTON v. BRADY', (1902) 184 U S 608: 46 Law Ed. 713, the contention that the tax was excessive was rejected and it was remarked:

> "that it is no part of the function of a Court to enquire into the reasonableness of the exercise, either as respects the amount or property on which it is imposed."

'TREAT v. WHITE', (1901) 181 U S 264: 45 Law Ed. 853, is another stamp duty case in which it was held that it was not within the province of the Court to examine the propriety of the tax. The following passage from Cooley on Constitutional law may be quoted in this context:

> "The power to tax is an incident of sovereignty and is co-extensive with the subjects to which the sovereignty extends. It is unlimited in its range acknowledging in its very nature no limits so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it."

But it is open to argument that when the Constitution which confers the power of taxation also confers certain fundamental rights the former should be so exercised as not to destroy the latter. The contention that the power to tax is the power to destroy has been rejected in so far as it seeks to negative any power to tax fundamental rights but it does not follow that it should be rejected in so far as it seeks to impose a limitation upon that power, that it should not be exercised so as to destroy them. As already pointed out there is a difference between profession tax and income-tax. The power of levying a tax on income is absolute and if the legislature chooses to levy a tax of fifteen annas in the rupee on that income Courts will have no jurisdiction to declare it unconstitutional on the ground that it is unreasonable. But a right to carry on business is a fundamental right protected by the Constitution and it stands to reason that a tax on such a right should not be such as to destroy it — as for example —a professional tax equal or nearly equal to the income earned in the previous year. It might well be contended that there is in such cases a limitation on the powers of taxation, implicit in the Constitution itself, that it should not be exercised in such a manner as to take away with one hand what has been given by the other. If this is the correct position it will follow that while the levy of income-tax cannot be questioned in Courts the levy of profession tax might be challenged on the ground that it is so unreasonable and excessive as to be prohibitive of the right to carry on trade. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the rights will, of course, be a matter for determination by Courts, in the same manner as questions of reasonableness of restrictions under Art. 19, sub-cls. 3 to 5.

(53) There is support for this view in the American authorities which were cited before us. Thus in 'JONES v. OPELIKA', (1942) 316 U S 584:86 Law Ed. 1691, in upholding the tax imposed on Jehovah's witnesses Reed, J. who delivered the opinion of the majority observed as follows:

> "Consequently there is not before us the question of the power to levy fees objectionable in their effect because of their size upon the constitutionally protected rights of free speech, press or exercise of religion."

In 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed. 1292, Frankfurter, J. who was for holding that the tax was valid observed as follows:

> "No claim is made that the effect of these taxes either separately or cumulatively has been or is likely to be to restrict the petitioners' religious propaganda activities in any degree. Counsel expressly disclaim any such contention."

and again

> "No complaint is made against the size of the taxes. If an appropriate claim indicating that the taxes were oppressive in their effect upon the petitioners' activities had been made the issues here would be very different. No such claim has been made and it would be gratuitous to consider its merits."

The decision in 'GROSJEAN v. AMERICAN PRESS CO.', (1936) 297 U S 233: 80 Law Ed. 660, would seem to be based on the same principle because it was not a case of a duty to be paid in advance but a tax of two per cent. on gross receipts to be paid by newspapers having a circulation of more than 2,000 per week and this payment was to be in addition to the other taxes and licence fees. The real object of this legislation would appear to have been to crush newspapers hostile to Senator Huey Long. The Supreme Court held that the tax was intended & calculated to prevent circulation of the papers and was, therefore bad.

There are observations in 'MACRAY v. THE UNITED STATES', (1904) 195 U S 27: 49 Law Ed. 78, tending in the same direction.

(54) Thus notwithstanding the recognition of the rule that powers of taxation are absolute subject only to limitations contained in the Constitution, these passages would seem to recognise the principle that in the case of "constitutionally protected rights" the reasonableness of the tax and whether it is calculated to destroy the rights are matters open to judicial review.

(55) No question has been raised in this case that the duty is such as to destroy the right and it is, therefore, unnecessary to consider it further.

(56) In the result, I agree with my Lord the Chief Justice that this application should be rejected without costs.

(57) We certify that this case involves a substantial question of law as to the interpretation of the Constitution and in particular Article 19.

C.R.K./R.G.D. *Application dismissed.*

A. I. R. 1952 Madras 409

RAJAMANNAR, C. J. AND VENKATARAMA AIYAR J.

A. C. S. Kandaswami Reddiar and others, Petitioners v. The Textile Commissioner of the Government of India, having his office at Bombay, Respondent.

Civil Misc. Petns. Nos. 5917 and 5974 of 1951, D/- 7-9-1951.

† (a) Cotton Control Order (1950), Cl. 18 — Notification S. R. O. 379, restricting export of goods, held is not invalid — (Constitution of India, Arts. 19 (1) (g), 19 (5), 302 and 301).

The notification S. R. O. No. 379 issued under Cl. 18 of the Cotton Control Order, 1950, which prohibits the export of goods in any area to any place outside that area except with the permission of the Government, the object clearly being to regulate the supply and demand of cotton and to control the price is in the interests of the public and is reasonable and must be held to fall within Art. 19 (5). As the price is fixed and as the demand is much more than the supply it is difficult to see how the restrictions can adversely affect the interests of the traders.

Similar restrictions are contained in Cl. 17 of the Madras Control Order of 1949 and by virtue of Art. 305, of the Constitution that clause will control Art. 301. Consequently the argument that right to free trade conferred by Art. 301 can only be taken away by legislation by Parliament under Art. 302, cannot be sustained. (Para 4)

† (b) Cotton Control Order (1950), Cl. 6 — Notification S. R. O. No. 388 held unconstitutional and void — Constitution of India, Arts. 19 (1) (g) and 19 (5).

The notification S. R. O. 388 issued under Cl. 6, Cotton Control Order 1950 has the effect of preventing most of the merchants from carrying on any business and must result in the extinction of their trade and all this for no demonstrable advantage to the public. This notification is therefore unconstitutional and void. AIR (38) 1951 S C 118 and AIR (37) 1950 S C 163, Rel. on. (Para 6)

R. Ramamurthi Aiyar, for Petitioners; Advocate-General for the Government-Pleader, for the State.

Cases referred to:

('50) 1950-13 S C J 324: (AIR (37) 1950 S C 163) (Pr 5)

('51) AIR (38) 1951 S C 118: (1950 S C R 759) (Pr 5)

ORDER: These are two petitions filed under Art. 226 of the Constitution. The petitioners 1 to 3 in C. M. P. No. 5917 of 1951 are certain cotton growers in the district of Tinnevelly and petitioners 4 to 8 are merchants who are carrying on business in cotton. These petitions have been filed by them questioning the validity of the two notifications S. R. O. Nos. 379 and 388 dated 19-3-1951 issued under clause 18 and clause 6 respectively of the Cotton Control Order, 1950.

(2) The relevant portion of S.R.O. No. 379 runs as follows:

"I hereby direct that notwithstanding anything contained in the Textile Commissioner's notification No. S.R.O. 597 no person shall except in accordance with the permission in writing of the Textile Commissioner, the Director (cotton) or an Assistant Director (cotton) in the office of the Textile Commissioner transport or cause to be transported kapas or cotton by rail, road or water from any place within any of the areas described below to any place outside that area."

Then follows a grouping of the cotton growing districts into five areas. We are concerned in these petitions with area No. 5, S. R. O. No. 388 provides that there should be no sale or purchase of cotton to any person in this area "unless such cotton is sold to anyone of the persons specified below". Then follows a list of persons. These persons have been referred to in these proceedings as "Nominees". For all the five areas similar notifications have been issued specifying nominees.

(3) The complaint of the petitioners is that both these notifications prevent them from carrying on trade and violate their fundamental rights under Art. 19 (1) (g) and that they cannot be upheld under Art. 19 (5) as they are unreasonable and are not in the interests of the public.

(4) We shall now consider the validity of S.R.O. No. 379. In substance it prohibits the export of goods in any area to any place outside that area except with the permission of the Government. The object of this notification is clearly to regulate the supply and demand of cotton and to control the price and it cannot be doubted that it is in the interest of the public. It is argued that by reason of these restrictions the petitioners are prevented from disposing of the goods freely and for proper prices but as the prices are fixed and as the demand is much more than the supply it is difficult to see how the restrictions can adversely affect the interests of the petitioners. As pointed out in the counter affidavit the references are to Pakistan market rates in the affidavit of the petitioner (?) suggests that the real complaint is that they are prevented from exporting their goods outside the country and making huge profits thereby. If the notification has the effect of preventing them from

doing that, it is in the interests of the public and is reasonable and must be held to fall within the Art. 19 (5). It is next contended that this notification is opposed to Art. 301 which runs as follows:

"Subject to the other provisions of this part trade and commerce and intercourse throughout the territory of India shall be free."

It is argued that the right to free trade conferred by Art. 301 would be taken away only by legislation by Parliament under Art. 302 and that as there has been no such legislation the notification S.R.O. No. 379 must be held to be bad but in the Control Order of 1949, clause 17 contains a similar prohibition and by virtue of Art. 305 that clause will control Art. 301. This objection must accordingly be overruled. In the result we hold that notification S.R.O. No. 379 is valid and not unconstitutional.

(5) We shall take up notification No. 388 for consideration. In this connection it is necessary to refer to some of the provisions of the Cotton Control Order of 1950. Clause 9 provides that no person shall produce, sell or carry on business in cotton except under licence in Form No. A and in accordance with the conditions therein. Under clause 10 any person desiring a licence might apply to the licensing authorities and under clause 11 provision is made for the grant of licence on payment of licence fee. The licence is to specify the period for which it shall be valid and there is a provision for renewal on payment of further fee. The licence which is in form A prescribes various conditions under which the licensee is to carry on business. Now petitioners 3 to 8 have obtained licences under these provisions. Their complaint is that though they have been granted licence to carry on trade the notification S.R.O. No. 388 virtually prevents them from doing any business. Under the notification they are prevented from purchasing cotton and therefore they can sell only their own goods and if they are not cotton growers there are no goods which they can sell. It is stated in the affidavit that there are over 1000 licence-holders and most of them must under this notification find their trade gone. It is undeniable that under these circumstances all the elaborate provisions regarding granting of licences have become idle formalities and the licence itself an empty and costly honour. As against this, the notification brings into existence a small body of monopolists. They alone have the right to purchase cotton and the consequence is that the trade which was carried on by 1000 licenseholders has come to be concentrated in their hands. It has not been shown how the interests of the public are served by eliminating a large class of merchants and substituting in their place a close oligarchy of middlemen. We shall now consider the authorities cited by the learned advocate for the petitioners. In 'RASHID AHMED v. MUNICIPAL BOARD, KAIRANA', (1950) 13 S.C.J. 324 the Commissioner of the Municipality of Kairana granted a monopoly of the right to do wholesale business in vegetables within the municipal limits to one Habib Ahmed. Previous to that one Rashid Ahmed was carrying on wholesale business in vegetables and fruits within the municipality & in view of the grant of monopoly to Habib Ahmed was refused licence to carry on business. This refusal was held to be void under the Constitution as having much more than the reasonable restrictions on trade. In 'CHINTAMAN RAO v. THE STATE OF MADHYA PRADESH', AIR (38) 1951 S C 118 it was held a total prohibition against carrying on business in beedies during the agricultural season was unreasonable and void under Art. 19 (1) (g). Mahajan J. in delivering the judgment of the Court observed as follows:

"The point for consideration in these applications, is whether the Central Provinces and Berar Act LXIV of 1948 comes within the ambit of this saving clause or is in excess of its provisions. The learned counsel for the petitioners contends that the impugned Act does not impose reasonable restrictions on the exercise of the fundamental right in the interests of the general public but totally negatives it. In order to judge the validity of this contention it is necessary to examine the impugned Act and some of its provisions. In the preamble to the Act, it is stated that it has been enacted to provide measures for the supply of adequate labour for agricultural purposes in bidi manufacturing areas. Sections 3 and 4 cited above empower the Deputy Commissioner to prohibit the manufacture of bidies during the agricultural season. The contravention of any of these provisions is made punishable by S. 7 of the Act, the penalty being imprisonment for a term which may extend to six months or with fine or with both. It was enacted to help in the grow more food campaign and for the purpose of bringing under the plough considerable areas of fallow land.

The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupations; in other words, whether the total prohibition of carrying on the business of manufacture of bidies within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Art. 19 (1) (g) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.'

(6) There can be no doubt that the notification S.R.O. No. 388 has the effect of preventing most of the merchants from carrying on any business and must result in the extinction of their trade and all this for no demonstrable advantage to the public. We are accordingly of opinion that this notification must be declared to be unconstitutional and void.

(7) In the result C.M.P. No. 5917 of 1951 will be ordered with costs and C.M.P. No. 5974 of 1951 will be dismissed with costs, advocate's fee Rs. 250 in each.

(8) We certify that the case involves a substantial question of law as to the interpretation of the Constitution and in particular Art. 14 and Art. 19 (1) (f) and (g) read with Art. 19 (5) and (6).

C.R.K./R.G.D. *Order accordingly.*

A. I. R. 1952 Madras 411

MACK AND KRISHNASWAMI NAYUDU, JJ.

In re, Ramaswami alias Kuppuswami and another, Accused.

Referred Trial No. 21 of 1951 and Criminal Appeal No. 148 of 1951, D/- 19-6-1951.

(a) *Criminal P. C. (1898), S. 164 — Substantial compliance with R. 85 of the Madras Criminal Rules of Practice. — (Madras Criminal Rules of Practice, R. 85.)*

Where before recording the confession the Magistrate put the following questions to the accused, "Did the police offer inducements to you that you would be released if you make a statement before Magistrate in Court. Have you understood that the statement you give will be used against you."

'Held' that there was a substantial compliance with the requirements of Rule 85, although the word "approver" was not actually imported into the question, and no specific warning that it was not intended to make him an approver was given. AIR (38) 1951 Mad 331, Explained; AIR (24) 1937 Mad 755; AIR (37) 1950 Mad 579, Relied on. (Para 9)

(b) *Penal Code (1860), Ss. 34, 302 — Bandits armed with revolvers waylaying passer-by — One firing shot and killing the passer-by. — All of the bandits carrying revolvers are guilty under S. 302 read with S. 34.*

Under S. 34, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. When more than one high-way robber is armed with a revolver, they obviously cannot be permitted to escape liability for murder on the ground that the prosecution has failed to show conclusively which robber fired the fatal shot. Nor can an armed bandit plead, when a person at whom he levels a revolver offers resistance, that he did not intend to shoot to kill or that the revolver accidentally went off in the course of a scuffle. A common intention to use a loaded revolver for the purpose of killing if necessary has to be presumed against the bandits, and high-way robbers, who are armed with these weapons and if a man is killed, the robbers so armed and acting in concert are all clearly guilty of murder under S. 302, read with S. 34, though each may not have actually fired a fatal shot. AIR (12) 1925 P C 1, Ref. (Para 11)

Anno: Penal Code, S. 34, N. 8; S. 300, N. 39.

(c) *Criminal P. C. (1898), S. 240 — Accused committed under Ss. 302, 307, 392, Penal Code — Sessions Judge should not split up case of murder from robbery to be dealt with separately — (Madras High Court Rules of Practice, R. 156.)*

Where the case was committed under Ss. 302, 307 and 392, it is not proper for the Sessions Judge to try only the case of murder against the accused leaving the charge of robbery to be dealt with at a separate trial. Accused persons cannot be tried a second time on precisely the same evidence, once for murder and then again for robbery. Rule 156 of the Criminal Rules of Practice merely states that it is inconvenient to try offences such as murder and theft at the same trial, and that in such cases Sessions Judge would exercise a sound discretion in holding separate trials and following the procedure in S. 240, Criminal P. C. This is not a case covered by this rule and the accused should obviously be tried both for murder and robbery at one and the same trial. (Para 13)

Anno: Criminal P. C., S. 235, N. 5; S. 240, N. 1.

V. Venkataraman, for Appellants; Asst. Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('25) 52 Cal 197: (AIR (12) 1925 P C 1:26 Cri L J 431 PC) (Prs 11, 13)
('37) 1937 Mad W N Cr 34: (AIR (24) 1937 Mad 321:38 Cri L J 753) (Pr 9)
('38) ILR (1938) Mad 348: (AIR (24) 1937 Mad 755:39 Cri L J 390) (Pr 9)
('47) R T No. 55 of 1947 (Mad) (Pr 9)
('50) 1950-1 Mad L J 659: (AIR (37) 1950 Mad 579:51 Cri L J 1047) (Pr 9)
('50) 1950-2 Mad L J 298: (AIR (38) 1951 Mad 331) (Pr 9)

MACK, J.: Ramaswami alias Kuppuswami, aged 27, has been found guilty under S. 302, I.P.C., of the murder of Subramania Mudali, whom he is alleged to have shot through the head with a revolver in the course of a high-way robbery on the Katpadi Gudiyattam High Road at about 7-40 p.m., on the 21st of August 1950. Muniyandi, the 2nd accused, who is also said to have carried a Revolver in this robbery has been found guilty under S. 302, read with S. 34, I.P.C. The learned Sessions Judge has sentenced them both to death. Two others (accused 3 and 4), who were also charged under S. 302, I.P.C., read with S. 34, I.P.C., have been acquitted.

(2) The deceased Subramania Mudali was a handloom cloth trader of Gudiyattam who was returning in a bandy driven by his cousin Natarajan (P.W. 2), a lad of 16. They sold saries at shandies and had about Rs. 70 kept under their bag of unsold articles. The bandy was, according to P.W.2, held up by accused 1 and 2 and two others whom they identified as the acquitted accused, all of whom had revolvers. First accused ordered the deceased to get down. He did so but refused even at the point of a revolver to hold up his hands. The first accused fired a shot which missed the deceased, who hid behind the cart. Then the second accused fired again and deceased hid behind the bull. According to P.W. 2 accused 3 and 4 also fired but missed. Then the deceased caught hold of the first accused, it would appear, with one hand and his neck with the other and they struggled on the road when a bus came along towards Gudiyattam from Katpadi with lights full on. First accused then fired a shot at the deceased's right temple. He collapsed. Accused 1, then tore away his shirt pocket and took his purse and all the accused made good their escape.

(3) In the bus were the Checking Inspector (P.W. 3), the bus driver (P. W. 5) and P. W. 7, a passenger, who was seated in the front seat. P. Ws. 5 and 7, who had the best facilities for observation, substantially corroborate each other . The bus driver says he saw three men struggling on the road near a stationary bandy. He stopped the bus about 9 feet from them, it would appear, after hearing a sound of a shot. He saw a black weapon in first accused's hand and a white weapon in second accused's hand and accused 1 take something from the pocket of the deceased after he had fallen down. Then accused 1 and 2 ran away. He did not observe the two other men through P. W. 7 whose observations were similar, says he saw two others standing in a little distance away. P. W. 3's observations were similar but he does not depose to the colour of the weapons in the hands

of accused 1 and 2. As will presently be shown, there is considerable significance in this as two revolvers, one black and white, have been recovered.

(4) When these witnesses alighted and came up to Subramania Mudali, they found him dead and immediately P.Ws. 3 and 5 proceeded by themselves in the bus to Kilvaithinakuppam police station which they reached at 8-15 p.m. The Sub-Inspector proceeded in it at once to the scene with armed constables, and recorded a complaint Ex. P. 3 from P. W. 2 in which he describes the robbers as wearing full pants and full-arm shirts. In Ex. P. 3, he did not say that all the four robbers had revolvers and he there speaks to four shots altogether having been fired.

(5-7) (Their Lordships discussed the evidence and came to the conclusion that accused 1 & 2 were carrying the revolvers and proceeded:)

(8) We now come to a confession, Ex. P. 5, recorded from the second accused on 14-9-1950, after he was arrested in Madras on 27-8-1950. The second accused has retracted that confession which both before the committing Magistrate and the Sessions Court, he said was due to Police coercion and beatings. (Their Lordships after narrating the contents of Ex. P. 5, proceeded:)

(9) Ex. P. 5 has been challenged as inadmissible in evidence by Mr. Venkataraman for the appellants on the ground that the Magistrate recording it did not give the second accused a specific warning that it was not intended to make him an approver as required by Rule 85 of the Criminal Rules of Practice. Rule 85 lays down that no magistrate shall record any statement or confession made by an accused under S. 164, Criminal P. C., until he has explained to the accused that he is under no obligation to answer any question at all and has warned the accused that it is not intended to make him an approver and that anything he says may be used against him. This rule then sets out certain question which Magistrates may usefully put. The Magistrate put the following questions to the second accused.

> "Did the police offer inducements to you that you would be released if you make a statement before Magistrate in Court?
>
> Have you understood that the statement you give will be used against you?"

We think that this is a substantial compliance with the requirements of Rule 85 although the word "approver" was not actually imported into the question. Our attention has been drawn to a recent Bench decision. In re: 'VENKATAREDDI', (1950) 2 Mad L J 298, a case where there were several accused, two of whom made confessions which they retracted. There were 8 accused originally charge-sheeted. The learned Bench held that the omission by the Magistrate to warn the two accused, who made confessions that it was not intended to take them as approvers was fatal to the admissibility of the confession. The learned Bench relied on 'GOVINDA SUBBARAMAYYA v. EMPEROR', 1937 Mad W N Cr 34, a decision by a single Judge and an unreported Bench decision in 'R. T. No. 55 of 1947' for the position that such an omission was fatal to the admissibility of a confession. We cannot regard that decision as laying down any hard and fast rule that in all cases, where there has been a technical breach of Rule 85 in giving the warning required there, a confession is rendered inadmissible. This specific point was considered in 'In re: 'KAMSALA MUNEYYA', ILR (1938) Mad 348', by Mockett and Horwill, JJ., who observed that the object of putting the questions set out in Rule 85 was merely to enable the Magistrate to make sure that the statement was a voluntary one, and that the confession cannot be rejected merely because a formal question was not asked. Rule 85 merely embodies some Government orders directing Magistrates to observe certain formalities to ensure that so far as possible confessions recorded from accused persons are voluntarily made and to minimise the possibility of their rejection in evidence under S. 164, Criminal P. C. The statutory requirements of S. 164, Criminal P. C., are that a Magistrate shall before recording any confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. In 'KARUNTHAMBI alias SUBRAMANIA GOUNDAR', 1950-1 Mad L J 659, Govinda Menon, J. and one of us (Krishnaswami Nayudu J.), held that a transgression of Rule 85 of the Criminal Rules of Practice in that the confession was not recorded during Courts hours does not amount to a defect of substance but only of form which cannot invalidate the confession. In this case the requirements of S. 164, Criminal P.C., have been complied with and though there has been a technical non-compliance with Rule 85 of the Criminal Rules of Practice, we are quite satisfied that the second accused's confession was voluntarily made to the Magistrate and that he could have been under no misapprehension at the time he made it that he would be released or taken as an approver.

(10) However quite apart from the confession, there is ample and overwhelming evidence against both the appellants that they way-laid this bandy, each carrying a loaded revolver. The learned Sessions Judge found it was the first accused who shot the deceased in the head with the black revolver (M. O. 5).

(Their Lordships reviewed the evidence and agreed with the Sessions Judge that the first accused fired the shot and then proceeded.)

(11) The case of the second appellant, whom all the assessors were of opinion was not guilty, but who has been convicted under S. 302, I.P.C., read with S. 34, I.P.C., requires different consideration, Mr. Venkataraman, has urged that the second accused had no common intention of killing the deceased and cannot be convicted of murder. Under S. 34, I.P.C., when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. It has been conclusively established that accused 1 and 2 had the common intention of robbing the deceased, each armed with a loaded revolver. By their taking loaded revolvers with them, they clearly had a common intention to use these revolvers if necessary to effect robbery, and if necessary by killing Subramania Mudali if he should offer resistance. In this case there can be no doubt that if Subramania Mudali meekly put up his hands and surrendered the money he had in the bandy, he would have escaped with his life, instead of which he courageously resisted these armed bandits, one of whom, accused 1, shot him fatally in the head. In 'BARENDRAKUMAR GHOSH v. EMPEROR', 52 Cal 197, the Privy Council considered the case in which three men of whom the appellant was one entered a Post Office. Shots were fired at the Postmaster, who was hit in two places and died. The trial Judge directed the jury that if they were satisfied that the postmaster was killed in furtherance of the common intention of all the three men, then the prisoner was guilty of murder, whether he fired the fatal shot

or not. Their Lordships of the Privy Council held this direction was correct. When more than one high-way robber is armed with a revolver, they obviously cannot be permitted to escape liability for murder on the ground that the prosecution has failed to show conclusively which robber fired the fatal shot. Nor can an armed bandit plead, when a person at whom he levels a revolver offers resistance that he did not intend to shoot to kill or that the revolver accidentally went off in the course of a scuffle. A common intention to use loaded revolver for the purpose of killing if necessary has to be presumed against bandits, and high-way robbers, who are armed with these weapons and if a man is killed, the robbers so armed and acting in concert are all clearly guilty of murder under S. 302, read with S. 34, I.P.C., though each may not have actually fired a fatal shot.

(12) We are satisfied that the second accused has been rightly convicted by the learned Sessions Judge under S. 302, I.P.C., read with S. 34, I.P.C. An eloquent plea has been made on behalf of the first accused on the score of his youth. We are wholly unable to find any extenuating circumstances. The evidence shows that he and the second accused deliberately commenced a career of high-way robbery armed with loaded revolvers. We cannot regard what appears to have been an inexperienced and blundering first attempt as an extenuating circumstance, culminating as it did in the murder of a plucky and courageous man. We confirm the sentence of death passed on the first accused while confirming his conviction for murder. As regards the second accused we think that as he did not fire the fatal shot he may be awarded the lesser penalty and sentence him to transportation for life.

(13) We should like before concluding to make one or two observations. The learned Sessions Judge rather extraordinarily split up this case committed under Ss. 302, 307 and 392 and tried only the case of murder against accused 1 to 4 leaving the charge of robbery to be dealt with at a separate trial. We are wholly unable to follow why he adopted this course as obviously robbery, which culminates in murder, should be dealt with at one and the same trial. In 'BARENDRA-KUMAR v. EMPEROR', 52 Cal 197, charges under Ss. 302 and 394, I.P.C., were tried together. We are unable to follow what the learned Sessions Judge meant by saying that the case was split up as a matter of convenience. Accused persons cannot be tried a second time on precisely the same evidence, once for murder and then again for robbery. Rule 156 of the Criminal Rules of Practice may be responsible for the learned Sessions Judge's decision. This rule merely states that it is inconvenient to try offences such as murder and theft at the same trial, and that in such cases Sessions Judges would exercise a sound discretion in holding separate trials and following the procedure in S. 240, Criminal P. C. This is not a case covered by this rule and the accused should obviously have been tried both for murder and robbery at one and the same trial. We are also satisfied in agreement with the learned Sessions Judge that only the two appellants carried revolvers though P.W. 2 whose evidence was confused in what was for him a most alarming experience, said that all the robbers were armed with revolvers.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. 1952 Madras 413

FULL BENCH

RAJAMANNAR, C. J., RAGHAVA RAO AND VENKATARAMA AIYAR JJ.

T. Dakshinamoorthy, Petitioner v. Thulja Bai and another, Respondents.

Civil Misc. Petn. No. 4955 of 1950, D/- 9-11-51.

† Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XV (15) of 1946), S. 7 (3) — Residential and non-residential building — Test indicated — Purpose of letting and not structural fitness is the test.

For the purpose of determining whether a building is residential or non-residential one has to bear in mind a few salient considerations: (1) Where there is an instrument of tenancy specifically and explicitly declaring the purpose of the letting as residential or non-residential, no difficulty generally arises. (2) where there is no such instrument of tenancy the question will have to be considered on the basis of direct evidence aliunde concerning the purpose of the letting, which may be adduced in a case; (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction as acquiesced in by the landlord. For such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting; (4) Where there is evidence of such user, but there is no evidence of such acquiescence, the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances, if any, will also have to enter into the determination of the question whether the building is or is not residential; (5) Difficulty may sometimes still remain, i.e., after applying the tests above indicated, if the buildings is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?

What is at the inception a residential building may well become a non-residential one by force of the terms of a letting, and any conversion, after the letting, of a residential building into a non-residential may well take place within and only within the limits which the statute prescribes. That if prior to a letting a building happens to have been of one character it must for ever keep that character irrespective of what the effect of the letting or of the acts of parties subsequent to the letting may, be, is a difficult, if not impossible, position. The original design of the structure may have been one suitable to residence, but if by the letting it became non-residential in character, there is no reason why one may not take it as such for the purpose of S. 7, sub-s. (3). If a landlord has let out a building for a residential or non-residential purpose as the case may be, it is only fair that when he seeks an order directing the tenant to put him in possession of the property, he has to show that he fulfils the requirements of sub-cl. (i) or (ii) of Cl. (a) of sub-s. (3) of S. 7. Having let out

the building as for a non-residential purpose, it would be unfair if the landlord were allowed to urge the requirement of the building for his own occupation, which is really a condition of his seeking to recover a residential building let out by him. The purpose of the letting and the condition of the landlord's recovery have alike reference to a residential or non-residential purpose according as a given case falls under sub-cl. (i) or sub-cl. (ii) of sub-s. 3 (a) of S. 7.

There is no rule of law which in any and every case forbids the interpretation of the same expression in two different senses as used in two different places although in one and the same provision of the statute. "Residential building" in S. 7 (3) (a) (i) in the first place where it is used may well mean "a building let or to be let for the residential purposes"; where it is next used, it may as well mean simpliciter "a building of residential character".

For several years the building was being used for the residence of the petitioner and P. W. 2. Then, it was let to a tenant who was carrying on business in 'chappals' and thereafter to the present tenant for his business in hides and skins. Structurally the building appeared to have been meant for residence rather than for carrying on business. The locality in which the building was situate was predominantly a business locality:

Held that the purpose of the letting being non-residential, the mere structural fitness of the building for residence at the time of the letting did not avail the landlord to contend that because he was not in occupation of a residential building of his own in the City and required this building for his own occupation he could evict the tenant from the premises. English Case law discussed.

(Paras 10, 15, 17, 30)

R. Ramamurthi Aiyar for A. Nagarajan and A. Viswanathan, for Petitioner; P. S. Panjatchara Mudaliar, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) C M P No. 6150 of 1948 (Mad) (Prs 4, 11)
('49) 1949-1 Mad L J 74: (AIR (36) 1949 Mad 785) (Pr 24)
(1921) 1 K B 541: (90 L J K B 656) (Pr 24)
(1924) 1 K B 936: (93 L J K B 521) (Prs 5, 20)
(1944) 1 K B 679: (113 L J K B 552) (Pr 22)
(1925) 2 K B 702: (94 L J K B 715) (Pr 20)
(1949) 2 K B 194: (1949-1 All E R 570) (Pr 23)
(1919) W N 170: (35 TLR 525) (Pr 25)

RAJAMANNAR C. J.: Under S. 7(3) of the Madras Buildings (Lease and Rent Control) Act, a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession (i) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned.

(2) The Act does not contain a definition of a residential building. There is however, a definition of "building". "Building" means, "any building or hut or part of building or hut, let or to be let separately for residential or non-residential purposes".

(3) The only question in this case is whether the building which is the subject-matter of the application is a residential or a non-residential building. The findings which are material for a determination of this question are as follows: For several years the building was being used for the residence of the petitioner and P. W. 2. Then, it was let to a tenant who was carrying on business in 'Chappals' & thereafter to the present tenant for his business in hides and skins. Structurally the building appears to have been meant for residence rather than for carrying on business. The locality in which the building is situate is predominantly a business locality.

(4) If the sole test for determining whether a building is residential or not is the purpose for which the building was let to the tenant in occupation at the time of the application for eviction, then undoubtedly, the building is a non-residential building. But the appellate tribunal in this case, the Chief Judge of the Court of Small Causes, has held that as it was once used for residential purposes and was structurally such that it must have been intended for residence,mere user for a number of years as a non-residential building would not make it non-residential and therefore it must be deemed to be a residential building. In coming to this conclusion he was largely influenced by the observations made by this Court in a decision to which I was a party in C. M. P. No. 6150 of 1948. In that case the building was actually being used as a restaurant at the time of the application for eviction but by its nature and by its structure it was a residential building. Both the Rent Controller and the appellate tribunal held that it was a residential building. In view of the fact that by its nature and structure the building was residential in character it was held, that the appellate tribunal was justified in its finding. I went on to say,

> "If by reason of the original character it was residential, the fact that for sometime—may be even for a long time—it was being used for purposes other than residence, would by itself not make the building non-residential."

Reliance was placed on S. 11(1) of the Act, but we were inclined to hold that what was contemplated by that section was structural alteration which converted a residential building into a non-residential building.

(5) Since that decision I have come across other cases in which conflicting considerations have placed me often in a state of uncertainty as to the meaning to be given to a "residential building" in S. 7(3). If the definition of "building" gives a clue, then, a residential building is a building let or to be let for residential purposes. That furnishes no doubt a simple test which has also the merit of reasonable certainty. But I have found it difficult to adopt that test in the case of a building which for instance, might be the family house of the owner in which he and his predecessors had been residing for years and therefore was at one time a residential building which, however, has been let for business purposes at the material period. The question will then arise whether there has been a conversion of a residential building into a non-residential building. I was at one time inclined to think that the conversion contemplated was by means of a structural alteration. But my attention has been drawn to the decision in 'WILLIAMS v. PERRY', (1924) 1 K B 936, in which Swift J. observed:

"I can see no reason why a dwelling house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration."

These remarks appear to me to show a way out of the difficulty.

(6) I expressed more than once the desirability of the Legislature clarifying the position by a definition of a residential building, but evidently there has been no attempt in that direction. As this is a matter which constantly comes up throughout the State, it is desirable that there should be an authoritative ruling laying down at least certain broad tests to find out if a building is or is not a residential building within the meaning of the Madras Buildings (Lease and Rent Control) Act.

(7) The petition will be posted before a Full Bench.

(8) PANCHAPAKESA AIYAR J.: I agree.

(In pursuance of the above order, this petition coming on for final hearing, the Court delivered the following 'Judgment':)

(9) RAGHAVA RAO J.: This matter comes up on a reference to a Full Bench by my Lord the Chief Justice and Panchapakesa Aiyar J. The question is whether the premises in the possession of the petitioner, the tenant, are in the nature of a non-residential building, of which it is not open to the landlord, the respondent, to ask for possession under Sec. 7(3) (a) (I) of Madras Act XXV (25) of 1949 (The Madras Buildings (Lease and Rent Control) Act.

(10) The findings of fact material to the determination of the question are stated in the Order of reference thus:

"For several years the building was being used for the residence of the petitioner and P. W. 2. Then, it was let to a tenant who was carrying on business in chappals and thereafter to the present tenant for his business in hides and skins. Structurally the building appears to have been meant for residence rather than for carrying on business. The locality in which the building is situate is predominantly a business locality."

(11) The reference has been necessitated by the fact that the Bench which has made it has doubted the soundness of the view expressed in 'C. M. P. No. 6150 of 1948' to which the learned Chief Justice himself was also a party concerning the test for determining whether a building is residential or not within Madras Act XXV (25) of 1949. That view is that if by reason of the original nature and structure of the building it was residential the fact that for some time—may be even for a long time—it was being used for purposes other than residence, would by itself not make the building non-residential. In the order of reference it is observed that if the definition of "building" in the Act gives a clue, then a residential building is a building let or to be let for residential purposes. The question is whether the view which favours regard for the original structural design or the view which emphasises the importance of the letting of the building as for a residential purposes is to be preferred.

(12) To have regard to the provisions of the Act so far as they throw light upon the matter, we find first that the preamble states that

"It is expedient to regulate the letting of residential and non-residential buildings..... and to prevent unreasonable eviction of tenants therefrom."

Next the definition of "building" in S. 2(1) is that it means

"any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes."

"Let" in the definition apparently means "let at the time of the passing of the Act" while "to be let" in the definition means "to be let after the passing of the Act". "Residential building" of which as such there is no definition in the Act must in the light of the definition of "building" mean "any building or hut or part of a building or hut hut or to be let separately for residential purposes".

Section 7 (3) (a) (i) provides that,

"A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession.....(i) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own, in the city, town or village concerned.

(ii) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled."

(13) Then we have S. 11(1) which states that,

"No residential building shall be converted into a non-residential building except with the permission in writing of the Controller."

(14) It may be relevant also to notice at this juncture that S. 4 of Madras Act VIII (8) of 1951 has replaced S. 3 of the Madras Act XXV (25) of 1949 by something more detailed than and in some respects differing from the provisions of the latter section. Sub-section (5) of S. 3 of the Act of 1949 as amended in 1951 contains three provisos of which the second and the third are material to the present discussion, namely,

"Provided further that if the building is a residential building, it shall not be converted into a non-residential building unless the permission in writing of the Controller is obtained under S. 11, Sub-s. (1);

Provided also that no structural alterations shall be made in the building, unless the consent of the landlord is also obtained therefor."

From these provisions the following material factors emerge: (1) that the Act must be so construed as to prevent unreasonable eviction of tenants; (2) that while "residential" according to its ordinary dictionary meaning (Vide the Concise Oxford Dictionary, 3rd Edition, 1944 page 998) may mean one of two things, (i) suitable for or occupied by private houses (e.g. residential estates, street, quarter) and (ii) "connected with residence" (e.g. residential qualifications) the latter of which is the one pertinent to the present context, the statute brings in, with reference to what a "residential building" means, by its definition of "building" the idea that the residential building must be one let or to be let for purposes connected with residence; (iii) that the residential or non-

residential character of the building for the purpose of a landlord's application under S. 7(3) (a) of the Act must be determined with reference to the date and purpose of the letting, the twofold condition for the application to succeed under (i) being that the landlord requires it for his own occupation, and that he is not occupying a residential building of his own and under (ii) the condition being that he is not occupying for the purposes of a business which he is carrying on a non-residential building which is his own or to the possession of which he is entitled; (4) that the status which a building which is his own or to the possession of which the letting shall not be converted into that of a non-residential building, apparently by the tenant, except with the permission in writing of the Controller; and (5) that the two provisos to sub-s. (5) of S. 3 as amended, when read together, suggest that the conversion of a residential building into a non-residential building need not always be by structural alterations, but that if the conversion is by such alterations, the consent of the landlord, in addition to the permission in writing of the Controller, is also a prerequisite for such a conversion.

(15) It seems to us, therefore, that what is at the inception a residential building may well become a non-residential by force of the terms of a letting, and that any conversion, after the letting, of a residential building into a non-residential may well take place within and only within the limits which the statute prescribes. That if prior to a letting a building happens to have been of one character it must for ever keep that character irrespective of what the effect of the letting or of the acts of parties subsequent to the letting may be, seems to our minds to be a difficult, if not impossible, position, having regard to the considerations above set forth. The original design of the structure may have been one suitable to residence, but if by the letting it became non-residential in character, there is no reason why one may not take it as such for the purpose of S. 7, Sub-s. (3). It seems to us that if a landlord has let out a building for a residential or non-residential purpose as the case may be, it is only fair that when he seeks an order directing the tenant to put him in possession of the property, he has to show that he fulfils the requirements of sub-clause (i) or (ii) of clause (a) of sub-section (3) of S. 7. Having let out the building as for a non-residential purpose, it would be unfair if we were allowed to urge the requirements of the building for his own occupation, which is really a condition of his seeking to recover a residential building let out by him. The purpose of the letting and the condition of the landlord's recovery have alike reference to a residential or non-residential purpose according as a given case falls under sub-clause (i) or sub-clause (ii) of sub-section 3(a) of S. 7.

(16) It is true as observed in the order of reference that this sort of test might sometimes work a hardship as for instance in the case of a building "which might be the family house of the owner in which he and his predecessors had been residing for years and, therefore, was at one time a residential building which, however, has been let for business purposes at the material period." On the other hand, there is no denying too that, as also observed in the order of reference, the clue afforded by the definition of "building" in the matter of the determination of the question whether a building is residential or non-residential "furnishes a simple test which has also the merit of reasonable certainty." Between these two conflicting tests we have no doubt but that the latter ought to be preferred as more consonant to considerations connected with the object and purpose of the Act as explained above and the scope and intendment of its several relevant sections as set forth already. This Court always listens and listens with due attention to an argument 'ab inconvenienti' or even 'ad miscricordium'. We feel, heowever, perfectly clear that the argument of hardship cannot prevail here.

(17) The learned advocate for the respondent has urged that the definition of "building" cannot be treated as affording a clue to the determination of the question whether a building is residential or non-residential. He says that the object of the definition of "building" is not that, and that the idea of the definition is to show that there can be a letting of a part as well as the whole of the building. Surely that is not a complete reading of the definition of "building" which also refers to residential or non-residential purposes in connection with the letting of the building in whole or in part Counsel also urges that this view of what "a residential building" is, does not fit in with the meaning of that expression as used for the second time in S. 7 (3) (a) (i). His point seems to be that one and the same meaning ought to be at ached to that erpression as used in both the places in S. 7 (3) (a) (i), and that such meaning must be "a building suitable for residence by its structural design" and not "a building let or to be let for residential purposes"; for, "if he is not occupying a residential building of his own" in that provision cannot mean "if he is not occupying a building let or to be let for residential purposes". The suggestion seems to have some plausibility of reason behind it; but there is no rule of law which in any and every case forbids the interpretation of the same expression in two different senses as used in two different places although in one and the same provision of the statute. "Residential building" in the first place where it is used may well mean "a building let or to be let for the residential purposes"; where it is next used, it may as well mean simpliciter "a building of a residential character." After all, the definition of "building" given in S. 2 of the Act, only operates where there is nothing repugnant in the subject or context, as is made clear by the opening words of the section. If the definition cannot be applied for the ascertainment of the meaning of the expression "a residential building" in the second place in which it is used in S. 7 (3) (a) (i) but can be applied for such a purpose with reference to the first place in which the expression "residential building" occurs there is no reason why the clue afforded by the definition of "building" may not be pressed into service for the ascertainment of the meaning of the expression "residential building" as it occurs in the first place though not as used in the second. The purpose of residence involved and implied in the expression "residential building" in both the places is of course there; only the idea of letting is there in the first context, while it is not there in the second.

(18) For the purpose of determining whether a building is residential or non-residential according to the view expressed above of what a "residential building" means, we have to bear in mind a few salient considerations, which (we?) propose to indicate: (1) Where there is an instrument of tenancy specifically & explicitly declaring the purpose of the letting as residential or non-residential, no difficulty generally arises; (2) where there is no such instrument of tenancy the question will have to be considered on the basis of direct evidence 'aliunde' concerning the purpose of the letting, which may be adduced in a case. (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction as acquiesced in by the landlord. For such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting. (4) Where there is evidence of such user, but there is no evidence of such acquiescence, the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances if any will also have to enter into the determination of the question whether the building is or is not residential. (5) Difficulty may sometimes still remain, i.e., evidently after applying the tests above indicated, if the building is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case it seems to us, that what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?

(19) As supporting or bearing on these considerations as affording the relevant tests, I wish to refer next to a few decisions of the Courts in England rendered under the Rent Restrictions Act prevailing there, which have been cited by learned counsel for the petitioner. It may be noted that, broadly speaking, in England there is distinction made in those Acts between a "dwelling house" and "business premises."

(20) In the case of 'WILLIAMS v. PERRY', (1924) 1 K B 936, premises which were occupied from 1914 till 1919 partly as business premises and partly as a dwelling house, were in 1919 let to the defendant solely as business premises. It was held that the premises were not within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. At the end of the judgment of Swift J. with which Acton J. agreed, there is the observation at page 940 of the Report quoted in the order of reference before us which is relevant to the present discussion:

> "I can see no reason why a dwelling house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration."

In the case of 'HYMAN v. STEWARD', (1925) 2 K. B. 702 the question which arose was whether the dwelling house there in question had become converted into business premises and therefore disentitled to the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, by reason of abandonment of all residence whatsoever on the part of the tenant. The county Court Judge found on the facts proved that there had been no such change of user as to destroy the character of dwelling house with which the premises were impressed by the tenancy agreement and gave judgment for the defendant, which was upheld on appeal. The main point about this decision so far as material to this case is that it shows that the character of dwelling house may well be impressed upon premises by the terms of the tenancy agreement. The further fact to notice is that in Greer J's judgment at page 712 of the Report there occurs this observation:

> "I confine myself to saying that if there had been a complete change of user of the premises by reason of the defendant entirely ceasing to use them as a dwelling house and using them all for business or trade purposes, and if the plaintiff had not interfered and was estopped by acquiescence from preventing the altered user of the premises as business premises, I think that the premises could then have been described as premises let entirely for business purposes, and not partly for residential and partly for business purposes."

(21) That shows that in England where premises are let as a dwelling house, conversion thereof into businness premises can be effected by such conduct on the part of the tenant acquiesced in by the landlord as is sufficient to erect an estoppel against the landlord from pleading that the premises must be regarded as still continuing as a dwelling house. Here, we have limits set by our own Acts to such conversion.

(22) The next case, 'VICKERY v. MARTIN', (1944) 1 K B 679, is a decision of the Court of Appeal and is interesting as only showing that in England there is in S. 3 sub-s. (3) of the Rent and Mortgage Interest (Restrictions) Act of 1939 which repeats in practically the same words in S. 12, sub-s. 2(ii) of the previous Act of 1920, a specific provision that it is not sufficient to exclude a dwelling house from the operation of the Act merely to show that part of the premises is used as a shop or (office or) for business, trade or professional purposes. It is in view of this specific provision that Lord Greene M. R. says thus at p. 684 of the Report:

> "I decline, with the language of the subsection before me, to embark on an inquiry what is the substantial use, or what, in the language of the County Court Judge is the principal or ancillary use of these premises."

We do not have here a provision to that effect, and where a house is found let for both residential and non-residential purposes, as I have already stated, the question will arise, what was the main, real and substantial purpose of the letting, residential or non-residential.

(23) The case of 'WOLFE v. HOGAN', (1949) 2-K B 194 is important as containing a discussion of the general considerations pertinent to the determination of the question whether premises of which possession is sought by a landlord are "let as a separate building" within the meaning of S. 12 sub-s. (2) of the Rent and Mortgage Interest (Restrictions) Act

of 1920. Those considerations are laid down in this decision of the Court of Appeal on practically the same lines as we have adopted earlier in this judgment in enunciating the salient considerations connected with the evidentiary material on the basis of which Courts here have to decide whether a building is or is not residential within the meaning of our Act. It is not, in our opinion, necessary to deal further with this decision.

(24) We propose next to turn to two decisions not cited at the Bar, the one reported in 'KRISHNA NAIR v. VALLIAMMAL', (1949) 1 M L J 74 & the other reported in 'WALLER & SONS v. THOMAS', (1921) 1 K B 541, which bear upon the test of "real main and substantial purpose of the letting" referred to above by us as coming up for application in a case where a building as a whole is found let for both kinds of purposes, residential and non-residential no distinction being made between one part as let for one kind of purpose and the other for the other kind of purpose. In the Madras case decided by Panchapakesa Aiyar J. what has been ruled by the learned Judge is that in determining whether certain premises are residential or non-residential, the main or primary purpose for which they are let out or taken or used must be considered. The premises in that case were held to have been let out for a residential purpose, although a portion thereof was used for making 'appalams' when people were not sleeping there and was used for sleeping purposes when 'appalams' were not made there. Says the learned Judge at page 76 of the Report:

> "I consider that, in such cases, the primary purpose for which the building is let out or used should be the determining factor. A lawyer may use a room of his house for giving legal advice to his clients; an astrologer may use a room for his house for giving predictions; a barber may use a room of his house for shaving his clients; but such use of a room will never make a house itself one used for non-residential purpose."

Cases in which premises are used exclusively for business purposes or exclusively for dwelling purposes present no difficulty. It is in cases in which the purpose of the letting happens to be both ways that a test has to be sought for the resolution of the difficulty arising from the dual character of the premises as let. The test laid down by the learned Judge seems to our minds to be sound.

(25) The case remaining still for consideration is the English case referred to above. The question there arose whether a public house which contained dwelling house accommodation constituted a dwelling house which fell within the general provisions of Increase of Rent and Mortgage Interest (Restrictions) Act 1920 or constituted business premises which fell within S. 13 of the Act. Both the learned Judges who composed the Divisional Bench, Lush J and Mc Cardie J. ruled that the premises were in the nature of a dwelling house and not in the nature of business premises. Mc Cardie J's judgment is, however, the one which contains matter relevant to the present discussion. The learned Judge says first at page 553 of the report that,

> "Under the Increase of Rent (Restrictions) Acts prior to 1920 the Court of Appeal had to consider this very point in 'EPSOM GRAND STAND ASSOCIATION v. CLARKE', (1919) W N 170, and there held in the clearest terms that a public house was "a dwelling house" for the purpose of those Acts."

(26) He then reproduces a passage from Bank L. J's judgment in the 'EPSOM CASE', 1919 W N 170 which expresses the reasoning in support of the conclusion in that case thus:

> "Was this a dwelling house? The house was dwelt in, and it was let to the defendant for that purpose. In the fullest sense it was a dwelling house, and none the less so because it was also a public house. He could not accept Mr. Disturnal's contention that because it was let for business purposes it could not be dwelling house within the Act. If that contention were accepted it would exclude a great many premises which the Legislature did not intend to be excluded."

McCardie, J. then proceeds to observe:

> "That is a definite decision of the Court of appeal, but I confess to feeling that juristic criticism may be properly applied to it. I feel with the deepest respect that the true test is to ascertain the dominant purpose and principal user of the premises. One might well have thought that the dominant purpose and object of a public house was to carry on the business of a licensed victualler and that the provision of accommodation for the occupants was a mere adjunct of the business. One might have said that premises do not cease to be 'business premises' because dwelling accommodation necessary for the purpose of the business is attached. However the Court of Appeal have taken a different view and we must loyally follow it."

Then the learned Judge proceeds to point out that the Act of 1920 recognised the Epsom decision and treated it as an integral part of the scheme of the Act; for S. 12, sub-s. 2(ii) provided that the application of the Act should not stand excluded by reason only that part of the premises was used as a shop or office or for business, trade or professional purposes. Reading the Epsom decision in conjunction with the words of the Act of 1920 says the learned Judge in conclusion:

> "I cannot avoid the conclusion that this house must be treated as a dwelling house within the general provisions of the Act rather than as business premises under S. 13 with the special modifications therein provided."

(27) Here in our statute as we have already observed, we do not have any provision such as came to be enacted in the English Act of 1920 by way of giving effect to the Epsom decision; and if the juristic criticism applied to the Epsom decision by McCardie J. is to be accepted as sound, there is no reason why the test of dominant purpose and principal user propounded by the learned Judge should not be regarded as applicable to cases arising under our statute.

(28) It is true that the test of dominant purpose and principal user is not always easy of application. Applied certainly it can be, speaking generally, though with some difficulty in some cases. Such difficulty in the actual application of the test in such cases will only mean that a margin of judicial discretion in the matter of the determination of the question of the character of the building as a question of fact has necessarily to be allowed for. In-

stances of transactions inspired by mixed motives and intents in which the question of the main, real and dominant motive and intent has to be canvassed for validating or invalidating them are not uncommon in other branches of law. There can in our judgment be no reason or principle why a canvass of the main, real and dominant purpose should be regarded as not legitimate in this branch of law in cases where the letting is actuated by mixed purposes.

(29) It only remains to add that where the Court finds the letting to be equally for residential and non-residential purposes and not mainly or substantially for one or the other kind of purpose the application by the landlord may well stand whether filed under S. 7 (3) (a) (i) or S. 7(3) (a) (ii) of the Act.

(30) Judging the case before us on the facts found and in the light of the legal principles indicated in the foregoing, we are of opinion that the purpose of the letting being non-residential, the mere structural fitness of the building for residence at the time of the letting does not avail the respondent to contend that because he is not in occupation of a residential building of his own in the city and requires this building for his own occupation he can evict the petitioner from the premises. This application accordingly succeeds with costs. (Advocate's fee Rs. 100).

C.R.K./R.G.D. Application allowed.

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* A. I. R. 1952 Madras 419

FULL BENCH

SATYANARAYANA RAO, PANCHAPAGESA SASTRI, VISWANATHA SASTRI, RAGHAVA RAO AND PANCHAPAKESA AYYAR, JJ.

K. Peramanayakam Pillai, Appellant v. S. T. Sivaraman and another, Respondents.

Second Appeal No. 2187 of 1947, D/- 22-3-51.

† * (a) Hindu Law — Alienation — Suit for partition — Method of adjusting equities between alienee and non-alienating coparcener.

A coparcener of a joint Hindu family governed by Mitakshara obtaining in the State of Madras is entitled to alienate his undivided share either in the whole of the property or in a certain specific item of the property or even the whole of a specific item. In all such cases the only right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. The alienee has to bear the proportionate share of the common burden of the family proportionate to the value of the share alienated to him.

Where an alienation is made by a father or manger of a joint Hindu family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other coparceners impugning the alienation to have the alienor's share allotted to him and also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated.

If the non-alienating coparcener challenges the sale made by the father or manager of the joint family property on the ground that it is not binding on him but institutes a suit only to recover his share in the property alienated thereby admitting the right of the alienee to the other share in that property, and if it is found that the alienation is supported by partial necessity, the common burden discharged from and out of the consideration should be distributed proportionately in the same suit on the principle of 'AIR 1914 Mad 582'.

If the alienation whether made by a father or manager or by any other coparcener, though purporting to be for value, is in fact a device to make a gift and not a transfer for consideration, the alienation would not defeat the right of the other coparceners to take the property by survivorship in case of death of the alienor. A non-alienating coparcener is not otherwise entitled to dispute the adequacy or fairness of the consideration for the sale by a coparcener and his only right is to insist that the property alienated should bear the proportionate share of the common burden on the family.

Neither the alienation of the entirety of the interest of a coparcener nor an adjudication of a coparcener as an insolvent would have the effect of disrupting the status of the family.

The share or in other words the fraction of the share which the alienee acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation.

The father sold certain land for a consideration of Rs. 13400 out of which only a sum of Rs. 7022 was applied for discharge of binding debts of the family. The suit was filed by the son, the relief claimed being partition and separate possession into two equal parts and for an allotment to him his share. The plaint proceeded on the footing that on the date of the action, the plaintiff and the father were members of a Mitakshara joint family and that the alienations made, did not bind the plaintiff's interest:

Held that the alienee was entitled to have a condition imposed in the very suit that the plaintiff should not recover possession of his half share of the property without payment of half share of the binding consideration, viz., Rs. 3511. 23 Mad 89, 51 Mad 824: AIR 1928 Mad 788: 113 Ind Cas 158, Overruled; AIR 1914 Mad 582, Approved. (Paras 37, 38)

(Per Raghava Rao, J.): 23 Mad 89 cannot be accepted as good law in so far as it refuses equities altogether to the alienee in the suit for partial partition by the non-alienating coparceners; AIR 1914 Mad 582 cannot be accepted as good law in so far as, while rightly sanctioning the working out of equities in such a case, the rule adopted by it for the purpose is one opposed to fundamental conceptions per-

taining to the nature of a coparcener's interest in the family estate as well as to the nature of the right which the alienee acquires; AIR 1928 Mad 788 must be accepted as good law as sanctioning the working out of equities in accordance with such fundamental conceptions and within and only within the limits set by law. (Para 112)

(b) Judicial Precedents — Two conflicting Full Bench decisions — Effect — Civil P. C. (1908), Preamble.

(Per Raghava Rao, J.) : The fact that a Full Bench decision of four Judges has not been accepted by another Full Bench of four Judges does not certainly show that the former has ceased to be and that the latter has, in its place, become binding authority on the point. Nor does the mere fact that later Divisional Benches have accepted the later Full Bench ruling and refused to consider themselves bound by the earlier Full Bench ruling make any difference to the continuing existence of the conflict between the two Full Bench decisions unless one of them is upheld and the other overruled formally and in an appropriate manner. If there are two conflicting Full Bench decisions of equal strength on any point, it is necessary that the conflict should be submitted to fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, Courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject. (Para 80)

Anno : C. P. C., Pre N. 15.

(c) Judicial Precedents — Stare decisis.

(Per Raghava Rao, J.) : The Rule of 'Stare Decisis' only means that where a rule has become settled law it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned. The rule can bear no application to a situation in which there is conflict between two Full Bench decisions of equal strength. (Para 80)

Anno : C. P. C., Pre N. 15.

(d) Transfer of Property Act (1882), S. 44 (as amended in 1929) — Effect on rights of alienee under Hindu Law.

Section 44 before the amendment of the Act by the Transfer of Property (Amendment) Act of 1929 had not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu Family to claim joint possession of the alienor's share as a tenant-in-common by virtue of the section and his only right is to obtain by a suit for partition the share to which his alienor would be entitled. The words "subject to the conditions and liabilities affecting at the date of transfer the share or interest so transferred" in Section 44 save the principles established by Mitakshara Hindu Law that the right of an alienee is only to institute a suit for partition to work out his equities, subject to the charges and encumbrances affecting the coparcenary property or the interest of the alienor at the time of the transfer. These principles are not in any manner and to any extent affected or altered by Section 3 of the Transfer of Property (Amendment) Act and Section 2 of the principal Act. 13 Mad 275, held still good law. (Para 28)

Anno : T. P. Act, S. 44 N. 6.

T. M. Krishnaswami Aiyar, R. Sethurama Sastri and P. Boopathi, for Appellant; K. V. Venkatasubramania Aiyar, K. Veeraswami and V. P. K. Nambiar, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(1861-63) 9 Moo Ind App 195: (1 W R 1 P C) (Prs 71, 129)
(1861-63) 9 Moo Ind App 539: (2 W R 31 P C) (Pr 45)
('66-67) 11 Moo Ind App 75: (8 W R 1 PC) (Prs 5, 24, 34, 45, 63, 94)
('70-72) 14 Moo Ind App 40 (PC) (Prs 47, 86, 124)
('76-77) 4 Ind App 247: (3 Cal 198 P C) (Prs 8, 10, 53, 65, 84, 93)
('80) 5 Bom 48: (7 Ind App 181 P C) (Prs 84, 99, 108)
('80) 6 Ind App 88: (5 Cal 148 P C) (Prs 9, 10, 11, 47, 53, 63, 84, 96, 97, 99, 120)
('84) 10 Cal 626: (11 Ind App 26 P C) (Pr 97)
('96) 23 Cal 670: (23 Ind App 37 P C) (Pr 65)
('98) 20 All 267: (25 Ind App 54 P C) (Pr 47)
('13) 40 Cal 966: (40 Ind App 213) (Prs 15, 84)
('16) 43 Cal 1031: (AIR 1916 PC 104) (Pr 35)
('19) 42 Mad 523: (AIR 1918 P C 196) (Pr 85)
('24) 46 All 95: (AIR 1924 P C 50) (Prs 50, 126)
('26) 48 All 518 :(AIR 1926 P C 105) (Prs 26, 67, 84, 101, 102, 103)
('27) 8 Lah 597: (AIR 1927 P C 121) (Pr 56)
('27) 53 Mad L J 786: (AIR 1927 PC 246) (Pr 56)
('27) 49 All 149: (AIR 1927 P C 37) (Prs 16, 56)
('33) 8 Luck 121: (AIR 1933 P C 72) (Pr 65)
('35) 58 Mad 350: (AIR 1935 P C 62) (Prs 65, 84, 107)
('36) 17 Lah 644: (AIR 1936 P C 277) (Prs 25, 35, 45, 70)
('37) ILR (1937) Mad 1: (AIR 1936 P C 264) (Prs 30, 34, 68, 129)
('42) ILR (1942) Mad 886: (AIR 1941 P C 48) (Prs 45, 83, 107)
(1862-63) 1 Bom H C R 27 (Pr 8)
('72-74) 1 Bom H C R 182 (Prs 7, 8)
('74) 11 Bom H C R 72 (Prs 8, 10, 12, 13)
('74) 11 Bom H C R 76 (Pr 8)
('97) 21 Bom 797 (Prs 49, 60)
('99-1900) 10 Bom H C R 139 (Pr 7)
('20) 44 Bom 967: (AIR 1920 Bom 104) (Prs 50, 120)
('28) 52 Bom 307: (AIR 1928 Bom 150) (Prs 50, 120)
('43) AIR 1943 Bom 278: (211 Ind Cas 379) (Prs 2, 6)
('74) 12 Beng L R 90: (20 W R 192) (Pr 84)
(1862-63) 1 Mad H C R 471 (Prs 7, 8, 47, 94, 120)
(1864-65) 2 Mad H C R 416 (Pr 8)
(1864-65) 2 Mad H C R 270 (Pr 7)
('68-69) 4 Mad H C R 60 (Pr 7)
('69-70) 5 Mad H C R 166 (Prs 10, 13, 57, 65, 94, 95, 97, 107, 125)
('82) 5 Mad 196 (Prs 14, 60, 86)
('82) 5 Mad 362 (Pr 99)
('86) 9 Mad 188 (Prs 20, 87)
('90) 13 Mad 275 (Prs 10, 12, 28)
('91) 14 Mad 408: (1 Mad L J 603 F B) (Prs 9, 10, 11, 53, 55, 77, 79, 80, 83, 94, 126).

('97) 20 Mad 243 (Prs 10, 12)
(1900) 23 Mad 89
(Prs 19, 20, 23, 24, 26, 27, 40, 58, 59, 60, 62 74, 81, 82, 83, 85, 87, 88, 89, 90, 91, 98, 100, 101, 103, 106, 107, 108, 110, 112, 114, 119, 125)
('02) 25 Mad 690 (FB)
(Prs 10, 11, 17, 21, 31, 33, 47, 53, 54, 65, 79, 94, 98, 99, 125, 126)
('03) 13 Mad L J 477 (Prs 14, 60, 86)
('04) 27 Mad 192: (13 Mad L J 341) (Pr 70)
('04) 27 Mad 162
(Prs 21, 27, 47, 61, 62, 84, 92, 98, 103, 104, 107, 108, 119, 125)
('09) 32 Mad 167: (2 Ind Cas 341) (Pr 70)
('11) 34 Mad 269: (7 Ind Cas 559 F B)
(Prs 39, 57, 97, 98, 125)
('12) 35 Mad 47: (9 Ind Cas 596 F B)
(Prs 11, 13, 33, 50, 53, 54, 55, 65, 77, 79, 80, 83, 101, 120, 125, 126)
('12) 22 Mad L J 85: (13 Ind Cas 7) (Pr 79)
('12) 23 Mad L J 64: (14 Ind Cas 524)
(Prs 13, 65, 95)
('13) 15 Ind Cas 354: (1912-1 Mad W N 379)
(Prs 13, 65)
('14) 37 Mad 435: (AIR 1914 Mad 582)
(Prs 3, 18, 22, 26, 27, 37, 38, 40, 58, 63, 64, 65, 67, 74, 81, 82, 83, 85, 91, 92, 93, 94, 95, 96, 98, 100, 101, 102, 103, 107, 108, 110, 114, 119, 125, 126)
('14) 26 Mad L J 460: (AIR 1914 Mad 91)
(Pr 79)
('14) 26 Mad L J 604: (AIR 1914 Mad 388)
(Prs 26, 67, 79, 101)
('14) 1914 Mad W N 16: (AIR 1914 Mad 9)
(Prs 26. 67)
('15) 38 Mad 118: (AIR 1915 Mad 1201)
(Pr 79)
('15) 38 Mad 684: (AIR 1914 Mad 440 (2))
(Prs 13, 31, 50, 86, 96, 99)
('15) 39 Mad 265: (AIR 1915 Mad 453)
(Prs 13, 14, 31, 96)
('16) 39 Mad 159: (AIR 1916 Mad 1170 F B)
(Prs 13, 65, 96)
('16) 30 Mad L J 592: (AIR 1917 Mad 700)
(Pr 79)
('16) 31 Mad L J 275: (AIR 1917 Mad 111 SB)
(Prs 13, 28)
('17) 1917 Mad W N 273: (AIR 1918 Mad 723)
(Pr 26)
('21) 44 Mad 605: (AIR 1921 Mad 172 FB)
(Prs 11, 13, 45, 47, 65, 66, 79, 89, 108)
('21) 44 Mad 801: (AIR 1921 Mad 447) (Pr 67)
('22) 45 Mad 449: (AIR 1922 Mad 112)
(Prs 13, 14, 15, 79, 84)
('23) 44 Mad L J 309: (AIR 1923 Mad 467)
(Prs 15, 84, 86)
('23) 46 Mad 815: (AIR 1924 Mad 81)
(Prs 15, 51, 56, 64, 79, 84)
('24) 47 Mad 462: (AIR 1924 Mad 550) (Pr 70)
('26) 49 Mad 483: (AIR 1926 Mad 241) (Pr 86)
('26) 49 Mad 849: (AIR 1926 Mad 994 FB)
(Pr 70)
('26) 49 Mad 98: (AIR 1926 Mad 273)
(Prs 5, 70, 130)
('27) 50 Mad 320: 51 Mad L J 99: (AIR 1926 Mad 774) (Prs 60, 86, 107)
('27) 50 Mad 535: (AIR 1927 Mad 471 FB)
(Prs 55, 64, 77, 126)
('27) AIR 1927 Mad 1116: (104 Ind Cas 621)
(Prs 26, 67, 82)
('28) 51 Mad 824: (AIR 1928 Mad 788)
(Prs 2, 18, 26, 27, 40, 58, 62, 74, 81, 84, 85, 100, 101, 102, 103, 106, 107, 108, 109, 110, 112, 114, 119, 125)
('30) 53 Mad 1: (AIR 1929 Mad 865 FB)
(Prs 47, 69, 86, 99)
('30) 53 Mad 188: (AIR 1930 Mad 51)
(Prs 31, 69)
('33) 56 Mad 534: (AIR 1933 Mad 158)
(Prs 11, 54, 77, 79, 80, 126)
('35) 58 Mad 126: (AIR 1934 Mad 676)
(Prs 31, 33)
('37) ILR (1937) Mad 203: (AIR 1937 Mad 131)
(Prs 31, 33, 69)
('40) ILR (1940) Mad 454: (AIR 1940 Mad 356 FB)
(Pr 80)
('40) ILR (1940) Mad 405: (AIR 1940 Mad 217)
(Prs 31, 57, 60, 69)
('40) 1940-1 Mad L J 820: (AIR 1940 Mad 691)
(Pr 79)
('41) 1941-1 Mad L J 15
(Prs 11, 55, 56, 64, 77, 80, 120, 125, 126)
('42) ILR (1942) Mad 738: (AIR 1942 Mad 554 FB)
(Pr 15)
('43) ILR (1943) Mad 83: (AIR 1942 Mad 682 FB)
(Pr 70)
('44) ILR (1944) Mad 212: (AIR 1943 Mad 652)
(Pr 70)
('45) S. A. No. 940 of 1945 (Mad) (Pr 28)
('46) S. A. Nos. 2339 of 1945 and 45 of 1946 (Mad)
(Pr 28)
('46) ILR (1946) Mad 54: (AIR 1945 Mad 257)
(Prs 31, 33, 53, 69)
('47) ILR (1947) Mad 44: (AIR 1946 Mad 503)
(Prs 33, 69)
('47) ILR (1947) Mad 105: (AIR 1946 Mad 427)
(Pr 111)
('47) 1947-2 Mad L J 166: (AIR 1948 Mad 1 F B)
(Pr 52)
('48) L. P. A. Nos. 2 and 3 of 1948 (Mad)
(Pr 28)
('48) 1948-1 Mad L J 478: (AIR 1948 Mad 464)
(Prs 12, 93, 107)
('48) 1948-1 Mad L J 430: (AIR 1949 Mad 67)
(Prs 11, 17, 51, 64, 93, 107)
('48) 1948-2 Mad L J 415: (AIR 1949 Mad 216)
(Pr 70)
('49) 1949-2 Mad L J 268: (AIR 1951 Mad 561)
(Pr 68)
('50) ILR (1950) Mad 1053: (AIR 1950 Mad 514 F B)
(Pr 111)
('27) AIR 1927 Nag 379: (101 Ind Cas 262)
(Pr 26)
('29) AIR 1929 Nag 311: (121 Ind Cas 43)
(Pr 26)

SATYANARAYANA RAO J.: The third defendant is the appellant in this second appeal. The facts are not seriously in dispute and are not complicated. The question raised is also a simple one, though the arguments before us ranged and covered a wider ground not strictly germane to the disposal of the case. The case itself was heard in the first instance by Panchapagesa Sastri J. who directed the papers to be placed before the Hon'ble the Chief Justice for the case to be heard either by a Bench or a Full Bench in view of the conflicting decisions relating to the method of adjusting the equities between the alienee and the non-alienating coparcener under a sale, part of the consideration of which was applied for purposes binding on the family. The case then came up for hearing before a Full Bench of three Judges who referred the case to a fuller Bench of five Judges. When the matter was referred to the Fuller Bench, the case itself and not any particular question was referred and therefore the scope of the hearing before the Full Bench was not restricted or confined to any particular question or questions. The case was argued ably on ooth sides for about six days and all the available authorities including the Hindu Law texts were placed before us.

(2) The plaintiff is the son of the first defendant. The father sold under Ex. D. 1 dated the 28th November 1934 six acres 56

cents of land specified in Sch. II attached to the plaint for a consideration of Rs. 13,400 out of which, as has now been concurrently found by the Courts below, only a sum of Rs. 7,022 was applied for discharge of binding debts of the family. The father was adjudicated an insolvent in I. P. No. 17 of 1935, Sub-Court, Tirunelveli and the properties specified in Schs. 4 to 12 appended to the plaint were sold by the Official Receiver in whom the interest of the insolvent had vested by reason of the adjudication. The present suit was filed by the son on the 11th January 1945 impleading all the alienees of the father as well as the Official Receiver as defendants. The relief claimed in the suit is partition and separate possession of each item of property in each of the schedules 1 to 12 into two equal parts and for an allotment to him his share, one of the parts in each item. The plaint proceeds on the footing that on the date of the action, the plaintiff and the first defendant were members of a Mitakshara joint family and that the alienations made, either by the first defendant or the Official Receiver, do not bind the plaintiff's interest in the family properties specified in Schs. 1 to 12 of the plaint.

The plaintiff examined on his side, the first defendant, his father as P. W. 1 who admitted in his evidence that he and the plaintiff were undivided on the date of the suit and that the properties were ancestral properties allotted to the father's share in a partition between himself and his elder brother in 1930. In this appeal we are concerned only with the alienation by the father in 1934 in favour of the third defendant of Sch. II properties. The plaintiff attacked the sale in favour of the third defendant alleging that it was neither for necessity nor for the benefit of the joint family and that it was an undersale. It has been found that the value of the properties conveyed under Ex. D. 1 was not Rs. 13,400 but Rs. 16,400 on the date of the sale and that the consideration from out of this sale was binding on the family only to the extent of Rs. 7022.

As a result of this finding, a preliminary decree for partition and recovery of possession of the plaintiff's half share in the properties comprised in Sch. II was granted in favour of the plaintiff without making any provision for the payment by the plaintiff of a proportionate share of the binding consideration. This decree was affirmed on appeal by the District Judge. Both the Courts, in rejecting the claim of the third defendant for a provision for payment by the plaintiff of a proportionate share of the binding consideration as a condition precedent for the recovery of a half share in the properties, followed 'VENKATA PATHI v. PAPPIAH', 51 Mad 824.

(3) In this second appeal by the third defendant, there is no dispute regarding the decree which recognised the right of the third defendant to a half share of the properties conveyed under Ex. D. 1, as the plaintiff claimed in the suit itself to recover only a half share in the properties. The question debated is whether or not the third defendant is entitled to a conditional decree making it obligatory upon the plaintiff to pay a half share of the binding consideration before he is allowed to recover possession of his half share after partition of the properties by metes and bounds. The appellant invokes, in support of his contention, the decision of this Court in 'VADIVELAM v. NATESAM', 37 Mad 435, while the respondent maintains that that case was wrongly decided and that the decision proceeded on an erroneous assumption of Hindu Law and should not therefore be followed and that the appellant is not entitled to any equity and his right is only to the half share admitted by the plaintiff.

In other words, learned counsel for the respondent stated the position he takes up as follows: The alienee from a coparcener of joint family property is entitled only to work out his rights by way of a general partition and is not entitled to claim to retain any specific item of property or a portion of it conveyed to him. Secondly, if without marshalling and a general partition, the alienee is allowed by the consent of the non-alienating coparcener to remain in possession of a share of the property alienated, any claim that he may have against the joint family in respect of the binding portion of the consideration must be regarded as satisfied 'pro tanto' by the value of the property allowed to be kept by him. This, according to his contention, exhausts the entire equity which an alienee from a coparcener is entitled to under Hindu Law. Of course, during the progress of the arguments, he did not stick to this extreme contention.

(4) Though the case itself may be disposed of on a narrow ground, as the arguments before us covered a larger ground, relating to the rights of the alienee from a member of a joint family, it is necessary to advert in this judgment to the whole topic and examine the basis of the equity which an alienee has, under Hindu Law, in respect of an alienation by a coparcener. The decisions dealing with the question of equities in favour of an alienee are not many, though they are not wholly reconcilable.

(5) It is necessary to go back to the very foundation of the right of a coparcener to alienate his interest in the family property, in order to appreciate the later developments in the law relating to it. Apart from the inroads made by decisions into the strict view of the rights of members in a coparcenary in respect of the family properties, it may be stated that the joint undivided family is the normal feature where the law of Mitakshara obtains. The joint family has a corporate character and a status of its own and can exist as a legal entity without owning joint family property. There is no presumption that the family owns joint porperty. The family can exist without property: vide 'JANAKIRAM CHETTI v. NAGAMONY MUDALIAR', 49 Mad 98. It is open to the members by mutual consent to hold or own any of the properties of the family in severalty without affecting their status as members of a joint family, but so long as the property continues undivided, there is a community of interest and unity of possession among all the members, with its consequent right to joint possession and joint enjoyment. Every coparcener has a proprietary right in the property of the family subject, however, to a similar right in others and in this respect, there is a fundamental difference between Mitakshara law and the Dayabhaga law.

The member of the family has no ascertained share in the property which is capable of being dealt with by him. The interest he possesses in the property is a fluctuating interest liable to be diminished by births in the family and equally liable to be increased by deaths. Each member by his birth acquires an interest in

the property and the death of a member passes on his interest to the other members by survivorship.

As observed by Lord Westbury in the well-known case of 'APPOVIER v. RAMA SUBBA AIYAN', 11 Moo Ind App 75 PC:

"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.....but when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided."

And later he pointed out the two-fold application of the word 'division':

"There may be a division of right; and there may be a division of property."

The division of right is brought about by division of the status of the family by methods known to law which have the effect of converting, to use an expression known to English law, a joint tenancy into a tenancy in common. The division of the right does not amount to a division of the property by metes and bounds. The unity of title under which the property is held by the family as a corporate unit is broken so as to bring about a severance of the right though not of the property. This indicates that the title to the joint property, i.e., jointness of the status of the family is one thing and the division of the property is separate and distinct. Of course, it is open to the members to divide a portion of the property without affecting the status of the family and confining the breaking up of the unity of title only to the extent of the propetry so divided.

Every coparcener is of course entitled to have the property divided by metes and bounds either by agreement or by suit or he may merely get his status as a member of the family severed so as to bring about a definition of his share in the property. Of course, this severance in status may be brought about by agreement or by a unilateral declaration of his to hold the property in severalty in which case he would have undoubted right to alienate his ascertained share. Until a division either of the right or of the property takes place, a coparcener, according to the strict Hindu law, has no right to alienate his interest in the property except with the consent of the other coparceners. The power, however, of the father or the manager of a joint family to alienate the property of the family, not merely his share for purposes binding on the family, such as an existing necessity or benefit, has been recognised by the Mitakshara.

(6) In Madras and Bombay, from early in the 19th century the rights of a coparcener, not being a father or a manager of the family, to alienate his interest in the family property began to be recognised and this was the first inroad upon the strict law of Mitakshara. This right of alienation by way of sale or mortgage was evolved and first recognised by Sir Thomas Strange in 1813 in 'RAMASAMI v. SESHACHALA', Notes of Cases, Vol. II 234, (74) 1827 Edn. He was supported in that view by Mr. Ellis and also by Mr. Colebrooke. In Vol. I of Strange's Hindu Law, 1830 Edn., the rule is stated at page 202:

"In favour of a bona fide alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due, out of the share of him, with whom he had dealt (i.e. the alienee); and, for this purpose, a Court would be warranted in enforcing a partition."

Volume II of Strange's Hindu law, at page 349, 1830 Edn. contained a case where a member of a family disposed of a village belonging to the family. It was held that the sale was without authority, general or special, but in setting aside the sale on the ground of want of authority, it was pointed out that equity would require redress to be afforded to the purchaser by enforcing a partition of the whole or a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share and that the sale was valid only so far as the seller's share in the property was concerned. The distinction between a gift of a coparcener's share and a sale or mortgage is noticed at page 433 of Vol. II (Strange's Hindu Law) and it was pointed out that in the case of gratuitous alienation, there is no kind of equity but in the case of a transfer for consideration, the injustice to the alienee may, however, be prevented by making the alienor repay the money or valuable consideration received by him and partitioning the property for the purpose of enforcing payment from his share.

The opinion of Colebrooke in support of the view of Sir Thomas Strange is to be found at page 344 Vol. II of Strange's Hindu Law where it is stated that the

"consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; & that an unauthorized alienation by one of the sharers is invalid, 'beyond the alienor's share', as against the alienee."

(7) This takes us back to 1827 and 1830. In 1863, both the Madras and Bombay High Courts recognised the right. The decision of the Madras High Court is 'VIRASWAMI GRAMANI v. AYYASWAMI GRAMANI', 1 Mad H C R 471, by Scotland, C. J. and Bittleston, J. and in the course of the judgment, reference was made to the earlier decisions of 1853 and 1855 which decided that one of several coparceners may bind his own share by alienation and that it is liable for his individual debt. The opinion of Sir Thomas Strange and the decision in 'RAMASWAMI v. SESHACHALA', Notes of Cases, Vol. 2, 234; 1827 Edn., were referred to in the course of the arguments by Mr. Mayne. The decision arose out of a suit on the Original Side of this Court and related to two houses on the Chule Bazaar Road. The sale itself was an execution sale but in dealing with the execution sale, the Court had to consider the right of the coparcener to alienate his share and it is stated in the judgment that the purchaser or execution creditor of the coparcener is entitled to the share to which, if a partition took place, the coparcener himself would be individually entitled the amount of such share, of course, depending on the state of the family. To a similar effect is the decision of the Bombay High Court in 'DAMODAR VITHAL v. DAMODAR HARI', 1 Bom H C R 182, about the same year.

In 1864 and 1868 there were two decisions of this Court in 'PEDDAMUTHULATY v. TIMMA REDDY', 2 Mad H C R 270 and 'RAYACHARLU v. VENKATARAMANIAH', 4 Mad H C R 60. The decision in 'VIRASWAMI GRAMANI v. AYYASWAMI GRAMANI', 1 Mad H C R 471, was followed. In 'PEDDAMUTHULATY v. TIMMA REDDY', 2 Mad H C R 270, the suit was by one of the three brothers, the eldest of an undivided family, for setting aside of a sale of family property made by the father and his third son. The sale of course was not binding on the non-alienating coparceners. The decree actually passed in that case was a declaration that the plaintiffs were entitled to a three-fifth share of land sued for, divided from that acquired by the defendant alienee and delivered to the plaintiffs. It was not even a suit for partition but was one to set aside the sale. The decision in 'RAYACHARLU v. VENKATRAMANIAH', 4 Mad H C R 60, arose out of a peculiar suit by the son for a declaration that after the death of the father, he was entitled to the whole of the ancestral property, moveable and immoveable, then in the possession of the father. Of course, such a declaration could not be granted but in the course of the judgment, the decisions above referred to were cited with approval. Westropp, C. J. in 1873 dealt with this question elaborately in 'VASUDEV BHAT v. VENKATESH', 10 Bom H C R 139 and recognised the right of a coparcener to alienate his share in undivided property approving an earlier decision of that Court.

(8) All these decisions, it must be observed, were before the decision of the Judicial Committee in 'DEENDYAL LAL v. JAGDEEP NARAIN SINGH', 4 Ind App 247: (3 Cal 198 PC), which established for the first time that:

> "a purchaser of an undivided share of property at an execution sale during the life of the debtor for his separate debt does acquire his share in such property with the power of ascertaining and realising it by partition."

Sir James Colville who delivered the judgment in the case referred to the two decisions of the Madras High Court in 'VEERASWAMI GRAMANI v. AYYASWAMI GRAMANI', 1 Mad HCR 471, and 'PALANIVELAPPA GOUNDAN v. MANNARU NAICKEN', 2 Mad H C R 416 and also the view of the Bombay High Court in 'DAMODAR VITHAL v. DAMODAR HARI', 1 Bom H C R 182 and 'TRIMBAK ANANT v. GOPAL SHET M. MAHADEV', 1 Bom H C R 27.

It was there pointed out that:

> "all these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his coparceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal."

The form of the decree granted by the Judicial Committee in that case is a declaration in favour of the purchaser at the execution sale, that he had acquired the share and interest of the judgment-debtor in the property and that he is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. This decision, therefore, is important in two respects. It established for the first time the right of a creditor to seize the share of an undivided member of the family in execution for the satisfaction of the debt due by the member and this rule applies to all the Provinces — and secondly it established that both in Madras and in Bombay a coparcener is entitled to alienate his share. The right of the alienee, however, is to work out his rights under the alienation by a suit for partition.

In 1874 there were two decisions of the Bombay High Court in 'PANDURANG ANANDRAV v. BHASKAR SADASHIV', 11 Bom H C R 72 and 'UDARAM SITHARAM v. RANU PANDUJI', 11 Bom H C R 76. The first of these cases related to a voluntary alienation and the case is also important as it was decided by West and Nanabhai Haridas, JJ. who are undoubted authorities on Hindu law. This case is important as it lays down the principles and the manner in which the rights of a purchaser have to be worked out and the equities adjusted. This, in my opinion, is the first considered judgment on the rights of an alienee and his equities. The facts in that case were: in 1848 two members of an undivided Hindu family mortgaged a portion of the joint family property. In due course, the mortgagee obtained a mortgage decree and brought to sale a portion of the mortgaged property on account of the right and interest of one of the mortgagors and the property was purchased by the plaintiff in the suit. The purchaser then instituted a suit against the third member of the undivided family for possession of the extent which he had purchased in the Court sale. Notwithstanding the fact that the purchase in Court auction was of a specific extent of property, it was held that the right of the purchaser was to sue for partition and not for recovery of possession of the extent purchased.

West, J. stated the position in the course of his judgment in these items:

> "Whether Nilo (the mortgagor whose interest was sold) had any interest at all in the land in 1848, and if he had, what was the extent of that interest, are questions which, as there was other family property, do not admit of an answer without an inquiry into the extent and value of the joint property at large, the encumbrances resting on it, the members entitled to shares, and their respective aliquot portions. Nilo's share was not, supposing the family a united one, in any particular part of the estate, but in the estate as a whole, and could be ascertained only by taking a general account and making a distribution in accordance with its results.
>
> In making such distribution without advertence to the claims or interests of any third party it might well happen that no part of the particular field now in dispute would be allotted to Nilo. But Nilo having affected to deal with this land as empowered to mortgage it, it would be only equitable that, 'ceteris paribus', his share should, if Bhaskar (the auction-purchaser) takes his place be so made up as to embrace wholly or so far as possible the 20 guntas which Baskar has bought as his."

It was pointed out that without prejudice to the rights of the other members of the family, the 20 guntas purchased by Baskar may be allotted to him in the partition. This judgment, in my opinion, has laid down succinctly and clearly the manner in which the alienee has to work out his rights and that decision holds the field even now as will be shown later.

(9) The next important landmark in this branch of the law is the decision of the Judi-

cial Committee in 'SURAJ BENSI v. SHEO PRESHAD', 6 Ind App 88: (5 Cal 148 P C). It is a decision under the Mitakshara law as it obtains in the province of Bengal and arose out of a suit by the sons, members of a joint family, against an execution purchaser of property sold in execution of a decree against the father. The prayer in the suit was that the purchasers should be restrained from obtaining delivery of possession and that the possession of the sons should be confirmed. The execution sale took place after the death of the father but by the time of the death of the father, the property was attached and even an order for sale of the property was made in execution of the decree. There were other questions considered by the Judicial Committee but one of the important questions for decision was whether by the death of the father the sons acquired the property by survivorship, thus putting an end to the rights of the Court auction-purchaser.

After referring to the decisions of the Madras and Bombay High Courts, Sir James Colville who delivered the judgment stated that it was settled law in Madras and Bombay that one coparcener may dispose of ancestral undivided estate even by private contract or conveyance to the extent of his own share and that it followed that such a share may be seized and sold in execution for his separate debt. It was recognised in that decision that such alienations, voluntary or compulsory, are inconsistent with the strict theory of joint undivided Hindu family and that the law in the two Presidencies, Madras and Bombay has been one of gradual growth. The rule is stated to have been

> "founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of partition."

Strange's Hindu Law was cited in support of this. It was held that the right of survivorship was defeated by the attachment and order for sale of the properties and that the auction-purchaser was entitled to the share of his judgment-debtor.

The actual decree made in that judgment was in favour of the plaintiffs confirming their possession with a declaration for the benefit of the auction-purchaser that he was entitled to the share of his judgment-debtor with a power of getting the extent of that share ascertained by means of a partition, the share which the judgment-debtor possessed in his lifetime. By this decision pronounced in 1878, therefore, it has been firmly established that in Madras and Bombay, a member of a joint family is entitled to dispose of his undivided interest either by contract or conveyance to the extent of his own share and that his share would be answerable for the personal debt during his lifetime and to make that share available for discharge of his debts after his death, there should be at least an attachment of that share during the lifetime of the judgment-debtor (coparcener) to defeat the claim of the right by survivorship by the other members.

The alienee had to face several difficulties in working out the right acquired by him under a conveyance by a member of the joint family and his path was not smooth. The right as stated by the Judicial Committee in 'SURAJ BENSI v. SHEO PROSHAD', 6 Ind App 88: (5 Cal 148 P C), is to step into the shoes of the alienor and work out his rights in a suit for partition. Suppose after the alienation, another coparcener was born in the family. Is the alienee entitled to the share of his vendor as on the date of the alienation or is it liable to decrease by reason of the subsequent birth of a son before the suit for partition was instituted? The interest of a coparcener in the family properties is undoubtedly a fluctuating interest and so it was contended before the Full Bench in 'RANGASAMI v. KRISHNAYYAN', 14 Mad 408 F B, that the alienee's share is subject to a similar disability and a similar fluctuation. No coparcener had a right to a definite share in the family property until there was severance of the joint estate. It was held in 'RANGASAMI v. KRISHNAYYAN', 14 Mad 408 F B, which was a case of a birth of a coparcener, that the share should be computed with reference to the date of the suit for partition instituted by the alienee.

As a corollary to this principle, two other questions were mooted before the Full Bench in 'RANGASAMI v. KRISHNAYYAN', 14 Mad 408 F B. If the interest purchased is liable to diminution by births in the family subsequent to the alienation, was it liable also to increase when there was a diminution in the number of coparceners by deaths and is the alienee to lose the right altogether if by the date of the institution of the suit, his alienor died leaving no shoes to the alienee to step in? The opinion, though obiter, was expressed in that case that the alienee was not entitled to take advantage of the increase in the share by the diminution in the number of coparceners as what he bargained for was a specific share or a quantum of interest and not the vendor's coparcenary interest, such as it might be when the partition was effected. The question as to what would happen if the alienor should die by the date of the suit, was answered by saying that the interest carved out by the sale vested in the purchaser at once and that the subsequent death of the alienor had not the effect of divesting what once vested. The rights under the sale should be worked out on the footing that the vendor was alive when the purchaser made a demand for partition.

This opinion, though obiter, on both the hypothetical questions, does not appear altogether logical and sound. If what was conveyed to the alienee was the fluctuating interest of the coparcener in the family property, it should logically follow that if the interest should be diminished by subsequent births it should also increase by deaths. If, on the other hand, it became vested and fixed once for all on the date of the alienation so as not to defeat the rights of the alienee even if the alienor were to die, it must follow that the fraction of the interest which he had acquired under the purchase must be treated as once for all having been fixed on the date of the alienation. There is less reason to postpone the determination of that fraction to the date when the purchaser made a demand for partition.

(10) The subject received an exhaustive and logical treatment in the illuminating judgment of Bashyam Ayyangar, J. in the Full Bench case in 'AYYAGIRI VENKATRAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690. It arose out of a suit by a purchaser of an undivided moiety in two plots of land from one V, a member of an undivided family consisting of himself and his two nephews, brother's sons. The suit was instituted after the death of V, against the nephews for a general partition of the whole

of the family properties and for an allotment of the alienor's share half the interest in the property and to recover the half share in the two plots conveyed to him by V. The objection raised by the nephews was that as the alienor died, the plaintiff's right based on equity was at an end.

The right of the purchaser is defined at p. 716 thus:

"The law as now settled is that the purchaser can enforce the sale only by a partition of the entire family property and if in such a partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several coparceners, be wholly allotted to the vendor's share the purchaser will be entitled to the whole property which the vendor professed to convey to him."

The vendee's right is a transferable right and a vested present interest. By describing it as a vested interest it is not as if, as was considered in some decisions, that the learned Judge ignored the nature of the right which the transferee from a coparcener acquired under the transfer for, at page 710, the learned Judges adverts to the fact that the transfer

"is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, any more than his transferor himself, to insist on that specific portion being allotted to the share of the vendor.

Being a purchaser for value, he will have an equity to have such portion or so much thereof as is practicable so allotted, if that can be done without prejudice to the interest of the other sharers. In any suit which may be brought by him to enforce the sale, all the members of the family should be joined as parties in a partition suit, the subject-matter of the suit being the family property as it existed at the date of transfer. Such a suit may, at the option of the members of the family, assume the character of a family partition suit and a decree may be passed for partition, among all the members of the entire family property."

It must be observed that unless all the members agree to have a partition 'inter se', a suit by an alienee for a general partition is not analogous to a suit for partition in the technical sense in which it is understood under Hindu law as such a suit can be instituted only by an undivided member of the family and by no one else. It is said that the learned Judge proceeded on the assumption that the alienee became a co-tenant or tenant-in-common as was assumed in 'VENKATACHALA PILLAI v. CHINNAIYA MUDALIAR', 5 Mad H C R 166. The passage above extracted clearly indicates and dispels any doubt regarding the view of the learned Judge. He, on the other hand, pointed out that the view taken in 'VENKATACHALA PILLAI v. CHINNAIYA MUDALIAR', 5 Mad H C R 166, that a purchaser can recover the share of the vendor by confining his suit for partition to the specific property sold to him has not been accepted in subsequent decisions 'VENKATRAMA v. MEENA LABBAI', 13 Mad 275 and 'PALANI KONAN v. MASA KONAN', 20 Mad 243, in which the view of West J. in 'PANDURANG ANANDRAV v. BHASKAR SHADASHIV', 11 Bom H C R 72, was adopted.

The learned Judge also pointed out on the basis of the decisions of the Privy Council in 'DEENDAYAL LAL v. JUGDEEP NARAIN SINGH', 4 Ind App 247: (3 Cal 198 P C), and 'SURAJ BANSI KOER v. SHEO PROSHAD SINGH', 6 Ind App 88: (5 Cal 148 P C), that the share of the undivided member which was conveyed to the purchaser must be determined as on the date of the alienation and not as on the date when the suit for partition was filed by the purchaser. He also considered the decision in 'RANGASAMI v. KRISHNAYAN', 14 Mad 408 F B and expressed the opinion that the actual decision in that case is opposed to principle and that there is nothing to support the contention that the interest conveyed by an undivided member will lapse to the family after the death of the alienor unless the purchaser instituted the suit before the alienor's death.

(11) The question whether the mortgagee of a Hindu father is entitled to proceed against the share of a son subsequently born in the family property mortgaged by him, was referred to a Fuller Bench of five Judges in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, in view of the observations of Bashyam Aiyangar J. in 'AYYAGIRI VENKATRAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 F B, throwing doubts on the correctness of the decision in 'RANGASAMI v. KRISHNAYYAN', 14 Mad 408 F B. The case was heard by Sir Arnold White C. J., Benson, Munro, Sankaran Nair and Krishnaswami Ayyar JJ. but before the judgment was delivered, Krishnaswami Ayyar, J. resigned his office and became the law member. The case was, therefore, again heard by the four Judges excluding Mr. Krishnaswami Ayyar & the opinion prepared by Krishnaswami Aiyar was, under the direction of the Chief Justice, appended as a note to the judgment.

The learned Chief Justice, on the strength of the decision of the Judicial Committee in 'SURAJ BANSI KOER v. SHEO PROSHAD SINGH' 6 Ind App 88: (5 Cal 148 P C), and the decision of the Full Bench in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, of which he was also a member answered the question referred to the Full Bench holding that the quantum of the interest which vests in the alienee is not affected by subsequent changes in the number of coparceners. "As the doctrine is based on equity", observed Sankaran Nair, J. at page 56:

"it is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of the alienation rather than that he gets a fluctuating share with the result that it will depreciate the value of the property and impart to the alienation the nature of a gambling transaction."

There was no doubt certain observations in the opinion of Mr. Krishnaswami Ayyar which are no longer good law. For example, he states that the "joint tenancy is destroyed by severance and an alienation by joint tenants affects a severance" on the analogy of the real property law in England. This view, however, was not expressed in the other judgments.

In his conclusion, however, Mr. Krishnaswami Ayyar agreed with the view of the other Judges. This decision is taken in this Court as having settled finally the law on the point and the question was not reopened in 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15. In the Full Bench decision in 'BALUSWAMI

AYYAR v. LAKSHMANA IYER', 44 Mad 605, Kumaraswami Sastri, J. treated it as settling the law and all the decisions in which the decision in 'CHINNU PILLAI v. KALIMUTHAN', 35 Mad 47, was followed were collected in the judgment in 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15. No doubt, a dissentient note was sounded by Jackson and Mockett, JJ. in 'MUTHUKUMARA SATHAPATHIAR v. SIVANARAYANA PILLAI', 56 Mad 534; but as pointed by the learned editor of Mayne's Hindu Law at page 494 in the foot-note, the decision in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, is contrary to the Full Bench in 'CHINNU PILLAI v. KALIMUTHAN', 35 Mad 47 and as a matter of fact, was not followed in later decisions in Madras. See also the observations of Wadsworth and Govindarajachari, JJ. in 'KRISHNAMURTHY IYER v. NATARAJA IYER', 1948-1 Mad L J 430 at page 434.

Leach, C. J. in 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15, refused to reopen the question on the ground that in numerous decisions extending over a period of 20 years (nearly 30 years) by that date, the decision in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47, was accepted as settled law and there was no need for further consideration of that case as was thought by Jackson and Mockett, JJ. in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534. The decision in 'RANGASAMI v. KRISHNAYYAN', 14 Mad 408, has always been treated as no longer good law after the decision in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47. An attempt was made on behalf of the respondent by his learned Advocate to reopen the question but in view of the fact that the decision in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47, was treated as having settled the law in this Presidency for so long a time and was followed in innumerable decisions, it would be wholly unjust and inequitable to reopen the question which might have the effect of unsettling titles already acquired. The principle of 'stare decisis' must be applied and we, therefore, were not inclined to reopen the question.

(12) "A coparcener may alienate" as stated by Mayne in Section 386, page 487 of the latest edition,

> "either his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property. In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession, but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition."

Learned counsel for the respondent does not take exception to this statement of the law and to this definition of the right of the alienee, whether the alienation was of the entire interest of the alienor in the whole of the family property or whether it was confined to a share in a specific item or even extended to a whole of the specific item of the family property.

In fact, he himself relied on this position even at the commencement of the arguments in the case and relied very strongly on a decision of Horwill, J. In 'SUBBIAH v. VENKATESWARLU', 1948-1 Mad L J 478, where at page 480, the learned Judge defined the right of an alienee of an item of joint family property as a right to sue for a general partition and to ask that the item of property alienated to him, be allotted to the share of his alienor. As observed by me earlier in this judgment, this definition of the right was first made by West J. in 'PANDURANG ANANDRAV v. BHASKAR SHADASHIV', 11 Bom H C R 72 and followed in 'VENKATRAMA v. MEERA LABBAI,' 13 Mad 275, and 'PALANI KONAN v. MASA KONAN', 20 Mad 243 and other decisions.

(13) No doubt, some of the Judges of this Court held the view that a purchaser of an undivided share of a member of a joint family became a tenant-in-common with the members of the family and was even entitled to possession along with them. This view was taken in 'VENKATACHALA PILLAI v. CHINNIYA MUDALIAR', 5 Mad H C R 166, by Benson and Sundara Aiyar JJ. in 'SUBBA RAO v. ANANTHANARAYANA AYYAR', 23 Mad L J 64, by Krishnaswami Iyer J. in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47 and by Sadasiva Iyer J. in 'SOUNDARARAJAN v. ARUNACHALAM CHETTI', 39 Mad 159. If this view were to be accepted the alienee would be entitled to joint possession of the specific item of the property conveyed to him and would also be entitled to mesne profits from the date of alienation. But the preponderance of authority is in favour of the view that he does not become a tenant-in-common with the other coparceners. Sankaram Nair J. and Bakewell J. in 'NANJAYA MUDALI v. SHANMUGA MUDALI', 38 Mad 684, considered the question and held that the alienee does not acquire any interest in the property and does not become a tenant-in-common as was held by Benson and Miller JJ. in 'SRINIVASA SUNDARA THATHACHARIAR v. KRISHNASWAMI AIYANGAR', 15 Ind Cas 354 (Mad) and Benson and Sundara Aiyar JJ. in 'SUBBA RAO v. ANANTHANARAYANA AYYAR', 23 Mad L J 64, following the opinion of Krishnaswami Aiyar J. in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47, and the right of the alienee is defined as a right to institute a suit for partition and to have the property alienated set apart to the share of the alienating coparcener if it is possible to do it without injustice and prejudice to the other coparceners.

This, it is emphasised, is only 'an equity' and not a 'right'. If it is not possible to set apart property in the aforesaid manner, the only right of the alienee is to recover that property allotted to the vendor for his share though it may not be identical property alienated in his favour. This is on the principle of substitution and the earlier decisions beginning from 'PANDURANG ANANDRAV v. BASKAR SADASHIV', 11 Bom H C R 72, were referred to and followed. The same view was taken in 'MAHARAJAH OF BOBBILLI v. VENKATARAMANUJULU NAIDU', 39 Mad 265, by Wallis C. J. and Kumaraswami Sastri J. As the alienee is not a tenant-in-common he is not entitled to any mesne profits in respect of his share between the date of his purchase and the date of the institution of the suit for partition. The learned Judges in 'BALABADRA PATRO v. KHETRA DOSS', 31 Mad L J 275, followed these two decisions. See also 'BALASAMI IYER v. LAKSHMANA IYER', 44 Mad 605 and ' SUBBA GOUNDAN v. KRISHNAMACHARI', 45 Mad 449.

(14) From the foregoing review of the decisions it is abundantly clear that if the alienee wishes to enforce his rights whether he is a pur-

chaser of the entirety of the interest of a coparcener in the joint family property or a purchaser of the interest of a coparcener in an item of property or even a purchaser of the whole of a specific item, his only right is to institute a suit for general partition, the object being to work out his equity as against the other non-alienating coparceners, subject to the burden which the alienor as a member of the coparcenary, has to bear along with the other coparceners and subject to an allotment of the property purchased, if possible, without prejudice to the rights of the other members of the family. Even if he is a purchaser of a specific item of property or even of the interest of a coparcener in a specific item, he cannot sue for recovery of possession of that item in its entirety or a share in that item alone after partition.

If the non-alienating coparcener institutes a suit for a general partition impeaching the validity and binding nature of an alienation made by the manager or the father and if it is found that the alienation is not supported by any necessity or is supported only by partial necessity the right of the alienee to step into the shoes of his alienor and work out his rights at least to the extent of his alienor's share, can be dealt with in such a comprehensive suit. Even if the alienation is by a coparcener other than the manager or the father, either of a specific item or interest in a specific item, if the alienee is impleaded as a party to such an action, his equity can be worked out and adjusted in that suit. It has been recognised in 'CHINNA SANYASI v. SURIYA', 5 Mad 196, that a non-alienating coparcener may sue to recover his interest in a parcel of family property which was conveyed away by a coparcener to a purchaser.

In such a case, the coparcener has got the option of repudiating the transaction altogether and recovering the property from the alienee who was put in possession, for the benefit of the joint family — see 'SUBBA GOUNDAN v. KRISHNAMACHARI', 45 Mad 449, or he may elect to affirm the transaction and sue to recover possession of his share of the property after partition. In such a case, it is held that the suit is not liable to be dismissed on the ground that it is bad for partial partition. Where the member repudiates the transaction, he can recover the property only for the benefit of the joint family and the property when recovered continues to be joint family property. But what is the position if he affirms the transaction and sues only to recover his share?

In a case where the members of a family are two and two alone, the share so recovered would be the separate property of the plaintiff as held in 'CHINNA SANYASI v. SURIA', 5 Mad 196, followed in 'KADEGAN v. PERIA MUNUSAMI', 13 Mad L J 477. If, however, there is more than one non-alienating coparcener, a suit to recover the share in the property cannot be instituted by one alone without the concurrence of the coparceners who should be impleaded either as plaintiffs or as defendants unless it be that the coparcener suing is the manager and head of the family. When there are more than one coparcener who did not join in the alienation, if the right of recovering possession of their share is to be exercised after affirming the transaction, it can be done only by all of them and not by any one of them. The property so recovered therefore would be the joint property of all the non-alienating coparceners. The question therefore of deciding the character and nature of the share recovered in such cases presents no difficulty.

(15) In the case of an alienation by a member of the family of an item of property, the non-alienating coparcener may sue to recover possession of the property without admitting the right of the alienee to the alienor's share. It has been held in 'SUBBA GOUNDAN v. KRISHNAMACHARI', 45 Mad 449, that if the alienation was by the father or manager of the property of the family in a suit instituted by the coparceners to recover possession of the property on the ground that it is not supported by necessity, the proper procedure is to decree to the plaintiffs recovery of possession of the entire property conveyed under the sale to the alienee and it is not permissible to the alienee defendant in the suit to insist that his equity should be worked out in that very suit.

This strict view was not followed in two later cases 'DAVUD BEEVI AMMAL v. RADHAKRISHNA AYYAR', 44 Mad L J 309 and 'RAMASWAMI IYER v. VENKATARAMA IYER', 46 Mad 815. In these two decisions the rule was not treated as an inflexible one and must be applied according to the circumstances of the case. If for example, there was only one surviving coparcener the plaintiff, and the property alienated was less than that of the alienor's share in the entire family properties at the time of the alienation, there is no necessity to drive the alienee to a separate suit and that the equities could be worked out even in that very suit. This view is based upon the observations of the Privy Council in 'RAMKISHORE KEDARNATH v. JAINARAYAN RAMRACHHPAL', 40 Cal 966. The same view was adopted in 'DAVUD BEEVI AMMAL v. RADHAKRISHNA AYYAR', 44 Mad L J 309, by a Bench.

A coparcener alienating his share of the property cannot escape from his liability to bear the common burden of debts and other obligations of the family. The liability, the alienee who steps into the shoes of the coparcener, has to bear is the proportionate burden, proportionate of course to the value of the property purchased by him. Of course, if once the sale is effected for discharge of the binding debts or for the necessity or benefit of the estate, the property in the hands of the alienee cannot be made once more liable for the obligations and other debts of the family. (Vide 'SREERAMULU v. SUBBARAMI REDDI', ILR (1942) Mad 738 (FB). So far, the principles of law are well settled and present no difficulty.

(16) The more difficult question, however, is when a father or manager of a family alienates an item or whole of the family property purporting to be for the benefit or necessity of the estate or in the case of the father for his antecedent debts. If the alienation is ultimately found to be supported by partial necessity or benefit, what are the rights of the alienee in such a case in respect of that portion of the consideration which has been applied for purposes binding on the family? It is always difficult for the father or manager of the family to sell exactly that extent of property which is sufficient to meet the particular necessity. Some margin, therefore, has to be allowed and if a large part of the consideration for the sale or mortgage has been applied for purposes binding on the family and if the alienee acts in good faith and it can be shown that the sale was justified by legal necessity, the sale may be upheld in its entirety.

It is not always easy to fix the proportion of the consideration which must be established to justify the sale in such circumstances. It is a question which must be decided on the facts of each case. This has been established by a number of decisions of the Judicial Committee and also of the High Courts in India beginning with 'SRI KRISHNADAS v. NATHURAM', 49 All 149 (PC), which are found collected and referred to in the foot-note at p. 468 of Mayne's Hindu Law (latest edition).

(17) If, however, the binding portion of the consideration is very much less, what are the equities of the alienee in such circumstances? If the suit instituted is one for partition either by the alienee or by a coparcener impeaching the alienation, the equities of the alienee will be adjusted in that suit. The entire item sold may be allotted, if it does not otherwise prejudice the rights of the coparceners, to the share of the manager or the father who alienated the property and the burden discharged from and out of the consideration may be adjusted between the father or manager on the one hand and the other coparceners on the other as the debts due by the family have to be considered in such an action as pointed out by Bashyam Ayyangar, J. in 'AYYAGIRI VENKATRAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 (FB) at page 716.

The alienee may also get the share of his alienor allotted to him with a direction that the other coparceners should pay to the alienee their proportionate share of the burden. All this flows from the right which an alienee acquires under the conveyance in his favour, viz., a right to institute a suit for general partition and to have, if possible, the particular property allotted to the share of his alienor in the partition with due regard, of course, to the interests of the other sharers and the debts due by the family. This equity, it is not disputed, is the only equity which the alienee is entitled to in such circumstances and has been established by the decisions which have been considered so far. The latest case is the decision in 'KRISHNAMURTHI IYER v. NATARAJA IYER', 1948-1 Mad L J 430 at page 434, by Wadsworth and Govindarajachari, JJ.

(18) Two situations, however, may arise. The coparcener disputing the alienation may institute a suit for partition claiming, as in the present case, a half share in the alienated item thereby admitting the right of the alienee to the other half belonging to the alienor. As the suit is for a general partition in which the debts and liabilities have to be adjusted, even in such an action the corparceners disputing the alienation may be made liable to pay to the alienee the proportionate part of their liability which has been discharged from the consideration for the sale. I am, of course, assuming in such cases, that there is no further complication that the property was undersold by the manager or the father. Even if it is established, in such a case, that in fact the consideration for the sale was grossly inadequate, there is no reason for not allowing the alienee to retain possession of the share of the alienor which is admitted by the very frame of the suit.

It makes no difference, in my opinion even if the frame of the suit was for a general partition without the qualification, viz., that the coparcener impeaching the transaction admits the right of the alienee to the extent of the alienor's share. The alienor himself in such a contigency cannot get rid of his own act in underselling the property and there is no reason or justification for permitting a third party like a coparcener to impeach the transaction on the ground that it was undersold so long as the share of the alienor bears the proportionate share of the common burden which, of course, is to be met by the alienee who stands in the shoes of the alienor. It is the undoubted right of a coparcener under Hindu law to alienate for consideration his interest in the property, but it is not open to him to make a gift of it as the very foundation of the alienee's equity is the payment of consideration.

In the present case, the plaintiff expressly claimed recovery of possession after partition of a half share in the properties annexed to the schedule and the suit was framed as one for partition under Hindu law on the basis that the family was joint till the date of the institution of the suit. During the father's insolvency, the other debts of the family must have been wiped out, at any rate, there is no evidence in this case that there are any debts of the family which remained undischarged. The only burden is that which was discharged out of the consideration for the sale. There is no doubt a finding of the Courts below that the consideration for the sale was not adequate and was more. But that does not, in my opinion, make any difference and would not in any way affect the adjustment of equities in the case.

For the entire consideration that the third defendant paid, he gets only the father's half share in the property in schedule II, i.e., half out of the extent of six acres 56 cents, i.e., for the sum of Rs. 13,400. The common burden is Rs. 7022. Out of this, the share of the plaintiff, there being no other coparceners, is Rs. 3511. As the case is not complicated by the existence of other debts which have to be taken into consideration, as no difficulty arises even in allotting the share of the first defendant to the alienee, the third defendant and as the plaintiff himself had admitted by the plaint and recognised the right of the third defendant to a half share, there is no reason for refusing to the third defendant the relief that the plaintiff should, as a condition precedent for recovery of possession of his half share, be made to pay his quota of the common burden of which he had the benefit from and out of the consideration for the sale, viz., the sum of Rs. 3511.

The whole argument of the respondent throughout was that the alienee is not entitled to get any equity except in a suit for general partition, perhaps over-looking the fact that the present suit is one of such description and that it is impossible for the plaintiff to get out of his pleadings and the evidence he adduced in the case. Strictly speaking, therefore, the question which was debated before us, viz., whether 'VADIVELAM v. NATESAM', 37 Mad 435, was correctly decided or whether the view in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, should be applied as did the lower Courts does not arise for consideration but as the point was fully argued and considerable time was spent in considering the correctness of these decisions, particularly as the matter was placed before this Bench for a consideration of this particular question, it is not proper that I should refrain from considering it.

The difficulty presented by that and the other decisions is whether in a suit instituted

by a coparcener or coparceners for recovery of his or their share in an item of property alienated by the manager or the father purporting to be for legal necessity impeaching the transaction as not binding on them, if it is found that a portion of the consideration was applied for discharging a common burden, the alienee could insist that the coparcener or coparceners should not be allowed to recover their interest in the property without paying their share of the common burden as a condition precedent for recovery of possession. I am not complicating the case by assuming that the sale was for an inadequate consideration as I propose to deal with that situation separately though I have already expressed my opinion about it in the earlier part of this judgment.

(19) Subramania Ayyar and Boddam, JJ. in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, aimed at a simple rule to meet such a situation and held that:

> "If the vendee wishes to stand by a sale which is valid only partially, such as the present he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid now all necessity for enquiry, into matters alluded to before and on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties therefo."

(20) That was a suit for ejectment of the purchaser of certain lands belonging to a joint family consisting of the father and two sons, the plaintiffs. The alienation was by the father and it did not comprise all the properties of the family. The object of the alienation was for the discharge of a debt of Rs. 120 secured by a mortgage on the land and for discharge of sundry debts incurred by the father from the vendee. It was found that the only consideration paid was Rs. 120 for the discharge of the mortgage debt. The suit itself was instituted after a long delay amounting to nearly 12 years after the alienation. The suit was decreed on appeal for two-thirds share of the plaintiffs without making them liable to contribute proportionately to the common burden. The contention of the defendant before the High Court was that as a sum of Rs. 120 went to discharge a mortgage debt, the plaintiffs should be made liable to pay Rs. 80 i. e., two-thirds of Rs. 120. The contention was rejected by the learned Judges.

In the first place, it was held that the alienee was a volunteer and was not entitled to claim reimbursement. If under the conveyance the alienee had acquired an interest in the property, whatever may be the quantity of that interest it is difficult to treat him as a volunteer. The decision in 'SIVAGANGA ZAMINDAR v. LAKSHMANNA', 9 Mad 188, which was relied on by the learned Judges in support of the view taken by them proceeded on the footing that the Zamindari which was sold was ancestral property and the Court sale conveyed to the purchaser only the life interest of the Zamindar and that the Court sale passed to the purchaser nothing more than the life interest of the Zamindar which terminated on his death. The purchaser in the Court sale bought only the late Zamindar's interest whatever that was for the money which he advanced as purchase money. There was, therefore, no basis for making the son liable to reimburse the purchaser the amount of the money which was applied for discharging the father's debt.

In my view, therefore, the purchaser in 'MARAPPA GOUNDAN v. RANGASAMI GOUNDAN', 23 Mad 89, was not a mere volunteer and the principle of 'SIVAGANGA ZAMINDAR v. LAKSHMANNA', 9 Mad 188, has no application. The learned Judges then adverted to the practical inconvenience that would result in accepting the contention of the defendant. It was conceded that the sale was valid to the extent of the vendor's share. But it was argued that if the share was really worth the whole of the amount paid by the vendee as the price, why should he be allowed to get anything more? If, on the other hand, the share was worth less than the price paid, the vendee was not entitled to insist on a charge for more than the difference between the real value of the share which he had purchased and the price paid,

The inconvenience indicated was that the Court in such a case would have to embark upon an inquiry regarding the valuation of the property, which it was pointed out, was not always capable of easy or even satisfactory settlement. It is for this reason that the learned Judges aimed at simplification of the law though it results in injustice to the purchaser. The real value of the property even if it is deemed relevant for adjusting the equities of the alienee, is not difficult to ascertain and Courts are very often called upon to decide questions of valuation of property for various purposes such as the Land Acquisition Act, for court-fees and other purposes. This difficulty therefore, should not have been allowed to stand in view of doing justice to the alienee.

But is the question of valuation really relevant if it is once conceded that a coparcener is entitled to sell his interest in the property for value though he cannot make a gift of it? The question even of the adequacy of consideration for such a sale is, in my opinion, not relevant. The non-alienating coparcener, who impugns the sale, is not entitled to dispute the adequacy of consideration for the sale of the alienor's interest so long as the alienation for value is not a device to defeat the right of the coparceners to get the property by survivorship, if during the lifetime of the alienating coparcener that right was not put an end to. The price to be paid for the share alienated is a matter entirely between the purchaser and the vendor and a third party is not entitled to question its adequacy. Nor is the reason that if the price paid was equal to the real value of the share, the purchaser should not get the benefit of the proportionate share of the common burden discharged from the consideration, tenable.

The alienee stepping into the shoes of the alienor is undoubtedly bound to bear the common burden of the family proportionate to the extent of the value of the share he purchased since an undivided member of a family cannot escape from his liability to bear the obligations binding on the family. But if, at his expense and at the expense of the alienee, the undivided member impeaching the transaction had derived benefit, there is no justification for allowing him to retain the benefit without returning it to the person justly entitled to it.

If once an inroad into the strict theory of joint family has been allowed and the alienee's

right based on equity is recognised by law, there is no reason for not applying that equity in an equitable manner so as to adjust the rights of all parties in a just manner. Simplicity, no doubt, in evolving a principle of law is good as an ideal but it should not be achieved at the expense of justice and equity. For these reasons, it is difficult to accept the decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, as laying down the law correctly.

(21) The decision in 'ROTTALA RANGANATHAM CHETTI v. RAMASAMI CHETTI', 27 Mad 162, turned on the peculiar facts of that case. Simplifying the facts of the case and stating them in so far as they are relevant to the present discussion, it was a case where the joint family consisted of a father and two sons. The father conveyed to the first defendant under a sale-deed property for a sum of Rs. 1000 in discharge of an antecedent debt of his which was due to the first defendant. The property, it was found, was of the value of Rs. 11000 on the date of the conveyance and the father, it was stated in the sale-deed, was induced to sell the property for a low consideration in view of the fact that the first defendant rendered considerable assistance to the father in prior litigations relating to the family properties.

The learned Judges who decided the case, Benson, Bashyam Ayyangar and Moore, JJ. treated the conveyance as one for value to the extent of Rs. 1000 and a conveyance by way of a gift to the extent of Rs. 10,000 of the property conveyed. In view of the principle of Hindu Law that a gift by an undivided member of his share or part thereof is void 'in toto', it is not open to an undivided member to evade the principle by purportig to make an alienation for value which is grossly inadequate and inequitable. In such a case, it would be inconsistent with the principle of Hindu Law, even to recognise the conveyance as good to the extent of the alienor's share. As the sum of Rs. 1000 was applied for discharge of the antecedent debt of the father, the only relief which the first defendant in the case was entitled to according to the learned Judges, was to have an equitable charge over the whole of the property for return of the amount with interest.

According to my understanding of this judgment, it proceeded entirely on the footing that the conveyance was only a gift and not alienation for value to any extent. Bashyam Ayyangar, J. who was a party to the decision in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, also took part in this case and it cannot be reasonably assumed that in this case the learned Judge intended to go behind the principles enunciated by him so clearly and cogently in the earlier decision. This case, therefore, is not an authority on the question as to the manner and the mode in which the equities of an alienee have to be worked out in a case where the consideration for a sale or mortgage is only partly binding on the joint family.

(22) I now come to the decision in 'VADIVELAM v. NATESAM', 37 Mad 435 which has been made the target of a severe attack by the learned counsel for the respondent. The facts were very simple. The joint family consisted of an uncle and a nephew. The uncle sold certain lands belonging to the family for a sum of Rs. 500 which, it was not disputed was the real value of the property at the time. Out of this consideration, Rs. 250/- was applied for discharge of debts borrowed for the purposes of the family. The nephew instituted the suit to rcover one half share of the lands conveyed under the sale-deed by his uncle, thereby admitting that the sale was valid to the extent of his uncle's half as he was undoubtedly entitled to alienate his own share for value. The question raised in the appeal was whether the plaintiff should be made liable to any extent for the binding portion of the consideration.

Two extreme contentions were urged. Mr. Seshagiri Ayyar for the appellant urged that the entire amount of Rs. 250 which was found to be binding must be treated as a charge on the plaintiff's share of the property. While Mr. Natesa Iyer for the plaintiff contended that the uncle should be treated as having sold his interest in the property only for the binding portion of the consideration. These two extreme contentions were rejected by the learned Judges Sundara Iyer and Sadasiva Ayyar, JJ. They formulated at page 437 the principle applicable to such cases in these words:

> "According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of Rs. 500/- must be distributed over the shares belonging to the plaintiff and Chinnappa (the uncle) respectively.
>
> There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively."

(23) Applying this principle, the result was that the plaintiff was bound to pay one half of Rs. 250/- held binding on the family, that is to say as a condition precedent for recovery of possession of the half share claimed by the plaintiff in the suit, he should pay Rs. 125. This principle so enunciated by the learned Judges, in my opinion, accords with equity and justice. The decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, was also considered by the learned Judges who dissented from the view of Subramania Ayyar, J. in that case.

It was pointed out at page 438, after quoting the passage from the judgment of Subramania Ayyar, J. in which he pointed out the practical inconveniences, as follows:

> "The whole of this reasoning proceeds on the assumption that when a coparcener sells his share as well as the share of other members the other coparceners are entitled to raise the question as to what is the real value of the share of the alienor. It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in case of dispute. There seems to be no reason for allowing the alienor's coparceners to ask the Court to adopt any other principle."

(24) The argument that the valuation was not capable of easy or satisfactory settlement, was rejected on the ground that as the right of a coparcener to sell his interest was recognised, the equities must be adjusted in the best manner possible and that the remedy indicated by Subramania Ayyar J. in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, may in very many cases be altogether useless as the alienor may not haye any interest in the family properties. The above passage from the judgment had been, if I may say so with respect misunderstood and it is this misconception of his that was responsible for the severe criticism by the learned counsel for the respondent. The learned advocate in the first place, argued that the view of the learned Judges was entirely coloured and is based upon the view now held to be untenable, that an alienee from an undivided member of a family becomes a tenant-in-common by reason of his purchase.

No doubt, this view was shared by Sadasiva Ayyar, J. in a later case already referred to. But on a careful perusal of the judgment, it is impossible to accept the contention and to hold that the decision was based upon such an erroneous assumption. The sentence in the above passage recognising the right of a coparcener to part with his share in the family property for consideration is stated to be the justification in support of that contention. That proposition itself, as it stands, cannot be taken exception to. The decisions reviewed in this judgment beginning from 1813 have firmly established the right of a coparcener to alienate his interest in the undivided property for value and that right was accepted by the Judicial Committee in more than one case. The use of the expression "his own share" does not indicate or convey the idea that the learned Judges were treating either the alienor or the alienee as a tenant-in-common with the other members of the family.

No doubt, it may not be strictly accurate to describe the interest of a coparcener in an undivided family as "his share", because, as pointed out in this judgment and by the Privy Council in 'APPOVIER v. RAMA SUBBA AYYAN', 11 Moo Ind App 75, no coparcener has a defined share in the property until there is a partition. But this expression was used by several eminent Judges and also by the Judicial Committee as meaning the interest of the coparcener in the undivided property. The learned Judges in enunciating the principle, were not stating and were not called upon to state the limitations under which the power to alienate is to be exercised and enforced. One of such important qualifications is that such a transfer would not result in exempting the property from bearing the proportionate share of the common burden whether the property is in the hands of the alienor or in the hands of his alienee.

The consideration of the question by the learned Judges did not necessitate the stating of the qualification of the rule as they were not dealing with all the principles governing the adjustment of the equities of an alienee. The decision, in my opinion, steers clear of all the difficulties and recognises the equities of all parties and gives effect to them. The rule is simple and capable of easy application without causing hardship to either the alienee or the non-alienating coparceners.

(25) It is unnecessary to drive the alienee to a further suit when the coparcener challenging the alienation had elected to treat the alienation as valid to the extent of the alienor's share. If really there is any difficulty, it was up to the person challenging the alienation to institute a suit for general partition which is wider in its scope and in which all the rights of the parties could be adjusted and provision for debts could be made as pointed out by the Privy Council in 'SAT NARAIN v. SRI KISHEN DAS', 17 Lah 644, approving the decisions of this Court on the point.

(26) This decision was followed by Wallis J. in 'SEETHARAM NAIDU v. BALAKRISHNA NAIDU', 26 Mad L J 604, in preference to the decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, and by Sadasiva Aiyar and Spencer JJ. in 'SUBBAIYA v. THULASI', 1914 Mad W N 16, and was applied without referring to it in 'MUTHU KRISHNA NAIDU v. KONAJI', 1917 Mad W N 273, by Sadasiva Ayyar and Spencer JJ. Jackson J. sitting as a sinlge Judge applied this decision in 'ADINARAYANA REDDI v. SUBBARAYAL REDDI', AIR 1927 Mad 1116, where he also observed that the manager was entitled to sell his own share for what he likes and stated that the point to keep in view in working out equities is that the Courts always held the vendor to his sale and "are not in the least concerned with the merits of his bargain".

This, if I may say so with respect, is a correct statement of the law. Though in the latest edition of Mayne's Hindu Law, this decision is not referred to but only the later decisions which followed it, in the edition by Coutts Trotter J. at page 514, it was accepted as laying down the law correctly and it was also noticed by Trevelyan on Hindu Law 1929 Edn., at page 322. This decision was also noticed by the Privy Council in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518, but on the facts of the case before their Lordships of the Judicial Committee, the necessity to apply or consider the correctness of that decision did not arise. The Bombay and Nagpur High Courts have followed the principle, in 'VADIVELAM v. NATESAM', 37 Mad 435. Vide 'MADHAVRAO GANPAT v. SHANKAR HARI', AIR 1943 Bom 278 and 'SURAJ MAL v. BAPURAO', AIR 1929 Nag 311 following 'RADHAKISHAN v. BISAM SINGH', AIR 1927 Nag 379.

(27) It remains to consider the decision of Kumaraswami Sastri and Ramesam JJ. in 'VENKATAPATHI v. PAPPIA', 51 Mad 824, in which the judgment of the Court was delivered by Ramesam J. It arose out of a suit by a minor plaintiff to set aside a deed for sale executed by his father in favour of the first defendant. The consideration stated in the sale-deed was Rs. 600. The vendee was also a near relation of the plaintiff's father. At the time of the sale, the plaintiff's grand-father was alive. Therefore the plaintiff's father's share on the date of the alienation could only be a quarter. It was found that the property, on the date of the sale, was really worth Rs. 2000 and that the vendee did not pay the entire consideration but paid only a sum of Rs. 400 for discharge of the binding obligations of the family.

It was held by Ramesam J. that regarding the sale as a sale of the father's share, the share was really worth Rs. 500 and that the consideration of Rs. 400 paid under the document was not grossly inadequate so as to treat the transaction as one of gift within the principle in 'ROTTALA RANGANATHAN CHETTI v. PULICAT RAMASAMI CHETTI', 27 Mad 162.

The learned Judges, therefore, were prepared to allow the alienee to retain a quarter share of the property but the further question that had not been decided was whether the alienee was entitled to ask the plaintiff to refund any portion of the consideration paid which was undoubtedly found to be binding, viz., the sum of Rs. 400. The decisions in 'MARAPPA GOUNDAN v. RANGASAMI GOUNDAN', 23 Mad 89; 'ROTTALA RANGANATHAN v. RAMASAMI CHETTI', 27 Mad 162 and VADIVELAM v. NATESAM', 37 Mad 435, were considered by the learned Judge, Ramesam J.

The proposition enunciated in 'VADIVELAM v. NATESAM', 37 Mad 435, that

> "It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases."

was taken exception to by the learned Judge. He seems to think that the principle so stated would apply only where the vendor is a divided member and that where he is still a member of the joint family, the proposition conflicts with the statement of law in 'ROTTALA RANGANATHAN CHETTI v. PULICAT RAMASAMI CHETTI', 27 Mad 162. It is difficult to follow and accept this criticism. The decisions in this High Court and of the Judicial Committee have clearly established that a coparcener governed by the Mitakshara Law is entitled to part with his interest in any family property. As regards the consideration for such a transfer so long as the vendor and purchaser agree and fix the price it is not open to a third party to canvass its adequacy or its fairness.

It is, therefore, wrong in my opinion, to state that a member of an undivided family cannot, so long as he is undivided, alienate his share. If the emphasis, however, is on the statement, "for any consideration he pleases" and what was meant was that by adopting the device of stating some nominal consideration a coparcener cannot make a gift so as to defeat the right of survivorship of other members, it can no doubt be accepted. I think this is what the learned Judge meant when he added that the principle so stated conflicts with the decision in 'ROTTALA RANGANATHAN CHETTI v. PULICAT RAMASAMI CHETTI', 27 Mad 162. I do think that the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435, when they stated the law in those terms intended to encourage gifts in the cloak of an unreal or nominal consideration.

In the sentence at page 830:

> "The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share, the sale of that share should (sic) be for a grossly inadequate consideration,"

in my opinion, the word "not" is omitted after the word "should" and before the words "be for a grossly inadequate consideration", in which case the sentence will mean that if the alienor's share is not undersold, the sale may be upheld. But then in the next sentence, the learned Judge seems to think that as the real value of the father's one fourth share was Rs. 500 and as the alienee paid only Rs. 400, 1/4th of the binding consideration being Rs. 100 and the sale of the one-fourth share was therefore for an inadequate consideration and therefore it should not be upheld on the principle laid down in 'RANGANATHAN CHETTI v. RAMASAMI CHETTI', 27 Mad 162.

At page 829 the learned Judge found that the sale could not be regarded as for a grossly inadequate consideration and

> "As practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only."

This seems to conflict with the view stated in the next page, 830, but then in the next sentence the learned Judge states:

> "In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share."

In this sentence, in my opinion, the learned Judge has in view the sum of Rs. 400 which was found to be the binding consideration and the equity suggested is that the burden should be thrown entirely upon the alienor and the alienee, for in the succeeding sentence, he added that if the value was less than the alienor's share, no further equity in favour of the vendee arose while if it was more, a charge may be given for the excess over the share of the coparceners. It is rather difficult to follow the reasoning of the learned Judge, but throughout the discussion, he seems to have been considering not the real value of the property but only the binding consideration for at page 831, in the second sentence, he stated that "when the consideration is so allotted, if it is grossly inadequate compared with the value of the alienor's share, it may be that the sale cannot be upheld, even for his share". It is unnecessary to pursue the consideration of the judgment further as the learned Judge has summarised his conclusions in three propositions at pages 831-832.

These propositions again are not very clear and intelligible. The case before them was treated as falling under the second of the above propositions, as the vendor's share was worth Rs. 500 and the consideration proved was only Rs. 400 i.e., the binding consideration. The first of the three possible cases, enumerated by the learned Judge does not present any difficulty, as it is based on 'RANGANATHAN CHETTI v. RAMASAMI CHETTI', 27 Mad 162, which proceeds on the conclusion that the alienation in question was really a gift and not a transfer for consideration. In the second of the three cases, the learned Judge seems to have had in mind the binding consideration when he speaks of the whole consideration and so also in the case of proposition No. 3 at page 832.

The effect of propositions 2 and 3 is to throw the entire burden on the alienor and alienee and to benefit the coparcener or coparceners — impugning the transaction as not binding though they derived the benefit from the consideration paid to the extent it was applied for discharging a binding debt. So long as the alienation is by an undivided coparcener or where the father or the manager purports to transfer for a binding necessity or benefit but only a partial necessity was established, his transfer is not for a grossly inadequate consideration and is not a cloak or a device really to make a gift though under the guise of an alienation for consideration, there is no justification or reason to canvass the adequacy and fairness of the price paid by the purchaser to the alienor. If from the consideration paid under a transaction by the father or manager a portion of it had been utilised for discharging a common burden, there is no justification for

throwing the entire burden upon the father or the manager and to allow the other coparcener to escape free from the liability.

As the property is equally distributed, the burden on the property must also be distributed in the same manner. This is in consonance with the principles of equity and justice. In my opinion 'VENKATAPATHI v. PAPPIA', 51 Mad 824, has been wrongly decided and must be overruled as well as the decision in 'MARAPPA GOUNDAN v. RANGASAMI GOUNDAN', 23 Mad 89. The law is correctly stated in 'VADIVELAM v. NATESAM', 37 Mad 435, and must be followed.

(28) Before I deal with the other branch of the arguments of the learned counsel for the respondent, it is necessary to advert to another question which arises incidentally. In 'VENKATARAMA v MEERA LABBAI', 13 Mad 275 and 'BALABADRA PATRO v. KHETRA DOSS', 31 Mad L J 275, it was decided by this Court that S. 44 of the Transfer of Property Act, before the amendment of that Act by the Transfer of Property (Amendment) Act of 1929 had not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu family to claim joint possession of the alienor's share as a tenant-in-common by virtue of that section and that his only right is to obtain by a suit for partition the share to which his alienor would be entitled.

The learned editor of Mayne's Hindu Law at page 499, latest edition, expressed the opinion that since by virtue of the Transfer of Property (Amendment) Act, 1929, the section is made applicable to Hindus and Buddhists by omitting the words "Hindu or Buddhist" in the concluding portion of S. 2 of the principal Act, the alienee from a coparcener would be entitled to the benefit of that section and claim joint possession. But this view is not accepted by Mulla in his commentary on the Transfer of Property Act, 3rd Edition at page 216. The section itself applies to co-owners of immoveable property and an alienee from a coparcener does not become an owner or a co-tenant by reason of the purchase. Further, the words "subject to the conditions and liabilities affecting at the date of transfer the share or interest so transferred", save the principles established by Mitakshara Hindu Law that the right of an alienee is only to institute a suit for partition to work out his equities, subject to the charges and encumbrances affecting the coparcenary property or the interest of the alienor at the time of the transfer. These principles are not in any manner and to any extent affected or altered by S. 44 (S. 3 ?) of the Transfer of Property (Amendment) Act and S. 2 of the Principal Act.

The last clause in the section relating to the transfer of a dwelling house cannot be treated as indicating that the "co-owner" referred to in the opening words of the section is applicable to an alienee from an undivided coparcener in a Mitakshara joint Hindu family. The view taken by Mulla in his commentary on the Transfer of Property Act was followed in preference to that of Mayne by Chandrasekhara Aiyar J. in 'RAMASWAMI CHETTIAR v. SUBRAMANIA CHETTIAR', S. A. No. 940 of 1945 and by Tyagarajan J. in 'THIMMU REDDIAR v. SENNAPPA REDDIAR', S. A. No. 2339 of 1945 and 95 of 1946. The last decision was affirmed on Letters Patent Appeal by Horwill and Balakrishna Ayyar JJ. in 'THIMMU REDDIAR v. SENNAPPA REDDIAR', L. P. A. Nos. 2 and 3 of 1948. With great respect I am inclined to accept the view taken by Mulla in his commentary on the Transfer of Property Act in preference to the view of the learned editor of Mayne's Hindu Law at p. 493 of the latest edition and the earlier decisions in 'BALABADRA PATRA v. KHETRA DOSS', 31 Mad L J 275 and 'VENKATRAMA v. MEERA LABBAI', 13 Mad 275, is still good law.

(29) The last contention urged on behalf of the respondent was that by reason of the insolvency of the father, the first defendant, there was a disruption of the joint family status and that, therefore, it is not open to the alienee, the third defendant, to insist in this action, for any adjustment of the equities in his favour as his only right which was a right to institute a suit for partition for the purpose of establishing his equtiy, is gone. In the first place, in my opinion, this contention is not open to the plaintiff-respondent as he had specifically admitted in his plaint that the family was joint and undivided on the date of the institution of the suit & it was supported by the evidence of the father examined on his side as P. W. 1. It is impossible to accede to the request of the learned counsel for the respondent that he should be granted an indulgence to amend his plaint so as to enable him to go behind his pleading and his evidence. In the next place, the contention itself seems to me wholly untenable. The subsequent insolvency of the father does not take away the right of the alienee which had already vested in time.

(30) The learned advocate to be logical in the attitude so taken, had to urge that even an alienation by a coparcener of his entire interest in the joint family property or part of it, would bring about a division in status while he all along maintained that the alienee's right was not a specific defined right in the property but was only an unqualified fraction representing the share of the alienor. Somewhat inconsistently in this branch of the argument, he maintained that the share becomes crystallised by reason of the alienation or insolvency practically converting the alienee into a tenant-in-common along with the other members of the family.

The crux of the argument, as I understand it, is that if the share of a member becomes defined in whatever manner it may be, such a definition of the share would operate to disrupt the status of the family and make the other members tenants-in-common along with the alienee or the Official Receiver in the case of insolvency. This position, he attempted to maintain by reference to the Mitakshara definition of Vibhaga or partition and the recognition by the later commentators of the conversion of the joint family status into a tenancy-in-common even by what is now described as a unilateral declaration of an intention which, according to him, is equivalent to Buddhivisesha and by a reference to a statement of the Privy Council in 'VENKATAPATHI RAJU v. VENKATANARASINHARAJU', ILR (1937) Mad 1.

(31) It is no doubt true as stated previously in this judgment, that some of the Judges of this Court held the view that by reason of the alienation, the alienee becomes a tenant-in-common. That an alienation by a coparcener does not terminate the coparcenary whether the property alienated is either the whole or only a part of his interest in the family property, and that notwithstanding the alienation, the

alienor continues to be undivided with the other members of the family with rights of survivorship between him and the other members of the family in respect of the property of the family was laid down clearly by Bhashyam Ayyangar J. in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 at page 717, though, it must be observed, in a later decision 'LAKSHMI ACHI v. NARAYANASAMI NAICKER', 53 Mad 188, Ramesam J., if I may say so with great respect, interpreted this proposition wrongly. This mistake was noticed by Venkataramana Rao J. in 'RAMASUBBARAYA v. GANAPATHIRAJU', ILR (1940) Mad 405. For the reason given by Venkataramana Rao, J. in that decision, I respectfully agree with his opinion that the view taken by Ramesam J. in 'LAKSHMI ACHI v. NARAYANASWAMI NAICKER', 53 Mad 188, is not correct. Even since the decision in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, the preponderance of authority in this Court is in favour of the view taken by Bhashyam Ayyangar J. notwithstanding the expressions of opinion to the contrary by other learned Judges. 'MANJAYYA MUDALI v. SHANMUGA MUDALAI', 38 Mad 684; 'MAHARAJ OF BOBBILLI v. VENKATARAMANJULU', 39 Mad 265; 'VENKATARAYUDU v. SIVARAMAKRISHNAYYA', 58 Mad 126; 'LAKSHMANAN CHETTIAR v. SRINIVASA AYYANGAR', ILR (1937) Mad 203; 'SURYANARAYANAMURTHI v. VEERARAJU', ILR (1946) Mad 54 and 'RAMASUBBARAYA SASTRI v. GANAPATHI RAJU', ILR (1940) Mad 405, support this view. In my opinion, it is too late in the day to set the clock back and to hold that the alienation has the effect of dividing the status of the family.

(32) The earlier branch of the argument of the learned advocate was directed to restrict and to curtail the rights of the alienee as far as possible and to prevent in effect the free exercise of the power of alienation by an undivided member of a Hindu joint family governed by Mitakshara Law. He now wants to go to the other extreme and asks us to hold that the alienation practically converts the ownership of the property into a tenancy-in-common. Judicial decisions in this State have evolved a power of alienation and a logical, and if I may say so with respect, equitable system, adjusting the equity of the alienee and the rights of the other coparceners. The object, I should think, was to encourage the exercise of individual rights with a view to advance commerce and trade and also to enable the coparcener to advance, by raising money, the interests of himself and his branch.

The law has progressed in India from the corporate ownership of the village community into the joint family also of a corporate nature. The joint family was taken as a unit and the conception of joint ownership continued for a long time when there was not much of a progress in the direction of commerce and trade. It is common knowledge that India was purely an agricultural country for a long time and even now the major part of the population of the country make their living by agriculture. The transition from the ownership of a joint family as a unit to individual property has been one of gradual evolution under Mitakshara law by judicial decisions. The swing of the pendulum in some of the countries is to go back and to abolish altogether individual property and vest the ownership of every kind of property in the State.

Whether individual ownership or State ownership of property is good for society and of the two which should survive is for the politicians to solve and for them to decide. It is not within the province of a Judge to consider these problems and express his opinion. But in a society which is advancing, it is unwise to retard the progress by introducing brakes at every stage. To curtail, therefore, or to restrict by limitations the power of alienation is, in my opinion, inconsistent with the progress of society and the evolution of the right of individual property.

(33) To resume the argument of the learned counsel for the respondent after this brief digression, it must also be stated that the insolvency of a coparcener does not bring about a division of the status of the family. This question has been considered in this Court in some of the decisions. When a coparcener is adjudicated insolvent, his property vests in the Official Receiver. The property of the insolvent for the purpose of Section 28 of the Provincial Insolvency Act does not, however, include any property which is exempt by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of the decree. The share of the insolvent in the family property in so far as it is attachable and saleable under Section 60, C. P. C. will vest in the Official Receiver. It is wrong, therefore, to assume that the entire interest of the insolvent in the joint family property vests in the Officail Receiver.

'VENKATRAYUDU v. SIVARAMAKRISHNAYYA', 58 Mad 126, considered the effect of insolvency on the joint family status and after an elaborate examination of the authorities, it was held that the insolvency would not sever the joint family status and the purchaser from the Official Receiver would not become a tenant-in-common from the date of his purchase. This opinion was based on the analogy of the effect of alienation by a coparcener of his entire interest in the joint family property. If there was a surplus of the assets of the insolvent after the administration is completed, the question arose whether that surplus which reverts to the insolvent is to be treated as joint family property or as the separate property of the insolvent. Venkataramana Rao, J. sitting as a single Judge considered the question in 'LAKSHMANAN CHETTIAR v. SRINIVASA AYYANGAR', ILR (1937) Mad 203, and held that the revesting of the surplus in the insolvent after the insolvency had the effect of altering the character of the property and that it would become the separate property of the insolvent. He, however did not consider that the insolvency operated to bring about a division in status. The family status continued to be undivided even according to the learned Judge, notwithstanding the insolvency.

In 'SURYANARAYANAMURTHY v. VEERARAJU', ILR (1946) Mad 54, Wadsworth and Patanjali Sastri, JJ. pointed out that the view taken by Venkataramana Rao, J. in 'LAKSHMANAN CHETTIAR v. SRINIVASA AYYANGAR', ILR (1937) Mad 203, was not correct and that the character of the property was not altered by reason of the insolvency. Of course, the learned Judges also affirmed the view that the insolvency does not affect the status of the family. This decision was again followed in 'HANUMANTHA v. OFFICIAL RECEIVER,

BELLARY', ILR (1947) Mad 44, by Wadsworth and Rajamannar, JJ. (as he then was) in which the question that arose for consideration was whether if after the adjudication of a member as an insolvent, another member dies and there is an increase in the share to which the insolvent would be entitled whether the increased share vested in the Official Receiver as after-acquired property under S. 28 (4) of the Provincial Insolvency Act. The learned Judges held that by reason of the Insolvency, the joint family status was not disrupted and that any addition to the share of the insolvent by survivorship would be "after-acquired property" within the meaning of Section 28(4).

The reason why the Official Receiver does not lose that which was vested in him is stated at page 46 to be that the

> "vesting amounts to an alienation which 'crystallises the share' of the insolvent to which the alienee is entitled on the date of the adjudication."

This expression in this judgment is the basis and the foundation of the argument of learned counsel for the respondent that the insolvency has the effect of crystallising the share in the sense that the Official Receiver practically becomes a tenant-in-common in respect of that share with the other coparceners. This argument, in my opinion, proceeds on a total misinterpretation of the expression used by the learned Judge, Wadsworth, J. in the context. The crystallisation of the share that is referred to by the learned Judge means only that the fractional interest of the coparcener who is adjudicated insolvent as on the date of the adjudication vests in the Official Receiver, and the fraction of the interest which so vested in the Official Receiver is not altered by subsequent births and the benefit of the increase by subsequent deaths which accrues by survivorship to the insolvent vests in the Official Receiver as after-acquired property in the right of the insolvent.

This is practically the principle which has been established in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, approved by the Full Bench in 'CHINNU PILLAI v. KALIMUTHU', 35 Mad 47. That principle is that the fraction of the share which vests in the alienee under an alienation is not altered by subsequent births or deaths and is once for all unalterably fixed. The crystallisation, therefore, in that sense has not the effect of defining the share of the insolvent in the joint family property so as to convert it into a tenancy-in-common and make it a defined share. If the foundation of the argument falls to the ground, the argument itself fails. Further as stated above, it is not the entire interest in the property that vests in the Official Receiver. Part of the property of the family which is not saleable and attachable under Section 60, C. P. C. must necessarily remain with the joint family without any interest in such property vesting in the Official Receiver.

(34) Assuming for the sake of argument that the insolvency has the effect of defining the share by a division of the joint right of the coparcener in the sense in which it was used by the Privy Council in 'APPOVIER v. RAMASUBBA AYYAN', 11 Moo Ind App 75 (P C), such a definition of a share has not the result of changing the status of the family so far as the insolvent is concerned. Strong reliance to support the view that it brings about that result was placed by learned counsel for the respondent on a passage in judgment of the Judicial Committee in 'VENKATAPATHIRAJU v. VENKATANARASIMHARAJU', ILR (1937) Mad 1 at pages 12 and 13:

> "A division of right or a severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. If the document clearly shows a division of the right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties."

The point actually decided by the Judicial Committee in the case was that a renunciation by a member of the joint Hindu family governed by the Mitakshara law merely extinguishes the renouncing member's interest in the family estate but does not affect the status of the remaining members 'Quoad' the family property and that they continued to be coparceners in the same manner, notwithstanding the renunciation. The passage relied on, in my opinion, does not at all apply to a situation where the entire interest of a coparcener is alienated or the interest of the coparcener became vested in the Official Receiver by reason of the insolvency. The division of right can undoubtedly be brought about by agreement between the parties as stated in 'APPOVIER v. RAMASUBBA AYYAN', 11 Moo Ind App 75 (PC). It may also be brought about by a unilateral declaration of a member to become divided in status as laid down by the Judicial Committee in 'GIRJA BAI v. SADASHIV DHUNDIRAJ', 43 Cal 1031, without an actual partition of the properties.

The view of the Judicial Committee as pointed out by Ameer Ali, J. in the judgment is based on Viramitrodaya, Vyavaharamayuka, Saraswathivilasa, passages from which were extracted at page 1046. The definition of partition given by Vignaneswara in Mitakshara as:

> "the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate,"

is also referred to at page 1045. The act, therefore, contemplated in the passages in 'VENKATAPATHI RAJU v. VENKATANARASIMHARAJU', ILR (1937) Mad 1, above extracted must be an act which amounts to an unilateral declaration expressed by a member of an intention to become separate from the family. It has been established that the declaration may be either express or implied from conduct. The 'transaction' referred to in the passage must be a transaction between the members of the family which may not be an express agreement between the parties to become divided in status and to divide the right but may be any document in which a division of the right is assumed or expressed.

The passage in question does not, in my opinion, contemplate the result of bringing about a division of the right when there is not either a consensus of intention expressed by the members of even a unilateral declaration by a member of his intention. The essence of the division of a right, in my opinion, is the expression of intention which may be contained in an agreement between the parties or any document entered into by the parties or it may be a division by the expression of unilateral declaration. The alienation by itself or a compulsory alienation like the insolvency or an exe-

cution sale cannot, in my opinion, be treated in view of the authorities already considered in this Court as an expression of an intention to sever the status of the family.

(35) Reference was made in the course of the argument to the definition of partition by Vijnaneswara where the author defines that term as:

(Vibagonama Dravyasamudhaya Vishayanamancka Swayamanam thathekatheseshu Vyavasthapanam).

The translation given by Colebrooke for this passage is

"Partition (Vibaga) is an adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions of the aggregate to a several ownership."

This, in my opinion, undoubtedly refers to the actual division by metes and bounds by an agreement between the parties. "Ekathesa Vyavasthapanam" can be only by a voluntary act of the parties and not by a compulsory alienation. Even then it requires the restriction of the ownership of each member in the entirety of the property to particular portions of the aggregate so as to constitute several ownership. This has no reference even to a mere division of the right without division of the property. Undoubtedly, as the Privy Council pointed out in 'GIRJA BAI v. SADASHIV DHUNDIRAJU', 43 Cal 1031 (P C), there are texts of Viramitrodaya and others which recognise the division of the right without the division of the property by a unilateral declaration or by 'buddhivisesha." The other passages to which reference was made in tne course of the arguments from Jimuthavahana's Dayabaga, Smritichandrika, page 12 and Viramitrodaya do not at all support the argument that without an intention to divide on the part of a member, a division in status can be brought about merely because either his share is crystallised or his interest was alienated whether the alienation is voluntary or even if it is unvoluntary.

It is needless to consider in detail the other texts which have been placed before us as we think that there is no foundation to support the argument of the learned counsel. I have therefore no hesitation in coming to the conclusion that the insolvency of a member does not change the status of the family. The family was not treated as divided in status notwithstanding the insolvency of the father in 'SAT NARAIN'S CASE', and the decree for partition provided for the discharge of joint family liabilities, 'SAT NARAIN v. KISHENDAS', 17 Lah 644 (PC).

(36) It was strongly pressed before us that conversion of a member, it has been established, has the effect of severing the status of that member separating him from the family and that that analogy should be applied to the case of insolvency also. I do not think that the analogy holds good as the effect of conversion is to change the religion of the coparcener and it would be impossible to allow him to continue to be a member of the family sharing the worship & the food & the other amenities of the members of the family. I do not think that by such an analogical reasoning the principle can be extended to the case of insolvency.

(37) It only remains to state my conclusions in order to avoid any confusion.

1. A coparcener of a joint Hindu family governed by Mitakshara obtaining in the State is entitled to alienate his undivided share either in the whole of the property or in a certain specific item of the property or even the whole of a specific item. In all such cases the only right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. The alienee has to bear the proportionate share of the common burden of the family proportionate to the value of the share alienated to him.

2. Where an alienation is made by a father or manager of a joint Hindu Family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

3. If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other coparceners, impugning the alienation to have the alienor's share allotted to him & also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated.

4. If the non-alienating coparcener challenges the sale made by the father or manager of the joint family property on the ground that it is not binding on him but institutes a suit only to recover his share in the property alienated thereby admitting the right of the alienee to the other share in that property, and if it is found that the alienation is supported by partial necessity, the common burden discharged from and out of the consideration should be distributed proportionately in the same suit on the principle of 'VADIVELAM v. NATESAM', 37 Mad 435.

5. If the alienation whether made by a father or manager or by any other coparcener, though purporting to be for value, is in fact a device to make a gift and not a transfer for consideration, the alienation would not defeat the right of the other coparceners to take the property by survivorship in case of death of the alienor. A non-alienating coparcener is not otherwise entitled to dispute the adequacy or fairness of the consideration for the sale by a coparcener and his only right is to insist that the property alienated should bear the proportionate share of the common burden on the family.

6. Neither the alienation of the entirety of the interest of a coparcener nor an adjudication of a coparcener as an insolvent would have the effect of disrupting the status of the family.

7. The share or in other words the fraction of the share which the alienee acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation.

(38) It follows that whether the general principle of the right of an alienee to work out his rights in a partition suit or whether the principle in 'VADIVELAM v. NATESAM', 37 Mad 435, is applied to the facts of this case, the third defendant is entitled to have a condition imposed that the plaintiff should not recover possession of his half share of the property without payment of a half share of the binding consideration, viz., Rs. 3511. The decree, there-

fore, of the Courts below must be modified by adding that before the plaintiff recovers possession of the property he must deposit into Court a sum of Rs. 3511 and the plaintiff would threafter be entitled to recover possession of the property with mesne profits as from the date of deposit. The money so deposited shall be paid over to the 3rd defendant. The appellant is entitled to his costs throughout.

(39) PANCHAPAGESA SASTRI J.: Where a sale of joint family properties is challenged by the non-alienating coparceners as not binding on their shares, they have been allowed to bring a suit for partition of the alienated items only and recover their shares therein leaving the share of the alienating coparcener in the possession of the alienee. This is an exception to the rule against partial partition. This right has been recognised by the Full Bench decision in 'IBURAMSA ROWTHAN v. THERUVENKATASAMI NAICK', 34 Mad 269, as "a long established rule." The judgment in that case rejected the argument that the recognition of this right of partial partition is logically inconsistent with and trenches upon the alienee's equity to have his rights worked out in a general partition suit so as to enable him to claim, if possible, an allotment of the whole of alienated items or as much of it as may be possible to the share of his alienor. Its real justification is its obvious convenience and simplicity of procedure and the undesirability of compelling the other coparceners to bring a complicated suit for general partition involving other properties of the family as well.

Its legal basis is rested upon the doctrine that it is open to the non-alienating coparceners to affirm the transaction and to recognise it as valid to the extent of the share of the alienor. Such affirmance of the transaction and the recognition of its partial validity must necessarily postulate a legal fiction of a prior division, quoad the alienated items, between the alienating coparcener and the others and the transfer of the share of the divided member of the alienee. A suit for partial partition brought by the non-alienating coparceners must therefore be deemed in law to contain these averments necessitated by the above legal fiction. The plaintiffs cannot be allowed to challenge the same, as the suit itself must be deemed to have been founded on the basis of such a fiction. They cannot be permitted to advance any arguments contrary to such implied averments, at any rate during the progress of such a suit.

The alienee, if he is not satisfied with the share of the alienor which is left undisturbed in his hands, and, is anxious to claim an allotment of the whole of the items, or a greater portion of it, must work out his rights in his own suit for a general partition. Where, however, he does not bring such a suit the rights of all the parties have to be adjusted by the Court within the frame work of the suit for partial partition brought by the non-alienating coparcener. Even in such cases a portion of the consideration of the sale of joint family properties may be found to be binding on the family. What then is the rule to be adopted in adjusting the equities in cases of that kind? This was the only question raised before me in hearing this appeal while sitting singly and the main and important question argued before the Full Bench.

(40) In my humble judgment the most equitable and eminently just rule will be to distribute the binding portion of the consideration proportionately over the whole of the property alienated and make the non-alienating coparceners liable for payment of their proportionate shares of such binding portion of the consideration as a condition precedent for the recovery of their proportionate shares in the alienated properties. The plaintiff has by his deliberate choice adopted the exceptional remedy of a suit for a partial partition of the alienated items alone. He cannot complain if within the frame work of such a suit as brought by him the Courts proceed to adjust the equities of the alienee to as large an extent as possible. There is no sound reason or valid justification for relieving him of his obligation to bear his proportionate share of the common liability or burden even in such a suit, just as he would have to share the same if the suit is to be one for general partition.

The rights of parties should be adjusted in the same manner as if this suit was a suit for a general partition the alienated properties alone being regarded as the whole of the joint family properties belonging to the family and available for division. This, I understand, to be the real principle underlying the decision in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435. This rule has not only the merit of simplicity but works out the equity in as large a measure as the framework of the suit permits. The contrary view laid down in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, really ignores the equities in favour of the alienee. Moreover, it is obviously incomplete as it does not provide for a case where the portion of the consideration found to be binding exceeds the real value of even the alienor's share; nor is it logical in leaving the entirety of the alienor's share undisturbed in the hands of the alienee where the binding portion of the consideration is less than its value.

The later decision in 'VENKATAPATHI NAICKER v. PAPPIAH NAICKER', 51 Mad 824, removes the first of the anomalies pointed above and provides for the excess being made a charge on the shares of the non-alienating coparceners. Both the decisions, however, throw the entirety of the common burden exclusively and in the first instance on the alienor's share alone. The exoneration of the shares of the non-alienating coparceners from the burden of this common liability is not called for by any compelling principle of law or justice. In my opinion, the decision in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, is right and should be followed. This view of the law is in consonance with the progressive need of the times and really enhances the value of a coparcener's interest in his hands.

(41) I agree that the decree of the Court below must be modified as per the judgment of my learned brother Satyanarayana Rao, J.

(42) In this view it is not necessary to deal with the other questions of law about which able and learned arguments were forcefully advanced by Mr. Venkatasubramania Aiyar.

(43) VISWANATHA SASTRI, J.: I do not rehearse the facts set out in the judgment of my learned brother. I wish at the outset to express my appreciation of the assistance given to us by counsel, particularly the learned counsel for the respondent, the merit of whose erudite and instructive argument is in no way diminished because it has not succeeded. We were invited during the prolonged hearing of this appeal to examine many texts of Hindu

Law and many more decided cases but I think that such an examination is of value only if it yields some general principle or test which may be of service in deciding other cases. To refer to all the texts and cases cited would be an endless and unprofitable task. Out of deference, however, to the respondent's argument which covered a wide field, I shall briefly sketch the back-ground against which the case should, in my opinion, be viewed.

(44) Unlike decided cases, the textual authority of the Mitakshara is both clear and logical. All the property of a joint Hindu family is held in collective ownership by all the coparceners and none is the owner of a part. Family property is alienable only with the consent of all the coparceners, at any rate, of all those who are in a position to consent. An alienation may be made by one member if the other coparceners are incapable of giving assent as for instance, by reason of their minority and the alienation is for purposes designated by the texts as proper. In no other case is an alienation of family property allowed, the idea being that no individual member of the family has an interest of his own to convey. The family property is held in trust for the members then living and thereafter to be born. Mitakshara I Pl. 28 to 30.

An alienation in violation of the above rule must be treated as 'non est' according to the Smritichandrika. The right of an individual member in family property can be ascertained and fixed by his exercising the right to partition and getting a separate allotment for himself. A partition or 'vibhaga' is the adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions to separate ownership. Mitakshara Chapter 1-1-Pl. 4. Though the respondent's effort was to keep us within the bounds of textual authority and incidentally within the grip of the joint family system, I consider it is permissible for us, consistently with precedents, to minimise the inconveniences of a personal law based on texts which have long outlived the epoch in which they were promulgated.

(45) According to the early English lawyers and Judges until a partition took place, the coparceners continued "seized by one and the same title of the whole and every portion of the family property alike". The English notion that joint tenants are seized of the land 'per mie et per tout' was imported into the discussion of the rights of coparceners in a Mitakshara joint family and alienees from them, 'BALUSWAMI IYER v. LAKSHMANA IYER', 44 Mad 605 at p. 626 (FB). The right of a coparcener in family property springs from the fact of his birth in the family & ceases on his death. On the death of one coparcener, the others take by the 'jus accrescendi' that in which they had a common interest and a common possession during the life-time of the deceased, 'KATAMA NATCHIER v. RAJA OF SIVAGANGA', 9 Moo Ind App 539 at p. 611 and 'RAMANNA v. JAGANNATHA RAO', ILR (1942) Mad 886. A coparcener has not such an ascertained share in joint family property as is capable of being absolutely or indefeasibly alienated by him at his pleasure.

The graphic description of the mode of enjoyment of joint family property given in 1866 by Lord Westbury in 'APPOOVIER v. RAMA SUBBA IYER', 11 Moo Ind App 75 (PC), is too familiar to require quotation. The members of the family have a right to be housed and maintained conformably to the means of the family and their respective needs and requirements. They cannot complain of inequality of enjoyment. A coparcener has a right to enforce a partition and reduce to his exclusive ownership and possession that part of the family property which might fall to his share. At such a partition there must be a stock-taking of the whole of the existing assets and liabilities of the family; provision must be made for the discharge of common debts, encumbrances and other liabilities; and the rest of the family property should be divided among the coparceners. 'SAT NARAIN v. SRI KISHEN DASS', 17 Lah 644.

(46) The joint family system has however been invaded and rudely shaken by doctrines inspired by English legal conceptions and the demands of a progressive society. The Courts too have lent a helping hand to influences that have undermined the integrity of the joint family. The law relating to self-acquisitions as developed by Courts has responded to the desire of the members of the family to secure their own economic freedom and betterment by individual effort and exertion. The rigour of the Mitakshara rule has been relaxed. The emergence of "managership" of a joint family with incidental right to full possession and control of the family properties and the right to represent the family in suits and transactions affecting the family property, was not based on textual authority. It arose out of the ascription of a corporate character to the joint family and the consequent need for joint action of the members through an accredited representative.

To this extent, the rights of individual coparceners were subordinated to the conception of a corporate entity, represented by its manager. The recognition of wider powers in the manager of a trading family was in response to the needs of modern trade and commerce. The equal rights of coparceners in family properties and their right to interdict alienations by their father were undermined by an appeal to the sanctity attached by Hindu Law to the obligation of a debt. The Courts allowed creditors of a father to attach and sell family property for the satisfaction of their debts not tainted by illegality or immorality. The further step was to recognise the father's power to effect a sale of family property so as to bind his sons' interests for discharging his debts, the consent of the sons being presumed or implied.

Gautama ruled that a father's debts incurred in the course of a business involving speculation need not be paid by the sons out of joint family properties but Courts do not now regard such debts as illegal or immoral. The next step was to enable a creditor to attach and sell the interest of a coparcener not being the father. The further step was to uphold the right of the coparcener himself to alienate his interest in joint family property for value. That the law has been progressively developed by Courts to suit changing conditions in different parts of the country will be evident from the fact that a voluntary sale by a coparcener of his interest in joint family property does not convey any interest to the vendee under the Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh while the opposite result has been arrived at in Madras and Bombay.

(47) One convenient method of getting round textual authority prohibiting alienation of property was by saying that the prohibition was merely moral rather than legal, the distinction

between the "vinculum juris and the vinculum pudoris" not being always kept in view by the texts. The alienation may be improper but not devoid of legal efficacy. See Sir W. Macnaughten's Hindu Law page 6 cited with approval in 'BALWANT SINGH v. RANI KISHORI', 20 All 267 (PC). The Mitakshara prohibition against alienation of joint family property was substantially abrogated by an appeal to equitable principles. English lawyers like Colebrooke, Ellis and Strange, who had to interpret and administer Hindu Law had a special solicitude for the purchasers for value in good faith and their views profoundly influenced the growth of Hindu Law in the first half of the last century.

Sir Thomas Strange relying on Colebrooke's opinion observed:

"In favour of a 'bona fide' alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be done, out of the share of him, with whom he had dealt; and for this purpose, a Court would be warranted in enforcing a partition". Strange's Hindu Law (1st Edition), Vol. 1 page 179.

Colebrooke previously had said:

"Equity would require redress to be awarded to the purchaser by enforcing a partition of the whole or sufficient portion of (family property) so as to make amends to the purchaser out of the vendor's share." Strange's Hindu Law (1830), Vol. II page 349.

This is the origin of the purchaser's equity, which powerfully reacted on the proprietary rights of coparceners and their right to alienate their interest in joint family property.

As early as 'SURAJ BANSI v. SHEO PRASAD', 5 Cal 148 PC, the Judicial Committee recognised the serious inroads that had been made into the Mitakshara joint family system and said:

"since the decision, however, of the case of 'VIRASWAMI GRAMANI v. AYYASAMI GRAMANI', 1 Mad H C R 471, it has been settled law in the Presidency of Madras that one coparcener may dispose of ancestral undivided estate even by contract and conveyance to the extent of his own share; and 'a fortiori' that such share may be eized and sold in execution for his separate debt..... There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition."

In 'SYED TUFZOOL HUSSAIN KHAN v. RAGHOONATH PERSHAD', 14 Moo Ind App 40 at p. 50, the Judicial Committee referred to a coparcener's undivided interest as something "specific, existing and definite." In 'AYYAGARI VENKATARAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690 and 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mad 162, Bhashyam Iyengar J. held that a coparcener had a "present vested interest" in joint family property transferable in whole or in part for value and that the transferee also took a present vested interest in the property. A further breach in the joint family system was made when the law of insolvency provided that the share of a coparcener in joint family property vested in the Official Receiver or Assignee of his adjudication. This was on the footing that it was property over which the insolvent had a power of disposal. As the law stands today, a coparcener can claim at any given moment of time that he has a definite share in the family property which he can alienate for value without reference to the other coparceners or which a Court can attach and sell for his personal debts.

He has an interest in property which, though it may fluctuate in extent from time to time, is yet definite and ascertainable at any given moment, as for instance by a demand for partition or by an alienation, with this difference that an alienation 'per se' does not affect a severance of the alienor from the joint family, 'NARAYANAH SAH v. SANKARA SAH', 53 Mad 1 at p. 14; 'BALUSWAMI IYER v. LAKSHMANA IYER', 44 Mad 605 at p. 626. The theory of the Mitakshara that an individual coparcener has nothing like a share or specific interest in joint family property and that the alienation of such a property by a coparcener without the consent of the others is void and of no effect whatever has been substantially abrogated by the decisions of Courts. What Jimutavahana did for Bengal in the 13th Century was partially achieved by the Courts in Madras and Bombay in the 19th Century. Nilakanta, though a pronounced follower of Vignaneswara, practically accepted the Dayabhaga view of the nature and extent of a coparcener's right in joint family property. Indeed Vignaneswara himself recognised that property had its basis only in popular recognition.

(48) What are the rights of an alienee of joint family property from a coparcener and how are they to be worked out? Have the other coparceners any, and if so, what rights against the alienee and has the alienee any rights as against them? In the ensuing discussion, it is assumed that the alienation is for value but not for a purpose binding on the family. The texts of Hindu Law do not throw any light on these questions for they do not contemplate an alienation of joint family property by a coparcener otherwise than for family necessity or benefit. Judge-made law has been hesitant with a gradual advance and an occasional set-back. The working out of the alienee's equity has caused not a little embarrassment in the logic of the law, which has to be gathered from decisions in which the principle has been progressively but not always consistently formulated. The touching refrain of the respondent's argument was:

"overrule me if you please, but at least say something logical and consistent with the Mitakshara doctrine."

(49) Bluntly I say it is not possible to find a logical solution of an illogical problem. As early as 'GURULINGAPPA v. NANDAPPA', 21 Bom 797 at p. 805, Farran C. J. had stated:

"The position of the purchaser of the interests of a Hindu coparcener in part 'or' the whole of a joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis. As it is an equity, it must be worked out on equitable principles."

The decisions on this topic are so many and so various that it will be impossible to ignore or reconcile all of them.

(50) The legal theory is that an alienee steps into the shoes of the alienating coparcener; that he can have no higher rights than the alienor, that he must take the interest conveyed subject to the same limitations and conditions as the

alienor, and that except through and in the right of the alienor, he cannot have any claim against the joint family. The stream can rise no higher than its source. This is good logic but law and logic soon parted company. The off-spring became more powerful than its parent and the alienee was held entitled to enforce his rights in a manner not open to his alienor. A coparcener's right to partition dies with him. His alienee for value or a purchaser of his interest at a Court sale after his death pursuant to a prior attachment, could work out his rights by a partition against the surviving coparceners even after the death of the vendor or judgment-debtor as the case may be.

A contract for valuable consideration entered into by a coparcener for the sale of his interest in joint family property has been held to be specifically enforceable against the surviving coparceners after his death. 'BHAGWAN BHAU v. KRISHNAJI', 44 Bom 967 and 'RAMAPPA v. YELLAPPA', 52 Bom 307. It is not therefore quite accurate to say as Bakewell J. did in 'MANJAYYA v. SHANMUGAMUDALI', 38 Mad 684, that the right of an alienee from a coparcener is a mere right 'in personam'. The alienating coparcener is entitled to a partition 'rebus sio standibus' as on the date of suit. The alienee's right, however, is to the share to which the alienor was entitled on the date of alienation according to 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 FB. An alienor's share is liable to diminution by a decrease of the family assets as well as by an increase in the number of coparceners but the alienee's right has been held not to be affected by these changes.

In 'BRIJ NARAIN v. MANGALA PRASAD', 46 All 95 (PC), Lord Dunedin after observing that this branch of Hindu Law was "illogical" and "anomalous" gave the following caution:

> "In such a matter as the present, it is above all things necessary 'stare decisis', not to unsettle what has been settled by a long course of decisions."

The respondent's invitation to us was to follow Vignaneswara wherever he led us ignoring decisions which have held the field for many years.

(51) When a coparcener alienates an item of family property, the bargain between the parties determines the interest intended to be conveyed to the vendee. In the case of a Court sale of the interest of a coparcener, the purchaser obtains what was intended to be sold. What the alienee gets is the totality of what he bargained for and not a mere fractional share. The alienee, however, cannot trench upon the rights of the non-alienating coparcener. In accordance with the 'maxim sic utene fuo ut alienum non laedas' his rights must be enjoyed in such a way as not to interfere with the rights of others. The right of the alienee though fixed as between himself and the alienor and in that sense unchanging, has to be enclosed wholly or partially within the circumference of the alienor's right, that is to say, within the share which on a general partition would have been allotted to him. The respondent's advocate relied on the following passage in page 489 of Mayne's Hindu Law (11th Edition):

> "The right to get properties which fell to an alienor at a partition is the primary and indeed the only right which the alienee has, though the Court may at partition allot to him the properties which he purchased at a Court sale or at a private sale if it could be conveniently done."

It is argued that all that an alienee gets is a right to sue for partition standing in the shoes of the alienor and no other right, legal or equitable, as against family properties or the non-alienating coparceners. It is not correct to regard an alienee as a transferee of a mere right to sue. Such a transfer would indeed be opposed to law. There is a transfer of property to the alienee with an incidental right of suit, if necessary, for perfecting his title. It may be granted that an alienation 'per se,' does not convey an unimpeachable or indefeasible title to the alienee. He gets a right or an equity if you like, to stand in the vendor's shoes and work out his rights at a partition of the family estate.

At such a partition, an alienee has the right to ask that 'ceteris paribus' the share of the alienor should be so made up as to embrace wholly or so far as is possible, the property purchased by him. The Court is bound to grant such a relief to the alienee and if it can be done without injustice to the other coparceners, it will so marshall the properties as to allot the property alienated or as much thereof as possible, to the share of the alienor. This right of the alienee can be worked out in any suit to which he is a party and which is of sufficient amplitude to allow a general stock-taking of the family assets as a whole and an adjustment of the rights of the coparceners. It is not necessary for an alienee to sue as a plaintiff himself, 'RAMASWAMI v. VENKATARAMA', 46 Mad 815 and 'KRISHNAMURTHI v. NATARAJA', 1948-1 Mad L J 430 at p. 434.

(52) The preponderance of opinion in this Court has been that an alienee from a coparcener does not become a tenant-in-common with the other coparceners and is not entitled to joint possession with or get mesne profits from them. See paragraphs 389 and 390 of Mayne's Hindu Law (11th Edition). The view of the learned editor of Mayne in paragraph 391 is that Section 44 of the Transfer of Property Act as amended in 1929 confers on an alienee from a coparcener even these rights. By reason of the omission of the word "Hindu" in Sec. 2 of the act as amended Section 44 now applies to Hindus as well. The section would apply to an alienee from a sharer in a Dayabhaga family whose members hold the common property to quasi severalty, each member being entitled to a defined share which he could dispose of as he likes. In the face of the saving words:

> "subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred,"

it may be difficult to construe Section 44 of the Transfer of Property Act as abrogating the decisions of this Court denying joint possession and a right to an account of profits to an alienee from a coparcener.

It does not, however, follow that an alienee from a coparcener has no right in or to any property but only a personal remedy against the alienor. Even when the alienee does not get an allotment of the property alienated to him at a general partition, he would be entitled to the property allotted to the vendor for his share in substitution for the property alienated to him. 'KORU ISSAKU v. SEETHARAMARAJU', 1947-2 Mad L J 166 at pages 175, 176. What an alienee gets is therefore a right in property carrying with it an equitable right to avail himself of the rule of substituted security. The right to get compensation of substituted property in case the property sold is lost for

want of title in the vendor was recognised by the early texts.

(53) I have said that the rights of the alienee are not co-extensive with those of the alienor. On the principle that he who seeks equity must do equity, it has been held that an alienee could, in no event, get more than what he bargained and paid for. If he purchases, say, the share of one of four undivided brothers in a property and at the time of the partition, the existing coparceners are only two the alienee cannot claim a half share because his vendor would be entitled to such share. If, however, there is an increase in the number of coparceners, say, to six, the share of the alienee would be 1/6 according to 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 (FB). The reason was thus stated:

"In the case before us, the delay in suing for partition is imputable to the purchaser and as new coparceners have meanwhile come into existence, the share to be awarded to him must diminish 'protanto' on the simple ground that what he could lawfully purchase was an uncertain interest to be computed into a definite share with reference to the coparcenary at the time of partition."

Good logic as far as it goes. But the necessity felt by Courts to promote certainty of title to property and to protect the interests of purchasers for value, forced the law into a procrustean bed where it has been lying uneasily for a long time. In 'AYYAGARI VENKATRAMAYYA', v. AYYAGARI RAMAYYA', 25 Mad 690, Bhashyam Ayyengar, J. observed obiter that 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408, was wrongly decided. So great was the hold of that eminent Judge on the legal minds of his generation that his dissent soon became the unanimously accepted law of the Court in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 (FB). This case decided that an alinee of the interest of a coparcener was entitled to enforce his claim against the share to which the vendor was entitled at the time of the alienation.

Perhaps Bhashyam Ayyangar J. in 'AYYAGARI VENKATARAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690, unduly emphasised some expressions occurring in the judgments of the Judicial Committee in 'DEENADAYAL v. JUGDEEP NARAIN', 3 Cal 198 (PC), and 'SURAJ BANSI KOER v. SHEO PRASAD', 5 Cal 148 (PC), and built up a theory of which their Lordships of the Judicial Committee were not the authors. The question is not whether the deductions of the learned Judge were justified in 1902 but whether his conclusions have not become the law of this Court accepted and acted upon as such for nearly half a century.

(54) The actual decision of the Full Bench in the 'AYYAGARI CASE', 25 Mad 690, was that the death of the alienating coparcener before a partition did not result in an extinction of the interest of the alienee by the operation of the law of the survivorship. But Bhashyam Ayyangar J. covered a much wider ground. Similarly the actual decision in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, was that a mortgage executed by a coparcener would operate on his share of joint family property as it stood at the date of the mortgage and that the security would remain undiminished in spite of a subsequent increase in the number of coparceners. But the learned Judges went on to affirm the views of Bhashyam Ayyangar J. in the 'AYYAGARI CASE', 25 Mad 690, in their entirety.

The result, though anomalous and illogical, was that an alienee from a coparcener supposed in theory to stand in the shoes of the alienor having no right of his own except through his alienor as against the family became a sharer in joint family property with a fixed and independent right of his own enforceable against the other members of the family. In 'MUTHU KUMARA v. SIVANARAYANA', 56 Mad 534, Jackson J. sitting with Mockett J. sought to effect a reconciliation between the Mitakshara doctrine refusing absolutely to recognise an alienation of joint family property by a coparcener without family necessity and the rule of equity recognising the rights of purchasers for value. The learned Judges held that though the fractional share of an alienee from a coparcener was fixed as on the date of alienation the properties in which the alienee was entitled to share were those existing at the time of the partition.

(55) If the position of the alienee 'vis-a-vis' the non-alienating coparceners has to be fixed as on the date of the alienation and his rights worked out as if there had been a partition on that date, the family hotchpot would have to be filled up retrospectively, it may be, years after the alienation. If there were a number of alienations in successive years by the same or different coparceners, each one of the alienees can claim to have a separate hotchpot hooked to the date of his alienation, though at the date of the actual partition the existing hotchpot might be merely empty. These difficulties which were real enough did not appeal to Leach C. J. and Horwill J. who, in 'DHARMARAO v. BAPANAYYA', 1941-1 Mad L J 15, assembled an imposing array of decisions in which 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, had been referred to and apparently followed and silenced the criticism of Jackson, J. without an independent consideration of the problem of the alienee's equity.

The reasoning of Krishnan and Curgenven JJ. in 'VENKU REDDI v. VENKU REDDI', 50 Mad 535 (FB), would seem to support the view of Jackson J. that partition quantifies the fractional share of the alienee from a coparcener and that the alienation is subject to the liabilities of the joint family. The learned Judge who decided 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15, did not, I humbly venture to think, realise the injustice done to the non-alienating coparceners by their decision. An alienee from one of these coparceners was allowed at a partition to retain an one third share of the whole family estate, while the non-alienating coparcener got one-ninth of the estate (or perhaps a little more) as the result of the birth of other coparceners before partition. This was the consequence of fixing the alienee's rights on the basis of 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 (FB).

If that were the law, the alienating coparcener has the best of both worlds. He enjoys the advantages of a divided status by realising the value of his share and of the membership of a joint family with its attendant benefits. Equity is not an one way traffic. In the name of equity it is not permissible to sacrifice the interests of non-alienating coparceners to satisfy the claims of an alienee from one coparcener who knows that he is purchasing something which

is subject to the rights of the other coparceners and the liabilities of the joint family. It is one thing to say that the fractional share of the alienee is fixed as on the date of the alienation and it is a different thing to say that the fraction must be related to the family estate as it stood at the date of alienation and not at the date of partition.

If the matter, were 'res integra' the inclination of my mind would be to agree with the reasoning of Jackson J. The majority of my learned brethern, however, are of the opinion that it is too late in the day to question the authority of 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 (FB), in the sense in which it was understood in 'DHARMARAO v. BAPANAYYA', 1941-1 Mad L J 15, and I do not wish to mar this pleasing unanimity by giving expression to views considered to be heretical. It is a case of 'stare decisis'. I realise that in a branch of law affecting titles to property it is more important that the applicable rule of law be settled than that it be refashioned on absolutely logical lines. The respondent's advocate hopes that the ghost of 'RANGASWAMI v. KRISHNAYYA', 14 Mad 408 (FB), which was buried forty years ago may walk again, nay, he anticipates a flesh and blood resurrection. All that I say is that such miracles, if they happen, will reduce transactions affecting property to a mere gamble.

(56) An alienation of family property by a coparcener be he the manager or father, can be set aside 'in toto' at the instance of the other coparceners if the alienation is not for family necessity or for discharging untainted antecedent debts. Even where the necessity for a sale is partial, that is to say ,where the consideration raised or applied for meeting necessary purposes is less than the price, the sale can be set aside as a whole as not justified. 'KRISHNA DAS v. NATHURAM', 49 All 149 (PC); 'NIAMAT RAI v. DIN DAYAL', 8 Lah 597 (PC), and 'GAURI SHANKAR v. JIVAN SINGH', 53 Mad L J 786 (PC). The property is recovered for the family and if it is found that part of the consideration paid by the alienee has been applied in discharge of debts or liabilities binding on the family, justice and equity require that the family should refund that portion of the consideration to the alienee. See Sections 64 and 65 of the Contract Act and S. 41 of the Specific Relief Act.

Otherwise, the Court would be helping the family to enrich itself unjustly at the expense of the alienee. Even if the property is recovered by the family, it is open to the alienee to sue for partition of the family estate and for allotment of the alienated property to him in the right of his alienor and as part of his alienor's share of the family properties. He can even set up this right as a defence to a suit by the non-alienating coparceners for recovery of their shares of the alienated property, if the suit is comprehensive enough to permit a stock-taking of the entire family estate. 'RAMASWAMI AYYAR v. VENKATRAMANA AYYAR', 46 Mad 815; 'KRISHNAMURTI v. NATARAJA', 1948-1 Mad L J 430 at p. 434, and 'DHARMA RAO v. BAPANAYYA', 1941-1 Madras Law Journal 15.

(57) An alienee's suit to work out his equity must be one for partition of the entire family property; and not for partition of any specific item or any specific interest. This is because the alienee has no connection with the joint family and can seek relief only in the right of the alienating coparcener. A coparcener suing for partition must sue for partition of the entire divisible family estate. Ordinarily a suit for partial partition does not lie among coparceners. An alienation by a coparcener of his interest in family property does not put an end to the coparcenary or effect a severance. See Mayne's Hindu Law (11th Edition). paragraph 389, page 490.

It has been laid down in many decisions of this Court starting from 'VENKATACHALLA v. CHINNAYYA', 5 Mad H C R 166, that it is open to coparceners objecting to an alienation by the father or manager to bring a suit for their share of the property alienated. 'IBURAMASA ROWTHAN v. THIRUVENKATASWAMI 34 Mad 269 at pages 272, 275. This kind of suit is different in its scope and effect from a suit for partition so-called. For instance, the inference of an unequivocal intention to separate from the family and become divided in status which a suit for partition gives rise to does not follow in a suit for recovery of a coparcener's share of alienated property. 'RAMASUBBRAYA v. GANAPATIRAJU', ILR (1940) Mad 405 at pages 410, 412. The dispute in the latter case is confined to the property alienated and is between the alienee on the one hand and the non-alienating coparceners on the other. The coparceners may wish to remain undivided and at the same time may be unwilling to allow the family property to be in the possession of a stranger claiming under a title which is not valid as against the family.

The non-alienating coparceners may, in effect say to the alienee:

> "Though we have a right to recover the entire property alienated still as you have paid the vendor the price of the property we consent to your retaining his share. Give us our shares of the property. We agree to have a partition as if this were the only property to be divided."

The suit is in effect one for a partition of the alienated property alone and the decisions allow such a suit. The jural basis of this rule has been clearly and concisely stated in the judgment of my learned brother Panchapagesa Sastri, J. and I respectfully agree with him. The question is whether in such a suit the alienee has an equity to compel the plaintiffs to refund a part of the binding consideration proportionate to the share of the plaintiffs in the alienated property.

(58) The decisions of this Court are conflicting. The appellant relies on the decision in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, which though not noticed in the 10th, and 11th editions of Mayne's Hindu Law, has nevertheless been accepted and acted upon in subsequent decisions of this and the other High Courts. This decision dissents from 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, which is relied upon by the respondent. The decision in 'VENKATAPATHI v. PAPPIAH NAYAKAR', 51 Mad 824, follows the earlier decision and lays down three propositions which will be noticed presently. All the three decisions profess to deal with the mode in which an alienee's equity has to be worked out.

(59) The respondents learned Advocate took high ground and maintained that so far as joint family was concerned, an alienee from a coparcener has no legal existence and he must work out his rights only through his alienor and that in a suit for a general partition.

The alienor and a 'fortiori' his alienee can only sue for a partition of the entire estate, partial partition not being allowed to them by law. It is only in such a suit that the alienee's equity can at all be enforced and the alienated property or as much of it as possible allotted to the share of his alienor. In a suit by non-alienating coparceners for recovery of their share of the alienated property, without any intention to become divided from the alienor, the alienee's equity does not come into the picture at all.

Even if it be assumed that he has any claim or equity against the joint family when a suit for recovery of the property alienated is brought, it must be regarded as satisfied by the value of the vendor's interest which the alienee is allowed to retain. 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89. The share of the property which an alienee is allowed to keep is joint family property and an alienee who is allowed to keep it cannot, under any circumstances, claim any further equity against the family. So ran the argument.

(60) With due respect to the learned Judges who decided 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, I fail to understand how a vendee from a coparcener can be said to be a "Volunteer." A person who purchases from one who has a right to sell his interest, whatever it is and pays value for it is in no sense a "volunteer." The learned Judges further ruled:

> "that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for return of the price paid, on the ground that the consideration for the payment failed."

This is with all respect begging the question. If the non-alienating coparceners exercise their right of interdiction and sue for recovery of the entire property alienated, they can, as already stated, be required to pay the alienee the whole of the consideration found to be binding on the family.

If they sue for a general partition, the alienee can work out his equity and might get an allotment of the entire alienated property for himself in the right of his alienor. If they seek recovery of their share of the property, they treat the alienation as valid to the extent of the alienor's share and seek a partition, confined to the alienated property and as against the alienee. It has been held in some decisions that the non-alienating coparceners can recover their shares of the alienated property as their own separate property. 'CHINNA SANYASI v. SURIYA', 5 Mad 196 and 'KADEGAN v. PERIAMUNUSWAMI', 13 Mad L J 477. There are however difficulties in the way of accepting this position. The recovery by the non-alienating coparceners of their shares of the property alienated would not prevent the alienee from bringing a suit for general partition and asking that the entire property should be allotted to him in the right of his alienor. If so, the property recovered retains its character as joint family property. 'GURULINGAPPA v. NANDAPPA', 21 Bom 797; 'KANDASAMI v. VELAYUDHA', 50 Mad 320 and 'RAMASUBBARAYA v. GANAPATIRAJU', ILR (1940) Mad 405 at pages 410, 412.

An alienee from a coparcener does not as already stated become a tenant-in-common with the other coparceners. At the same time, a right of action has been conceded to the non-alienating coparceners to recover only their share of the alienated property in decisions too numerous to be now upset. The position is no doubt illogical but a Court need not throw up its hands in despair and leave the alienee helpless. If on account of the limited scope of the suit instituted by the non-alienating coparceners and by reason of its comprising only the alienated property to the exclusion of other family properties, an alienee is unable to have his equity worked out fully, there is no reason why his equity should not be recognised to the limited extent to which the suit permits. There is no reason why the non-alienating coparceners who recover their shares, should escape liability for a proportionate part of the common burden which the alienee has discharged.

They cannot seek the advantages of a partition confined to the alienated property without submitting to an apportionment of a common liability discharged by the alienee. If the alienee receives or recovers the binding part of the consideration from the non-alienating coparceners, it may be a 'protanto' satisfaction of his claim against joint family and he cannot thereafter sue for a partition and allotment of the entire properties alienated to him. The learned Judges in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, claimed that their decision would

> "tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto."

It may be argued that their view seriously impairs the commercial value of the proprietary rights of coparceners by tying them up to the joint family too closely and by seriously jeopardising the rights of alienees from them. The remedy by way of damages or otherwise against the alienor pointed out by the learned Judges may not always be effective or fruitful.

(61) Reference may here be made to 'RANGANATHAN CHETTY v. RAMASAMI CHETTY', 27 Mad 162, where this Court held that it was not permissible for a coparcener to evade the prohibition of Hindu Law against gifts of joint family property by professing to make an ostensible sale when the price was wholly and obviously inadequate. The Court ruled that in such a case

> "the transaction could be upheld against the family to the extent of the ailenor's interest in the joint family properties only to the extent of the value received."

The alienor's interest was treated as having been sold in part and gifted as to the rest.

(62) This decision was followed in 'VENKATAPATHI v. PAPPIAH NAYAKAR'. 51 Mad-824, and the Court enunciated three propositions of which the first was as follows:

> "Where the whole of the consideration for a sale even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may be set aside making the consideration proved a charge on the family property."

When is the consideration "grossly inadequate" when it is merely "inadequate" and when it is low but not "inadequate" are questions which do not admit of an easy answer as the decision itself shows. The quantum of the consideration for a sale is a matter between the vendor and

the vendee. This rule is to some extent, displaced in the case of a proposed sale of joint family property for the Hindu Law prohibits a gift by a coparcener under the guise of a sale.

I confess to considerable difficulty in understanding the precise sense in which the learned Judges in 'VENKATAPATHI v. PAPPIAH NAYAKAR', 51 Mad 824, use the expression "consideration" occurring in each of the three propositions enunciated by them. It is clear however that they are not using the expression in the same sense throughout. When they refer in the passage above cited to the whole of the consideration for a sale, I take it that they refer to the price paid by the vendee. When they refer to the "consideration proved" being made a charge on the family property they must refer, I think, to the consideration paid by the vendee and proved to be binding on the joint family. If so, the first proposition is a mere re-statement of 'RANGANATHAN CHETTY v. RAMASAMI CHETTY', 27 Mad 162.

When the non-alienating coparceners sue for recovery of only their share of the properties sold they in effect admit that 'quoad' the share of the alienor, the sale is supported by adequate consideration and is not gift: The second proposition runs thus:

> "Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as a sale of the alienor's share only and the other members who question the transaction are entitled to recover their shares of the property without being subject to any other equity. In such a case if the members are divided and the alienor leaves other heirs, then the members who question the transaction, he or his heirs may have right to contribution."

Here the learned Judges use the word "consideration" as meaning the binding part of the consideration, for only if it is so understood does the reference to an "Equity" become intelligible.

The reference to a right of contribution in the second sentence of the above extract also confirms this view. In so stating the rule the learned Judges followed the decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89. I am unable, with great respect, to accept the second proposition as a correct statement of the law. Why should the alienor's share in the hands of the alienee be entirely appropriated to the satisfaction of family debts and the non-alienating coparcener's share escape liability? Surely the alienor is not a trustee for sale of his interest in joint family property and for the application of the proceeds for the discharge of family debts, thereby relieving the other coparceners of their share of the burden.

If the non-alienating coparceners, instead of seeking a general partition and the adjustment of all rights and liabilities and equities between them and the alienor sue for recovery only of their shares of the alienated property, why should they get their shares free of any obligation to pay their proportion of the family debts discharged by the alienee. If they want a piece-meal partition taking advantage of an exceptional procedure sanctioned by decisions, why should they not be made to submit to a piece-meal adjustment of equities, when they recover their shares of the alienated property? By suing for a partition and recovery only of their shares of the alienated property, they affirm the alienation to the extent of the alienor's share as a proper and valid transaction and invite an adjustment of the equities arising in favour of the alienee from the partial setting aside of the alienation.

The third proposition was in these terms:

> "Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as a sale of the alienor's share only and for the excess, a charge may be given over the shares of the other members."

Here again, the word "consideration" must be taken to be used in the sense of binding consideration. This is an extension of the principle of 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89. Here again, the value of the share of the alienor is wholly appropriated to the binding portion of the consideration and to the extent the latter exceeds the former, a charge is allowed on the shares of the other members.

It is not explained why there should be a piece-meal adjustment of equity in this case in contravention of the rule laid down in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, but not in the case covered by the second proposition. Unless it is assumed — I see no reason in law or justice for so doing — that the alienating coparcener's interest alone is liable for the payment of family debts and that an alienee who purchases that interest can therefore have no higher rights it is not possible in my opinion, to support the second and third propositions in 'VENKATAPATHI v. PAPPIAH NAYAKAR', 51 Mad 824. No principle of justice or equity entitles the non-alienating coparceners to throw the entire burden of the family debt on an alienee from a coparcener and secure an immunity for themselves at his expense. The same principles must govern private sales and sales 'in invitum'. If there is a court-sale of a coparcener's interest there is no warrant for dissecting the sale in order to find how much of it is a gift and how much of it is a sale.

(63) The decision in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, presents, on the whole, not only a simple and workable rule but also a just and equitable solution of the problem of the alienee's equity. This decision besides being that of two distinguished Hindu Judges of this Court familiar with Hindu Law and the needs and conditions of modern joint family life has been uniformly followed. The learned Judges held that where an alienation of family property by a coparcener is only partially justified by family necessity and the non-alienating coparceners sue for recovery of their share of the property they must bear their share of the family debts and liabilities discharged by or out of the consideration paid by the alienee.

> "According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole property sold in proportion to the value of each part (p. 437) .....It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendees in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in cases of dispute (page 438)."

This passage came in for strong criticism at the hands of the respondent's advocate who maintained that a coparcener has no share in any property of the family according to 'APPOOVIER v. RAMA SUBBA IYER', 11 Moo Ind App 75 at page 89 (PC), that an alienee from a coparcener merely got an uncertain fluctuating and contigent interest described vaguely as the alienee's "equity" as opposed to a present legal vested interest; and that his only right was to sue for a partition of the family estate and work out his rights, such as they are, in that suit. He argued that the basic assumption of the learned Judges in the above passage was untenable. Earlier in this judgment I have endeavoured to show that the share of coparcener in joint family property is predicable with sufficient definiteness at any given point of time and is also transferable for value. The alienee acquires a right to property and not merely a right of action. In 'SURAJ BANSI KOER v. SHEO PRASAD SINGH', 5 Cal 148 (PC). the Judicial Committee categorically asserted that:

"A coparcener may dispose of ancestral undivided estate even by contract and conveyance to the extent of his own share."

(64) When the learned Judges observed that a coparcener could alienate his share for any consideration he pleased they were, in my opinion, primarily thinking of the nature of the consideration, as for instance, his own personal needs as distinguished from family necessity. There was no question of inadequacy of consideration for the sale in that case. As regards the vendor's own share the Court must hold him to his sale without being concerned with the merits of his bargain. When the non-alienating coparceners sue only for recovery of their share of the alienated property 'ex concessi' they treat the alienation as valid and proper 'quoad' the share of the vendor and no question of adequacy of consideration would arise.

If a coparcener alienates his interest for a cheap price it is his own affair. The alienee cannot escape liability for his just share of binding family debts existing at the date of alienation. (VENKU REDDI v. VENKU REDDI', 50 Mad 535 (FB)), & there is no prejudice to the other coparceners. We may leave out of account cases where the consideration for the sale is so illusory as to make the transaction a virtual gift of the alienor's interest. In all other cases the consideration for the sale, the binding as well as the non-binding part must be distributed over the whole property sold in proportion to the shares of the alienor and the non-alienating coparceners when the latter sue for recovery of their share of the property sold.

(65) It is said that the learned Judges who decided 'VEDIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, were influenced by a view of the law which has been held to be incorrect in this Court. In joint family property, the Mitakshara recognised only a common ownership in all the coparceners while the Dayabhaga recognised an ownership in quasi severalty. Deviating from the two main streams there was a cross-current of decisions in Madras to the effect that an alienee from a coparcener became a tenant-in-common with the non-alienating coparceners 'quoad' the property alienated. It starts feebly in 'VENKATACHALA v. CHINNAYYA', 5 Mad H C R 166, gathered momentum when Bhashyam Ayyangar J. joined it in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, and swelled in volume with the adherence of Krishnaswami Iyer, J. in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 (FB), Bensom and Miller JJ. in 'SRINIVASA SUNDARA TATACHARIAR v. KRISHNASWAMI AYYENGAR', 15 Ind Cas 354 (Mad) and Bensom and Sundara Ayyar, JJ. in 'SUBBARAO v. ANANTHANARAYANA IYYER', 23 Mad L J 64 at page 70. Sadasiva Ayyar, J. also was to mingle with this cross-current in 'SOUNDARARAJAN v. ARUNACHALAM CHETTY'. 39 Mad 159.

When the Full Bench granted a decree for specific performance of a contract for sale of the share of coparcener in a specific item of joint family property, it practically acted upon this view. Indeed Kumaraswami Sastri J. went even to the length of observing that a "coparcener has a share in each item of the joint family property." 'BALASAMI IYER v. LAKSHMANA IYER', 44 Mad 605 (FB). The position of the members of a Mitakshara joint family had been assimilated to some extent to that of English coparceners or joint tenants by the decisions of the Judicial Committee. 'BAHU RANI v. RAJENDRA', 8 Luck 121 (PC), and 'JOGESWAR NARAIN v. RAMCHANDRA DUTT', 23 Cal 670. According to English Law, a conveyance or an agreement to convey his interest by one of the joint tenants operates as severance. A mere attachment of the share of a coparcener in execution of a decree for his personal debts prevents the operation of survivorship. So also an alienation for value in Madras and Bombay.

In 'DEENDAYAL v. JAGDEEP NARAIN', 3 Cal 198 (PC), the Judicial Committee applied the analogy of the purchase of a partner's interest in execution of a decree against him to the case of a purchase of a coparcener's interest. Once it is accepted that the interest or share of the alienee is to be fixed with reference to the position of the vendor 'vis-a-vis' the other coparceners as on the date of alienation unaffected by fluctuations due to subsequent births and deaths and increase or decrease in the family assets, the view of the learned Judges of this Court in the cases above cited cannot be said to be unreasonable. The preponderance of authority in this Court, however, is against the view that an alienee from a coparcener is in the position of a tenant-in-common with the other coparceners. See Mayne's Hindu Law (11th Edition), pages 488-491.

In this corner of Hindu Law one is frequently obliged to seek refuge in the well-known shelter provided by Lord Halsbury and say that law is not logical. There is however nothing in the judgment in 'VEDIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, to suggest that the learned Judges rested their decision on the dissentient view of a minority regarding the position and rights of an alienee from a coparcener. There the non-alienating coparcener claimed a partition of only his share of the alienated property. The limited equity recognised in 'VEDIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, should in justice, be available to the alienee if, owing to the restricted nature of the suit for partition by the non-alienating coparceners, it is not possible to have a stock-taking of the family assets and liabilities and the allotment of the entire property to the alienee in the right of his alienor.

If a suit by the non-alienating coparceners to set aside an alienation is of sufficient ampli-

tude to admit of a consideration of the rights of the coparceners in the entire joint family estate, the Court will do complete justice to the alienee and allow him to retain the entirety of the alienated property or as much of it as possible consistently with the rights of the other coparceners. 'RAMASWAMI v. VENKATARAMA', 46 Mad 815; 'KRISHNAMURTHI v. NATARAJA', 1948-1 Mad L J 430 at p. 435 and 'DHARMA RAO v. BAPANNAYYA', 1941-1 Mad L J 15.

(65) Reference was made to the well-established rule that a Court has no power to make a new bargain between the parties to a sale by splitting the land sold into parcels, evaluating them separately, assigning one of the parcels to the purchaser and directing a refund of a part of the price proportionate to the share in the property sought to be recovered. 'NAGAPPA CHETTY v. BRAHADAMBAL AMMANI', 58 Mad 350. In my opinion, this contention has no force for this is not a case where as between the vendor and the vendee a different contract with terms differing from the sale-deed executed by the one to the other, is sought to be enforced.

This is a case where third persons having an interest in the property sold seek to have the sale set aside to the extent of their interest in the property and ask for a partition only of their share in the property. In such a case the Court can grant relief to the plaintiffs on condition of their restoring the benefit received by them out of the consideration paid by the vendee. In innumerable cases where the Court has set aside a father's, manager's, guardian's, trustee's or widow's sale in excess of the powers of the alienor, it has granted equitable relief to the plaintiff on condition of a refund of that part of the consideration which is found to be binding on the estate.

(66) The principle of Section 15 of the Specific Relief Act as applied in 'BALUSWAMI IYER v. LAKSHMANA IYER', 44 Mad 605, to a suit for specific performance of a contract for sale entered into by the manager of a joint Hindu family without legal necessity was next referred to. This Court held that the vendee was not entitled to specific performance of the contract as a whole but only to a conveyance of the share his vendor had at the time of the contract, on payment of the entire consideration. On this analogy it was suggested that an alienee of joint family property must rest content with his vendor's share and has no further claim to a refund of a part of the consideration. Here a title which has already passed under the sale-deed duly executed and registered is sought to be displaced in part by third person who were not parties to the contract of sale. This is not a case where a contract of sale is sought to be enforced by the vendee against a vendor with imperfect title. Principles of equity which prevent unjust enrichment of one party at the expense of another and compel restitution of or compensation for a benefit not intended to be gratuitously conferred are here invoked.

(67) I am in respectful agreement with the decision in 'VEDIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, which was referred to with apparent approval by the Judicial Committee in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518, at p. 522. In 'SRINIVASA IYENGAR v. KUPPUSWAMI', 44 Mad 801 at pp. 802-803, Wallis, C. J. referred to the well-known equity of an alienee from a coparcener to a refund from the non-alienating coparceners of a proportionate part of the consideration paid by the alienee and applied in discharge of binding family debts, as a condition of the sale in his favour being set aside at the instance of the other coparceners. The other decisions of this Court in which the same principle has been accepted are 'ADINARAYANA REDDI v. SUBBARAYULU', AIR 1927 Mad 1116; 'SEETHARAMA NAIDU v. BALAKRISHNA NAIDU', 26 Mad L J 604; 'SUBBAYYA MUDALIAR v. THULASI MUDALIAR', 1914 Mad W N 16. If this conclusion deals a blow at the tottering joint family structure there will not be many to shed a tear over the result.

I shall now advert to another branch of the argument of the learned counsel for the respondent which to a large extent, contradicts his submissions on the main part of the case directed to demolishing the authority of 'VEDIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435. The suit as framed is one for a general partition by a son against his father impleading also the alienees from the latter and in my opinion, the rights of the alienee to any equities they may have can be satisfactorily worked out in this suit. It is said however, that here is a fatal objection to this course, by reason of the adjudication of the father as an insolvent and the administration of this estate by the Official Receiver. The adjudication coupled with the administration of the estate in insolvency effected a division between the insolvent debtor and his son and therefore, the suit cannot be viewed as one for a partition of joint family estate but only as simple suit for recovery by the son of his half share of an item of joint family property improperly alienated by his father.

As the alienee stands in the shoes of the alienor and uses the alienor's right to claim a partition as a lever against the other coparceners if the alienor has lost his right to a partition, the alienee cannot enforce his equity against the other coparceners by a claim for partition. The equity of the alienee is an 'inter partes' equity as between the alienor and the alienee and not against the joint family. The liquidation of the alienor's right in the joint family property by the administration in insolvency put an end to the alienee's equity which was thereafter available only against the Receiver in insolvency. As a debt or liability of the alienor it has been wiped off by his adjudication in insolvency and his subsequent discharge. This was how the argument was presented to us.

In my opinion, it cannot be accepted. The alienee has a legal right against his vendor to the property alienated and an equitable right against the non-alienating coparceners to have the alienated property allotted to him in the right, of his vendor. Neither the death nor the subsequent insolvency of the alienor affects the vendee's right as against the members of the family and he can work out his right of a partition of the family estate. The insolvency has no effect on the rights of the alienee whose title accrued prior to the filing of the petition for adjudication. The alienee has a right of his own, the extent of the right being determined with reference to the interest of the vendor in the joint family property as it stood on the date of the alienation. As already pointed out the alienee can assert his right as a defence to a suit for partition, if the suit is comprehensive enough to allow a general stock taking of the family assets.

(68) Another phase of the argument was that the adjudication of the father effected a crystallisation of his interest in joint family property and the Receiver in whom that interest vested took the place of the father. The vesting of the entire share of the father in the Receiver and the administration of that interest by him effected a severance between the father and son and thereafter there could be no suit for a partition of the joint family estate by the son against the father. According to the Mitakshara "Ekadesavyavasthapana" or the establishment of the sole right of one person in displacement of the right of all in the "Dravya Samudaya" or aggregate wealth constitutes partition. But the partition contemplated by Vignaneswara is obviously a division by metes and bounds as the result of a consensus among coparceners or in the exercise of the father's power of effecting a partition.

Moreover the intention to become divided must be present and manifested, separate allotments being evidentiary of that intention. According to Vignaneswara partition created a title in each of the erstwhile coparceners by its own effect and operation while Jimuthavahana asserted that partition was merely the external manifestation of a pre-existing right in the sharers. I have already stated that Nilakanta though in the main a follower of the Mitakshara school, differed from Vignaneswara as regards the conception of the interest of a coparcener in joint family property and was inclined to accept the theory of Jimuthavahana — see Mayukka Daya Nirnaya Section 1, Pl. 6, Setlur's translation page 63. This was the basis of the distinction drawn by English lawyers between the joint tenancy of the Mitakshara family and the quasi-severalty of the Dayabhaga family. According to the later writers of the Mitakshara school, a severance in status resulted from a unilateral declaration of his intention to become divided on the part of a coparcener.

The textual authority is reviewed in 'KATHESUMMA v. BECHU', 1949-2 Mad L J 268. The respondent's advocate states that the "Ekadessavyavasthapana" of the Mitakshara which is the essence of a division is brought about by the adjudication of a coparcener as an insolvent and administration of his estate by the Receiver. He maintains that a division in status can be brought about not only by the intention or volition of a coparcener or by an agreement between the coparceners concerned but also by the operation of external factors. Reference was made to the following passage in the judgment of the Judicial Committee in 'VENKATAPATHIRAJU v. VENKATANARASIMHARAJU', ILR (1937) Mad 1 (PC).

> "A division of right or severance of the joint status may result, not only from an agreement between the parties but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate."

In my opinion, the "act or transaction" in this passage has reference to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals etc. It has no reference to an attachment or a Court sale of a coparcener's interest or his adjudication in insolvency. This is made clear by the context in which the expression occurs.

(69) It is urged that on adjudication there is a fixation of the interest of the insolvent and the vesting of that interest in the Official Receiver and thereby a severance is effected between the insolvent and his coparceners. If the insolvent dies, his share already vested in the Receiver does not pass by survivorship to the other coparceners, but continued to vest in the Receiver. In 'NARAYANA SAH v. SANKAR SAH', 53 Mad 1 at page 14, Wallace J. observed that on the insolvency of a coparcener, his entire estate or interest vested in the Receiver and was "thus lost to the family." In 'LAKSHMANAN v. SRINIVASA', ILR (1937) Mad 203, Venkataramana Rao J. sitting as a single Judge held that the surplus proceeds of the share of an insolvent which had vested in the Official Assignee would on an annulment of adjudication consequent on payment of the insolvent's debts in full revert to him or his heirs as separate property though the insolvent was a member of joint family at the time of his adjudication.

The learned Judge said:

> "If the effect of the insolvency is to divest the share of the insolvent of its character as joint family property, it cannot regain that character as joint family property when it comes back to the insolvent on annulment."

Apart from the fact that this view has been overruled in two later decisions of division Benches in 'SURYANARAYANAMURTHY v. VEERRAJU', ILR (1946) Mad 54 at page 59 and 'HANUMANTHA v. OFFICIAL RECEIVER, BELLARY', ILR (1947) Mad 44. I am unable to agree with the reasoning. The vesting in the Receiver on an adjudication is only for the limited purpose of satisfying the creditors of the insolvent. There is no question of an intention on the part of the coparceners to become divided and the joint status of the insolvent is not affected. The law merely places the share of the insolvent coparcener in the hands of the Receiver for the purpose of administration and payment of his creditors.

An attachment of the right, title and interest of a coparcener in joint family property does not effect a severance between him and the other members of the family nor does an involuntary or private sale of his entire interest have that effect. See Mayne's Hindu Law, (11th Edition), Paragraph 389 and the cases cited in the foot-note. An adjudication in insolvency has no more drastic effect. The view of Ramesam J. in 'LAKSHMI ACHI v. NARAYANASWAMI NAICKER', 53 Mad 188 at page 195, that a member becomes divided if he alienates his entire interest does not, it appears to me, proceed on a proper understanding of the observations of Bhashyam Ayyangar J. in 'AYYAGARI VENKATRAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690. This was pointed out by the learned Judges in 'RAMASUBBARAYA v. GANAPATHIRAJU', ILR (1940) Mad 405 at pages 410, 412. Even according to Venkataramana Rao J. in 'LAKSHMANAN v. SRINIVASA', ILR (1937) Mad 203 neither an adjudication of a coparcener nor an alienation of his entire interest in joint family property brings about a severance between him and the other coparceners. This was also the view taken in the two decisions above referred to, in which the view of the learned Judge was dissented from.

With great respect however to the learned Judges who decided 'HANUMANTHA v. OFFICIAL RECEIVER, BELLARY', ILR (1947) Mad 44, I venture to doubt whether on the

death of a coparcener there is any "devolution" of "interest" on the insolvent within the meaning of Section 28(4) of the Provincial Insolvency Act. The dying coparcener merely drops out or fades away and nobody steps into his place. The claims of the other coparceners spring from the mere fact of their birth, and not from their taking the place of any particular individual. The dying coparcener leaves no interest behind him and there is nothing to pass by devolution to his heirs or other person. It is on this ground that the widow of an undivided coparcener is excluded from succession to his share in the Mitakshara school. It is further reason that coparceners taking the whole estate by survivorship are not held liable for the personal debts and obligations of their deceased coparcener. The result of this decision would be to give the Receiver the benefit of an increase in the share of the insolvent by reason of the death of a coparcener subsequent to the adjudication while the Receiver is not affected by any debts incurred after that date by the joint family. This however does not affect the other principle underlying the decision that the adjudication of a coparcener does not work a severance between him and the other members of the family.

(70) On the adjudication of the father in a Mitakshara family, his power to sell his sons' interest for antecedent debts not tainted by illegality or immorality, vests in the Official Assignee under Section 52(2) of the Presidency Towns Insolvency Act. It was so held by the Judicial Committee in 'SAT NARAIN v. SRIKISHEN DAS', 17 Lah 644 (PC). Decisions of this Court held that the law was the same under Section 28 of the Provincial Insolvency Act. 'SANKARANARAYANA v. RAJAMANI', 47 Mad 462 & 'BALAVENKATA SEETHARAMA v. OFFICIAL RECEIVER, TANJORE', 49 Mad 849. Though this line of authority was reversed by 'RAMASASTRULU v. BALAKRISHNA' ILR (1943) Mad 83 and 'VIRUPAKSHA REDDI v. SIVA REDDI', ILR (1944) Mad 212, it has been restored with retrospective effect by the enactment of S. 28-A of the Provincial Insolvency Act in 1948. 'OFFICIAL RECEIVER OF RAMNAD v. DEVARAYAN', 1948-2 Mad L J 415. But during all this time nobody ever suggested that the adjudication of a father effected a severance in status between him and his sons and for that reason his power to sell his sons' interest for his own untainted debts was at an end and could not thereafter vest in the Official Receiver.

Realising this difficulty, the respondent's advocate stated that a severance took place only when the estate of the insolvent had been administered by the Receiver. What about a case where the insolvent has no assets and there is no question of any administration of his estate by the Official Receiver? There may be a joint family consisting of persons who are joint in food and worship without having or holding any property. 'JANKIRAM v. NAGAMONY', 49 Mad 98 at pages 115-6. In such a case it must be conceded that the adjudication of one of the members does not work a severance for there is no property to vest in the Receiver and the object of the insolvency is merely to enable the debtor to start a new life unhampered by debts. Again what is to happen during the time the administration of the estate is in progress and the properties are being sold one by one? Is the division to be postponed to the closure of the insolvency proceedings or is it to be said quoad the item sold by the Receiver there is a division?

Again even if the administration is complete what is to happen to properties that are exempt by statute from vesting in the Receiver or to trust properties in which the family of the insolvent has a right to trusteeship. It is well settled that the devolution of trusteeship held by a family depends upon the status of the members of the family at the time when the succession opens. 'THANDAVAROYA v. SHUNMUGHAM PILLAI', 32 Mad 167 and 'RAMANATHAN CHETTY v. MURUGAPPA CHETTY', 27 Mad 192 at page 200. There cannot be an administration by the Receiver in respect of these properties and it cannot be contended that the insolvent becomes divided even with reference to them. It follows from these considerations that neither the adjudication nor the administration of the insolvent's estate by the Receiver affects a severance between the insolvent and his coparceners. Under the Hindu Law, the intention to become divided is essential to create a severance. There is no warrant either in the texts or in the decisions or in commonsense for saying that a man becomes divided against his own wishes and the wishes of his coparceners if he happens to be adjudicated an insolvent.

(71) The respondent's learned Advocate called in aid the analogy of the conversion of a coparcener to another faith & the decisions which have held that a conversion effects a severance. The distance between a conversion and an adjudication of a coparcener as an insolvent can be measured only in miles. An insolvent coparcener does not cease to be a member of the family and may often continue joint in food and worship with the other coparceners either by choice or by necessity. A convert is regarded as dead and even obsequial rites are directed to be performed for him by the texts of Hindu law. Act XXI of 1850 removes the disqualification arising from apostacy and relieves against the forfeiture of the convert's interest in joint family property.

In 'ABRAHAM v. ABRAHAM', 9 Moo Ind App 195 at page 237, Lord Kingdown observed that conversion dissolved the family tie and severed the convert from the family and compared the situation arising from a conversion to that of a severance by partition. In their attempt to work out the result of Act XXI of 1850 and fit it into the framework of the joint Hindu family system of holding property, the Courts assimilated the effect of a conversion to a partition. The ancient law-givers, however, never countenanced such a theory. In my opinion, the analogy of a conversion is an unsafe basis for the argument that in Hindu law a severance in status might be brought about even against the wishes of the coparceners or without the volition or intention of a coparcener to become divided.

(72) For these reasons, it must be held that the suit for partition was maintainable by the son against the father notwithstanding the latter's adjudication in insolvency.

(73) I agree with the conclusion of my learned brother Satyanarayana Rao J. as regards the decree to be passed in this appeal.

(74) RAGHAVA RAO, J.: The question in this case is whether the decrees of the Courts below are correct which granted the plaintiff his half share of certain property alienated by his father the first defendant to the third for Rs. 13,400, although, in

fact, worth Rs. 16,400, without imposing a condition on the plaintiff that he should before getting his half of the property pay one-half of the sum of Rs. 7,022, representing that portion of the consideration of Rs. 13,400, paid which was binding on the joint family of the plaintiff and the first defendant. The Courts below granted the decree without imposing such a condition in the view that they took that the case fell within Rule 2 of the three rules laid down by a Bench of this Court (Kumaraswami Sastri and Ramesam, JJ.) in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, for working out the equities between the alienee from a coparcener on the one hand and the non-alienating coparcener or coparceners on the other in a suit by the latter for setting aside the alienation found to be only partially supported by consideration binding on the joint family.

The decree is assailed in this Court on the ground that it is opposed to 'VADIVELAM v. NATESAM', 37 Mad 435 which, in the submission of the learned Counsel for the appellant (third defendant) enunciates the correct law. It is not disputed that, if that is so, this appeal must prevail; but what is contended for the respondent is, 'firstly', that an earlier decision of a Bench of this Court (Subramania Aiyar and Boddam, JJ.) in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, lays down the correct law and ought not to have been dissented from in 'VADIVELAM v. NATESAM', 37 Mad 435 inasmuch as the grounds of dissent are opposed to fundamental principles of Hindu law and cannot be countenanced, and, 'secondly', that no equity can be claimed by the third defendant who has had and is to have the share of the first defendant actually worth Rs. 8200 when the binding portion of the consideration for the sale of the whole of the property is only Rs. 7,022 and that this case is governed, as rightly held by the Courts below, by Rule 2 of the rules laid down in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

The first of these lines of argument for the respondent is of wider ambit than the second and entails that the suit should be decreed in accordance with the decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, without any consideration of equities in favour of the appellant while the second assumes that such equities can be considered but to no good purpose for the appellant inasmuch as no equity can be held to arise on the facts of this case which attract the second of the rules in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

(75) Before dealing with the arguments advanced before us with reference to the three reported decisions, I shall clear the ground by making a few preliminary observations.

(76) In the course of a highly learned and strenuous argument, on his own side occupying practically three days out of nearly five of the total hearing, Mr. Venkatasubramania Aiyar dwelt at considerable length against a whole current of more or less settled authority of this Court on the effect of adjudication and administration in insolvency as bringing about a division in status between the person adjudged insolvent and other members of his family, a question which, in my opinion, does not fall to be considered at all in view of the basis of his client's plaint which, on the contrary, avers jointness continuing even after the adjudication down to the date of the suit. No cause can be decided except 'secundum allegata et probata' and the question cannot therefore be entertained.

Why Mr. Venkatasubramania Aiyar dwelt on the question at all, it was not easy for me to see either for long time but, as he explained the position in answer to a question from me at a later stage of the hearing, it was because, if his first line of argument that there were no equities to be worked out for the alienee except in a suit for general partition were to be repelled on the ground that in the present case we have a suit for such a partition,—it being immaterial whether in such suit the alienee is defendant or plaintiff — no such suit bringing about a partition in status for the first time between the alienor and his co-parceners could be postulated here, because long long ago there had already been a division in the sense of fixation or crystallisation of the first defendant's share effected by his adjudication in insolvency. With such fixation or crystallisation, it was contended by the learned Counsel that the appellant even if he had any equities was to have worked them out from the standpoint of their ultimate destination by looking up to the Official Receiver in whom the insolvent's share had become vested and proceeding against him.

The contention, however, overlooked that the equities claimable by the alienee as standing in the shoes of the alienor had become vested in him by an alienation prior to the insolvency and would have to be worked out as against the other coparceners and not against the alienor himself or the Official Receiver as representing his estate in insolvency. The contention also overlooked that now that the insolvency is at an end, there can be no objections even on the assumption that insolvency means division and that the present suit is for general partition as between tenants-in-common subject to what has taken place in insolvency to the working out of equities as between the plaintiff and the 3rd defendant in respect of the above mentioned item.

(77) Again, there were repeated asseverations of anxiety before us from the learned Counsel for the respondent during the argument to reopen the Full Bench ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 and rehabilitate the earlier Full Bench ruling that is, the one in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 FB. Counsel went so far as to maintain that this Full Bench of five Judges had been constituted only because in the opinion of the three Judges who at an earlier stage heard this second appeal, any conflict between 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 and 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408, would have to be resolved for the disposal of this second appeal. Whether indeed the conflict between the two Full Bench decisions is one which is ever required to be resolved in view of the weight of subsequent authority in this Court applying and approving the later Full Bench decision in disregard of the earlier, which has been adverted to by a Division Bench of this Court (Leach, C. J., and Horwill, J.) in 'DHARMARAO v. BAPANAYYA', 1941-1 Mad L J 15 is another matter with which I shall deal later in this judgment.

The point remains that counsel was not able to make it clear how the conflict arises for a resolution in the circumstances of the present case in which no question of a diminished share for the alienee depending on subsequent births in the family arises for consideration. All that counsel could and did persist in saying was that 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, is a much misunderstood case in the sense that while it has only laid down that in Hindu Law the alienee of the interest of a coparcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation regardless

of subsequent births and deaths in the family, the decision has been however understood in later cases of this Court as authority for the position that a fractional interest in any particular item alienated stands conveyed to the alienee — a position which counsel contended would be opposed to the fundamental conception of Hindu Law established by a long course of decisions, some of them of the highest authority extending over a period of well-nigh three quarters of a century, that where a coparcener alienates, whether his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property in none of these cases does the alienee acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition.

Till the equity materialises in such working out of rights by the allotment of certain specified property or properties there can be no question, says learned counsel of mesne profits as from the date of alienation; there is every possibility of the right to the specific item alienated in whole or in part being defeated by a subsequent partition in the family and superseded by a right to the other item or items allotted to the alienor's share at such partition or at the partition to be effected by Court in the alienee's or non-alienating coparcener's suit for general partition, where the allotment to the alienor of the precise item alienated is found impossible; and there is every possibility of the alienee being evicted from the property alienated in a suit at the instance of the non-alienating coparcener or coparceners. I for one, am prepared to proceed with the decision of this appeal on the footing that the case in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, has been misunderstood in some later cases as contended by learned Counsel; and that it should be understood in the manner indicated by him.

As in my opinion rightly put in paragraph 393 at page 494 of Mayne's Hindu Law and Usage, 11th Edition, while the quantum of interest which according to the number of members of the family an alienee of a coparcener's interest acquires by alienation is to be ascertained as on the date of the alienation, the properties of the family in which he has to get his share are as usual ascertained as on the date of the suit for partition. That position is borne out by the decisions in 'VENKUREDDI v. VENKUREDDI', 50 Mad 535 and 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534 FB and cannot be and has not been disputed for the appellant either. Judging the matter from this standpoint, it makes to my mind, very little difference for the decision of this case whether 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 or 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, declares the correct law, as it is not suggested that there has been any addition to the members of the family since the date of the first defendant's alienation.

Nor is it suggested that in addition to the debt representing the binding portion of the consideration for the sale in favour of the appellant, there has been any other binding debt incurred by the first defendant since the date of the sale or that there has been any alteration of the assets and liabilities of the family notwithstanding the first defendant's adjudication in insolvency and the administration of his estate in insolvency such as would introduce any complication into the situation relating to the partition of the only particular item still remaining as claimed by the plaintiff. This claim of partition has to be upheld in accordance with the decision in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534 and the only question is how the equities have to be worked out in view of the partial necessity for the alienation in question which has been found by the Courts below in the present case.

(78) It may not be out of place at this juncture to say a few words about the way in which the conflict between 'RANGASWAMI v. KRISHNAYYAN' 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 is dealt with in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534. In that case the facts were as follows: the defendant was an alienee from a brother in a Hindu joint family and by virtue of the alienation the defendant got into possession of certain parcel of land. The rest of the joint family property became later dissipated and then the plaintiff, the other brother, sued for partition of that parcel. It was on those facts held by Devadoss, J., in Second Appeal that the plaintiff was to be non-suited because the defendant was entitled to claim the whole item for himself as a matter of equity available to him on the date of alienation with reference to the state of family assets and liabilities then existing which was such that it would have allowed of the allotment of the whole item to the alienor's share had there been a partition then and there instead of years afterwards during which the rest of the family properties had become dissipated. This decision was reversed in Letters Patent Appeal.

(79) It is true that in that case the conflict did not directly arise for determination as even assuming 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 and not 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408, to be correct as laying down that the share of the alienating coparcener in the family property alienated by him ceased to fluctuate from the date of the alienation, the learned Judges there, (Jackson and Mockett, JJ.), held that there was no justification for concluding that the hotchpot to be taken note of for working out the right of the alienee in a suit for partition whether filed by him or against him later on should be hooked to the date of the alienation and not had regard to as with reference to the date of such suit. The opinion of the learned Judges, although obiter, with reference to the conflict in question reveals, if I may say so with respect, an incisive analysis by Jackson, J., of the entire case law bearing on the point.

The learned Judge in his analysis subjects to a very searching criticism Bhashyam Aiyangar's opinion in the Full Bench case in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 on which the later Full Bench ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 is founded and points out how the repudiation of the much earlier Full Bench ruling in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408, by the later Full Bench ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, is really unfounded. His Lordship points out the errors and infirmities of Bhashyam Aiyangar's reasoning in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 and proceeds to show how from the Full Bench ruling in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690 that the death of the alienating coparcener does not create any right of survivorship to the other coparceners so as to preclude a suit for partition by the alienee after the death of the alienor it had come to be regarded almost as a necessary corollary by White, C. J., in the Full Bench case in 'CHINNU PILLAI v. KALI-

MUTHU CHETTY', 35 Mad 47, that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of coparceners.

Says the learned Judge:

"That is good logic; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest of the alienee fluctuates. We start with the principle 'only that passed which the alienor had.' We recognise an arbitrary exception that death does not diminish the alienee's right, then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law, or on logic."

His Lordship concludes the entire discussion with remarks to be found at page 544 of the report in these terms:

"In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got; that is a basic principle which I can understand and I should have been quite prepared to hold that as the right of the alienor becomes extinct upon his death, the right of the alienee becomes extinct also. However the contrary opinion is founded upon a long series of cases and I agree with the Full Bench in 'AYYAGIRI VENKATARAMAYYA v. AYYAGIRI RAMAYYA', 25 Mad 690, that even at that date it was too late to think of upsetting it. So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating.

But I see no reason to import other exceptions, and prefer the decision of the four Judges in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408, to the decision of the four Judges in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47. The former decision is logical, and quite equitable for the alienee has only himself to thank if by delaying his right to compel partition he finds his security diminished.

Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation....."

Whether the view thus expressed in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534 is or is not correct is a matter which may arise for determination only in another case and not, for the reasons which I shall indicate 'infra', in the present case. We have not heard any argument on this question and I do not propose to express my own opinion on it. An argument has been found unnecessary by this Bench in the circumstances of this case as will appear from a later part of this Judgment; but it cannot, in my opinion be maintained that if the question arose for determination in another case this Court could avoid a decision on it in the way in which Leach, C. J., and Horwill, J., made short-circuit in the case in 'DHARMARO v. BAPANNAYYA', 1941-1 Mad L J 15.

There are two Full Bench decisions of equal strength in the law reports, 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 which undoubtedly conflict with each other. Had the later decision been that of five Judges and not that of four as it eventually happened to be, on account of the dropping out of one of the five Judges who had been constituted into a Full Bench in that case, the matter would, of course, have been different. With two such conflicting decisions in the law reports the question is whether the conflict has not got to be resolved in a case in which it arises for resolution. The learned Judge in the case in 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15, avoided a reference of the conflict for determination to a Full Bench of sufficient strength to overrule 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 on the basis of their reasoning to be found expressed at page 18 of the report in these terms by Leach, C. J. who delivered the judgment of the Court:

"It is said by the learned counsel for the appellant in this case that as there are here two Full Bench decisions, each by a Court composed of four Judges, he is entitled to rely on the earlier decision, but this argument cannot be accepted because as I have already indicated this Court has held that the later decision settled the law, so far as this province is concerned. In 'BALUSWAMI AIYAR v. LAKSHMANA AIYAR', 44 Mad 605, the question was considered by Wallis C. J. and Oldfield and Kumaraswami Sastri JJ. The leading Judgment was delivered by Kumaraswami Sastri, J. and in it the learned Chief Justice and Oldfield, J. concurred. After referring to 'RANGASWAMI v. KRISHNAYYA', 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, Kumarswami Sastri J. said:

"It may, therefore, be taken as settled that there is no fluctuation in the share to which the alienee is entitled and that his share will be the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor."

'Other cases in which the same view has been taken are 'SINNACHAMI v. RAMASWAMI CHETTIAR', 22 Mad L J 85; 'GANESH ROW v. TULJA RAM RAO', 26 Mad L J 460; 'SEETHARAM NAIDU v. BALAKRISHNA NAIDU', 26 Mad L J 604; 'DORAISWAMI v. NANDISWAMI SALUVAN', 38 Mad 118; 'SOUNDARARAJAN v. SARAVANA PILLAI', 30 Mad L J 592; 'SUBBA GOUNDAN v. KRISHNAMACHARI', 45 Mad 449: 'RAMASWAMI AIYAR v. VENKATARAMA AIYAR', 46 Mad 815 & 'VASIREDDI BALACHANDRASEKHARA v. LAKSHMINARASIMHAM', 1940-1 Mad L J 820.

The only dissentient note was struck in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, which was decided by Jackson and Mockett JJ. The decision given was in accord with 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, Jackson J. in the course of his judgment in which Mockett J. concurred, indicated a strong preference for the decision in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408. Inasmuch as 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion in view of what has gone before 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, must be followed and therefore the appellant's main contention must be rejected."

(80) I am not satisfied with all respect to the learned Chief Justice that this mode of treatment of the conflict between 'RANGASWAMI v. KRISHNAYYA', 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 is correct. The fact that a Full Bench decision of four Judges has not been accepted by another Full Bench of four Judges does not certainly show that the former has ceased to be & that the latter has, in its place, become binding authority on the point. Nor does the mere fact that later Divisional Benches have accepted the later Full Bench ruling and refused to consider themselves bound by the earlier Full Bench ruling make any difference to the continuing existence of the conflict between the two Full Bench decisions unless one of them is upheld and the other overruled formally and in an appropriate manner.

It may be that the later Divisional Benches accepted the ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 as setting the law under the impression that it was a ruling of five judges and not of four. The very fact that the judgment of Krishnaswami Iyer J. who had dropped out of the case before delivery of judgment was published in the Law Reports along with the opinions of the four other Judges may have created that impression. The course adopted by the learned Chief Justice of the time in directing the judgment of Krishnaswami Iyer J. to be published in the Law Reports was itself perhaps ill-advised and certainly misleading. What his Lordship ought to have done was to constitute another Full Bench with some other Judge putting in the place of Mr. Justice Krishnaswami Iyer for the re-hearing of the point referred to the original Full Bench.

This the learned Chief Justice failed to do and the result is that there is a conflict still continuing in the Law Reports which is bound to be embarrassing. The learned Judges in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, were certainly justified in their treatment of the conflict as best suited their reasoning and their judgment. They were not bound by the later Full Bench ruling which never could, or did, overrule the earlier Full Bench ruling. Whether the dissentient note struck in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, is or is not sound in itself is a different matter. But that it 'could' well be struck by the learned Judges who decided that case does not appear to my mind to admit of any doubt. I cannot agree with the learned Chief Justice that 'inasmuch as 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion'. The need was felt by the learned Judges in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, because they felt themselves and rightly, in my opinion, free to discuss the relative merits of the two Full Bench rulings of equal strength in 'RANGASWAMI v. KRISHNAYYA', 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, the conflict between which had not been so far settled by this Court.

I wonder too whether any subordinate Court of this State may not so long as the two conflicting Full Bench decisions prevail in the law reports without a settlement of the conflict by a fuller Bench feel free, as the learned Judges in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, felt free, to choose for itself either the one or the other of the Full Bench decisions as it pleases. The conflict between the two Full Bench rulings is in my opinion, one which ought to be resolved in a proper manner in a case in which the question, on which the conflict exists, actually arises for determination. As Leach C. J. himself remarks in 'SESHAMMA v. NARASIMHA RAO', ILR (1940) Mad 454 at p. 475

> "If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance."

So, in my opinion, if there are two conflicting Full Bench decisions of equal strength on any point, it is necessary that the conflict should be sumitted to a fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, Courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject. Even Judges of this Court may be left with no sure guidance as to which of the two Full Bench decisions to follow and which to reject and will accordingly be inclined to feel themselves free, as did the learned Judges in 'MUTHUKUMARA v. SIVANARAYANA PILLAI', 56 Mad 534, to choose either the one Full Bench ruling or the other as best suits their sense of reasoning with the result that confusion only becomes worse confounded.

In my opinion there is no question of 'stare decisis' such as precludes a consideration of the relative merits of the two Full Bench rulings by a Bench competent by reason of its numerical strength to pronounce upon such merits. 'Stare decisis' in favour of 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 may be a good ground for such competent Full Bench overruling the decision in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408. 'Stare decisis' cannot be a ground inhibiting Judges of this Court or even Subordinate Judges from choosing for themselves between 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 and 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 unless this Full Bench or a Full Bench of at least equal strength overrules the former decision and upholds the latter. If as I presume, 'stare decisis' was the consideration which influenced the learned Judges in 'DHARMARAO v. BAPANNAYYA', 1941-1 Mad L J 15 not to refer the conflict for determination by a competent Full Bench I can only say that they failed in their duty to do so under a misconception that the principle of 'stare decisis' forbade such reference.

I may add that in this very case in the interests of early guidance to be afforded to subordinate Courts as well as to Judges here and by way of an exception to the ordinary

rule of practice that a Full Bench ought not to busy itself with answering hypothetical questions, I should have possibly been prepared to entertain the question on which the conflict exists and hear arguments of counsel thereon, had my learned colleagues been clearly similarly inclined. There has been no formal reference of the question to this Bench by the Full Bench of three Judges who earlier heard this appeal and in the actual circumstances of the course which the hearing of this appeal has taken I regret that an opportunity for the resolution of the conflict has not arisen in this case. My regret stands further accentuated by the consideration that my learned brother, Viswanatha Sastri, J. is, on the merits of the question, inclined in favour of 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 in preference to 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 although, regarding the case as one of 'stare decisis', to use his expression,—but in my opinion with all respect wrongly so regarding the case—he has felt himself not called upon to consider the question of conflict any further and to decide in favour of 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 in accordance with the inclination of his mind.

I for one do not regard as heretical any expression of view in favour of the ruling in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 and against the ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 in the view that I have expressed that there is really no question of 'stare decisis' for application in the present case. After all as pointed out in Broom's Legal maxims (10th edition) pp. 90 and 91 the Rule of 'Stare Decisis' only means that where a rule has become settled law it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned. The rule can in my opinion bear no application to a situation in which there is conflict between two Full Bench decisions of equal strength. The rehabilitation of the ruling in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 as against the ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47, if that is going to be the result of any reference of the question to a sufficiently Full Bench for determination, will only mean the re-importation of the leaven of logic into a situation, highly illogical created by the ruling in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47.

If, on the other hand, the result of any such reference is to be the other way, we can then—but not till then—console ourselves with the thought that after all, law is not always logical and that what was wrongly treated as settled law has indeed become the settled law of the land so as not to imperil titles already created. Whether the result is to be one way or the other is not a matter which I can anticipate or on which I propose to express anything like a definite opinion of my own in the absence of arguments before us as to the relative merits of the two Full Bench rulings.

(81) The next observation which falls to be made with reference to the present case is that all the three reported decisions whose mutual conflict has led to a Full Bench hearing of this appeal (the decisions in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89; 'VADIVELAM v. NATESAM', 37 Mad 435 and 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 related to suits simply for the recovery by the non-alienating co-parcener or coparceners of his share or their shares of the particular item or items of joint family property alienated by a coparcener, without a prayer for general partition and not to a suit like the one in the present case which is for a general partition after setting aside the alienation impugned. The conflict between 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VADIVELAM v. NATESAM', 37 Mad 435 and between 'VADIVELAM v. NATESAM', 37 Mad 435 and 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 does not, in my opinion, call for resolution in the present case in which the plaintiff has become divided from his father, the first defendant by the institution of a suit for general partition and in which the equities on the setting aside of the alienation in question must be adjusted as between the members of a divided family.

It is not disputed for the respondent that the equitable principle of apportionment of a common burden over the several parcels subject thereto and belonging to tenants-in-common on which the decision in 'VADIVELAM v. NATESAM', 37 Mad 435 rests becomes applicable in the circumstances of the present case. There is only one item alienated by the father prior to the insolvency and the only question which calls for consideration is whether although the plaintiff and first defendant were undivided at the time of the alienation, the binding portion of the consideration for the sale of that only item still remaining to be divided is not to be apportioned as the only debt now pertaining to the family between the separated interests of the father and the son in the manner laid down in 'VADIVELAM v. NATESAM', 37 Mad 435. It is manifest that the answer must be in favour of the appellant and that this is quite sufficient for the disposal of this appeal.

(82) Support for this manner of treatment and application of the case in 'VADIVELAM v. NATESAM', 37 Mad 435 can be found in the judgment of Jackson J. sitting singly in 'ADINARAYANA REDDI v. SUBBARAYALU REDDI', AIR 1927 Mad 1116. There defendant 2, the father of defendant 3, sold to defendant 1 the entire family property of himself and his son and defendant 1 subsequently sold it to the plaintiff. Rs. 300 out of the consideration for the sale was found to have gone in discharge of mortgage debts binding on the family. The suit was decreed as to the half share of the second defendant with a charge for Rs. 150 given over the half share of defendant 3. The learned Judge first observes in his judgment thus:

> "If a manager of a Hindu family sells half the family estate for justifiable necessity the benefit must be distributed over the shares of the various members. At the same time, a manager can sell his own share for what he likes.
>
> The proper course is to divide the property by metes and bounds and to allot to the other members of the family their shares

charged with the amount by which they have benefited by the liquidation of debts."

Then the learned Judge refers to 'VADIVELAM v. NATESAM', 37 Mad 435 to the facts thereof and the decision therein and proceeds to say:

"In the present case the property should also be divided; and defendant 3 would be entitled to his half share of the property sold, charged with Rs. 150/- the amount by which he has benefited on the discharge of the mortgages. The other half share belonging to the second defendant must be regarded as sold to defendant 1 and ultimately to the plaintiff.

The point to keep in view in working out these equities is that as regards the vendor's own share the Courts held him to his sale and are not in the least concerned with the merits of his bargain. Therefore the vendee on partition steps into his shoes. Then each share is charged with its portion of relief obtained by the transaction."

To a case like 'ADINARAYANA REDDI v. SUBBARAYALU REDDI', AIR 1927 Mad 1116 or like the present in which the entire family estate and all the members of the family are present before the Court, whether the suit be at the instance of the alienee as in 'ADINARAYANA REDDI v. SUBBARAYALU REDDI', AIR 1927 Mad 1116 or at the instance of the non-alienating co-parcener as here the application of 'VADIVELAM v. NATESAM', 37 Mad 435 is simple and easy. In such a case, the actual division by metes and bounds of the property sold, with charge given over the share of the non-alienating coparcener for a proportionate share of the consideration proved to be binding is beyond doubt the proper mode of adjustment of equities which gives effect to the two principle of distribution of a common burden over all the shares of the co-parceners and the right of any coparcener to sell his own share for what he likes, to use the language of the learned Judge who decided 'ADINARAYANA REDDI v. SUBBARAYALU REDDI', AIR 1927 Mad 1116.

The limitations within which only the two principles can be given effect to in a suit for partial partition in which the non-alienating co-parcener seeks to recover his share of the item alienated—a question which will be discussed and pronounced upon in a later portion of this judgment—did not arise for discussion or decision in that case, even as they do not strictly speaking arise for determination here. In this view of the matter, it is by no means strictly necessary to deal with the arguments of counsel addressed to us on the basis of a suit, pure and simpliciter, for recovery by a non-alienating coparcener of his share of a specific item alienated for consideration found partly binding. Since my learned brothers have however chosen to deal with them and express their decision thereon in view of the importance of the questions debated and the length of time spent by the Court over the hearing relating to them, I shall not withhold my opinion on them but shall turn straightway and seriatim to the two lines of argument of Mr. Venkatasubramania Aiyar.

Of them, the first has, in its turn, a two-fold aspect. One is that it seeks to demolish both 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VADIVELAM v. NATESAM', 37 Mad 435 in so far as they make advertence to a share predicable as such in a member of a joint Mitakshara family in respect of any particular item of the family estate. The other is that it seeks to affirm 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and invalidate 'VADIVELAM v. NATESAM', 37 Mad 435 as to the reasoning on which the former decision rests in holding an alienee of such an item from a coparcener disentitled to any equities whatsoever. This reasoning, it is contended, is sound, but has been wrongly dissented from in 'VADIVELAM v. NATESAM' 37 Mad 435.

(83) With reference to the first aspect of the first line of argument there is, in my opinion, no real force, although there may seem to be, if you take some of the language of the learned Judges in the two cases in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VADIVELAM v. NATESAM', 37 Mad 435 literally. In the two cases alike, the learned Judges did use the word 'share' as it it related to the particular item alienated by a coparcener whereas the truth of the matter in the eye of law is that there can be no share predicable in favour of a co-parcener in any item of the family property so long as the estate continues joint. The argument in this aspect is, as it seems to me, however, only a verbal criticism. To employ the words of a certain observation of Sir George Rankin in 'RAMANNA v. JAGANNADA', ILR (1942) Mad 886 at p. 892 even a member of a Mitakshara family may sometimes be forgiven for speaking of his share as his "1/3rd share", 1/4th or the like instead of using the more accurate but more elaborate expression "The share which if a partition were to take place today would be 1/3rd, 1/4th or the like."

Neither the learned Judges in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 nor the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 could reasonably speaking, have been unalive to the basic principle of the Hindu Law which renders a share as such unpredicable in any item of the family estate with reference to any member of the family. They must be taken therefore to have meant by their use of the word 'share' to use the language of the learned counsel for the respondent, only that interest in the entire family estate which if attempted to be expressed in terms of an arithmetical fraction, can only be done by a 'fraction', no doubt defined as to its denominator by a number representing the actual number of co-parceners in existence at the date of alienation according to 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 147 or at the date of suit for partition by the alienee according to 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 but as to its numerator undefined and incapable of being defined in the form of a concrete figure representing the net divisible assets till after their ascertainment within the circumference of the complete stock taking of a transaction of general partition.

The essence of the difference between the Judges in the one case and the Judges in the other remains however for consideration in

that the former refuse to recognise any equity on the part of the alienee to be worked out in the suit for recovery by the non-alienating coparcener of his share of the property alienated, while the Judges in the latter do recognise such an equity and work it out on the principle of apportionment of a common burden between two or more parcels subject thereto. The Judges in the two cases alike recognise the alienability for consideration in this province of the share of a coparcener in a joint family property and address themselves to the question of the equities available to the alienee on a setting aside of an alienation by the coparcener, as only partially, and not altogether, supported by consideration binding on the family only, they differ in their answer to the question, because they differ rather fundamentally, maintains learned counsel for the respondent, in their perception of the true nature of a coparcener's interest and the true effect of a conveyance by him of such interest. Here I agree with the learned counsel.

(84) Before considering which of these two views is correct—which relates to the second aspect of the first line of argument of Mr. Venkatasubramania Aiyer — and the further allied question whether and how far the working out of the equities in the manner laid down in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 is sound,—which relates to the second line of argument of learned counsel—it may not be inappropriate to refer to certain broad considerations more or less settled by judicial decisions or more or less indisputably emerging on principles which are relevant to this question of the working out of such equities and which I propose to formulate in the shape of the following propositions.

(1) A gift or devise by a coparcener in a Mitakshara family of his undivided interest is, ordinarily speaking and subject to an exception in the case of a manager in favour of small gifts to female relations on special occasions or for pious, charitable or religious purpose, wholly invalid, void in toto. This principle cannot be evaded by the undivided member 'professing to make an alienation for value, when such value is manifestly inadequate and inequitable' (vide 'ROTTALA RANGANATHAM CHETTY v. P. RAMASWAMI CHETTI', 27 Mad 162).

(2) That alienations of a co-parcener's share even if for consideration are inconsistent with strict Hindu Law was laid down by the Privy Council as early as 'SURAJ BUNZI KOER v. SHEE PRASAD SINGH', 6 Ind App 88:5 Cal 148 P C. The principle is that the property of the family belongs to all the members jointly as to a corporation, in the words of Shearer J. in 'MAHABUR PERSAD v. RAMYAD', 12 Beng L R 90 At p. 94 and no one of the individual members has any share in it which he can deal with as his property. In the well-known and oft-quoted words of Lord Westbury in 'APPROVIER'S CASE', 11 Moo Ind App 75 which have become the 'locus classicus' on the point, according to the true notions of the undivided property in Hindu Law, no individual member of that family while it remains undivided can predicate of the joint and undivided property that he, that particular member has a certain definite share. No individual member of an undivided family could go to the place of the receipt of the rent and claim to take from the collector or receiver of the rents a certain definite share (11 Moo I A 75). According to the strict theory of Mitakshara Law each coparcener has a proprietary interest in the 'whole' of the coparcenary property. No co-parcener can therefore alienate his interest in the property, without the consent of the other coparceners (Vide Mulla's Principles of Hindu Law 10th Edn. page 304). At the same time it seems to have been felt by Courts that in equity a person who had parted with his money should receive something in exchange. So in 'DEEN DAYAL v. JUGDEEP NARAIN SINGH', 3 Cal 198 at p. 209 P C the alienee was given a right limited to compelling the partition which his alienor might have been compelled, had he been so minded, before the alienation of his share took place.

(3) According to the Law of Mitakshara as administered in the provinces of Madras and Bombay, and the Central Provinces, including Bihar, (Berar?) a coparcener of an undivided family may sell, mortgage or otherwise make an alienation for value of his undivided interest be it in the co-parcenary property as a whole or in a specific item thereof or be it by way of a whole specific item without the consent of the other coparceners. In all the other provinces a coparcener cannot sell, mortgage or otherwise alienate for value his undivided interest in the joint family property without the consent of the other coparceners and the father who was a co-sharer with his minor son cannot give such a consent on behalf of his minor son. An alienation made by a coparcener without the consent of the other coparceners has been held to be only voidable at the option of the other coparceners, the alienating coparcener himself not being competent to impeach it.

In all the provinces in India, the undivided interest of a coparcener in the joint family property may, during his life-time be seized and sold, in execution of a decree against him for his own debt; provided the attachment was made before his death, it is immaterial whether the sale is before or after death (Vide Mayne on Hindu Law and Usage, 11th Edition paragraph 381). There can be little doubt as their Lordships of the Privy Council observe in 'SURAJ BURSI v. SHEO PERSAD', 5 Cal 148 at p. 166 (PC) that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition.

As their Lordships further observe in the later case in 'LAKSHMAN DADA NAICK v. RAMACHANDRA DADA NAICK', 5 Bom 48 P C at 62:

> "The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern jurisprudence."

(4) As the purchaser of a coparcener's interests gets only an equity to enforce a parti-

tion, he takes the share upon partition subject to all the liabilities in the hands of the vendor, as for example, a liability to pay the alienor's father's debts. But where the alienation is itself in discharge of binding debts, the alienee cannot, in a suit for partition, be saddled with other family debts as any such condition would amount to a direction that the same property be sold twice over for this purpose, a position which no Court with power to apply the principles of equity could ever contemplate with equanimity.

(5) The equity which a purchaser from a co-parcener acquires is enforceable by him alike as a defendant in a suit of the non-alienating co-parcener for general partition and as plaintiff in a suit of his own for general partition. That it is enforceable by him as such defendant has been ruled by this Court in DAVUD BEEVIAMMAL v. RADHAKRISHNA AYYAR', 44 Mad L J 309 and 'RAMASWAMI v. VENKATARAMA', 46 Mad 815 on the strength of the Privy Council ruling in 'RAMA-KISHORE v. JAINARAYAN', 40 Cal 966 notwithstanding the view to the contrary in 'SUBBA GOUNDAN v. KRISHNAMACHARI', 45 Mad 449 and cannot be seriously doubted or disputed.

(6) The alienee's own suit to enforce the alienation in his favour by means of general partition in effectuation of such equity as he obtains by the conveyance in his favour is not technically a suit for partition in the sense of the Mitakshara law and the decree which he may obtain for enforcing the transfer either in whole or in part by partition of the family property will not by itself break up the joint ownership of the members of the family in the remaining property or the corporate character of the family. On the other hand, the co-parceners objecting to the alienation may, without bringing a suit for general partition sue for a decree for their shares in the property alienated by the coparcener.

The distinction rests upon the ground that in a suit for partition by the purchaser, an account of the whole estate must be taken in order to see what interest, if any, the alienor possesses; but as the coparceners may wish to remain undivided amongst themselves, notwithstanding an alienation by one of them of his interest in the joint estate as a whole or in any item thereof, which does not 'per se' bring about a disruption of status, they are entitled to confine the suit between themselves and the stranger purchaser to the property in dispute.

This is, in fact, a well-established exception to the rule ordinarily obtaining against partial partition although it is not as well-established whether the result of such a suit which, while affirming the unauthorised alienation as to the alienor's own share, repudiates it as to the remainder, is to make the share or shares of the property alienated which is or are recovered by the non-alienating coparcener or coparceners his or their separate property or to leave it as joint family property still. On the other hand, it is competent to the non-alienating co-parcener or co-parceners to exercise his or their right of interdict against the unauthorised alienation and sue to recover the entire property alienated, in which case, if the suit succeeds, the property is got back for the family as its estate.

7. Where in the suit for general partition with the alienee either as plaintiff or as defendant, as mentioned 'supra', his right is worked out by allotment to the alienor's share of the very item alienated as it may have been, whether in whole or in part, or by allotment to the alienor's share of other items, after ascertainment of the net divisible residue of the family assets with due provision made for all binding family obligations, and in full 'quid pro quo' for the consideration paid which is wholly not binding on the joint family, there are no further equities to be adjusted even as there will be none 'a fortiori' where the consideration is wholly binding on the family and the alienation is to be upheld wholly.

An alienation may be upheld in it's entirety though the necessity was only partial, in other words, even though the whole consideration received was not for a necessary purpose or for the discharge of antecedent debts. Where the necessity for a particular sale is only partial, i.e. where the money required to meet the necessary purposes is less than the amount sought to be raised by the sale, the real question for determination is whether the sale itself is one justified by legal necessity. The reason for this is that it is not always possible for the managing member to sell just that share of the family property which will bring in the precise sum which is wanted to clear the debts which are binding. But in a case where the circumstances only disclose a partial necessity, the sale will, however, be valid only where the purchaser acts in good faith & after due enquiry, and is able to show that the sale itself is justified by legal necessity, though he is under no obligation to enquire into the application of any surplus of the consideration.

8. The question of equities can only arise where the alienation in question is to be found partially supported and partially unsupported by necessity, or, in the case of the father alienating, by antecedent debts. Any such question can only be part and parcel of the law of 'restitutio in integrum' which requires that a person ought not, after setting aside an alienation, to be permitted to retain the benefit of the consideration received thereunder.

9. Any equity can only be given effect to according to equitable principles not exceeding the limits set by law, as otherwise it would cease to be an equity, in the language of Lord Blanesburg in the Privy Council in 'NAGAPPA CHETTY v. BRIHADAMMAL AMMAL', 58 Mad 350 at p. 362 P C. In that case the Privy Council upset the decree of the High Court which had with reference to the valid portion of the consideration for a sale of an impartible zamindary by the father challenged by the son, directed the ascertainment of a proportionate number of villages out of the total number sold, in order to uphold the sale to the extent of such proportionate number. The course adopted by the High Court was condemned by the Privy Council as tantamount to splitting the parcels sold with a view to making a new bargain between the parties. Similarly when in 'MUSIT-ULLA v. DAMODAR PRASAD', 48 All 518, the High Court disapproved of a like direction by the trial Court as an unworkable decree, the Privy

Council expressed its concurrence with the view of the High Court.

(85) It is with these broad considerations borne in mind that we have to consider the question of working out of equities in favour of an alienee from a co-parcener under a transaction which is only partially supported by binding consideration. The question is by no means admitting of an easy answer and calls for resolution of the conflict between the decisions in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89; 'VADIVELAM v. NATESAM', 37 Mad 435 and 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, in the light of and without prejudice to the propositions above formulated. Why I say 'in the light of and without prejudice to the propositions above formulated' is because I consider it no part of the province of this Full Bench, in spite of its strength of number to do anything by way of upsetting settled law for the purpose of settling conflicting law. As I think, we ought, on the other hand, to lay down the law on the point under consideration, consistently and not inconsistently with the law undisputedly prevailing on allied points.

True it is that consistency on abstract grounds of logic cannot always prevail in the realm of Judge made law. It may also be that as said by Lord Halsbury once, Law is not a logical science. But if that dictum of the learned Lord cannot, as appears from 'RANGASWAMI GOUNDAN v. NACHIAPPA GOUNDEN', 42 Mad 523, avail as a source of consolation for presuming an illogical extention of principle in interpreting the existing case law on a subject it can hardly be doubted or disputed that only logical applications and extensions of existing legal principle should stand encouraged and all illogical applications and extensions of legal principle should stand discouraged. So much is in my opinion required for that healthy, if slow and gradual, broadening out from precedent to precedent which is of the essence of the living mechanism of a system of justice governed by the authority of decided cases.

(86) Now, the wider argument of Mr. Venkatasubramania Aiyar is that the holder of a mere equity like the alienee from a coparcener can invoke no equities to his aid against the non-alienating coparcener seeking to set aside the alienation when the Court finds it to be supported only partially by binding consideration. When such an alienee is described as a person who has acquired only an equity, what is meant however is, not that he has no legal interest whatsoever in the property alienated such as entitles him to equities on the setting aside of the alienation with reference to the binding part of the consideration, but that for the materialisation of such interest in the property which he can properly call exclusively his own, he is bound still to take steps whether in a suit of his own or in a suit for gereral partition instituted by the non-alienating coparcener or coparceners.

Equities arise because of the partially binding character of the transaction and do not stand excluded because the title of the alienee is not at the very inception a perfect right to a specific item. The title may be inchoate in the sense that in the allotment at a general partition he cannot claim the item as his own or mesne profits thereon as from the date of the alienation. The title may be defeasible or even turn out illusory in the sense that on allotment at the general partition he may get other item or items, or nothing at all in substitution. But suject to such infirmities, he does certainly derive from the alienation a legal right, not a bare right in personam to use the language of Bakewell J. in 'MANJAYYA v. SHANMUGA', 38 Mad 684, but a right to something much nearer to real property than a mere claim to partition, to use the language of Wallace J. in 'NARAYANA SHA v. SHANKAR SHA', 53 Mad 1 at p. 15, something 'specific, existing and definite' in the language of Lord Justice James in the Privy Council in 'TUFFUZOOL HOSSAIN KHAN v. RAGHOONATH PERSHAD', 14 Moo I A 40 at 50.

On the non-alienating co-parcener or co-parceners seeking to recover his share or their shares of the specific property alienated the question is whether he is not entitled to put forward any equities at all as arising with reference to the portion of the consideration found binding. If the non-alienating co-parcener or co-parceners is or are permitted to recover his share or their shares of the particular property alienated without an adjustment of equities, not only will he or they be thereby allowed undue advantage but there will also be no further occasion afforded to the alienee to enforce equities.

Just as in a later suit for general partition by him, he cannot, if as I think 'SOURIMUTHU v. PICHIA PILLAI', 49 Mad 483 and not 'KANDASWAMI UDAYAN v. VELAYUDHA UDAYAN', 51 Mad L J 99: 50 Mad 320, lays down the correct law, ask for allotment to his alienor of the share recovered which will have become his separate property under 'CHINNA SANYASI v. SURIYA', 5 Mad 196; 'KADEGAN v. PERIA MUNUSWAMI', 13 Mad L J 477 and 'SOURIMUTHU v. PICHIA PILLAI', 49 Mad 483, notwithstanding Wallace J.'s view to the contrary in 'DAVUD BEEVI AMMAL v. RADHAKRISHNA', 44 Mad L J 309, so too he cannot ask for the adjustment of equities either. On this question of working out of equities of course the position in law might well be different if the Courts did not recognise the right to partial partition at all on the part of the non-alienating coparcener or coparceners. That right being there, the only question is whether there is anything unjust in allowing to the alienee such adjustment of the equities arising out of the partial validity of the transaction as is possible in law in the very suit for partial partition instituted by the non-alienating coparcener or coparceners. In my opinion the answer to the question must be in the negative.

(87) Even in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, relied on by the learned advocate for the respondent the equities of the alienee were not negatived on the ground that he was the holder of an equity only. The question that arose there was, whether Rs. 120/- out of the price paid by the defendant to the plaintiffs' father having gone to discharge a mortgage debt which the plaintiffs also were bound to pay their interests in the property comprised in the sale by their father should be held liable for their share of the Rs. 120/- namely Rs. 80/-. In negativing

the liability, Subramania Aiyar J. who delivered the judgment of the Court, consisting of himself and Boddam J. first makes the following observation:

"In making the purchase the defendant was with reference to the plaintiffs but a volunteer, and he cannot, as against them, claim by way of equity a charge on their shares for the Rs. 80/- even though this sum was applied towards the discharge of their joint debt. (Cf 'SIVAGANGA ZAMINDAR v. LAKSHMAN', 9 Mad 188 at pp. 197, 200 and 201)."

It is not quite easy to understand precisely what the learned Judge meant by the use of the word 'volunteer' in the sentence quoted. Nor does a reference to 'SIVAGANGA ZAMINDAR v. LAKSHMAN', 9 Mad 188 at pp. 197, 200 and 201, remove the difficulty of obscurity involved in his observation. In this last case, in execution of a money decree obtained against the holder of an impartible zamindari a creditor attached certain immovable property, a portion of the zamindari, which he described as property of the debtor. This was sold by the Court and purchased by one Lakshman. A suit having been brought by a son of the judgment-debtor after his father's death to recover the property from Lakshman, it was held that all that Lakshman acquired was the life interest of the judgment-debtor in the property and that, therefore the plaintiff was entitled to recover.

As appears from page 197 of the report the purchaser seems to have contended that as his purchase money was applied to pay off the debts on the estate for which the zamindari and the plaintiff were liable he in equity was entitled either to have possession of the property bought or to hold the property until he should be recouped with the purchase money. The contention was repelled by Kernan O. C. J. thus:

"I do not see what equity the purchaser can have. He did not get an assignment of the decree; he was a volunteer in buying against the plaintiff. He made a bad speculation as it turned out on account of the death of the zamindar, but if he had lived, the purchaser probably by having possession of the zamindar's residue would be able to make money from his bargain."

At pages 200 and 201 of the report which are part of the judgment of the other learned Judge, Muthuswami Aiyar J. this is what we find:

"Another contention is that if the appellant's title to the zamindari is declared, he should be declared entitled to its possession on payment of his father's debt or the purchase money. The purchaser bought the late Zamindar's interest, whatever that was, for the money which he advanced. If the Zamindar had lived long it would have been a profitable speculation rather than a losing speculation. In the event which has occurred, it has turned out to be a losing speculation. I do not see how this can give rise to any equity in favour of the purchaser."

It is difficult to find any parallelism of facts between the case in 'SIVAGANGA ZAMINDAR v. LAKSHMAN', 9 Mad 188 and the case before the Court in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 189, such as justifies the use to which in the sentence quoted from the later case the decision in the earlier was sought to be put. Perhaps all that was meant by the learned Judge (Subramania Aiyar J.) in the later case was that if the Court came to the conclusion that there was no justification for the sale by the plaintiffs' father the purchaser must be regarded as a mere volunteer notwithstanding that the purchase money may have been applied in discharge of binding debt. I am not satisfied that the legal position indicated thus by the learned Judge is really correct. Whatever that may be, proceeding further, the learned Judge observes thus:

"Even if there were any doubt as to whether the defendant was a volunteer one must hesitate to countenance the introduction of a new rule such as that suggested having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a coparcener though made without legal necessity is in this presidency valid to the extent of vendor's share. Suppose that share is really worth the whole of the amount paid by the vendee as the price why should he get anything more?

Next suppose that the share is worth less than the price paid. The vendee cannot in such a case reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price he had actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy and satisfactory settlement. The simpler and better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether his remedy is only against the vendor in a suit for the return of the price paid on the ground that the consideration for the payment failed.

This view will on the one hand avoid all necessity for an enquiry into matters alluded to before and on the other tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto. The contention of the defendant is clearly unsustainable and cannot be accepted."

(88) It will be seen from the foregoing quotation from 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 that the reason given by the Court in support of its conclusion, negativing the equities is not the circumstance that the alienee is only the holder of a bare equity but the practical inconvenience in giving effect to them in a manner not till them recognised as well as the check which a refusal of the kind of equities claimed would operate to bring into existence against collusive transactions between some co-parceners and speculative persons who may enter into transaction with them prejudicially to the interests of the other coparceners who are not parties thereto. The conclusion reached by the Court in that case was, that the vendee must either be content with the vendor's share if he wishes to stand by a sale valid only partially or must sue the vendor for the return of the price paid on the ground

of failure of consideration if he wishes to repudiate the transaction altogether.

(89) During the argument as well as for some time thereafter, it seemed to me that this view might well be accepted as based on the whole on considerations calculated at once to preserve the interests of coparceners in family properties and to ensure a rough and ready rule in the administration of justice. It also seemed to me that the conclusion reached by the learned Judges in 'MARAPPA v. RANGASWAMI', 23 Mad 89 as to the remedy to be pursued by the alienee in a case where the alienation might not be binding on the family was on lines implicably, if not statedly, similar to what a Full Bench of this Court in 'BALUSWAMI AIYAR v. LAKSHMANA AIYAR', 44 Mad 605 F B adopted in dealing with a suit for specific performance of a contract for sale by the managing member of a joint Hindu family found not to be binding upon the other members of the family, the purchaser in such a case having been held not entitled to enforce specific performance of the entire contract, but, if he was so minded, to have such performance on payment of the full consideration for the share of the alienor only; there was nothing wrong as I thought in the principle of the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89 above adverted to.

(90) I have, however, on a closer consideration of the matter since reservation of judgment come to the conclusion that there would be grave and serious injustice involved in refusing altogether as that ruling does equities to the alienee with reference to the binding part of the consideration for the sale in his favour while allowing the non-alienating coparcener or coparceners to sue for his share or their shares of the property alienated. After all, if the alienee should think that working out of Equities in the suit for partial partition by the non-alienating coparcener — whatever the mode of such working out may be — which is another question, might not be altogether as much to his advantage as working out of Equities in a suit for general partition, it would be open to him to file such a suit and ask for stay of the coparcener's suit till the disposal of his own or obtain a joint trial of both by appropriate application. If he does not do so, but wants coparcener's suit itself a working out of equities, is he to be refused such working out? Viewing the matter from this standpoint I must repel the argument of Mr. Venkatasubramania Aiyar so far as it is directed to a re-affirmance of the ruling 'MARAPPA v. RANGASWAMI', 23 Mad 89.

(91) The question then is whether assuming 'MARAPPA v. RANGASWAMI', 23 Mad 89 to be unworthy of acceptance, the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435 suffers, as contended by the learned counsel for the respondent from any serious legal infirmity such as would invalidate it and entail its rejection as well. It is contended by counsel that the infirmity about the decision is twofold; (1) in that it rules that it cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases, (2) in that it holds that it is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for the sale will be apportioned between all the items of property sold in cases of dispute.

(92) In order to prove the first infirmity said to beset the decision in 'VADIVELAM v. NATESAM', 37 Mad 435 counsel relies on the Full Bench ruling in 'ROTTALA RANGANATHAN CHETTI v. RAMASWAMI CHETTI', 27 Mad 162 to the effect that the principle that no coparcener can make a gift of his interest cannot be evaded by the undivided member professing to make an alienation for value, when such value is manifestly inadequate and inequitable. Counsel contends, therefore, that a question as to the proper consideration for the alienation of a coparcener's interest is not a matter with which the other members of the family are in no way concerned. The learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 it is urged, erred in holding that a co-parcener is entitled to part with his own share in any family property for any consideration as he pleases.

(93) In order to make out the second infirmity the learned advocate for the respondent has drawn our attention to a series of decisions beginning with 'DEENDAYAL v. JUGDEEP NARAIN SINGH', 4 Ind App 247:3 Cal 198 P C and ending with the two decisions of this Court reported in 'KRISHNAMURTHI IYER v. NATARAJA AIYAR', 1948-1 Mad L J 430 and 'SUBBIAH v. VENKATESWARLU' 1948-1 Mad L J 478. Counsel contends that all that the alienee from a co-parcener acquires being an equity to work out his rights standing in the shoes of his alienor, the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 are wrong in assimilating the case in question to a case of a sale of more items of property than one in which as between the vendor and the vendee in the absence of a contract to the contrary the consideration will be apportioned between all such items in cases of dispute.

(94) It is urged that 'VADIVELAM v. NATESAM', 37 Mad 435 is only the logical consummation of the fundamental misconception first ventilated in this Court in 'VENKATACHALA PILLAI v. CHINNAIYA PILLAI', 5 Mad HCR 166 that a share in any item as such of joint family property alienated by a co-parcener is at all capable of passing to the alienee. This, it is said, is opposed to 'APPOOVIER'S CASE' 11 Moo Ind App 75 (PC). The decision in 'VENKATACHALA PILLAI v. CHINNAIYA PILLAI', 5 Mad HCR 166 it may be mentioned, is the very first case which was relied on before us by the learned advocate for the appellant in the course of his argument and there is no wonder that the argument for the respondent has been directed to a prominent attack against it.

In order to appreciate the relative arguments of counsel on both sides in regard to this decision, it may be necessary to know what exactly the facts of the case were. The facts as well as the actual decision are stated as follows by Bhashyam Aiyangar J. in 'AYAGIRI VENKATARAMAYYA v. AYAGIRI RAMAYYA', 25 Mad 690 at p 715 quite correctly, if I may say so with respect:

> "In that case, the vendor (one Subbaraya Mudali) as one of two co-parceners was entitled to a moiety of the joint family pro-

perty. He sold one entire village and put the purchaser in possession thereof. After the death of the vendor the surviving co-parcener brought a suit to recover his one half share in the village. The purchaser resisted the suit on the ground that the entire village formed less than a moiety of the whole family property and that, therefore, the conveyance would operate to vest in him the whole village. Though the principle was recognised 'that each co-parcener has a vested present undivided estate in his share which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate was transferable like any other interest in property' yet the contention that the vendee was entitled to the whole village was overruled on the ground that though the extent and value of the village in question was less than the extent and value of a moiety of the entire family property, yet as the vendor was entitled only to one moiety in the village, the conveyance could operate to convey only a moiety of the village."

In the course of the judgment in that case 'VENKATACHALA v. CHINNAYYA', 5 Mad HCR 166 there occurs the passage at page 170 of the report to this effect:

"The estate of each coparcener gives him only the right to enjoy a fair proportion of the benefits of the whole family property in common with the other coparceners. But as respects the proprietary right to the corpus of the property, there is a perfect unity of title which makes the coparcenary to some extent of the nature of a joint tenancy, and until a partition takes place coparceners continue seized by one and the same title of the whole and every portion of the property alike the law recognising the right of one co-parcener to hold possession and manage for the joint benefit of himself and the rest.

By the sale in the present case, therefore, the vendor, Subbaraya, could not in our judgment transfer to the first defendant's father a valid title to any specific portion of the joint family property but only to his beneficial estate as an undivided co-parcener with the incidental right of partition, and it follows that the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale."

Mr. Venkatasubramania Aiyar's complaint is that while the law is correctly stated in the rest of the passage quoted the deduction made from it as expressed at the end of the passage namely:

"that the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale"

is erroneous. That is why, says counsel, the Court in dealing with the argument for the defendant-appellant that a half of the purchase money should be made good to him, observed:

"Had any portion of the purchase money..... ...been expended.....for the benefit of the joint estate the plaintiffs' legal right to possession might upon equitable grounds have decreed subject to the refund of half the purchase money....."

Counsel in effect contends that the case cannot be regarded as authority for anything more than the proposition as stated by Collins C. J. and Muthuswami Aiyar J. in the Full Bench Case in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 at page 417 where after referring to 'VEERASWAMI GRAMANI v. AYYASWAMI GRAMANI', 1 Mad HCR 471 as well as 'VENKATACHALA PILLAI v. CHINNAIYA PILLAI', 5 Mad HCR 166, the learned Judges observe:

"The principle on which these decisions rest is that the vendor could confer a valid title not to any specific portion of the joint family property, but only to his beneficial estate as an undivided coparcener with the incidental right of partition."

(95) It is also contended by Mr. Venkatasubramania Aiyar that the case in 'VADIVELAM v. NATESAM', 37 Mad 435 which reflects the error of 'VENKATACHELLA PILLAI v. CHINNAIYA', 5 Mad HCR 166 in so far as it proceeded not on the basis of a suit for general partition and of the stock-taking incidental thereto as the proper remedy for an alienee from a co-parcener but on the basis of a fractional interest in the alienated item as unimpeachably conveyed 'in praesenti' to the alienee which corresponds to the quantum of interest of the coparcener in the entire property of the coparcenary is itself vitiated by fundamental error. It is also pointed out by the learned counsel that the idea of a tenancy-in-common resulting with reference to an item of property alienated from the fact of the alienation as held in 'SUBBA RAO v. ANANTHANARAYANA AYYAR', 23 Mad L J 64 to which one of the judges who took part in 'VADIVELAM v. NATESAM', 37 Mad 435, Sundara Iyer J. was party lies at the root of the decision in 'VADIVELAM v. NATESAM', 37 Mad 435 and that such an idea does not really hold the field on account of later decisions as well as earlier.

Reference is made in this connection to paragraph 386 of Mayne on Hindu Law and Usage pages 487 and 488 and to the foot-note 'W' in particular at the latter page. The paragraph runs as follows:

"Where the transfer is of an undivided interest in the whole of the family property the transferee will get whatever may be allotted to the transferor's share in a suit for partition. A coparcener may alienate either his undivided share in the whole of the family property or his undivided share in certain specific item of the family property or the whole of a specific item of the family property. In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition."

(96) The foot note refers to 'SURAJ BUNSI KOER v. SHEO PERSHAD', 5 Cal 148 (P C); 'MANJAYA v. SHANMUGA', 38 Mad 684; 'MAHARAJA OF BOBBILI v. VENKATARAMANJULU', 39 Mad 265, as dissenting from the dicta to the contrary in certain other cases also referred to in the foot-note. Reference is

also made by Counsel to the view of Sadasiva Aiyar J. in 'SOUNDARARAJAN v. ARUNACHALAM CHETTY', 39 Mad 159 at p. 172 (F B), Sadasiva Iyer J. being the other learned Judge who had taken part in 'VADIVELAM v. NATESAM', 37 Mad 435. So learned counsel contends that the decision in 'VADIVELAM v. NATESAM', 37 Mad 435, must be taken to have been tangibly coloured by notions of joint tenancy and tenancy-in-common derived from English Law which are not by their nature strictly speaking applicable to the case of a joint Hindu family of which one co-parcener alienates his interest in a particular item of the family property. I am inclined to think that these points of criticism levelled by the learned counsel against the reasoning of the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435, are entitled to great weight. Assuming so, the question still remains whether the decision itself is wrong as contended by the learned counsel or can be supported, notwithstanding these points.

(97) It is difficult as I have already observed to hold, so long as the view declared by a Full Bench ruling of this Court in 'IBURAMSA ROWTHER v. THIRUVENKATASWAMI NAICK', 34 Mad 269, in accordance with practice and precedent going back to 'VENKATACHELA v. CHINNAYYA', 5 Mad H C R 166, prevails that the co-parceners objecting to the alienation may, without bringing a suit for general partition, sue for a decree for their shares in the property alienated by a coparcener, that the equities arising out of the partial character of the validity of the transaction should not be taken into consideration at all by the Court in such a suit. Where one of two coparceners makes an unauthorised alienation, surely the other coparcener may either exercise his right of interdiction and sue for the recovery of the entire property alienated or affirm the alienation to the extent of the share of the vendor and sue for the recovery of his share.

If he does the former at the option of the alienee, he might be given an unconditional decree for possession with liberty to the defendant alienee to work out his equities in a separate suit for partition (vide 'IBURAMSA ROWTHER v. THIRUVENKATASWAMI NAICK', 34 Mad 269; 'HARI NARAIN v. RUDER PERKASH', 10 Cal 626 P C and 'SURAJ BUNSI v. SHEO PRASAD', 5 Cal 148 (P C) or he might be given a decree conditional on refunding the amount found binding on the family on whose behalf clearly he is suing, as in the case of widow 'alienations sought to be set aside by reversioners, or karnavans' alienations sought to be set aside by junior members of the tharwad, or dharmakarthas' alienations sought to be set aside by the succeeding dharmakarthas or guardians' alienations sought to be set aside by or on behalf of the ex-ward or the ward respectively. Even where he chooses to affirm the sale as to the alienor's share and sue for his own shares, does it not look prima facie equitable that he should be made liable for his proportion of the consideration found to be binding?

(98) True, prima facie, it does look so, as a matter of off hand parity by reasoning. But then this overlooks what Subramania Aiyar J. rightly points out in 'MARAPPA v. RANGASWAMI', 23 Mad 89, namely, the possibility that the share sold is worth much more than that for which it is sold, and the hardship which that way arises to the other coparceners to whom the value of the vendor's share is by no means a matter of no concern having regard to the Full Bench ruling in 'ROOTALLA RANGANATHAN CHETTI v. RAMASWAMI CHETTI', 27 Mad 162. Further, the working out of equities in a suit concerning a particular item of family property alienated by a coparcener and the valid portion of the consideration for the alienation thereof involves the difficulty that the portion of the property recovered by the non-alienating coparcener may not be liable for other debts of the family if such portion possibly becomes as a result of the decree in the suit the separate property of the non-alienating co-parcener.

In fact if regard is had to the strict theory of Hindu Law, that the alienee from the coparcener acquires nothing more than an equity, working out of equities otherwise than in a suit for general partition by him is not to be permitted to him at all. Moreover it cannot be denied that the more satisfactory mode after all of working out of equities is furnished by a suit for general partition in which the net divisible residue can be ascertained and an allotment can be made thereafter to the share of the alienee as standing in the shoes of the alienor. It cannot be disputed too that a suit of the non-alienating co-parcener for partial partition is not liable to be converted into a suit for general partition at the instance of the defendant so that the more comprehensive working out of equities as in a suit for general partition may be adopted.

Referring to the decisions in 'AYAGIRI VENKATARAMAYYA v. AYAGIRI RAMAYYA', 25 Mad 690 and another decision cited before them in 'IBURAMSA ROWTHER v. THIRUVENKATASWAMI NAICKER', 34 Mad 269, the Full Bench observe in their judgment at page 275 of the report thus:

> "Those cases however do not lay down that the member of the family suing for his share could be driven by the purchaser from another sharer to institute a suit for general partition."

Having regard to these several consideration, I am of opinion that although so long as a suit for partial partition at the instance of the non-alienating co-parcener stands recognised in law, there must, inevitably, be a corresponding working out so far as possible, of partial equities, only pertaining to the particular item alienated and depending on the partial character of the validity of the consideration for the alienation of such item, such working out cannot be on the basis adopted in 'VADIVELAM v. NATESAM', 37 Mad 435, however equitable prima facie such basis may seem.

(99) In a case decided by Full Bench of this Court, 'NARAYANA SAH v. SANKAR SAH', 53 Mad 1, the breach in the water-tight compartment of ancient Hindu Law relating to property of a joint Hindu family evidenced by the gradual development of the case law connected therewith has been noticed in some detail by Wallace J. and Anantakrishna Aiyar J. Wallace J. also refers in his judgment in that case to the way in which the breach has become widened with reference to the present

state of law in the case of an insolvency of a coparcener. The question in the Full Bench case was whether when there had been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition as laid down in 'MANJANATHA v. NARAYANA', 5 Mad 362, or should the subsequent partition be made 'rebus sic stantibus' at the time of such subsequent partition?

The Full Bench answered the question in the manner laid down in 'MANJANATHA v. NARAYANA', 5 Mad 362. Coutts-Trotter, C. J. in his judgment observes at page 5 of the report:

"The point is a very short one, and, were the whole matter to be regarded as being at large, I should attach very great weight to the arguments addressed to us with much learning by Mr. K. S. Krishnaswami Ayyangar. There can be no doubt of the logic of the statement that, until, an actual partition arises, no member of a coparcenary can be said to have a share, nor can any branch of the whole family; but in my opinion, it is far too late to apply all these logical rules in their strictness to Hindu Law as we find it today. Modifications have been found necessary as, for instance, in the case of the alienee from a member of the coparcenary, who is allowed to stand in his shoes and enforce a partition. See 'SURAJ BUNSI KOER v. SHEO PERSAD', 5 Cal 148 (P C), where their Lordships frankly concede that the sanctioning of such transactions can be justified not by strict Hindu Law but by necessary implications of equity.

Similarly with regard to a partial partition as in the present case, I think it may be taken as settled law now, that the separation of one branch of the family does not involve a notional partition of the whole property including all the members, with the corresponding legal fiction that the remaining branches or members are to be deemed to have reunited."

Wallace J. at pages 15 and 16 of the report observes:

"I do not think the conclusion can be resisted that, as the law stands, it involves the proposition that a coparcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate in extent from time to time, but definite and ascertainable at any particular point of time, and actually made definite and ascertained by the act of the coparcener seizing and using it for his benefit, and holding it as against the possession and use of it which the joint family as a whole is entitled. The act of alienation makes definite the indefinite interest which the coparcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu Law about devolution on death.

So far, the Courts have not gone so far as to hold that an alienation 'per se' is such an expression by the alienor of his unequivocal intention to separate as is sufficient to effect a severance of the alienor from the joint family, and at present the law is that the alienor, in spite of the alienation, remains a member of the joint family, 'AYYAGARI VENKATARAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690, although the suit by the alienee for partition would presumably sever an alienor entirely from the joint family, and the alienee must always sue for partition of the alienor's whole share, 'NANJAYYA v. SHANMUGA', 38 Mad 684."

Anantakrishna Aiyar J. at page 20 of the report points out:

"The Hindu Law texts do not contemplate cases of partial partition....., partial, either as regards the property to be divided, or partial, as regards the co-parceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically Judge-made law."

The learned Judge proceeds further to remark at page 23:

"Seeing that partial partition was not recognised by the old Hindu Law-givers and none of the Hindu Law texts refer to the same, it is clear that the rules relating to such partial partitions should be sought for in places other than original Hindu Law texts. The law relating to partial partition is essentially Judge-made law. Such law was moulded out of considerations of principles of equity. Therefore, one has to look to principles of equity in adjudicating on questions relating to partial partition."

Then again at page 25 of the report referring to the dictum of the Privy Council in 'LAKSHMANAN v. RAMACHANDRAN', 5 Bom 48 at p. 62 (P C), namely:

"The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern jurisprudence."

The learned Judge remarks:

"The Hindu text writers knew nothing of partial partition. Therefore the theory and incidents of joint family and joint family property according to the genius of the Mitakshara are not the sole questions that should govern us, but it is the nature and extent of the equitable principles relating to partial partition established by modern decisions that have to be really considered and applied to such cases."

I must express my respectful concurrence with the mode of approach adopted by all the learned Judges of the Full Bench on the question referred to them for decisions as well as in particular with the remarks of Anantakrishna Aiyar J. on the true character of the doctrine of partial partition and the considerations of equity which have to be borne in mind by Courts in dealing with cases of partial partition.

(100) The result of my consideration of the case, so far, is that, in my opinion, the equities arising from out of the partial character of the validity of the co-parcener's alienation must not be left out, as was done in 'MARAPPA v. RANGASWAMI', 23 Mad 89, but must be worked out, not however, on the basis laid down

in 'VADIVELAM v. NATESAM', 37 Mad 435. The question then is whether they should be worked out as laid down in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

(101) Before dealing with this question, I propose to say a few words more in regard to the contention of Mr. Krishnaswami Iyer that the equities must be worked out in the manner laid down in 'VADIVELAM v. NATESAM', 37 Mad 435. The learned Counsel for the appellant has sought to fortify his position by maintaining that 'VADIVELAM v. NATESAM', 37 Mad 435, which is the primary authority in his favour has been accepted as good law in later decisions of this Court down to 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, as well as, in a way, by the Privy Council in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518 P.C. Of such decisions of this Court the one important decision which calls for consideration is 'SEETHA RAMA NAIDU v. BALAKRISHNA NAIDU', 26 Mad L J 604. That was a case decided by Wallis, J., (as he then was) sitting on the Original Side of this Court. The suit in question was one brought by the plaintiffs who were the sons of the first defendant for a cancellation of the alienations of their father and for partition.

Dealing with the alienation of Item 5, the learned Judge held that out of the total consideration of Rs. 850, therefor, Rs. 414 had been accounted for as for purposes binding on the family while Rs. 436 was left unaccounted for. The learned Judge was prepared to allow the alienation to the extent of Rs. 414 and in dealing with the equities to be worked out with reference to Rs. 436 the learned Judge observed at page 610 as follows:

> "If the alienation were by a widow or guardian or dharmakartha, in the circumstances of the present case, the alienation to a much greater extent than was necessary would be set aside on payment to the alienee of the amount which was held binding. It is however contended that this is not the proper way to deal with an alienation by a co-parcener where the alienation is only partially binding because according to the law now established in this presidency, such an alienation is in any event binding to the extent of the coparcener's share as it existed at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family."

Consequently, it is contended that the alienees in this case acquired a one-third share in the property alienated independently altogether of the sum of Rs. 414 which was held to have been advanced by him for purposes binding on the joint family. As regards this sum there is the decision of 'MARAPPA v. RANGASWAMI', 23 Mad 89, before the decision in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other coparceners in respect of the sum for which the alienation was rightly made. This view has been dissented from by Sundara Aiyar and Sadasiva Aiyar, JJ., in a very recent case in 'VADIVELAM v. NATESAM', 37 Mad 435, and does not so far as I can judge appear to rest on any sound principle.

It appears to me that the right way of look at it is this: the alienee acquired by the alienation a one-third share of the first defendant in this case. That one-third share must of course be burdened with a one-third of the joint liability of the family for Rs. 414 but there is no reason so far as I can see why the shares of the other co-parceners should not similarly be burdened with their proportionate share of the liability and therefore I hold it is binding on them to the extent of two-thirds of Rs. 414; and in the result that the alienee is entitled to one-third share plus 2/3 of Rs. 414 as a charge upon the shares of the other coparceners."

It is clear that the learned Judge in this case definitely ruled out the decision in 'MARAPPA v. RANGASWAMI', 23 Mad 89, as resting on no sound principle. I agree. I have already discussed that case in the course of this judgment and do not propose to say anything more about it. The learned Judge has further accepted 'VADIVELAM v. NATESAM', 37 Mad 435 as sound law. So far as this view of the learned Judge is concerned, two points have been attempted to be made by the learned Counsel for the respondent. One is that this view rests upon the same fallacious reasoning as the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435, I have already dealt with this aspect of the matter and do not propose to say anything more. Mr. Venkatasubramania Aiyar further emphasises the reference to 'CHINNU PILLI v. KALIMUTHU', 35 Mad 47, in the course of the passage cited, as indicating a misunderstanding on the part of the learned Judge as to the true scope of the Full Bench ruling and as vitiating his decision as well as the decision in 'VADIVELAM v. NATESAM', 37 Mad 435.

The learned Counsel contends that while the Full Bench no doubt ruled that the fundamental interest of the alienee of a coparcener is what the co-parcener was entitled to on the date of the alienation in accordance with the number of members then in existence, the Full Bench did not as supposed by the two learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 and by the single Judge in 'SEETHARAM NAIDU v. BALAKRISHNA NAIDU', 26 Mad L J 604, rule that the fractional interest would attach to any particular item alienated without reference to the stocktaking of the entirety of the assets and liabilities of the family incidental to a general partition.

It does not seem to me that this contention founded on the sentence in the passage quoted namely:

> "As regards this sum, there is the decision in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, before the decision in 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other coparceners in respect of the sum for which the alienation was rightly made."

and in particular upon the words:

> "before the decision in 'CHINNU PILLAI v. KALIMUTHU CHETTI', 35 Mad 47 in the sentence is well founded.

The real purpose of the reference to 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 can be gathered from the later part of the judgment of the learned Judge where he observes thus in continuation of the passage already set forth by me; Says the learned Judge:

> "I need only allude to the contention which was put forward by Mahadeva Aiyar that the proportion of the alienee was liable to be affected by subsequent additions to the family. It seems to me that this is inconsistent with the principles laid down in 'CHINNU PILLAI v. KALIMUTHU CHETTY'. 35 Mad 47."

I am inclined to think that it is only for the purpose of refuting this contention of Mr. Mahadeva

Aiyar that 'CHINNU PILLAI v. KALIMUTHU CHETTY' ,35 Mad 47, was at all referred to by the learned Judge.

In my opinion, there is nothing in his judgment which suggests that he was putting 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 to any further effect than that just indicated. If that is so, there is no misunderstanding of 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47, on the part of the learned Judge such as vitiates his reasoning in affirmation of the ruling of Sundara Aiyar and Sadasiva Aiyar, JJ., in 'VADIVELAM v. NATESAM', 37 Mad 435.

(102) The Privy Council decision in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518 is one of the decisions to which I propose to refer in the context of this discussion. That is a decision which Mr. Krishnawami Aiyar drew our attention to in support of his contention that 'VADIVELAM v. NATESAM', 37 Mad 435, has been referred to with approval by the Privy Council and must, therefore, be accepted. The suit in question in the Allahabad case before the Judicial Committee was one by the son in a Mitakshara family of North West Provinces to set aside a sale by the father of joint family property for Rs. 18,400. Out of this amount of consideration, Rs. 16,400 was proved to have been utilised for payment of the debts of the plaintiff's great grandfather, not illegal or immoral in their nature. Rs. 2,000 was left unaccounted for and the evidence of the plaintiff's father in regard to how it had been spent having been withheld from the Court the sale was upheld by the Privy Council altogether.

The main question in the case was whether or not a Hindu governed by Mitakshara is liable for the debt of his great grandfather in the same manner as he is liable for the debts of his father or grandfather. The trial Court having answered that question in the affirmative but having found that out of the total consideration, a sum of Rs. 2,000 had not been accounted for passed a decree declaring that the plaintiff is entitled to have proportionate property released from the sale-deed and only to the extent of his share. The High Court on appeal answered the question of law as to the great grandson's liability for debts of the great grandfather in the negative and further found that the plaintiff was not entitled to anything more than Rs. 3,077 which was actually left in the hands of the vendees for payment to certain creditors of his father (defendant) and which had been proved to have been paid to these persons by the vendees. The decretal part of the judgment of the High Court is to be found set forth at page 522 of the report in these terms:

> "The result is that the plaintiff is entitled to a decree directing that he may recover possession of one half of the property specified at the foot of the plaint, subject to payment into Court for the benefit of the defendants-vendees of a sum of Rs. 1,561-2-6."

The amount in question was apparently the plaintiff's share of the binding debt found by the Court. On further appeal to the Privy Council the question of law was answered by their Lordships in the affirmative, that is, in agreement with the Subordinate Judge and in disagreement with the High Court. Further, it was held by their Lordships on the evidence and probabilities that the sum of Rs. 2,000/- and odd which had been held by the Subordinate Judge to have been not properly accounted for must be treated as proved, because the evidence of the father as to the way in which the amount was utilised was not forthcoming and that raised a presumption against the plaintiff.

At the end of the judgment of the Privy Council there is this observation which their Lordships make after answering the question of law and dealing with the question of fact in the manner above stated:

> "In their Lordships' judgment, the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435 does not apply to the facts of this case."

It is contended by Mr. Krishnaswami Aiyar from this that that ruling must be taken to have received the approval of the Privy Council because all that their Lordships have said is that it did not apply to the facts of the case before them, not that it was wrong on principle. While I am not inclined to think this way of looking at the reference by their Lordships to the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435 can be regarded as conclusively correct, there is no doubt that the Privy Council ruling does certainly seem to support the learned Counsel for the appellant by way of suggesting a 'prima facie' point which must be accepted unless there is any reason to the contrary established.

It certainly is possible to hold from the reference by their Lordships of the Privy Council to the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435 in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518, that the inference by implication sought to be extracted by the learned Counsel for the appellant from that reference is not by any means unreasonable. Of course, if on its own merits 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 is to be preferred to 'VADIVELAM v. NATESAM', 37 Mad 435, a question with which I shall presently deal, the fact of the reference to 'VADIVELAM v. NATESAM', 37 Mad 435 by the Privy Council in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518 cannot operate as an obstacle in the way of the respondent; because the reference to 'VADIVELAM v. NATESAM', 37 Mad 435 in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518, is not in the nature of an express statement of categorical approval, but only a cautious abstention from any pronouncement on its merits, in view of its inapplicability to the facts of the case before their Lordships.

(103) Now, therefore, to turn to the question of the merits of the ruling in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 as a question open to consideration untrammelled by anything said in 'MASIT ULLAH v. DAMODAR PRASAD', 48 All 518 as to 'VADIVELAM v. NATESAM', 37 Mad 435, it is well to know how exactly the question arose in the later decision of the High Court so far as it is material for the purpose of the present discussion. There was a sale effected by the plaintiff's father of certain joint family property worth about Rs. 2,000, for Rs. 600 of which Rs. 400 was proved to have been utilised for the discharge of debts binding on the family. The argument for the appellant which fell to be considered was that the whole sale was to be set aside on condition of the plaintiff paying to the vendee Rs. 400/- which he was willing to do, instead of the Court upholding the sale to the extent of the share of the plaintiff's father.

The argument was based upon 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mal 162 but was repelled by the Court (Kumaraswami Sastri and Ramesam, JJ.), Ramesam, J., who delivered the judgment observing thus:

> "But even in 'RANGANATHAM CHETTY v. RAMASWAMI', 27 Mad 162, what was held was that the transaction could be upheld against the family in respect of the alienator's interest in the joint family property only to the extent of the value received and that if the conveyance had

been of a reasonable portion of the joint family property for the discharge of an antecedent debt, the conveyance as such would bind the sons also; but in the circumstances of the particular case it was held that the vendee could not claim the benefit of the sale even as regards the father's share. In that case, even if the sale was regarded as a sale of the father's share, the consideration would be grossly inadequate and to give effect to the sale of the father's share would be to evade the principle of Hindu Law that it is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share, or any portion thereof, and this principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable."

Ramesam, J., thereafter proceeds to deal with 'MARAPPA v. RANGASWAMI', 23 Mad 89 and 'VADIVELAM v. NATESAM', 37 Mad 435 as being cases more in point for and more akin to the case before the Court, in which the transaction was upheld as a sale of the alienor's share only, where the consideration was not grossly inadequate if regarded as consideration for the share only. Once again distinguishing the case before the Court from the case in 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mad 162, the learned Judge observes:

"In the present case if the sale is regarded as a sale of the father's share only, as the share was worth Rs. 500/- the sale could not be regarded as for a grossly inadequate consideration and as practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only. In this respect the facts of the case before us do not resemble the facts in 'RANGANATHAM CHETTY v. RAMASWAMY CHETTY', 27 Mad 162, but resemble the facts of the other cases mentioned above."

From the rest of the discussion in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 there are two things which become clear. One is that the learned Judges in that case did not accept the decision in 'MARAPPA v. RANGASWAMI', 23 Mad 89, as correct in so far as it refused altogether any equity in favour of the refunding of any portion of the purchase money to the vendee found binding on the estate. The other is that the learned Judges equally clearly refused to accept the principle of 'VADIVELAM v. NATESAM', 37 Mad 435 found expressed at page 438 of the report that:

"It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases."

This principle which the learned Judges admit as no doubt correct where the vendor is a divided member, they refuse to accept where the vendor is still a member of the joint family as, if accepted in the latter case as well it would conflict with the statement of law in 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mad 162 where it was observed that:

"the principle that a member of a joint family cannot make a gift of his share cannot be evaded by making a sale for a grossly inadequate consideration and practically making a gift of the property."

The learned Judge therefore hold thus:

"We agree with the observations in 'RANGANATHAN HETTY v. RAMASWAMI CHETTY', 27 Mad 162 and are inclined to dissent from the observations in 'VADIVELAM v. NATESAM', 37 Mad 435."

Thereafter, the learned Judges proceed to consider how exactly the equities in the case would have to be worked out consistently with the Full Bench ruling in 'RANGANATHAM CHETTY v. RAMASWAMI CHETTY', 27 Mad 162 with which they agree.

In considering the question they observe next:

"The result would be if the consideration is distributed over all the shares, and if we then try to uphold the sale even as regards the alienor's share, the sale of that share should (not) be for a possibly inadequate consideration. In the present case the sale of the father's share which is worth Rs. 500 at least would be for Rs. 100 which is his one-fourth share of the consideration proved. Looked at from this point of view the sale of the father's share too would be for an adequate consideration with the result that it cannot be upheld on the principles laid down in '27 Mad 162.' In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share. If it is less than the value of the alienor's share no further equity in favour of the vendee arises. If it is more, for the excess a charge may be given for the share of the coparceners."

The learned Judges further point out in this connection that:

"It may be that in such a case where the consideration is found to be binding on the whole family the effect of alloting the consideration wholly to the alienor's share would be to give rise to some equity in favour of the alienor, for the result of such allotment would be to make him bear the whole of the debt, whereas it is a debt really binding on the whole family. If the family is divided, as a result of this transaction it may be that he may file a suit for contribution but if the family continues undivided there is no need for such equity."

Finally this is what their Lordships say:

"To sum up three possible cases arise:

(1) Where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction will have to be set aside making the consideration proved a charge on the family property. That would be a case resembling '27 Mad 162.'

(2) Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share, but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. The case would then resemble 'MARAPPA v. RANGASWAMI', 23 Mad 89. In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction he or his heirs may have a right to contribution.

(3) Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as the sale of the alienor's share only and for the excess a charge may be given over the shares of the other members."

(104) It will be seen from the foregoing that so far as the first of the rules laid down in the case is concerned there can be no doubt about its soundness. The Full Bench in '27 Mad 162' fully supports it: and there has been no reason shown for the appellant why it should not be accepted. It was argued that the matter of adequacy of the consideration for the alienation of a share of the coparcener is a matter of no moment whatsoever

to the other co-parceners. The ordinary principle that anybody can sell his own property for any consideration he pleases must, it is said, apply to the case of an alienation of a coparcener of his own share in the family property. I am not however prepared to accept this contention. The case in 'RANGANATHAM v. RAMASWAMI CHETTY', 27 Mad 162' has held the field for about half a century and rests on a principle which considering the corporate character of the joint family has never been questioned. In the case contemplated by the rule in question the only equity that can be worked out is of the kind indicated therein which is what '27 Mad 162' itself allows for.

(105) The real question is as to Rules (2) and (3) and the basis on which they rest. They come in, it will be seen, only where even distributing the binding consideration amongst all the sharers, it is impossible to uphold the sale as a sale of the alienor's share even on account of the inadequacy of the proportionate part of the binding consideration even for a sale of the alienor's share only. The exact meaning of these rules has given rise to considerable debate before the Court because of some doubt felt by us during the hearing in regard to the meaning of the word 'consideration' employed in more than one place in the formulation of the rules — as to whether it means the entire consideration named in the deed or the binding part of the consideration. I have carefully pondered over the doubt since reservation of judgment and come to feel on the whole that the meaning of the rules is by no means open to real or serious doubt, whatever their soundness. It seems to me that where the whole consideration is referred to in the rules, that means the whole consideration actually paid for the deed. On the other hand, where the expression used is 'the consideration proved', it obviously refers to the consideration proved to be binding upon the joint family.

(106) Rule (2) in my opinion deals with a case in which the whole consideration is not grossly inadequate and the consideration proved to be binding can be regarded as the price of the alienors share but is less than the value of such share. That the rule should be so read, i.e., by introducing there into the words 'the consideration proved to be binding' — is clear from two circumstances: one is that then only will the illustration in 'MARAPPA v. RANGASWAMI', 23 Mad 89 referred to in the rule stand justified. The other is that Rules (2) and (3) are converse to each other and Rule (3) uses the expression 'consideration proved' which has contracted with the expression 'the whole consideration' or 'the whole of the consideration' occurring elsewhere in the formulation of the rules means 'consideration proved to be binding.'

Moreover, from the last sentence of Rule (2) which refers to the right of contribution of the alienor and after his death, of his heirs at a subsequent partition in the family, it is clear that the consideration proved must refer to the consideration proved to be binding as except on the hypothesis of binding character no right of contribution in respect of the amount assigned to the share of the alienor is reasonably conceivable. The rules have been understood in this manner by the learned Subordinate Judge in the Court of trial and the learned District Judge on appeal in the present case and no difficulty has been expressed by them in the matter of understanding the rules on account of vagueness of language. To condemn the rules on the ground of such vagueness and therefore to overrule them, or to refuse to apply one or the other of them in a given case to which one or other is capable of being applied if understood properly is to create an imaginary difficulty where in fact there is none and to do serious injustice to the learned Judges who decided 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

It is of course a different matter if the rules themselves are unsound if understood in the way mentioned by me and adopted by the Courts below in the present case. Moreover, the rules have been incorporated into Mayne on Hindu Law and Usage in the latest as well as the immediately prior editions and it cannot be presumed that they have been mechanically incorporated by the learned editors without satisfying themselves about what is meant by them.

(107) Now to analyse the rules so incorporated with reference to the principles on which they rest in order to examine the soundness of their foundation, it is clear that after refusing though not in so many terms to accept the view of the learned Judges in 'MARAPPA v. RANGASWAMI', 23 Mad 89, that no equities ought to be worked out at all, the learned Judges in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, set about to ascertain the rules for working out the equities in the light of the very considerations of the true value of the share set forth in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 as grounds rendering such working out impracticable. It is equally clear that they so set about the task on the basis of the principle of the Full Bench ruling in 'RANGANATHAM v. RAMASWAMI', 27 Mad 162 FB that the adequacy of the consideration for the sale by a coparcener of his interest is by no means a matter of no moment to the other coparceners. It is also clear that they set about the task after accepting the principle of distribution of the binding portion of the consideration over the several shares consistently with 'RANGANATHAM CHETTY v. RAMASWAMI CHETTY', 27 Mad 162 and considerations of the true value of the share, but not, in the manner contended for by the appellant before us, i.e., as though the shares were like different items of property subject to a common burden which is liable to be apportioned over them irrespective of the true value of the share alienated as a matter of no moment to the other coparceners.

The learned Judges set about the task by seeking to assign the entire binding portion to the share of the alienor if it is less than the true value of the alienor's share; and by leaving it to him or his heirs to claim contribution at the subsequent partition; and where the binding portion exceeds the value of the share by recognising a charge over the shares of the non-alienating coparceners for such excess. As already noticed, these rules (Rules 2 and 3 as numbered by the learned Judges) come into operation where, even distributing the binding consideration amongst all the coparceners' shares it is impossible to regard the sale of even the alienor's share as anything but for a possibly inadequate consideration. Where on the basis of such distribution there is no such inadequacy the sale stands as in respect of the alienor's share.

It will be seen that this is a rather limited mode of working out the equities in favour of the alienee but more consonant to the conception of a coparcenary continuing even after the alienation and even in respect of the share recovered according to 'KANDASAMI v. VELAYUDHA', 50 Mad 320:51 Mad L J 99. Although in the first instance in the case contemplated by Rule (2) the burden is thrown entirely on the alienor's share there is the provision made for contribution at the subsequent partition in the family. Then again, in the case contemplated by Rule (3) although not expressly so stated, there is room, I imagine similarly for adjustment of rights between coparceners arising

out of possibly more burden being thrown on the alienor's share in the first instance, at the partition to be later on effected between them. The equities laid down by the learned Judges are such as recognised the principle of continuing jointness between coparceners notwithstanding the alienation without at the same time offending against the rule of partial partition well established in Hindu Law from as long ago as 'VENKATACHALA PILLAY v. CHINNAYYA', 5 Mad H C R 166.

These equities commend themselves to me to be better in the sense that they do not go beyond but conform to the limits set by law to use the language of Lord Blanesburg in 'NAGAPPA CHETTIAR v. BRIHADAMMBAL', 58 Mad 350 at p. 362 (PC). To set about working out equities in the manner laid down in 'VADIVELAM v. NATESAM', 37 Mad 435 is in my opinion to revolutionise the Hindu Law by seeking to place the interest of a coparcener on precisely the same footing as the interest of any absolute owner of property in a manner opposed to fundamental conceptions as to the nature of the interest acquired by an alienee from a coparcener too deep-rooted to be destroyed altogether. Whatever the inroads on the original incidents of joint family holding of property already sanctioned by decided cases in the interests of alienees who have parted with consideration or of the personal creditors of a coparcener who has become adjudged an insolvent whether at his own instance or on the petition of a creditor, the right of the alienee remains no more than an equity even according to the latest cases of this Court in 'KRISHNAMURTHI IYER v. NATARAJA IYER', 1948-1 Mad L J 430 and 'SUBBIAH v. VENKATESWARLU', '1948-1 Mad L J 478 and according to the implication of the observation of Sir George Rankin in the Privy Council decision in 'RAMANNA v. JAGANNADHA', ILR (1942) Mad 886 at p. 892 (PC), referred to earlier in this judgment.

While, that may not forbid working out of equities altogether as already observed by me in the course of this judgment, the equities to be worked out must be ascertained within the limits set by law and must be conceived not on the basis that the coparceners have become altogether separated 'quoad' the item which is the subject-matter of the alienation by one of them and of the suit for recovery of his share by the non-alienating coparcener without any need of further adjustments as to that item between them at a later suit for partition in respect of the remainder of the joint family estate but in accord and harmony with the settled principle of continuing jointness of the family, even after such recovery of the share be it as his separate property or private family property with reference to the rest of the property of the family till the jointness becomes disrupted by subsequent partition at which the further equities by way of rights of contribution as between the alienor and his co-parceners may be worked out as arising from the result of the suit of the non-alienating coparcener.

The ground apparently on which the burden of the entire binding debt is thrown in the first instance upon the alienor's share in rules (2) and (3) in the ruling in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, is that in alienating his share for a purpose only partially binding on the joint family property and without the consent of the other members of the family the alienating co-parcener has been guilty of something in the nature of bad faith though not in the sense of a breach of trust in the strict sense of the latter expression in relation to the rest of the members of the coparcenary. But at the same time he is not penalised for his conduct in the ultimate result as the assignment or attribution of the binding portion in its entirety to his share leaves him still with his rights of contribution at a subsequent partition between himself and the other members of the family.

(108) The learned Judges in the case in 'VADIVELAM v. NATESAM', 37 Mad 435, in my opinion, wrought a social reform in the guise of a judicial decision which was not within their province. On the other hand, the learned Judges in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, have attempted to deal with 'MARAPPA GOUNDAN v. RANGASWMI GOUNDAN', 23 Mad 89 and 'VEDIVELAM v. NATESAM', 37 Mad 435, together, by going further than the one but not so far as the other and evolved a formula of compromise or 'via-media' between the two decisions, in consonance with well-established principles, meeting out justice alike to the alienee and to the non-alienating coparcener. The ruling in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, holds the scales as even as possible between the two parties without making of equity a principle of unilateral operation.

It is anomalous enough that under the law as it stands, the alienating coparcener is able to realise the full value of his share by an alienation for consideration and continues to enjoy all the same the advantages of a subsisting state of coparcenary between himself and the other members of his family. It is to add another anomaly to the situation to hold as the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 held, that the alienee, who acquires only an equity in the sense of a right "subject of course to the equities in favour of the other members of the family against the transferor" to use the language of Kumaraswami Sastri J. in 'BALUSWAMI IYER v. LAKSHMANA IYER', 44 Mad 605, is entitled to the kind of equitable apportionment laid down by those learned Judges, notwithstanding the unfair and inequitable conduct of the alienor by means of which he obtains an undue advantage over his coparceners. If the coparceners of a joint Hindu family were in exactly the same position as ordinary co-owners or tenants-in-common the position might differ, and well attract the principle at the basis of 'VADIVELAM v. NATESAM', 37 Mad 435.

On the one hand, for us to refuse equities altogether on the basis of the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89, may be to set the dial back from where it has progressed to in 'VADIVELAM v. NATESAM', 37 Mad 435. On the other hand, for us to sanction the working out of the equities in accordance with the later decision will be to sanction the abrupt precipitation of the motion of the clock which the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435 rather daringly and unwarrantedly promoted. These learned Judges were not right in taking such action and no wonder the learned Judges in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, disapproved of the decision reached in the earlier case.

These learned Judges after taking note of the Full Bench ruling in 'RANGANATHAM CHETTI v. RAMASWAMI CHETTI', 27 Mad 162, contravened by the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435, after recognising the principle of distribution of the binding portion of the consideration over all the shares, given effect to by the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435, in disregard of the considerations as to the true value of the property alienated adumbrated in 'MARAPPA v. RANGASWAMI', 23 Mad 89, only to be rejected for no valid reason, laid down the three rules for working out the equities in favour of the alienee in a sufficiently just and practical manner calculated to satisfy the claims

of the alienee as well as of the non-alienating coparceners. I do not consider the mere simplicity of a formula for working out such equities like the one laid down in 'VADIVELAM v. NATESAM', 37 Mad 435, to be sufficient virtue in itself to attract my judgment. If it were, there would be that virtue even about the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89.

I consider that, however lacking in the simplicity of the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89, or the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435, we ought not on that ground to discard the view of the learned Judges in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, whose names are not a whit less illustrious than those of the learned Judges responsible for the decision in 'VADIVELAM v. NATESAM', 37 Mad 435, especially when that view is the only possible view in harmony with binding precedent as well as the surviving basic principles of the holding of property by the joint Hindu family of the Mitakshara school after all the inroads on it which decided cases of binding authority have made. To add one more to the list of such inroads, which has the effect of further assimilating the share of the coparcener in joint family property to any ordinary, separate property possessed by a person in co-ownership with another so as to destroy the basic distinction between the two kinds of property is a feat from which I shrink with this inevitable conservatism of judicial outlook, which is part of my constitution.

It may be that the progressive conditions of modern Hindu society do require relaxation of some of our ancient rules of law. It may be that some of us do sometimes feel that the share of a member of a joint Hindu family should become much more of a fluid asset than it is at the present day in the interests of commerce and business, in the interests of social as well as individual prosperity. I am afraid, however, I cannot share the view of my learned brother Viswanatha Sastri J. that there will not be many to shed a tear over a conclusion which deals a further blow to the tottering joint family structure. I, for one, am an ardent admirer of the Mitakshara joint Hindu family system with the innumerable virtues which it enshrines and cannot witness such a blow except in a spirit of genuine concern. Whatever that may be, any change in the law can come in through judicial decisions only within limits which govern Courts and for anything beyond must come in by way of legislation.

The question for the Court in such a case, to use the language of the Privy Council in 'LAKSHMAN v. RAMACHANDRA', 5 Bom 48 at p. 62, is not so much whether an admitted principle shall be carried out to its apparently logical consequence as what are the limits of an exceptional doctrine established by modern jurisprudence. The doctrine of equity in favour of an alienee from a coparcener can never in my opinion, however much extended already by judicial decisions, be further extended so as to lay the axe at the very root altogether of the nature which a coparcener holds in the joint family estate. 'VADIVELAM v. NATESAM', 37 Mad 435 sought to so extend the equity. 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, discountenanced the attempt. A regrettable feature of the situation perhaps is that the learned Judges in the latter case did not then and there refer the question on which they differed from the earlier decision to a Full Bench for determination.

Anyhow, now, as the question has come up for determination, I prefer the latter decision to the earlier and while recognising, in disapproval of the ruling in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, that equities have to be worked out in favour of the alienee from a coparcener with reference to the binding portion of the consideration on cancellation of the alienation at the instance of the non-alienating coparcener, I prefer to have the equities worked out in accordance with the rules laid down in the later decision rather than in accordance with the rule laid down in the earlier. It is significant to note that although 'VADIVELAM v. NATESAM', 37 Mad 435 was referred to in Coutts-Trotter's edition of Mayne on Hindu law and Usage, the reference has been removed from the edition of Srinivasa Aiyangar, even as it is not to be found in the latest edition of Chandrasekhara Aiyar J.

The view of law that I am taking may not perhaps look like quite as logical as the view of the learned Judges in 'VADIVELAM v. NATESAM', 37 Mad 435. But that decision went to one extreme even as 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89, had remained at the other extreme. Either of these decisions might be more logical in the abstract than the decision in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824. But after all, it is not abstract logic that so much matters in cases of this kind as the logic of relative consistency between decisions on the same or similar topics. I hold that the balanced and poised view of the learned Judges in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 savouring, it may be, of the mathematical bent of mind of one of them and founded, undoubtedly, in the instincts of a sober and healthy outlook, neither unduly progressive nor unduly conservative, characteristic of both of them meets the requirements of the situation with which we are dealing in a manner most consonant to considerations of law as well as equity.

To the process of working out of equities as laid down in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824 it is difficult to see what just exception the alienee can take. Where the binding part of the consideration is either equivalent to or less than the value of the share of the alienor he cannot have any cause of complaint. Where it exceeds he gets a charge for the excess over the share or shares of the other member or members.

(109) If the binding consideration is the basis on which the question of equities in his favour is to be considered according to 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, how can he complain of it when that is the only basis on which the validity of the alienation in his favour is itself to be considered, where there is no consent to the alienation proved on the part of the other members of the family? After all, the alienation is that of the coparcener's interest in the joint family which ordinarily cannot be disposed of except for fully binding consideration or with the consent of all other members of the family. The alienee acquired that interest, no more, and no better, for the value which he pays. Where that value happens to exceed the binding portion of the consideration he has only to thank himself if it turns out eventually that he has paid more than he ought to have paid for the share which is all that he bargained for and which he ought not to have bargained for at all except on the basis of consent of the other coparceners or on the basis that all that he is paying is for purposes binding on the family.

It is only a qualified estate that a coparcener owns and possesses and no alienee from him can claim equities so as to convert it into an unqualified estate. There are limitations attached to it as inherent incidents and the coparcener cannot alienate nor the alienee acquire more than the limitations warrant. Such limitations exist in the case

of a widow and daughter in what is not her stridhanam property and neither there nor here can any Court destroy them or do away with them, however unpalatable they may be. The fact of payment of consideration which is of the essence of the equity invokable by the alienee can only justify the working out of equities consistently with the limitations attaching to the estate conveyed.

If no Court can destroy or do away with such limitations directly, neither can it destroy nor do away with them indirectly under the guise of working out of equities. No Court has the power to enlarge an estate beyond the limits set by law and if the equities worked out consistently with such limits still leave the alienee in the position that he is not thereby getting the full 'quid pro quo' for the consideration paid by him, he has of course his remedy under the ordinary law for damages for breach of covenant for title, where the covenant exists as usually it does. Where, however, the covenant stands excluded by the terms of the bargain between the parties he has only to please himself with what he gets as a result of the working out of equities according to the rules in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

(110) I may also mention in this connection that there is to be found in '27 M L J', notes of Indian cases at page 62 a learned note expressing preference of 'MARAPPA GOUNDAN v. RANGASWAMI', 23 Mad 89 to VADIVELAM v. NATESAM', 37 Mad 435 and setting forth grounds for the preference. Although for the reasons given by me in the foregoing, I cannot accept '23 Mad 89' as sufficiently meeting the requirements of equity in favour of an alienee for consideration it seems to me to use the language of the learned Editors, that from their tenderness to purchasers and creditors Courts have proceeded sufficiently far in derogation of the rights of coparceners that they may properly be asked to halt and consider whether it is right to remove altogether, what seems to be a desirable check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto which the learned Judges in '23 Mad 89' had in mind. 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, preserves the check not in the wrong manner laid down by '23 Mad 89', i.e., by refusing equities altogether but in the right manner best calculated to reconcile the interests of the alienee as well as the other coparceners, i.e., by working out the equities in the limited manner and measure sanctioned by its three rules. I accordingly accept it.

(111) Considerations of equity are sometimes apt to mislead Courts and deflect them from the proper path of law. That happened for instance in the case in 'GOVINDU v. VENKATAPATHI', ILR (1947) Mad 105, where Leach C. J. delivering the judgment of the Court consisting of himself and Lakshmana Rao, J., in a case which related to the validity of an alienation by a limited estate holder like a Hindu widow held thus:

> "where owing the lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of enquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, we consider that the cases quoted (noticed above in this judgment) provide ample authority for the Court disregarding the ordinary rule of Hindu law and drawing an inference in favour of the validity of the alienation. In such circumstances, it would be unreasonable not to recognise an exception to the rule; otherwise grave injustice might result."

This view of the learned Chief Justice and Lakshmana Rao J. has been since overruled by a Full Bench of this Court consisting of the present Chief Justice, Satyanarayana Rao and Viswanatha Sastry JJ. 'SUBRAMANIAH v. SOORAYA', ILR (1950) Mad 1053, Viswanatha Sastri J. in his judgment observes:

> "In our opinion, it is not permissible for us to convert a rule of evidence into a rule of substantive law. Lapse of time does not alter the incidence of the burden of proof nor does it dispense with evidence direct or circumstantial, to prove justifying necessity for an alienation by a limited owner under the Hindu Law."

Equity ought never in my opinion to be pressed into service for over-stepping the limits set by law.

(112) To sum up now the several conclusions reached by me on this part of the case:

1. 'MARAPPA v. RANGASWAMI', 23 Mad 89 cannot be accepted as good law in so far as it refuses equities altogether to the alienee in the suit for partial partition by the non-alienating coparceners;
2. 'VADIVELAM v. NATESAM', 37 Mad 435 cannot be accepted as good law in so far as, while rightly sanctioning the working out of equities in such a case, the rule adopted by it for the purpose is one opposed to fundamental conceptions pertaining to the nature of a coparcener's interest in the family estate as well as to the nature of the right which the alienee acquires;
3. 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, must be accepted as good law as sanctioning the working out of equities in accordance with such fundamental conceptions and within and only within the limits set by law.

(113) These conclusions I have reached, bearing in mind and applying to the case on hand the principles embodied in propositions Nos. 1 to 9 formulated in an earlier part of this judgment. After reaching these conclusions, I have also anxiously considered whether I should differ from my learned brothers on what may seem to be a point of practice and procedure, the proper mode of working out of equities in favour of the alienee from a coparcener where the alienation is only partially supported by binding consideration. I have finally made up my mind to differ for the reason that the point is so much mixed up with principles of substantive law that if differ I do, differ I must.

(114) I may mention two points of relatively subsidiary importance before I close my treatment of this part of the case. One is that both the rulings in 'MARAPPA v. RANGASWAMI', 23 Mad 89 and 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, are shown side by side with each other in Mayne on Hindu Law and Usage in the present edition as well as in the edition immediately prior to it. It is stated first at page 508 in paragraph 407 of the latest edition:

> "Where an alienee stands by an alienation which is only partially binding he must be content with the alienor's share. If he wishes to repudiate the transaction altogether his 'only' remedy is by a suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed."

In the same paragraph it is further stated:

> "When an objection sues to set aside the alienation the following rules of the Madras High Court in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, are applicable."

The rules are thereafter stated. From the juxtaposition of the two passages quoted, without notice of any conflict between them it may appear that the remedy suggested to the alienee in 'MARAPPA v. RANGASWAMI', 23 Mad 89, is one which coexists with the remedy by way of working out of

equities as laid down in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824. I wish to make it clear that in my opinion that is so, notwithstanding the difficulty created by the word 'only' underlined (here quoted) by me in the first passage. It is only in the sense that equities were refused altogether to the alienee against a non-alienating coparcener by the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89 where he chose to stand by the alienation, that it must be taken that the ruling in 'MARAPPA v. RANGASWAMI', 23 Mad 89 is no longer in my opinion good law. The remedy of a suit against the vendor for the return of the price paid on the ground of failure of consideration in the case of total repudiation of the transaction by the non-alienating coparcener stands altogether unaffected by the ruling in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824.

The remedies are alternative and it is open to the alienee to choose the one or the other as he pleases. If it is a question of working out of equities as I have already said that must be in accordance with the ruling in 'VENKATAPATHI v. PAPPIAH', 51 Mad 824, which I consider to be correct and not in accordance with the ruling in 'VADIVELAM v. NATESAM', 37 Mad 435, which I consider to be wrong.

(115) The other subsidiary point with which I propose to shortly deal is as to the effect of S. 44 of the T. P. Act, (as amended in 1929, by the omission of the words 'Hindu or Buddist' in the concluding part of S. 2 of the T. P. Act) on the right of mesne profits which under well-settled decisions of this Court stands denied to an alienee from a coparcener. It is the opinion of Mayne on Hindu Law and Usage in the latest edition as well as the edition immediately prior thereto (Vide para 391, p. 493 of the latest edition) that the result of the amendment of the Act in 1929 is that:

> "While the transferee of a share of a dwelling house belonging to an undivided family is not entitled to joint possession, the transferee of a share of other immoveable property is entitled to joint possession and enjoyment; he would be tenant-in-common entitled to meshe profits if he is kept out of possession."

As pointed out by my learned brother, Satyanarayana Rao J., in his judgment, this opinion has not been followed in this Court by Chandrasekhara Aiyar J. in second Appeal No. 940 of 1945 or by Tyagarajan J. in Second Appeal No. 2339/45 and 95/46 or in the Letters Patent Appeal decided by Horwill & Balkrishna Aiyar JJ. against the latter decision in affirmance of the view of Tyagarajan J. The view expressed by Mulla in his commentary on the T. P. Act (3rd Edn.) which has been followed in these decisions for the reasons given therein is in my opinion preferable to that expressed in Mayne on the Hindu Law and Usage.

(116) There remains for treatment only the question of the effect of a coparcener's adjudication in insolvency and the administration of his share of the family estate by the Official Receiver upon the decision of this case. The way in which argument was framed by the learned counsel for the respondent on this point has been set forth by me in a very early part of this judgment. As I observed there, the question does not strictly arise for determination in this case because of the allegations in the plaint of a continuing jointness between the plaintiff and the first defendant down to the date of suit. What I am saying therefore on this question is bound to be 'obiter' even as what this Bench saying on the question as to the proper mode of working out of equities is bound to be. Since on this question also the other members of the Court have expressed their opinion it may not be out of place for me to say just a few words of my own on this question.

(117) The point which Mr. Venkatasubramania Aiyar sought to make is that with the crystallisation of the share of a coparcener on his adjudication for separate treatment by the Official Receiver or Official Assignee, there is an automatic severance of statute which comes about in the family. Partition, says learned counsel, is as defined by Mitakashara and other relevant texts "the adjustment of diverse rights regarding the whole (of the joint estate) by distributing them over particular portions of the aggregate". Therefore, as in the case of an unilateral declaration by a coparcener of his intention to become divided so, according to Mr. Venkatasubramaniam, there results irrespective of any such violation on the part of the coparcener a fixation of his right on insolvency.

It is absolutely beyond doubt that the ancient texts on Hindu Law never contemplated any such situation as of insolvency or any such results as of severance. I respectfully agree on this question with all that has been said by my learned brothers in their judgments. Their treatment of the question is so exhaustive and their conclusion is so obviously sound to my mind that I reckon it to be a sheer waste of judicial time to seek to add one single further word of my own to their judgments.

(118) In the result, I agree with the decree proposed by my learned brother, Satyanarayana Rao J.

(119) PANCHAPAKESA AYYAR, J.: I have gone through the judgments of my learned brothers and am in agreement with them that this second appeal should be allowed with costs throughout and the respondent made to pay half the binding debt (Rs. 3,511/-) as a condition precedent for recovering his half share in the property alienated by his father, P.W. 1, before his insolvency, and for claiming mesne profits, and that the rule in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435 should be applied, in preference to the rules in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824 but subject to the application of the rule in 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mad 162 as it is too well settled to be disturbed now and as it also, according to me, embodies the simplest and most easily workable rule of sound equity and justice.

I am also of opinion that even apart from the ruling in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, the scope of this suit, a partition suit brought by the respondent for getting his half share in the entire remaining family properties divided and delivered to him allowing the appellant alienee to retain the father's half share in the alienated properties, is wide enough to work out the equity of the alienee under the Hindu Law, as a purchaser for value from an undivided coparcener, in this suit itself, by stepping into his alienor's shoes and working out his right to get his share partitioned, and give him the relief regarding half the binding debt discharged by executing the sale-deed in his favour. I am also convinced that the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver did not effect a severance in status between father and son and make this suit in consequence not a suit for partition.

In view of the importance of the matter, I wish to add a few words on some aspects of the general and particular arguments so ably and vividly addressed to us by Mr. Venkatasubramania Iyer for the respondent. His arguments were a passionate plea to set aside the rule in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435 on the ground of

alleged error, inconsistency with the law laid down by the 'Mitakshara' and in the ruling in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824 and its inequity, and also to rule that the suit would not amount to a general suit for partition, allowing of the equity to be worked out apart from the rule in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435 as the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver had effected a severance in status, leaving no more scope for partition or equity. After listening to his arguments with great attention and respect, I am unable to agree with them.

(120) There is no doubt whatever in my mind that a private purchaser from an undivided Hindu coparcener in Madras, Bombay and Madhya Pradesh (old Central Provinces and Berar) gets not merely a right in 'personam' or a right to sue, as urged by Mr. Venkatasubramania Iyer, but a tangible property right, whether in law or equity it does not very much matter, a right which, according to settled decisions which it is too late to question or disturb, does not disappear at the death of the alienating coparcener (See 'BHAGWAN BHAU v. KRISHNAJI', 44 Bom 967 and 'RAMAPPA v. YELLAPPA', 52 Bom 307 and which gets fixed at the alienating coparcener's estimated fractional share in the joint family properties at the time of the alienation, as it were crystallising it as on that date 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 FB and 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15.

In a very early case, 'VIRASWAMI GRAMANI v. AYYASAMI GRAMANI', 1 Mad H C R 471, quoted with approval by the Privy Council in 'SURAJ BANSI v. SHEO PRASAD', 5 Cal 148 PC, this Court decided, on the basis of an equity not recognised by the 'Mitakshara' but invoked by Colebrooke, Ellis and Strange, that in the Presidency of Madras one coparcener may dispose of his ancestral undivided estate even by contract and conveyance to the extent of his own share and a 'fortiori' that such share may be seized and sold in execution for his separate debt. This equity is, in my opinion, not altogether undeducible from Hindu Law and need not be wholly attributed to English Law, an alien system, as urged by Mr. Venkatasubramania Iyer. Equity was well-known to Hindu sages who put "swasya cha priyamatmana:" (what is approved by one's conscience, literally, what is acceptable to one's soul), as a source of law along with the 'Sruti, Smriti and Sadachara:' (Vedas', 'Sastras' and valid custom.) (See Manu. II 12; Yajnavalkya 1. 7 etc.)

Hindu sages wanted equity to step in, in order to render justice where the text of the 'sastra' would operate to bring about inequity, Brihaspati's text (quoted in 'Vyavaharanirnaya of Varadaraja' and other books) runs:

KEVALAM SASTRAMASRITYA NA KARTAVYOHI NIRNAYA; YUKTIHINE VICHARETU DHARMAHANI: PRAJAYATE.,

(The decision should not be based only on the 'sastras.' By an inequitable judgment there is permanent loss of 'Dharma.')

(121) Nor is Hindu Law devoid of examples of change of law for equitable considerations, despite texts, even Vedic texts, to the contrary. Thus, a Vedic Text by describing women as "nirindriya" (devoid of the necessary limbs), was sought to deprive women of all right to property by giving it the meaning "impotent" and quoting the well-known text "Anansaukliba patitan." But, Varadaraja and others got over this property disqualification by giving an equitable interpretation to the word "nirindriya" and making it merely a disqualification to receive a share in the 'soma juice' in a certain sacrifice. Emperor Dushyanta seems to have been responsible for giving posthumous children in the womb a share at partition, out of equitable considerations, enunciating the equitable doctrine, "The King stands as the father of all unborn posthumous children."

(122) The reverse also happened sometimes. Vyasa said categorically: (See Viramitrodaya):

STHAVARAM DVIPADAMCHAIVA YADYAPI SVAYAMARJITAM SAMBHUYASUTAN SARVAN NA DANAM NACHA VIKRAYA: YE JATA YEPYA JATASCHA YE CHA GARBHEVYAVASTHITA: VRITHIM CHA TEBHIKAMKSHATI NA DANAM NA CHA VIKRAYAM."

(Though immoveables and bipeds (slaves or serfs attached to land are meant) have been acquired by a man himself, a gift or sale of them should not be made without consulting all the sons. They who are born and they who are yet unbegotten and they who are still in the womb require the means of support. So, no gift or sale of these should be made.) But this rule has been abrogated, though quoted both in the 'Mitakshara' and the 'Dayabhaga', for equitable reasons, regarding self-acquired property, on the ground that it is a mere religious and moral injunction and merely recommendatory, and not a rule of positive law, and mandatory, and that Yagnavalkya's text permitting such gift or sale will prevail.

(123) Manu treats sale without ownership as theft, and such a sale, if made secretly (say, without the knowledge of the other coparceners) will increase the presumption of guilt. The seller of immovable property who did not give possession to the purchaser, after receiving the consideration from him, was held liable for punishment like a thief, and the purchaser was given compensation in money or in equivalent property (See Texts of Manu, Brishaspati, Katyayana, Sankha and Vyasa, quoted in 'Vyavaharanirnaya' of Varadaraja, Pages 274 and 277 Adyar Edn. 1942, edited by Professor K. V. Rangaswami Aiyangar). The equity given by Colebrooke, Ellis and Strange, and by our Courts, to the purchaser from an undivided coparcener, whether of entire interest or his interest in a specified item or the whole of a specified item, can easily be fitted in with the equity given by Brihaspati, Katyayana, Sankha and Vyasa, as it is only compensation in money or in equivalent property in a suit for partition or partial partition. The imperfect alienor is made to give over his right of partition to the alienee for value and repair the damage just as the raper or seducer of a woman in Hindu times was made to repair the damages by marrying her in 'Rakshasa and 'Paisacha' forms. So, I see no violent departure from ancient Hindu Law principles in granting this equity.

Indeed, an ancient and vigorous law, like Hindu law, existing for at least three thousand years continuously, must, it is obvious, change from time to time in some way for adjusting itself to changing times and conditions to meet the needs of a progressive society. The sages recognised this, as is shown by Parasara's famous verse:

'Krite tu manava dharmastretayam Gautama: smrita; 'Dwapara Sankha Likshita; Kalau Parasara smrita:" (Parasara I. 24) (In the 'Krita' age the 'Dharmasastra' of Manu, in 'Treta' age that of Gautama, in 'Dwapara' age the 'Dharmasastras' of Sankha and Likshita, and in 'Kali' age the Dharmasatra of Parasara shall be followed.)

(124) It will be a mistake to regard Hindu Law as static and unprogressive, as some western historians do. It has always been changing with the changing times though imperceptibly so far,

like the waters of the Ganges or the stones of the Himalayas. The recognition of the purchaser's equity was necessitated by the paramount need to enable undivided coparceners to raise money on their undivided shares, and get a good value for sale of such shares, by giving them "specific, existing and definite" rights (recognised in 'TUFZOOL HUSSAIN KHAN v. RAGHOONATH PRASAD', 14 Moo Ind App 40, in the joint family properties when making such purchases.

(125) I consider the rule in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435 to be more simple and workable and not less equitable than the rule in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 or the somewhat extended rule in 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824. When a non-alienating coparcener's right to sue for his share in an alienated item (leaving the alienating coparcener's share in that item with the alienee) is recognised, as in 'VENKATACHALA v. CHINNAYYA', 5 Mad H C R 166, 'IBURAMSA ROWTHER v. THIRUVENKATASWAMI', 34 Mad 269, 'RAMASUBBAYYA v. GANAPATIRAJU', ILR (1940) Mad 405 etc., and a right of partial partition virtually conceded to him, I do not see any inequity in allowing the alienee his equity regarding the share of the binding debt due by the non-alienating coparcener in that partial partition suit itself. What is sauce for the gander ought to be sauce for the goose too! The Hindu texts mentioned above allow of both compensation in money as well as equivalent property in all such cases of sale without proper and full title. There is no reason in law or equity to throw the entire binding debt on the alienating coparcener's share, as the decisions in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89 and 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824 virtually do.

I cannot see how a purchaser for value, like this appellant, can be termed a 'volunteer" in the best known sense of that term, namely, a person who has paid no consideration. Nor is he a person who never intended to buy what he claims, like a man buying a widow's estate claiming the reversion. Nor is he a man volunteering to buy what he knows to be against law, like a man buying the High Court building even for consideration from a High Court peon or gardener, or buying some property from a lunatic or ignorant 'purdhanashin' guardian of a minor, even for consideration, after using undue influence or fraud. It is also significant that in 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824, the purchaser is given, under proposition three, some more equity in such partial suit than in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN', 23 Mad 89. I agree with my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., that the three propositions laid down by Ramesam, J., in 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824 are not capable of being given definite meanings without doubts and misgivings, as the word "consideration" has been used by Ramesam, J., in two senses, namely, the entire consideration named in the deed and the binding part of that consideration.

So, I am for adopting the rule in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, laid down by two eminent Hindu Judges and followed in so many later rulings of this Court by other eminent Judges, once for all, and also the rulings in AYYAGARI VENKATARAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690, 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 FB. and 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15, subject to the rule in 'RANGANATHAN CHETTY v. RAMASWAMI CHETTY', 27 Mad 162, prohibiting gifts to pass off in the guise of sales for nominal amounts, in preference to the rulings in 'MARAPPA GOUNDAN v. RANGASWAMI GOUNDAN", 23 Mad 89 and 'VENKATAPATHI v. PAPIAH NAYAKAR', 51 Mad 824.

(126) Mr. Venkatasubramania Iyer urged that the principle of 'stare decisis' should not be applied in this case as the rulings in 'VADIVELAM PILLAI v. NATESAM PILLAI', 37 Mad 435, 'AYYAGARI VENKATARAMAYYA v. AYYAGARI RAMAYYA', 25 Mad 690; 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 FB and 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15 are wrong and inequitable. I do not consider them to be wrong or inequitable. I may also say that the principle of 'stare decisis' will apply even if they are wrong. The Privy Council has in 'BRIJ NARAIN v. MANGALA PRASAD', 46 All 95 said:

> "In such a matter as the present, it is above all things necessary as 'stare decisis', not to unsettle what has been settled by a long course of decisions."

In law, as in custom, 'certainty' and 'long observance' are of far greater importance than 'logicality' or 'abstract equity.' Even Hindu Nyaya Sastras recognise this principle under the doctrine of 'Visha Vriksha Nyaya (Poison tree argument) which is stated as follows:

> "Even a poison tree planted by oneself should not be cut down after it has taken root and has been enumerated."

For that reason, I am not for following the ancient and abandoned course of the stream of law represented by the decisions in 'RANGASWAMI v. KRISHNAYYAN', 14 Mad 408 and 'MUTHUKUMARA v. SIVANARAYANA', 56 Mad 534 (which have greater logicality and abstract equity) and the supporting observations in 'VENKU REDDI v. VENKU REDDI', 50 Mad 535 and I am for following the new and current course of the stream of law represented by the rulings in 'CHINNU PILLAI v. KALIMUTHU CHETTY'(35 Mad 47 and 'DHARMA RAO v. BAPANAYYA', 1941-1 Mad L J 15 as laying down the present law on this point. Decisions followed uniformly for three decades like 'CHINNU PILLAI v. KALIMUTHU CHETTY', 35 Mad 47 do not deserve to be disturbed.

(127) I agree with my learned brothers that the purchaser from an undivided 'Mitakshara' coparcener in this State does not become a tenant-in-common with the non-alienating coparceners and is not entitled to joint possession with them or to get mesne profits from them, despite the omission of the word "Hindu" from S. 2 of the Transfer of Property Act, making Section 44 of that Act applicable to the Hindus as well. I agree with the reasons given by my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., for that, and have nothing to add.

(128) I am clearly of opinion that the frame of the suit brought by this respondent is ample enough to allow of the purchaser's equity being worked out in this very suit, the respondent made to pay half the binding debt as a condition precedent for recovering his half share in the properties alienated to the appellant and the mesne profits on that half-share. The pleadings show that it is a general suit for partition, and the suit is filed on the basis of non-division between the respondent and his father on the date of the suit. The respondent also examined his father, as P.W. 1, to prove non-division between the two till the date of the suit. The plaint has not been amended. And I cannot also conceive of permission being given to amend the plaint at this stage. Besides,

the alienation in favour of the respondent was before the father's insolvency, and neither the subsequent insolvency of the father nor the administration of his interest in the family property by the Official Receiver will have the effect of severing the father's interest from the respondent's interest.

(129) The analogy of conversion of a coparcener to Islam or Christianity effecting a severance in a Hindu Joint Family without agreement or unilateral consent, and indeed against the will of one and all the members, was relied on by Mr. Venkatasubramania Iyer to show that even adjudication in insolvency will effect a similar severance, as agreement and consent, even unilateral, is not needed to effect severance. He relied also on the observations of the Privy Council in 'VENKATAPATHIRAJU v. VENKATANARASIMHARAJU', ILR (1937) Mad 1 P C:

"A division of right, of severance of the joint status, may result, not only from an agreement between the parties, but from any act or transaction which has the effect of denying their shares in the estate, though it may not partition the estate."

I agree with my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., that the phrase "any act or transaction" in that passage has reference only to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals etc., all involving an expression of "buddhivisesha" (the exercise of the will of a coparcener), and that it has no reference to acts of purely third parties like an attachment or Court sale of a coparcener's interest or his adjudication in insolvency.

It may well be said that a Hindu can never become a member of a joint family by mere consent and can never leave it without consent. Conversion effects a severance of the convert from the joint family only by virtue of Act XXI of 1850 removing the Hindu Law disqualification from inheritance regarding a convert who was regarded as a dead in Hindu law, obsequial ceremonies being performed for him, and he given no share at all, and the decision of the Privy Council in 'ABRAHAM v. ABRAHAM', 9 Moo Ind App 195 PC, comparing the situation arising from conversion to one arising from partition. It may also be noticed that in this case an implied consent of the converted coparcener and the unconverted ones to partition may perhaps be with some strain inferred, as the unconverted ones will not be willing to have common mess, dwelling and worship, the essence of a Hindu joint family, with the converted man. In insolvency, however, there is no such implied consent, or impossibility of having common mess, dwelling and worship.

Shakala says:

"EKAPAKENAVASATANEMEKAM DEVARCHANAM GRIHE VAISVADEVAM TATHAIVAIKAM VIBHAKTANAM GRIHE GRIHE."

(Those who live in the same mess, have one worship and one fire likewise in their home are coparceners. Separated coparceners have got separate worship and fire in each house.) (Shakala, quoted in the 'Mayukha'.)

(130) It is not necessary for a Hindu joint family to have any property (See 'JANAKIRAM v. NAGAMONEY', 49 Mad 98. Hindu sages did not say anything about insolvency perhaps because there were no provisions in those days for insolvents being adjudicated and protected and their available assets distributed. The equity rule has been extended by modern Courts for the benefit of the insolvent and his creditors as to purchases from an undivided coparcener. For the reasons given in detail in the judgments of my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., with which I fully agree, I am satisfied that neither adjudication as an insolvent nor administration in insolvency effects a severance of the joint family status of the insolvent 'vis-a-vis' the other coparceners. No decision has ever laid down like that. All decisions proceed on the footing that no severance of joint family status takes place by insolvency or administration in insolvency.

Mr. Venkatasubramania Iyer urged that the adjudication or at least the administration in insolvency effected a change from the common right of the insolvent to the 'Dravyasamudayam (Collective wealth) into a crystallised separate right to a share (Ekadesavyavasthapana mentioned in the Mitakshara) and so effected a severance. But, as pointed out by my learned brothers, Satyanarayana Rao and Viswantha Sastri, JJ., the 'Ekadesavyavasthapana' of the Mitakshara obviously refers only to an actual partition of the properties by metes and bounds, or heaps and shares, and not to any division by status. Besides, what is to happen in the case of the adjudication as insolvent of a coparcener of a joint family owning or holding no property? What about the unattachable properties not vestable in insolvency in the Official Receiver like trust properties, properties exempt under Section 60 C.P.C., etc? Indeed, even the very able argument of the learned counsel for the respondent in this 'respect' is like the argument on a hopelessly untenable point referred to in the 'Nyaya' books, where no sooner is one objection met than two more appear, and where the argument is compared to a well dug in sandy soil where the sides will always be falling in.

(131) In this case, happily, there is no difficulty in working out the equity as there are no other family debts or liabilities proved, and there is no increase or decrease even in the number of the coparceners, and only the debt of Rs. 7,022/- has to be divided into two, and the plaintiff made to pay his half share as condition precedent.

(132) So, I am also of the opinion that the decree of the Courts below must be modified by directing the plaintiff to deposit into the trial Court a sum of Rs. 3,511/- as a condition precedent to his recovering his share in the suit properties in the hands of the appellant and the mesne profits from that half share (which can be claimed only from the date of such deposit) and that the respondent should pay the appellant's costs throughout and agree to the decree proposed to be passed by my learned brother Satyanarayana Rao, J.

C.R.K./D.H. *Order accordingly.*

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RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

G. Michael, Petitioner v. Mr. S. Venkateswaran, Additional Secretary to Government, Public (Elections) Department, Fort St. George, Madras, Respondent.

Writ Petn. No. 601 of 1951, D/- 6-11-1951.

(a) Constitution (Scheduled Castes) Order, 1950, Paras. 2 and 3 — Para. 3 does not imply that person professing religion different from Hinduism is member otherwise of scheduled caste — (Constitution of India, Art. 341 (1)).

Reading paragraphs 2 and 3, the result is as if the Hindu parts of or the Hindu groups within the castes specified in the schedule shall be deemed to be scheduled castes. The words "notwithstanding anything contained in paragraph 2" appearing in the beginning of para. 3, does not necessarily imply that a person who professes a religion different from Hinduism is a member otherwise of a scheduled caste. Such expressions are almost invariably used in provisions inserted by the legislature by way of abundant caution to remove any possible doubt which might arise in the application of a substantive provision.

Paragraph 3 should be read in conjunction with paragraph 2 and so read, the Order in effect specifies those parts of, or groups within the enumerated castes which profess the Hindu religion and directs that they should be deemed to be scheduled castes. Though in form para. 3 is negative in substance the definition is positive. (Paras 5, 18)

(b) Constitution (Scheduled Castes) Order 1950 — Paragraphs 2 and 3 — Converts from Hinduism do not fall into category of scheduled castes — Order is within powers of President and valid — (Constitution of India, Article 341 (1)).

Instances can be found in which in spite of conversion from Hinduism the caste distinctions might continue. This is somewhat analogous to cases in which even after conversion certain families and groups continue to be governed by the law by which they were governed before they became converts. But these are all cases of exception and the general rule is conversion operates as an explusion from the caste; in other words, a convert ceases to have any caste. Paragraph 3 of the Constitution (Scheduled Castes) Order proceeds on this general assumption and does not take notice of individual exceptional instances. When in any locality, in spite of conversion caste distinctions continue as a general rule, then the President evidently takes notice of it. The proviso to para. 3 of the Order illustrates this. Presumably on the information which must have been placed before the President he was not convinced that as a general rule the persistence of caste differences obtained in other parts of the Union in spite of conversion to other religions. It may be that the President was mistaken or his information was incomplete; but it is not open to the Courts to sit in judgment over his decision. It is clear that President has not arbitrarily specified a part or group which has no independent objective existence. The Hindu section of a particular scheduled caste has certainly such an existence, though in exceptional cases some converts might still be members of the caste to which they belonged before conversion. The Constitution (Scheduled Castes) Order is valid and within the powers of the President. (Paras 17, 17a, 20, 21)

(c) Constitution (Scheduled Castes) Order, 1950, Para 3—"Professes" means "belongs to".

The expression "professes" in Paragraph 3 is intended to have the same meaning as the expression "belongs to" and a person belongs to a religion either by birth or by conversion. Mere sympathy with or admiration for particular tenets of any religion by a person who was not born in it and who has not been converted to it would not bring him within the meaning of the expression "professing a particular religion." Equally if a person has been born into a particular religion and has not been converted to another religion the mere fact that he is of an unorthodox type or has no belief personally in the tenets of that religion would not take him out of the category of a person professing that religion. (Para 19)

K. Venkatasubramania Aiyar, for Petitioner; Advocate-General, for State Counsel, for Respondent.

RAJAMANNAR C. J.: Article 330 (1) of the Constitution provides that seats shall be reserved in the House of the People for the Scheduled castes. Article 332 (1) similarly provides for the reservation of seats for the Scheduled castes in the Legislative Assembly of every State. The expression "Scheduled castes" is defined in Art. 366, clause 24 as meaning:

> "Such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be scheduled castes for the purpose of this Constitution."

Article 341 (1) now runs as follows:

> "The President may, with respect to any State, or where it is a State specified in Part A or Part B of the First schedule, after consultation with the Governor or Rajpramukh thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled castes in relation to that State."

In exercise of the powers conferred by clause (1) of Art. 341, the President made an order called the Constitution (Scheduled Castes) Order, 1950. The material provisions of this Order are paragraphs 2 and 3 which are as follows:

> "2. Subject to the provisions of this Order, the castes, races or tribes, or parts of, or groups within, castes, races, or tribes, specified in Parts 1 to XVI of the Schedule to this Order shall, in relation to the States to which those parts respectively relate, be deemed to be scheduled castes so far as regards members thereof resident in the localities specified in relation to them in those Parts of that schedule.
> 3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from Hinduism shall be deemed to be a member of a scheduled caste."

(2) The petitioner alleges that he is a member of the Paraiyan caste which is item 64 in Part V of the Schedule to the Scheduled Castes Order. Admittedly, he is a convert to Christianity. He therefore would be a person professing a religion different from Hinduism and therefore under paragraph 3 of the Scheduled Castes Order would be deemed not to be a member of a scheduled caste. He desires to stand as a candidate for a seat reserved for the Scheduled Castes and he can do so only if he is deemed to be a member of a Scheduled Caste. As the aforesaid provision prevents him from so standing, he has filed

the above application for adequate relief from this Court.

(3) Learned counsel for the petitioner contended that paragraph 3 of the Order in question is not valid as it is beyond the power conferred on the President by Art. 341 (1). The President can no doubt specify the castes or parts of or groups within castes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes. But he cannot artificially or arbitrarily create a part of or group within a caste. The part or group must have a separate objective existence independent of the President's fiat. The President can only specify a part or group which has such an independent existence, even before he specifies it. He cannot create a part or group by specifying it. He cannot, for instance, say that only the illiterate members of a particular caste shall be deemed to be a Scheduled Caste or members of the caste who do not own any property. No doubt, persons could be selected on such a basis and formed into a part or group; but Art. 341 does not contemplate such a part or group. So ran one part of the argument of the petitioner's learned counsel.

(4) The other part of the argument was based on the form of the rule embodied in paragraph 3. It is negative in character it was submitted. It assumes that a particular person would otherwise be a member of a scheduled caste but because the person happens to profess a religion other than Hinduism he is taken out of the category of a scheduled caste. This is beyond the powers of the President under Art. 341.

(5) The second part of the argument does not call for much discussion. It is true that the rule is in a negative form; but reading paragraphs 2 and 3, the result is as if the Hindu parts of or the Hindu groups within the castes specified in the schedule shall be deemed to be scheduled castes. We do not agree with the petitioner's learned counsel that the words "notwithstanding anything contained in paragraph 2" necessarily imply that a person who professes a religion different from Hinduism is a member otherwise of a scheduled caste. Such expressions are almost invariably used in provisions inserted by the legislature by way of abundant caution to remove any possible doubt which might arise in the application of a substantive provision. We must take it that what the President has specified is that part of or group within the castes enumerated by him which consists of persons professing Hinduism.

(6) Mr. Venkatasubramania Iyer learned counsel for the petitioner incidentally addressed an interesting argument in which stress was laid on the expression "professes a religion different from Hinduism". Learned counsel asked, what about a free thinker, an agnostic or an atheist? He would not be professing any religion at all. He also dwelt on the extremely liberal tenets of Hinduism which can assimilate every one of the religions of the world.

(7) As this case must be decided without the help of any decided authority and more or less as a matter of first impression, it will not be out of place to set out what appears to me to be the background and the basis of the provisions relating to the scheduled castes in our Constitution. The preamble to the Constitution contains the solemn resolution of the people of India to secure to all its citizens "justice, social, economic and political" as well as "equality of status and of opportunity." Though the general rule is equality, equal protection of the laws and non-discrimination (vide Arts. 14 and 15 (1)), the scheduled castes and tribes are placed in a comparatively favoured position. The new clause added to Art. 15 by the Constitution (First Amendment) Act 1951 says that nothing in Art. 15 or in clause 2 of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.

Article 16 (4) empowers the State to make provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 335 specifically enjoins that the claims of the members of the scheduled castes and the scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. It has already been mentioned that Arts. 330 and 332 provide for the reservation of seats for the scheduled castes in the legislatures of the country.

Article 338 contemplates the appointment by the President of a Special officer for the scheduled castes and scheduled tribes whose duty is to investigate all matters relating to the safeguards provided for them under the Constitution and report to the President upon the working of those safeguards. These reports are to be laid before each House of Parliament. Under Art. 340 (1) the President may appoint a Commission to investigate the conditions of socially and educationally backward classes and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition. Besides these imperative provisions of the Constitution, there is Art. 46 in the Part embodying the directive principles of the State Policy which is in the following terms:

> 2. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation."

It must be mentioned that this category of scheduled castes is not an original creation of the new Constitution. It is a part of the legacy from the British days. The Government of India Act, 1935, provided for reservation of seats for scheduled castes. Paragraph 26 of schedule I of the Government of India Act, 1935 defined scheduled castes as:

> "such castes, races or tribes or parts of or groups within castes, races, or tribes being castes, races, tribes, parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as the 'depressed classes', as His Majesty in Council may specify."

(8) The Government of India (scheduled castes) Order 1936, corresponds to the Consti-

tution (Scheduled castes) Order, 1950. Paragraph 2 of the Order declares that the castes, races, or tribes, or parts of or groups within castes, races, or tribes specified in parts I to IX of the Schedule to the Order shall be deemed to be scheduled castes. Paragraph 3 is as follows:

"Notwithstanding anything in the last preceding paragraph (a) no Indian Christian shall be deemed to be a member of a scheduled caste; (b) in Bengal no person who professes Buddhism or a tribal religion shall be deemed to be a member of any scheduled caste;

and if any question should arise as to whether any particular person does or does not profess Buddhism or a tribal religion, that question shall be determined according to the answers which he may make, in the prescribed manner, to such questions as may be prescribed."

(9) An Indian Christian was defined in schedule I as meaning a person who professes any form of the Christian religion and is not a European or an Anglo-Indian.

(10) It is obvious, therefore, from the several provisions of the present Constitution to which I have referred and of the previous Government of India Act that certain sections of the people are deemed to be depressed and backward socially and economically and therefore politically. Article 46 of the present Constitution even goes further and suggests that they have been the victims of social injustice and exploitation.

(11) It is a matter of common knowledge that the institution of Caste is peculiarly Indian. Caste as we now understand it is a social combination the members of which are enlisted by birth and not by enrolment (vide Ganapathi Aiyar's Hindu law, page 410). Whatever may be the origin of the various castes and sub-castes, it is likely that at its inception the caste system was much more elastic than it grew to be in later times. It might be, as some scholars suggest, that the primay division into four castes was based upon differences of colour and race; but it is equally clear that the castes and certainly many, if not most, of the sub-castes were economic occupational group.

Plato in his Republic envisaged the division of society into clases based on differences of function and occupation. It was a part of his definition of justice that the members of each class (caste) that is followers of each occupation should know and attend to their business and did not aspire to perform the functions of members of different castes. An almost identical principle is enunciated in the Gita which dwells on the importance of following one's own 'dharma' in preference to 'paradharma'. There can be no doubt, as a modern English philosopher has said, that the caste system in its early stages:

"represents one of the most successful applications of a philosophic principle to the world of concrete fact that mankind has contrived."

At the same time it is a matter of history that the system gradually hardened into a rigid frame work based upon heredity. Inevitably it gave rise to gradation which resulted in social inequality and put a premium upon snobbery. Social snobbery is not the monopoly of any race or country. But the caste system tended to develop, as it were, a group snobbery, one group, caste or sub-caste, looking down upon another group. At the bottom of the scale of social values were the members of the fifth caste, the panchamas, who were again members of several well-defined sub-castes. Even the best of human institutions, when it becomes mechanical and decadent, becomes also oppressive. This happened also to the caste system in India. The result was the perpetration of a certain amount of social injustice by the so-called higher castes on the lower castes and naturally the lowest of the castes became gradually the "depressed classes".

(12) Such is the historical background for the several provisions in the Government of India Act and in the present Constitution which attempted and attempt to accord specially favourable treatment to these depressed classes. It is the implied assumption that the higher castes would not properly represent the needs of the lower castes that is the basis of the principle of reservation of seats in the legislature for the depressed classes or the scheduled castes.

(13) It cannot be denied that whatever might be the philosophical doctrine of what we now call Hinduism, so far as social customs and usages went, the caste system became an integral part of Hindu religion. It is true that religion in one sense has nothing to do with social conduct; but ethics being founded ultimately on religious beliefs and doctrines—and in so far as ethics provided the standard for social life — it was inevitable that religion should be mixed up with social conduct. That is why it has often been said that the caste system is a part of Hindu religion.

(14) As I said before, caste system has become an integral feature of Hindu society and is bound up with the practice of Hindu religion. The well accepted scriptures of the Hindus contain reference to castes as having even a divine origin. I need only give two instances, viz, the famous description in the 'Purusha Suktha' and the equally well known passage in the 'Gita' in which Lord Krishna who is accepted by the Hindus as a divine incarnation speaks of the four 'varnas' having been created by him ('chathurvarniam mayasrishtam'). I am not unaware of the new interpretation sought to be put on these references and the attempt made by several modern scholars to explain the caste system as being founded on a natural division of persons according to their 'gunas', (qualities), aptitudes and conduct. But it cannot be gainsaid that in actual practice the caste system is based strictly on birth.

(15) When I speak of Hinduism, I am actually conscious of the vague connotation of that word:

"Hinduism is not a religion in the sense in which we now understand the word. The word is not Indian in origin; nor was it ever used by the Hindus as the same name of their religion" (The Cultural Heritage of India, Vol. I, page 150).

But the word has come to stay and convenience requires that the word should be retained to describe a typical mode of life inclusive of religion and philosophy in the strict

sense of those terms. It has been rightly said that:

"Hinduism is thus less a religion in the western sense of the word than a fellowship of those who accept the immutable law; of right conduct and fashion their lives after the pattern whose lines philosophy; religion and ethics have combined to trace."

(16) It must, however, be acknowledged that in spite of the fact that the doctrines of Hinduism as a religion cannot be reduced to a formal creed, it is not difficult to differentiate those who profess Hinduism from those who profess other religions like Christianity and Islam. Mr. Venkatasubramania Aiyar said that Hinduism is so all comprehensive that it can embrace every religion in the world. This is true only if by Hindu religion one understands Hindu religious philosophy. I do not think it is true if one takes into account Hindu religious practice. For certain purposes, Buddhism, Jainism and Sikkhism have been considered to be part of Hinduism. In our present Constitution itself explanation (2) to clause 2 of Art. 25 says that the reference to Hindus in sub-clause (b) of clause 2 shall be construed as including a reference to persons professing the Sikhs, Jains or Buddhist religion. Mr. Venkatasubramania Aiyar said that it would not be accurate to speak of Buddhism as something different from Hinduism and relied on the fact that Buddha is treated as one of the Avatars of Vishnu. But this is overlooking the fact that though some Hindus might consider so, the Buddhist would never accept that Buddha is an Avatar of a Hindu deity. So there is a clear difference, doctrinal and practical between Hinduism and Buddhism.

(17) Christianity and Islam are religions prevalent not only in India but also in other countries in the world. We know that in other countries these religions do not recognise a system of castes as an integral part of their creed or tenets. Is it different in India? Mr. Venkatasubramania Aiyar frankly confessed that so far as Islam is concerned there is no question that it does not tolerate any difference based on caste distinction. A member of one of the castes or sub-castes when he is converted to Islam ceases to be a member of any caste. He becomes just a Mussalman and his place in Muslim society is not determined by the caste to which he belonged before his conversion. Learned counsel also conceded that generally this is so even when there has been a conversion to Christianity. But he said that there were several cases in which a member of one of the lower castes who has been converted to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted. I am prepared to accept that instances can be found in which in spite of conversion, the caste distinctions might continue. This is somewhat analogous to cases in which even after conversion certain families and groups continue to be governed by the law by which they were governed before they became converts. But these are all cases of exception and the general rule is conversion operates as an expulsion from the caste; in other words, a convert ceases to have any caste.

(17a) In my opinion, paragraph 3 of the Constitution (Scheduled castes) Order proceeds on the general assumption and does not take notice of individual exceptional instances. When in any locality, in spite of conversion caste distinctions continue as a general rule, then the President evidently takes notice of it. The proviso to paragraph 3 of the Order illustrates this. Apparently in Punjab and the Patiala and East Punjab States Union members of some of the castes in spite of professing the Sikh Religion, continue to have caste distinctions. That is why the members of those castes are deemed to be members of the scheduled caste whether they profess the Hindu or the Sikh religion. Presumably on the information which must have been placed before the President he was not convinced that as a general rule the persistence of caste differences obtained in other parts of the Union in spite of conversion to other religions. It may be that the President was mistaken or his information was incomplete; but I do not think it is open to us to sit in judgment over his decision.

(18) I have no hesitation in holding that paragraph 3 should be read in conjunction with paragraph 2 and so read, the Order in effect specifies those parts of, or groups within the enumerated castes which profess the Hindu religion and directs that they should be deemed to be scheduled castes. Though in form paragraph 3 is negative in substance the definition is positive.

(19) I do not think undue stress should be laid on the word "profess". I think the expression "profess" is intended to have the same meaning as the expression "belongs to" and a person belongs to a religion either by birth or by conversion. Mere sympathy with or admiration for particular tenets of any religion by a person who was not born in it and who has not been converted to it would not bring him within the meaning of the expression "professing a particular religion." Equally if a person has been born into a particular religion and has not been converted to another religion the mere fact that he is of an unorthodox type or has no belief personally in the tenets of that religion would not take him out of the category of a person professing that religion. To give an instance a person born of Hindu parents and who has not been converted to any other religion would not cease to be a Hindu merely because he does not believe in the Vedas or has cultivated the habit of beef eating. This would be so for the application of the personal law to him. Likewise it would be so for political purposes.

(20) In view of what I have said before, it is clear that the President has not arbitrarily specified a part or group which has no independent objective existence. The Hindu section of a particular scheduled caste has certainly such an existence, though in exceptional cases some converts might still be members of the caste to which they belonged before conversion.

(21) In my opinion, the Constitution (Scheduled Castes) Order is valid and within the powers of the President The petition is therefore dismissed. There will be no order as to costs.

(22) VENKATARAMA AIYAR J.: I agree.

(23) 'By Court': We certify that this case involves a substantial question of law as to the interpretation of the Constitution and in particular Art. 341.

C.R.K./R.G.D. Petition dismissed.

A. I. R. 1952 Madras 479

CHANDRA REDDI J.

Thiruvathammal and another, Appellants v. Vagunathan alias Kuppa Goundan, Respondent.

Second Appeal No. 496 of 1948, D/- 23-10-51.

Hindu Law — Marriage — Expenses — Liability for — Daughter — Father's liability.

The father has a legal obligation to meet the marriage expenses of his daughter, if it is shown that there is joint family property. But if there is no joint family property, the obligation of the father is only a moral or natural obligation, but not a legal obligation. AIR 1929 Mad 586 (FB), Rel. on. Case law ref. (Para 6)

T. R. Srinivasan and T. V. Hari Rao, for Appellants; T. K. Subramania Pillai, for Respondent.

Cases referred to:

('98) 8 Mad L J 105 (Pr 5)
('03) 26 Mad 505 (Prs 4, 5)
('12) 35 Mad 728: (11 Ind Cas 570) (Pr 5)
('30) 53 Mad 84: (AIR (16) 1929 Mad 586 FB) (Prs 5, 8)

JUDGMENT: This second appeal is filed by the two plaintiffs in O.S. No. 344 of 1945, who are aggrieved by the dismissal of their suit by the Courts below. They instituted the said suit in the Court of the District Munsif of Tirupattur for recovering a sum of Rs. 850 for the expenses incurred in connection with the second plaintiff's marriage, and Rs. 116-3-0 interest that accrued thereon upto the date of the plaint.

(2) The first plaintiff is the mother of the second plaintiff and the wife of the defendant. The marriage between the first plaintiff and the defendant did not prove to be a happy one, and in or about 1925, the plaintiff separated herself from her husband on the latter agreeing to pay maintenance, as provided in Ex. P-1. At that time, the second plaintiff was only two years old. Subsequently, the defendant married a second wife, and by her had some daughters. In 1940, the defendant issued a notice under Ex. P-2 calling upon his wife not to get the second plaintiff married to the former's brother, and leave the question of the second plaintiff's marriage to him. In spite of this, the second plaintiff was married to the first plaintiff's brother & the defendant was called upon to meet the expenses of this marriage. As he refused to do so, the plaintiffs instituted the present suit for the recovery of the amount mentioned above.

(3) The suit was opposed on various grounds relating to the customs of the community according to which the marriage expenses are not incurred by the bride's party. It is to be noted that there is no plea raised in the written statement that there is no legal obligation on the part of the father to bear the expenses of the daughter's marriage.

(4) The Courts below dismissed the suit holding that there was no legal obligation on the part of the father to perform the marriage of his daughter and in support of this view they relied upon a decision of a Bench of this Court in 'SUNDARIAMMAL v. SUBRAMANIA AIYAR', 26 Mad 505 where it was held that a wife, who spent money on her daughter's marriage was not entitled to recover it from the husband.

(5) In 'SUBBAYYA v. ANANTARAMAYYA', 53 Mad 84, a Full Bench of this Court expressed the opinion that there was a legal obligation on the part of the father to meet the marriage expenses of the daughter, if the family was possessed of joint family property. Referring to 'SUNDARI AMMAL v. SUBRAMANIA AIYAR', 26 Mad 505 and to an earlier decision 'SESHAMMAL v. MUNISAMI MUDALIAR', 8 Mad L J 105 Ramesam J. who was one of the members of the Full Bench, observed that in those cases it did not appear that the father was a member of the joint family or had ancestral property. In 'RANGANAYAKIAMMAL v. RAMANUJA AIYANGAR', 35 Mad 728 the claim of a daughter-in-law to recover the marriage expenses of her daughter from her father-in-law, who was in possession of the joint family properties was upheld.

(6) What emerges from these decided cases is that the father has a legal obligation to meet the marriage expenses of his daughter, if it is shown that there is joint family property. But if there is no joint family property, the obligation of the father is only a moral or natural obligation, but not a legal obligation.

(7) Therefore, the main question that arises for consideration in this appeal is whether the defendant in this case was in possession of the joint family property. Though the question of the possession of joint family property was not specifically raised either in the plaint or in the written statement, the defendant had specifically admitted that the property in his possession was ancestral property. On this admission, it is not open to doubt that the property in the possession of the defendant was ancestral property, and from this flows his legal obligation to meet the marriage expenses of his daughter.

(8) Though the attention of the lower appellate Court was drawn to the ruling in 'SUBBAYYA v. ANANTARAMAYYA', 53 Mad 84 (FB) it contented itself by observing that the facts of the present case were entirely different from the facts in 'SUBBAYYA v. ANANTARAMAYYA', 53 Mad 84 (F B). The learned Judge does not state how the facts of the present case were different from those in 'SUBBAYYA v. ANANTARAMAYYA', 53 Mad 84 (F B). The Court below entirely overlooked the distinction pointed out in 'SUBBAYYA v. ANANTARAMAYYA', 53 Mad 84 (F B), between the liability of the father to meet the marriage expenses of the daughter when he is possessed of joint family property, & the liability of such a father when he is not possessed of any joint family property.

(9) It follows that the judgment of the Courts below dismissing the suit on the ground that there is no liability on the part of the father, has to be set aside. The case has to go back to the trial Court for an enquiry as to the amount to which the plaintiffs would be entitled.

(10) In the result, the second appeal is allowed and the case remanded to the trial Court for disposal according to law and in the light of the observation made above. The appellants will have refund of the court-fee paid by them in this second appeal. I make no order as to costs.

(11) No leave.

C.R.K./V.B.B. Case remanded.

A. I. R. 1952 Madras 480

SATYANARAYANA RAO AND RAJAGOPALAN, JJ.

Gadireddy Peda Narasimhalu Naidu and Sons, Petitioners v. Commissioner of Income-tax, Madras, Respondent.

Civil Misc. Petn. No. 14051 of 1950, D/- 19-10-1951.

Income-tax Act (1922), S. 13 — Assessee not maintaining accounts properly — Department arriving at profits on basis of estimate — Assessee though entitled to get information of comparable cases is not entitled to detailed information regarding their business.

Where the assessee did not maintain his accounts properly to reflect faithfully the profits which he had earned in the business and the department had to reject the accounts and to arrive at the profits on the basis of an estimate, taking the comparable cases into consideration:

Held that the assessee no doubt was entitled to get such of the information regarding the comparable cases as could possibly be disclosed by the department with a view to apprise him of the basis on which the estimate was made. But he was not entitled to detailed information regarding the business of those assessees whose profits were taken as the standard of comparison. (Para 1)

Anno : Income-tax Act, S. 13 N. 6, 8.

K. Rajah Aiyar, for K. Srinivasan & M. J. Swami, for Petitioners; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: This application under S. 66(2) of the Indian Income-tax Act relates to the assessment year 1943-44, accounting year ending with March 1943. The assessee is a firm carrying on business in cloth. It manufactures and also sells dyed cloths. During the assessment year the assessee returned a profit of Rs. 4200 in respect of his business on a turnover of Rs. 6,09,649. This return of the profits was not accepted by the Income-tax Officer on the ground that the inventories produced by him in respect of the cloth dyed were incomplete and unreliable and that the purchases made were not properly accounted for either under sales or under the closing stock.

Out of the turnover of six lakhs odd, Rs. 2,52,007 related to sales of cloth in terms of bales or wholesale business and the profit in respect of it returned by the assessee came to about 8 per cent. on the turnover or Rs. 21,000. This was accepted by the department but in respect of the retail sales of Rs 3,57,643 the profit worked out only at 6 per cent. on the turnover and as the accounts were not acceptable the department proceeded to estimate the profits on the basis of the comparable cases of profits made by other merchants in the locality and in the district which range between 15 to 20 per cent. The result was the Income-tax Officer arrived at the result that 15 per cent. profit on the turnover of the retail sales was reasonable in the circumstances. This decision of the Income-tax Officer was accepted on appeal by the Appellate Assistant Commissioner and on further appeal also by the Appellate Tribunal.

The main complaint of the assessee before us in respect of his application for directing the Appellate Tribunal to make a reference is that these comparable cases which were taken as a standard for arriving at a profit of 15 per cent. on the retail sales were not put to the assessee. Stated in that form the objection is not well-founded for it is clear from the order of the Income-tax Officer that he did in fact put to the assessee that the accounts of dealers in cloth who merely bought and sold the goods without dyeing disclosed a gross profit ranging between 15 to 20 per cent. In the case of one merchant the Income-tax Officer pointed out to the assessee who also dyed the cloths and sold them that the profit was 17½ per cent. The further complaint, however, is that the outturn of those merchants and the magnitude of the business and whether the contracts under which the goods were purchased were forward contracts or ready contracts—all those details should have been furnished to the assessee and as this was not done, the estimate made by the department should not be accepted. We are, however, unable to accept this contention. It must be remembered that the situation was the creation of the assessee's own as he did not maintain his accounts properly to reflect faithfully the profits which he had earned in the business. The result was the department had to reject the accounts and to arrive at the profits on the basis of an estimate, taking the comparable cases into consideration. The assessee cannot expect the department to disclose not only the basis on which they proceeded to make the asssesment but also to give further details regarding the comparable cases. If an investigation of that kind were permitted, there will be no end to the enquiry and the assessment could never be made. The assessee no doubt was entitled to get such of the information regarding the comparable cases as could possibly be disclosed by the department with a view to apprise him of the basis on which the estimate was made. We do not think that he is entitled to detailed information regarding the business of those assessees whose profits were taken as the standard of comparison. The application, therefore, for reference under S. 66(2) must be dismissed with costs of the Income-tax Commissioner, which we fix at Rs. 150/-.

C.R.K./R.G.D. Application dismissed.

A. I. R. (39) 1952 MADRAS 481 (C. N. 106)

KRISHNASWAMI NAYUDU J.

The Karnataka Films Ltd., Petnr. v. The Official Receiver, Madras, as such the Official Liquidator of Chitrakala Movietone, Ltd., and others, Resps.

O. P. No. 429 of 1948, (Appln. No. 1244 of 1950), D/- 8 & 12-12-1950.

† (a) *Companies Act (1913), S. 195 — Order against non-resident foreigner — Civil P. C. (1908), S. 20.*

Jurisdiction over persons and property, apart from principles of international law where foreign subjects are involved, is governed by legislation passed in the Country where it is sought to be exercised. Though the Court has power u/s. 195 to pass an order directing a non-resident foreigner to appear before the Ct. and submit himself for examination it should naturally be reluctant to do so as more often such order is likely to be ignored and in such circumstances the Court will be helpless without being able to enforce it. (Paras 5, 6)

Anno: Companies Act, S. 195 N. 1; C. P. C., S. 20 N. 32.

(b) *Companies Act (1913), S. 235 — Application against non-resident foreigner — Civil P. C. (1908), S. 20.*

An application under S. 235 against a non-resident foreigner is maintainable and the Court has jurisdiction to entertain the same and consider the same on merits and an order passed in such application will have the same force as a decree passed in a suit against non-resident foreigner. (Para 7)

Anno: Companies Act, S. 235 N. 1; C. P. C., S. 20 N. 32.

(c) *Companies Act (1913), S. 229 — Trust money — Claim to professional payment — Trusts Act (1882), S. 6.*

Where a sum of money is deposited by the sole distributor of a film-producing company with the company as a permanent deposit for a period of five years and it is agreed that the same shall be refunded at the end of the period or on prior determination of the distribution agency and the amount is not to carry interest and the Directors of the company instead of keeping the amount separately, utilise the money in the business of the company.

'Held': that the deposit made contains all the elements of trust contemplated in S. 6, Indian Trusts Act. The fact that the directors utilised the money in the business of the company without the knowledge and express consent of the depositor can not be taken as a test to find out whether a trust had been created.

The depositor is entitled to a preferential payment from the Company. But the remedy of the depositor is to proceed against the assets of the Company other than these specific movable and immovable properties which are the subject of a hypothecation and a mortgage decree. A I R (26) 1939 Mad 337; A I R (30) 1943 Cal 105, rel. on. A I R (29) 1942 All 119 F B, diss. from. (Paras 12, 13, 16)

Anno: Companies Act, S. 229 N. 10, 11; Trusts Act, S. 6 N. 1.

(d) *Companies Act (1913), S. 235 (1) — Distributor's deposit — Use of, in ordinary business of Company.*

Where the directors of a Film producing company receive deposits under an agreement between the Company and the distributor and there is no direction by the distributor that the amount should not be utilised for any purpose and must be kept in a separate account to be returned to him or adjusted to the collections in terms of the agreement between the parties and there is also no resolution of the company as to the manner in which the amount is to be dealt with or whether it should be invested separately and there is nothing to indicate that the directors are prevented from utilising the money for the purpose of the ordinary business of the company and the directors utilise the deposit in the course of and for the business of the company.

'Held': that it cannot be said that the directors have misapplied the funds or committed a breach of trust in respect thereof in relation to the company and the directors cannot be said to be guilty of any of the acts within the meaning of S. 235. 'Case law discussed'. (Paras 28, 30)

Anno: Companies Act, S. 235 N. 1, 7.

V. K. Thiruvenkatachari for V. R. Natarajan, for Petnr. — K. Subramaniam, for Bank — K. Srinivasamurthy T. Lakshmayya, Y. Rami Reddy and P. S. Chinnappa, for Resps.

Cases referred to:

('96) 18 All 12 (Pr 27)
('42) A I R (29) 1942 All 119: (I L R (1942) All 242 F B) (Pr 13)
('93) 17 Bom 662 (Pr 5)
('95) 22 Cal 222: (21 I A 171 P C) (Prs 3, 5)
('43) I L R (1943) 1Cal 313: (A I R (30) 1943 Cal 105) (Prs 9, 12, 13)
('27) 8 Lah 167: (A I R (14) 1927 Lah 433) (Pr 27)
('18) 35 M L J 189: (A I R (6) 1919 Mad 883) (Pr 5)
('35) 68 M L J 506: (A I R (22) 1935 Mad 545) (Pr 5)
('39) A I R (26) 1939 Mad 337: (183 I C 203) (Prs 9, 10, 12, 13)
('41) I L R (1941) Mad 120: (A I R (28) 1941 Mad 53) (Pr 27)
('26) 1 Luck 334: (A I R (13) 1926 Oudh 243) (Pr 27)
('37) A I R (24) 1937 Pat 196: (15 Pat 630) (Pr 3)
(1880) 12 Ch D 522: (41 L T 46) (Pr 5)
(1880) 14 Ch D 660: (42 L T 559) (Pr 21)
(1880) 14 Ch D 335: (49 L J Ch 446) (Prs 22, 28)
(1883) 21 Ch D 519: (52 L J Ch 217) (Prs 23, 28)
(1887) 12 A C 652: (57 L J Ch 552) (Pr 25)
(1890) 59 L J Ch 616: (62 L T 873) (Pr 26)
(1932) 2 Ch 196: (48 T L R 525) (Pr 6)

JUDGMENT: The company which is under liquidation is an unregistered company not having been registered under the Indian Companies Act & in respect of which a winding up order has been made. The company had its head office in Colombo & a branch of which which was in Mathurai has now been wound up. Respondents 3 to 11 who are the directors of this company are all permanent residents of Ceylon & the applicants ask for an order that these respondents who were directors of the company may be directed to submit themselves for public examination under S. 195, Companies Act, & that they may be proceeded against for misfeasance under S. 235 of the Act. There is also a further prayer that the applicants' claim for payment of the deposit amount may be treated as preferential claim.

(2) The applicants entered into an agreement on 7-9-1946 with the company & they were appointed distributors for the company's production for certain territory & a sum of Rs. 50,000 was paid as deposit as follows: Rs. 15000 on 7-9-1946, Rs. 10000 against delivery of copies of "Kumaraguru" & the balance of Rs. 25000 was to be paid on or before 27-10-1946. The grievance of the applicants is that in spite of demand the company has not refunded the deposit of Rs. 50,000 or such other amount as would be found actually due out of the deposit, that in contravention of the terms of the agreement these monies were utilised by the company & that the directors should be made liable to pay for breach of trust or misfeasance caused by them & that they should also submit for public examination regarding their dealings & other matters concerning the company.

(3) Apart from the merits, a preliminary objection was taken as to the jurisdiction of this Court to consider an application of this nature under Ss. 195 & 235, Companies Act. It is contended that the directors who are permanent residents of Ceylon which is a foreign territory cannot be proceeded against & that no summons could be issued under S. 195 compelling them to appear & that no order can be made directing them to reimburse any loss or to make any payment for any misfeasance on their part under S. 235, Companies Act. The decision in 'Bishadandu Gupta v. H. Langham Read', A I R (24) 1937 Pat 196 ,is cited in support of this contention. In that case in respect of a company which was registered within the Province but some of whose directors were residing in England & against whom an application under S. 235 was made in order to enquire into their conduct, it was held that the High Court had no jurisdiction over persons residing in England but had jurisdiction only on persons, residing in British India, though in a different Province, & that therefore an enquiry should be made only with respect to the directors residing in British India & not with respect to those residing outside British India. It was observed by Wort Ag. C. J. at p. 197 as follows:

"It is the principle of international law that a Court shall not serve its processes on persons outside its own jurisdiction & upon persons against whom, if an order was made, the order cannot be enforced. It is expressed in these words: 'extra territorium jus decenti non paretur legis extra terrorum non obligant'."

A passage from the judgment of their Lordships of the Privy Council in 'Gurdayal Singh v. Raja of Faridkot', 22 Cal 222, is quoted. It is as follows:

"All jurisdiction is properly territorial, & 'extra territorium jus dicenti, impune non paretur'. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, & when they are living in another independent country. It exists always as to land within the territory, & it may be exercised over moveables within the territory &, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory."

Reliance has also been placed on a passage in Cheshire's Private International Law at p. 100 which is as follows:

"The general doctrine of English law is that the exercise of civil jurisdiction, in the absence of an Act of Parliament, must in all cases be founded upon one or other of two principles, namely, the principle of effectiveness or the principle of submission.

The principle of effectiveness means that a judge has no right to pronounce a judgment if he cannot enforce it within his own territory. The elementary fact several times stated by Holmes J. that 'the foundation of jurisdiction is physical power', is worthy of attention, although, as we shall see, there are certain exceptional cases in which jurisdiction may be assumed by virtue of statute over persons who are abroad & thus not within the power of the Court. Power in this connection means that physical power which becomes exercisable because the property which is the subject matter of the suit is in England or because the defendant is present at the time of service of the writ in England, &, broadly speaking it is true to say that an English Court does not consider itself competent to adjudicate upon a claim if neither of these elements is present. In such a case the maxim is 'actor acquitur forum rei' & the pltf. has no alternative but to sue the deft. in the country where he happens to be."

It is argued relying on this passage that the purpose of an application under S. 195 is to summon any officer of the company & examine him on oath concerning any dealing or affair or property of the company or direct him or require him to produce any document & if he refused to come to Court at the time appointed, the Court may cause him to be apprehended & cause him to be brought before it for examination & that directors of the company, not being subject to the jurisdiction of the High Court, cannot be summoned & compelled to appear & no process for the purpose could be executed in a foreign territory, & that there is no purpose in issuing a summons under S. 195 as it cannot be enforced by this Court by any process which is available & that therefore this Court cannot exercise jurisdiction knowing that the exercise of it would not be effective. It is also argued that this Court has no jurisdiction to issue a summons under S. 195 since proceedings under Ss. 195 & 235 do not relate to any properties which the non-resident foreigner is possessed of & no proceeding against him can be initiated in the High Court & that therefore this Court has no jurisdiction.

(4) This company being an unregistered company & carrying on its business within the jurisdiction of the High Court can be wound up under the provisions of Part IX of the Indian Companies Act & for the purposes of winding up, an unregistered company is deemed to be a company registered in the Province, and the provisions of the Act with respect to winding up are held to apply to unregistered companies which have been wound up with certain exceptions under S. 201. Therefore the applicant maintains that since all the provisions relating to winding up are made applicable to the winding up of unregistered company, Ss. 195 & 235 which are ordinarily applicable in cases of winding up of companies registered in the Indian Union can be made applicable & therefore the application is maintainable.

Further, it is pointed out that even in respect of companies which are registered outside British India, Part IX of the Companies Act is made applicable to them & such companies which are incorporated outside the Indian Union shall comply with certain requisitions of the Registrar to file certified copies of the Charter or Articles of the company, the full address of the registered or principal office of the company, a list of directors and managers of the company, the names & particulars of persons resident within India authorised to accept on behalf of the company process & any notices required to be served on the company etc. This company has complied with the provisions of S. 277 & it is therefore argued that there has been a submission to jurisdiction of the Courts of this State & that therefore even if initially this Court had no jurisdiction they have acquired jurisdiction by virtue of the foreign company submitting itself to the jurisdiction of the Indian Courts.

(5) Jurisdiction over persons & property apart from principles of international law where foreign subjects are involved, is governed by legislation passed in the country where it is sought to be exercised. In so far as suits are concerned the C. P. C. & the Letters Patent apply. S. 20, C. P. C. provides the forum in which suits can be instituted. S. 19, C. P. C. provides that where a suit is for compensation for wrong done to a person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the deft. resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the pltf. in either of the said Courts. There are rules for service of summons on persons who are residing outside the jurisdiction of such Courts & even in foreign territories. It is therefore open to the pltf. to institute a suit in the Court within the limits of which the cause of action arises even though the deft. resides outside the limits of the jurisdiction of the Court in which the suit is instituted & where the cause of action arose. Service is made usually by registered post & if the deft. who is in a foreign territory accepts summons but does not appear, the suit could be proceeded with & a decree passed if the pltf. establishes his claim. This position was considered in 'Rajabai Narain v. Haji Karim', 35 M L J 189, where on an objection taken that a local Court is not entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within the jurisdiction of the Court, it was observed by Krishnan J. as follows at p. 193:

"This objection is not valid, as a municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign state is a question for disposal of that state."

In 'Neelakanda Pillai v. Kunju Pillai', 68 M L J 506, Venkatasubba Rao J. considered the question whether the application of S. 20 was excluded by reason of the fact that deft. is a non-resident foreigner. After referring to the following passage in the 'Faridkot case (Gurdayal Singh v. Raja of Faridkot', 22 Cal 222, namely,

"It (the foreign decree) must be regarded as a mere nullity by the Courts of other nations except (when authorised by special local legislation) in the country of the forum by which it was pronounced."

it was observed

"That shows that though by International law such a decree is a nullity, in other words, will not be recognised by Courts of other nations, it is nevertheless, valid, when authorised by special local legislation, in the country of the forum by which that decree was pronounced."

The learned Judge later on observes as follows:

"This distinction is very clearly brought out in the judgment of Starling J. in 'Girdhar Damodar v. Kassigar Hiragar', 17 Bom 662. The learned Judge observes that it would be the duty of the Courts acting in the execution of a statutory enactment, to give effect to it, it being immaterial whether the judgment rendered would, in the circumstances, be recognised by foreign tribunals as being consistent with International law & the general principles of justice, & in support of this view he cites the observations of James L. J. & Cotton L. J. in 'Ex parte Blain in re Sawers', (1880) 12 Ch D 522.'

It is, therefore, unnecessary to consider what would be the effect of an order or decree which is passed by this Court provided it is authorised by local legislation empowering the Court to entertain a proceeding for the purpose & pass an order or decree as is provided, & whether that order or decree would be treated as a nullity, whether the person against whom the order or decree is passed would comply with it or whether it could be exercised. These are all matters which do not arise in order to enable a Court to exercise jurisdiction, to receive and adjudicate upon matters which it is competent to do by virtue of the legislation authorising the Court to act.

(6) It is argued that these are matters in personam & directions against an individual compelling him to do certain things should not be given if the court could not enforce the same & it would be futile to pass such orders directing the non-resident foreigner to submit himself for examination & such ineffective orders should not be passed. There is force in this contention, but that does not mean that the court has no power to pass an order under S. 195 directing the non-resident foreigner to appear before the court & submit himself for examination though more often it is likely to be ignored & in such circumstances the court will be helpless. The question is whether in such circumstances it is advisable, knowing that such an order would be ineffective, to use its discretion & not pass the order which it cannot possibly enforce. This principle is enunciated in 'Vocalion (Foreign) Ltd., in re', (1932) 2 Ch D 196 at p. 205, by Maugham J. where he observes as follows:

"The Court in general is very reluctant to exercise a jurisdiction in personam against a foreigner in relation to a matter in which there cannot be an effective order. It may be added that the Court ought to be satisfied before making the order that it will not hesitate, if the order is disobeyed, to commit or sequestrate the property of the person or company in default."

I therefore consider that the objection to this Court issuing an order under S. 195 directing respondents 3 to 11 to submit themselves for

public examination has undoubtedly great force. Such an order will be ineffective & the Court should naturally be reluctant in passing such an order though the Court may have power under S. 195 to make an order in terms of that section. I am therefore of opinion that the applicant will not be entitled to an order against the respondents 3 to 11 under S. 195 directing them to submit themselves for public examination, on the ground that it is inadvisable to pass such an order.

(7) But the application under S. 235 stands on a different footing altogether. In respect of certain acts of the directors amounting to misfeasance & breach of trust, the case is they are liable to account & bring back certain sums of money & for that purpose the Court is asked to examine into the conduct of those directors & compel them to pay the amount in respect of which they have committed breach of trust. This proceeding, is in the nature of a suit for recovery of monies wrongfully converted by a person who happens to be a non-resident foreigner. If this proceeding is instituted by way of a suit, the provisions of Ss. 19 & 20, C. P. C. would be applicable & since the cause of action arose within the local limits of the jurisdiction of this Court, though the defts. — the persons who are liable to account — reside in a foreign territory, a suit can very well be laid and summons served in the manner provided by the rules & a decree could be passed. How and in what manner the decree would be treated by the foreign Court is immaterial for the decree is nevertheless valid though it may be treated as a nullity by the foreign Court. It is also equally unnecessary to consider whether such a decree could be enforced against him. The Court is competent to pass such a decree by virtue of the local or municipal law governing the exercise of such jurisdiction. S. 235 provides only a summary remedy to the applicants who agitate this question by way of Judge's summons, which otherwise should be by way of a suit, by virtue of the rules framed under the Companies Act enabling applications of this nature to be brought by way of Judge's summons. In so far as service of notices of such summons is concerned, R. 4 of the rules framed under the Companies Act makes the rules of the Original Side as amended from time to time applicable to all proceedings under the Act. O. IV, R. 6 (c) of the Original Side Rules contemplates service of summons on a deft. residing beyond the limits of India. So there is no question of there being no provision of any kind to enable notice of summons being served on the defendant who is residing in a foreign territory. Unlike an application under S. 195, a proceeding under S. 235 is not for public examination of the non-resident director but it is for the Court to enquire into his conduct & ascertain whether he is liable to repay or restore any monies or property or contribute any sum to the assets of the company by way of compensation in respect of misfeasance or breach of trust on the evidence that may be placed before it. This does not necessarily involve any process to compel his attendance in order to submit himself for examination. If on the receipt of notice served in the manner provided under the rules, the concerned director does not choose to appear, the Court can come to a conclusion on the material placed before it on behalf of the applicant as to the conduct of the director in the matter & decide about his liability to the applicant or to the company & an order could be made directing the particular director to bring in any amount which he has misapplied, retained or in respect of which he has committed breach of trust or misfeasance which order would be in the nature of a decree. If the concerned director has any properties within the jurisdiction of the State such an order could very well be executed against those properties & if there are no such properties, the order will have the same force & effect as a decree passed in a suit against a non-resident foreigner. I am therefore of opinion that whatever may be the position as regards the application under S. 195, an application under S. 235 is maintainable & the Court has jurisdiction to entertain such application & consider the same on its merits. In the view which I am taking it is not necessary to consider as to whether there is jurisdiction conferred on this Court by reason of the foreign company having complied with the requisitions in the Companies Act under Prat X, S. 277.

(8) The claim for preferential payment is made on the ground that the sum deposited was trust money since a trust was created in respect of this amount in favour of the applicants. In order to arrive at a decision whether a particular deposit constituted a trust or not, it is necessary to consider the particular terms under which the monies were deposited. Ex. P. 1 is the agreement which is in the form of a letter written by the company to the applicants. It is as follows:

"Dear Sirs,

We have pleasure in confirming you as our distributors for all our productions, commencing from Sri Kumara Guru for a period of five years, for the territory comprising Mysore State, Coorg, South Canara & Bombay Presidency, excluding Bombay City proper, on the following terms:

1. You shall deposit with us a sum of Rs. 50,000 (Rs. fifty thousand) in the manner following: Rs. 15,000 to be paid today, balance Rs. 10,000 to be paid against delivery of the copies of Sri Kumara Guru & the balance Rs. 25,000 to be paid on or before the 22nd October 1946. This sum of Rs. 50,000 shall be a permanent deposit with us for a period of five years & shall be refunded at the end of the above period or on prior determination of the distribution agency. This amount shall not carry any interest whatsoever."

There are other terms also whereby the applicants were to be entitled to a commission of 15 per cent. on the takings of the films & the company was to supply two new pictures every year, the film called Sri Kumara Guru having been one of the pictures supplied in the first instance. There is also a provision for terminating the distribution agency by giving three calender months' notice in writing. Three receipts were granted by the company for payment by the applicants of the sums of Rs. 15,000, Rs. 10,000 & Rs. 10,000 respectively on the 7th & 15th September & 17-10-1946. The receipts are stated to be as "being part deposits against distribution agency". Another film known as "Thai Nadu" was sent by the company but the same not having been censored by the Mysore Cinematograph Board, the applicants wrote on 3-10-1947 to the company, Ex. R. 1, that since the stipulation as to the supply of two new pictures every year not

having been complied with, the company has intimated that the agreement stood cancelled and the applicants asked for the return of the deposit intimating that whatever prints and publicity materials lying with them will be immediately returned on the return of the deposit. There is a further demand made by the applicants under Ex. R. 2 dated 5-2-1948 for the return of the deposit followed by a further demand dated 5-3-1948, Ex. P. 4, to which the company replied on 10-3-1948, Ex. R. 3 asking the applicants to censor the picture "Thai Nadu" at an early date & "adjust the collections against the deposit given to us with a view to reduce the balance" & mentioning that the agreement of 7-9-1946 still holds good & also expressing the company's readiness to entrust all their productions to the applicants for distribution. The applicants finally sent a notice of demand through their Advocate, Ex. R. 4, in which while demanding the return of the deposit amount of Rs. 50,000 it was observed as follows:

"You requested my clients to exploit 'Thai Nadu' & adjust the collections against the deposit, which could not be done for the obvious reason that the said picture was not passed by the censors here & you never moved in the matter to have it censored here."

The applicants filed a petition for winding up on 30-12-1948 & in the petition the applicants stated that they are entitled to the repayment of Rs. 50000 paid to the company as preferential payment & a further sum of Rs. 30000 as damages for non-fulfilment of the agreement dated 7-9-1946, amounting in all to Rs. 80000 less Rs. 7698-5-3 by realisations leaving a balance of Rs. 72301-11-3 due by the company to the applicants. It may be stated here that in the balance sheet of the company for the year ending 31-12-1946, Ex. P. 3, a sum of Rs. 68932/- 29 cents is shown as "Distributors' deposits" under the column Sundry creditors. There are also entries relating to deposits called "representatives' deposits" & "producers' deposits".

(9) Relying on the decisions in 're Travancore National and Quilon Bank Ltd.', AIR (26) 1939 Mad 337 & 'Kshetra Mohandas v. D. Basu', ILR (1943) 1 Cal 313, it is contended on behalf of the applicants that the sum of Rs. 50,000 paid as distribution deposit is a trust fund & therefore the applicants are entitled to preferential payment.

(10) In 're Travancore National & Quilon Bank Ltd.', AIR (26) 1939 Mad 337 where an employee was required to deposit a certain amount as security for the post he held, & the amount was returnable to him at the end of his service, it was held that the amounts were to be held by the Bank in trust for the employee until termination of his services as a security for his good behaviour so that in case he is found guilty of any act or omission in discharge of his duties & loss should result therefrom the bank might recoup such loss & pay the balance. In that case a separate account was kept for such deposit and receipts were granted to the employee in respect of it & the amounts so deposited were however to carry interest. It was held in that case that as the amounts were received by the bank on a specific understanding to be applied by the bank for a specific purpose, such amounts constituted trust money in the hands of the bank & did not form part of the assets of the bank divisible among its creditors & the fact that these amounts were to carry interest did not alter its character.

(11) S. 282-B (1), Companies Act makes the position as regards such moneys or securities deposited by employees in pursuance of their contracts of service clear & it is provided that such moneys should be kept or deposited by the company in a special account in a scheduled bank & that no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service & any director or other officer of the company contravening the provisions of that section is liable on conviction to a fine not exceeding Rs. 500. Since the bank in which the deposit was made in the decision cited was governed by the provisions of the Travancore regulations, where there was no corresponding provision to S. 282 B (1), the learned Judge, Venkataramana Rao, J. had to consider the law bearing on the subject exhaustively & he came to the conclusion that there is a relationship of trustee and 'cestui que trust' between the company & the employee.

(12) The decision in Kshetra Mohandas v. D. Basu', ILR (1943) 1 Cal 313 is a decision on the point raised in this application. The question that arose for consideration there was about the nature of a deposit made by a selling agent of the company's goods. The contract of agency provided for a security deposit of Rs. 10500 carrying interest at the rate of 3 per cent. per annum. There was a provision in the agreement that the company would be entitled to appropriate any damage or any amounts for which the selling agent did not account for from and out of the security deposit. It was held that the security deposit of the agent in the hands of the company must be regarded as impressed with a trust or held in a fiduciary capacity by such company & that the agent is entitled to get back the whole of the security deposit even after such company goes to liquidation. Both 'In re Travancore National & Quilon Bank Ltd.', AIR (26) 1939 Mad 337 & 'Kshetra Mohandas v. Basu', ILR (1943) 1 Cal 313, there was in particular a stipulation as to provision of payment of interest by the company which implied that the company could utilise the monies. It was argued that it could not therefore have been intended that the deposit should be kept separate or must be deemed to be paid into the hands of the company to be held by them in a fiduciary capacity. In the present case, there is no provision as to payment of interest. The language of the document here is simple. It is provided that the sum of Rs. 50,000 shall be a permanent deposit with the company for a period of five years & shall be refunded at the end of the above period or on prior determination of the distribution agency & that the amount shall not carry any interest whatsoever. There is therefore nothing to distinguish this case from the decision in 'Kshetra Mohandas v. D. Basu', ILR (1943) 1 Cal 313, that there was a provision for payment of interest which could be argued as a circumstance to be taken into consideration in favour of the company that the depositor never intended the amount to be kept as a separate fund, but permitted it to be used just as any kind of deposit & that therefore it would only be a creditor & not a 'cestui que trust'. I agree with the reasoning of the

learned Judges in 'Kshetra Mohandas v. D. Basu', I L R (1943) 1 Cal 313, & hold that the amount of Rs. 50,000 in the hands of the company is impressed with a trust.

(13) It is contended on behalf of the directors by Mr. Lakshmayya that the elements of a trust as are required for the creation of a trust laid down by S. 6 of the Trusts Act are absent in this case. S. 3 defines as follows:

"A 'trust' is an obligation annexed to the ownership of property, & arising out of a confidence reposed in & accepted by the owner, or declared & accepted by him, for the benefit of another, or of another & the owner."

Under S. 6 a trust is created when the author of the trust indicates with reasonable certainty the intention to create a trust, the purpose of the trust, the beneficiary & the trust property & transfers the trust property to the trustee. I fail to see how any of these elements are absent with reference to the deposit made by the applicants. The purpose of the trust is for the fulfilment of the obligations under the agreement. The beneficiaries are the applicants & the company under certain circumstances. So long as the applicants fulfil their obligations under the agreement they are the sole beneficiaries; but failure to fulfil to any extent would deprive them of the full benfits of the trust, the company being entitled to withhold such monies. It is pointed out that in so far as the intention of the depositee, that is, the company is concerned, it can be seen from the way in which the amount was utilised for the purpose of the company, that the company never intended that the amount should be a fund entrusted to them for a specific purpose & should not be utilised by them & will be returnable to the applicants 'in specie' subject to such deductions as may arise in case the applicants did not fulfil their obligations & that therefore the applicants would not be entitled to rank as any other creditor. Further, that the intention to treat this amount as not a trust is also shown by the circumstance that this deposit was not kept as a separate fund but was mixed with the funds of the company & subsequently utilised by the company for its own purposes & the fact that such utilisation was made by the company shows that the intention must have been otherwise. In support of his contentions the learned counsel relied on the Full Bench decision in 'Maheshwari Bros. v. Official Liquidators', A I R (29) 1942 All 119. In that case the managing agents of the company under liquidation entered into an agreement of agency whereby they deposited a sum of Rs. 50,000 with the company as security for the fulfilment of their obligations. The company being ordered to be wound up, the agents claimed a preferential payment of the sum of Rs. 50000 with interest & also claimed a charge on the machinery & other goods of the company, since under the agreement a charge was created. It was contended by the agents that the money deposited with the company was trust money & as such was not part of the assets of the company & should be returned to them. On the facts & circumstances of the case, having regard to the creation of a charge on the company's assets & to the provision for payment of interest by the company & to the fact that the money was deposited by the agents of the company into the general assets of the company & was subsequently utilised by the company for their general purposes, the learned Judges held that no trust was created, & they observed that every case of this kind will fall to be considered on its own facts & circumstances. The circumstances referred to above weighed with the learned Judges & they observed as follows:

"We think that a fair test of whether a sum of money of this kind is to be held as a trust fund or not is to ask whether, in the circumstances, it was intended that it should remain segregated fund, or whether it should, on payment, become the property of the company & be compensated for by the company's express or implied covenant to repay it in exactly the same way as the customer's deposit in a bank creates the relationship of debtor & creditor: We think that the circumstance that it passed into the general assets of the company & was utilised by them for their general purposes is a strong indication that the latter view is the correct one, as the first duty of a "trustee" is to avoid mixing the trust funds with his own or to use them for other than trust purposes."

This decision, as observed by the learned Judges, is a decision on the facts & circumstances of that case. But in so far as the provision for interest is concerned, I prefer to agree with the views of the learned Judges expressed 'In re Travancore National & Quilon Bank Ltd.', A I R (26) 1939 Mad 337, and 'Kshetra Mohandas v. D. Basu', I L R (1943) 1 Cal 313, that the provision for payment of interest need not necessarily militate against the case that a trust was created. But with respect to the learned Judges in 'A I R (29) 1942 All 119', I do not think that the test as laid by them, namely, the circumstance that the money passed into the general assets of the company & was utilised by them for their general purposes is a strong indication that the amount was not deposited as a trust is a correct one. The intention to create the trust should primarily be that of the author of the trust first which must be accepted by the person in whose favour the confidence is reposed as a trustee. If the company, who should be in the position of a trustee, without reference to the consent of the person who deposited, utilised the funds for general purposes and failed to carry out the intention of the trust by mixing the fund with the funds of the company or using the same for purposes other than for which it was deposited that could not be taken as a test to find out whether a trust has been created. It may be that the intention on the part of the author of the trust is not expressed. The subsequent conduct of the company in utilising the fund might throw a light on whether the intention of the parties was to create a trust. But that cannot be a conclusive or a safe test in such cases, since even in a case where a deposit has been made for a specific purpose, as in the present case, if the person who has received the deposit applies it for purposes other than for which it is deposited, that would amount to a breach of the conditions of the deposit & would not be taken as a consideration in arriving at the intention as to the nature of the deposit. I am therefore unable to agree with the decision in 'Maheshwari Bros. v. Official Liquidators', A I R (29) 1942 All 119.

(14) An argument is advanced on behalf of the directors that the statement made by the applicants in the petition for winding up,

namely that they deduct a sum of Rs. 7698-5-3, being the realisations & claim only the balance due by the company, must be taken as proof positive that the applicants never intended to create a trust in respect of the sum of Rs. 50,000 since they agreed to the deduction out of it, of the sums accountable by the applicants to the company & that the intention was not that this sum of Rs. 50000 should be kept separate and returned. But this argument loses sight of the terms under which & the specific purposes for which the deposit has been made. This deposit has been made or demanded by the company & agreed to by the applicants as security for the fulfilment of the obligations under the agreement by the applicants & one of the obligations is to render an account of the collections & realisations from the films entrusted to them & therefore such a deduction is only in pursuance of the terms of the trust & not in derogation of it. There is nothing incompatible or foreign to the terms under which the deposit was made that this deduction has been agreed to be made by the applicants. I have therefore no hesitation in holding that a trust has been created in respect of this deposit under the agreement dated 7-9-1946 & that the applicants are entitled to a preferential payment from the company.

(15) The next question that arises for decision in this case is as to the rights 'inter se' between the Madura Bank Ltd., & the applicants with reference to the assets of the company. The Madura Bank Ltd., hold a mortgage decree against the properties of the company in O. S. No. 49 of 1949 on the file of the Subordinate Judge's Court, Madura. They advanced a sum of Rs. 3 lakhs on the pronote executed by the directors & on the security of the movable & immoveable properties of the company particulars of which are given in the schedule to the decree. The machinery & other movable & immovable properties have been mortgaged. The applicants claim priority over that of the decree in favour of the Madura Bank on the ground that the amount deposited by them is a trust amount which could not be subjected by the company to any charge, or in any event be held liable to any charge or mortgage created by the company & that the bank had notice that this amount of Rs. 50000 was a deposit amount & not the assets of the company, as could be seen from the balance sheet Ex. P.3.

(16) An ex-director of productions of the company was examined on behalf of the applicants to establish that the agent of the Madura Bank & an accountant came to the company's premises, looked into the statement of affairs of the company & the balance sheet & they questioned the management as to where this deposit was kept, checked the securities & it was only thereafter that the loan was granted. But, a witness on behalf of the Madura Bank denies that either the Bank's agent or anyone went & inspected the accounts and other papers of the company. He states that they did not look into the balance sheet & they were not aware that there was such a balance sheet & that they came to know of it only after the mortgage was executed. Whatever may be the real truth as regards whether the bank had knowledge of this deposit of Rs. 50000 by the applicants with the company & whether it was with the knowledge that the deposit amount has to be repaid, the bank advanced this amount on the hypothecation of the properties of the company, it is not likely that the Madura Bank would have failed to look into the balance sheet as no businessman of ordinary prudence would have agreed to give an advance of 3 lakhs without knowing the affairs of the company. If they had looked into the balance sheet, they could have found that a sum of Rs. 68932 & 29 cents was kept by the company as "distributors' deposits". But, it was however unnecessary for them to make further investigation as regards the deposit since what they were taking as security was not the entire assets of the company, but only the movable & immovable properties specified in the schedule to the document creating the mortgage. Unless it could be the case of the applicants that by reason of the deposit being in the nature of a trust, a charge was created on all the properties of the company on the date of such deposit, it does not matter whether the deposit which was with the company, as other deposits, is in the nature of trust or otherwise. Since the bank was concerned only with the securities that were offered to them, which were specific moveable & immoveable properties, & in so far as these properties were concerned, the Bank were given a charge, it cannot be stated that the applicants would be entitled to a charge over these specific properties, which are the subject matter of hypothecation & the subsequent mortgage decree in favour of the bank. I do not think that the bank's rights are in any way affected & they are entitled to enforce the charge against the company by reason of the fact that they are secured creditors, being mortgage decree-holders. The remedy of the applicants in respect of this deposit of Rs. 50000 would be to proceed against the other assets of the company & not against these specific movable & immovable properties so as to deprive the Madura Bank of their right of proceeding against the case & recovering the amount due to them.

(17) The question that remains for determination is whether respondents 3 to 11, the directors of the company, or any of them, are liable for misfeasance in respect of the deposit amount & whether they should be personally directed to pay the amount to the applicants. The allegations in the affidavit regarding this prayer is very vague & excepting stating that the directors of the respondent company should also be made to pay for breach of trust or misfeasance, there is nothing alleged as to what the misfeasance or breach of trust that the directors had committed and in what manner they had become responsible & what is the failure of their duty which would make them liable to the applicants. The joint Official Liquidator has filed an affidavit wherein he states that from the records available there are not sufficient materials to come to the conclusion that there has been any act of fraud or misfeasance by the directors. The directors while denying their liability state through their Chairman that the deposit money of the petitioners has been made use of in the running of the company & the money has been properly accounted for.

(18) The contention on behalf of the applicants is that the directors misapplied the amount & committed a wrong in utilising the amount, which was a trust fund, for purposes

other than for which it was intended & therefore committed a breach of trust.

(19) The section in the Indian Companies Act as regards the liability of the directors for misfeasance is S. 235 (1), which is in the following terms:

"Where in the course of winding up of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied, or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the mis-application, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator, or officer, & compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just."

(20) Certain English & Indian decisions bearing on the subject have been referred to & it will be useful to refer to some of them to understand as to what is the precise nature of liability which the statute imposes upon the director in respect of wrongs committed by them.

(21) In 'in re Canadian Land Reclaiming & Colonishing Co.', (1880) 14 Ch D 660, known as Coventry & Dixon's case, where two gentlemen were appointed, & for sometime acted, as directors of the company without the necessary qualification of holding a certain number of shares, a charge was made against them by the liquidator under S. 165 of the Companies Act of 1862 for misfeasance in acting as directors without qualification. It was held in that case that S. 165 (corresponding to S. 235, Indian Companies Act), creates no new right, but merely provides a summary mode of calling directors to account for acts of impropriety for which they are liable to an action; that to make a person liable under it, he must be shown to have been guilty of some misconduct by which the company has suffered loss; and the application must therefore be dismissed. In that case the Master of the Rolls was of opinion that the directors by acting as such without the necessary qualification had been guilty of misfeasance; but on appeal the judgment was set aside. James L. J. states as follows at p. 670,

"In order to enable the Court to apply that section, the liquidator as it seems to me, must show something which would have been the ground of an action by the company if it had not been wound up. I am of opinion also that the word 'misfeasance' in that section means misfeasance in the nature of a breach of trust, that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any monies of the company, or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in actual loss to the company."

Bramwell L. J. at p. 673 observes:

"It seems to me that the sole object of the clause is to give a summary remedy for that for which there would be a remedy without that section in the Courts of law. Then again it seems to me that the amount with which these gentlemen have been charged cannot be justified. The section authorises the Court to direct persons chargeable under it to pay a sum of money by way of compensation. Therefore the Official Liquidator has to show, first of all, the misfeasance, & then the damage in respect of which the company is to be compensated. To my mind the liquidator has failed to show any damage at all. This is not a section for punishing a man who has been guilty of misfeasance, but for compensating the company in respect of the loss occasioned by his misfeasance. It is not shown that there was any loss, & indeed, if the burden of proof were upon the appellants to show there was not any loss, I should say they had succeeded in doing it."

(22) In the same report there is another decision of 'Hall V. C. 'In re British Guardian Life Assurance Co.', (1880) 14 Ch D 335. In that case, the company which was an insurance company, was formed in 1869 and was registered under the Companies Act in 1871 & on 3-6-1876 it was ordered to be wound up. In 1872 a resolution was passed by the company as follows:

"that for the better security of the policy holders 50 per cent. of the premium paid on whole life policies on & after 29-9-1872, shall be invested in British Govt. securities in the names of the trustees of the company."

Prospectuses were issued thereafter stating that 50 per cent of the premiums paid upon whole life policies is invested in the names of the trustees in British Govt. securities. It was discovered that after 6-8-1875 no investment was made by the trustees & that the sums which had before that time been invested were gradually sold out, & the proceeds applied to the general purposes of the company before the company went into liquidation. On summons by the liquidator & a whole life policy holder jointly for a declaration that the directors were liable to account to the company for a moiety of the premiums received, it was held that the summons was maintainable as against the surviving directors, that the directors were liable, as for a breach of trust, for a moiety of the premiums which ought to have been invested. Hall V. C. observes as follows at p. 346:

"I cannot say that there might not be questions raised as to the application of the funds which were to be invested in the manner specified, but as regards the investment a clearer clause than this I never saw, & I see no difficulty in construing the words, viz., that 50 per cent. of the premiums on the whole life policies shall be invested in Govt. securities. The addition of the words 'for the better security of the policy holders', does not create an ambiguity which reduces the clause to a nullity. As to any question that may have to be decided between the policy holders and the whole life policy holders, because the amount to be invested is 50 per cent. of the premiums paid on the latter, I abstain from expressing any

opinion. Should there be any question as to the application of the funds, there can be none either as to the amount to be set apart & invested, or that the clause created an obligation on the part of those who had the management of the company to see that effect was given to it. It was submitted that the funds had been properly applied for purposes of the company. As to that, there is no ambiguity or vagueness in the clause, & I have not the least doubt that it was meant as a protection to those entitled under the trust as policy holders, & that there would have been no difficulty whatever, if the persons entitled to the benefit of the funds had taken proceedings for the purpose of preventing them being applied towards the general purposes of the company. I now come to the question of Mr. Williamson's liability — whether or not he is under any, & I hold that he having been a director during the whole of the time in which investments ought to have been made — having been a most active member of the board, constantly attending, & rarely absent from the meetings of the directors, is, in common with his co-directors, liable. It was his duty to see that the investments were made in accordance with the resolution & clauses of the partnership contract, & his not attending to it was a breach of trust to the company for which he was acting as a director; and a breach of trust in respect of which, after the order made for winding up the company, he can be charged & made liable."

(23) In 'In re Exchange Banking Co.', (1883) 21 Ch D 519, the directors of a limited company for several years presented to the general meetings of shareholders reports and balance sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shown though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends which the directors accordingly paid. An order having been made to wind up the company the liquidator applied, under S. 165 of the Companies Act, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital. It was held in that case that the directors were liable & that the fact that the capital thus improperly applied was distributed 'pro rata' among the whole body of shareholders did not protect the directors, for that the shareholders were not the corporation, & that payment to them would not prevent the corporation before winding up, or the liquidator after winding up, from compelling the directors to replace the money that it might be applied to proper purposes.

(24) Jessel M. R. observes as follows at page 533,

"A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner & with the safeguards provided by statute, & looking at the Act 40 & 41 Vict. C. 26, it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited company cannot in any other way make a return of capital, the sanction of a general meeting can give no validity to such a proceeding, & even the sanction of every shareholder cannot bring within the powers of the company an act which is not within its powers. If, therefore, the shareholders had all been present at the meetings, & had all known the facts, & had all concurred in declaring the dividends, the payment of the dividends would not be effectually sanctioned."

The reasoning of the decision is that the capital of the company was utilised for purposes not authorised by the memorandum & articles of association, that the directors were quasi trustees for the company & not for the individual shareholders in respect of this capital & therefore the acts of the directors amounted to a breach of trust, & accordingly they would be liable.

(25) Lord Macnaghten in 'Cavendish Bentinck v. Fenn', (1887) 12 A C 652, summarises the scope of S. 165 of the Companies Act of 1862. At p. 669 he observes as follows:

"The 165th section of the Act of 1862 has often come under discussion & it has been settled, & I think rightly settled, that that section creates no new offence, & that it gives no new rights, but only provides a summary & efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company."

In that case, a director purchased for the company a property in which, before he became director, he had acquired an interest. The director having been proceeded against after liquidation on the ground of misfeasance or breach of trust for having allowed the company to make the purchases without disclosing his own interest & at a price far exceeding the value it was held that the evidence adduced by the applicant failed to show either that the director had not disclosed his interest or that the purchase price was above the value. Lord Herschell in that case was of opinion that assuming that a breach of duty such as is suggested would be of a misfeasance giving rise to an application under the 165th section such an application could only succeed where it could be shown that the breach of duty had resulted in loss to the funds and assets of the company.

(26) All these cases, are referred to by Kekewich J. in 'In re the Liverpool Household Stores Association Ltd.,' (1890) 59 L J C H 616. The directors in this case were charged with misfeasance on several grounds. This decision lays down:

"S. 165 of the Companies Act, 1862, enables a creditor of a company to obtain by summary process any relief to which he is entitled in respect of damages incurred through the misfeasance of an officer of the company, but the remedy afforded by the section is only for the recovery of damages for losses incurred. The misfeasance to which the section is directed is not restricted to acts of commision, but extends to all breaches of trust in relation to a company through which loss is incurred. Misfeasance is not to be imputed to a director unless he has dishonestly acted, or abstained from acting, in conflict with his plain duty & the burden of proof lies on the party making the charge; but in considering the question of the director's liability, there must be imputed

to him a special knowledge of the business which he has undertaken. Directors are liable for losses occasioned through acts done by them as directors in matters which are 'ultra vires' the company, & this liability is not dependent upon any question of honesty of intention."

(27) The Indian decisions that are cited are: 'Gopalaswami. v. Krishnaswami, I. L. R. (1941) Mad 120, National Bank of Upper India, Lucknow. v. Dinanath Sapru 1 Luck 334, Connell. v. The Himalaya Bank Ltd., 18 All 12 and Bhim Singh. v.Union Bank of India, 8 Lah 167'. The Indian Courts uniformly hold that misfeasance must be such as would amount to breach of trust in relation to the company & must result in loss to the company. It is necessary that in all cases, loss to the company must be established & as observed by Edge C. J. & Banerji J. being in the nature of damages, it is necessary that the loss to the company in respect of which compensation is asked for should be the direct, & not a remote & more or less speculative, consequence or the misfeasance or neglect of duty on the part of the director or other officer of the company from whom such compensation is sought.

(28) In the present case, the amount which was paid by the applicansts was received as a deposit under the agreement & referred to as "distributors' deposit". There was no direction by the applicants that this amount should not be utilised for any other purpose & must be kept in a separate account to be returned to the applicants or adjusted to the collections in terms of the agreement between the applicants & the company. There was likewise no resolution of the company as to the manner in which this amount was to be dealt with & whether it should be invested separately. There was neither by agreement nor by way of resolution of the company anything to indicate that the amount should not be utilised for the purposes of the ordinary business of the company. There is no provision even in the memorandum & articles of association governing such amounts received as deposits either from employees or from agents. In the absence of any such direction, if the directors had utilised the amount for the legitimate purposes of the company in the course of their management & not appropriated any portion of the same for their personal use & not utilised it for any purpose not authorised by the memorandum & articles of association, could it be said that they had misapplied the funds of the company or committed a breach of trust in relation to the company? The word 'misapplication' in S. 235 has been argued to be an application for purposes other than for which the funds were intended. 'Prima facie', this argument sounds plausible. But, as pointed out already, there is no allegation that the applicants desired that the amount should be invested & kept separately. Misapplication by a director of the funds of the company was intended to mean application of the funds belonging to the company for his own purposes, or application for purposes other than that of the company, or for purposes not sanctioned by the memorandum and articles of association or applying the funds in contravention of any specific provision of law, or direction, or resolution of the company. If the director bona fide believes that the fund, which has come into the company, such as the applicants' deposit, being the funds of the company, could be legitimately applied for the bona fide needs of the company, it cannot be said that the director was doing something wrong by so applying. It is not a case of retention of the amount in his hands and not accounting for it. The use of the monies for the business of the company by the directors would not also amount to an act said to be 'ultra vires'. In 'In re British Guardian Life Assurance Co. (1880) 14 Ch. D 335' and 'In re Exchange Banking Co, (1883) 21 Ch. 519' the acts of the directors were held to be 'ultra vires' & acts done in contravention of the memorandum & articles of association. I am therefore unable to hold that the directors in this case have misapplied the applicants' amounts & that therefore they are liable to account. There is no case as to any breach of trust. The breach of trust that is contemplated under S. 235 is a breach of trust in relation to the company and it is not suggested that any monies of the company have been misappropriated by the directors or that any duty was imposed on the directors by the company in respect of which the directors have committed a breach. In order to make the directors personally liable under S. 235 for misfeasance, it is necessary to show that the directors have dishonestly acted, or abstained from acting, in conflict with their plain duty & that by reason of the act of the directors, the company has incurred a loss. But this dishonest intention need not be shown in cases where the directors have been responsible for acts which were 'ultra vires' of the company & losses have therefore been occasioned to the company by such 'ultra vires' acts.

(29) Counsel for the applicants endeavoured to show that in this case loss has occurred to the company, since the disappearance of the money, which should have been there, has created a liability on the company which can be said to be a loss which the company has incurred. The argument is that if the fund had been there, the same could have been paid over to the applicants & the company would not be made liable to the applicants now. I am unable to follow this argument as no new liability has been created by reason of the disappearance of the money. The liability, if any, had always been there & that liability should, in any event, have been discharged, the difference being that if the sum was there as a deposit it could have been paid now. But since the company is always liable, I consider that no new liability has arisen & therefore it could not be said that the company has sustained a loss by reason of the utilisation of these monies.

(30) It is also argued that by reason of the directors not having kept this amount separately & made it available to the applicants, it would become necessary for the liquidators to make a call on the contributories for the unpaid capita to that extent, which means that the shareholders have suffered a loss, since they have to pay uncalled for share capital. The liability of the shareholders to pay unpaid calls is again a liability which existed at the inception, when they became shareholders & has not been created by reason of any subsequent event including the disappearance of money and its having been utilised for the

purposes of the company. In any event ,the loss alleged to have been sustained by the company appears to be rather speculative than real & too remote that it cannot be said that the company has sustained a loss as a direct consequence of the acts of the directors in spending the amount admittedly for the legitimate business of the company. The directors have acted 'bona fide' & have not contravened any provision of law, or any direction or injunction of the company in utilising the amount for the company's business. I therefore hold that they are not liable for any misfeasance, or misapplication or breach of trust under S. 235 of the Indian Companies Act.

(31) The result is: Prayers (a) & (b) are rejected. Prayer (c): The applicants will be entitled to rank as preferential creditors, but not in preference to the claim of the second respondent against the company out of the properties mortgaged and hypothecated to the Bank. No orders as to costs.

C.R.K./D.H. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 491 (C. N. 107)

SATYANARAYANA RAO, J.

Thalagadadivi Saty Venkata Subba Rao, Applt.
v. Yellapragada Ananda Rao and others, Resps.

Second Appeal No. 2024 of 1947 D/- 1-12-1950.

(a) *Practice — Hearing the other side.*

It is a principle of a natural justice that no order to the prejudice of a person should be made without giving an opportunity to him of making his defence, and the order would be invalid in such a case. A I R (34) 1947 Mad 401 Rel. on. (*Para 4*)

(b) *Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation, VII(7) of 1828) S. 3 third para — Power of revision when can be exercised.*

The power is conferred under S. 3 third para to interfere with the order of the Subordinate in the manner provided by the section only before the order is carried into execution. The power, therefore, cannot obviously be exercised after the order of the Subordinate has been carried into execution whether the proceedings came to the notice of the Collector by virtue of a general direction or a particular direction. A I R (25) 1938 Mad 903 rel. on. (*Para 5*)

(c) *Madras Hereditary Village Offices Act (III (3) of 1895) S. 10(4)(6) — Scope of.*

S. 10(4) does not make obligatory on the Revenue Divisional Officer to issue the direction contemplated by that sub-section but vests in him a discretion. A person can be recognised and registered as the successor to the office under S. 10(6) only if there was no direction contemplated and permitted by S. 10(4) (*Para 1*)

(d) *Madras Hereditary Village Offices Act (III(3) of 1895) Ss. 10, 13, 21 — Jurisdiction of Revenue and Civil Courts — Civil P. C. (1908) S. 9.*

Notwithstanding the generality of the language of S. 21, the Jurisdiction of the Civil Court is taken away only in cases in which such jurisdiction is conferred on the revenue Court under S. 13. S. 21, therefore, must be read with S. 13. Whenever a person basing his claim to succeed to the office rests his right in respect of offices forming class (1) in S. 3 and seeks to recover the office or the emoluments attached to such office on the ground that he is entitled to so succeed under sub-s .(2) or (3) of S. 10 he must institute his suit in the Revenue Court under S. 13. If, however, the tribunal created by S. 13(1) acts without jurisdiction there would be a right of suit in the civil Court to an aggrieved person. If a person is validly appointed to a post as headman but by reason of a subsequent order which was passed by a Revenue authority without jurisdiction he is deprived of the right which was recognised and accepted by the authorities concerned at a previous stage, it would be open to the aggrieved person to institute a suit to have the legality of the subsequent order tested in a civil Court. 'Case law Rel. on.' (*Paras 6, 7*)

Anno: C. P. C. S. 9 N. 50, 51.

C. Rama Rao and M. Appa Rao, for Applt. — The Govt. pleader, for Resps.

Cases referred to:

('99) 22 Mad 270: (26 I A 16 P C) (Pr 7)
('10) 33 Mad 208: (5 I C 137) (Pr 6)
('24) 20 MLW 451: (A I R (11) 1924 Mad 867) (Pr 6)
('30) 58 M L J 698: (A I R (17) 1930 Mad 349 (2)) (Pr 7)
('31) A I R (18) 1931 Mad 502: (136 I C 38) (Pr 7)
('33) 56 Mad 749: (A I R (20) 1933 Mad 618) (Pr 7)
('38) 1938-1 M L J 539: (A I R (25) 1938 Mad 483) (Pr 7)
('38) I L R (1938) Mad 841: (A I R (25) 1938 Mad 441 F B) (Pr 7)
('38) 1938-2 M L J 488: (A I R (25) 1938 Mad 903) (Pr 5)
('39) 1939-2 M L J 6: (A I R (26) 1939 Mad 648) (Pr 7)
('41) 1941-2 M L J 439: (A I R (28) 1941 Mad 857) (Pr 7)
('48) I L R (1948) Mad 548: (A I R (35) 1948 Mad 200) (Pr 7)
('48) I L R (1948) Mad 91: (A I R (34) 1947 Mad 401) (Pr 4)

JUDGMENT: In this second appeal, the plff. appellant seeks in substance a declaration that two orders of the District Collector, Krishna, dated 27-11-1937 & 31-7-1942 are illegal & 'ultra vires'. In the suit he also prayed for a mandatory injunction directing the District Collector, Krishna to recognise the plff. as the permanent headman of the village of Thalagadadivi but that prayer is now out of the case & is not pressed. From 1937 the plff. was making unsuccessful attempts to assume charge as headman of the village after he had attained majority & qualified himself to the post. His right to the headmanship was recognised in 1933 during his minority & he was registered under S. 10(5), Madras Hereditary Village Offices Act, as the person entitled to succeed to the office. The plff.'s father, Mallikarjuna Prasada Rao was the village munsif of Thalagadadivi till he was dismissed from service on 21-4-1932 as he was found guilty of misappropriation of Govt., money amounting to over Rs. 1000. The office was held by the family in hereditary right. The Revenue Divisional Officer who dismissed him from service by his proceedings dated 21-4-1932, Ex. P. 1, did not conform to the procedure applicable under S. 10(4) of the Act. That sub-section empowers the collector to direct when a vacancy had occurred & when the holder of the office is dismissed or suspended that until the death or return to duty of such last holder, the duties of the office shall be performed by some person duly qualified under Sub-s. (1) who is not an undivided member of the family of the dismissed or suspended officer. The disability, if imposed by a direction under this section, continues until the death of the dismissed holder. If a vacancy is caused by the dismissal of the holder of the office under S. 10 (4) & if the collector did not thing fit to issue a direction contemplated by S. 10 (4), the vacancy has to be filled up under Sub-s. (6) as if the dismissed older

died at that moment; in other words, when there is no direction imposing a disability on an undivided member of the family of the dismissed office holder, such undivided member if he is otherwise entitled to hold the office is entitled to be appointed to fill up the vacancy under Sub-s. (6) of S. 10. The direction actually given in Ex. P. 1 was not in terms of S. 10 (4). He merely stated there as follows:

"I therefore dismiss him from service & order that during his life time no undivided member of his family should succeed to the post."

This direction means that if the person entitled to succeed to the office at the time the vacancy had occurred becomes divided from the family, he should be entitled to succeed to the post. The Revenue Divisional Officer who can be assumed to have understood the import of the order he passed on 21-4-1932, followed up this order by registering the pltf. who was then a minor aged 16 as the headman of the village in place of the dismissed Mallikarjuna Prasada Rao & also appointed as his deputy a Muhammadan following the procedure laid down in Sub-s. (5) of S. 10. This conduct of the Revenue Divisional Officer makes it clear that he did not intend by his order of 21-4-1932 to impose a disability on the undivided member to succeed to the post under Sub-s. (6) of S. 10 as the pltf. could be recognised & registered as the successor to the office under that sub-section, only if there was no direction contemplated & permitted by S. 10 (4). What is more, the same Revenue Divisional Officer subsequently modified his order dated 9-1-1933, Ex. P. 2 registering the minor pltf. as the successor to the Office & appointing a deputy by a subsequent order of 1-5-1933, Ex. P. 3. In place of the Muhammadan deputy whom he appointed under the previous order, he appointed the pltf's maternal grandfather, the first deft. in the present suit as his deputy. These two orders make it abundantly clear that the order of the Revenue Divisional Officer in Ex. P .1 was not intended to be a direction imposing a disability or what is styled in the revenue language a "bar order". Under S. 10(4), the Revenue Divisional Officer is not bound to issue a direction in exercise of his discretion & this view receives support from the language of Sub-s. (6) which clearly contemplates that if the collector did not issue a direction under Sub-s. (4), the vacancy can be filled up as if it was caused by the death of the last holder. By 1937 the plff. attained majority & completed all the tests required for qualifying himself to the post. He also became divided from his father & this fact is now beyond dispute. By his application dated 28-5-1937, Ex. P. 7 to the Deputy Collector, he prayed that he should be permitted to enter upon his duties. The Deputy Collector seems to have sought the advice of the District Collector in the matter as the Revenue Divisional Officer at that time was a different person from the officer who passed the earlier orders, Ex. P. 1, P. 2 & P. 3. The Colltctor of Krishna seems to have felt that Revenue Divisional Officer who dismissed the plff.'s father from service should have given a direction under Sub-s. (4) of S. 10 & should not have registered the minor as entitled to the office overlooking the fact that S. 10(4) does not make it obligatory on the Revenue Divisional Officer to issue the direction contemplated by that sub-section but vests in him a discretion. The Collector of Kistna issued a notice to the plff. on 5-11-1937, Ex. D. 1, calling upon him to show cause why the order registering him as headman of the village should not be cancelled as being illegal. This notice was served on the plff. who appeared before the Collector by a pleader to present his case. But the Collector cancelled on 27-11-1937 by Ex. P. 8 the order registering the plff. under S. 10(5) as entitled to succeed to the office. This order of the Collector was based on his view that the order of the Revenue Divisional Officer in Ex. P. 1 was wrong & that he should have passed a "bar order" without filling up permanently the vacancy under the provisions of Sub-s. (2) or (3) of S. 10 as that question would arise only after the death of the dismissed holder. He thought that the registry of the minor as heir was void 'ab initio' & was inoperative. The plff. took up this matter through various stages up to the Board of Revenue & even applied for a review of the order by the Collector but was unsuccessful. He then filed a suit under S. 13 of the Act on 25-11-1940 substantially for getting the orders of the Collector set aside. That suit which was ill-conceived & was without jurisdiction was of course unsuccessful though it was found by the Deputy Collector who tried the suit that the partition pleaded by the plff. was true. There was an appeal against the decision of the Deputy Collector to the Collector. In disposing of the appeal & dismissing it, the collector followed the somewhat extraordinary procedure of revising the order passed by the Revenue Divisional Officer in Ex. P. 1 & in doing so, he purported to act under the powers assumed to have been conferred upon him by Regulation VII of 1828. The order that was passed was in these terms:

"In the interest of the administration, I direct under S. 10(4) of Act III (3) of 1895, that until the death of the dismissed village munsif the duties of the office shall be performed by some person duly qualified under S. 10(1) who is not an undivided member of the family of the dismissed village munsif."

There were in the usual course appeals to the Board of Revenue & to Govt. but to no purpose.

(2) On 20-11-1943 the plff. launched the present suit for the reliefs already stated impleading as parties to the suit, the deputy, his maternal grand father as the first deft. & the Province of Madras as deft. 2. Both the defts. supported the two cancellation orders passed by the Collector, Krishna as valid & also raised the further plea that the civil court had no jurisdiction to entertain the suit as its jurisdiction was barred by S. 21 read with S. 13 of the Act. The District Munsif who tried the suit found on the merits in favour of the plff. but thought that he had no jurisdiction to entertain the suit. On appeal the learned Subordinate Judge held on both the points against the plff. Hence this second appeal.

(3) The validity of the orders of the Collector of Krishna & the jurisdiction of the civil court to entertain the suit, has been hotly contested on both sides, i. e., by the Govt. & the plff. & counsel on both sides argued the two questions with considerable ability & learning.

(4) The order of the Collector of Krishna cancelling the registration was assumed by the District Munsif as having been made without notice to the plff. If this fact were true, the order would be invalid as it is an elementary principle of the law that no order to the prejudice of a person should be made without giving an opportunity to him of making his defence. This is based on the maxim 'audi alteram partem' & is a principle of natural justice — see 'Satyanarayana v. Venkatramayya', I. L. R. (1948) Mad 91 but it has been brought to my notice by the learned Govt. Pleader that in fact a notice was issued by the Collector before cancelling the order on 5-11-1937, Ex. D. 1 & I find from an endorsement on that notice that the plff. was served. What is more, it is admitted by this very plff. in Ex D. 2, the plaint filed by him under S. 13 of the Act, that he had received such a notice & that he had ap-

peared by pleader to represent his case before the District Collector who thereafter passed the order of 27-11-1937. The order, therefore, cannot be attacked on the ground on which it was held to be invalid by the learned District Munsif.

(5) The point which was pressed on behalf of the appellant, however, is that the Collector of Krishna had no jurisdiction to revise the order under the Madras Subordinate Collectors & Revenue Malversation (Amendment) Regulation VII of 1828. That Regulation was intended to declare the powers of Subordinate & Assistant Collectors in charge of particular divisions of districts & to confer upon them the powers of collectors granted by the Regulations then in force & thereafter to be enacted. The Regulation also empowered the Collector to delegate his functions at his discretion in the manner provided by S. 3. The third para of S. 3 contains the provisions conferring upon the Collector of the District power of revision to control the action of the Subordinate & Assistant Collectors. It reads as follows:

"The proceedings of Subordinate & Assistant Collectors acting under the preceding clauses shall be subject, in all cases, & in the fullest manner, to the superintendence, control & revision of the collector, who shall have power either to direct, 'generally', that the proceedings of any of his subordinates or Assistants shall be regularly submitted to himself 'before the decision, order or sentence is carried into execution', & to confirm, modify or annul them or issue any further orders in the cases, as he may see fit; or in any 'particular' case to direct that the decision, order or sentence of any of his subordinates or assistants shall 'not be carried into execution', & to pass such further orders as he may see fit" (the itilics (here into invested comas') are mine). The power conferred under this para is of a twofold character. The Collector under this clause may direct generally that the proceedings of any of his subordinates & assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution & if so submitted, he is empowered to confirm, modify or annul those proceedings or even may issue any further orders in the case as he may think fit. Instead of making a general direction he may require that in a particular case the decision, order or sentence of any of his subordinates or assistants shall not be carried into execution & he may pass such further orders as he may think fit. In either case it should be noticed that the power is conferred, to interfere with the order in the manner provided by the section only before the order is carried into execution. If once an order is carried into execution, it is but natural that the Collector should not undo what has been done by his subordinate. The power, therefore, cannot obviously be exercised after the order of the Subordinate has been carried into execution whether the proceedings came to his notice by virtue of a general direction or a particular direction. That this regulation is not a dead letter is clear from the decision of a Bench of this court in 'Srinivasa Iyengar v. Jagannahta Aiyangar', 1938-2 M. L. J. 488. In that case there was no question of the order sought to be revised having been executed before it was altered in revision by the Collector. The Collector in a matter in which there was no right of appeal interfered & reversed the order of the Revenue Divisional Officer in a matter arising under the Madras Hereditary Village Offices Act. The order was justified on the ground that though the Collector could not entertain an appeal & interfere with the order of the Revenue Divisional Officer in the exercise of his appellate jurisdiction, was certainly entitled to reverse the order in the exercise of his revisional jurisdiction under Regulation VII of 1828. In the present case, the order of 21-4-1932 was given effect to and acted upon by registry of the minor & even appointing a deputy for him — vide Exs. P. 2 & P. 3. The order registering the minor under S. 10(5) of the Act was acted upon by appointing a deputy & then later by modifying that order by appointing the first deft. as a deputy. Therefore, during all these years till the cancellation in 1937 & later on by the Collector in 1942 the two orders were in force & were treated as valid. The deputy functioned only as the deputy of the minor. He could so function only if the order registering the minor under S. 10(5) was valid on the basis that there was no bar order under S. 10(4) & the deputy could not have acted otherwise. The Collector, therefore, could not have exercised & had no jurisdiction to exercise his power of revision when once the orders were put in execution. I am therefore clearly of opinion that the Collector of Krishna had no jurisdiction to make the two orders, one in 1937 & the other in 1942 cancelling the registration of the minor under S. 10(5) of the Act & making a fresh bar order under S. 10(4). These orders therefore are wholly without jurisdiction & are null & void.

(6) The next important question is whether the present suit is maintainable in the civil court. Under S. 9 Civil P. C., Civil courts have "jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred". The point for consideration therefore is whether under the provisions of the Madras Hereditary Village Offices Act, the present suit is barred. Under S. 21 of the Act,

"No civil court shall have authority to take into consideration or decide any claim to 'succeed' to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office, or except as provided in proviso (ii) to Sub-s. (1) of S. 13, any claim to recover the emoluments of any such office".

Notwithstanding the generality of the language of S. 21, the jurisdiction of the civil court is taken away only in cases in which such jurisdiction is conferred on the revenue court under S. 13. S. 21 therefore must be read with S. 13 — See 'Seetharam Naidu v. Rami Naidu', 33 Mad 208 followed in 'Sahadeva Reddi v. Lingappa Asari', 20 M. L. W. 451 (the reference to 33 Mad in 20 L. W. is not accurate. The decision was reported in 33 Madras at p. 208 & not 308). This takes one back to S. 13 to find out the nature & the class of suits in respect of which jurisdiction has been conferred on the Revenue court under the Section. Sub-s. (1) of S. 13 is in these terms:

"Any person may sue before the Collector for any of the village offices specified in S. 3 or for recovery of the emoluments of any such office, on the ground that he is entitled under sub-s. (2) or (3) of S. 10 of the Madras Property Estates Village Service Act, 1894 or under Sub-s. (2) or (3) of S. 10 or Sub-s. (2) or (3) of S. 11 or S. 12 of this Act, as the case may be, to hold such office & enjoy such emoluments, or being a minor, may sue before the Collector to be registered as heir of the last holder of any such office".

(7) It has been authoritatively decided by a Full Bench of this court in 'Rangareddi v. Dasaradha Rami Reddi', I. L. R. (1938) Mad 841 that the word "succeed" in S. 21 should be understood in its ordinary sense of succession strictly so called as it was used in the same sense in S. 10(5). The word should receive the same construction throughout the Act & when so interpreted, S. 21 does not bar a suit for declaration that a person is a rightful holder of an office newly created under S. 6(1) of the Act. The right to the office in such a case is

not based on succession & the new office has to be filled by the Collector under S. 6(1) of the Act by selecting a person from among the persons whom the Collector may consider best qualified from among the families of the last holders of the offices which have been abolished. S. 10 relates to offices forming class (1) in S. 3, S. 11 to offices in a proprietary estate forming class (3) in S. 3 & S. 12 to class (4) in S. (3). Whenever therefore a person basing his claim to succeed to the office rests his right in respect of offices forming class (1), (& the present suit relates to an office in class (1)) & seeks to recover the office or the emoluments attached to such office on the ground that he is entitled to so succeed under Sub-s. (2) or (3) of S. 10 must institute his suit in the Revenue court under S. 13. On the revenue court therefore an exclusive jurisdiction is conferred to try the right claimed & to give him the appropriate relief. Appeals against the decision of the Collector & even a second appeal to the Revenue Board in some cases are provided by S. 23 of the Act. The decision in such a suit is binding & is final & cannot be questioned in a civil court. The jurisdiction of the Revenue court in these matters is analogous to the jurisdiction of the Revenue court to try suits for rent under the provisions of the Madras Estates Land Act. A decision of a court of exclusive jurisdiction is binding on the civil court. Suits for declaration, therefore, that the ultimate decree in a suit filed under S. 13(sic) do not lie as the jurisdiction of the civil court in such matters is barred under S. 21 of the Act, & even apart from S. 21, on general principles a decision of a court of exclusive jurisdiction is binding on the parties to it & cannot be questioned in a collateral proceeding. If, however, the tribunal created by S. 13(1) of the Act acts without jurisdiction there would be a right of suit in the civil court to an aggrieved person, as for example where the revenue board purporting to exercise its second appellate jurisdiction in matters where no such second appeals lie, reverses the decision of the appellate court. It will be noticed that in the proviso to S. 23 a second appeal is provided for against the decisions arising out of suits under S. 13 only in respect of the offices of head of the village & village accountant to the Board of Revenue. The decisions in 'Venkatasubbayya v. Secy. of State', 1938-1-M. L. J. 539 & 'Venkatasastri v. Umamaheswara Venkata Jaganatha Rao', I. L. R. (1948) Mad 548 are instances in which the final decision arising in a suit under S. 13(1) of the Act was not allowed to be questioned in a civil court. Gentle C. J. in the last of the cases recognised an exception in cases where the tribunal created under S. 13(1) of the Act acted without jurisdiction for he observed at p. 552,

"I think it desirable to add that, if the tribunal created by S. 13(1) of the Act did in fact act without jurisdiction, then there would still be a right, in spite of S. 21, for the aggrieved person to come to this court if he could show that the special tribunal had acted without jurisdiction."

So long as the plff. in the action does not rest his claim in the suit in the civil court for the office on the ground that he is entitled under Sub-s. (2) or (3) of S. 10, the bar under S. 21 does not operate & does not come into play as in respect of claims to office or emoluments resting on S. 10(2) or (3) alone the Revenue court is given exclusive jurisdiction under the Act. If once a person is validly appointed to a post either as karnam or as headman but by reason of a subsequent order which was passed by a Revenue authority without jurisdiction he is deprived of the right which was recognised & accepted by the authorities concerned at a previous stage, it would be open to the aggrieved person to institute a suit to have the legality of the order which had the effect of depriving him of that which was previously secured tested in a civil court. The basis on which such suits are held to be cognizable by a civil court is that if once the order which was passed without jurisdiction by the revenue authorities is got rid of by a declaration by the civil court, his right to the office held by him under a valid order which was negatived by a latter void order, would automatically be restored. The decisions have recognised the right of the person aggrived by an 'ultra vires' order to institute a suit for a bare declaration. This principle was established by the Judicial Committee in the well known case of 'Robert Fisher v. Secretary of State', 22 Mad 270. The decision no doubt was under a different Act but the principle established by that decision is applicable to all similar situations & is stated by Lord Macnaghten at p. 282:

"If the so-called cancellation is pronounced void the order of the Govt. falls to the ground & the decision of the Collector stands good & operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of entry in the Collector's book. Cancellation in obedience to illegal commands of the Govt. can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist."

This principle was applied to a case under the Hereditary Village Offices Act by Wallace J. in 'Subbarao v. Secretary of State', 58 M L J 698 & by Beasley C. J. & Bardswell J. in Letters Patent Appeal against that decision in the 'Secretary of State v. Subbarao', 56 Mad 749. In that case the order of the Collector suspending a karnam who had a hereditary right to the office was modified into an order of dismissal by the Board of Revenue in second appeal. The second appeal was incompetent & the Board had no jurisdiction to alter the order of suspension made by the Collector into one of dismissal. It was held that a suit for a declaration that the order made by the Board of Revenue was invalid & 'ultra vires' was maintainable in a civil court & that even a suit for bare declaration was competent. To a similar effect is an earlier decision of Madhavan Nair J. (as he then was) in 'Venkataraghaviah v. Chenchu Subbiah', A. I. R. (18) 1931 Mad 502 where the learned Judge pointed out that if the suit is based on S. 10(2) or (3) of the Act, then alone the jurisdiction of the civil court is barred & not otherwise. Wadsworth J. applied the principle of 'Subbarao v. Secretary of State' 58 M. L. J. 698 and the 'Secy. of State v. Subbarao' 56 Mad 749, to a case where a village munsif who was lawfully appointed has been unlawfully threatened with ejection by an official act & the learned Judge held that a suit in the civil court to protect his right to the office & for a declaration that the order which purported to affect his rights was 'ultra vires' & void was maintainable — See 'Duraiswami Reddi v. Secy. of State', 1939-2-M. L. J. 6. S. 5 of the Board of Revenue Regulation which was pointed out both in 'Secy. of State v. Subbarao' 56 Mad 749 & by Wadsworth J. in the decision above cited does not give the Board of Revenue power to set aside a statutory order passed by one of his subordinates particularly when the statute itself provided a remedy for rectifying the error. Of course, as pointed out by Somayya J. in 'Narasimaharao v. Venkataramana Rao', 1941-2 M. L. J. 439, a person by a trick of pleading cannot get out of the statutory bar but one has to see the substance of the claim. If his claim was already recognised and that right was sought be affected by a subsequent illegal order then it would be open to

him to come to a civil court for a declaration that the right recognised earlier should be protected by granting a declaration in cases where the subsequent order was without jurisdiction & was 'ultra vires'. If, on the other hand, his right in substance & in effect is founded on S. 10, he cannot get out of the statutory bar and agitate his rights in the civil court.

(8) I have come to the conclusion that the two later orders of the Collector are without jurisdiction as he had no power to revise those orders under Regulation VII of 1828. In the light of the principles above discussed, it follows that the present suit by the plff. in a civil court is maintainable & he is entitled to the declaration asked for. The result is that the second appeal is allowed & there will be a decree in favour of the plff. granting a declaration that the two orders of the Collector are 'ultra vires' & without jurisdiction & the plff. is entitled to his costs throughout. No leave.

C.R.K./D.H. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 495 (C. N. 108)

VISWANATHA SASTRI J.

Sistla Yagnanarayana Sastri, Appellant v. Chilukuri Lakshminarayana and others, Resps.

Appeal No. 301 of 1947 D/-30-11-1950.

(a) *Civil P. C. (1908) O. 23 R. 3 — Compromise by some of the parties.*

A bona fide compromise might validly be entered into, even though a trial might have resulted in the contentions of one or other of the parties being upheld in their entirety. (Para 5)

Anno. C. P. C. O. 23 R. 3 N. 20.

(b) *Limitation Act (1908) Art. 125 — Alienation — Meaning — Hindu Law — Widow — Power to compromise claims against estate — Civil P. C. (1908) O. 23 R. 3.*

A Hindu widow or other limited owner has power to compromise claims against the estate represented by her. But a compromise of a litigation entered into by the limited owner must, in order to bind the reversioner, be bona fide, fair and reasonable, or for the benefit of the estate and not for the personal advantage of the limited owner at the expense of the estate.

Where a person in assertion of an ostensible title sues to recover properties from a Hindu widow of which she is in possession as heir of her husband, and the widow having entered upon her defence, withdraws it and confesses judgment and suffers a decree for possession to be passed in favour of the plff, on foot of a compromise entered into by her in fraud of the rights of the reversioners and in consideration of a personal benefit to herself, the transaction can well be regarded as an alienation by the widow within the meaning of Art. 125. The Ct. is bound to record the compromise and pass a decree according to its terms so far as they related to the suit, its jurisdiction being limited to an enquiry into the lawfulness of the compromise. The basis of the compromise is only the contract between the parties. Art. 125 would apply to a suit by a reversioner to have such a compromise which resulted in an alienation declared invalid. Case law rel. on. (Paras 6, 9)

Anno. C. P. C. O. 23 R. 3 N. 8; Lim. Act Art. 125 N. 13.

(c) *Hindu Law — Widow — Alienation — Power of next male reversioner to sue for declaration.*

Where the nearest reversioner is a female who would only be entitled to a limited interest, it is open to the next male reversioner to sue for a declaration that an alienation by a widow is not binding beyond her life-time. In such a case it is not necessary for the plff. to allege or prove that the presumptive reversioner has disabled himself to institute a suit. 13 Mad. 195, 15 Mad. 422 and 33 Mad. 410 rel. on. (Para 9)

(d) *Limitation Act (1908) Art. 125 — Suit by remote reversioner.*

Though a literal interpretation of the first column of Art. 125 would make it applicable to a suit only by a presumptive reversioner, a wider interpretation has been put upon it so as to make it applicable even to a suit by a remote reversioner in view of the fact that a suit by a reversioner to set aside an alienation by a limited owner is representative one brought on behalf of all the reversioners and that all of them have only a single cause of action. It would apply where the nearest male reversioner sues to declare the invalidity of an alienation by the widow and where the presumptive reversioner is herself a limited owner. A I R (6) 1919 Mad. 911 (F B) Foll. A I R (14) 1927 Mad 216 Ref. (Para 9)

Anno. Lim. Act Art. 125 N. 7, 8.

C. V. Dhikshitulu and N. Rajeswara Rao, for Appellant V. Subramanyam, for Respondents.

Cases referred to

('11) 33 All 356: (38 I A 87 P C). (Pr. 6)
('25) 47 All 883: (A I R (12) 1925 P C 272) (Pr 6)
('28) 52 Bom 1: (A I R (14) 1927 P C 227) (Pr 6)
('97) 19 All 524: (1897 A W N 141) (Pr. 9)
('07) 29 All 239: (1907 A W N 33) (Pr 9)
('39) A I R (26) 1939 All 526: (184 I C 169) (Pr 9)
('90) 13 Mad 195 (Pr. 9)
('92) 15 Mad 422: (2 M L J 91) (Pr. 9)
('10) 33 Mad 473: (5 I C 640) (Pr. 9)
('10) 33 Mad 410: (5 I C 154) (Pr. 9)
('18) 35 M L J 364: (A I R (6) 1919 Mad 706) (Pr. 9)
('18) 41 Mad 659 (A I R (6) 1919 Mad 911 F B) (Pr. 9)
('25) 21 M L W 277: (A I R (12) 1925 Mad 567) (Pr. 9)
('27) 52 M L J 13: (A I R (14) 1927 Mad 216) (Pr. 9)
('39) 1939-2 M L J 236; (A I R (26) 1939 Mad 830) (Pr. 6)
('47) I L R (1947) Mad 681: (A I R (35) 1948 Mad 158) (Pr. 6)
('22) 1 Pat 741: (A I R (9) 1922 P C 356) (Pr. 6)

JUDGMENT: This is an appeal by deft. 2. against a decree of the Court of the Subordinate Judge of Tenali granting a declaration that a compromise of a prior suit effected as between deft. 1. the widow of the last male owner & deft. 2, who claimed a title adverse to the widow, was not binding on the plffs., the reversioners. Mr. Dikshitulu for the appellant raised two main contentions, namely, that the suit was barred by limitation & that the compromise was a bona-fide settlement of a dispute by the widow of the last male owner & was therefore binding on the reversioners. There were subsidiary contentions which would be noticed when dealing with these main points.

(2) The relevant facts have to be stated. Narayanamurthi, a merchant & land-owner, died in 1931, leaving his widow, plff. 2. & two sons Lakshminarayana plff. 1. & Anjaneyulu who died after his father leaving his widow, deft. 1. Narayanamurthi became heavily involved in debts & was adjudicated an insolvent on 28-2-1931 on a petition, I. P. No. 30 of 1930, filed by his creditors on 22-8-1930. On 4-12-1930, the two sons of Narayanamurthi filed a suit for partition, each claiming a 1/3rd share of his properties on the footing that they were joint family properties. A preliminary decree passed on 10-1-1931was followed by a final decree dated 3-2-1931. Lakshminarayana, plff. 1, & Anjaneyulu, his brother, obtained possession in December 1931, of the properties allotted to each of them by the final decree. On 30-6-1934 Kushaljee, a creditor of Narayanamurthi, sued on a pre-

partition debt & obtained a decree in O. S. 390 of 1933 against the sons' shares of the family properties & was taking steps by way of execution. Lakshminarayana, plff. 1, conveyed all the properties he got under the partition decree in favour of his wife. Anjaneyulu died leaving his widow Krishnaveni Amma, deft. 1 who entered into possession of her husband's properties which consisted of 2 acres 30 cents of agricultural land, a separate portion of a house & some sites.

(3) On 17-1-1936 the Official Receiver in the insolvency of Narayanamurthi sold for Rs. 1,100/- the right, title & interest of the insolvent in the entire properties to the present deft. 2. who immediately thereafter filed O. S. No. 14 of 1936 on the file of the Court of the Subordinate Judge of Tenali for recovery of possession of the properties sold to him, impleading among others, Lakshminarayana (the present plff .1.) as deft. 1, his wife in whose favour he had conveyed his share of the properties as deft. 5, the widow of Anjaneyulu (the present deft. 1.) as deft. 2, Kushaljee the D. H. in O. S. 390 of 1933 as deft. 3. The suit was filed on the allegation that the properties purchased by the plff. from the Official Receiver were the self-acquired properties of the insolvent Narayanamurthi, that the partition decree obtained by the sons against him was fraudulent & collusive & that the sale by the Official Receiver conveyed the entire interest in the properties & not merely a third share of the insolvent. Defts. 1, 2, 3 & 5 among others filed written statements denying the plffs' allegations & repudiating the claim of the pltf. to anything more than the third share of the insolvent. Anjaneyulu's widow (the present deft. 1.) then deft. 2, was a minor when the suit was instituted & was declared a major on 2-2-1938. On the same day I. A. 74 of 1938 was filed into court signed by the pltf. (now deft. 2), &deft. 2 (now deft. 1.) praying for a decree in terms of a compromise under which she withdrew her defence & consented to a decree for possession as prayed for by the pltf. & the latter gave up his claim for mesne profits & costs against her. On 3-2-1938 the Court passed an order on I. A. 74 of 1938 in these terms:

"Pltf. & defts. 2 & 20 admit Decree in terms."

The suit O. S. 14 of 1936 was tried on the merits against the other defts. & was dismissed except with regard to one item of property, the Court holding that the properties purchased by the pltf. were the joint family properties of Narayanamurthi & his sons & that the partition decree obtained by the sons in respect of those properties had been validly passed. The decre in O. S. 14 of 1936 was drawn up on 21-9-1939. An appeal against the decree was dismissed by the District Court on 23-2-1942.

(4) The present suit was instituted on 9-8-1945 by Lakshminarayana, the brother of Anjaneyulu for a declaration that the compromise in I. A. No. 74 of 1938 on which a decree was passed by the Court O. S. 14 of 1936 was a fraudulent & collusive arrangement entered into between Anjaneyalu's widow, the present deft. 1 & the plff. in O. S. 14 of 1936 (the present deft. 2) & was not binding on the reversioners of Anjaneyulu. At the close of the trial the mother of Lakshminarayana was impleaded as plff. 2 on 8-8-1946 in order to overcome an objection that the suit was not filed by the presumptive reversioner. The suit was decreed in favour of the plffs. on 8-8-1946. Hence the appeal by deft. 2.

(5) It would be inconvenient to deal with the merits of the case relating to the binding character of the compromise decree before I consider the question of limitation. The properties now in suit consist of 1 acre 64 cents of wet land & a separate part of a house & a site in Tenali, which deft. 1 inherited as heir to her husband. The wet lands had been purchased in 1926 at about Rs. 1,500/- per acre. The house is valued by the plff. at Rs. 2,000/- in his evidence, but this is probably an exaggerated valuation. The deft. 2 would value the properties at Rs. 700 or Rs. 800 which is an absurdly low figure. The value of the properties in suit might safely be assumed to be somewhere between Rs. 3,000 & Rs. 4,000. O. S. No. 14 of 1936 was brought by the present deft. 2 on the allegation that the suit properties & others which formed the subject of the partition decree, were the self-acquired properties of Narayanamurthi & that the partition decree obtained by his sons in respect of these properties was fraudulent & collusive. The deft. 1 along with other defts., had filed a written statement denying these allegations. She was a minor represented by her father as guardian 'ad litem' when the written statement was filed. Directly she attained majority, she withdrew her defence & suffered a decree in favour of deft. 2 in respect of the whole of his claim against her except mesne profits & costs. If the compromise had been entered into during her minority, the court might have had an opportunity to consider if it was beneficial to her. It was however effected immediately after she attained majority, & the court had to record the compromise irrespective of its fairness or otherwise. The court tried the suit on the merits as between the plff. & the other defts. who had raised the same defence as deft. 1 & dismissed it except as regards a small item. The appellate court also confirmed the decision of the trial court. I am not relying on this circumstance as decisive one way or the other. A bona fide compromise might validly be entered into, even though a trial might have resulted in the contentions of one or other of the parties being upheld in their entirety. I am referring to the further course of the litigation in order to show that deft. 1 had a good & honest defence to the suit. There was a prior decree of court for partition in favour of her husband. There were other defts. contesting the suit on the same grounds as she did when she filed her written statement. It is not as if the burden of the defence or any part of the defence rested exclusively on her. It is not as if the widow gave up only a portion of the properties claimed by the plff. retaining the rest for the estate of her husband. She withdrew her defence & suffered a decree in favour of the plff. (present deft. 2) in respect of the entire claim against her except mesne profits. The benefit that she is supposed to have got by way of exoneration from liability from mesne profits was in my opinion, illusory. Her liability was to say the least, highly problematical. There is one circumstance which, in my opinion, tells strongly against the fairness & 'bona fides' of the compromise. The defts 1 & 2 entered into a secret bargain by which the latter allowed the former to enjoy 1 acre 11 cents of the lands absolutely as if it was a free gift by him to her. She has been in enjoyment of this land since the compromise. She has also paid the kist for the land & deft. 2 has been paying kist only for the rest of the property. This appears clearly from the evidence of P. W. 1 & the karnam P. W. 2. D. W. 1, the father of deft. 1, is not in a position to state whether his daughter would retain the 1 acre 11 cents or disclaim her right. D. W. 2, the deft. 2, states that he gave the land on lease to one Ramayya for 20 or 25 years & that he does not know whether Ramayya gave the land to deft. 1 or whether he is paying rent to her. This is merely a disingenuous explanation for covering up the fact that deft. 1 is in possession of 1 acre 11 cents. Deft. 1 herself has not been examined as to how she retains possession of one acre 11 cents of land in spite of the compromise decree & under what circumstances

the compromise was entered into. She filed a written statement in the present suit fully supporting the case of deft. 2, & the omission of deft. 2 to examine her as a witness in support of the compromise is a serious defect in his case. Her father, D. W. 1, who had filed a written statement on her behalf in the previous suit contesting the claim of deft. 2, admits that the compromise was not entered into on account of any apprehension that the defence would fail as a result of the evidence adduced or likely to be adduced on behalf of deft. 2. The property formed the bulk of the estate inherited by deft. 1, & it is not likely that he would have suffered a decree to be passed in favour of deft. 2 on a confession of judgment unless she had bargained for & obtained 1 acre 11 cents for herself. Under the guise of the compromise she gave away her husband's property to deft. 2 receiving a portion of it absolutely for herself as a secret benefit.

(6) A Hindu widow or other limited owner has power to compromise claims against the estate represented by her. But a compromise of a litigation entered into by the limited owner must, in order to bind the reversioner, be bona fide, fair & reasonable, or for the benefit of the estate & not for the personal advantage of the limited owner at the expense of the estate. 'Ram Sumran Prasad v. Shyam Kumari', 1 Pat. 741, 'Mata Prasad v. Nageshar Sahai', 47 All. 883, 'Ram Gowda Anna Gowda v. Bhau Saheb', 52 Bom. 1, 'Appasami v. Thyammal', (1939) 2 M. L. J. 236 at p. 245 and 'Perireddi v. Venkataraju', I. L. R. (1947) Mad 681 at p. 688. It has been urged by Mr. Dikshitulu that a compromise of a disputed claim does not amount to an alienation but is based on the antecedent title of the parties which it acknowledges, reliance being placed on the well-known decision of the Judicial Committee in 'Kunni Lal v. Gobinda Krishna Narain', 33 All. 356 & the cases which followed it. The effect of these decisions is that when a person puts forward a bona fide claim based on a pre-existing title & that title is to some extent recognised by a compromise, the estate which passes under the compromise to a limited owner would be of the same quality & amplitude as that of the title put forward. The true position is thus stated in Mayne's Hindu Law, Edn. 11, at p. 794 & 795:

"If the compromise is fair, reasonable & prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind the reversioners. The alienation cannot be considered apart from the compromise....If the arrangement or settlement is between the limited owner on the one hand & a person who has no claims on the estate & who could not have had any bona fide belief in the justice of his claim on the other, any property which the latter takes under such arrangement will be held by him only as an alienee from a limited owner & with no higher rights".

(7) It is impossible to hold that the widow acted bona fide in the interest of the estate when she withdrew her defence & confessed judgment. The circumstances referred to by Mr. Dikshitulu for the appellant are, in my opinion, not sufficient to repel the inference that follows from the circumstances already adverted to. The fact that there was a D. H. in the person of Khushaljee who had to be paid is not a relevant consideration. The debt was scaled down to Rs. 405/-, Madras Act IV (4) of 1938 having been passed by the Provincial Legislature was awaiting the assent of the Governor-General at the time when the compromise was entered into. The D. H. had a right to proceed against the properties allotted not only to the share, of deft. 1's husband, but also against the properties of his brother. In any case I do not see what connection that decree debt had with the withdrawal of her defence to the suit by the widow. Nor has the fact that deft. 2 paid the D. H. a sum of Rs. 629/- in 1945, long after the compromise, any significance in this connection. It was suggested that there was some trouble from the tenants of the land. But this trouble assuming there was much of a trouble was long after compromise & did not relate to the lands in the possession of the widow. It was said that the value of the property given up must have been only about Rs. 1,000/- judging by the price stated in the sale deeds, Exs. D-6 & D-7 effected by plff. 1 in favour of his wife As plff. 1 himself naively stated, they were after all sales effected by a husband in favour of his wife. They were evidently intended as a ruse to put off his creditors & there was no need to waste more money on stamp & registration charges than was absolutely necessary for the end designed. The Court below has reached the conclusion that the compromise was brought about with the object of defeating the reversionary right of the plff. Deft. 2 was a speculative purchaser of property for about a tenth of its value & the widow played into his hands in consideration of a secret advantage which she gained at the expense of the reversioners I agree with the Court below in its finding on issue (3). Mr. C. V. Dikshitulu contends that the suit should have been dismissed as barred by limitation under Art. 120, Limitation Act. The suit was filed by the brother of the last male owner while a nearest reversioner, the mother, was living for a declaration that the compromise decree in O. S. 14 of 1936 was fraudulent & collusive & not binding on the reversioners. The brother admitted in his evidence that he was aware of the compromise in O. S. 14 of 1936 before it was filed into Court on 2-2-1938. The Court made an order "decree in terms" of the compromise on 3-2-1938. The suit was filed more than six years after the compromise was recorded & an order thereon was made. The fact that the suit was tried on the merits against the other defts. & a formal decree in respect of the whole suit was drawn up by the Court on 21-9-1939 would not give a fresh starting point of limitation, time having begun to run from 3-2-1938 the date of the Court's order. This defect could not be cured by the addition of the nearer reversioner, the mother, as a party to the suit on 8-8-1946.

(8) The compromise decree cannot be considered to be an alienation so as to attract the operation of Art. 125, Limitation Act, & save the suit from the bar of limitation. So ran an elaborate & strenuous argument which I have summarised as above.

(9) I am of the opinion that Art. 125, Limitation Act, governs this case. Where a person in assertion of an ostensible title sues to recover properties from a Hindu widow of which she is in possession as heir of her husband, & the widow having entered upon her defence, withdraws it & confesses judgment & suffers a decree for possession to be passed in favour of the pltf., on foot of a compromise entered into by her in fraud of the rights of the reversioners & in consideration of a personal benefit to herself, the transaction can well be regarded as an alienation by the widow within the meaning of Art. 125. "Alienation" in Art. 125 is not used as synonymous with a transfer by way of sale, mortgage, exchange, lease or gift. These are the kinds of transfers dealt with by the Transfer of Property Act, but they are not exhaustive of the modes in which the alienation contemplated in Art. 125, Limitation Act. could be effected. If a compromise decree or an award or a release is used by the widow as a pretext or cloak for parting with property belonging to the estate in favour of another person, there in an "alienation" by the

widow, though no formal conveyance of the property is executed by her. In the present case the widow effectively, though indirectly, parted with her proprietory right in the suit properties in favour of deft. 2 under the compromise decree & also put him in possession thereof. There has been in truth & substance an alienation by the widow through the medium of a compromise. The court was bound to record the compromise & pass a decree according to its terms so far as they related to the suit, its jurisdiction being limited to an enquiry into the lawfulness of the compromise. The basis of the compromise was only the contract between the parties. Art. 125 would apply to a suit by a reversioner to have such a compromise which resulted in an alienation declared invalid. See 'Ranga Rao v. Ranganayaki Ammal', 35 M. L. J. 364, 'Kamakshi Ammal v. Poochammal', 21 M. L. W. 277, 'Sheo Singh v. Jeoni', 19 All. 524, 'Ram Sarup v. Ramdei', 29 All. 239, 'Anant Bahadur Singh v. Tirathraj', A. I. R. (26) 1939 All. 526. In 'Timmaji v. Subba Raju', 33 Mad. 473 relied upon by the appellant the question was whether the possession of the property under a compromise with the widow & who did not get any title or possession from the widow herself under the compromise, was adverse to the reversioner. The learned Judges while holding that the possession was not a derivative possession from the widow recognised that a compromise might be regarded as an alienation so as to enable a reversioner to sue for a declaration of its invalidity beyond the life-time of the limited owner who entered into the compromise. All that they said was that in that case the possession of the adverse claimant was adverse throughout & not a possession derived from the widow under the compromise. Where the nearest reversioner is a female who would only be entitled to a limited interest, it is open to the next male reversioner to sue for a declaration that an alienation by a widow is not binding beyond her life-time. In such a case it is not necessary for the plff. to allege or prove that the presumptive reversioner has disabled himself from suing or has refused without sufficient cause, to institute a suit. Kandasami v. Akkammal', 13 Mad. 195, Raghupathi v. Tirumalai', 15 Mad 422, 'Chidambar Reddiar v. Nallammal' 33 Mad. 410. Though a literal interpretation of the first column of Art. 125 would make it applicable to a suit only by a presumptive reversioner, a wider interpretation has been put upon it so as to make it applicable even to a suit by a remoter reversioner in view of the fact that a suit by a reversioner to set aside an alienation by a limited owner is a representative one brought on behalf of all the reversioners & that all of them have only a single cause of action. At any rate, this is the view of a Full Bench of this Court in 'Varamma v. Gopaladasayya', 41 Mad. 659. See also 'Neelkantamier v. Chinna Ammal', 52 M. L. J. 13. I have the less hesitation in applying Art. 125 to a case like the present where the nearest male reversioner sues to declare the invalidity of an alienation by the widow & where the presumptive reversioner is herself a limited owner for, it is not even necessary for the plff. to allege that the presumptive reversioner refused without sufficient cause to sue or has disabled herself from suing for the relief sought by the plff.

(10) For these reasons I hold that the suit was governed by Art. 125, Limitation Act, & was instituted in time by plff. 1. The addition of plff. 2 was unnecessary & in no way have affected the result of the suit.

(11) This appeal fails & is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. (39) 1952 MADRAS 498 (C. N. 109)

CHANDRA REDDI J.

Kamma Jogappa, Appellant. v. Bacham Hanumakka, Resp.

A. A. O. No. 664 of 1950 (C. R P 1524/48 converted into A A O) D/- 29-11-1950.

(a) *Guaridians and Wards Act (1890), S. 34(d) — Scope of.*

Under cl. (d) of S. 34 a guardian can be required to pay into Court only such amounts as are shown to be the balance due on the accounts. This only means that a guardian can be called upon to bring into Court amounts admittedly due from him. Under that section he cannot be called upon to produce such amounts as might be found due from him on a taking of correct account. (Para 6)

Anno: G. & W. Act, S. 34 N. 4.

(b) *Guardians and Wards Act (1890), Ss. 34(d), 35, 36 — Failure to account properly — Remedy against guardian.*

The remedy against a guardian who has not properly accounted for the amounts received by him is the one provided in Ss. 35 and 36 and not S. 34 (d). A I R (13) 1926 Mad 478 and A I R (13) 1926 Mad. 977 Ref. (Para 6)

Anno. G. & W. Act, S. 34 N. 1; S 35 N 1; S 36 N 1

(c) *Guardians and Wards Act (1890), Ss. 34(d) 43, 47 — Order to bring amount in Court — Order whether revisable or appealable.*

A person who was appointed the property guardian of a minor sought to revise the order of the Dist. J. calling upon him to bring some amounts said to belong to the estate of the minor into Court.

'Held' that the order under revision did not fall under S. 34 (d) but was one passed under S. 43 therefore an appeal lay against that order under S. 47. A I R (13) 1926 Mad 478. Rel. on. (Para 8)

Anno. G. & W. Act S. 43 N. 1; S. 47 N. 5.

A. Bhujanga Rao and D. R. Krishna Rao, for Applt. — E. Venkataramana Rao, for Resp.

Cases referred to:

('26) 50 M L J 273: (A I R (13) 1926 Mad 478) (Prs 6, 8)

('26) 51 M L J 249: (A I R (13) 1926 Mad 977) (Pr 7)

JUDGMENT: By this petition, a person who was appointed the property guardian of a minor on 8-1-1942 in O. P. No. 72 of 1940, seeks to revise the order of the District Judge, Anantapur, dated 3-9-1948, calling upon him to bring some amounts said to belong to the estate of the minor into court. At the outset the counsel for the respondent, who is the mother and the personal guardian of the minor, has raised a preliminary objection to the maintainability of this revision petition. In order to get over this difficulty a petition has been filed by Mr. Bhujanga Rao on behalf of the petitioner to convert the civil revision petition into a civil miscellaneous appeal under S. 43 of the Guardians and Wards Act.

(2) In order to appreciate the preliminary objection and the contention raised in this petition it is necessary to set out briefly a few material facts. By the order of appointment the petitioner was directed to file accounts for each year on or before the fifth day of July, and not to invest any amounts belonging to the estate of the minor in any concern without the sanction of the court. In pursuance of those directions the petitioner was filing accounts every year before the 5th of July, and they were being scrutinised and passed up to the end of 1946. In July 1947 the District Judge, as a result of scrutiny of the accounts filed by the petitioner, passed certain remarks and called upon the petitioner to offer an explanation in res-

pect thereof. Accordingly the petitioner filed a memo giving explanation on all the matters referred to in those remarks. It is not in evidence as to what happened to that memo. Ultimately the District Judge framed charges against the petitioner, and some of the items involved in the order under revision were also the subject-matter of those charges. An explanation was offered by the petitioner, but without considering it, the District Judge removed the petitioner on 24-2-1948 and directed him to hand over charge of the estate to the Official Receiver, who was appointed as property guardian in his place.

(3) As against the order dismissing him, the petitioner preferred C. M. A. No 189 of 1948 which was ultimately dismissed by a Bench of this Court. Subsequently he handed over charge to the Official Receiver as directed by the order of his removal. On 12-7-1948 the petitioner was required to appear in court with account books. Pursuant to this notice he appeared in court and filed a memo stating that accounts had already been filed into court. Notwithstanding this, the petitioner was called upon to show cause why he should not be fined for disobeying the previous order of the court calling upon him to file accounts into court, and ultimately he was fined in a sum of Rs. 25 in spite of his explanation. Subsequently, that is, on 13-8-1948, the petitioner was required to submit a list of debtors to the estate, which direction was complied with by him. On 3-9-1948 the order under revision was made by the learned District Judge calling upon him to bring into court the various amounts mentioned in that order. It is against that order that the present civil revision petition is filed.

(4) In view of the application by Mr. Bhujanga Rao for converting it into an appeal, which I am inclined to allow for the reasons mentioned hereunder, it is unnecessary for me to consider the soundness of the preliminary objection.

(5) In order to appreciate the questions arising in this case, it is necessary to refer to certain provisions of the Guardians and Wards Act. S. 34 provides:

"Where a guardian of the property of a ward has been appointed or declared by the court and such guardian is not the Collector, he shall,—

(a) if so required by the court, give a bond as nearly as may be in the prescribed form, to the Judge of the court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what he may receive in respect of the property of the ward;

(b) if so required by the court, deliver to the court within six months from the date of his appointment or declaration of the court or within such other time as the court directs, a statement of the immoveable property belonging to the ward, of the money and other moveable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts on that date to or from the ward;

(c) if so required by the court, exhibit his accounts in the court at such times and in such forms as the court from time to time directs;

(d) if so required by the court, pay into the court at such time as the court directs the balance due from him on these accounts, or so much thereof as the court directs; and

(e) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income of the property of the ward as the court from time to time directs, and, if the court so directs the whole or any part of that property".

The only relevant provision of S. 34 that applies to this case is one contained in clause (d). Another section of the Act which has bearing on this case is S. 43, sub-clause (1). It reads thus:

"The court may, on the application of any person interested or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the court".

S. 47 provides for appeals against orders passed under certain sections of the Act, but S. 34 is not one such. S. 48 lays down that save as provided for by S. 47 of the Act and Or 43 rule 1 C. P. C. the orders passed under this Act shall be final and shall not be liable to be contested by suit or otherwise.

(6) First, I will consider whether the order passed by the learned Judge falls under any of the provisions of S. 34 of the Act. As I have already observed, the only relevant provision of S. 34 is the one contained in clause (d). Under clause (d) a guardian can be required to pay into court only such amounts as are shown to be the balance due on the accounts. This only means that a guardian can be called upon to bring into court amounts admittedly due from him. Under that section he cannot be called upon to produce such amounts as might be found due from him on a taking of correct accounts. The remedy against a guardian who has not properly accounted for the amounts received by him is the one provided in Ss. 35 and 36 of the Act. That this is the correct position is seen from the decision of Venkatasubba Rao and Madhavan Nair JJ. in 'Harikrishna Chettiar v. Govindarajulu Naicker', 50 M. L. J. 273.

(7) In that case the property guardian was called upon to deposit into court a sum much larger than that admitted in the accounts. The question arose whether the court had jurisdiction to do so. The learned Judges, on a consideration of the relevant sections of the Act, came to the conclusion that the court had no jurisdiction to direct the guardian to bring into court any amount larger than that admitted in the accounts and held that such an order would be a nullity as having been made without jurisdiction. It was pointed out by them that if the property guardian was sought to be made liable for a larger amount than that admitted in the accounts, that could be decided only in a regular suit and could not be disposed of under S. 34(d) of the Act. To the same effect is the decision in 'Subbarami Reddi v. Pattabhirami Reddi', 51 M. L. J. 249, where Phillips and Madhavan Nair JJ., held that the court had no jurisdiction to hold an enquiry and ascertain what amounts were due by the guardian under S. 34 of the Act, and the remedy of a ward who wanted to get more than the amounts admitted in the accounts was to proceed by way of suit. So the order cannot be treated as one passed under S. 34 of the Act.

(8) Then I have to consider whether this order can be treated as one falling under any other provision of the Guardians and Wards Act. It was pointed out in 'Harikrishna v. Govindarajulu', 50 M. L. J. 273 that cases like this can be brought under S. 43 though it might involve a strained construction of S. 43. In this context the observations of the learned Judges 'at page 277' of the report are apposite:

"If it is absolutely necessary to find this power somewhere within the four corners of the Act, S. 43, by straining it somewhat, may be pressed into service. The first clause of that section reads thus:

'The court may on the application of any person interested or of its own motion make an order regulating the conduct or proceedings of any guardian appointed or declared by the court.'

It may not be quite the right thing to say that an order of the kind under discussion is 'an order regulating the conduct of proceedings' of a guardian. But it is only by construing these words in this rather wide sense, that we can find justification in the Act for the view that has been uniformly adopted in the cases cited to us, that such an order as this is within the competency of a court acting under the Guardians and Wards Act. There is, however, this much to be said for this view, that the order in that case is not final but is appealable. The preliminary objection thus fails".

The learned Judges in that case, though not without considerable hesitation, treated the order as one falling under S. 43 of the Act, which is appealable under S. 47 of the Act. I express my respectful agreement with the observations made by the learned Judges in that case. For the same reasons given by the learned Judges in that case for treating it as proceedings under S. 43 of the Act, I consider the order under revision as one passed under S. 43 of the Guardians and Wards Act and hold that an appeal lies against that order under S. 47 of the Act.

(9) Now dealing with the merits of the case, this is a case which calls for interference with the order of the lower court. It is scarcely necessary for me to state that some of the directions contained therein are perverse. (His Lordship then modified the directions given by the lower Court and concluded:) The appeal is allowed to the extent indicated above. In other respects, the appeal is dismissed. Each party will bear his own costs.

C.R.K./V.S.B. *Appeal allowed partly.*

A. I. R. (39) 1952 MADRAS 500 (C. N. 110)

VISWANATHA SASTRI J.

Saraswathi Raithi and others, Appellants v. Duggamma Shedthi and others, Respondents.

Appeal No. 294 of 1947 D/- 22-11-1950.

(a) Malabar Law — Aliyasanthana family — Karnavan — Right of, to spend tarwad funds for education of junior members — Such expenses if can be taken into account for fixing rate of maintenance of junior members.

The imparting of school or collegiate education to the junior members of the family must now be held to be a legitimate purpose for which the karnavan or Ejman is entitled to spend the funds of the tarwad so long as the expenditure is reasonable and consistent with the income of the tarwad and the needs of the other members of the family. If there is no facility for imparting education in or near the tarwad house and there are several boys and girls that have to be educated in Schools or colleges, there is nothing improper in the Ejman or karnavan setting up a separate establishment in a city where educational facilities are available and providing for the residence and mess of the students who pursue their studies. The fact that some members of the tarwad come and stay at intervals at such establishment does not result in the karnavan becoming liable to account in respect of the expenses incurred by him for their food and lodging.

Hence in fixing the rate of maintenance for the junior members of the family the expenses of such establishment cannot be left out of consideration. (Para 6)

(b) Malabar law — Tarwad — Junior members— Rights of — Maintenance — Fixation of — Factors to be taken into account.

A junior member of a tarwad is no doubt a co-proprietor of the tarwad properties with the karnavan and other members and the right to maintenance is the mode in which this right of ownership is effectively exercised by the junior member. At the same time the karnavan has very large power of administration of the tarwad properties and its funds, and the junior members cannot claim that the whole of the net income of the tarwad should be distributed among the several members or accounted for as if they were tenants-in-common. The Mitakashara rule of stirpital division does not apply. Each individual member can claim maintenance for himself or herself and as a rule maintenance is awarded 'per capita'. But a junior member is not entitled to claim an aliquot share of the net income of the tarwad properties and a karnavan is not accountable if he gives some members more than what he gives to others, so long as he gives to each what, under the circumstances, would be a reasonable allowance for his or her subsistence. The needs and requirements of the different members of the family may vary according to their age, health and other circumstances. The Karnavan has to incur expenses in connection with payment of revenue on the lands, repairs to buildings, renewal of kanoms, births and deaths, performance of the customary charities, reception of guests and relatives, maintenance of the establishment, and similar items. A prudent karnavan might set apart a portion of the income of the tarwad in order to meet these charges year by year. It is by taking into account these several factors that the rate of maintenance awardable to each member of the family can be settled. (Para 7)

K. Y. Adiga, S. Ramayya Nayak and K. P. Adiga, for Appellants — A. Narayana Pai, K. Srinivasa Rao and K. S. Shetty, for Respondents.

Cases referred to:

('82) 5 Mad 71 (Pr 7)
('98) 8 M L J 294 (Pr 6)
('09) 19 M L J 590: (4 I C 724) (Pr 6)

JUDGMENT: The plffs, here appellants, claim maintenance at a rate higher than that decreed to them by the trial court. The parties are members of an Alayasanthana family of which deft. 1 is the ejamanthi. Plffs. 2 to 7 are the children of plff. 1 &plff. 1 & defts. 2 to 8 are the daughters & sons of deft. 1. There were 28 members of the branch of deft. 1 on the date of suit, & the properties out of which maintenance is now claimed by the plffs. were allotted to the branch of deft. 1 under an award, Ex. D. 39, dated 12-2-1932. Though the suit was laid for the recovery of Rs. 10,000 as arrears of maintenance for the period from 1-5-1934 till 25-10-1945, the court below granted a decree only for Rs. 2668-6-0, for the period from July 1941 to 25-10-1945. On appeal an additional sum of Rs. 2681-4-0 is claimed as maintenance for this period, the claim for the earlier years having been given up. Mr. Adiga for the appellants contends that the court below has grossly under-estimated the available income of the family & has not applied the correct legal principles in determining the rate at which maintenance should be paid to the different plffs.

(2) The following is common ground: The family house is at Kotadadi & the income of the family consists of rents, both cash & kind, received from its landed properties. The deft. 1's husband, Subbayya Shetti of Marakada, was himself an affluent member of his family with considerable income of his own, which he spent on himself & his children. He died in February 1944. He purchased a town-house in Mangalore for the occupation of himself & his family. In 1934 deft. 1 set up an establishment at Mangalore referred to in the evidence & in this judgment as the Mangalore bidar, intended mainly for the education of the children of her prolific family. Supplies of rice, straw, firewood, coconuts, vegetables, jaggery

& fuel were sent from Kotadadi to Mangalore whenever necessary, & a mess was run at the Mangalore bidar. Day to day cash expenses incurred in the purchase of groceries & the like were also met, sometimes out of the family funds & sometimes from contributions made by or on behalf of the members of the family. The youngsters of the family who were receiving education at Mangalore were housed & fed at the Mangalore bidar, & their parents, whenever they happened to go to Mangalore, stayed with them. There was a residential family house & an establishment maintained at Kotadadi for the members of the family. Accounts of the receipts & disbursements of the family were kept by or on behalf of deft. 1 but these accounts are not now available, the sons of deft. 1 charging one another with the responsibility for their non-production. The deft. 1 being an old lady depended on one or other of her sons for the management of the properties, is not wholly to blame for the non-production of the accounts. There is, however, available a rough account of receipts & expenses maintained by deft. 8 for the period beginning from January 1944. On 22-10-1941 the plffs. through their advocate, gave notice to deft. 1 claiming arrears as well as future maintenance separately for themselves. Plff. 1's husband, Ramanna Rai, has been in Govt. service, & plff. 1 & some of their children were staying with him wherever he happened to be employed & also in the Mangalore bidar for various periods of time. During the period from July 1941 till April 1944 there was a working arrangement under which the members of the family who lived at the Mangalore bidar agreed to share the expenses, though some of them paid & the others did not pay regularly. Plaintiff 1's husband paid the charges incurred for the upkeep of his wife & children whenever they or any of them stayed in the Managalore bidar during this period. This arrangement, however, ceased to be in force after April 1944.

(3) All the plffs. lived in the Mangalore bidar from July to December 1942. From January 1943 till the end of March 1944 plffs. 2 & 3, & from April 1944 till April 1945 plffs. 2 to 6 lived in the Mangalore bidar. None of the plffs. lived there after April 1945. The bulk of the family income consists of the rice rents received from tenants. Since the price of rice varies from time to time its conversion value also varies, & the maintenance awardable to the members of the family after deduction of the common family expenses, would also vary from year to year. The learned Judge has granted a decree at varying rates for the different periods for which maintenance was awarded.

(4) Mr. Adiga for the appellants contends that in arriving at the net income of the family from which maintenance was payable to the plffs. the learned Judge erred in deducting the expenses of the Mangalore bidar & that the only legitimate deductions that could be made were the expenses of the family & its establishment at the family house at Kotadadi. He argues that not only the children of female members of the family but also the wives & children of the male members were fed at the Mangalore bidar when they happened to go there, & that the expenses incurred on this account should not be deducted in arriving at the net income of the family available for distribution to the plffs. He further maintains that the learned Judge erred in treating all members of the family alike, including majors & minors, & those who contributed to the Mangalore bidar & those who did not, & in giving the plffs. only a 'pro rata' maintenance by dividing the net income of the family by the number of the members for the time being. No objection was taken to the other deductions like Viniyagas, Ejamanthi's expenses, building repairs etc, allowed by the court below from the gross receipts before arriving at the net income of the family available for distribution as maintenance to the members of the family, but objection was taken to the computation of the total income of the family made by the learned Judge.

(5) I have been referred by larned counsel to some decisions of this Court dealing with the rights of junior members in an Aliyasanthana or Marumakathayam family. Marumakathayam or Aliyasanthana Law as administered today by the courts, though resting on ancient usage, has largely been moulded by judicial decisions. So far as this branch of the Law is concerned, courts have not been inelastic, unyielding or unwilling to respond to social & economic changes & the needs of a progressive society. The old customary law did not recognise the union of man & wife as a valid or binding marriage, but regarded it as a state of concubinage into which the woman entered of her choice & was at liberty to change when she pleased. But today such unions are as permanent & sacred as the matrimonial ties recognised in other systems of law, & this court has held that the reasonable expenses of the marriage of a member of a Marumakathayam or Aliyasanthana family have to be provided for ny the tarwad if it has the means to do so. It was thought at one time that a junior member of a tarwad had a right to be maintained only in the family house & had no right to separate maintenance if he or she resided elsewhere. This resulted not only in the over-crowding of tarwad houses but also in retarding the growth of family ties & affection between the spouses & in acting as a clog upon the enterprise & initiative of the junior members of the tarwad. It had long ago become a recognised practice in the west coast for a woman to live with her husband & her children. Today a junior member who leaves the tarwad house to live separately with her husband & children is entitled to separate maintenance, & a male who lives separately from the tarwad in order to pursue his vocation or for other reasonable cause, is likewise entitled. Formerly a right to maintenance meant only a right to sufficient food, raiment & small quantity of oil. Today the right includes a right to "menchilavu" or extra expenditure necessary for leading a comfortable life consistently with the status, dignity & the means of the family, & the needs of its members under the conditions of modern life.

(6) In 1898, in 'Krishnan. v. Govinda Menon, 8 M.L.J. 294', this court, while recognising the obligation of a karnavan to educate the junior members of the tarwad, declared that it was not incumbent on him to "give the junior members education through the medium of the English language or on western lines" & declined to order the karnavan to pay the school fees & other expenses incurred in imparting English education to the junior members on western lines. In 1907 this court held in 'Neelakanta Thuruvambi v. Ananthanarayana Aiyar, 19 M.L.J. 590 that in the case of a well-to-do family the imparting of education in English to the junior members of the family was a necessary & proper purpose for which the funds of the tarwad could be spent & the properties of the tarwad could be made liable. Having regard to the high percentage of literacy in Kerala & Canara & to the very large number of people from this part of the country employed in public services both in India & outside, & also in the pursuit of other avocations, the imparting of school or collegiate education to the junior mem-

bers of the family must now be held to be a legitimate purpose for which the karnavan of Ejman is entitled to spend the funds of the tarwad so long as the expenditure is reasonable & consistent with the income of the tarwad & the needs of the other members of the family. If there is no facility for imparting education in or near the tarwad house & there are several boys & girls that have to be educated in Schools or Colleges, there is nothing improper in the Ejman or Karnavan setting up a separate establishment in a city where educational facilities are available & providing for the residence & mess of the students who pursue their studies. Judge-made law must be stable, but yet it cannot stand still ignoring the progress of society & the march of events. I hold the maintenance of the Mangalore bidar for the education of boys & girls of the Kotadadi family was a proper & necessary purpose for which the Ejmanthi, deft. 1 was entitled to spend a reasonable portion of the income of the family properties. Some of the plffs. themselves have taken advantage of this establishment at Mangalore & I cannot accept Mr. Adiga's contention that the expenses of the Mangalore bidar should be left out of consideration in fixing a rate of maintenance for the junior members of the family. The fact that the husbands of the ladies or the children of the male members of the tarwad came & stayed at intervals at the Mangalore bidar, does not result in the karnavan becoming liable to account in respect of the expenses incurred by him for their food & lodging. I have no reason to think that people in the west coast insist on such a sordid accounting by their, karnavan. Nor does the law compel me to order the karnavan to account for the expenses incurred by him in receiving & maintaining guests or near relations of the family.

(7) With regard to the right of a junior member of an Aliyasanthana or Marumakathayam family to maintenance, Mr. Adiga stressed the point tnat their right is not analogous to the right of the widow of an undivided coparcener in a Mitakshara family, but is of the same quality as the right of the male coparcener himself. It has no doubt been held in several decisions of this court that a junior member of a tarwad is a co-proprietor of the tarwad properties with the karnavan & other members & that the right to maintenance is the mode in which this right of ownership is effectively exercised by the junior member. At the same time, it has also been recognised that the karnavan has very large powers of administration of the tarwad properties & its funds & the junior members cannot claim that the whole of the net income of the tarwad should be distributed among the several members or accounted for as if they were tenants-in-common. The Mitakshara rule of stirpital division does not apply. Each individual member can claim maintenance for himself & as a rule maintenance is awarded 'per capita. But a junior member is not entitled to claim an aliquot share of the net income of the tarwad properties & a karnavan is not accountable if he gives some members more than what he gives to others, so long as he gives to each what, under the circumstances, would be a reasonable allowance for his or her subsistence. Ekanat Thayu Kunji Amma v. Ekanat Sangunni, 5 Mad 71. The needs & requirements of the different members of the family may vary according to their age, health & other circumstances. The karnavan has to incur expenses in connection with payment of revenue on the lands, repairs to buildings, renewal of kanoms, births & deaths, performance of the customary charities, reception of guests & relatives, maintenance of the establishment, & similar items. A prudent karnavan might set apart a portion of the income of the tarwad in order to meet these charges year by year. It is by taking into account these several factors that the rate of maintenance awardable to each member of the family can be settled. In my opinion, the learned Judge has not misapplied any of the well settled principles of law in fixing the rate of maintenance for the plffs. (The rest of the judgment is not material for the purposes of this report.)

C.R.K./K.S. *Decree modified.*

A. I. R. (39) 1952 MADRAS 502 (C. N. 111)

PANCHAPAGESA SASTRY J.

A. Sankunni Menon, Applt. v. South Indian Railway having their head office at Trichinopoly and others, Resps.

Appeal No. 543 of 1947, D/- 21-11-1950.

(a) *Civil P. C. (1908), S. 80 — Delivery of notice — Necessity to mention fact in plaint.*

..Where in a suit against the railway administration, along with the plaint the acknowledgments of the delivery of registered letters were filed and the plaint referred to the despatch of the registered notice under S. 80 and the non-receipt of a reply, it would be highly technical to dismiss the plaint on the ground that the express words that notice was delivered or left with the Secretary for Rlys are not found in the plaint. (Para 4)

Anno. C. P. C, S. 80 N. 17.

(b) *C. P. C. (1908), S. 80 — Sufficiency of notice — Notice to railway administered by Govt.— Notice to Secretary for Rlys.*

S. 80 is mandatory. At the same time the Court should not be hypercritical in examining the language used but should interpret the same in a free and liberal spirit. (Para 5)

Where a notice merely stated that a suit against "your railway" for loss would be instituted and was addressed to Secretary for Rlys Central Govt. New Delhi, Held that the notice might be taken as satisfying the requirements of Ss. 79 and 80, though it did not expressly state that the proposed suit would be against the Governor-General in Council. A. I. R. (38) 1951 Mad 416, Foll; A. I. R. (33) 1946 Mad 366, Disting; A. I. R. (14) 1927 P. C. 176 Ref. (Para 5)

Anno: C. P. C. S. 80 N. 13.

K. Bhashyam and T. R. Srinivasan, for Applt. — S. S. Ramachandra Ayyar, for Resps.

Cases referred to:

('27) 51 Bom 725: (A I R (14) 1927 P C 176) (Pr. 5)

('46) 1946-1 M L J 267: (A I R (33) 1946 Mad 366) (Pr 5)

('50) 1950 M W N 787: (A I R (38) 1951 Mad 416) (Pr 5)

JUDGMENT: This is an appeal by the plff. against the decree of the Subordinate Judge of South Malabar at Calicut dismissing his suit on a preliminary point namely that a proper statutory notice under S. 80 of the C. P. C., has not been given by the plff. before the suit was instituted. There are four defts. to the suit. The first is the South Indian Railway. The second is the Madras & Southern Maharatta Railway. The third is the Great Indian Peninsular Railway & the fourth is the Governor-General in Council, New Delhi. The plff's case was that he despatched from Calicut to self at Kalapipal, a station in the G. I. P. Railway, 34 bags of dry coconuts, 11 bags of moist coconuts & 77 bags of copra balls by invoice dated 17-7-1944. He charged the railway system with wilful default & negligence & misconduct as the goods were wrongfully diverted &

otherwise unduly delayed in the course of transit. It was only after continued enquiries regarding the delay at the other end that the goods were traced & finally sent to the destination in October 1944. The goods had become deteriorated & became unmarketable. The District Commercial Inspector, Jhansi, certified the condition of the goods & assessed the claim for damages at Rs. 1,918. The plff's agent took delivery under protest reserving his claim for full & adequate damages. He claimed Rs. 5,059 as the proper amount of damages sustained by him. In para. 9, of the plaint it was stated that he had sent various letters to the defts. compliaining of the delay & claiming damages that finally the defts; evaded & refused to make good the damages. He issued on 29-3-1945 a registered notice under S. 80, C. P. C. Along with the plaint he filed the copy of the notice sent by him & also the acknowledgments of delivery by the various addressees signed by them. All the defts. separately filed written statements & in each of them we find an objection being taken to the legal validity of the notice under S. 80. The ground of objection was that proper statutory notice was not served on the Governor-General in Council who owns the railways. The written statements disclosed that the goods were misdespatched to Mysore & after some delay they were traced & finally they were rebooked to Kalapipal. Some time before the trial an additional written statement was filed on behalf of all the defts; wherein it was stated that S. 80, C. P. C. was not complied with as the plaint did not use the words "sent, delivered & left" with reference to the notice under S .80. Various issues were framed but as stated before the validity of the notice was treated as a preliminary point of law & the lower court was asked to try that issue first. It accordingly took it up for trial & in the end dismissed the suit as stated above.

2. Two grounds are urged in the judgment of the court below for its conclusion that the notice is bad. The first is that there is no allegation in the plaint that the notice was delivered or left at the office of the Central Govt. & that the mandatory provision of S. 80 are not complied with. S. 80 says: "That the plaint shall contain a statement that such notice has been so delivered or left". The second ground was that the notice does not state that the Governor General in Council will be sued & it did not claim any relief against the Governor General in Council.

3. The points for determination are whether the notice is bad because the plaint did not contain an averment that it was delivered or left with the Secretary to Govt; (2) whether the notice is bad because no relief was claimed against the Governor General in Council nor was it intimated that he will be sued.

(4) As regards point number 1, want of a proper averment in the plaint it may be noted that along with the plaint the acknowledgments of the delivery of registered letters were filed. Para 9 of the plaint referred to the despatch of the registered notice under S. 80 & the non-receipt of a reply. In this circumstance it seems to me a highly technical view that the plaint should be dismissed on the ground that the express words that the notice was delivered or left with the Secretary for Railways are not found in the plaint. If that was the only point I would allow an amendment to get over the objection. Learned advocate for the respondents agreed that an amendment would get over the technical argument. In view of that he did not insist on an amendment but was content to support the judgment of other points. Point 1 therefore must be found in favour of the plff. in the circumstance.

(5) Point No. 2: — The more serious objection to the notice that was pressed before me was the absence of a reference to the Governor General in Council in the notice issued. The copy of the notice is Ex. P. 1, (the original has not been produced by the defts.) P-1, after setting out the despatch of goods & the non-delivery in time & their late arrival & the deterioration of the goods & the loss sustained by the plff; ends with this para.

"Please therefore take notice that unless you make good the loss I have sustained by reason of your gross negligence I intend instituting a suit against your railway for such loss as mentioned above."

The letter, was amongst others, addressed to Secretary for Railways, Central Govt. New Delhi. Similar notices were sent to various persons including the agents of the three railways. The lower court had placed reliance on the judgment of a Division Bench of this court in Governor General in Council v. Krishnaswami Pillai', 1946-1 M. L. J. 267 and also the decision of the Privy Council in 'Bhagchand Dagadusa, v. Secretary of State, 51 Bom 725. It is well settled that the section is mandatory. At the same time it is equally well settled that the court should not be nypercritical in examining the language used but should interpret the same in a free & liberal spirit. In my opinion the decision in the M. L. J. case is distinguishable because the registered notice there stated that the Secretary of State for India in Council will be sued. Actually it is a different person that should be the deft; & that was the deft. In such circumstance the notice was regarded as bad. In the present case there is no such reference to a wrong person as the person who was going to be sued. It is no doubt true that it is not expressly stated that the proposed suit would be against the Governor General in Council. On the other hand it is stated generally that the suit will be against your railway & the notice was addressed to Secretary to Railways, Central Government, New Delhi. Any person who receives this notice & reads it will understand that this is a claim against the Govt; & the suit would be against the owners of the Railway, the Governor General in Council. It could not have been the intention, nor could it have been understood; as a suit which is contemplated against the individual official, the Secretary for Railways. In fact the language used is "the suit will be against your railway" and not " against you." I think a fair reading of this notice may well be taken as an intimation which will satisfy the requirements of Ss. 79 & 80 of the C.P.C. In fact S. 79 says that actually in the suit the deft. must be the Governor General in Council. In the present suit he is the 4th deft. S. 79, therefore, is strictly & literally complied with. S. 80 requires that the notice should state the cause of action, the name, description of the plff. & the relief which he claims. It is somewhat significant that the name of the proposed deft. need not be stated although of course it is expected that the person against whom the relief is sought would be particularised. I had occasion to decide the same question in a batch of C. R. Ps., C. R. P. No. 753 of 1948 etc., Subrahamanyam v. Union of India, 1950 M. W. N. 787. I held therein that a notice in somewhat similar terms which merely stated that the suit would be filed for recovery of the amount claimed & was despatched by registered notice to the Secretary to Governor General in Council, Department of Railways & stated that it was a notice under S. 80 of the C. P. C. was a good notice. The matter has been argued before me again. I do not, however, see any reason to change my view. I hold accordingly that the notice is not bad on this ground either.

(6) Lastly Mr. Ramchandra Aiyar the learned advocate for the respondents sought to raise a new point in support of the judgment of the lower court. He contended that the notice was certainly bad because it merely stated that loss had been incurred & that unless the loss is made good a suit will be filed. No particulars of the loss were indicated nor the amount. He stressed the need for definite information on the point in the notice itself so that the Government may be apprised of the magnitude of the claim & the matter be dealt with at the appropriate level having regard to the magnitude of the claim among other things. I see some force in this argument. But in the present case notwithstanding the fact that the defendants raised an additional statement setting an objection to the notice on other grounds, they never raised this point. I do not see any justice in allowing them to raise a further point now particularly when I find that in the written statement it is admitted that the goods were misdespatched to Mysore where they were lying unclaimed & it was only after some considerable delay that the mistake was found out & it was only after some considerable delay that the mistake was found out & the goods were despatched to the proper place. I do not see any reason why the plff. should be made to suffer for this delay which may be due either to the negligence or an accident on the part of the railway officials. Having regard to this aspect of the matter I do not see why I should allow an indulgence in favour of the railway to the possible detriment of the plff. I therefore decline to entertain this point.

(7) In the result, the appeal is allowed & the case will be sent back to the lower court for trial of other issues. Costs to abide. Court-fee to be refunded.

C.R.K./V.B.B. *Appeal allowed.*

A. I. R. (39) 1952 MADRAS 504 (1) (C. N. 112)

GOVINDA MENON, J.

In re Marutha Goundan alias Kulla Goundan, Petnr.

Cr. Revn. Case No. 1287 & Cr. Revn. Petn. No. 1215 of 1949 D/- 30-11-1950.

Madras Prohibition Act (10 of 1937) S. 4(1)(a) — Possession of Ganja after enactment of Madras Act XI(11) of 1941 — If offence — Hemp Drug Rules (1936) R. 23 — Madras Prohibition Supplementary Act (XI (11) of 1941) S. 2.

After the enactment of the Madras Prohibition Supplementary Act (XI (11) of 1941), the Hemp Drug Rules including R. 23 framed under the Indian Abkari Act, are not in force. Hence, the possession of 1/16 tola of Ganja after that enactment, is an offence, u/s. 4(1)(a), Madras Prohibition Act: A I R (28) 1941 Mad 533 (F B), Ref. (Para 2)

R. V. Raghavan, for Petnr. — Public Prosecutor for the State.

Case referred to:

('41) 1941-2 M L J 41: (A I R (28) 1941 Mad 533: 42 Cr L J 793 (F B)) (Pr 1)

ORDER: Under the Hemp Drug rules dated 1-2-1936 framed under the Abkari Act, there is R. 23 which allows any person to be in possession of not more than three tolas of ganja, in the districts of the State of Madras except in the District of Madras & the Agency tracts of Ganjam Vizagapatam & East Godavari. The accused here has been convicted u/s. 4(1)(a), Madras Prohibition Act, for being in possession of 1/16 tola of ganja & the lower Cts. have held that he is guilty of the offence with which he is charged. In a F. B. decision in 'Adi Lakshmiammal' in re', 1941-2-M. L. J. 41 it has been held that in so far as the Prohibition Act repeals the provisions of the Madras Abkari Act, they have not been reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure & therefore the Madras Legislature had no power to interfere with the Madras Abkari Act so far as possession of dangerous drug is concerned. In that view, the F. B. held that S. 4(1)(a) as it stands being entirely repugnant to an existing law is completely 'ultra vires' so far as possession of ganja or any other dangerous drug is concerned. At p. 44 of the report, Leach C. J. delivering the judgment of the Bench observed as follows:

"The Hemp Drug rules framed under the statutory authority were notified on 1-2-1936. By R. 23 a person may have in his possession in Agency Tracts of Ganjam, Vizagapatam and East Godavari any quantity of ganja not exceeding two tolas & elsewhere in the presidency, any quantity exceeding three tolas. Therefore, before the application of the Prohibition Act to the North Arcot district a person there could lawfully possess three tolas of ganja".

(2) As a result of this observation the F. B. set aside the conviction of a person who was found to be in possession of ganja not exceeding three tolas in the District of North Arcot. This decision would have applied in its entirety to the facts of the present case had it not been for the fact that the Madras Prohibition Supplementary Act XI (11) of 1941 rectified the mistake pointed out by the F. B. Madras Act XI (11) of 1941 by S. 2 provided that the provisions of the Madras Prohibition Act in regard to intoxicating drugs shall apply to every intoxicating drug as therein specified although such drug may also be a dangerous drug. In view of this rectifying clause, it cannot be held that the rules framed under the Hemp Drug rules (Sic) are in force after the enactment of the Madras Prohibition Supplementary Act XI (11) of 1941. The conviction of the petnr. must therefore be held to be right. But the sentence of two months R. I. in the circumstances of the case seems to be excessive for the possession of 1/16 tolas of ganja. It has been brought to my notice that the accused has undergone a period of ten days sentence prior to his being released on bail. I would therefore reduce the sentence to the period already undergone. Otherwise the petn. is dismissed.

C.R.K./V.B.B. *Sentence reduced.*

A. I. R. (39) 1952 MADRAS 504 (2) (C. N. 113)

SUBBA RAO AND PANCHAPAKESA AYYAR JJ.

Venkatarama Naicker, Petitioner v. Ramasami Naicker and others, Respondents.

Civil Revn. Petn. No. 806 of 1946, D/- 24-4-1950.

(a) Civil P. C. (1908) O. 41 R. 22 — Cross-Objections in revision.

No memorandum of cross-objections will lie in a revision petition. (Para 9)

Anno: C. P. C. O. 41 R. 22 N. 10.

(b) Provincial Insolvency Act (1920) Ss. 34, 53, 54 — Fraudulent preference not carried out — Proof of deft. as unsecured creditor.

Where in spite of a mortgage, (which is set aside under Ss. 53 and 54) and a suit and a decree therein for the first instalment due under the mortgage, there has been no substantial part performance of the fraudulent intention to prefer some of the creditors to others under the mortgage and no harm has been actually done and the parties have virtually been put back to their original position by the cancellation of the deed, the intended fraudulent transaction will not prevent the mortgagee

from proving in insolvency the debts covered by the mortgage as an unsecured creditor. A I R (23) 1936 Mad 717 F B. Rel. on. (Para 11)

Anno: Pro Ins. Act S. 34 N. 3; S. 54 N. 11.

†(c) *Provincial Insolvency Act (1920) Ss. 34, 53, 54 — Mortgage declared void — Effect on debt.*

The mere fact that a mortgage is declared void under Ss. 53 and 54 does not make the debt included in it void. Though the mortgage deed is annulled under Ss. 53 and 54, the mortgagee thereunder can rely on the debt included in the mortgage deed and prove the debt in insolvency as an unsecured creditor. The mortgagee need not plead any fraud for proving these debts as for proving the mortgage. Further this view does not take away the effect of cancelling the mortgage deed. The mortgagee, who was a secured creditor and could recover his dues in full under the mortgage set aside, is, owing to the cancellation of the mortgage, relegated to the position of a mere unsecured creditor, entitled only to the dividend (a mere fraction) of his dues, like the remaining unsecured creditors. A I R (18) 1931 P C 245, Foll. (Para 12)

Anno: Pro. Ins. Act S. 34 N. 3; S. 54 N. 11.

(d) *Provincial Insolvency Act (1920) Ss. 9, 34 — Joint family debt.*

A person liable for debts merely on the ground that he is a member of a joint family and that the debts are payable by the joint family cannot be adjudicated insolvent for those debts, and those, debts cannot be proved in his insolvency and will have only to be allowed for preliminarily in a partition suit brought by the purchasers of the other share or shares. But there are also undoubtedly circumstances which will make such a person 'personally liable' for the debt. such as his being a member of a trading firm and holding himself out as a partner, and the debts being contracted for the trade. There is no need to wait then for a partition suit for allowing such debts which can be proved in the insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties. A I R (23) 1936 P C 277 and A I R (18) 1931 Mad 788, Ref. (Para 14)

Anno: Pro. Ins. Act S. 9 N. 3; S. 34 N. 3.

(e) *Debt Law — Madras Agriculturists' Relief Act (IV (4) of 1938) S. 21 — Person having no land on the three crucial dates.*

It is essential for the application of S. 21 that the insolvent should have all the qualifications prescribed for an "agriculturist" entitled to scaling down by the Madras Agriculturists' Relief Act on the three crucial dates, the only concession given by S. 21 being the ignoring of the fact of adjudication and the consequent vesting of the properties in the Official Receiver. If a man has no lands whatever on 1-10-1937, 22-3-1938, or the date of the application and could not, therefore, have been an "agriculturist" entitled to scaling down even if there were no adjudication, there will be no question of his being entitled to any scaling down. No Court can speculate on what would have happened but for the insolvency, and whether the insolvent might have had some lands left after discharging his debts privately or by evading his creditors and avoiding sales. (Para 16)

T. M. Krishnaswami Iyer and M. Murugappa Chettiar, for Petnr; V. Ramaswami Iyer, for Respondent.

Cases referred to:

('32) 59 Cal 377: (A I R (18) 1931 P C 245) (Pr 12)

('36) 17 Lah 644: (A I R (23) 1936 P C 277) (Pr 14)

('31) 34 M L W 761: (A I R (18) 1931 Mad 788) (Prs 13, 14)

('36) 59 Mad 998: (A I R (23) 1936 Mad 717 F B) (Pr 11)

ORDER: This is a revision petition under S. 75 of the Provincial Insolvency Act, by one Venkatarama Naicker, hereinafter called the opposing creditor, against the judgment & decree of the Dist. J. of Tirunelveli in C. M. A. No. 5 of 1945, dated 12-3-1946, allowing the respondents hereinafter called the proving creditors, to prove certain debts of theirs holding them to be recoverable from the estate of the insolvent, Narayanappa Naicker, to the extent held to be true & binding. The memorandum of cross-objections is against the debts not allowed to be proved as they were held to be not true & binding on the insolvent.

(2) The facts are briefly these: Narayanappa Naicker, the insolvent, was adjudged insolvent in I. P. No. 40 of 1923 on the file of the District Court, Tirunelveli. He was the father of one Venkatasami Naicker who predeceased him & was said to have been the manager of the joint family. Venkatasami Naicker had also several children who were minors at the time of the I. P. The I. P. had been filed by the opposing creditor & others for adjudicating Venkatasami Naicker, Narayanappa Naicker & Venkatasami's minor children, all insolvents on the ground that they had executed a mortgage deed, Ex. A in 1923, in favour of the proving creditors, in fraudulent preference under S. 54 of the Provincial Insolvency Act, & also as void, regarding part of the consideration recited therein, under S. 53, Provincial Insolvency Act. The opposing creditor had, in his I. P., relied on certain debts due to him contracted by Narayanappa, Venkatasami and Venkatasami's sons, for running a trade in cotton & a ginning factory. There were two aspects of this trade, one being run by Venkatasami Naicker, Narayanappa Naicker & their family members alone, & the other by the family members in partnership with one Appadurai Ayyappa Naicker. Venkatasami died during the pendency of the I. P. By his order dated 10-12-1923, the Dist. J. Tirunelveli, adjudicated Narayanappa & Venkatasami's minor sons as insolvents. Narayanappa & the minors filed an appeal to this court. On 18-11-1927, Phillips & Madhavan Nair JJ. delivered their judgment (Ex. SS) in the appeal. As the wording of the judgment is somewhat important for other purposes, & as the judgment itself is short, it is extracted below:

"The only question for decision is whether the trade carried on by the deceased second respt. was a family trade or his own private trade. It was carried on under the 'vilasam' of A. N. V. Venkatasami Naick, which is the name of the second respondent. The clerk who was employed in the trade says that it was a family trade & that the first appellant used to assist in the business as well as looking after the family lands. It is also alleged by P. W. 4, one of the creditors, that the trade was a family trade & the fact that it is in the deceased's name is accounted for by the fact that he was the managing member of the family. It is alleged that patta was transferred in his name by his father, &, although the father denies this, he has not produced the patta in his own name. Finally, when the deceased incurred debts in his trade all the family property as well as the family house were mortgaged to borrow money & the executants of the mortgage were the 1st appellant, the deceased & his minor sons. The Dist. J. has believed the evidence of the witnesses & we see no reason to differ from his conclusions. He has however made a mistake in adjudicating the minor respondents 3 to 7 insolvent & in that respect his order must be modified. The appeals are dismissed with costs".

(3) It will be seen that the learned Judges held in that order that the cotton trade & the ginning factory were carried on as a family trade by Venkatasami, Narayanappa & other members of the family, & that Narayanappa, the first appellant, used to assist in the business as well as look after the family lands, & that the debts of the creditors who filed the I. P. were incurred for such family trade, though they stood in the name of Venkatasami, as he was the managing member of the family, all the family properties & the family house being mortgaged subsequently by all family members to borrow money. Of course, the adjudication of the minor sons of Venkatasami was set aside as they could not be held to be personally liable for the debts, but only liable to pay them out of the joint family debts, for which they were, of course, not personally liable.

(4) After the adjudication by the Dist. J., the Official Receiver filed O. P. No. 30 of 1925, in the Sub Court, Tuticorin, for setting aside the mortgage deed, Ex. A., under Ss. 53 & 54, Provincial Insolvency Act. The proving creditors filed O. S. No. 28 of 1925 on the file of the Sub Court, Tuticorin, for recovering the first instalment of Rs. 2500 due under the mortgage deed, Ex. A, which was for Rs. 46500 & consisted of seven items, including the debts now allowed by the learned Dist. J. to be proved. The Subordinate Judge decreed O. S. No. 28 of 1925, & dismissed O. P. No. 30 of 1925. The official Receiver did not prefer any appeal against the decree in O. S. No. 28 of 1925, but preferred an appeal against the order in O. P. No. 30 of 1925, namely, C. M. A. No. 4 of 1927, on the file of the District Court, Tirunelveli.

(5) The Dist. Judge, Tirunelveli, allowed C. M. A. No. 4 of 1927, on 29-9-1928, & set aside the mortgage deed, Ex. A, under Ss. 53 & 54, Provincial Insolvency Act. The gist of his finding lies in the following sentence:

"I declare the mortgage to be void as against the Official Receiver both because it is not fully supported by consideration, & also because it is & was, intended to be a fraudulent preference & made with a view of removing the insolvent's properties from the powers of his creditors".

(6) The proving creditors, who were thus affected by the cancellation of the mortgage deed, took the matter in appeal to this court. This court, by its judgment, dated 12-12-1932, confirmed the order of the Dist. Judge setting aside the mortgage, and dismissed the appeal.

(7) As the mortgage was thus set aside, the proving creditors the mortgagees, filed I. A. No. 45 of 1941 for proving the very debts included in the mortgage deed after deducting the Rs. 2,500 for which they had got a decree in O. S. No. 28 of 1925, & adding a sum of Rs. 500 the unrealised balance, i.e. in all for Rs. 44500. The Official Receiver found that out of the 7 items comprised in the mortgage deed, Ex. A, & sought to be proved in the insolvency of Narayanappa, items 1, 2, 3, 4 and 7 were true, but that items 5 & 6 were not proved to be binding. He also found the additional Rs. 500 claimed by the proving creditors to be true. But he thought that the proving creditors could not claim anything in the insolvency proceedings of Narayanappa because the mortgage deed, Ex. A, had been declared by the Dist. J., Tirunelvely, to be void against the Official Receiver, this order had been confirmed by the High Court on appeal, & further, that the proving creditors should exhaust all their remedies against the assets of Venkatasami Naicker and his sons before proceedings against the insolvent's estate. His order, dated 14-12 1941, to that effect, was carried in appeal to the Subordinate Judge, Tuticorin, by means of I. A. No. 45 of 1941. On 15-12-1943, the learned Subordinate Judge pronounced an order holding that items 1, 2, 4 & 7, recited in Ex. A, were true, as also the additional Rs. 500, & that all these were recoverable in the insolvency, & that items 5 & 6 were not true. In respect of item 3, he remanded the matter to the Official Receiver for a fresh finding after taking all the facts into consideration. The Official Receiver gave a finding that only Rs. 8,186-5-10 out of the Rs. 10,000 & odd, covered by the third item, was true. The first item covered a liability of Rs. 8,500, item 2 covered a liability of Rs. 11,500, item 3 to the extent found liable, covered a liability of Rs. 8,186-8-10, item 4 covered a liability of Rs. 10,000 & item 7 a liability of Rs. 5000. Items 5 & 6, the disallowed items covered liabilities of Rs. 3,300 & Rs. 2,700 respectively. Eventually, after some amendments of defective decrees etc., the learned Subordinate Judge allowed proof of items 1 & 2, the portion of item 3 found to be true, item 4, item 7 & the extra Rs. 500 claimed by the proving creditors, & disallowed items 5 & 6.

(8) The opposing creditor filed C. M. A. No. 5 of 1945 before the Dist. J. of Tirunelveli, against the order of the Subordinate Judge allowing proof of the debts to the extent he did. The proving creditors filed a memorandum of cross objections regarding the items disallowed. Various points of facts & law were raised by both sides before the learned Dist. J., but, after a thorough discussion, & an exhaustive judgment dealing with all the points raised, the learned Dist. J. dismissed both the appeal & the memorandum of cross-objections, & directed both the parties to bear their own costs. Hence this revision petition & memorandum of cross objections.

(9) We have perused the entire records, & heard the learned counsel on both sides. It is obvious that the memorandum of cross objections must be dismissed; as no memorandum of cross objections will lie in a revision petition, & as Mr. V. Ramaswami, for the proving creditors, was unable to show how it will lie it is therefore dismissed with costs.

(10) Now we come to the revision petition itself. Though there were numerous contentions raised in the revision petition, Mr. T. M. Krishnaswami, Iyer, the learned counsel for the opposing creditor, who argued the petition, raised only three contentions before us.

(11) The first was that the learned Dist. J. ought to have held that the mortgage deed, Ex. A, having been set aside under Ss. 53 & 54, Provincial Insolvency Act, as partially void & in fraudulent preference, the proving creditors could not be allowed to prove in insolvency the debts covered by Ex. A as unsecured creditors even to the extent allowed by the lower court. It was urged that the lower court ought not to have allowed the proving creditors to rely on their fraud in getting Ex. A, which had also been partly carried out by filing the suit, O. S. No. 28 of 1925, & getting a decree therein for the first instalment, & to prove the very debts included in Ex. A, thus allowing them to continue their fraud & get away with it. We cannot agree. As the learned Dist. J. has pointed out, after discussing, various rulings, & in particular, the Full Bench ruling in 'Venkataramayya v. Pullayya', 59 Mad 998, in order to prevent a person who has been a party to a fraudulent transaction from pleading his own fraud, the intended fraud must have been effected or there must have been a substantial part performance of the intention to defraud, & a mere fraudulent intention evidenced by the transaction is not sufficient. In other words, if the fraud or the illegal transaction is not carried out, but comes to an

end, for whatever reason, & the parties are put back in the same situation as they were in before the illegal transaction was determined upon, the intended fraudulent or illegal transaction will not prevent a party to it from claiming the remedy he will be entitled to. In the present case, it is clear that despite the mortgage, Ex. A, which was set aside under Ss. 53 & 54, Provincial Insolvency Act, & a suit, O. S. No. 28 of 1925, & a decree therein for the first instalment due under the mortgage, there has been no substantial part performance of the fraudulent intention to prefer some of the creditors to others, under Ex. A. (under S. 54, Provincial Insolvency Act), & that no harm has been actually done, & that the parties have virtually been put back to their original position by the cancellation of Ex. 'A', as by the compromise in the Full Bench case quoted above. We cannot agree with Mr. Krishnaswami Aiyar's argument that the Full Bench judgment contains contradictory observations, & that in one portion of it the principle laid down above was watered down to the extent of practically dissenting from it. A perusal of the entire judgment with the arguments of Mr. K. Subba Rao (as he then was) & the observations of the learned Judges, have convinced us of this. Thus, in reply to the observation of Mr. Subbo Rao to the effect that the fraud was no doubt ultimately frustrated but the fraudulent object was in part carried out, namely, the object of securing the property in question to the father himself, the learned Chief Justice, who delivered the judgment of the Full Bench, remarked:

"At the most there was a claim to the exclusion of the property in question from the partition, but that claim was not persisted in, & nobody was damaged. So no fraud has been effected",

& King J. remarked, "the fraudulent object was abandoned, & nobody has been damaged".

In this case too, the fraudulent object has been abandoned & nobody has been damaged, & so the ruling of the Full Bench will apply with full force here.

(12) Ss. 53 & 54, Provincial Insolvency Act, merely say that the transfer of the property under the deed so set aside is void, & not everything connected with it. The judgment of the Dist. J. Tirunelveli, in C. M. A. No. 4 of 1927, also only declared the mortgage deed, Ex. A, to be void against the Official Receiver, as it was not fully supported by consideration & was intended to be a fraudulent preference of some creditors over others, & did not make the debts included in it void. So, that order made only the security offered under Ex. A. void, & did not purport to, & could not, wipe out the debts comprised in that mortgage deed. The dissociation of the debts included in the mortgage deed from the security is a familiar notion in law, from time immemorial, & has been forcibly brought out in the Privy Council decision in the 'Imperial Bank of India v. Bengal National Bank', 59 Cal 377. So, even though the mortgage deed, Ex. A, was cancelled, the debts comprised in it were not cancelled, & the 'status quo ante', before the mortgage deed was executed, would automatically revive. Many cases have been relied on by the learned Dist. J. for his view that though the mortgage deed is annulled under Ss. 53 & 54, Provincial Insolvency Act, the mortgagee thereunder could, rely on the debts included in the mortgage deed & prove those debts in insolvency as an unsecured creditor. We agree with this view which is obviously the only sound one. The mortgagee need not, it is obvious, plead any fraud for proving these debts as for proving the mortgage. It is also not as if, this view takes away the effect of cancelling the mortgage deed. The mortgagee, who was a secured creditor & could recover his dues in full under the mortgage set aside, is, owing to the cancellation of the mortgage, relegated to the position of a mere unsecured creditor, entitled only to the dividend (a mere fraction) of his dues, like the remaining unsecured creditors. That is a substantial difference, & it cannot be said that the cancellation of the mortgage deed, Ex. 'A', by the Dist. J. & High Court, is rendered illusory by the view taken by the learned Dist. J. that the ex-mortgagees, the proving creditors, can prove the debts included in the mortgage as unsecured creditors in the insolvency.

(13) The next contention of Mr. Krishnaswami Aiyar, pressed before us, was that the whole proceedings before the learned Dist. J., till the stage of arguments, had gone on the footing that Narayanappa, the insolvent, was only liable for the debts of the proving creditors as a member of the joint family, liable to pay the joint family debts, & that only at the stage of arguments was it urged that he is liable 'personally' to pay those debts, as a partner in the trade along with his son, Venkatasami, taking an active part in the conduct of the business, & therefore liable personally for the debts incurred along with Venkatasami & that, therefore, the debts allowed to be proved by the lower court should only be proved & allowed for in a partition suit brought by the proving creditors who have bought the shares of Venkatasami's minor sons. It was argued further that the High Court's judgment in Ex. SS, quoted above, only held the debts incurred by Venkatasami for the cotton & ginning business carried on by him in his own name, & not in partnership, to be debts binding on 'Narayanappa also personally', & not also the debts incurred in the business conducted in partnership with Appadurai Ayyappa Naicker, & that, in any event, only the debts of the creditors who filed the I. P. had been admitted by the opposing creditor to have been contracted by Venkatasami for the cotton & ginning business carried on by the family, either by itself or in partnership with Appadurai Ayyappa Naicker. Mr. Ramaswami Iyer, for the proving creditors, urged that nobody can, under our law, be adjudicated insolvent for a mere liability for joint family debts, & that a man can be adjudicated only for debts for which he is personally liable, relying on the ruling in 'Purnayya v. Basava Kotayya', 34 M. L. W. 761 & similar rulings. He, therefore, urged that the mere fact that Narayanappa was adjudicated insolvent would prove that he was liable personally to pay the debts covered by the I. P. & all other debts contracted for the cotton & ginning business run by the family, either by itself or in partnership with Appadurai Ayyappa Naicker. Mr. Krishnaswami Iyer retorted that, even if the debts of the creditors in the I. P. have been held to be payable personally by Narayanappa, it is not proved that 'the debts of these proving creditors' were contracted for the cotton & ginning business run by the family, by itself or in partnership with Appadurai Ayyappa Naicker, & that, without some formal proof to that effect, it would be preposterous to allow these debts to be proved by the proving creditors in the insolvency of Narayanappa Naicker, relying on mere arguments & inferences. We agree. It is clear to us, from the records, &, it is indeed mentioned by the learned Dist. J. also in his judgment, that there was no formal proof of Narayanappa's 'personal liability' for the debts contracted from the proving creditors & allowed to be proved in this insolvency, in the proofs submitted by these creditors. Nor was it made clear in the Sub Court & the District Court till the stage of arguments. Narayanappa's personal liability was evidently taken for granted by the proving creditors because of his joining in the

mortgage deed, Ex. 'A'. But, the moment Ex. 'A' was cancelled, that basis for his personal liability had to be formally proved by some evidence let in for that purpose.

(14) Of course, we agree with Mr. Ramaswami Iyer that in view of the judgment of this court in Ex. SS, & of the Subordinate Judge & Dist. J., & for the reasons given in all the three judgments all debts contracted by Venkatasami Naicker, the managing member of the family business, whether carried on by the family itself or in partnership with Appadurai Ayyappa Naicker, would be debts for which Narayanappa, who had interfered in the partnership & assisted in the management of the business, would be 'personally liable'. We cannot go behind this. The law undoubtedly is that a person liable for debts merely on the ground that he is a member of a joint family & that the debts are payable by the joint family cannot be adjudicated insolvent for those debts, & those debts cannot be proved in his insolvency & will have only to be allowed for preliminarily in a partition suit brought by the purchasers of tne other share or shares (as here, by the proving creditors who have bought the minors' shares): see the ruling of the Privy Council in 'Sat Narain v. Sri Kishendas', 17 Lah 644 & Yagnavalkya's specific directions in his 'Smriti' & directions to that effect in the 'Mitakshara'. But there are also undoubtedly circumstances which will make such a person 'personally liable' for the debt, such as his being a member of a trading firm and holding himself out as a partner, & the debts being contracted for that trade. There is no need to wait then for a partition suit for allowing such debts which can be proved in the insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties, see the ruling in 'Kalagara Purnayya v. Chenurubi Basava Kotayya', 34 M. L. W. 761.

(15) We are, therefore, of opinion that the matter must be remanded to the Subordinate Judge, Tuticorin, for proof by the proving creditors that the debts held to be true by the Subordinate Judge & Dist. J., were incurred for the cotton & ginning trade carried on by Venkatasami & the family members, either solely or in partnership with Appadurai Ayyappa Naicker. Once it is so proved, the proving creditors will be allowed to the debts of items 1, 2, 3, (to the extent allowed already), 4 & 7, & the Rs. 500, without further ado. The findings of fact of both the courts below, regarding the truth & validity of the above items & the non-proof of the truth & validity of items 5 & 6, — matters within their jurisdiction & competence, — cannot be interfered with or disturbed by us, in revision, & we see also no reason to do so.

(16) Lastly, Mr. T. M. Krishnaswami Aiyar urged that the lower court went wrong in holding that the debts allowed to be proved were not liable to be scaled down under the Madras Agriculturist Relief Act. He contended that, under S. 21, Madras Agriculturists Relief Act, the debts ought to have been scaled down as they were debts of an insolvent whose insolvency proceedings were still pending on 1-10-1937, 22-3-1938 & the date of the application, the three crucial dates, & a dividend has not been declared out of his assets prior to the coming into force of the Act on 22-3-1938 & he would have been an "agriculturist", within the meaning of the Act, but for his adjudication in insolvency, & that his death before 1-10-1937 or the sale of all his properties before that day by the Official Receiver, in insolvency, would be totally irrelevant & immaterial. We cannot agree. S. 21, Madras Agriculturists Relief Act, runs as follows:

"Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets. If a dividend has not been so declared this Act shall apply to the debts payable by such person if he would have been an agriculturist, within the meaning of this Act but for his adjudication in insolvency".

In our opinion, it is essential for the application of that section, that the insolvent should be an "agriculturist" on 1-10-1937, 22-3-1938, & the date of the application for scaling down, the three crucial dates, but for the adjudication in insolvency. In other words, he should have all the qualifications prescribed for an "agriculturist" entitled to scaling down by the Madras Agriculturists Relief Act on the three crucial dates, the only concession given by S. 21 being the ignoring of the fact of adjudication & the consequent vesting of the properties in the Official Receiver. If a man has no lands whatever on 1-10-1937, 22-3-1938, or the date of the application & could not, therefore, have been an "agriculturist" entitled to scaling down even if there were no adjudication, there will be no question of his being entitled to any scaling down. No court can speculate on what would have happened but for the insolvency, & whether the insolvent might have had some lands left after discharging his debts privately or by evading his creditors & avoiding sales. In the present case, it was proved that all the lands of the insolvent were sold by the Official Receiver in '1933' itself, years before the Madras Agriculturists Relief Act was on the anvil. There was no proof of the allegation that he had some other lands left. Indeed, we agree with the learned Dist. J. that nothing more was left after the sale in 1933. So, we are of opinion that Narayanappa even if he had not been adjudicated in insolvency, would not have been an "agriculturist" entitled to scaling down, on 1-10-1937 or on 22-3-1938 & on the date of the application, the three crucial dates. In our opinion, the question of the applicability of S. 21 can only be raked up at the time of the application for scaling down. If on that date, but for the adjudication, the insolvent would have had lands, & would be an "agriculturist", S. 21 would apply. If on that date he had no lands at all, for whatever reason, there will be no question of applying S. 21. It is something, like a provision removing the disqualification of imprisonment for a political crime regarding employment in Govt. service. It is only the disqualification which is removed. The other qualifications which are necessary for Govt. service, like being a graduate, eligible S. S. L. C., etc., will still remain. No appointing authority can be allowed to speculate as to whether the person in question would have qualified himself educationally & got the requisite qualification but for the imprisonment intervening. All such speculations would be out of place in the matter-of-fact world of law. In this view there is no need to consider whether the death of Narayanappa before 1-10-1937 would also have deprived him or his legal representatives or the Official Receiver of the right to have the debts scaled down. We hold that the learned Dist. J. was right in holding that the debts allowed by him to be proved by the proving creditors were not liable to be scaled down.

No other point was argued before us.

(18) In the result, the petition (I. A. No. 45 of 1941) is sent down to the Subordinate Judge of Tuticorin for proof by the proving creditors that the debts covered by items 1, 2, 3 (to the extent allowed already 4 & 7, & the Rs. 500 allowed to be proved by the proving creditors, were debts con-

tracted for the cotton & ginning business of Venkatasami Naicker & his family, either run solely by the family members or in partnership with Appadurai Ayyappa Naicker. On such proof, the above debts will all be held to be proved in the insolvency of Narayanappa Naicker, who would be held personally liable for them. All the parties will be free to adduce all relevant oral & documentary evidence in connection with this. Costs of this petition will be suitably provided for by the Subordinate Judge when disposing of the petition afresh.

C. R. K./D. H. *Order accordingly.*

A. I. R. (39) 1952 MADRAS 509 (C. N. 114)

SOMASUNDARAM J.

In re Venugopal Mudaliar, Petitioner.

Criminal Misc. Petns. Nos. 2410, 2411 and 2412 of 1950 D/- 8-11-1950.

(a) Cri. P. C. (1898) S. 540 — Court-witness — Discretion of Court to examine — Important and material witness given up by prosecution — Right of Court to examine him as Court witness — Stage at which witness should be examined.

Where the prosecution thinks fit not to examine an important and material witness and gives him up, it is the duty of the Court to call him and examine him as a court-witness in the case. (Para 6)

There is no restriction as to the stage at which a witness may be called by a Court. It is open to it to examine first or after 1 or 2 witnesses for the prosecution are examined. In its discretion, the Court can examine the witness at any stage. (Para 6)

(Conduct of Public Prosecutor in giving up important and material witness held highly improper and deserved censure.) (Para 5)

Anno: Cr. P. C. S. 540 N. 2, 4, 5.

(b) Cri. P. C. (1898), S. 526 — Transfer application by prosecution witness — Neither prosecution nor accused seeking transfer — Petitioner himself complainant and making attempts to see that he was not examined as a witness — Held allegations for transfer were illfounded. (Para 8)

Anno: Cr. P. C. S. 526 N. 3, 4.

V. M. Ramaswami Mudaliar and N. Gopalan Menon, for Petitioner.

ORDER: This is an extraordinary application by one Venugopal Mudaliar who is cited as P. W. 1 in the chargesheet filed by the police in C. C. No. 5 of 1950 on the file of the Additional Sub Magistrate, Vellore.

(2) The circumstances which have given rise to this petition are these: The petitioner complained to the police that one Thandavarayan who was employed under him & dismissed by him, entered into his house & abused & threatened to cause bodily injuries to two ladies by name Rukmani Ammal & Saradambal Ammal who were said to be in occupation of the house at the time. The petitioner further alleges that he apprehended danger to his life & that of Rukmani Ammal. The police after investigation has filed a charge-sheet against the accused in the case & as the petitioner is the informant he is cited as P. W. 1 in the charge sheet. The Assistant Public Prosecutor appears to be in charge of the prosecution. The petitioner has also engaged an advocate to assist the Assistant Public Prosecutor in the conduct of the prosecution.

(3) On 4-10-1950 the advocate engaged by the petitioner presented a petition on behalf of the petitioner to strike out his name from the list of witnesses & to dispense with the examination of the petitioner as a witness in the case on the ground that the petitioner is not an eye-witness to the occurrence. Under what section of the Code of Criminal Procedure or the Evidence Act this petition is filed is not clear. Nor is it clear under what section of the Cri. P. C. the petitioner's advocate was permitted to interfere with the course & conduct of the prosecution which is in charge of the Assistant Public Prosecutor. However, strangely enough the Assistant Public Prosecutor himself inspired by the petitioner or his advocate (vide the allegations in para 5 of the petitioner's affidavit) field a petition on 13-10-1950 similar to the one filed by the petitioner's advocate to dispense with the evidence of the petitioner herein. The Magistrate very properly questioned the right of the petitioner's advocate to appear in the case & finally allowed the petition of the Assistant Public Prosecutor to dispense with the evidence of the petitioner. The magistrate however seems to have decided to examine the petitioner as a court witness; and it is stated that he has issued a warrant against the petitioner. It is this procedure of the Magistrate & the proceedings in issuing the warrant that are sought to be questioned & quashed. The petitioner also seeks the transfer of this case from the file of the present magistrate to some other court.

(4) It is contended by Mr. V. M. Ramaswami Mudaliar who appears on behalf of the petitioner that the prosecution has a right to pick & call its own witnesses & when it dispenses with a witness the court has no right to call that witness to come to court to give evidence. It is further contended that as the enquiry has not begun the court has no right to call the petitioner to give evidence before the prosecution lets in its evidence.

(5) It is true that the prosecution cannot be compelled to call a witness given up by it. But it must not be forgotten that a duty is cast on the Public Prosecutor to place before the Court all material & important available evidence in the case. The first information in this case was given by the petitioner & it is stated to be in writing. The record is an important piece of evidence & the best way of proving it is by examining the person who gave the information. The petitioner being a person who gave the information, is a very important & material witness in the case. The prosecution would be failing in its duty if it does not examine such a person as its witness. The court can draw an adverse inference for the non-examination of such an important & material witness. However, in this case, very surprisingly the Assistant Public Prosecutor has thought fit not to examine such a witness & gave him up. I must say that the conduct of the Assistant Public Prosecutor in giving up the petitioner as a witness is highly improper & he deserves censure.

(6) The Assistant Public Prosecutor having given up such an important & material witness, the only alternative is for the Court to examine him as a court witness. It is the duty of the court to call him & examine him as a court-witness. The magistrate has very rightly & properly called the petitioner to give evidence in the case. The discretion given to a court to examine any person as a court-witness is very wide; & in its discretion it can call a witness at any stage of the case. There is no restriction as to the stage at which a witness may be called by a court. The contention of the learned advocate for the petitioner that the court can call a witness only after the prosecution & the defence have closed their evidence is not warranted by the language of the section. As already stated, it is the duty of the Magistrate to examine the petitioner as a witness in the case; and the learned Magistrate was, therefore, perfectly justified in insisting on the petitioner coming

to court to give evidence in the case. It is open to him either to examine him first or after one or two witnesses for the prosecution are examined. In his discretion he can examine the petitioner at any stage.

(7) It is stated in the affidavit of the petitioner that no subpeona was served on him & a warrant has straightaway been issued against him. I am not quite certain as to the truth or otherwise of this allegation. The anxiety displayed by the petitioner not to enter the witness box shows that it is possible that he might have kept out of the way from the service of the subpeona & that has resulted in a warrant being issued; or the magistrate has materials from which he has concluded that it is only by a warrant he can secure the presence of the petitioner in court. In any event, on the materials placed before me I am not prepared to say that the action of the Magistrate in issuing a warrant to secure the presence of the petitioner is either wrong or illegal. As already stated, this is an extraordinary application by a witnesss, in the case & there is no precedent for it. The application to quash the proceedings is refused & it must be dismissed.

(8) As regards the petitioner's prayer for transfer I should say that it is still more extraordinary than the application to quash the proceedings. The petitioner is only cited as a witness for the prosecution in a case in which the police have filed a charge-sheet. The prosecution does not seek a transfer nor the accused but the witness (petitioner) wants it. Herein lies the extraordinary nature of the application. The petitioner is making all attempts to see that he is not examined as a witness; & he is very anxious and eager to make the court understand that he cannot give any useful evidence in the case. Still like a party interested, which alone can give him right to apply for transfer he has applied for a transfer of this case. The petitioner is either interested or not interested in the case. If he is interested in the case, then I cannot understand his attitude to avoid getting into the witness box & give evidence in respect of the complaint which he himself gave. If he is not interested in the case, then this application for transfer cannot lie. Either way the conduct of the petitioner is inexplicable. I am satisfied in this case that what the magistrate did was right & the allegations for transfer are ill-founded. The prayer for transfer is therefore refused & the petition is dismissed.

C. R. K./V. B. B. *Petition dismissed.*

A. I. R. (39) 1952 MADRAS 510 (C. N. 115)

SUBBA RAO AND PANCHAPAKESA AYYAR, JJ.

The State of Madras represented by the Collector of East Godavari at Kallinada, Applt. v. Sree Raja Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu Maharajah of Pithapuram Trustee of Shree Rajah Ram Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu and others, Resps.

Appeals Nos. 93 & 111 of 1947 and Transferred Appeals Nos. 251 to 257 of 1948, D/- 31-10-1950.

(a) Madras River Conservancy Act (VI (6) of 1884) Ss. 16, 25 — Suit against Govt. alone without adding Conservator — Civil P. C. (1908) S. 80, O. 1, R. 10.

As in S. 25, there is no reference to the compensation claimable under S. 16, and S. 16 and other Sections nowhere say that the compensation claimable under S. 16 shall only be claimable by a suit brought against the conservator of Rivers. The right of the plffs. under the general law to sue the Govt. for such compensation, or for damages or mesne profits, cannot be taken away, and will remain as supplementing the rights under S. 25. No question of non-maintainability of the suit or limitation arises in such a case. So a suit for compensation under S. 16 can be brought against Govt. alone under S. 80 Civil P. C. without adding the conservator. If, however, the Conservator is added, the notice under S. 25 will become necessary. The decree against the Govt. alone is not affected by the addition of the Conservator as deft., when he is an unnecessary party. (Paras 7, 8.)

Anno: C. P. C. S. 80 N. 2, 3; O. 1 R. 10 N. 11, 33.

(b) Riparian rights — Title to river bed and lands reformed in situ.

Where a river is a navigable and tidal at a certain spot, its bed belongs to the Govt. though, of course, that will not affect the right of the private owners of lands submerged by that river to those lands when they are reformed 'in situ' or to 'lateral accretions' to such lands. The fact that the re-formations 'in situ' were partly due to the conservancy work done by Govt. will not take away the title of the owners to the re-formed lands. A. I. R. (32) 1945 Mad. 396, Rel. on. (Paras 12, 13)

(c) Madras River Conservancy Act (VI (6) of 1884) S. 16 — Rightful refusal of permission— Effect.

S. 16 expressly allows compensation for refusal of permission to cultivate and that right to compensation has not been taken away by any other Act or Ordinance or circumstances. The mere fact that orders refusing permission for cultivation were proper and in public interests cannot take away the private parties' right to compensation, as no private party need shoulder the whole burden of conferring such a benefit on the public. (Para 14)

(d) T. P. Act (1882) S. 117 — Lease by Zamindar to member of his family — Validity.

Leases to members of the Zamindar's family are too numerous, and of too long a practice, to be suddenly declared null and void. On principle, there is nothing in law to prevent a zamindar from giving a lease to a member of his family, especially in these days when zamindaries are being abolished and zamindars levelled down to the status of common men. Nor need a lessee show bulls and ploughs of his own or cultivate the land himself, before he can claim the lease-hold rights granted to him validly. (Para 15)

Anno: T. P. Act. S. 117 N. 2.

The Govt. Pleader and V. Balakrishna Eradi, for Appellant, in Nos. 93 of 1947, and 251 to 257 of 1948 and Respondents in No. 111 of 1947. — A Sundaram Iyer, Ch. Ramakrishna Rao, V. Sethumadhava Rao and K. Ramamurthi, for Respondents in No. 93 of 1947 etc., and with C. Durgabai, for Appellants in No. 111 of 1947.

Cases referred to:

('49) I L R (1949) Mad 675: (A I R (36) 1949 P C 3) (Pr 11)

('20) 11 M L W 256: (A I R (7) 1920 Mad 295) (Pr 11)

('45) I L R (1945) Mad 420: (A I R (32) 1945 Mad 396) (Prs 11, 12)

PANCHAPAKESA AYYAR J: These are nine connected appeals, A. S. Nos. 93 & 111 of 1947 being appeals by the opposite parties to O. S. No. 61 of 1944 on the file of the Sub-Court, Amalapuram, & the other seven appeals having been originally filed in the District Court, East Godavari, & got transferred here as the points involved in those appeals were the same as those in the first two appeals. Of these 8 suits, covered by the 9 appeals, 4 were filed by the Maharajah of Pithapuram, his son the Kumararajah, in whose favour he had executed a settlement, & his daughter-in-law the Yuvarani, who was the lessee in respect of the suit lands. These four suits are O. S. Nos. 34 of 1941, 29 of 1943, 14 of 1944 & 61 of 1944. In those suits

the plffs. had alleged that the two blocks of land shown in the plaint schedule had been formerly 'ryoti' lands of the Pittapuram Zamindari & part of Lankala Gannavaram village, adjoining the Vynatheyam branch of the river Godavari, & that the lands had been cultivated till fasli 1325, that is, till about 1915, that the Godavari submerged those lands & cultivation therein had to be abandoned, that by about 1935 or so the lands began to be re-formed 'in situ' owing to the river receding & so, the first two plffs. leased out the 17 acres 90 cents of the suit lands thus re-formed to the third plff. on a rental of Rs. 455-5-6 by an order dated 29-9-1940, & that the third plff. held an auction for the lease of the above lands publicly & got bids for Rs. 10,000 on 28-9-1940 after she had applied to the conservator of Rivers, East Godavari, who was the East Godavari Executive Engineer, Head Works Division, Dowleswaram, under the Govt. of Madras, for permission to clean the 'nanal' & cultivate the lands, but the conservator of Rivers refused such permission for this and the three succeeding years covered by the four suits, improperly & illegally, & that, in any event, the Government became liable to pay the "compensation" to the plffs. under S. 16, Madras River Conservancy Act, VI (6) of 1884, or ,in the alternative, to pay 'mesne profits" or "damages" for such deprivation of cultivation.

(2) In O. S. No. 34 of 1941 (covered by A. S. No. 256 of 1948) the plffs. claimed Rs. 3,760/- as compensation under S. 16 of Act VI (6) of 1884 or as damages & mesne profits for 1940-41. In O. S. No. 29 of 1943 (covered by A. S. No. 255 of 1948) they claimed damages of Rs. 3,500/- Rs. 455-5-6 for plffs. 1 & 2 & Rs. 3,044-10-6 for plff. 3, for the year 1941-42, as compensation under S. 16 of Act VI of 1884, or as damages & mesne profits. In O. S. No. 14 of 1944 (covered by A. S. No. 257 of 1948) they claimed the same amount of Rs. 3,500 as compensation under S. 16 of Act VI (6) of 1884, or as damages & mesne profits for the year 1942-43. In O. S. No. 61 of 1944 (covered by A. S. No. 93 of 1947) they claimed Rs. 10,000/- as compensation under S. 16 of Act VI (6) of 1884, or as damages & mesne profits for the year 1943-44 claiming Rs. 455-5-6 for plffs. 1 & 2 & Rs. 9,635/- for plff. 3 & giving up Rs. 80-5-6. In O. S. Nos. 29 of 1943, 14 of 1944 & 61 of 1944, only the Province of Madras, represented by the Collector of East Godavari had been made the deft., & notice under S. 80 C. P. C. alone was given. In O. S. No. 34 of 1941, though the conservator of Rivers. East Godavari, namely, the Executive Engineer, Head Works Division, Dowleswaram, was made deft. 2 the Province of Madras being the 1st deft., notice under S. 80 C. P. C. alone was given to the Government and notice under S. 25 of Act VI (6) of 1884 was not given to the conservator of Rivers. In O. S. No. 13 of 1944, Ravi Subbarayudu, the owner of Zamindari 'ryoti' land in Lankala Gannavaram village, near the lands covered by the other four suits & said to have been submerged like them in 1915 or so & become fit for cultivation in 1940 claimed a compensation of Rs. 350 under S. 16 of Act VI (6) of 1884, for the year 1941-42, owing to refusal of permission to cultivate & made only the conservator of Rivers East Godavari the sole deft. He gave notice to the conservator, under S. 25 of Act VI (6) of 1884. In O. S. No. 11 of 1945, covered by A. S. No. 252 of 1948, the same Ravi Subbarayudu claimed a compensation of Rs. 500 for the same land for the year 1943-44 owing to refusal of permission to cultivate. In O. S. No. 41 of 1943, covered by A. S. No. 253 of 1948, one Dokka Jagganna, the owner of a Zamindari 'ryoti' land of Lankala Gannavaram village, adjoining the lands in the other suits, said to have been submerged in 1915 or so & become fit for cultivation in 1940, claimed damages of Rs. 1,100/- under S. 16 of Act VI (6) of 1884 for the year 1941-42 for refusal of permission for cultivation, the sole deft. was the conservator of Rivers, & he was given notice under S. 25 of Act VI (6) of 1884. In O. S. No. 42 of 1943, one Jogganna claimed compensation of Rs. 1,850 under S. 16 of Act VI (6) of 1884, against the conservator of Rivers in respect of another land submerged by the Godawari in 1915 or so & re-formed in 1939 or so, owing to refusal of permission to cultivate in 1941-42. Subbarayudu, Jagganna, & Joganna had filed their suits originally in the District Munsif's Court, Razole, & they had been transferred to the Sub-Court, Amalapuram, for trial along with the other four suits filed there covering the same questions.

(3) All these suits were vigorously contested. The main points of the contention by the Govt. in all the suits were (1) that the plots were not proved to be re-formations 'in situ' & that, at any rate, the plot E. F. G. H. I concerned in the four suits, O. S. Nos. 34 of 1941, 29 of 1943, 14 of 1944 & 61 of 1944, was an independent formation in the bed of the Godavari a navigable & tidal river, & that the title to this plot, at any rate, belonged only to the Govt.; (2) that the re-formations in the other cases, even if true, were not spontaneous re-formations 'in situ', but a direct result of protective & conservancy works undertaken by the Govt. through the conservator of Rivers, &, so, the title to such re-formed lands would vest only in the Govt.; (3) that the orders of the conservator of Rivers refusing permission to cultivate were 'bona fide' & proper & in the interests of the River & the public, & so, no compensation or damages could be claimed; (4) that, even otherwise, no damages could be claimed by the plffs. as the lands covered by the suits were overgrown with 'nanal' & unfit for tobacco or other cultivation (contrary to the allegations in the plaints) & would have fetched very little, if at all anything, if the 'nanal' were cleared & the lands were cultivated with tobacco, and that they would not have fetched even the cost of clearing the 'nanal' & that the damages claimed were, in any event, exorbitant & fanciful, not even Rs. 10 to 15 per acre being got on similar adjoining lanka lands free from nanal in auctions held by Govt. in these very years. Regarding the four suits filed by the Maharajah of Pithapuram & two others, the Govt. raised two more contentions, namely, that the suits were not maintainable as no notice had been given to the Conservator of Rivers under S. 25 of Act VI (6) of 1884, & as the Govt. would not be liable for compensation except through the Conservator of Rivers under S. 25 of the Act, & that the alleged lease to the third plff., the Yuvarani of Pithapuram, was a fraud on the public in order to prevent the actual cultivating tenants from getting 'ryoti' rights in the lands by giving them fictitiously to this lady of the zamindar's own family and that the alleged bids for Rs. 10,000 for these lands were bogus & nominal & would not afford any standard for assessing the compensation or damages, if any, caused by the refusal of permission to cultivate.

(4) The learned Subordinate Judge, Amalapuram, in an exhaustive judgment, considered all the contentions of all the parties in all the suits. He held that the orders of the conservator of Rivers refusing permission to cultivate were 'bona fide' & in the interest of the conservancy of the rivers, & of the public, as such cultivation would have been prejudicial from the conservancy point of view, & that, therefore, the orders were neither

unauthorised nor 'ultra vires' nor 'mala fide', but that reasonable compensation could be claimed by the plffs. for the inability to cultivate the lands, consequent on such refusal of permission, under S. 16 of Act VI (6) of 1884 itself. He found, after a local inspection & after a thorough discussion of the evidence, including the survey plans & sketches & their comparison, that all the suit lands were re-formations 'in situ' of old zamindari 'ryoti' lands in existence for more than sixty years before they were submerged by the Godavari in 1915 or so, they having completely re-emerged in 1939 or 1940. He held that the plot E. F. G. H. I. was also such a re-formation 'in situ' of old zamindari 'ryoti' lands belonging to the plffs., either by grant or at least by adverse possession uninterruptedly for more than sixty years, & that plot E. F. G. H. I was not part of the bed of a tidal & navigable river, & so, even if it was not a re-formation 'in situ' it would only belong to the plffs., the riparian owners' & not to the Govt. He found further that even if the plot E. F. G. H. I was not a re-formation 'in situ' & was an independant formation in a tidal & navigable river, as urged by the Govt., it would still belong to the plffs. being a 'lateral accretion, & not a vertical accretion.' He held after a careful discussion of the entire oral & documentary evidence regarding the income from tobacco cultivation in similar lanka lands & from his local inspection of the suit lands, that if permission had been given to cultivate them the net annual income per acre would be one 'putti' of tobacco, for the majority of the lands, & he fixed the value of that one 'putti' at Rs. 100 in 1940, Rs. 125/- in 1941, Rs. 150/- in 1942, Rs. 175/- in 1943 & Rs. 200 in 1944. He gave slightly higher rates of income for Oorapaya lands, & the plot E. F. G. H. I.

(5) He was of the opinion that in O. S. No. 34 of 1941 deft. 2. the conservator of Rivers, was an unnecesary party, as deft. 1, the Govt., which was liable to pay compensation, had been made a party & no independent tort had been proved against deft. 2 & so dismissed the suit as against deft. 2 & granted a decree only against deft. 1. He held in O. S. No. 34 of 1941, 29 of 1943, 14 of 1944 and 61 of 1944, that the suits were all maintainable even though a notice under S. 25 of Act VI (6) of 1884 had not been given to the conservator of Rivers, & that officer had not been made even a party in three of the suits. According to him, a suit under the general law against & the Govt. for damages & mesne profits, & even for compensation under S. 16 of Act VI (6) of 1884, was not precluded by S. 25 of Act which was only an enabling & not an exhaustive section.

(6) In the end, he gave the plffs. in O. S. No. 34 of 1941 a decree for Rs. 2,385-8-0 as damages & Rs. 374-13-0 as proportionate costs, & dismissed the rest of the claim with proportionate costs of Rs. 151-6-9. A. S. No. 256 of 1948 is the appeal by the Govt. against that decree. The plffs. have filed a memo. of cross-objections for Rs. 2,614-3-9 the disallowed amount & costs & subsequent interest. In O. S. No. 29 of 1943 he gave a decree to the plffs. for Rs. 2,833-4-0 as damages & Rs. 388-5-2 as proportionate costs & dismissed the rest of claim with proportionate costs of Rs. 44-9-9. The Govt. have filed appeal No. 255 of 1948 against the decree, & the plff. have filed a memo. of cross-objections for Rs. 1,427-0-11, the disallowed amount, costs & subsequent interest. In O. S. No. 14 of 1944 he gave the plffs. a decree for Rs. 3,134-4-0 as damages & Rs. 428-10-1 for proportionate costs & dismissed the rest of the claim with proportionate costs of Rs. 24-8-1. The Govt. have filed A. S. No. 257 of 1948 against the decree & the plffs. have filed a memo. of cross-objections for Rs. 968-7-11 being the disallowed amount, costs & interest. In O. S. 61 of 1944 he granted a decree to the plffs. for Rs. 3,580 as damages & Rs. 399-0-11 as proportionate costs & dismissed the rest of the claim with proportionate costs of Rs. 342-6-5. The Govt. have filed A. S. No. 93 of 1947 against the decree, & the plffs. have filed A. S. No. 111 of 1947 for Rs. 6,773-5-8, for the disallowed amount, costs & interest. In O. S. No. 13 of 1944 he granted the plff. a decree for Rs. 300/- as damages with Rs. 53-10-0 as proportionate cost & dismissed the rest of claim with proportionate costs of Rs. 3-9-2. The Govt. have filed an appeal, A. S. No. 251 of 1948 against the decree. There is no memo. of cross-objections. In O. S. No. 11 of 1945, he granted the plff. a decree for Rs. 400/- as damages with proportionate costs of Rs. 67-0-10, & dismissed the rest of the claim with proportionate costs of Rs. 5/-. The Govt. have filed A. S. No. 252 of 1948 against the decree. There is no memo. of cross-objections. In O. S. No. 41 of 1943 he gave the plff. a decree for Rs. 750 as damages & proportionate costs of Rs. 120-9-0 & dismissed the rest of the claim with proportionate costs of Rs. 23-9-2. The Govt. have filed A. S. No. 253 of 1948. There is no memo. of cross-objections. In O. S. No. 42 of 1943 he gave the plff. a decree for Rs. 1,200 as damages & Rs. 177-13-7 as proportionate costs, & dismissed the rest of the claim with proportionate costs of Rs. 43-9-6. The Govt. have filed A. S. 254 of 1948 against the decree. There is no memo. of cross-objections.

(7) We have perused the entire records, & heard the learned Govt. Pleader for the Govt. & the learned counsel for the plffs. The learned Govt. Pleader raised several contentions. His first contention was that O. S. No. 34 of 1941, 29 of 1943, 14 of 1944 & 61 of 1944 were not maintainable & should have been dismissed as the requisite notice under S. 25 of Act VI (6) of 1884 had not been given to the Conservator of Rivers; & as no compensation under S. 16 for refusal of permission to cultivate the lands could be claimed except as provided for under S. 25 of Act, & that the suits had become barred by limitation under S. 25. We cannot agree. It is, no doubt, true that if in a particular Act a particular mode is exclusively prescribed for claiming the compensation claimable under the Act, that mode, and 'no other' should be resorted to. But where as in S. 25, there is no reference to the compensation claimable under S. 16, & S. 16 & other sections of Act VI (6) of 1884 nowhere say that the compensation claimable under S. 16 shall only be claimable by a suit brought against the conservator of Rivers, the right of the plffs. under the general law to sue the Govt. for such compensation, or for damages or mesne profits, cannot be taken away, & will remain as supplementing the right under S. 25 of the Act. So no question of non-maintainability, or limitation arises. As this point has not been apparently covered by any decision of this Court, it is better to discuss the point a little in detail.

(8) S. 16 runs as follows:

"Whenever under S. 11, 12, 13 or 14 the conservator of Rivers refuses the owner or occupier of any land permission to plant, cultivate or build on any land, or requires him to remove any groynes buildings, constructions, plantations, grasses, trees or other obstructions or works existing at the time or the survey or subsequently authorised by the conservator of Rivers, such owner or occupier shall be entitled to compensation for any damages sustained by him by reason of such requirement or refusal of permission.

Section 25 runs as follows:

"No suit shall be brought against any conservator, surveyor or subordinate, or any person acting under his direction, for anything done or intended to be done under this Act until after expiration of three months next after notice in writing shall have been delivered or left at the office of such conservator, surveyor, subordinate or person or at his place of abode, explicitly stating the cause of action & the name & place of abode of the intended plff. & of his agent in the cause if any, & upon the trial of such suit the plff. shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so delivered, & unless such notice be proved the court shall find for the deft; & every such suit shall be commenced, within six months next after the accrual of the cause of action."

It will be obvious, even at a cursory glance, that S. 25 does not say that the compensation claimable under S. 16 can only be claimed by a suit brought under that section against the Conservator, surveyor or subordinate or any person acting under his direction. It is also not reasonable to hold so, as the section does not refer to the word "compensation" at all or say that that shall be the only mode of claiming the compensation claimable under S. 16. As the lower court has remarked, it is immaterial from the point of view of the plffs. whether a decree is passed against the Govt. or the conservator of Rivers, or against both, & that, while it is open to the plffs. to make both parties or one of them a party to a suit for compensation, the sum awarded as compensation has to be recovered only from the Govt. as this represents only compensation under S. 16 of the Act for an act lawfully done by the conservator of Rivers under powers vested in him under Act VI of 1884, & not any compensation for independent torts committed by the conservator of Rivers for which the Govt. is not liable. It is clear that S. 25, while undoubtedly covering a claim for compensation under S. 16, as contended by the learned Govt. Pleader, may also conceivably cover other claims against the Conservator, surveyor or subordinate or person acting under his direction, besides the compensation contemplated in S. 16. So, two conclusions follow. The first is that the compensation claimable under S. 16 can be claimed by a suit under S. 25 after a notice under S. 25, against the Govt. & the conservator of Rivers though if the conservator is added the conditions prescribed in S. 25 for the period of notice & for limitation will operate. The very clause,

"No suit shall be brought against any Conservator, surveyor or subordinate or any person acting under his direction".

in S. 25 shows that it is a section intended to protect the conservator, surveyor, or subordinate or person acting under his direction, & not one intended to exclude the liability of the Govt. for compensation under S. 16, except by a suit under S. 25. Under S. 80, C.P. C., no suit shall be instituted against the Govt. or against a public officer in respect of any act purporting to be done by such public officer in his official capacity except under the terms regarding notice etc., prescribed by that section. It is clear to us that the Conservator of Rivers, East Godavari who is no other than the Executive Engineer, Headworks, Dowleswaram Division, is a 'public officer', & that his acts in these suits were undoubtedly purported to be done by him as such public officer in his official capacity. So a suit for compensation under S. 16 of the Act VI (6) of 1884, can, in our opinion be brought against Govt. alone under S, 80, Civil P. C. without adding the conservator. If, the conservator is added, the notice under S. 25 will become necessary. Of these four suits, the conservator was added only in O. S. No. 34 of 1941. We agree that no decree could be given against him in that suit as the notice required under S. 25 of Act VI (6) of 1884 was not given to him. But the lower court held him to be an unnecessary party in that suit, & dismissed the suit as against him. We see no legal objection to the lower courts having granted a decree against deft. 1 (Govt.) who had been given proper notice under S. 80, C. P. C.. The decree will not be affected by the addition of deft. 2 in the plaint as he had been held to be an unnecessary party to the suit & there was no decree against him.

(9) The second conclusion is that S. 25 of Act VI (6) of 1884 may conceivably cover claims to compensation against a conservator, surveyor or subordinate or any person acting under his direction though such compensation may not in all cases be claimable against the Govt. being compensation for damage caused by the negligent & careless acts of these officials & subordinates in carrying out their duties under the Act albeit not 'mala fide.' So we overrule this contention.

(10) The next contention of the learned Govt. Pleader is that the lower court went wrong in holding that the Godavari at the spot where the suit lands, especially the plot E. F. G. H. I, are located is not a tidal & navigable river whose bed vests in the Govt. After an exhaustive consideration of the entire evidence in the case we agree with the learned Govt. Pleader that the lower Court went wrong in this respect though it does not affect the decrees in these suits, & that really the Godavari at this spot is a tidal and navigable river whose bed belongs to the Govt. We have had occasion in a recent appeal, A. S. No. 120 of 1947, between more or less the same parties, to deal with this question regarding the Godavari river only a furlong away from the present spot, concerning some islands formed near Patha Gannavaram, on the other side of the Vynatheyam branch of the Godavari to Lanka Gannavaram. The conclusion we arrived at regarding the river & the river bed in this case also is the same and is based on the same grounds.

(11) The law regarding the matter is well settled, & may be stated broadly in five propositions, as we did in A. S. No. 120 of 1947: (1) The bed of a navigable river in any part of India whether tidal or not, is vested in the Govt., & not in the Zamindar or other private persons owning lands on both sides of the river, unless it has been granted to such private individual. The Privy Council has laid down this clearly in 'Maharajah of Pithapuram v. Province of Madras', I. L. R. (1949) Mad. 675. The English common law rule that the bed of non-tidal rivers, even though they are navigable, belongs to the riparian proprietors, does not apply to Madras State. (2) To create a title to the river bed in the Govt. the river should be navigable at that part of it where the disputed plots are situated. (3) The ownership of the bed of the river would depend upon its character in 1802, the time of the permanent settlement & the grant of the adjacent land to the plff. 'Province of Madras v. Jagannadha Raju', ILR (1945) Mad 420. (4) A river in India is not navigable in the legal sense unless it is navigable throughout the year, though it need not be navigable for a portion of the day, as at low tide. (5) Facilities for passage of large river crafts, which may not be capable of rising to the dignity of ships, seem to be generally considered sufficient to call a river affording

such facilities a navigable river. 'Secretary of State v. Venkatanarasimha Naidu', 11 M. L. W. 256.

(12) The evidence in this case clearly shows that river craft carrying firewood etc., can freely navigate in this portion of the river at all times of the year except during low tide, & even shows that there is tidal action at this place. We hold that the Vynatheyam, passing between the villages of Lanka Gannavaram & Patha Gannavaram, is a navigable and tidal river at this spot, & that its bed belongs to the Govt., though, of course, that will not affect the right of a private owner of lands submerged by that river to those lands when they are re-formed 'in situ' or to 'lateral accretions' to such lands. Till the year 1866 Lanka Gannavaram & Patha Gannavaram admittedly formed part of one single village. In that year, for purposes of revenue convenience, the single village was divided into two separate villages. In A. S. No. 120 of 1947 we held that the river Vynatheyam, at a spot a furlong from the suit plots & adjoining Patha Gannavaram on the opposite side, was a navigable river even at the time of the permanent settlement in 1802. We considered that a river navigable throughout the year now except at low tide should have been navigable then, the Dowleswaram anicut having even diminished the quantity of water below it, & the river above it being navigable for many miles even now & for years before. In 'Province of Madras v. Jagannatha', a Bench of this Court held that the Vasishta branch of the Godavari from which the Vynatheyam takes off only some three miles from this spot, should have been navigable in the year 1802. There have been also some other cases holding the river Godavari very near the suit plots to be navigable. The oral evidence in the case of disinterested & credible persons, also proves this.

(13) But this conclusion of ours regarding the Vinatheyam river, differing from the lower court, will not help the Govt. much in these suits as we are satisfied, after an exhaustive perusal of the evidence on record, that the lower court was right in considering all the suit plots to be only reformations 'in situ' of ancient zamindari ryoti lands submerged by the river Godavari in 1915, after having been continuously cultivated for more than 60 years. That will apply also to the plot E. F. G. H. I. which too we are satisfied, is only a reformation 'in situ' of former zamindari 'ryoti' land. The contention of the learned Govt. Pleader, that the plot E. F. G. H. I is still river bed, & has not yet become a formation, cannot be upheld in view of the express recital in para 5 of the written statement filed by the Govt. in O. S. No. 61 of 1944 which admits that the plot E. F. G. H. I. has been formed, though it calls it "an independent formation" in the bed of the river. This plot E. F. G. H. I. is only two or three feet lower in level than the rest of the plots claimed in the suit, & is more than 16 feet above the level of the Godavari, & not a drop of water is found anywhere on this plot. So, we need not consider the further contention of the learned Govt. Pleader that the lower court erred in recognising the title of the plff. to this plot on the ground of its being a lateral accretion, though it was not set up in the plaint & was covered only by an issue & though it was not consistent with the allegation of re-formation 'in situ'. We are of opinion that the question of lateral formation, having been raised by an issue & covered by the evidence, could have been considered by the lower court under the law though it is not quite consistent with the plffs'. story of re-formation 'in situ' & though it is unnecessary for supporting the plffs'. case as they have fully proved their case that this plot too is only re-formation 'in situ'. We see no point in the learned Govt. Pleader's claiming that the re-formations 'in situ' were partly due to the conservancy work done by Govt. That will not take away the title of the owners to the re-formed lands, even if true, any more than the title of the owner of a stolen or lost jewel is lost by him before the Govt. police officers recovered it.

(14) The next contention of the Govt. Pleader was that when the orders of the Conservator of Rivers were held by the lower court itself to be fully justified in the interest of river conservancy, & to be necessary and proper, the plffs. should not have been given any damages. We cannot agree. S. 16 of Act VI (6) of 1884 expressly allows compensation for such rightful refusal of permission to cultivate, & that right to compensation has not been taken away by any other Act or Ordinance or circumstance. The mere fact that orders refusing permission for cultivation were proper & in public interests cannot take away the private parties' right to compensation, as no private party need shoulder the whole burden of conferring such a benefit on the public. Thus a plot may be required for constructing defences, or a hospital, or a prison, or a school, or a court, or a cremation ground, & yet the Land Acquisition Act, under which such lands are acquired usually, not only awards compensation to the private party whose land is acquired for such public purposes, but gives him 15 per cent extra for compulsory acquisition. So, this contention cannot hold good.

(15) The last contention of the learned Govt. pleader was that the 'quantum' of compensation awarded was excessive & ought to be drastically reduced. The learned counsel for the Maharajah & others who have filed three memoranda of cross objections & A. S. No. 111 of 1947, argued on the other hand, that the compensation awarded by the lower court was totally inadequate & that the entire compensation claimed in those four suits ought to have been granted, especially since the highest bid for the lease was Rs. 10,000/- every year. The learned Government Pleader attacked those bids as bogus & nominal, & even the lease to plff. 3 as a fraudulent act intended to prevent the actual cultivating ryots from getting 'ryoti' rights in those lands. We are not very much concerned in this case with the alleged fraudulent act of the zamindar in giving a lease to plff. 3, the Yuvarani of Pittapuram, who has neither bulls nor ploughs of her own & is not likely to cultivate those lands herself. Such leases to members of the zamindar's family are too numerous, & of too long a practice, to be suddenly declared null & void. On principle, there is nothing in law to prevent a zamindar from giving a lease to a member of his family especially in these days when zamindaries are being abolished & zamindars levelled down to the status of common men. Nor need a lessee show bulls & ploughs of his own or cultivate the land himself, before he can claim the lease-hold rights granted to him validly. In fact many Brahmins & Vysias & others, who do not own ploughs or bulls & do not intend to cultivate the lands themselves, have got leases in their names & those leases cannot be attacked as invalid for those reasons. The learned Govt. Pleader did not, therefore, seriously press this portion of his argument. He pressed the other portion of his argument, namely, that the bids were all bogus & nominal ones, & that the auctions were simply held to bolster up the suit claims, that not a pie was paid by the bidders, that the auctions themselves were held only after applications for cultivation had

been made in 1940 & it was informally known that they would be refused, & that the auctions were held year after year thereafter in spite of the knowledge that permission to cultivate would be refused in public interests, would all show the bids to be bogus & nominal. We agree regarding this, for the reasons urged by the learned Govt. Pleader which appeal to us as true & valid.

(16) But his further contention that no compensation or damages should have been awarded to the plffs, or, at the most, only some small amount, not exceeding Rs. 25/- per acre does not appeal to us. No doubt, one witness examined by the plffs. admitted that he sustained loss by clearing similar 'lanka' land of 'nanal' & cultivating it with tobacco. But that was an exceptional case and cannot be relied on. No doubt also, some of the witnesses like P. W. 7, speaking to an income of Rs. 200/- or Rs. 300/- per acre by tobacco cultivation of similar lands, were speaking of lands in Kapileswaram Estate, 17 or 20 miles from this place. It is also true that the Govt. realised only Rs. 7-11-0 to 73-12-0 per acre by leasing out the 'Lanka' lands in 'Mondapulanka, Kottapalli lanka', Manapalli Lanka, Koderu lanka and Korugeru milli Lanka' similar to the suit lands, & situated only some 2 to 8 furlongs from the suit lands, though tobacco was raised in the lands in all those five 'lankas'. But Govt., it is notorious, realises much less in such leases than private parties do. There is no doubt that there is an element of surmise & guess in fixing the damages arising out of the refusal of the permission to clear the nanal & do tobacco cultivation on these lanka lands. There is also evidence to show that the normal net income per acre from such lands is only a 'putti' an acre. The lower court has considered all these factors when rejecting the contention of the Govt. for awarding no compensation, or a very small sum as compensation, & when rejecting the exorbitant sums (Rs. 300 to Rs. 560 per acre) claimed by the plffs. based on the bids & the evidence of P. Ws. 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16 & others about the realisations from Kapileswaram lanka and other lands farther away. It has carefully weighed the evidence on both sides & arrived at the figures it did after such weighing & after a local inspection. Generally, appellate courts are not expected to interfere with such careful assessment of figures by the trial Court, which has seen the witnesses & weighed every bit of evidence, oral & documentary & made also a local inspection. We do not see any reason to depart from that salutory practice in this case, especially as we too consider the figure fixed by him to be proper. In the end, therefore, we hold that the compensations, or damages, awarded by the lower court in all the cases were correct & proper, & do not deserve to be interfered with.

(17) In the result, all the appeals & memo of cross-objections are dismissed with costs. Govt. given two months time to pay the costs.

C. R. K./D. H. Appeals and cross-objections dismissed.

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SATYANARAYANA RAO AND CHANDRA REDDI JJ.

S. RM. S. T. Narayana Chettiar and another, Appellants v. The Kaleeswarar Mills Ltd. and others, Respondents.

Appeal No. 36 of 1950, D/- 7-9-1950.

(a) Companies Act (1913), S. 79 — Meeting of the company — Chairman if can decline to preside.

Where one of the Articles of the Company provides that the Chairman of the Board of Directors should preside only if he is willing he cannot be compelled to preside. There is nothing in law to compel him to do that which he is not willing to do. But he is not entitled to stop the meeting at his own will and pleasure because he is unwilling to preside. If a meeting is called for a particular purpose of the company, undoubtedly, a person should preside at that meeting, and invariably the constitution of the company provides for the same. It is not open to the Chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the share-holders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsequent date. If the Chairman unjustly and without the consent of the share-holders stops the meeting and declares it dissolved, it is perfectly within the powers of the meeting to elect another Chairman and conduct the business remaining unfinished; but there is no authority in support of the proposition that a Chairman is not entitled to give up his right to preside at a meeting. (1894) 3 Ch 159; (1916) 2 Ch 325, Relied on; AIR 1932 Mad 100, Disting. (Para 7a)

Where a meeting of share-holders to hold a poll is adjourned to another date without holding the poll, the second meeting held on the adjourned date is the continuation of the first and if the Chairman of the first meeting declines to preside, the share-holders have a right to elect another chairman and continue the meeting. The function of the chairman would not be merely to supervise the recording of the votes. He is entitled to exercise all the functions of a Chairman at the meeting. (Paras 7c, 8b)

Anno : Companies Act, S. 79 N. 3.

(b) Companies Act (1913), S. 79 — Share-holders' right to vote by proxy — Revocation of proxy — Principles — Contract Act (1872), Ss. 203, 204, 205 and 209.

Share-holders' right to vote by proxy is recognized by S. 79, subject to conditions and limitations imposed by the Articles of Association. But this right has to be given by the Articles, which form a contract between the company and the share-holders.

A proxy as an agent of the share-holder, as between himself and the principal, is not entitled to act contrary to his instructions in the matter. The relationship brought about between the share-holder and his proxy is that of a principal and agent. (Para 8a)

When once the relationship of principal and agent is created by contract, the incidents of that contract of agency are governed and have to be determined by applying the law of contracts. The principal cannot be denied his right to revoke a contract which brought about the relationship of principal and agent. The Articles might make the proxy irrevocable or impose restrictions or circumscribe the limitations within which the power of revocation should be exercised. But all these are matters within the region of contract between the parties and in the absence of anything to the contrary, there is no reason to exclude the right of revocation which is recognised under S. 203

of the Contract Act. There are other limitations imposed by the Contract Act on the exercise of the power of revocation, e.g. by Ss. 204, 205, 209. The same principles have to be applied for revocation of proxy by share-holder. If the articles lay down the limitations within which a power to vote by proxy can be exercised, it should be strictly observed. This follows from the fact that the right to vote by proxy is founded on contract. Consequently unless the right of revocation is expressly excluded by the articles the right is governed by the general law of contract of agency. Case law Relied. (Paras 8a, 8b, 11, 11a)

Anno: Companies Act, S. 79 N. 2; Contract Act, S. 203 N. 1; S. 205 N. 1; S. 209 N. 1.

(c) Companies Act (1913), S. 79 — Provision in Articles of Association conferring power of revocation in respect of permanent proxy — Whether it can be deemed that such power is excluded in respect of specific proxy — (Maxim — expressio unius est exclusio alterius).

Where one of the Articles of Association expressly confers a specific power of revocation in respect of permanent proxy, it cannot be deemed in the absence of any such provision in respect of specific proxy, that power of revocation is excluded on the maxim 'expressio unius est exclusio alterius' (the express mention of one thing implies the exclusion of another). It is only if power of revocation of a limited nature is recognised in respect of a specific proxy by any article then it would be possible to contend that by reason of the express mention of the limited power any other power is excluded. (Para 13)

Anno: Companies Act, S. 79 N. 2.

(d) Companies Act (1913), S. 79 — Revocation of proxy after their exercise at first poll but before second poll — Result of first poll is not affected — (Contract Act (1872), S. 204).

The power to revoke an authority given to an agent, after the authority has been partially exercised, has been recognised by S. 204 of the Contract Act. The revocation cannot have the effect of invalidating acts and obligations already done in the exercise of that authority as an agent. Where the first poll of the meeting at which the proxies were exercised became final the effect of revocation of the proxies subsequently but before the second poll cannot in any manner affect the declaration of the result of that poll. (Para 14)

Anno: Companies Act, S. 79 N. 1; Contract Act, S. 204 N. 1.

(e) Companies Act (1913), S. 79 — Revocation of proxy without notice to proxy — Effect — (Contract Act (1872), S. 207).

The effect of the want of notice of revocation of proxy to the agent (proxy) does not invalidate the revocation or the termination of the authority of the proxy but makes the principal liable for any damage that results to the agent by reason of such want of notice. (Para 15)

Anno: Companies Act, S. 79 N. 2.

(f) Companies Act (1913), S. 79 — Chairman's decision on question of allowing proxies or not on ground of insufficiency of stamps is binding on him and his successors — (Stamp Act (1899), S. 36).

If the Chairman in the exercise of his powers comes to a decision whether the votes given on proxy which are in question shall be disallowed or not on the ground of sufficiency of stamp and if that decision is not vitiated by fraud or misconduct on the part of the chairman that decision is binding on himself or his successor at a later stage of the same meeting. Under S. 36 of the Stamp Act if the instrument is admitted in evidence overruling the objection concerning stamp duty, such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. No doubt, a chairman is not a person authorised by law or consent of parties to receive evidence within the meaning of S. 35 of the Stamp Act. But there is no reason for not applying the same principle of finality to the ruling of the chairman on the nature of the instrument in dispute. (Para 19a)

Anno: Companies Act, S. 79 N. 2, 3; Stamp Act, S. 36 N. 1, 3.

(g) Companies Act (1913), S. 79 — Chairman's power to reject proxies on ground of insufficiency of stamp — No intention to evade payment of stamp duty — Duty of Chairman to refer matter to Collector under S. 31, Stamp Act — (Stamp Act (1899), S. 31).

Where a share-holder complies with the requirements of Article of Association and pays on a proxy in the form prescribed by the Article, stamp duty of two annas under the law as altered on the footing that it is a proxy and not a general power of attorney, the chairman has no option but to accept the proxy even if he comes to a conclusion that the stamp duty was not proper. If the proxy conforms to the articles in all respects they cannot be rejected by the chairman. The articles constitute a contract binding on the company and the members in all matters. The chairman is not entitled to go behind the articles and to reject the proxies on the ground that they were not duly stamped.

Where there was no intention on the part of persons holding the proxies to evade the stamp duty when they had acted bona fide and followed the articles of association and paid two annas stamp on each proxy and they also offered that if the objection to the sufficiency of stamps was to be sustained, it would only involve payment of extra stamp duty with penalty which might be fixed by the Collector and that they were prepared to pay it if and when it was decided that it was payable in the present case, the Chairman would be acting unfairly if he were to reject the proxies on the ground of insufficiency of stamp. The fair way would be to refer the matter to the Collector under S. 31 of the Stamp Act and to postpone the declaration of the result of the poll until the decision of the Collector was obtained. (1903) 2 K B 121; AIR 1928 Bom 80, Expl. (Paras 20, 20b)

Anno: Companies Act, S. 79 N. 2; Stamp Act, S. 31 N. 1.

(h) Companies Act (1913), S. 79 — Proxy containing specific power and general power — Both separable — Stamp duty sufficient for one — Proxy if can be allowed only in respect of that power — Stamp Act (1899), Ss. 35, 5.

Where the proxy contains the specific power as well as the general power, it would be ad-

missible only if the aggregate amount of the duties in respect of two such separable instruments is paid even if both the parts are separable. It is not permissible to dissect the instrument into two parts and use the unobjectionable part in evidence, that is, to allow only that part of the proxy, for which, there is sufficient stamp. AIR 1946 PC 51, Foll; (1849) 2 H L C 286, Not Foll. **(Para 21b)**

Anno: Companies Act, S. 79 N. 2; Stamp Act, S. 35 N. 7; S. 5 N. 11.

(i) Stamp Act (1899), Art. 48 — Construction — Applicability -- Proxy held fell under Clause (g).

Article 48, Clause (g) has to be read with Clause (e). When so read, it means that if there are more than ten persons authorised to act jointly or severally in more than one transaction or generally, then stamp duty payable is according to the number of persons and it is one rupee to each person authorised. Clause (d) applies when the authority is given to not more than five persons and relates to more than one transaction or generally.

The proxy form was in the following language: "Every proxy shall be in the following form, or shall contain words to the following effect". Stamp 1 anna) "The Kaleeswarar Mills Limited", Coimbatore I.....of.....being a member of "The Kaleeswarar Mills Ltd.", and entitled to vote, do hereby appoint.....of .....as my attorney or substitute to vote for me and on my behalf at the (ordinary or Extraordinary, as the case may be) General meeting of the company to be held on the day of.....and at any adjournment thereof (or at any meeting of the company, that may be held within the period of.....from the date hereof, or generally as the case may be) in the same manner as I myself could vote if personally present provided he be then a member of the company and be entitled or admitted to vote. As witness my hand this day of "signed by the said in the presence of.....":

Held that the document fell under Cl. (g) of Art. 48, Stamp Act. **(Para 24c)**

Anno: Stamp Act, Art. 48 N. 6.

K. C. Gopalaratnam and L. V. Krishnaswami Iyer, for Appellants; K. Rajah Ayyar, K. Krishnaswami Ayyangar and K. Parasaraman, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('46) 1946-1 Mad L J 295: (AIR 1946 PC 51) (Pr 21a)
('28) AIR 1928 Bom 80: (108 Ind Cas 465) (Pr 21a)
('26) 53 Cal 515: (AIR 1926 Cal 877) (Pr 20a)
('31) 61 Mad L J 724: (AIR 1932 Mad 100) (Prs 7a, 7c)
(1894) 3 Ch 159: (63 L J Ch 906) (Pr 7a)
(1913) 1 Ch 292: (82 L J Ch 159) (Pr 7b)
(1914) 1 Ch 382: (83 L J Ch 303) (Pr 11)
(1916) 2 Ch 325: (85 L J Ch 745) (Pr 7a)
(1917) 2 Ch 41 (Pr 11)
(1926) 1 Ch 143: (95 L J Ch 132) (Pr 19a)
(1931) 2 Ch 90: (100 L J Ch 404) (Prs 8a, 9, 11a)
(1882) 20 Ch D 151: (51 L J Ch 242) (Pr 11)
(1882) 23 Ch D 14: (48 LT 741) (Prs 7b, 8, 11)
(1884) 25 Ch D 320: (53 L J Ch 353) (Pr 24b)
(1884) 26 Ch D 70: (53 L J Ch 468) (Pr 19)
(1849) 2 H L C 286: 9 E R 1101 (Pr 21a)
(1859) 5 Jur (N S) 817 (Pr 9)
(1903) 2 K B 121: (72 LJKB 681) (Pr 21)
(1926) 1926 W N 78: (61 L Jo 301) (Prs 7b, 9, 10, 11a)
(1882) 8 QBD 459: (51 LJQB 219) (Pr 7b)

SATYANARAYANA RAO J.: This appeal relates to a dispute between two rival groups of share-holders of Kaleeswarar Mills, Ltd., Coimbatore, each attempting to obtain control over the management of the company. For this purpose, these two factions have engaged themselves in a battle of wits for a long time with the result that the business of the company has been seriously affected. For the purpose of this appeal, it is not necessary to advert to the incessant quarrels between the two groups since 1931. It would be sufficient to start from 1948. The two factions are led by Sathappa Chettiar on the one hand who represents the plaintiffs' group and A.L.A.R. family consisting of three brothers of whom the eldest, Kalairaja Chettiar is the leader.

(1a) The annual meeting of the company, which is the first defendant in the case, for the year ending 1947 was held on 30th September 1948. The agenda paper for that meeting contained four subjects: 1. to receive and adopt the directors' report and the audited profit and loss account for the year ended 31st December 1947 and the audited balance sheet as at 31st December 1947; 2. to elect directors in the place of the two directors who retired by rotation; 3. to appoint an auditor or auditors and to fix his or their remuneration; 4. to approve the co-option of Messrs. P. K. Palaniappa Gounder and A.L.A.R. Arunachalam Chettiar.

(2) The company was incorporated under the Indian Companies Act, 1882, in or about 1906. Its main object was to manufacture cotton goods. Among the signatories to the memorandum of association are included the legal luminaries of the Madras Bar at the time, viz., Sri V. Bhashyam Aiyangar, P. R. Sundaram Aiyar, V. Krishnaswami Aiyar and S. Srinivasa Ayyangar besides business magnates. The articles of association of the company excluded the application of Table A in the first schedule to the Indian Companies Act; but the regulations framed were modelled more or less on the regulations contained in Table A. The capital of the company which then consisted of nine lakhs of rupees, was divided into 9000 shares of Rs. 100 each. Sathappa Chettiar's group owned in 1948 as many as 3450 shares while the A.L.A.R. group owned only 2300 shares. Before the general body meeting of September 1948, however, the A.L.A.R group increased their voting capacity by splitting their shares and transferring single shares to various individulas. About 450 single shares were registered with that end in view in the name of 450 individuals who were not members before.

(3) The proceedings of the meeting of the 30th September 1948 (Ex. A. 2 in A.S. No. 29 of 1949) show that Palaniappa Gounder, the present fifth defendant. who was the chairman of the Board of Directors entitled to preside at every general meeting under Art. 78, presided at that meeting and disposed of the various objections raised at that meeting. Before the subjects on the agenda were considered,

objection was taken on behalf of A.L.A.R. group that proxies filed on behalf of the plaintiffs' group were not valid as they were not given particularly for that meeting but they were general in language. The objection was answered on behalf of the plaintiffs' group by Mr. Lakshmanan, the present second plaintiff, stating that the proxies were intended only for that meeting which was made clear from the date given in the proxies. On this the Chairman ruled that the proxies were valid. Mr. Lakshmanan also seems to have objected to the validity of about 49 revocations of proxies filed by the opponents but the Chairman overruled that objection. The most important objection that had to be considered, however, raised by the second plaintiff was that shareholders owning less than five shares were not entitled to vote in view of Article 88 which provided that every shareholder not disqualified shall have one vote in respect of every five shares. After due consideration, the chairman overruled this objection.

(3a) The subjects which were on the agenda were taken up for consideration and were put to vote one after the other. On a show of hands, the sense of the meeting was in favour of the resolutions and at each time a poll was demanded and on a poll, 859 votes were cast in favour of the resolutions and 703 votes against. At the end of each poll, the plaintiffs' party demanded a further poll which is styled under the articles, as a "poll of the whole company"; but this was rejected. The result, therefore, of the poll at this meeting was that the A.L.A.R. group was successful and the plaintiffs' party lost. The two plaintiffs in the present suit, who were the sitting directors, were unseated and in their place, defendants 6 and 7 were elected and the co-option of the 4th and 5th defendants was approved.

(4) Two of the share-holders thereafter filed on the 7th October 1948 a representative suit on behalf of themselves and on behalf of the share-holders of Kaleeswarar Mills Ltd., (O.S. No. 325 of 1948, Sub-Court, Coimbatore) to declare that the resolutions passed at the general body meeting were illegal and void and that the newly elected and co-opted directors were not entitled to act. There were various objections to the resolutions passed at that meeting which were considered by the learned Subordinate Judge who tried the suit. He dismissed the suit overruling the contentions of the plaintiffs in that action. There was an appeal to this Court against that decision in A. S. No. 29 of 1949 and in that appeal, the plaintiffs confined their objections to the resolutions to three grounds; firstly, that persons who owned less than five shares were allowed to vote when the poll was taken which was contrary to the provisions of the articles of association; secondly, the demand for a poll of the whole company should have been allowed by the Chairman; thirdly, that Palaniappa Gounder, the present fifth defendant, was not competent to act as Chairman of the meeting as the confirmation of his co-option as a director was one of the subjects comprised in the agenda for that meeting.

(4a) On the first of the three questions there was a difference of opinion between Horwill J. and Raghava Rao J. who heard the appeal in the first instance, the former holding that every share-holder even if he owned less than five shares was entitled to vote but if a share-holder owned five or more shares, he would be entitled to one vote in respect of every five shares. In other words, a shareholder having between 5 and 9 shares will have only one vote and those having between 10 and 14 shares two votes and so on; but a person holding less than five shares would be entitled to one vote. This view, however, was not shared by Raghava Rao J. As there was a difference of opinion on this point, the case was laid before a third Judge, Viswanatha Sastry J. who agreed with Horwill J. On the other two questions, both the learned Judges concurred. The second poll is no doubt a unique feature of this company, but according to the learned Judges such a poll should be taken if demanded in the manner provided by the articles of association. A poll of the whole company was probably intended, as observed by Horwill J.

> "to afford an opportunity, where a considerable number remain dissatisfied after the show of hands and polls are taken, for the whole company, including those not present in person or by proxy at the meeting, to express their opinion on the matter."

On the third question also, both the learned Judges were unanimous in holding that it was an elementary principle of justice that a person should not preside while the meeting is considering a question which personally affects him. The result was that the learned Judges directed that before the decisions on the various resolutions in which a second poll was demanded can be considered finally, there should be another poll at the registered office of the company at such time as the fifth defendant should direct and that he should vacate the chair when a resolution relating to his co-option is to be taken up for consideration. The decree of the High Court (Ex. A-4) directed, after setting aside the decree of the trial Court dismissing the suit:

1. that before the decisions on the various resolutions in which the second poll was demanded can be considered final, a fresh poll shall be held at the registered office of the company at such time as the fourth defendant (the present fifth defendant) shall direct;
2. that the fourth defendant (the present fifth defendant) should not preside when the question of his co-option is in question;
3. that at the poll to be held in pursuance of clause (1) supra, each member will be entitled to vote the number of votes being calculated according to the provisions of Article 88 of the Articles of Association.

(5) The plaintiffs' party were anxious to know the addresses of some of the shareholders comprised in the newly added 450 members with a view to canvass their support for the second poll. Their complaint was that particulars regarding the share-holders so added were not given in the register as required by Sections 31 and 32 and form E of the third schedule to the Indian Companies Act. There was some correspondence between Sathappa Chettiar and Kaleeswarar Mills Ltd. on this point but there was no sign of getting the required information. On the 29th August 1949 three of the directors of the plaintiff's party sent notices calling for a meeting of the directors to be held at the registered office of the

company on the 6th September 1949 at 10 a.m. to consider the matters on which they required information and also to waive under Article 94 of the Article, the rule relating to deposit of proxies for the purpose of poll. On the same day the fifth defendant published a notice, Ex. A. 8, to the share-holders of the company intimating that the second poll of the annual general body meeting held on the 30th September 1948 would be taken on Monday the 5th September 1949 commencing from 3 p.m. at the registered office of the said company. The plaintiffs' party sent a circular to the share-holders newly added, Ex. A. 12, and obtained revocations of the proxies. On the 4th September 1949 Ex. A. 11 was addressed to the fifth defendant, the Chairman of the Board of Directors, by four people of the plaintiffs' group in which they impeached the bona fides of the Chairman and intimated that they lost their confidence in him to act impartially as Chairman at the meeting for conducting the second poll. They also anticipated that the Chairman had made up his mind to summarily reject all revocations obtained by the plaintiffs' group. Some of these revocations have been marked as Ex. B. 3 series. It is agreed before us that the total revocations covered proxies in respect of 230 votes which were obtained by the plaintiffs and which would have the effect of cancelling the proxies already obtained and deposited by the defendants' group before the meeting of the 30th September 1948.

(5a) On the 5th Septemer 1949 at 3 p.m. the share-holders assembled at the registered office of the company and the revocation forms were handed over to the Chairman. The Chairman, the fifth defendant, then decided that he did not intend to preside at the meeting for two reasons; firstly, because the High Court had directed that he should not preside at the second poll when the subject of his co-option would be under consideration and secondly because he had received a communication from some share-holders, apparently referring to Ex. A.11, in which advice was given to him as to how he should give his rulings. He requested the members to choose a Chairman to take the poll. The names of two directors were suggested, Messrs. Alagappa Chettiar, the third defendant and K. Srinivasa Ayyar. The former belongs to the A.L.A.R. group and the latter to the plaintiffs' group. The plaintiffs did not then object that the Chairman had no right to decline to preside at the poll. On the contrary, they accepted the position that the Chairman was entitled to decline to preside and to put up a candidate of his own for the chairmanship. The plaintiffs' candidate Srinivasa Ayyar was defeated by a large majority and Alagappa Chettiar was elected Chairman by the share-holders.

(5b) Then the proceedings continued and Arunachala Ayyar and Narayanan Chettiar were appointed scrutineers. The revocations received that day were rejected as unacceptable. The first plaintiff objected that the revocations filed before 30th September 1948 numbering 49 should not be accepted as they were not stamped; but his objection was overruled. At about 10 p.m. one of the scrutineers who belonged to the defendants' group filed a memo before the chairman of the meeting raising three objections. The second of it was that the proxies filed by Narayanan Chettiar, Lakshmanan Chettiar and Ramanathan Chettiar (plaintiffs' group) for the meeting of the 30th September 1948 were not properly stamped as they were not proxies but were powers of attorney and should have been stamped as such. The other scrutineer was however of the view that the objections of Arunachala Aiyar were untenable. The chairman adjourned this question for decision being given before 10 a.m. the next day. The poll was then taken on all the resolutions which resulted in securing 793 votes in favour of the resolutions and 767 against. On the next day, 6th September 1949, the Chairman gave his ruling that the proxies were invalid and they should be excluded. Consequently, 661 votes cast against the resolutions were excluded as a result of which the number of votes against the resolutions were reduced from 767 to 106. There were therefore 793 votes in favour of the resolution and 106 against. The plaintiffs, therefore, lost in this poll and the election and co-option of directors was upheld and the two plaintiffs were unseated.

(6) The unseated directors instituted the suit which has given rise to this appeal objecting to the poll taken on three grounds: firstly, Palaniappa Gounder the fifth defendant had no right to decline to preside at the poll and that the share-holders had no right to elect the third defendant as Chairman; secondly, that the revocations should not have been rejected and thirdly, that the proxies were valid and the votes recorded under those proxies should not have been excluded. The first defendant to the suit is the company, the fourth and fifth defendants are the co-opted directors, the sixth and seventh defendants the newly elected directors, the third defendant is the Chairman who presided at the poll and the second defendant is Kalairaja Chettiar, the leader of the defendants' group. In the lower Court, the parties did not lead any oral evidence and contented themselves by filing documents. The trial Court rejected the contentions of the plaintiffs and dismissed the suit. Hence this appeal.

(7) The same questions have again been argued elaborately before us. The first question for consideration is whether the fifth defendant was bound to preside at the poll. On this point we have no hesitation in agreeing with the conclusion of the learned Subordinate Judge that the fifth defendant cannot be compelled to continue to act as chairman notwithstanding the fact that his bona fides were questioned earlier by the plaintiffs and this Court directed, at any rate, that so far as one of the subjects was concerned, he should not preside at the poll.

(7a) The argument before us on behalf of the plaintiffs by the learned advocate was that the decision of the High Court precluded the Chairman from declining to preside at the poll. No doubt, the judgment of the High Court and the decree proceeded on the assumption that the Chairman of the Board of Directors would continue to preside even at the poll as the roll was nothing but a continuation of the meeting of the 30th September 1948. The decree directed that he should fix the time for the second poll. This was done by him and there is no other indication in the judgment preventing him from having the right recognised by Art. 78. That Article provides that the Chair-

man of the Board of Directors should preside only if he is willing. There is nothing in law to compel a man to do that which he is not willing to do. Express power is recognised in the Article itself to give up the right if he so chooses. The Chairman of the meeting is not entitled to stop the meeting at his own will and pleasure. If a meeting is called for a particular purpose of the company, undoubtedly, a person should preside at that meeting and invariably the constitution of the company provides for the same. It is not open to the Chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the shareholders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsesquent date. If the Chairman unjustly and without the consent of the share-holders stops the meeting and declares it dissolved, it is perfectly within the powers of the meeting to elect a Chairman and conduct the business remaining unfinished; but there is no authority in support of the proposition that a Chairman is not entitled to give up his right to preside at a meeting. There is no direct authority on the question but Article 78 itself recognises that the Chairman of the Board of Directors can preside over the meeting only if he is willing. That it is not open to a Chairman of the meeting to stop the meeting or adjourn it at his sweet will and pleasure has been decided by Chitty J. in 'NATIONAL DWELLING SOCIETY v. SYKES', (1894) 3 Ch 159 — See also 8 Halsbury, p. 61, para 108 and 5 Halsbury p. 364 para 592, Hailsham Edn. 'CATESBY v. BURNETT', (1916) 2 Ch 325 is an instance in which also the Chairman of the meeting declared that the business was closed and left the chair and the hall whereupon the shareholders elected another to the Chair and carried on the business of the meeting. The second poll also is undoubtedly a part of the meeting and the contention of the appellants that it was not open to the share-holders to elect another chairman, in our opinion, proceeds on a wrong hypothesis. In support of the contention, a passage in the judgment of Curgenven J. in 'SRINIVASAN v. WATRAP SUBRAMANIA AIYAR', 61 Mad L J 724 was relied on by the appellants where the learned Judge observed:

> "The original meeting in law continues until the Chairman has carried out the directions given to him by the share-holders to take a poll. It is a notional meeting, not dependent for its existence and continuity upon the share-holders being actually in session and business being transacted. The actual process of holding the poll is not a 'meeting' at all. It differs in several of its features from any meeting of share-holders."

(7b) These observations of the learned Judge have to be taken in relation to the facts of that case. In that case, the Chairman of the meeting directed, when a poll was demanded on a resolution, that it should be taken on a subsequent day between 4 and 6 p.m. and appointed the company manager, one Mr. Church, as returning officer for the purpose of taking it. The poll, however, was not taken on the 20th as for some reason Mr. Church was unable to attend to the poll. The question that had to be considered was whether the process of holding the poll was a detached portion of the general meeting or was, at any rate, a meeting within the meaning of the articles of association. This point became material as it was contended that when the Commissioner, Mr. Church was absent to take the poll, it was open to the shareholders assembled to have elected a new Chairman for the meeting and as they did not do so, the meeting was at an end. In answer to these objections, it was pointed out that the original meeting continued in law until the Chairman had carried out the direction given to him by the shareholders to take a poll. The actual process of holding the poll was not a meeting at all though the result of the poll formed part of the meeting at which the poll was demanded. The meeting therefore did not come to an end until the result of the poll was ascertained in the manner provided by the Articles. The original meeting continued therefore for the purpose of taking the poll until the poll was closed. For this position, the decisions in 'HARBEN v. PHILLIPS', (1882) 23 Ch. D. 14; 'THE QUEEN v. WIMBLEDON LOCAL BOARD', (1882) 8 Q B D 459; 'SHAW v. TATI CONCESSIONS LTD', (1913) 1 Ch. 292 and 'SPILLER v. MAYO (RHODASIA) DEVELOPMENT CO (1908) LTD', 1926 W N 78 were relied on.

(7c) The decision in 'SRINIVASAN v. WATRAP SUBRAMANIA AIYAR', 61 Mad L J 724, in our opinion, far from supporting the contention of the appellants, is against them. The meeting of the share-holders on the 5th September 1949 was a continuation of the meeting and it was open to the shareholders to elect a chairman when the fifth defendant declined to preside at that meeting. The Chairman so elected was not like the Commissioner, Mr. Church in the case in 'SRINIVASAN v. WATRAP SUBRAMANIA AIYAR', 61 Mad L J 724. His function was not merely to supervise the recording of the votes. He was entitled to exercise all the functions of a Chairman at the meeting. For these reasons we think that the objections of the appellants on this point are not well founded and must be rejected.

(8) The next point that has to be considered is whether the Chairman was justified in rejecting the revocations. Until recently, both in England and in India, a member had no right to vote by proxy unless the Articles provided for such a right as common law did not recognise voting by proxy. The Articles, however, generally conferred such a right subject to such conditions and limitations as are prescribed thereunder. This right has now been recognised by the statute both in England from 1947 now enacted as S. 136 of the Act of 1948 and by S. 79 of the Indian Companies Act, as amended in 1936. As the Articles generally recognised a right to vote by proxy, it is a contractual right as the Articles of Association undoubtedly constituted a contract between the company on the one side and the members on the other. Independently of the contract, therefore, until the statute altered it there was no right of voting by proxy. The reason why the right to vote by proxy was not recognised seems to be that "when persons agreed" as pointed out by Bowen L. J. in 'HARBEN v. PHILLIPS', (1882) 23 Ch. D. 14 at p. 35

> "to act together in the conduct of a business the way in which that business is to be carried on must depend on each case on the

contract, express or implied, which exists between them as to the way of carrying it on."

The decision on every question relating to the business of an incorporated company should essentiallly be that of the shareholders, having regard to their interest in the company. Unless, therefore, there was a contract between the company and the shareholders, they could not delegate this power of expressing their opinion at a meeting of the company to another. These propositions are so well established as not to require citation of a number of authorities in support of them. It is summarised in Palmer's Company Law, 19th Edn. at page 153.

(8a) A proxy is defined by Lord Hanworth M. R. in 'COUSINS v. INTERNATIONAL BRICK CO.', (1931) 2 Ch. 90 as

"a person representative of the shareholder who may be described as his agent to carry out a course which the shareholder himself has decided upon"

and the Lord Justice in the same case defined a proxy as an agent of the shareholder who, as between himself and the principal, was not entitled to act contrary to his instructions in the matter. It cannot therefore be seriously disputed that the relationship brought about between the shareholder and his proxy is that of a principal and agent. The argument of the respondents is that unless the power of revocation is expressly conferred by the Articles under which a right of voting by proxy is recognised, the power of revocation does not exist and that the contract creating the agency is exhaustive of the rights and duties of the proxy. This contention proceeds upon a wrong view of the incidents of a contract of agency. When once the relationship of principal and agent is created by contract, the incidents of that contract of agency are governed and have to be determined by applying the law of contracts. In India such law is to be found in the Contract Act.

(8b) The argument on behalf of the respondents amounts to this that all the rights and liabilities which flow from a contract by reason of the application of the general law of contracts do not attach themselves to a contract unless they are enumerated in the contract itself. In other words, if there is a contract of sale of goods unless all the rights and liabilities of the seller and buyer which are to be found in the Sale of Goods Act are specifically enumerated in the contract itself, they have no application. When once there is a contract all the legal incidents of such a contract are governed by the law of contracts whether it is in the form of a statute as in India or is ascertainable from judicial decisions as in England. It will be an intolerable state of affairs if one is obliged to embody in every contract the provisions of the Contract Act or the Sale of Goods Act as the case may be relevant to such a contract. When once the relationship enters the region of contract, the law of contract alone must determine its incidents. On the argument of the respondents, the relationship of agent and principal brought about by the execution of the proxies cannot be terminated even by death though they are forced to concede that such a termination follows and that even when the principal is present in person at the meeting, the right of the proxy to exercise his vote on behalf of the principal must yield to the right of the principal to exercise the vote personally. If so much is conceded, it is difficult to see why the principal should be denied his right to revoke a contract which brought about the relationship of principal and agent. The Articles might make the proxy irrevocable or impose restrictions or circumscribe the limitations within which the power of revocation should be exercised. But all these are matters within the region of contract between the parties and in the absence of anything to the contrary, there is no reason to exclude the right of revocation which is recognised under S. 203 of the Contract Act.

(8c) There are other limitations imposed by the Contract Act on the exercise of the power of revocation, e.g., if the revocation is made after the authority had been partly exercised, S. 204 of the Act preserves the validity of such acts and obligations and makes the revocation effective only in respect of future acts. If the agency is limited to a period of time and without sufficient cause it is revoked before the expiry of the period under S. 205, the agent is entitled to compensation. The principal is bound to give reasonable notice of revocation as otherwise he would be liable to pay damages to the agent which result from such act of his. As regards third persons, under S. 208, the termination of authority of the agent does not take effect before it becomes known to them so that if third persons are sought to be affected by revocation of the authority of the agent, the principal must give due notice of the same. Termination of the authority by death of the principal is recognised under S. 209. On an examination of the authorities cited at the Bar, it will be seen that the same principles have been applied for the revocation of proxy by a shareholder.

(9) The subject of revocation of proxy is dealt with by Palmer in his book on Company Law, 19th Edn. page 154 and he summarises the law on the subject in these terms:

"The appointment of a proxy, unless made irrevocable for valuable consideration, can be revoked. The revocation must, however, conform to any provisions in the articles.

If the shareholder, after appointing a proxy, himself attends the meeting, he can vote in person. The right of the shareholder to vote in person is paramount to the right of the proxy. The presence of the shareholder does not avoid the instrument of proxy; but if he votes before his proxy has voted for him, he impliedly revokes the proxy.

The death of a shareholder who has appointed a proxy, in the absence of the provisions in the articles, revokes the authority of the proxy."

This summary by the learned author is based on the decisions in 'SPILLER v. MAYO (RHODESIA) DEVELOPMENT CO. (1908) LTD', 1926 W N 78; 'COUSINS v. INTERNATIONAL BRICK CO.', (1931) 2 Ch. 90; 'KNIGHT v. BULKELEY', (1859) 5 Jur. (n.s.) 817. The subject is also discussed and the same principles more or less have been recognised in Halsbury, Laws of England, Vol. 5, pages 364 and

365 where voting by proxy and revocation of proxy are discussed; 8 Halsbury 61 paragraph 108 discusses the subject of proxies; Buckley on Companies Acts, 12th Edn. pages 324 and 325; Shackleton on Law relating to Meetings, 1934 Edn. at page 62.

(10) In 'SPILLER v. MAYO (RHODESIA) DEVELOPMENT CO. (1908) LTD.', 1926 W N 78, one of the articles provided that

"a vote given in accordance with the terms of an instrument of proxy or power of attorney shall be valid notwithstanding the previous death of the principal or revocation of the proxy, or power of attorney, or transfer of the share in respect of which the vote is given, provided no intimation in writing of the death, revocation, or transfer shall have been received at the office before the meeting."

After a poll for the election of a director the scrutineers discovered that a proxy was revoked by the principal before the poll. The votes recorded on the strength of that proxy were excluded from the poll. If such votes were allowed, the plaintiff in the action would have been successful in the election as a director and the respondent would have been defeated. The question that had to be decided was whether the exclusion of the votes from the poll by the Chairman was justified. The Article clearly provided that the notice of revocation should be received at the office before the meeting, i.e., before the commencement of the meeting. The revocation in that case that had been received was communicated to the office only before the poll and not before the meeting. The communication, therefore, was ineffective to make the revocation operative. It was, therefore, held by Russell J. that the votes were improperly rejected. In the course of the judgment, the learned Judge stated the law in these terms:

(10a) "The matter really turned upon Art. 88, which he had been told was also in common form, but, if so, in his view it was a somewhat unfortunate common form. Omitting for the moment the proviso, it seemed quite clear, upon the construction of that article, that a vote given by proxy was by contract between the shareholders, to be valid notwithstanding that the shareholder had died before the vote was taken, and notwithstanding that the shareholder had revoked the proxy before the vote was given; but that contractual result, which might in certain instances be somewhat startling, could be avoided if the proviso was complied with. It could be avoided apparently if an intimation in writing of the death or revocation was received at the office 'before the meeting'.

(10b) Two points had been urged by Mr. Gordon Brown on behalf of the plaintiff why these votes should not have been objected to. The first point was there had been in fact no intimation of any revocation at all. In his Lordship's opinion that could not be sustained. The second point was in his view a more formidable one. It was said that no intimation of the revocation was received before the meeting.

(10c) In his Lordship's opinion, if English language meant anything, the article required that in order to invalidate the vote, intimation in writing of the revocation must be received at the office before the meeting, and in his view that must mean before the commencement of the meeting. It was well settled that the taking of a poll was not a meeting of the company in the strict sense, but was in law a mere continuation of the meeting at which the poll was directed to be taken. For the particular purpose in question therefore the meeting must be held to have begun on December 15 and to have come to an end at the declaration of the poll, a week later. The intimation of revocation, however, had been received between those two dates.

(10d) In his opinion it was impossible to say on the true construction of the particular article that the proviso has been complied with, namely, that intimation in writing of the revocation had been received before the meeting. In his Lordship's view it was received after the meeting had commenced, it had been received during the meeting. Accordingly the proviso did not operate, and the original part of the article must be held to operate, namely, that the vote given by the proxy was valid notwithstanding the revocation of the proxy during the meeting."

(11) If the articles lay down the limitations within which a power to vote by proxy can be exercised, it should be strictly observed. This follows from the fact that the right to vote by proxy is founded on contract. For this reason, it was held in 'HARBEN v. PHILLIPS', (1882) 23 Ch D 14, that where the articles required that the proxy papers should be attested in a particular manner and if this condition is not satisfied, they should be rejected. 'MCLAREN v. THOMSON', (1917) 2 Ch 41, also illustrates the same principle. The article in that case required that the instrument appointing a proxy should be deposited at the registered office of the company not less than two clear days before the day of the meeting. The proxies were lodged between the dates of the original meeting and its adjournment. It was held that the adjourned meeting when held was really a continuation of the meeting at which the adjournment took place and as the proxies were not deposited before the date for holding the meeting as required by the article they were invalid and were therefore rejected. Astbury J. says at page 46:

"There is no inherent or equitable right in any share-holder to vote by proxy; such right if it exists, must be found in the contract binding the share-holders generally, that is in the company's regulations or constitution, and it then exists only in the form and subject to the limitations therein appearing. There is no room for contending that an appointment of a proxy, irregularly made, is within the spirit or equity of any inchoate right so to vote existing in the share-holder; he has either complied with the terms of the contract upon which alone the right is based or he has not. Prima facie a provision that a proxy must be lodged before the day for holding or before the time for holding a meeting means that it must be lodged before the beginning and not before the end of the gathering."

(11a) These and similar observations in other decisions were relied on on behalf of the respondents as establishing the proposition that unless the right of revocation is expressly conferred by the articles, there is no right of re-

vocation. The restrictions on the power to vote by proxy are undoubtedly absolute but the power of revocation is an incident of the contract of agency and wherever a power to vote by proxy is conferred, the power of revocation unless excluded under the articles, exists as the relationship of principal and agent is governed by the law of contracts. The right to vote by proxy and the right of revocation are distinct powers. In 'COUSINS v. INTERNATIONAL BRICK, CO.', (1931) 2 Ch D 90, there were two provisions in the articles of association, one providing that the instrument appointing a proxy should be deposited at the office not less than 48 hours before the time of holding the meeting at which it should be used and the other regulation that a vote given in accordance with the terms of the instrument of proxy will be valid notwithstanding the previous revocation of the proxy provided no intimation in writing of the revocation shall have been received at the office before the meeting. Some shareholders purported by notice in writing to revoke the proxies given by them previously, while others without giving notice to revoke the proxies voted personally at the meeting. The revocation of the proxies was not in accordance with the articles of association as the intimation in writing of the revocation was not received at the office before the meeting. The case therefore was directly governed by the decision in 'SPILLER v. MAYO (RHODESIA) DEVELOPMENT CO, (1908) LTD', 1926 W N 78. The further question was whether the shareholders were entitled to vote personally without revoking the proxies given by them. The Court of Appeal accepted the view of Russell J. on the question whether the revocation was effective; on the second question, it was held that the person by giving a proxy was not thereby deprived of exercising the vote personally before the proxy had exercised the vote. Lord Hanworth, M. R. pointed out in the course of his judgment that it is open to provide by articles to exclude the right to vote personally when a proxy was given; but if this is not done and there are no clear words taking away the shareholder's personal right to vote after he has put in force the proxy system the personal right remains and the shareholder is entitled to attend and give his vote according to his choice. The proxy is not entitled to prevent him for exercising the vote. Lawrence L. J. and Romer L. J. put it also on the ground that

> "every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the share-holder, and as between himself and his principal is not entitled to act contrary to the instructions of the latter."
> "A proxy is always subject to an understanding that the share-holder giving it does not elect to give his vote in person and when he in fact gives a vote in person he is not revoking the proxy but taking a step which obviates the necessity of the proxy being used at all" (per Romer L J at p. 103).

(11b) From these observations it follows that the exercise of a personal vote by the shareholder after he had adopted the proxy system does not revoke the proxy but only prevents the exercise of the vote by the proxy. The decisions in 'IN RE HAVEN GOLD MINING CO.', (1882) 20 Ch D 151 and 'COLONIAL GOLD REEFS LTD. v. FREE STATE RAND LTD', (1914) 1 Ch. 382 also illustrate the same proposition that the various matters relating to the poll are matters of contract as provided by the articles. It is unnecessary to deal with those decisions in detail and none of the decisions, therefore, relied on on behalf of the respondents, supports the proposition that the shareholder has no right to revoke a proxy once given unless such a power is expressly conferred by the articles.

(12) Articles 91 to 97 of the Articles of Association of the first defendant company relate to proxies. None of these articles exclude the power of revocation nor do they lay down any restrictions as to the manner in which the power of revocation should be exercised as in 'SPILLER v. MAYO DEVELOPMENT CO', 1926 W N 78 and 'COUSINS v. INTERNATIONAL BRICK CO', 1931-2 Ch. D. 90. The power of revocation, therefore, is unfettered and if it is communicated in due time to the company, there is no reason for holding that it does not take effect. The requirement as to notice to the company of the revocation is to be derived from the provisions of the Contract Act, S. 208 which enacts that the termination of the authority of an agent does not take effect so far as third parties are concerned before it becomes known to them.

(13) The next line of argument adopted by Mr. Rajah Aiyar learned advocate for the respondents is based on the language of Art. 96 which states:

> "Any instrument appointing a permanent proxy or attorney to vote may be registered with the company once for all and shall be in force until the same shall be revoked."

It was suggested that this article specifically confers a power of revocation in respect of a permanent proxy or attorney and as express mention of specific power is made in the case of a permanent proxy, the power of revocation in the case of specific power must be deemed to have been excluded on the maxim 'expressio unius est exclusio alterius' (the express mention of one thing implies the exclusion of another) which has been applied in the construction of written instruments. In the first place the article does not expressly confer a power of revocation. On the contrary it assumes that the power was existing and therefore lays down that the instrument appointing a permanent proxy will hold good until the same is revoked. The maxim, therefore, has no application at all. Further the subject-matter of Art. 96 is a permanent proxy and not a specific proxy. It power of revocation of a limited nature is recognised in respect of a specific proxy by any article then it would be possible to contend that by reason of the express mention of the limited power any other power is excluded. The argument proceeds on a misconstruction of Art. 96 and on a wrong appreciation of the scope of the maxim.

(14) It is next contended that a proxy can be revoked only before its use and as in the present case, the proxies were used to exercise the vote at the first poll of the same meeting. it is too late to revoke the proxies. In other words. a proxy cannot be revoked between one poll and another and these two polls at the same meeting should be treated as one act and not as a series of acts. The power to revoke an authority given to an agent, after the autho-

rity has been partially exercised, has been recognised by S. 204 of the Contract Act. The revocation cannot have the effect of invalidating acts and obligations already done in the exercise of that authority as an agent. The first poll of the meeting at which the proxies were exercised became final and the effect of revocation of the proxies cannot in any manner affect the declaration of the result of that poll; but the second poll which is styled as the whole company's poll is a different act in a series of acts done at the meeting. There is no reason nor is there any authority in support of the contention that at that point of time a proxy could not be revoked or authority of the agent could not be terminated. On the principle underlying S. 204 of the Contract Act, it is difficult to accept the contention of the learned advocate for the respondents.

(15) Lastly, it is urged that there was no notice by the principal to the agent and therefore the revocation was not valid. There is undoubtedly notice to the third party, i.e., the company. But it is not suggested on behalf of the appellants that there was any notice of revocation to the proxy. The effect of the want of notice to the agent does not invalidate the revocation or the termination of the authority but makes the principal liable for any damage that results to the agent by reason of such want of notice. There is no complaint here by the persons in whose favour the proxies were given that they had suffered any damage nor is it relevant for the purpose of this case. The contention, therefore, that the revocation is invalid on this ground must be rejected.

(16) From the foregoing discussion it follows that the rejection of the revocations by the Chairman was wrong.

(17) The next and the more difficult question for decision is whether the rejection of the proxies by the Chairman was justified. The proxies were rejected on the ground that they were insufficiently stamped. According to the respondents, the proxies are in the nature of powers of attorney under Art. 48 of the Indian Stamp Act and should have been stamped as required by that Article and that they were not proxies within the meaning of Art. 52 to justify a stamp of two annas. The first defendant company was incorporated under the Indian Companies Act, 1882 and the Articles of Association were modelled on the Articles contained in Table A of that Act. The Indian Act of 1882 was framed on the lines of the English Companies Act, 1862 (25 and 26 Vict. Ch. 89). In Ex. A. 2, the Articles of Association of the defendant company, the form of the proxy is provided by Art. 97. This form word for word is the same as the form in Art. 51 in Table A of the Indian Act, 1882 and Art. 51 of Table A of the English Act, 1862, though there are a few alterations particularly at the end where the words

> "or, generally as the case may be in the same manner as I myself could vote if personally present provided he be then a member of the company and be entitled or admitted to vote."

are found. The addition of the expression "generally as the case may be" at the end of the sentence "(or at any meeting of the company that may be held within the period of... from the date hereof, or generally as the case may be)" is an innovation. The form also states that the stamp payable is one anna which was the stamp duty payable at that time as it is only in 1923 by an Amending Act that a duty of two annas was made payable in Art. 52 of the Stamp Act.

(18) The stamp duty fixed under the Articles was presumably on the footing that it was a proxy within the meaning of Article 52 of the Stamp Act and not a general power of attorney under Art. 48. It must be remembered in this connection that the question whether it is a proxy of the specific meeting or it was a general power was specifically raised at the time of the poll on the 30th September 1948 (Ex. A. 2 in A. S. No. 29 of 1949) by Arunachala Ayyar and the objection was met by Mr. Lakshmanan on the ground that the proxy objected to was intended only for the meeting of the 30th September 1948 as was clear from the date given in the proxies. No doubt this objection was not based on insufficiency of stamp but if it is held to be a specific power, it follows that the proxy was properly stamped. The then Chairman of the meeting, the fifth defendant, overruled the objection and allowed the proxies as valid. Under the above circumstances, the question that naturally arises is whether the Chairman of the meeting of the 5th September 1949 was entitled to reopen the question.

(19) As pointed out by the Earl of Selborne, L. C. in 'IN RE INDIAN ZOEDONE CO', (1884) 26 Ch. D. 70 the duties of the Chairman who presides at a meeting are:

> "has to receive the poll and declare its result, has prima facie authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute book, following the decision of the Chairman, that the result of the poll was different from that there recorded."

(19a) If the Chairman in the exercise of his powers comes to a decision whether the votes which are in question shall be disallowed or not and if that decision is not vitiated by fraud or misconduct on the part of the chairman that decision is binding—see the observations of Pollock M. R. in 'WALL v. EXCHANGE INVESTMENT CORPORATION LTD.', (1926) 1 Ch 143 at p. 146. There is no decided case, however, how far and to what extent a ruling or a decision given by a chairman on a question raised at one stage of the meeting would bind himself or his successor at a later stage of the same meeting. Article 82 of Ex A. 2 no doubt provides in the case of resolutions that a declaration given by a Chairman at a meeting that a resolution has been carried thereat is conclusive. But there is no provision in the Articles giving finality to the rulings of the chairman at a meeting. There is no reason, however, to hold that the ruling of a chairman given at one stage of a meeting is not final and binding on the chairman or his successor at a later stage. If such a finality is not recognised, the proceedings of the meeting cannot be conducted in an orderly manner and will very often end in confusion and disorder. The chairman

is expected to act impartially uninfluenced by party politics. He has to hold the scales even between the majority and the minority parties and his decision on all the questions must be unbiassed and impartial. It is not suggested that the ruling of the fifth defendant on the 30th September 1948 was vitiated by fraud or misconduct and there is no reason to hold it as not being final. What would have happened if the objection on the ground of insufficiency of stamp was raised in a Court of law and the Court decided at one stage of the suit that the disputed instrument was properly stamped! Under Sec. 36 of the Stamp Act if the instrument is admitted in evidence overruling the objection concerning stamp duty, such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. No doubt, a chairman is not a person authorised by law or consent of parties to receive evidence within the meaning of S. 35 of the Stamp Act. But there is no reason for not applying the same principle of finality to the ruling of the chairman on the nature of the instrument in dispute.

(20) There is another aspect from which the matter may be considered. The articles of association prescribe the form of the proxy by Art. 97 and on the footing that it is a proxy within the meaning of Art. 52 stated that the stamp duty payable was one anna under the law as it then stood and these articles, we are told, were drafted by eminent lawyers of the Madras bar. If a shareholder complies with the requirements of that article & pays stamp duty of two annas under the law as altered on the footing that it is a proxy and not a general power of attorney, the chairman has no option but to accept the proxy even if he comes to a conclusion that the stamp duty was not proper. If the proxies conform to the articles in all respects they cannot be rejected by the chairman '(see Shackleton, Law of Meetings, page 98)'. The articles constitute a contract binding on the company and the members in all matters. The chairman, therefore, was not entitled to go behind the articles and to reject the proxies on the ground that they were not duly stamped.

(20a) Insufficiency of stamp does not affect the validity of the instrument but makes it inadmissible — See 'JOYMA BEWA v. EASIN SARKAR', 53 Cal 515, except in the case of instruments requiring one anna stamp. The policy underlying the provisions of the Stamp Act is as far as possible to give an opportunity to the person concerned to make good the stamp except in the case of instruments required to be stamped with one anna. Under S. 35, in the case of instruments insufficiently stamped, the instrument may be admitted in evidence on payment of penalty and the deficit stamp duty. If an instrument is impounded under S. 33 of the Act, the Collector gives an opportunity to the person concerned to make good the deficit stamp duty and also pay penalty—S. 41. The final authority under the Act to decide the questions relating to stamp duty is the Collector (See S. 31)—who however has the right in case of doubt to refer the matter for the opinion of the chief controlling revenue authority and the chief controlling revenue authority in his turn has the right under S. 57 to refer the matter to the High Court for opinion. All these provisions clearly indicate that the instrument could always be validated by paying the deficit stamp duty at a later stage together with penalty and the sole authority vested with the power of finally deciding the question of stamp duty is the Collector acting under S. 31 of the Act. If a person votes or attempts to vote under any proxy not duly stamped he is liable for punishment with a fine which may extend to Rs. 500 under S. 62 (1) (c) of the Act. But as indicated in the proviso to S. 43, the intention must be one of evading payment of the proper duty.

(20b) In the present case, it is difficult if not impossible, to hold that there was an intention on the part of persons holding the proxies to evade the stamp duty as they had acted bona fide and followed the articles of association and paid two annas stamp on each proxy. The fifth defendant gave his ruling at the meeting of the 30th September 1948 that it was a specific power. On the 6th September 1949, when the chairman, the third defendant, gave his ruling that the proxies should be rejected as invalid, the plaintiffs' party filed a memo, Ex. A. 13 dated 6th September 1949 in which it was pointed out that the form used by them was the exact one prescribed by Art. 97 and the stamp duty paid was two annas instead of one anna under the altered law. They also offered that if the objection is to be sustained, it would only involve payment of extra stamp duty with penalty which may be fixed by the Collector and that they were prepared to pay it if and when it is decided that it is payable in the present case. Even at that stage, if the Chairman acted fairly and in a judicial manner, it was open to him to have referred the matter to the Collector for decision under S. 31 of the Stamp Act particularly as the plaintiffs' party offered to pay the stamp duty and penalty if so decided by the Collector. The chairman could have postponed the declaration of the result of the poll until the decision of the Collector was obtained if he really was acting in an impartial manner. The objection itself was taken at a very late stage at about 10 p.m. in the night when the votes were being scrutinised by the scrutineer and there was hardly any time for the plaintiffs' party to ascertain the opinion of the Collector and to make good the deficit stamp duty if really such stamp duty was required. The chairman, in our opinion, acted very unfairly to the minority and was wrong in rejecting the proxies without giving an opportunity to the plaintiffs to make good the deficient stamp duty after ascertaining the opinion of the Collector in the matter.

(21) The argument most strenuously pressed before us on behalf of the respondents is that a person in the position of a chairman was not bound to accept a document which was insufficiently stamped. In support of this proposition, reliance was strongly placed on the decision of the Court of Appeal in England in 'MAYNARD v. THE CONSOLIDATED KENT COLLIERIES CORPORATION LTD.', (1903) 2 K B 121, which related to a transfer of shares in a company. The instrument of transfer in that case was stamped in accordance with the consideration stated in the face of the document but it was discovered that the consideration appearing on the face of the document was far less than what it really is. The directors thereupon refused to register the transfer. An action was brought to recover damages for wrongful refusal of the registration of the transfer. It was

decided by the Court of Appeal that it was the bounden duty of the plaintiff in the action who claimed the right to register the transfer to tender a transfer which was right in all respects and which would be available to the directors of the company in a Court of law if it became necessary to enforce the rights under the document against the transferee or if they were called upon to defend themselves against a hostile attack levelled against the transfer on the faith of which they acted. Similarly, if a vendor offers to the purchaser a sale-deed not duly stamped, it is argued that he was not bound to accept it.

(21a) This position regarding the right of a person who would be entitled to claim rights under an instrument cannot be questioned as he is entitled to get from the other party a deed valid in all respects and enforceable in a Court of law. But does that apply to a proxy under which a person is entitled to vote. The company, and much less the chairman of the meeting, claims no rights of property under the instrument. All that he is entitled to do under the instrument is to exercise the vote. No question of establishing rights in a Court of law under the document or defending the rights on the basis of the document ever arises under the proxy. So long as a share-holder complies with the formalities laid down by the Articles regarding stamp duty on the basis enacted in the Articles, it is the bounden duty of the chairman to accept the proxy and he is not entitled to reject it. We are not now concerned with a situation similar to the one that came up for consideration in 'IN RE TATA IRON STEEL CO, LTD', AIR (15) 1928 Bom 80, where the proxies were unstamped. The contention, therefore, that the chairman was entitled to reject the proxies in the circumtances, on the ground that they were not duly stamped cannot be accepted.

(21a) We may dispose of a contention urged on behalf of the appellants based upon the decision of the House of Lords in the well-known case of 'KENNETH MATHESON v. ALEXANDER ROSS', (1849) 2 H L C 286: 9 E R 1101. The argument was based upon the assumption that the proxy contains two powers one a specific power to vote at the meeting of the 30th September 1948 and the other a general power to vote at any other meeting. It is argued that the two can be separated and that the chairman should have allowed the proxies as valid to the extent of voting at the specific meeting of the 30th September 1948 which was adjourned to 5th September 1949. There was a judicial conflict of opinion regarding the applicability of the principle of that decision under the Indian Stamp Act having regard to the language of S. 35 of the Act. Under S. 35 no instrument chargeable with duty shall be admitted in evidence 'for any purpose' by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped. Notwithstanding the clear language that the instrument shall not be admitted in evidence for any purpose whatever, some decisions have taken the view that the instrument could be used for what is styled as a collateral purpose. This conflict, however, has now been set at rest by the Judicial Committee in 'RAM RATTAN v. PARMA NAND', (1946) 1 Mad L J 295. Sir John Beaumont observed at page 296 as follows:

> "As already noted, Section 35 of the Indian Stamp Act enacts that no instrument chargeable with duty shall be admitted in evidence for any purpose. Mr. Rewcastle as part of his argument for the respondent adopted the note on the words 'for any purpose' in S. 35 contained in the 4th edition of Sir Dinshaw Mullah's book on the Indian Stamp Act, 1899. He pointed out that the words 'for any purpose' first appeared in India in the Stamp Act of 1879, and in England in the Stamp Act of 1891, and that under the earlier Acts there were decisions in both countries that an unstamped document might be admitted in evidence for a collateral purpose, that is, to prove some matter other than the transaction recorded in the instrument, and he submitted that these cases applied even under the later Acts. Their Lordships do not take this view. A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and the statute enacts that it shall not be admitted in evidence for any purpose. Their Lordships see no reason why the words 'for any purpose' in the Indian Act of 1879 should not be given their natural meaning and effect. Such words may well have been inserted by the Legislature in order to get rid of the difficulties surrounding the question of what amounted to a collateral purpose."

It must be remembered that the decision of the House of Lords was pronounced before the English Stamp Act of 1891. It is, therefore, impossible for the appellants to maintain that the document could be split up in the manner contended for. Especially in a Court of law it would not have been permissible to so dissect the instrument into two parts and use the unobjectionable part in evidence. Under S. 5 of the Stamp Act, an instrument which comprises or relates to several distinct matters is chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act. If, therefore, the proxy contains the specific power as well as the general power, it would be admissible only if the aggregate amount of the duties in respect of two such separate instruments is paid, as under the charging section, S. 3, the instrument should be charged with the duty indicated in the schedule. Of course, the schedule must be taken along with the sections in order to determine the proper stamp duty. Under S. 6 if an instrument falls within the several descriptions of Schedule I and the duties are different, it should be chargeable only with the highest of such duties.

(22) Whether the proxies are general powers of attorney within the meaning of Art. 48 of the Stamp Act or specific powers under Art. 52 is a difficult question and does not seem to us as easy to decide as the chairman the third defendant, thought. One specimen form of proxy seems to have been marked for identification; but as we did not find it in the records sent to this Court, we called for the proxy forms and we find that they are similar in language as in Art. 97 of Ex. A-2. For easy reference the language in the form is quoted herein.

"Every proxy shall be in the following form, or shall contain words to the following effect.
(stamp 1 anna). "The Kaleeswarar Mills Limited." Coimbatore, I
being a member of "The Kaleeswarar Mills Ltd.", and entitled to vote, do hereby appoint of as my attorney or substitute to vote for me and on my behalf at the (ordinary or Extraordinary, as the case may be) General Meeting of the company to be held on the day of and at any adjournment thereof (or at any meeting of the company, that may be held within the period of from the date hereof, or generally as the case may be) in the same manner as I myself could vote if personally present provided he be then a member of the company and be entitled or admitted to vote. As witness my hand this day of "signed by the said in the presence of "

It consists of two parts

"do hereby appoint as my attorney or substitute to vote for me and on my behalf at the (Ordinary or Extraordinary, as the case may be) General Meeting of the company to be held on the 30th September 1948 and at any adjournment thereof."

The second part is "(or at any meeting of the company, that may be held within the period of one year from the date hereof, or generally as the case may be." It is not disputed that so far as the first part is concerned, notwithstanding the words, "Ordinary or Extraordinary" within brackets, it authorises the person only to vote at the meeting of the 30th September 1948 or at any adjournment thereof. The words "as the case may be" clearly indicate that the word "or" in the expression "Ordinary or Extraordinary" is disjunctive and if the instrument had stopped with this clause, it is not disputed that the instrument was duly stamped. The trouble arises by the existence of the second clause. It is argued that the word "or" occurring at the beginning of the expression "or at any meeting of the company" is not disjunctive but is used as meaning "and" Having regard to the context, we are not inclined to accept the interpretation that the word "or" in the context means "and". It is a coordinating particle indicating an alternative.

(23) The question then is even if "or" is disjunctive whether the expression "at any meeting of the company that may be held within the period of one year from the date hereof, or generally as the case may be" means only at any one meeting of the company or at all the meetings of the company that may be held within a period of one year. There is also the question as to the meaning to be given to the expression "generally as the case may be." The construction suggested on behalf of the respondents is that it means at any meeting of the company within a period of one year or generally without any limitation as to time. The meaning of the expression, to our mind, is clear and it cannot be said that the contention urged on behalf of the respondents is unreasonable.

(24) Even then does the word "any" mean all the meetings or at any 'one' meeting of the company. If the latter, the object of the instrument is undoubtedly to give an option to the person concerned to vote either at the meeting of the 30th or at any other one meeting of the company. If the former, it means the person is entitled to vote either at the meeting of the 30th or its adjournment or at his option at all the meetings of the company to be held within one year or without any limitation as to time. If the latter construction is to be adopted, undoubtedly as it gives a power in the alternative, in the first instance specifically and in the second instance, in the alternative generally, it would fall within S. 5 of the Stamp Act and require to be stamped in accordance with it or at any rate under S. 6 and the stamp duty will be one rupee in the latter case. If, on the other hand, it is confined to any one meeting of the company, the stamp duty paid is proper.

(24a) The decisions under the English Act are of no assistance as the language is not similar. S. 80 of the English Stamp Act, (1891, 54-55 Victoria Chap 39) requires that every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, & any adjournment thereof & the first schedule to that Act referring to letter or power of attorney and commission, factory, mandate or other instrument in the nature thereof for the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more, the duty payable is one penny. In other cases, it is ten shillings . The Act both in the section and in the schedule requires that it should be for the sole purpose of voting at any one meeting and the day upon which the meeting is to be held is also to be specified.

(24b) The language of Art. 52 of the Indian Act is

"proxy empowering any person to vote at any one election of the members of a district or local board, or of a body of municipal commissioners, or at any one meeting of (a) members of an incorporated company or other body corporate whose stock of funds is or are divided into shares and transferable."

(The rest of it is omitted as being irrelevant). It need not be for the sole purpose of voting at one meeting, but it must be sufficiently clear that the proxy is intended to exercise the vote at any one meeting of the company. If, therefore, on a fair reading of the instrument, it is possible to come to the conclusion that it is intended to authorise the person to vote at any one meeting, though the power is given in the alternative as "at the meeting of the 30th September or at any other meeting" the stamp duty payable would be two annas. That there is some indication that the parties intended that the sole object of the proxy is to enable the person to vote at any one meeting may be inferred to some extent from the fact that they fixed the stamp duty as one anna in the articles of association and the proxy holders also sent a covering letter (dated 25-9-1948, page 140, Vol. I) along with the proxies that they were intended to be used at

the meeting of 30th September 1948. The word "any" as pointed out in Webster's dictionary has also the meaning of one of three or more and in the Oxford dictionary, its meaning is given as "an indeterminate derivative of one, or rather of its weakened adjectival form, a, an, in which the idea of unity is subordinated to that of indifference as to the particular one or ones that may be selected." (Vol. I page 378); so that on a fair reading of the instrument, we have come to the conclusion, though with hesitation, that the instrument is a proxy within the meaning of Art. 52 and the proper stamp duty payable is two annas. No doubt, as pointed by learned counsel for the respondents, in some context "any" may be read as "or" as in the case of the 'ISLE OF WIGHT RAILWAY CO. v. TAHOURDIN', (1884) 25 Ch. D. 320 at 332 relied on in Stround's Judicial Dictionary, Vol. 1, page 92. We have to consider the context in which the word is used and interpret it and no invariable rule can be laid down.

(24c) We felt some difficulty in deciding whether assuming that the proxy is a general power of attorney, the clauses in Art. 48 of the Stamp Act, apply to the present case. The clauses which have to be considered are clauses (d), (e) and (g) of Art. 48. As pointed out in Donoughs Indian Stamp Law, 9th Edn. at p. 707, Clause (g) has to be read with Clause (e). When so read, it means that if there are more than ten persons authorised to act jointly or severally in more than one transaction or generally, then stamp duty payable is according to the number of persons and it is one rupee to each person authorised. Clause (d) applies when the authority is given to not more than five persons and relates to more than one transaction or generally. In Referred Case No. 15 of 1905 cited in the Stamp Manual, this Court decided that a document of the present description would fall under clause (g). We do not see any reason to differ from that view as otherwise a power of attorney in favour of one person in respect of more than one transaction would escape stamp duty altogether.

(25) Lastly, Mr. Gopalaratnam, learned counsel for the appellants, argued that in any event the direction of the lower Court that the plaintiffs should pay separate sets of costs to the first defendant, second defendant, third defendant, fifth defendant and defendants 4 and 7 is not justifiable. The learned Judge did not give any reasons in his judgment for allowing separate sets of costs to each of the defendants. They had no separate interest in the suit and the questions that were considered were common questions. Merely because the defendants chose to engage separate advocates, that will not justify the course adopted by the learned Subordinate Judge. We think that this direction regarding costs is not justified.

(26) Our conclusion in the result is that the rejection of the revocations affecting 230 votes and of the proxies relating to 661 votes was not justified. The defendants' party, according to the chairman, after these exclusions obtained 793 votes in favour of the resolutions while the plaintiffs' party obtained only 106. If the excluded proxies are added, the votes in favour of the plaintiffs' party will be 767, i.e., 106 plus 661 while the votes obtained in favour of the resolution by the defendant's party would be 793 minus 230 leaving a balance of 563. The resolutions, therefore, must be taken to have been defeated. It follows from this result that the plaintiffs are entitled to the declarations asked for and they were also entitled to a permanent injunction restraining the first defendant company from giving effect to the said resolutions and defendants 4 to 7 from acting as directors of the first defendant company. The appeal, therefore, must be allowed and the decree of the learned Subordinate Judge dismissing the suit must be set aside and there should be a decree in favour of the plaintiffs as prayed for with costs here & in the Court below.

C.R.K./R.G.D. Appeal allowed.

A. I. R. 1952 Madras 528

RAJAMANNAR C. J.
AND VENKATARAMA AIYER J.

R. N. Vallinayagam Pillai, Proprietor of Sri Shanmugananda Touring Talkies, Petitioner v. State of Madras and another.

Civil Misc. Petns. Nos. 5939 and 6660 of 1951, D/- 17-10-1951.

Cinematograph Act (1918), Ss. 5 (3) and 8 — Instructions by Government to licensing authorities to restrict number of touring cinemas — Validity — Constitution of India, Art. 19.

The Government instructed licensing authorities to restrict the number of touring cinemas in places where there were permanent cinemas in order to prevent unhealthy competition and to ensure public safety. In places where there was only one permanent cinema, the licensing authorities were instructed to use the discretion vested in them to grant or refuse licenses to touring cinemas. There were detailed instructions as regards the grant of licenses to permanent and touring cinemas based on the population of the area sought to be exploited:

Held (1) that the instructions were presumably issued by the Government in exercise of its power of control under S. 5 (3). It was not strictly accurate to speak of these instructions as rules framed under S. 8 and so the question whether they went beyond the rule-making power contained in S. 8 did not arise. (Para 3)

(2) Nor did the instructions contravene Art. 19 of the Constitution. Article 19 (6) clearly contemplates imposition of restrictions on the exercise of right conferred by Art. 19 (1) (g). It was not difficult to perceive that the said restrictions were in the interests of the safety and the health of the general public and designed to prevent unhealthy competition which itself indirectly would have deleterious influence on the general public. (Para 4)

K. Venkataramani, for Petitioner; The Advocate-General, for The State.

Cases referred to:

(1934) 291 U S 502: 78 Law Ed 940 (Pr 4)
(1940) 309 U S 134: 84 Law Ed 656 (Pr 4)

RAJAMANNAR, C. J.: The petitioner applied to the District Magistrate, Tirunelveli the licensing authority under the Cinematograph Act, to run a touring cinema called "Sri Shanmugananda Touring Talkies" at Mela Ambasamudram village. He had previously obtained the necessary licence under the

Places of Public Resort Act, paid the prescribed fee for the license and he states in his affidavit that he has complied with other rules and conditions under the Cinematograph Act. The District Magistrate passed an order on 1-12-1950 refusing to grant a licence to him. It is now common ground that this refusal was because of certain instructions issued by the Government in two orders dated 5-5-1950 and 11-11-1950. In the first of these orders, the Government instructed licensing authorities to restrict the number of touring cinemas in places where there were permanent cinemas in order to prevent unhealthy competition and to ensure public safety. In places where there was only one permanent cinema, the licensing authorities were instructed to use the discretion vested in them to grant or refuse licenses to touring cinemas. There were detailed instructions as regards the grant of licenses to permanent and touring cinemas based on the population of the area sought to be exploited. It was 'inter alia' directed that for places with a population of over 50000 no touring cinema should be allowed within a distance of three miles from the nearest permanent cinema. We are not concerned with other instructions in this application. By the later order, the Government further instructed the licensing authorities not to grant a license to a touring cinema within three miles of a place with a population of over 50000 even if there was no permanent cinema there, as the intention of the Government was to encourage the construction of permanent cinemas in such places. In a village, municipal or panchayat area adjoining a town with a population of over 50000 no touring cinema was allowed within three miles of the nearest permanent cinema in the latter town. Licensing authorities were directed to strictly follow the instructions given in the earlier order of the Government as well as in the later order and that they should not make any relaxation to suit any individual case. They were further intimated that they should obtain the order of the Government in border line cases or in cases where they had any doubt on the question of granting or refusing the license.

(2) On behalf of the petitioner the validity of the refusal by the licensing authority to grant a license to the petitioner was challenged on the ground that it was based on instructions from the Government which (1) were beyond the scope of the Act and (2) were in contravention of the article of the Constitution which conferred a right on the petitioner to carry on the business of running a touring cinema.

(3) There is no substance whatever in the first ground. The Cinematograph Act was passed to make provision for regulating exhibitions by means of cinematograph. Under S. 4, the licensing authority outside the Presidency town is the District Magistrate. But under S. 5(3) which confers a power on the licensing authority to grant licenses to such persons as it thinks fit and on such terms and conditions subject to such restrictions as it may determine, the licensing authority is subject to the control of the Provincial Government. It is presumably in exercise of this power of control that the instructions above mentioned were issued by the Government to the licensing authorities. It is not strictly accurate to speak of these instructions as rules framed under S. 8 of the Act, and so it is not necessary to deal with the contention that they go beyond the rule-making power contained in S. 8.

(4) The second ground evidently presupposes that the petitioner has an unfettered and unrestricted right to carry on the business of running a touring cinema at whatever place he likes. This obviously is not the correct position. Art. 19(6) clearly contemplates that the State may impose reasonable restrictions in the interests of the general public on the exercise of the right conferred by Art. 19 (1) (g) on every citizen to carry on any business. As was observed in the well-known case of 'NEBBIA v. NEW YORK', (1934) 291 U S 502: 78 Law Ed 940.

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."

This principle was applied in a subsequent case by the Supreme Court of the United States in the matter of granting permits for the construction of radio broadcasting stations, 'FEDERAL COMMUNICATIONS COMMISSION v. POTTSVILLE BROADCASTING CO.', (1940) 309 U S 134: 84 Law Ed 656. In our opinion the instructions contained in the two Government Orders contain restrictions which are reasonable and in the interests of the general public. It is not difficult to perceive that the said restrictions are in the interests of the safety and the health of the general public and designed to prevent unhealthy competition which itself indirectly would have deleterious influence on the general public. It was not suggested that there has been any discrimination of any sort, nor has mala fides been alleged. It was said during the course of the arguments that the authority erred in considering that the area for which the license was asked for contains a population of over 50000; but we cannot canvass this fact which must be peculiarly in the knowledge of the licensing authority. In any event, it is not open to us in this application to embark on an enquiry as to the correct population figure of the area. There is no reason to interfere with the order of the licensing authority refusing to grant a license to the petitioner.

(5) The applications must be dismissed with costs in C. M. P. No. 5939 of 1951 only which we fix at Rs. 100.

C.R.K./G.M.J. Application dismissed.

A. I. R. 1952 Madras 529

SOMASUNDARAM, J.

Thamsi Goundan, Petitioner v. Kanni Ammal, Respondent.

Criminal Revn. Case No. 634 of 1950 and Criminal Revn. Petn. No. 583 of 1950, D/- 21-9-51.

† Criminal P. C. (1898), S. 488 — Validity — Section not 'ultra vires' of Constitution — (Constitution of India, Art. 14).

Section 488 is intended to prevent starvation of wives deserted by their husbands. It applies to all women in similar circumstances. Legislation therefore, in favour of this class of people, cannot be said to be arbitrary and the provisions therefore is not 'ultra vires' of the Constitution. AIR 1951 S C 41, Rel. on. (Para 3)

Anno : Criminal P. C., S. 488 N. 2.

M. Natesan, for Petitioner; G. Vasantha Pai, for Respondent; The Public Prosecutor, for the State.

Case referred to :

('51) 1951 S C J 29: (AIR 1951 S C 41) (Pr 2)

ORDER: This petition is by the husband against an order of maintenance passed by the Additional First Class Magistrate, Vellore, under S. 488, Criminal P. C., in favour of his wife. The petitioner has been ordered to pay Rs. 15 a month. There is a clear finding by the Magistrate that the petitioner has neglected and refused to maintain the respondent herein. After going through the records I am satisfied that the lower Court was justified in arriving at that conclusion. On the merits, therefore, there is no case for the petitioner herein.

(2) The question that is raised by the learned counsel for the petitioner is that S. 488 Criminal P. C. is 'ultra vires' of the Constitution because the provision is only in favour of women without a similar provision in favour of men. In short his argument is that in the absence of a provision that the husband must in similar circumstances also be awarded maintenance from the wife, the provision is 'ultra vires'. He says that it offends Art. 14 of the Constitution. I must at the outset say that a mere untenable argument could not have been advanced by anyone appearing for the petitioner. On the face of it, it is ridiculous to suggest that husband must have a similar provision in his favour. What is meant by Art. 14 of the Constitution has been stated by their Lordships of the Supreme Court in 'CHARANJIT LAL v. UNION OF INDIA', 1951 S C J 29. His Lordship Mr. Justice Fazl Ali dealing with this article quotes with approval from Professor Willis's Constitution Law as follows:

"It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed'.....It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis."

Then His Lordship says as follows:

"I wish to lay particular emphasis on the principle enunciated by him that any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some 'difference' (underlining (here in single quotation) is mine) and must bear a reasonable and just relation to the things in respect of which it is proposed."

In the same judgment, His Lordship Mr. Justice Mukherjee, dealing with this Article states at page 53 as follows:

"As has been said by the Supreme Court of America, 'equal protection of laws is a pledge of the protection of equal laws' and this means 'subjection to equal laws applying alike to all in the same situation'. In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the 'same' (underlining (here in single quotation) is mine)..... There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character. It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them, which is not imposed upon others guilty of like delinquency'. The Legislature undoubtedly has a wide field of choice in determining and classifying the subjects of its laws, & if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid."

(3) The question is whether judged by this test, S. 488 Criminal P. C., can be said to have contravened the provision embodied in Art. 14 of the Constitution. Can it be said that this classification in favour of women, more particularly wives and that too deserted by their husbands is arbitrary, and that it does not bear a reasonable and just relation to the things in respect to which the classification is made? The difference between men and women forms the basis of the classification. Women as a whole suffer from several disabilities from which men do not suffer. They have no right at least under Hindu law to participate along with their brothers in the inheritance to the property of their parents. Even in England only after the passing of the Married Women's Property Act, their right to own property was recognised. Instances can be multiplied without number to show how women have not equal rights with men. That as a class they are weaker than men cannot also be disputed. In fact they are even called by the appellation "Weaker Sex". The very provision in clause 3 of Art. 15, that special provision may be made for women, suggests the existence of disparity. S. 488 is intended to prevent starvation of wives deserted by their husbands. It applies to all women in similar circumstances. Legislation therefore, in favour of this class of people cannot be said to be arbitrary. The provision, therefore, is not 'ultra vires' of the Constitution. The petition is dismissed.

C.R.K./D.R. Petition dismissed.

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RAMASWAMI, J.

Velur Devasthanam by its head clerk, R. Ramaswami Pillai, Petitioner v. A. Sambandamurthi Nainar, Counter-Petitioner.

Criminal Revn. Case No. 1227 of 1951, and Criminal M. P. Nos. 2428 and 2429 of 1951, D/- 3-12-1951.

(a) Criminal P. C. (1898), S. 145 (5)—Magistrate can drop proceeding at any stage, if he comes to conclusion that there is no apprehension of breach of peace.

When the Magistrate who is responsible for the maintenance of law and order within his own division comes to the conclusion that there was no longer any apprehension of a breach of the peace, it is his duty to drop further proceedings under Section 145 leaving it open to the parties to resort to the appropriate remedies in civil Courts. This can be done at any stage. It is not obligatory for him to take evidence before dropping proceedings, and need not give an opportunity to the parties to establish the contrary. Case law relied on. (Paras 6, 7)

Anno: Criminal P. C., S. 145 N. 48.

(b) Criminal P. C. (1898), S. 145 (5)—Magistrate holding that there is no apprehension of breach of peace and dropping proceedings — High Court will not lightly interfere in revision — (Criminal P. C. (1898), Ss. 435, 439).

On the question of the sufficiency of the evidence on which the Magistrate comes to the conclusion that there was no likelihood of the breach of the peace and drops the proceedings under Section 145, the High Court in revision will not interfere with such an order unless it was obviously unreasonable or unjust, because though the High Court is invested with powers of revision still orders under this section should not be lightly disturbed; it is only in very exceptional cases that the High Court will interfere. (Para 8)

Anno: Criminal P. C., S. 145 N. 48, 61; Section 435 N. 11; S. 439 N. 19.

(c) Criminal P. C. (1898), S. 145 (5) — Proceedings dropped — Magistrate does not become functus officio — He can pass orders for winding up proceedings. AIR 1924 Mad 795; AIR 1925 Mad 1252, Relied on. (Para 10)

Anno: Criminal P. C., S. 145 N. 48.

T. S. Kuppuswami Iyer, for Petitioner; The Public Prosecutor, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('02) 29 Cal 187: (29 Ind App 24 P C) (Pr 6)
('31) 32 Cri L J 309: (AIR 1931 All 14) (Pr 6)
('03) 30 Cal 112: (6 Cal W N 417) (Pr 7)
('32) AIR 1932 Cal 60: (33 Cri L J 305) (Pr 6)
('15) 16 Cri L J 767: (AIR 1916 Mad 775) (Pr 8)
('16) 17 Cri L J 143 (2): (AIR 1917 Mad 204 (1)) (Pr 8)
('17) 5 Mad L W 165: (AIR 1917 Mad 610: 18 Cri L J 23) (Pr 8)
('24) 47 Mad 713: (AIR 1924 Mad 795) (Prs 7, 10)
('25) 49 Mad 232: (AIR 1925 Mad 1252) (Prs 7, 10)
('32) 33 Cri L J 937: (AIR 1932 Nag 134) (Pr 6)
('16) 17 Cri L J 286: (AIR 1916 Pat 418) (Pr 8)
('43) AIR 1943 Pat 44: (44 Cri L J 25) (Pr 6)

ORDER: Criminal Revision Case No. 1227 of 1951 has been filed against the order dropping proceedings under S. 145 Criminal P. C., made by the Sub Divisional Magistrate, Mayuram, in M. C. No. 74 of 1951.

(2) The facts are: On the ground of strained feelings existing between the Velur Devastanam & Sambandamurthi Nainar in connection with the cultivation of five survey numbers in the village of Maruvathur, 24 acres in extent, a preliminary order dated 13-7-1951 under S. 145(1), Criminal P. C., was issued calling on both the parties to put in their written statements in regard to the factum of actual possession. The lands were also attached under S. 145(1), Criminal P. C., and the Tahsildar of Sirkali was directed to be the Court agent. This order was passed on 14-7-1951. The Tahsildar of Sirkali took possession of the lands on 18-7-1951. On 26-7-1951 the Tahsildar held an auction in respect of the lease of the lands for fasli 1361 and one Gopala Chettiar was the highest bidder and the lease was granted to him for 290 kalams of paddy and 72 bundles of straw. This Gopala Chettiar is stated to have deposited Rs. 1848-8-0 as security for the due performance of the obligation under the lease. In response to the preliminary order dated 13-7-1951 written statements were filed by the parties on 4-9-1951 and 11-9-1951. These are the facts constituting the background as to what happened on 19-9-1951.

(3) On 19-9-1951 P. W. 1, the Head Clerk of the petitioner Devastanam as well as the counter-petitioner (R. W. 1) were examined and the learned Sub Divisional Magistrate passed the following Order:

'Both the petitioner and the counter petitioner deposed in Court that there was no breach of peace or clash regarding the lands in dispute. I, therefore, am satisfied that there existed no dispute likely to cause a breach of peace. Hence under S. 145(5), Criminal P. C., I cancel the preliminary order under S. 145(1), Criminal P. C., and withdraw the attachment of the lands and all further proceedings under S. 145 are hereby dropped."

(4) The present revision petition is filed on the foot of the following ground, namely, that in cases where parties in response to the preliminary order passed under S. 145(1), Criminal P.C., came and satisfied the Court that there is no likelihood of breach of the peace, S. 145 (5) can be resorted to; but if without doing so they filed their statements and asserted their rights and the case itself was posted to a later date for evidence, at that stage there was no question of clause (5) of S. 145, Criminal P. C., into operation.

(5) This proposition involves two aspects, namely, whether in law the Sub-Divisional Magistrate was entitled to pass the order dropping the proceeding at the stage at which he had done and secondly, whether on the reasons set out by him the proceedings could be dropped as a fact.

(6) 'Point 1:' On the first point I have come to the conclusion that in law the learned Sub Divisional Magistrate was fully entitled to drop

the proceedings at the stage at which he had done. The object of S. 145, Criminal P. C., is to preserve public peace and tranquillity of the realm from riots and commotion. Orders under S. 145, Criminal P. C., are merely police orders made to prevent breaches of the peace and they decide no questions of title: 'DINOMANI v. BROJO MOHINI', 29 Cal 187 (P. C.). The foundation of the jurisdiction of the Magistrate, is not sufficient ground for taking action: less action is taken there will be a breach of the peace. It is the Magistrate who should be satisfied that the apprehension is an existing one and an adequate one for taking action to avert the breach of the peace. Mere apprehension of the party or even of the police or by a superior authority, namely, the District Magistrate, is not sufficient ground for taking action: 'HARICHARAN v. SHERALI TALUKDAR', AIR 1932 Cal 60; 'SHIBNARAYAN v. SATYADEO PRASAD', AIR (30) 1943 Pat 44; 'TODAR MAL v. EMPEROR', 32 Cri L J 309 (All); 'BALIRAM PATIL v. GANGOO', 33 Cri L J 937 (Nag). It follows, therefore, that when that Magistrate who is responsible for the maintenance of law and order within his own division comes to the conclusion that there was no longer any apprehension of a breach of the peace, it is his duty to drop further proceedings under S. 145 leaving it open to the parties to resort to the appropriate remedies in civil Courts. This can be done at any stage.

(7) And what is more it is not obligatory for a Magistrate to take evidence before dropping proceedings under S. 145, Criminal P. C., and need not give an opportunity to the parties to establish the contrary. This has been laid down in two decisions of this Court in 'SURYANARAYANA v. ANKINEED PRASAD', 47 Mad 713 and in 'NARASAYYA v. VENKAIAH', 49 Mad 232. In 'SURYANARAYANA v. ANKINEED PRASAD', 47 Mad 713, it was pointed out that whatever the source of the Magistrate's information he might act upon it if he was satisfied that the state of things, which alone would have given him jurisdiction to proceed with the enquiry, no longer existed. The learned Judge (Spencer J.) relied upon 'MANINDRA CHANDRA v. BARADA KANTA', 30 Cal 112 and the learned Judge further points out that the Magistrate's power contained a full discretion of his power to drop proceedings at any stage and that he declined to interfere with the order of the Magistrate on this point. In the later case 'NARASAYYA v. VENKIAH', 49 Mad 232, Justice Krishnan followed the earlier decision and came to the following conclusion:

"I do not think it is open to a party to come up here and say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of the peace in his district. Clause 5 of S. 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop the proceedings, if he is satisfied that there is no further likelihood of a breach of a peace."

Therefore the first aspect of this case and the point taken fail.

(8) 'Point 2': Turning to the question of the sufficiency of the evidence on which the learned Magistrate has come to the conclusion that there was no likelihood of the breach of the peace, the High Court in revision will not interfere with such an order unless it was obviously unreasonable or unjust, because though the High Court is invested with powers of revision still orders under this section should not be lightly disturbed; it is only in very exceptional cases the High Court will interfere. In 'RE LINGARAJA MISRO', 17 Cri L J 143 (Mad) and 'HARDEO SINGH v. RAM CHARITHER SINGH', 17 Cri L J 286 (Pat). Orders passed by a competent Magistrate are not to be lightly interfered with by the High Court first because the object of such orders is to preserve peace and secondly because the aggrieved party has his remedy by a civil suit: 'KRISHNAPPA NAIDU v. ALAMELU AMMAL', 5 Mad L J 165. Proceedings under this chapter are of a special nature and are such that the Magistrate may be allowed greater liberty in carrying out these provisions than they are allowed in trying ordinary crime. The provisions of this chapter are concerned with the dispute relating to immovable property which are likely to cause a breach of the peace and give Magistrates power to deal with matters of a quasi civil nature because upon the Magistrate and the police is thrown the burden of maintaining the public peace. In this view it is undesirable that an order in which the Magistrate clearly says that he does not apprehend a breach of the peace and that further proceedings may be safely dropped should be interfered with in revision and the Magistrate be made to feel an apprehension which he does not really feel: 'SUDALAIMUTHU CHETTIAR v. ENAN SAMBAN', 16 Cri L J 767 (Mad). In this case on the face of the order it appears to be reasonable and based upon acceptable evidence. Therefore, on the ground of sufficiency of evidence this point taken fails.

(9) In the result the main petition has got to be dismissed and is hereby dismissed.

(10) In regard to the two subsidiary petitions Cri. M. P. Nos. 2428 and 2429 of 1951 for giving directions to the Tahsildar of Sirkali to retain with him the amount of Rs. 1848-8-0 deposited by Gopala Chetty and to continue him as the lessee of the lands and authorise him to harvest the crops and retain the same or its value with him etc.. the petitioner can obtain the necessary reliefs by applying to the Sub Divisional Magistrate because it is now settled law that the Magistrate dropping proceedings under S. 145, Cri P. C., does not become functus officio but has jurisdiction to pass further orders in the case for winding up the proceedings started under S. 145, Cri P. C. See 'SURYANARAYANA v. ANKINEED PRASAD', 47 Mad 713 and 'NARASAYYA v. VENKIAH', 49 Mad 232. These ancillary petitions are disposed of accordingly.

C.R.K./R.G.D. Orders accordingly.

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KRISHNASWAMI NAYUDU J.

S. R. Muthusami Gounder, Plaintiff-Applicant v. T. Krishnaswamy Iyengar and another, Defendants-Respondents.

C. S. No. 431 of 1950, D/- 9-11-1951.

† Letters Patent (Mad), Cl. 12 — Suit instituted after obtaining leave — Plaintiff seeking to introduce amendment to plaint — Court can grant necessary amendment — Plaintiff however should obtain leave for suit on cause of action described in amendment before carrying out order of amendment.

Where the Court, on an application of the plaintiff, considers that the plaint has to be amended so as to include a cause of action, which was not originally in the plaint, on the ground that such an amendment is necessary, it is not prevented from granting such an amendment merely for the reason that it was a suit instituted after obtaining previous leave to sue under Cl. 12 of the Letters Patent. It does not also preclude the plaintiff from giving effect to such an order by carrying out the amendment or presenting an amended plaint, before which, however, he should apply for and obtain under Cl. 12 leave to sue on the cause of action described in the amendment. Such an application for leave can be filed and leave can be granted, if it comes within the scope of the clause. 15 Bom 93; AIR 1939 Bom 345; ILR 1944-2 Cal 101, Ref. **(Para 13)**

T. C. A. Bhashyam and T. C. A. Thirumalachari, for Applicant; A. Viswanatha Iyer, K. S. Sundaram; P. B. Srinivasa Iyengar and P. V. Srinivasachariar, for Respondents.

Cases referred to:

('91) 15 Bom 93 (Prs 7, 8, 9, 11, 12a)
('39) AIR 1939 Bom 345: (184 Ind Cas 520) (Prs 8, 9, 12a)
('44) ILR (1944) 2 Cal 101: (AIR 1946 Cal 23) (Prs 9, 11, 12b)

ORDER: These are two applications taken out by the plaintiff. One is an appeal against the order of the Master refusing leave to amend the plaint and the other is for leave to sue on the basis of the plaint sought to be amended.

(2) The suit is for specific performance of a contract for the sale of certain lands in Salem District entered into at Madras, and for an injunction restraining the second defendant from bringing about a breach of the said contract. Application No. 260 of 1951 was filed by the plaintiff for amendment of the plaint consequent on the plaintiff having been made aware subsequent to the suit that the second defendant claimed to be purchaser of the same property under a sale deed executed in his favour on the 28th September 1950. The plaint is, therefore, sought to be amended by stating that the sale is sham and nominal, and, in any event, the second defendant is not a 'bona fide' purchaser for value without notice, and for directing the execution of the sale deed not only by the first defendant, but also by the second defendant.

(3) The application was opposed on the grounds that the amendment could not be allowed, as it substantially alters the cause of action, secondly, that the amendment would covert the suit into a suit for land, and this Court would not have jurisdiction to try the suit, and, thirdly, that in any event, the amendment petition was incompetent, as it was filed without previously obtaining leave of Court to sue in respect of the suit as proposed to be amended. The learned Master held in favour of the plaintiff on the first two contentions, but dismissed the application on the ground that as amendment substantially alters the cause of action, the suit having been filed after obtaining previous leave of Court under clause 12 of the Letters Patent, no amendment could be allowed. The learned Master, however, observed that he considered the question as to whether he should grant the plaintiff an adjournment to enable him to apply for leave to sue in regard to the amendment sought but as the obtaining of the leave was a condition precedent to the presentation of the application for amendment, he considered that no purpose would be served by an adjournment.

(4) I am in agreement with the learned Master that but for this objection raised as regards the non-obtaining of leave to sue, the amendment ought to be granted, as it does not seek to set up an inconsistent cause of action, and the amendment has, therefore, to be allowed. I have only to consider whether the amendment should be rejected for the reason that this being a suit instituted after obtaining leave to sue under clause 12 of the Letters Patent, no further amendment can be ordered and any cause of action to which the plaintiff has become entitled could only be adjudicated in a separate suit.

(5) Clause 12 of the Letters Patent provides that

> "the High Court, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description.....if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the High Court....."

(6) Leave was obtained initially before the institution of the suit. The plaintiff now seeks an amendment of the plaint, which he would ordinarily be entitled to but for this objection raised. Does the circumstance that previous leave to institute has been obtained in a suit disentitle the plaintiff from asking for an amendment of the plaint in the suit so instituted? There are three decisions which were referred to by the learned Master and relied upon as establishing the proposition that no amendment could be allowed in a suit so instituted.

(7) It is held in 'RAMPURTAB v. PREMSUKH', 15 Bom 93, that the grant of leave under clause 12 of the Letters Patent is a judicial act, which must be held to relate only to the cause of action contained in the plaint, as presented to the Court at the time of the grant that such leave, which affords the very foundation of the jurisdiction, is not available to confer jurisdiction in respect of a different cause of action, which was not judicially considered at the time it was granted, that in respect of such a different cause of action, leave under clause 12 cannot be granted after the institution of the suit, and, therefore, the Court cannot try such different cause of action, except in another suit duly instituted, and further

that in suits for which leave to sue under Clause 12 of the Letters Patent is necessary, the plaint cannot be afterwards amended.

(8) This decision was referred to by Kania, J. (as he then was) in 'MOTILAL v. SHANKARLAL', AIR (26) 1939 Bom 345. In that case, the suit was originally instituted by six persons as representing a firm, and as the defendant was a resident outside the jurisdiction of the Bombay High Court, leave to sue under clause 12 was obtained before the filing of the plaint. On an objection raised by the defendant that his dealings were not with the firm but with an individual, amendment of the plaint was asked for and granted, and the plaint was amended. The defendant then raised the contention that the Court had no jurisdiction to try the suit and it was pointed out that the individual, who by reason of the amendment proceeded with the suit, had not obtained leave under clause 12 of the Letters Patent, and the Court had no jurisdiction to try the suit. The learned Judge observed as follows:

"The question goes to the root of the jurisdiction of the Court, and when the facts are pointed out, it is the duty of the Court to consider the question, whether the same has been raised by the defendant or not. In the present case, the facts are not disputed. The obtaining of the leave under clause 12, Letters Patent, is the foundation of the jurisdiction, and it has been held that such leave must be obtained before the institution of the suit and cannot be granted afterwards. In 'RAMPURTAB v. PREMSUKH' 15 Bom 93, it was held that the leave granted was confined to the cause or causes of action set forward in the plaint at the time the leave was granted; hence the plaint cannot be amended so as to alter the cause of action. If an amendment, which would alter the cause of action, was made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action.....The two causes of action being thus entirely different and no leave having been obtained when Motilal, the individual, desired to carry on the suit, this issue must be found against the plaintiff....."

(9) Gentle, J. in 'BARASAT BASIRHAT LIGHT RLY. CO. LTD. v. DISTRICT BOARD, 24-PARGANAS', ILR (1944) 2 Cal 101, had occasion to consider a similar question. After referring to the cases, 'RAMPURTAB v. PREMSUKH', 15 Bom 93; 'MOTILAL v. SHANKARLAL', AIR (26) 1939 Bom 345 and other decisions, the learned Judge observes as follows:

"The wording and meaning of clause 12 of the Letters Patent, 1865, is clear, namely, that the Court's leave shall previously be obtained before it has jurisdiction to receive a suit for which leave is required. The grant of leave is a condition precedent to the Court having jurisdiction to receive such a suit. An amendment to a plaint raising a new cause of action upon which a claim is made is not a fresh suit but is an additional claim made in an existing suit. The Court's leave is previously required in respect of a cause of action before the Court can have jurisdiction to receive the suit in which it is alleged.....In my opinion, the Court has no jurisdiction to receive, try and determine the claims upon the causes of action in the amendment to the plaint since leave was not previously obtained in respect of those causes of action before the suit in which those claims are made was instituted in this Court."

(10a) While in agreement with the views of Telang, J. that the grant of leave under clause 12 of the Letters Patent being a judicial act must relate only to the cause of action contained in the plaint, as presented to the Court at the time of the grant, and that such leave affords the very foundation of the jurisdiction & would not be available to confer jurisdiction in respect of a substantially different cause of action, which was not and could not have been judicially considered at the time it was granted, it does not necessarily follow, that in respect of such a different cause of action, leave under clause 12, cannot be granted after the institution of the suit, and that, therefore, the Court cannot try such a different cause of action, except in another suit duly instituted. Neither the language of clause 12, nor the principle of providing for leave before a suit is tried would necessitate such a conclusion.

(10b) In cases, where leave is required, in order to enable the High Court to have jurisdiction, right is conferred on the High Court in its ordinary original civil jurisdiction, to receive, try, and determine such suits, provided the leave of the Court is previously obtained. Therefore the grant of leave must be made before the High Court receives, tries and determines the suit and the grant 'ipso facto' vests jurisdiction to receive, try and determine such suits. The leave, therefore, must be prior to such receipt, trial and determination, and not after, and must necessarily relate to the cause of action on which the suit is based.

(11) In regard to plaints in such suits so instituted, could it be said that the plaint cannot be amended at all? There does not appear to be any controversy for the position that an amendment to such a plaint can be granted, if it is only a formal amendment, which is not based on a substantially different cause of action. But if a Court finds that a cause of action is not inconsistent, and that to avoid multiplicity of suits or for the purpose of determining the real question in controversy raised in the suit between the parties, or for other reasons an amendment is necessary, though based on a different cause of action, the Court has ample power to order an amendment of the plaint, but in view of the decision in 'RAMPURTAB v. PREMSUKH', 15 Bom 93, followed in 'BARASAT BASIRHAT LIGHT RLY. CO. LTD. v. DISTRICT BOARD, 24 PARGANAS', ILR (1944) 2 Cal 101, such an amendment could not be granted, since the suit happens to be a suit instituted after obtaining leave under clause 12. What all that is required to be complied with to satisfy the provisions of clause 12 is that in cases where leave is required, the High Court has no power to receive a plaint before such leave is granted. There is nothing to show that a plaint instituted under clause 12, would not include an amended plaint, and if an amended plaint after obtaining leave to amend is to be received and the cause of action arising therein is to be tried and determined, which cannot be done since previous leave is required which alone confers jurisdiction, there is no reason why such leave to present an amended plaint should not be granted under clause 12 on a fresh application stating

the cause of action on which the amendment has been applied for and the reasons for grant of leave under clause 12.

(12a) That appears to be the reasoning of Kania, J. (as he then was) in 'MOTILAL v. SHANKARLAL', AIR (26) 1939 Bom 345, where the learned Judge after referring to the decision in 'RAMPURTAB v. PREMSUKH', 15 Bom 93 observes that

"if an amendment, which would alter the cause of action, was made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action."

(12b) In that case, however, the point as to want of jurisdiction was raised at the time of the trial of the suit and the learned Judge was of opinion that fresh leave, which ought to have been obtained for the amended plaint, was not obtained, obviously being of the view that such leave could be granted in the case of an amended plaint. Though Gentle, J., in 'BARASAT BASIRHAT LIGHT RLY. CO., LTD. v. DISTRICT BOARD, 24-PARGANAS', ILR (1944) 2 Cal 101, considers this observation of Kania, J. and similar argument based thereon, and proceeds to observe that leave was not sought in the case with which he was dealing with respect to the cause of action in the amendment either at the time the application was made to amend or when leave was given for the amendment or when the plaint with the amendment was presented to the Court and states

"that this omission and the grant of leave to amend the plaint cannot confer upon the Court jurisdiction which it does not possess."

Eventually, however, he says that the

"Court has no jurisdiction to receive, try and determine the claims upon the causes of action in the amendment to the plaint since leave was not previously obtained in respect of those causes of action before the suit in which those claims are made was instituted in this Court."

(13) I am of opinion that in cases where the Court, on an application of the plaintiff, considers that the plaint has to be amended so as to include a cause of action, which was not originally in the plaint, on the ground that such an amendment is necessary, it does not prevent the Court from granting such an amendment merely for the reason that it was a suit instituted after obtaining previous leave to sue under clause 12 of the Letters Patent. It does not also preclude the plaintiff from giving effect to such an order by carrying out the amendment or presenting an amended plaint, before which, however, he should apply for and obtain leave to sue on the cause of action described in the amendment under clause 12 of the Letters Patent. Such an application for leave can be filed and leave can be granted, if it comes within the scope of clause 12 of the Letters Patent.

(14) In the present case, Application No. 3257 of 1951 is for grant of leave to sue on the basis of the plaint as sought to be amended. Leave is granted. The appeal is allowed and the order of the Master is set aside and leave to amend the plaint is granted. Time for amendment one week. Additional written statement, if any, two weeks thereafter. Costs in cause.

C.R.K./R.G.D. Leave granted and appeal allowed.

A. I. R. 1952 Madras 535

MACK AND SOMASUNDARAM JJ.

In re Vokkaligara Yengtappa, Appellant.

Criminal Appeal No. 339 of 1950, D/- 22-10-51.

(a) Criminal P. C. (1898), S. 162 (1) — "Statement made by any person" — Statement by accused.

A statement made by an accused person to the police during investigation is strictly inadmissible in evidence although it explains the production of property. AIR 1939 PC 47, Foll.; AIR 1932 Mad 391 (FB) and AIR 1927 Cal 17, Referred to. (Para 9)

Anno: Cr. P. C., S. 162 N. 4 Pts 2 to 14.

(b) Evidence Act (1872), Ss. 24 and 27 — Accused producing bottle containing arsenic — Accused stating before 'Panchayatdars' that other accused gave her bottle and asked her to keep it in safe custody. Statement held was neither confession nor admissible under S. 27. (Para 10)

Anno: Evi. Act, S. 24 N. 2; S. 27 N. 13.

(c) Penal Code (1860), Ss. 300 and 328 — Accused pouring out of bottle arsenic poison into food — Person dying — Accused having no knowledge of real contents of bottle — Accused mere tool in hands of others — Accused held could not be convicted of murder — Accused held could properly be convicted under S. 328. (Paras 10, 12a)

Anno: Penal Code, S. 300 N. 4; S. 328 N. 1.

S. Govind Swaminathan, for Appellant; R. Santhanam, for Public Prosecutor, for the State.

Cases referred to:

('39) 18 Pat 234: (AIR 1939 P C 47: 40 Cri L J 364) (Pr 9)

('27) 54 Cal 237: (AIR 1927 Cal 17: 28 Cri L J 99) (Pr 9)

('32) 55 Mad 903: (AIR 1932 Mad 391: 33 Cri L J 418 FB) (Pr 9)

('43) ILR (1943) Mad 679: (AIR 1943 Mad 396: 44 Cri L J 550) (Pr 12)

MACK, J.: Appellant, a youth aged 20, has been found guilty under S. 302, I. P. C., of the murder of his cousin Eranna aged about 12 by putting arsenic poison into some cooked curry with the intention of doing away with Eranna's family, particularly his father P. W. 8. Eranna alone died. P. W. 8 and others, who partook of this curry, after much purging and vomitting recovered. Appellant has been sentenced to transportation for life. Chennamma A. 2, an old woman, the mother of the second wife of the appellant's father Chennappa, was also charged with this murder along with the appellant but acquitted.

(2) The family back-ground and the motive alleged, though seemingly involved, is briefly this. Appellant's father Chennappa had two wives. He was the son by the first wife, who died. Then Chennappa married the daughter of A. 2. The deceased boy's father Narasagowda, (P. W. 8) Chennappa and Giriappa (P. W. 12) were brothers. Estrangement between P. W. 8 and Chennappa originated some years ago in A. 2 objecting to her son Manjappa marrying Boramma (P. W. 16) the daughter of P. W. 8. Incensed by Manjappa marrying this girl in defiance of her wishes, A. 2 had nothing further to do with him. Her family owned property and 'panchayatdars' decided that she and Manjappa should enjoy it in separate portions. Manjappa died in 1948 leaving

a small daughter Puttamma. Revenue registration in the village was effected of Manjappa's family property in this child's name with her mother P. W. 16 and her father's mother A. 2 as joint enjoyers. P. W. 16 appealed to the District Commissioner of Coorg, who eliminated A. 2 who then filed a suit in the Court of the District Munsif, Virajpet to assert her claims. This was dismissed shortly before this alleged offence. In this dispute P. W. 8 naturally supported the claim of his grand-daughter, whereas his brother Chennappa supported his mother-in-law. According to the evidence of P. W. 16, A. 1 left his father's house after a quarrel with his step mother but there was a reconciliation. There is some evidence to show that A. 2 at one time thought of arranging a marriage between A. 1 and the child Puttamma, which would consolidate the property in one family again. However, this may be for some time before the offence, A. 1, as is not disputed, was living quite amicably with his father and step-mother.

(3) The brothers P. W. 8 and Chennappa lived in strictly separate portions of their family house in Kannangala on very strained terms. It is in evidence that there was a common loft over the whole of the house to which there was only access originally from a ladder in P. W. 8's kitchen. In view of strained feelings, Chennappa provided a separate ladder for his family to reach this common loft by a ladder from one of his rooms. It was, however, possible for any one in Chennappa's house to enter his brother's kitchen through the loft and 'vice versa'. The only occupants of Chennappa's portion of the house were Chennappa himself, his second wife (A. 2's daughter) and his son A. 1. On the date of the poisoning which was 31-7-1949 they had locked up their part of the house and gone some days previously to the house of A. 2 who lived in a separate house of her own in a village Mythadi 3 or 4 miles away to assist her in her cultivation.

(4) The prosecution case is that sometime after 9 a.m. that morning A. 1 came to this house, made his way through the loft into P. W. 8's kitchen and poured out of a bottle a mixture of arsenic poison into a 'chatti' of cooked fish and potato curry which was hanging on the wall of the kitchen near a pot of cooked rice after P. W. 8 and all the inmates had locked up their part of the house and gone to the fields.

The inmates of the house were P. W. 8, his second wife (P. W. 9) by whom he had a baby son and three sons including the deceased Eranna by his deceased first wife. The other two sons had gone out to work that day and have not appeared before the Court. P. W. 9 had cooked rice and this curry that morning of which she, P. W. 8 and Erranna partook a little and then P. W. 8 went to the field of P. W. 4 to help in some ploughing.

P. W. 9 and Eranna taking with them the little child, went to their fields for transplanting. P. W. 9 was joined there by another woman P. W. 15 who is the mother of P. W. 14. P. W. 8 later joined them after finishing his ploughing. Another witness (P. W. 10) a friend on some business, who came to see P. W. 3 joined them in transplantation. They saw A. 1 going in the direction of his house carrying an umbrella and a bag. P. W. 9 had left some eggs in the common hall and thinking that A. 1 might help himself to them, sent Eranna to put them away in a safe place. According to this witness Eranna came back and said A. 1 was in his house. After their field work, P. Ws. 8 and 9 returned home accompanied by P. W. 10 who had his mid-day meal with them. They were followed a little later by Eranna and all ate of this rice and curry which P. W. 9 had cooked early that morning. After their meal, P. W. 8 on his way to his fields began to vomit and purge. P. W. 9 Eranna and P. W. 10 were similarly affected. P. W. 9 called out to her brother-in-law P. W. 12 who lived nearby. He sent his son P. W. 11 to fetch P. W. 8 whom he found also in great distress and making his way home. Eranna died that night. P. W. 10 who says he vomitted ten times and purged five times later went to the hospital where he stayed for 4 days.

(5) On the following day at 1-30 p.m. P. W. 8 made a complaint Ex. P. 1 at the Virajpet police station to the Inspector himself P. W. 1 who happened to be there. This briefly sets out the family enmity and all that happened the preceding day. It concludes with a suspicion that as his brother Chennappa and Chennamma A. 2 were on terms of enmity with him on account of the civil suit, they must have administered poison through Kajji by which name A. 1 is called. Ex. P. 1 mentions that when they were transplanting they saw A. 1 going towards their house and that P. W. 9 then sent Eranna to the house who returned saying A. 1 was there.

(6) There can be no doubt that a large quantity of arsenic had been put into this curry while the family had gone to the fields after locking up their house. A cock which had eaten up some vomit was found dead and the Inspector sent up for chemical analysis its viscera and a portion of the curry found in an earthen dish. The Chemical Examiner whose report, Ex. P. 15, was not received till several weeks later on 27-10-1949, found no arsenic in the cock but 2-2/5 grains of arsenic in the curry remnants. In the liver and kidney of Eranna, the Chemical Examiner found 1/4 grain of arsenic. The Inspector arrested A. 1 on the evening of 3-8-1949 and on a search of Chennappa's house the following day, he seized three bottles which he sent to the Chemical Examiner. In one of them, 3/4 grains of arsenic was detected. The bottle containing this liquid has not been apparently sent back by the Chemical Examiner and it has not been exhibited.

Far more significant is the arrest of the old woman A. 2 according to the Inspector after he examined A. 1. There is no reason, whatsoever for rejecting his evidence that A. 2 took him to her plantain garden and took out concealed under the roots of a tree, a bottle M. O. 4 which according to the Chemical Examiner's report, Ex. P. 15, was found to contain no less than 15 grains of white arsenic. This is far and away the most important discovery in the case, the large quantity of arsenic found in this bottle being disclosed long after the rest of the investigation was completed. The Circle Inspector says he received the Chemical Examiner's report on 27-10-1949 and that same day laid the final charge-sheet against both the accused.

(7) The main complication in this case is a confession recorded from appellant by the Subedar

Magistrate Sri M. A. Uttayya (P. W. 13) on 9-8-1949 on a police requisition. In this confession, Ex. P. 34, A. 1 confessed that he brought the bottle containing tree killing poison from Mytadi that morning, and described how he unlocked his portion of the house with keys he took from his father's pocket without his knowledge, got into P. W. 8's kitchen through the loft and put half the portion of the tree killing poison into the cooked curry in this 'chatti'. He then said he did some work in the cattle shed and went to the house of P. W. 14 where he stayed that night. Next morning he heard that Eranna was dead, and taking the poison bottle with him from the poultry pen in which he had hidden it, he returned to Mythadi and gave it to his grand-mother asking her to keep it safe. He informed her and his father of Eranna's death. The most difficult feature of this confession is this youth's assumption of full responsibility for the poisoning. The confession concludes with these words:

> "I did this act on my own accord. Neither father nor grand-mother were responsible for what I did."

Both in the committing Magistrate's Court and in the Sessions Court, A. 1 went back completely on this confession, and wholly denied having entered his house at all that morning and having put any poison into this curry or that he took back any bottle to A. 2. A. 2 consistently denied that A. 1 gave her any bottle at all or that she produced it before the police. The learned Sessions Judge found the retracted confession to be voluntary and true and in agreement with the assessors, found A. 1 alone guilty of murder, acquitting A. 2 against whom he considered, although there was serious suspicion, the evidence to be not conclusive. When he came, however, to sentence the learned Sessions Judge took appellant's youth into consideration and also held that the evidence showed that he was a victim in the hands of A. 2 if not of his father Chennappa and accordingly passed on him the lesser sentence.

(8) There can be little doubt that A. 2's acquittal was the result of A. 1 taking full responsibility for the poisoning in the confession made before the Magistrate. There are some unsatisfactory features attaching to this confession. In the first place, it appears to have been recorded by the Magistrate on the very day A. 1 was first produced before him. Five simple questions were put to the accused, answered on a printed form in use in Coorg for the recording of confessions under S. 164, Criminal P. C. They may be strictly in sufficient compliance with S. 164, Criminal P. C., but are not in compliance with R. 85 of the Madras Criminal Rules of Practice, which has suggested several other useful questions, which may be put to an accused to enable the Magistrate to determine whether the confession was voluntary or not. We would draw the attention of the learned Sessions Judge of Coorg and the Coorg authorities to the desirability of a printed form more in accordance with R. 85 of the Madras Criminal Rules of Practice. In these questions, there has been a strict compliance with S. 164, Criminal P. C., and the accused was made to understand that any confession may be used in evidence against him and that he was not bound to make any confession.

We are, however, really disturbed by two circumstances surrounding the confession. The first is that the Magistrate did not give A. 1 sometime for consideration after giving him a warning and take such precautions as were possible in view of his Court being a few yards from the Sub-jail entrance to keep the accused away from any possible external influences. The second circumstance is that the Magistrate closed all the doors of the Court room after the accused was produced before him. He explained in his evidence that he did so in order "to bring courage to the accused". On the other hand, action of this kind to an unsophisticated mind may have savoured of further confinement and intimidation. The learned Magistrate may have acted with the best of intentions to obviate any criticism sometimes levelled at confessions that the police officer in the back ground through a door with intimidating gestures kept the confessor in the straight and narrow path of police requirements. We have very carefully considered the confession and while agreeing with the Sessions Judge, that much of it was voluntarily made and is true, we are unable to accept his full assumption of guilt as being at the time he was examined by the Magistrate freely and voluntarily made. We do not know what influences this young man was subjected to between the date of his arrest, viz., the 3rd of August and the date of his production before the Magistrate on the 9th of August when his confession was recorded.

(9) Now, the conduct of A. 1 militates against his being the sole culprit in the case and against his knowledge that what he was inserting into the curry contained deadly poison in sufficient quantity really to kill more than one person. In fact, had he emptied out the contents of the whole bottle, M. O. 4 into this curry, everybody who had partaken of it, may well have died. But we find A. 1 staying on in the village that night in the house of P. W. 14 after working that day at transplantation with P. W. 14 and some others in the field of P. W. 17. P. W. 15 the mother of P. W. 14 says she told him to go and see P. W. 8 and P. W. 9 who, she heard, were vomitting and that the appellant went out and came back saying he had gone only to the cattle shed. However this may be, there can be no doubt that the appellant stayed in P. W. 14's house that night and that he also went along with P. W. 14 the following morning and saw Eranna's dead body. According to the Inspector, when A. 2 produced M. O. 4 the statement she made before the 'Panchayatdars' embodied in the 'Panchayatnama' Ex. P. 6 is that A. 1 took it from the right pocket of his trousers and asked her to keep it in safe custody on the morning of 1st August 1949. This is a statement made by an accused person to the police during investigation and is strictly and unfortunately inadmissible in evidence although it explains the production of property.

In 'PAKALA NARAYANASAMI v. EMPEROR', 18 Pat 234, their Lordships of the Privy Council approved of the view taken by a Full Bench of this Court in 'IN RE SYAMA MAHAPATRO', 55 Mad 903, that the words "statement made by any person" in S. 162, Criminal P. C., included a statement made by an accused person, and resolved a difference of opinion on this point held by the Indian Courts, the representative judgment taking the opposite view being that of Rankin J. in 'AZIMUDDY v. EMPEROR', 54 Cal 237. This

statement by A. 2 when she produced M. O. 4 is of course not a confession and can in no sense be admissible as information leading to discovery under S. 27 of the Evidence Act. There can, however, be no doubt that it was A. 2 who produced this bottle M. O. 4 found later to contain 15 grains of arsenic buried under the roots of a plantain tree.

(10) This bottle M. O. 4 is, as we have said, perhaps the most significant production in the case. We are satisfied that the portion of the judicial confession made by A. 1 that he took this bottle and gave it to A. 2 after pouring half of its contents into the curry is true. We are unable to reconcile his subsequent conduct with knowledge that this bottle contained a deadly poison. Had this been the case, it is most unlikely that he would have stayed in the village that night keeping in his possession this bottle with this poison without making any attempt to destroy it or throw the contents away. Further, if he knew that what he put into the curry was so potent a poison, it is most unlikely that he would have stayed in the village that night at all. There are, therefore, inherent probabilities, which favour the view that this young man had no knowledge of the real contents of the bottle and if this were the case, although what he put into the curry was in fact a deadly poison, he cannot be convicted of murder, the requisite intention to constitute which would not be proved.

(11) We are in agreement with the learned Sessions Judge's view that A. 1 was a tool in the hands of A. 2 or also possibly his father Chennappa. In our opinion Chennappa should have been either examined as a witness or he should have been put into the dock. One of the bottles found in his house contained 3/4 grain of arsenic and no investigation after the receipt of the Chemical Examiner's report appears to have been pursued as regards this discovery. It is in evidence that arsenic is present in large quantities in chemical preparation for the killing of trees in plantations in Coorg without the necessity of felling them, and it may be that arsenic in this way was quite easily procurable in these areas. If A. 1 was a mere tool, it may well be that he had no knowledge that what he was pouring into the curry was a deadly poison. He may well have been under some other impression.

(12) Under S. 172 of the Criminal P. C., a Court may use the police diaries of cases not as evidence in the case but to aid it in such inquiry or trial.

The manner in which a case diary can be utilised to aid a Court is nowhere defined. Neither the accused nor his agents shall be entitled to call for such diaries or to see them merely because they are referred to by the Court; but if they are used by the police officer who made them to refresh his memory or if the Court uses them for the purpose of contradicting a witness the provisions of the Indian Evidence Act, 1872, S. 161 or S. 145, as the case may be shall apply. A statement made by an accused person recorded in a case diary is inadmissible in evidence under S. 162, Criminal P. C., even and most unfortunately if there is something in such a statement in favour of an accused; for instance, if an accused person produces an incriminating item of property connected with the case, explaining how he got it and exculpating himself, there is no legal way of that statement being used in favour of an accused even by a defending advocate. When we expressed our doubt during the hearing of the appeal, as to whether the accused although we were satisfied that he put the poison into this curry had the guilty knowledge that it was poison, the learned Assistant Public Prosecutor very fairly invited our attention to the statement of the accused as recorded in the case diary made when he was first examined. Nothing there can be used as legal or admissible evidence 'against' him.

All that we are prepared to say here is something in favour of the appellant, that in his original confession to the police, far from assuming full responsibility for the poisoning and while admitting that he put the contents of the bottle into the curry, he said he was acting on the instructions of A. 2. A defending advocate has under the rules no access to the statement of accused persons in a case diary and only to the statement of witnesses actually examined in Court for user for the purpose of contradiction under S. 162, Criminal P. C. At the actual trial, both A. 1 and A. 2 put forward a common defence completely denying all the evidence against them. We have made use of the case diary in this manner in favour of the accused as it strongly re-inforces the grave doubts that we have had on the merits of the admissible evidence as to the intention of A. 1 and his knowledge at the time he put this poison into the curry. Had Chennamma also been convicted of this murder, it would have been legally impossible for us to have utilised the case diary in the explict manner that we have done as evidence, however, much the statement of the accused recorded there may have influenced our decision. It is most regrettable in the present state of the law that even a Public Prosecutor although he may know that there is something in a statement made by an accused when examined at the commencement of great help to him, is precluded from bringing it openly to Court's notice by way of evidence. But this is the present state of the law under S. 162, Criminal P. C., and Ss. 25 to 27 of the Evidence Act and until the law is changed, it is extremely difficult to utilise material in a case diary even in favour of an accused person.

(12a) We do not think that the appellant can be convicted of murder. We are, however, satisfied that he did put this poison into the curry giving him the benefit of a reasonable doubt as regards knowledge that it was a considerable quantity of arsenic. We agree with the learned Sessions Judge that he was a mere tool and that the principal culprit has escaped for lack of a sufficiency of legal evidence. We think that the proper section under which the appellant should be convicted is S. 328, I. P. C., it being a reasonable inference that a person who puts into the food of another secretely any unwholesome drug intended to cause or knowing it to be likely to cause some bodily pain, disease or infirmity, that is, hurt within the meaning of S. 319, I. P. C. This section was used to convict a wife who administered aconite powder to her husband in 'IN RE KURUBA CHINNA HANUMAKKA', ILR (1943) Mad 679. S. 328, I P. C., is, we consider, the appropriate section under which this young appellant can in the circumstances, be fairly convicted, tool that he was as the learned Sessions

Judge rightly in our opinion found him to be. The appellant has been continuously in jail since 24-3-1950 the date of his conviction, the case having undergone a regrettable delay before in coming up for hearing owing to Coorg having comparatively recently come under the jurisdiction of this Court. We find the appellant guilty under S. 328, I. P. C., and sentence him to 20 months rigorous imprisonment which would approximately be the period he would have undergone by the time he is released.

(13) SOMASUNDARAM, J.: I agree with the judgment of my learned brother. So far as Ss. 25 to 27 of the Indian Evidence Act are concerned, I have already stated in another case, that they only prohibit the use of the confession against the accused and that there is no prohibition of their use in favour of the accused. But as regards S. 162, Criminal P. C., it prohibits the use of the statement made by any person (which includes the statement of the accused) for any purpose. There is, therefore, a prohibition to use the statement of the accused if made in the course of investigation even if it is in favour of the accused. This section needs to be amended so as to enable the statements of the accused to be used if they are in their favour particularly if they happen to be in explanation of the recovery of incriminating articles from their possession.

C.R.K./V.R.B. Conviction and sentence altered.

A. I. R. 1952 Madras 539

BASHEER AHMED SAYEED, J.

S. Narayanaswami Ayyar, Petitioner v. Kesava Ayyar, Respondent.

Civil Revn. Petn. No. 668 of 1950, D/- 12-9-1951.

† Court-fees Act (1870), S. 7(v), Art. 17 (vi) — Partition suit by alienee from co-sharer who had separated in status — Court-fee payable.

Alienee from a co-sharer who had separated in status long ago, and who is in joint possession of property as tenant in common, with other co-sharers, steps into the shoes of the vendor, and his suit for partition, seeking to convert the joint possession as a tenant-in-common, into separate possession, cannot be valued except under Art. 17. Such a suit cannot be brought within the scope of Section 7 (v). AIR 1947 Mad 285, Distinguished.; AIR 1924 Mad 207; AIR 1926 Mad 122; AIR 1930 Mad 597; AIR 1920 Mad 585 (1), Relied on. (Para 1a)

Anno: Court-fees Act, S. 7(v) N. 7a; S. 7(iv) (b) N. 7; Art. 17(vi) N. 10.

K. Vaitheeswaran, for Petitioner; Government Pleader, for the State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('20) 43 Mad 396: (AIR 1920 Mad 585 (1)) (Pr 1)

('23) 75 Ind Cas 93: (AIR 1924 Mad 207) (Pr 1)

('25) 90 Ind Cas 843: (AIR 1926 Mad 122) (Pr 1)

('30) 53 Mad 540: (AIR 1930 Mad 597) (Pr 1)

('47) ILR (1947) Mad 763: (AIR 1947 Mad 285) (Pr 1)

ORDER: The plaintiff is the petitioner. He seeks to revise the order of the learned District Munsif of Melur whereby he has been directed to pay court-fee on the plaint under S. 7, Cl. (v) of the Court-fees Act. A reading of his judgment would show that he has clearly misunderstood the facts averred in the plaint. He has followed the decision in 'NAGENDRAM v. APPAYYA', ILR (1947) Mad 763. But the facts in that case are quite different from the facts in the present case and the decision cannot apply to the present case though the learned Government Pleader would urge to the contrary. In that case, it was a purchaser from a coparcener of a Hindu joint family that was filing the suit for partition and possession. But in the present case the plaintiff is an alienee from a co-sharer who got divided in status nearly 45 years ago. The plaint allegations in the present case also make it clear that the vendor of the present plaintiff has been in joint possession of some of the items of the suit property as a tenant in common with the other co-sharer. The purchaser therefore steps into the shoes of his vendor who was in constructive possession as co-sharer and what he is seeking now to do is to convert the joint possession as tenant in common to separate possession. In such a case the position is that the suit cannot be valued except under Art. 17 of the second schedule to the Court-fees Act where suits which cannot be valued will have to be paid a fixed court-fee prescribed in the said Article. That is what the plaintiff has done in this case. That this case cannot be brought within the scope of S. 7, Clause (v) has been made clear by a series of decisions.

(1a) 'GILL v. YARADARAGHAVAYYA', 43 Mad 396, seems to be a direct authority in support of the contention of the petitioner. Even so the observations made in 'KANDUNNI NAIR v. RAMAN NAIR', 53 Mad 540, are very opposite and apply to the facts of the present case. 'SURYANARAYANA v. SESHAYYA', 90 Ind Cas 843 (Mad) and 'KURSHIT KATHUM v. HYDER KHAN', 75 Ind Cas 93 (Mad), are also on the same principle and the decisions therein apply to the facts of the present case. I do not think it is necessary for me to refer to any authority which would say that the plaintiff in this case who is a purchaser from one of the co-sharer who became divided several years ago steps into the shoes of that co-sharer and gets all the rights and interests that that co-sharer possessed in the properties. It is sufficient for me to refer to the passages cited by the learned counsel for the petitioner in the 1950 edition of Mitra's Limitation Act at pages 979 and 981. The learned District Munsif has failed to draw the distinction between an alienee from a coparcener of a Hindu joint family and an alienee from a member of such a family who became divided in status and whose possession thereafter became that of a co-sharer in the properties. The plaint allegations clearly point to this fact that not merely is the plaintiff in joint possession as a tenant-in-common but he is also a co-sharer and the plaintiff is only an alienee from the co-sharer. Such being the circumstances, the learned District Munsif was entirely wrong in having applied the principle laid down in 'NAGENDRAM v. APPAYYA', ILR (1947) Mad 763. The proper court-fee that would be payable under such circumstances would be the one which the plaintiff has already paid. This petition is therefore allowed. There will be no order as to costs.

C.R.K./R.G.D. Revision allowed.

A. I. R. 1952 Madras 540

KRISHNASWAMI NAYUDU J.

V. T. Ranga Bashyam Chetty, Applicant v. Sambandam Chetty and another, Respondents.

C. S. No. 423 of 1949, D/- 9-11-1951.

† Civil P. C. (1908), O. 21 R. 52, proviso — Order for payment out — Amount is not available for subsequent attachment by third party.

The proviso to O. 21, R. 52 comes into operation only after there has been an attachment of the fund in Court. Only when there is a fund in Court which would be available for attachment in pursuance of an order issued by another Court, the claim relating to the fund attached should properly be raised before the Court which issued the order of attachment.

But once an order for payment out has been made by the Court, whatever amount that is ordered to be paid out, belongs to the person to whom the money is ordered to be paid. It cannot thereafter be made available to the claim of third parties to that amount. There can therefore be no valid attachment of these monies subsequent to the order of payment out. On the passing of the order which is the judicial act, the property is transferred to the person in whose favour the order is made and the issue of the cheque or the actual payment of the money which might be delayed in pursuance of the order is a ministerial act which cannot prejudice the rights of the person who has obtained the order for payment out. C. S. No. 774 of 1923, D/- 27-1-1926 (Mad), Relied; C. S. No. 181 of 1948, D/- 26-2-1951 (Mad), Expl. (Para 3)

But where the judgment-debtor against whom an order of attachment is made and the applicant in whose favour the order for payment out has been made are one and the same person, the amount would still stand to the credit of the judgment-debtor and it cannot be contended that the amount cannot be attached. (Para 4)

Anno: Civil P. C., O. 21 R. 52 N. 2.

T. C. A. Bhashyam and T. C. A. Thirumalechari, for Appellant; A. Viswanatha Iyer, K. S. Sunderam, P. M. Srinivasa Iyengar and P. V. Srinivasachari, for Respondents.

Cases referred to:

('26) C. S. No. 774 of 1923, D/- 27-1-1926 (Mad) (Pr 3)

('51) C. S. No. 181 of 1948, D/- 26-2-1951 (Mad) (Pr 3)

ORDER: This reference raises a question of some importance which comes up frequently for consideration on the Original Side of the High Court.

(2) In and by the decree in C. S. No. 423 of 1949, the applicant herein, who is the third plaintiff in the suit, became entitled to a sum of Rs. 3800/10/- out of the entire sum standing to the credit of that suit. He asked for payment out of a sum of Rs. 3,753-2-0 being the balance he was entitled to, after retaining a sum of Rs. 47-8-0 being the cost of stamps for engrossing the decree. On the 20th April 1951, the learned Master passed an order ordering payment out. An order of attachment of the moneys standing to the credit of the applicant in this suit was issued by the Court of Small Causes in execution of a decree obtained by one Krishnamruthi Ayyar against the applicant in Small Cause Suit No. 361 of 1951, and the said order of attachment was received in this Court on 26th April 1951. Attachment was effected by this Court, and the original order was returned after service. Though the attachment was subsequent to the order for payment out, a cheque was issued in favour of the applicant in pursuance of the order of the learned Master dated 20th April 1951 after deducting the amount for which the attachment was issued. Objection having been taken to the matter is posted before me for orders.

(3) The contention on behalf of the applicant is that once an order has been made for payment out there is no fund in Court available for attachment and that the order of attachment must have been returned with the endorsement that there is no fund in Court available for attachment. In support of this contention, the view expressed by Kumaraswami Sastri J. on 27th January 1926 in C. S. No. 774 of 1923, in almost similar circumstances is cited which is as follows:

> "I think the correct rule is that, where a Court orders payment to be made, that order must be treated as if the payment had actually been made at the date of the order so as to prevent subsequent attachment on the money in Court. There is always a certain interval between the passing of the order and its issue and the payment being made on the strength of that order and I do not think that the party should be prejudiced simply because there is delay. When he has actually got the order the proper course is to treat the order of payment as an actual payment so far as the rights of third persons to attach are concerned."

A different view was taken by Rajagopalan J. in application 'No. 794 of 1951, in C. S. No. 181 of 1948', by his order dated 26th February 1951. In that case, in pursuance of a decree passed on 30th January 1951 in terms of the memorandum of compromise certain payments were directed to be made out of the funds in Court to the parties to the compromise decree. Subsequent to the date of the decree, two attachments were received on 7-2-1951. A similar reference was made to Rajagopalan J. and the learned counsel for the applicant in whose favour payment out order had been made relied upon the judgment of Kumaraswami Sastriar J. in 'C. S. No. 774 of 1923 dated 27th January 1926' The attaching decree holder in C. S. No. 181 of 1948 took out application No. 794 of 1951 for directions to retain the attached amount viz., Rs. 1,604-4-0 and send it to the transmitting Court. With reference to the respective contentions of the applicant in whose favour payment out has been ordered and the attaching decree-holder, the learned Judge observed as follows:

> "From the records I find that there was an order of attachment issued by the Registrar, Court of Small Causes, to attach a sum of Rs. 1,604-4-0 and that the attachment was executed and the warrant returned. Mr. D. R. Krishna Rao for the respondent contends that since there was an order passed by this Court that the amount including this amount of Rs. 1,604-4-0 should be paid over to the Respondent and since that order was long prior to the attachment effected at the instance of the appilcant, the money vested in the respondent on the date of the order of this Court, and that there was therefore nothing still in the custody of the Court which could be attached under Order XXI, R. 52, Civil P. C. But I cannot be called upon to pronounce upon the soundness of this contention or otherwise in these proceedings. The

attachment was ordered by the Court of Small Causes, and the validity of that attachment will be for the Court of Small Causes to decide. It is perfectly open to the respondent to move the competent Court to decide whether the attachment which had been ordered to be effected and which has been effected in pursuance of that order is valid or not. If the attachment is set aside by the attaching Court, then the money will be available for payment out to the respondent. But I am unable to accept the contention of Mr. D. R. Krishna Rao for the respondent, that it is for this Court to decide whether the order of attachment issued by the Court of Small Causes was validly executed or not."

This view of Rajagopalan J. apparently proceeds on the language of the proviso to Order XXI, Rule 52, Civil P. C. which provides that:

"Where such property is in the custody of a Court any question of title or priority, arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

The proviso to Order XXI, Rule 52 comes into operation only after there has been an attachment of the fund in Court. Only when there is a fund in Court which would be available for attachment in pursuance of an order issued by another Court, the claim relating to the fund attached should properly be raised before the Court which issued the order of attachment. Could it, however, be said in the present case that, after an order for payment out had been made on the 20th April 1951, there was any fund in Court available for attachment under the order issued by the Court of Small Causes? Under Order XXI, Rule 52, if the property to be attached is in the custody of any Court the attachment shall be made by a notice to such Court requesting that such Court may hold the property subject to further orders of the Court from which the notice is issued.

(4) The sum of Rs. 3753-2-0 ordered to be paid out was no doubt in the custody of the Court on 26th April 1951 when the order of attachment was received. But it is not sufficient if the property (here money) was in the custody of the Court. It must have been in the custody of the Court to the credit of the judgment-debtor, i.e., the third plaintiff-applicant, or it must be shown that the money was held on his behalf. In view of the order for payment out made on the 20-4-1951, from the date of the order the money must be deemed to have been held on behalf of the person in whose favour the order for payment out has been made. Further, once an order for payment out has been made, it must be treated that the property in these moneys has passed to the person in whose favour the order has been made; and from that date of the order, the person, who has got the payment out order in his favour, becomes the owner of the moneys, notwithstanding that he may not have got actual possession of the same. As was observed by Kumaraswami Sastriar J. once an order for payment out has been made, it must be treated that payment out has been actually made and whatever amount that was ordered to be paid out, belonged to him and it cannot be made available to the claim of third parties to that amount. There can therefore be no valid attachment of these moneys subsequent to the order for payment out. On the passing of the order which is the judicial act, the property is transferred to the person in whose favour the order is made and the issue of a cheque, or payment of the money is a ministerial act, and any delay in the performance of which could not prejudice the right of the person who has obtained the order for payment out. For instance suppose an immovable property has been in the possession of a receiver appointed by Court, it must be treated to be in the Court's custody. If during the possession of the property in the hands of the receiver, an order for sale is made by the Court and the sale in favour of any purchaser is confirmed and if after such confirmation and before actual delivery of possession of the property by the receiver to the purchaser an attachment order of the property is received, it cannot be said that the property could be validly attached. The circumstance that the possession continued to be with the receiver notwithstanding that the sale in favour of the third party has been confirmed, would not be sufficient to treat the property as the property of the parties on whose behalf the receiver was appointed. The correct and also the reasonable view that could be taken in such cases is that when once an order for payment out is made, there cannot be any subsequent attachment of the moneys, even though the moneys continue to remain in Court and no cheque has been issued to the party.

In the present case the difficulty, however, arises in view of the judgment-debtor in the Small Cause suit against whom an order for attachment has been made and the applicant in whose favour the order for payment out has been made are one and the same person viz., the third plaintiff. If the applicant in the application for payment out is a third party, the principle that is now laid down will be applicable and the third party — applicant would be entitled to the amount once the order for payment out is made, notwithstanding any order of attachment subsequently received on the ground that the funds in Court ceased to be held on behalf of the judgment-debtor under the order of attachment. It is, however, stated by Mr. E. R. Krishnan, learned counsel for the applicant, that the two persons are different, the decree in the Small Cause Court being against the 3rd plaintiff in his capacity as the executor of Chokkammal, while the payment out order here was in his favour. But a reference to the decree in this Court shows that he was added as an executor of the 1st plaintiff Chokkammal and the payment out order could only be in his capacity as executor of Chokkammal, who is the 1st plaintiff in this suit. There is certainly therefore no difference between his position in this suit and his position in the Small Cause suit. So, in this case, the property, though ceases to be in the custody of the Court, does not cease to be held by the Court on behalf of the judgment-debtor in the Small Cause suit, who is the very same person as the applicant. The amount would therefore stand to the credit of the applicant—3rd plaintiff. It cannot therefore be contended that the judgment-debtor who is the third plaintiff-applicant has ceased to have any interest in the amount and therefore the amount cannot be attached. I am of the opinion that in this case the attachment must be given effect to and the payment out could only be in respect of such amount that is available after deducting the amount mentioned in the warrant of attachment.

C.R.K./R.G.D. Order accordingly.

A. I. R. 1952 Madras 542

SATYANARAYANA RAO AND VISWANATHA SASTRI, JJ.

Commissioner of Income-tax and Excess Profits Tax, Applicant v. The Erin Estate, Galaha, by Partners M. T. Andiappa Pillai, Respondents.

Case Referred No. 62 of 1946, D/- 27-3-51.

(a) Income-tax Act (1922), S. 66 — Question of law — Question regarding Control and management of business.

The proper legal effect of facts proved or admitted is essentially a question of law. Though the Tribunal's findings of fact are not open to review by the High Court, the correctness of the inference which the Tribunal has drawn from facts which are proved or admitted may be a question of law. The question whether the control and management of a firm's business or affairs is situated wholly out of British India is not a mere question of fact. Case law relied on. **(Para 6)**

Anno : Income-tax Act, S. 66 N. 10.

(b) Income-tax Act (1922), S. 4 A (b) — Control and management being situated wholly without British India — Evidence Act (1872), Ss. 101 to 103.

The onus of proving facts necessary to establish that the control and management of the affairs of the assessee a firm is situate wholly outside British India is on the assessee. The language of Section 4-A(b) shows that a firm is normally presumed to be resident in British India but such a presumption can be rebutted by showing that the case comes within the second part of the provision, viz., that the control and management of its affairs is situated wholly without British India. The onus which is cast by the section on the assessee must be dischagred by the production of evidence that is, or must be available with the assessee. The non-production of such material and available evidence is an infirmative circumstance that has to be taken into account against the assessee in arriving at a conclusion on the question whether the control and management of the affairs of the firm was situate wholly outside British India. Control and management means de facto control and management. The existence of a mere right or power of control and management is not the criterion.

All the partners were residents of the Trichinopoly District; the major partners, that is to say, the partners who held the largest number of shares, were attending to the firm's affairs from Trichinopoly; the estate in Ceylon was managed by a Superintendent, who was paid a salary; there was no power of attorney in his favour in connection with the management of the firm's business; he had no plenary powers of management and his status was not higher than that of the head of an establishment maintained for the purpose of producing manufacturing and marketing tea in Ceylon.

Held that the cumulative effect pointed to the fact that the control and management of the affairs of the assessee firm were not situated wholly out of British India. Some part of the control and management and the supervision of the affairs of the firm abided in Trichinopoly where all the partners resided. Case law Relied on. **(Paras 11, 12)**

Anno : Income-tax Act, S. 4A N. 2; Evidence Act, Ss. 101 to 103 N. 1.

C. S. Rama Rao Sahib, for Applicant; T. M. Krishnaswami Aiyar, for M. Subbaraya Aiyar, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Coutrs chronologically. List of foreign cases referred to comes after the Indian Cases).

('51) 1951-1 Mad L J 310: (AIR 1951 S C 101) (Pr 11)
('51) 1951-19 I T R 191: (AIR 1951 S C 108) (Pr 8)
('46) 1946-14 I T R 334: (AIR 1947 Bom 24) (Pr 11)
('20) 1 I T C 37: 43 Mad 75: (AIR 1920 Mad 344 S B) (Pr 4)
('45) 1945-13 I T R 329: (AIR 1945 Mad 366) (Pr 6)
('48) ILR (1948) Mad 607: (AIR 1948 Mad 307) (Pr 11)
('50) 1950-18 I T R 935: (AIR 1950 Mad 645) (Pr 11)
('50) 1950-18 I T R 320: (AIR 1950 Mad 781) (Pr 10)
('50) 1950-18 I T R 181: (AIR 1950 Mad 808) (Prs 11, 12)
(1896) A C 31: (65 L J Q B 161) (Pr11)
(1906) A C 455: (75 L J K B 858) (Pr 11)
(1915) A C 1022: (84 L J K B 1772) (Pr 11)
(1922) 2 A C 1: (91 L J K B 472) (Pr 6)
(1925) A C 495: (94 L J K B 527) (Pr 11)
(1928) A C 234 (Pr 6)
(1940) A C 549: (23 Tax Cas 122) (Pr 6)
(1942) A C 14: (23 Tax Cas 642) (Pr 6)
(1938) 7 I T R 245 (C A) (Pr 6)
(1908) 5 Tax Cas 338 (Pr 11)
(1912) 6 Tax Cas 1 (Pr 6)

VISWANATHA SASTRI J: The question that has been referred to us is in these terms: "Whether the assessee firm is a resident in British India within the meaning of S. 4-A (b) of the Income-tax Act."

(2) With reference to income-tax, the assessment years in question are 1939-40, 1940-41, 1941-42 and 1942-43. With reference to excess profits tax, the chargeable accounting periods are 1st September 1939 to 31st December 1939, 1st January 1940 to 31st December 1940, 1st January 1941 to 31st December 1941. Though the assessments relate to different accounting periods, both before us and the Income-tax authorities as well as the Appellate Tribunal, the case has been presented on the footing that the essential facts and circumstances are the same throughout. The facts are shortly these. The assessee is a registered firm of seven partners carrying on the business of tea planters in Ceylon. The partnership owns tea estates compendiously styled: "The Erin Estate". Tea is grown on this estate and is manufactured into a marketable product and sold in Ceylon through brokers, or commission agents. The price is realised in Ceylon. These trading operations are carried on in Ceylon on behalf of the firm by an agent, Ponnambalam Pillai who is residing there. It is not correct to state, as has been done in the statement of the case drawn up by the Appellate Tribunal, that Ponnambalam Pillai had a power-of-attorney from the partners empowering him to manage and control the business in Ceylon. Such a statement is opposed to the express sworn state-

ment of the two major partners, Andiappa Pillai and Nagalingam Pillai. The power of attorney, to which apparently a reference was meant, has been placed before us and we find it is not a power of attorney executed by the firm or by any of the partners of the firm in their capacity as such partners. Though the partnership had been in existence from before 1938, a deed of partnership dated 5th March 1942 was drawn up setting out the shares of the partners in the Erin Estate and providing for sundry matters connected with the partnership business. Cl. 3 of the Partnership deed ran thus:

"The estate shall be managed by the Superintendent, Sriman A. P. S. T. Ponnambalam Pillai, who has hitherto been in charge of the same and managing the same or by a person appointed by the majority of the partners. (Majority opinion is to be determined by the numbers of shares and not by the number of partners constituting the partnership.")

(3) Out of the total number of 147 shares, Andiappa Pillai owned 50 shares. Veerappa Pillai owned 43 shares and Nagalingam Pillai owned 18 shares. The other four partners held nine shares each. All the partners were permanent residents of certain villages in the Trichinopoly district. These facts are common ground.

(4) The order of the Appellate Tribunal does not deal adequately with the evidence and the material that has been produced in the case. Beyond referring to a few introductory facts and extracting in extenso the statement of the partner, Andiappa Pillai, the order of the Appellate Tribunal makes no attempt to evaluate the evidence that had been placed before the assessing authorities and also before the Tribunal. It does not pay attention to the language of S. 4-A (b) of the Income-tax Act but refers to two English decisions & dismisses them as beside the point. Indeed, the grounds of decision of the Appellate Tribunal are contained only in one paragraph of its order which may be set out in full:

"In our opinion, this case comes for decision as to whether the manager was controlling or as to whether the partners were controlling. From the facts stated above, it seems that the whole control was really situated in Ceylon. We get some support from the judgment of Mr. Justice Sheshagiri Aiyar, reported in 'SECRETARY TO THE COMMISSIONER, SALT, ABKARI AND SEPARATE REVENUE v. RAMANATHAN CHETTI', 1 I T C 37 at p. 47 : 43 Mad 75, where His Lordship seems to have taken the view that by giving general instructions the business is not carried on from the country from which those instructions were issued. The so-called letters relied upon by the Departmental representatives are either informative or required for general instructions and they do not, therefore, contradict the fact that the control is certainly situated in Ceylon, i.e., 'wholly outside British India.'".

(5) The matter that had to be investigated and decided by the Appellate Tribunal was whether the control and management of the firm's business was situated wholly outside British India. In the last sentence of the passage above extracted the Tribunal seems to assume the very fact that has to be proved, namely, that the control was situated in Ceylon. The letters which have been treated so summarily did require further and more serious consideration at the hands of the Tribunal.

(6) It has been contended before us on behalf of the assessee that as the Appellate Tribunal held that no control or management was exercised in British India by the partners, its finding must be accepted by us as a finding of fact binding on this Court and that no question of law arose on such finding. As pointed out in the order under S. 66(2) of the Income-tax Act directing the present reference and in the decision of this Court in' COMMISSIONER OF INCOME-TAX v. SHANMUGAM RUBBER ESTATE', 1945-13 ITR 329 (Mad), the question whether the control and management of a firm's business or affairs is situate wholly out of British India is not a mere question of fact. See also the decision in 'INLAND REVENUE COMMISSIONERS v. LYSAGHT', (1928) A. C. 234, dealing with a question of "residence". Though the Tribunal's findings of fact are not open to review by this Court, the correctness of the inference which the Tribunal has drawn from facts which are proved or admitted may be a question of law—see 'AMERICAN THREAD CO. v. JOYCE', (1912) 6 Tax Cas 1 at p. 23; In 'LAND REVENUE COMMISSIONERS v. BRITISH SALMSON AERO ENGINES LTD.', (1938) 7 ITR 245 at p. 259 Court of Appeal. The argument of the assessee in this case is merely an attempt to secure for a bald finding on a mixed question of law and fact that unassailability which properly belongs to a finding on a question of pure fact arrived at after a consideration of the relevant evidence—c. f. 'GREAT WESTERN RAILWAY CO, LTD. v. BAKER', (1922) 2-A. C. 1; 'INLAND REVENUE COMMISSIONERS v. LYSAGHT', (1928) A. C. 234. Indeed, Viscount Simon in the case in 'BOMFORD v. OSBORNE', (1942) A. C. 14, held that there may be cases where the revenue authority having proved or admitted facts before it, might deduce therefrom further conclusions which are themselves conclusions of fact, but in such cases there might emerge a question of law, the question of law being whether the facts proved or admitted provided evidence to support the revenue authority's further conclusions of fact. In 'CAMERON v. PRENDERGAST', (1940) A. C. 549, Viscount Maugham observed that if the Tribunal stated or referred to the evidence and held upon that evidence that certain results followed, it was open to the Court to differ from that conclusion. In any case, it has been held over and over again both by the Judicial Committee and this Court that the proper legal effect of facts proved or admitted is essentially a question of law. It is needless to cite authority for this elementary proposition.

(7) Having regard to the meagreness of the order of the Tribunal in so far as it deals with the facts relevant for a determination of the question at issue and having regard to the fact that the letters which were produced before the revenue authorities and the Tribunal are referred to in the judgment of the Tribunal in a casual manner, we enquired of the learned counsel appearing on both sides whether the genuineness or authenticity of these letters is admitted by them. Both of them stated that the letters were genuine and that they were produced before the Income-tax authorities by

the assessee for being acted upon by the department. Consequently, we have felt ourselves at liberty to refer to these letters even though they have not been made part of the printed case placed before us. It is regrettable that no attention was paid to the preparation of the records necessary for supporting the case of the Commissioner of Income-tax at the time when the reference was made to this Court.

(8) In the 'COMMISSIONER OF INCOME-TAX v. CALCUTTA AGENCY LTD', 1951-19 ITR 191, the Supreme Court has observed that the jurisdiction of this Court in the matter of income-tax references is advisory and that the decision of the Tribunal on facts is final. Their Lordships observed that the duty of the High Court was to start by looking at the facts found by the Tribunal and answer the question of law on that footing and that any departure from this rule would convert the High Court into a fact finding authority which it is not. Unlike the case before the Supreme Court, the statement of the case in the present case was not prepared with the knowledge or approval of both the parties. They did not peruse the statement of the case & did not make any suggestions which they might have made in respect thereof. To the extent to which the Tribunal has found facts, we have accepted those facts;that is to say, that the Erin Estate belonged to the assessee firm; that tea was planted in the estate and sold in Ceylon; that one Ponnambalam Pillai was an agent or superintendent looking after the trading operations in Ceylon; and that the monies realised by the sales of tea through brokers in Ceylon were paid into a local bank on which the agent operated. The letters referred to in the order of the Tribunal, and which therefore must have presumably formed part of the evidence on which the Tribunal based its conclusion, have not yet been analysed and the value of their contents has not been noticed. In view of the fact that these letters were placed before the Appellate Tribunal and the revenue authorities and were also referred to in the order of the Tribunal we have felt ourselves at liberty to look into them though they have not been made part of the printed case. We have also before us the affidavits filed by the partners and also the statements made by them before the Income-tax authorities.

(9) Before we analyse the evidence and summarise its effect, we might as well indicate the proper method of approach to the question of law that is involved in the reference. This is all the more necessary because the Tribunal does not seem to have appreciated the meaning and scope of S. 4-A(b) of the Income-tax Act, on which the decision of the question depends.

(10) S. 4-A(b) runs thus:

> "A Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India."

(11) We refer to the section as it stood at the relevant dates. We had occasion to deal with the meaning and scope of the provision in our judgments in 'NARASIMHA RAO v. COMMISSIONER OF INCOME-TAX', 1950-18-ITR 181 (Mad); 'TALIPATIGALA ESTATE v. COMMISSIONER OF INCOME-TAX', 1950-18 ITR 320 (Mad) and COMMISSIONER OF INCOME-TAX v. AR. PL. S. PL. FIRM', 1950-18-ITR 935 (Mad). There is, however, now available an authoritative exposition of the law in a recent judgment of the Supreme Court in 'SUBBAYYA CHETTIAR v. COMMISSIONER OF INCOME-TAX', 1951-1 Mad L J 310, which renders it unnecessary for us to examine the earlier decisions. The following propositions may be taken as fairly well-established by the decisions of the Supreme Court. The onus of proving facts necessary to establish that the control and management of the affairs of a firm is situate wholly outside British India is on the assessee. The language of S. 4-A(b) shows that a firm is normally presumed to be resident in British India but such a presumption can be rebutted by showing that the case comes within the second part of the provision, viz., that the control and management of its affairs is situated wholly without British India. The onus which is cast by the section on the assessee must be discharged by the production of evidence, that is, or must be available with the assessee. The non-production of such material and available evidence is an infirmative circumstance that has to be taken into account against the assessee in arriving at a conclusion on the question whether the control and management of the affairs of the firm was situate wholly outside British India. The meaning and scope of S. 4-A(b) was expounded by Patanjali Sastri J. in 'SUBBIAH CHETTIAR v. COMMISSIONER OF INCOME-TAX', ILR (1948) Mad 607, in a passage which was cited with approval on appeal by the Supreme Court. The learned Judge said:

> "'Control and management' signifies in the present context, the controlling and directive power, the head and brain as it is sometimes called, and 'situated' implies the functioning of such power at a particular place with some degree of permanence, while 'wholly' would seem to recognise the possibility of the seat of such power being divided between two distinct and separate places."

The control and management of a firm's business is situated at the place where, as was said in 'DE BEERS CONSOLIDATED MINES LTD. v. HOWE', (1906) A. C. 455, "where the central management and control actually abides", or, as stated in 'SAN PAULO (BRAZILIAN) RAILWAY CO. LTD. v. CATER', (1896) A. C. 31, "the head and brain of a particular adventure is situate" or as stated elsewhere "the head and seat and the directing power is situated." Control of a business does not necessarily mean the carrying on of the business. The place of control may be different from the place where the physical operations of the business are carried on and the place where trading activities are carried on need not necessarily be the place of control or management. A place wherefrom oversight or supervision or even tacit control of the affairs of the business by the owner of the business conducted abroad is regularly exercised would be a place where the control and management is situate. There may be control and management at a particular place where the partners of the firm reside even though occasions for active and actual intervention with the conduct of business operations elsewhere do not arise on account of the business activities being carried on smoothly by local agents or servants—see MITCHELL v. EGYPTIAN

HOTELS LTD.', (1915) A. C. 1022; 'OGILVIE v. KITTEN', (1908) 5 Tax Cas 338 at p. 345. Control and management, therefore, means de facto control and management. The existence of a mere right or power of control and management is not the criterion. This is what the decision in 'BHIMJI R. NAIK v. COMMISSIONER OF INCOME-TAX', (1946) 14 ITR 334, referred to by the assessee laid down. It is not what the partners of the firm in the present case have power to do, but what they actually do that is of importance in determining the place where the control is exercised. When S. 4-A(b) refers to the control and management of its affairs by the firm it means the affairs which have some relation to the business whose income, profits and gains are sought to be taxed and not the private or domestic affairs of the individual partners having no relation to the firm's business. The execution of a power of attorney by one of the partners in this case was in respect of his own individual or private affairs. Finally S. 4-A(b) itself adopts the principle recognised by 'SWEDISH CENTRAL RAILWAY CO. v. THOMPSON', (1925) A. C. 495, that the control and management of the firm's affairs may be divided and may abide in more than one place. If so, the firm has a dual residence in each of the places where it "performs some of the vital or organic functions incidental to its existence as such", to quote the language of Fazl Ali J. in the Supreme Court.

(12) Judged by these tests, which are also the tests formulated by us in 'NARSIMHA RAO v. COMMISSIONER OF INCOME-TAX', 1950-18 ITR 181, how does the present case stand? All the partners were residents of the Trichinopoly District. The major partners, that is to say, the partners who hold the largest number of shares, Andiappa Pillai and Nagalingam Pillai were attending to the firm's affairs from Trichinopoly. The estate was managed by a Superintendent, Ponnambalam Pillai, who was paid a salary of Rs. 300 per mensem. There was no power of attorney in his favour in connection with the management of the firm's business. There was nothing in writing to substantiate the assertion of the assessee's learned advocate that Ponnambalam Pillai had plenary powers of management or to show that his status was higher than that of the head of an establishment maintained for the purpose of producing, manufacturing and marketing tea in Ceylon. We have been taken through the letters written by Andiappa Pillai, the partner from Trichinopoly District, to Ponnambalam Pillai in Ceylon. There is also a letter written by Veerappa Pillai one of the partners from Trichinopoly. The correspondence which has been translated and placed before us shows that the partners who hold the largest number of shares, Andiappa Pillai, Veerappa Pillai and Nagalingam Pillai were in the Trichinopoly District, Veerappa Pillai alone going occasionally to Ceylon. The Superintendent took instructions from the partners in Trichinopoly with reference to the purchase or sale of tea coupons and tea. He reported to them the current prices in the Ceylon market and took instructions as regards the sale of coupons. He took instructions as regards the improvements to be effected on the estate by the construction of buildings. True copies of the day books and the balance sheet were sent every month to the partners in Trichinopoly. Ponnambalam Pillai, the local agent, regularly reported to the partners the conditions of the estate, the progress of the work on the estate, the extent of manuring done and the current prices of tea leaves and tea coupons. As regards the manuring of the tea gardens, he asks for definite instructions whether manuring could be done on a large scale and the partner Andiappa Pillai instructed him to do the manuring extensively. With regard to the buildings, he took instructions as to whether a particular building should be constructed or whether the construction of another building should be stopped. Even as regards the salary payable to petty servants of the estate, he took instructions as to whether an increment could be granted. The partner from Trichinopoly gave instructions sanctioning such an increment. Instructions were also given to him to accumulate and keep on hand a reserve fund ranging from Rs. 7500 to Rs. 10000 from out of the realisations of the tea sales. With reference to labour disputes on the estate, the partner from Trichinopoly directed him to settle such disputes amicably exercising a wise discretion as a man on the spot. Every year at the beginning of the year, a budget estimate was framed for the work to be done on the estate and submitted to the partners and sanctioned by them. Whenever any large expenditure in excess of the budgeted expenditure was incurred without previous sanction, the agent immediately reported it for approval to the partners at Trichinopoly. The partner at Trichinopoly was giving directions to the Superintendent as to what should be done in connection with the management of the estate. The fact that the action of the Superintendent has generally been approved by the partners only shows that the Superintendent was doing his work properly and without giving occasion for complaint. The cumulative effect of the correspondence above referred to as well as the other circumstances adverted to by us clearly point to the fact that the control & management of the affairs of the assessee firm were not situated wholly out of British India. It is quite clear that some part of the control and management and the supervision of the affairs of the firm abided in Trichinopoly where all the partners resided.

(13) For these reasons, we answer the question referred to us in the affirmative and hold that the assessee firm is a resident in British India. The assessee will pay Rs. 250 the costs of the Commissioner of Income-tax in this reference.

C.R.K./D.H. Answer in the affirmative.

A. I. R. 1952 Madras 545

RAJAMANNAR, C. J. AND VENKATARAMA IYAR, J.

M. Kali Mudaliar, Appellant v. A. Vedachala Mudaliar and others, Respondents.

Letters Patent Appeal No. 86 of 1951, D/- 17-9-1951.

(a) Motor Vehicles Act (1939), S. 64(b) and (f), 48(d)(iii) — Change in bus timings, is not variation in condition of permit — Regional Transport Authority changing timings — No appeal lies — Central Road Traffic Board setting aside orders of Regional Transport Autho-

rity — Government restoring original orders of Regional Transport Authority — High Court will not interfere.

The timings fixed by the Regional Transport Authority at the time of the grant of the permit is not one of the conditions of the permit. Section 59(3) mentions the conditions which should be attached to every permit and Section 48(d)(3) gives power to the Regional Transport Authority to attach to a permit any one or more of the conditions mentioned in sub-clauses (i) to (vi) of Section 48(d). There may be also other conditions, but they should be in pari materia with the conditions mentoined above. The Regional Transport Authority is given the power to regulate the timings of arrival and departure of stage carriages whether they belong to a single owner or several owners. This power to regulate has nothing to do with the grant of the permit to individual owners. The only condition in this matter would be a condition that the timing as fixed from time to time should be exhibited on the stage carriage and the timing so exhibited should be observed. For a breach of any of these conditions, a permit may be cancelled, under Section 60 of the Act. Where the Regional Transport Authority changes the timings, Section 48-A has no application, because there has been no variation, cancellation or addition to any condition attached to a stage carriage permit. It follows that Section 64 has equally no application. It is only if there is any variation of a condition that Clause (b) of that section would apply. Clause (f) also has no application. The person opposing an application for variation cannot be deemed to be a person opposing the grant of a permit within Sec. 64(f). Therefore an appeal against the order of the Regional Transport Authority changing the timings to the Central Road Traffic Board is not maintainable. The order of the Central Road Traffic Board purporting to set aside the order of the Regional Transport Authority on appeal is therefore void, and the original order of the Regional Transport Authority stands unaffected. Where the Government sets aside the order of the Central Road Traffic Board and restores the order of the Regional Transport Authority, the High Court will not quash an order of the Government the result of which has been to maintain a lawful order passed by the Regional Transport Authority which could not be interfered with on appeal and which had been improperly set aside by the Central Road Traffic Board. (Para 3)

Anno : Motor Vehicles Act, S. 64 N. 1.

(b) Motor Vehicles Act (1939), S. 64(b) — Clause does not confer right of appeal on person against order varying the condition of permit of another.

The proper construction of Clause (b) to Section 64 is to confine its application to persons aggrieved by the revocation or suspension of the permits granted to them or aggrieved by any variation of the conditions of such permits granted to them. That clause does not confer a right on a person to appeal against an order varying the condition of a permit granted to another person. (Para 4)

Anno : Motor Vehicles Act, S. 64 N. 1.

R. Rajeswara Rao, for Appellant; S. Ranga-swami Iyengar and the Government Pleader, for Respondents.

RAJAMANNAR C. J.: This is an appeal against the judgment and order of Subba Rao J. quashing an order of the Government dated 5th July 1951 passed under S. 64-A of the Motor Vehicles Act. The first respondent before us was granted two stage carriage permits for the route from Vanangupet to Madras. The time fixed for starting the two buses, the one from Madras and the other from Vanangupet was 7 a.m. The appellant before us was granted a permit for the route between Vanangupet and Madhurantakam. The time fixed for starting of his bus was 8-5 a.m. The Regional Transport Authority on an application by the appellant changed the timings for his bus to 6-40 a.m. instead of 8-5 a.m. by his order dated 21st July 1950. Against this order, the first respondent herein preferred an appeal to the Central Road Traffic Board which restored the original timings. Thereupon the appellant preferred a revision to the Government under S. 64-A of the Motor Vehicles Act. The Government set aside the order of the Central Road Traffic Board and restored the order of the Regional Transport Authority. There was an application to this Court for a writ of certiorari to quash the order of the Government and this Court allowed that application and quashed the order on the ground that the order on the face of it did not disclose why the Government passed the order under S. 64-A. The appellant again moved the Government subsequent to the order of this Court and the Government once again set aside the Central Road Traffic Board's order and restored the order of the Regional Transport Authority. The first respondent again filed another application which came on before Subba Rao J. The learned Judge first heard and overruled a preliminary objection raised by the appellant to the maintainability of the application for a Writ of Certiorari based on the ground that the order of the Regional Transport Authority in fixing the timings was an administrative act and therefore the order of Central Road Traffic Board made on appeal and the order of the Government passed under S. 64-A in revision were also administrative orders not liable to be quashed by a Writ of Certiorari. The learned Judge then held that viewed as a judicial order, the order of the Government must be set aside because the Government had not assigned any reasons for their conclusion. His conclusion is stated thus:

"In the present case the latest order of the Government is only a mechanical repetition of the words in S. 64-A of the Act. It is not a judicial determination of the conditions laid down in S. 64-A, which entitle them to interfere with the order of the subordinate authorities. I have, therefore, no alternative but to quash the order of the Government."

In our opinion, the appeal must be allowed, but on a ground which apparently did not loom large before the learned Judge, though it can-

not be said that the point was not taken at all. It was contended by Mr. Bhashyam Aiyangar, for the appellant that an appeal from the order of the Regional Transport Authority changing the timings of his bus did not lie to the Central Road Traffic Board and therefore the Government by restoring the order of the Regional Transport Authority was in effect doing a proper thing, because the order of the Regional Transport Authority had become final. The only provision in the Motor Vehicles Act which confers a right of appeal in certain specified cases is S. 64. The question is whether the first respondent herein could be deemed to fall under any of the clauses (a) to (g) of that section. The learned Judge (Subba Rao J.) was apparently inclined to take the view that he would fall within clause (b), namely, any person "aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof." Before us Mr. Rangaswami Aiyangar for the first respondent suggested as an alternative clause (f), which runs thus:

> "Any person being a local authority or police authority or an association which, or a person providing transport facilities who having opposed the grant of a permit is aggrieved by the grant thereof or by any condition attached thereto."

We have considerable doubt as to the correctness of the learned Judge's conclusion so far as clause (b) is concerned. But it is not necessary to deal with this aspect of the matter, because we agree with Mr. Bhashyam Aiyangar that the change of the timing of the petitioner's bus cannot be held to be a variation of any of the conditions of the permit. If it is not, then neither clause (b) nor clause (f) will apply.

(2) The material provisions of the Act which have any bearing on the question which falls for decision are Secs. 46, 47, 48, 48-A and 59. S. 46 deals with an application for a stage carriage permit. It provides that such an application shall contain certain particulars. Mr. Rangaswami Aiyangar contended that all these particulars when incorporated in the permit would become conditions of the permit. We have no hesitation in rejecting this contention. One of the particulars which has to be mentioned in the application is the type of the vehicle in respect of which the application is made. Surely it cannot be contended that the mention of the particular type in the permit would amount to imposing a condition in respect of the permit. S. 46 deals with the stage of an application by the owner of the vehicle and does not purport to deal with the conditions which may be imposed by the authority granting the permit. S. 47 prescribes the procedure which the Regional Transport Authority has to follow in considering applications for stage carriage permits. He is enjoined to have regard to certain matters and to take into consideration any representations made by persons already providing road transport facilities along or near the proposed route or by any local authority or police authority within whose jurisdiction any part of the proposed route may lie or by any association interested in the provision of road transport facilities. Under S. 47(2), the Regional Transport Authority is bound to refuse to grant a stage carriage permit if it appears from any time table furnished that the provisions of the Act relating to the speed at which vehicles may be driven are likely to be contravened. S. 48 confers certain powers on the Regional Transport Authority. These powers are not all of the same nature and do not belong to the same category. The only common thing is that these powers are to be exercised in the interests of the public and to provide adequate transport facilities to the public. The powers conferred are, (a) the power to limit the number of stage carriages in any particular region or in any specified area or on any specified route, (b) the power to issue a stage carriage permit in respect of a particular stage carriage or a particular service of stage carriages, (c) the power to regulate timings of arrival or departure of stage carriages whether they belong to a single or more owners, (d) power to attach to a stage carriage permit any prescribed condition or any one or more of the conditions enumerated in sub-clauses (i) to (vi) of clause (d). The relevant sub-clause is sub-clause (iii) which runs as follows:

> "That copies of the fare table and the time table shall be exhibited on the stage carriage and that the fare table and time table so exhibited shall be observed."

Under S. 48-A, the Provincial Authority is entitled to vary, cancel or add to any conditions attached to a stage carriage permit in pursuance of clause (d) of S. 48. S. 59(3) prescribes the conditions to which every permit is subject. They are,

(a) that the vehicle or vehicles to which the permit relates are at all times so maintained as to comply with the requirements of Chapter V and the rules made thereunder,

(b) that the vehicle or vehicles to which the permit relates are not driven at a speed exceeding the speed lawful under this Act;

(c) that any prohibition or restriction imposed & any maximum or minimum fares or freights fixed by notification made under S. 43 are observed in connection with any vehicle or vehicles to which the permit relates;

(d) that the vehicle or vehicles to which the permit relates are not driven in contravention of the provisions of S. 72;

(e) that the provisions of this Act limiting the hours of work of drivers are observed in connection with any vehicle or vehicles to which the permit relates; and

(f) that the provisions of Chapter VIII so far as they apply to the holder of the permit are observed.

(3) In exercise of the powers conferred on the Government rules have been framed under the Act. Rule 269 relates to the change of timings. It runs thus:

> "The transport, from time to time may (i) by a general order prescribe a schedule of timings for stage carriages running on specified routes; or
>
> (ii) by a special order, prescribe a schedule of timings for each stage carriage."

R. 270 provides that when a schedule of timings has been prescribed under R. 269, every stage

carriage on such a route shall run in accordance with it, except when prevented by accident or other unavoidable cause or when otherwise authorised in writing by the authority granting the permit. R. 208 is in these terms:

"(a) Upon application made in writing by the holder of any permit, the Transport Authority may at any time, in its discretion, vary the permit or any of the conditions thereof subject to the provisions of sub-rule (b).

(b) If the application is for the variation of the permit by the inclusion of an additional vehicle or vehicles or if the grant of variation would authorise transport facilities materially different from those authorised by the original permit the Transport Authority shall deal with the application as if it were an application for a permit."

In our opinion, the time fixed by the Regional Transport Authority at the time of the grant of the permit is not one of the conditions of the permit. The sections above referred to clearly indicate what is meant by a condition attached to a stage carriage permit. S. 59(3) mentions the conditions which should be attached to every permit and S. 48(3) gives power to the Regional Transport Authority to attach to a permit any one or more of the conditions mentioned in sub-clauses (i) to (vi) of S. 48(d). There may be also other conditions, but they should be in 'pari materia' with the conditions mentioned above. The Regional Transport Authority is given the power to regulate the timings of arrival and departure of stage carriages whether they belong to a single owner or several owners. This power to regulate has nothing to do with the grant of the permit to individual owners. It is a comprehensive power conferred on the authority to be exercised in the interests of the general public. The only condition in this matter would be a condition that the timing as fixed from time to time should be exhibited on the stage carriage and the timing so exhibited should be observed. For a breach of any of these conditions, a permit may be cancelled, under S. 60 of the Act. We think, therefore, S. 48-A, has no application to this case, because there has been no variation, cancellation or addition to any condition attached to a stage carriage permit. It follows that S. 64 has equally no application. It is only if there is any variation of a condition that clause (b) of that section would apply. Cl. (f) also has no application. It cannot be said that the first respondent is a person who had opposed the grant of a permit. It is true that S. 208 provides that if there is an application for the variation of the permit which would authorise transport facilities materially different from those attached to the original permit, the procedure to be followed is the same as that prescribed for considering applications for permit; but we do think that because this procedure applies, the person opposing an application for variation could be deemed to be a person opposing the grant of a permit within S. 64(f). We must, therefore, hold that an appeal against the order of the Regional Transport Authority changing the timings to the Central Road Traffic Board was not maintainable. The order of the Central Road Traffic Board purporting to set aside the order of the Regional Transport Authority on appeal is, therefore, void. The result is that the original order of the Regional Transport Authority stands unaffected. This is exactly the result of the order of the Government setting aside the order of the Central Road Traffic Board and restoring the order of the Regional Transport Authority. In these circumstances, we see no reason why this Court should quash an order of the Government the result of which has been to maintain a lawful order passed by the Regional Transport Authority which could not be interfered with on appeal and which had been improperly set aside by the Central Road Traffic Board.

(4) Even if the timing can be said to be a condition attached to a permit, we do not agree with the learned Judge that the first respondent could be treated as a person aggrieved by the variation of the conditions of the permit within the meaning of clause (b) of S. 64. The expression "the permit" in that clause must obviously refer to the permit mentioned in clause (a). That permit is a permit granted to any person by the Transport Authority. We think the proper construction of that clause is to confine its application to persons aggrieved by the revocation or suspension of the permits granted to them or again aggrieved by any variation of the conditions of such permits granted to them. That clause does not confer a right on one person to appeal against an order varying the condition of a permit granted to another person.

(5) In this view it does not become necessary to examine the correctness of the learned Judge's conclusion on the other important question argued before him as to the nature of the order of the Regional Transport Authority in fixing or regulating the timings. On the merits we hold that the order of the Central Road Traffic Board was void, because there was no appeal against the order of the Regional Transport Authority.

(6) The appeal is allowed and the order of the learned Judge quashing the order of the Government is set aside and the application (W. P. No. 171 of 1951) is dismissed. There shall be no order as to costs.

C. R. K./R. G. D. Appeal allowed.

A. I. R. 1952 Madras 548

GOVINDA MENON, J.

M. R. Kalyana Krishna Ayyar, Petitioner v. Lakshmi Ammal and others, Respondents.

Civil Revn. Petns. Nos. 1590 and 1591 of 1949, D/- 9-3-1951.

† Court-fees Act (1870), S. 7 (IV-A) (Mad) — Suit by trustee for recovery of trust property sold as result of decree obtained on mortgage created by previous trustee — Court-fee payable when plaint alleges void nature of transaction and when it ignores it.

For a determination of the question as to what the proper court-fee is, the allegations in the plaint alone are to be looked into.

A trustee cannot be said to have any beneficial interest in the trust property and therefore when he seeks to recover possession of

property invalidly alienated by a preceding trustee, by a suit for a declaration that a decree obtained against the trust was void so far as the trust was concerned, he cannot be deemed to be litigating on any title vested in himself. The correct principle applicable to matters of this kind is that a succeeding trustee may sue to recover possession of property ignoring an invalid or void alienation by the previous trustee and in such a case it is for the alienee to substantiate that the alienation or transaction by the previous trustee is valid and binding on the trust. If the alienee does not substantiate such a transaction, it is open to the succeeding trustee to recover the property as if such an alienation did not exist. The burden of proof in such a case should be on the alienee and not on the trustee, and these are matters to be gone into in the trial of the suits. If the plaintiff persists in keeping the allegations of the alleged void decree in the plaint as framed then he has to pay court-fees under Section 7, Clause (iv-A) (Mad), on the basis of cancellation of decrees referred to in the plaint. But if the plaintiff is prepared to delete those portions of the plaints by amending the same and simply sue to recover possession of the suit properties on the foot of the title of the temple, the court-fee as for recovery of possession and mesne profits, is sufficient. Case law reviewed. (Paras 4, 5, 6)

Anno : Court-fees Act, S. 7 (iv-A) (Mad) N. 1.

S. Venkatachala Sastri and N. Sundara Iyer, for Petitioner; The Government Pleader, for Respondents.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('21) 43 All 547: (AIR 1921 All 118 F B) (Pr 4)

('43) ILR (1943) Bom 19: (AIR 1943 Bom 54) (Pr 4)

('33) AIR 1933 Lah 397: (141 Ind Cas 634) (Pr 4)

('14) 37 Mad 420: (AIR 1914 Mad 445) (Pr 4)

('18) 41 Mad 124: (AIR 1918 Mad 464) (Pr 4)

('24) 46 Mad L J 341: (AIR 1924 Mad 615 (1)) (Pr 4)

('27) 53 Mad L J 533: (AIR 1927 Mad 911) (Prs 3, 4)

('30) 59 Mad L J 714: (AIR 1930 Mad 881) (Pr 4)

('37) 45 Mad L W 380: (AIR 1937 Mad 449) (Pr 3)

('40) AIR 1940 Mad 628: (1941-1 Mad L J 329) (Pr 4)

('40) ILR(1940) Mad 123: (AIR 1939 Mad 867) (Prs 3, 4)

('40) ILR (1940) Mad 259: (AIR 1940 Mad 113 F B) (Pr 5)

('41) ILR (1941) Mad 708: 1941-1 Mad L J 414: (AIR 1941 Mad 493) (Pr 3)

('49) C R P No. 426 of 1949: (AIR 1951 Mad 793) (Pr 5)

ORDER: On a court-fee slip of the inspecting Court-fee Examiner, the learned Subordinate Judge of Palghat held that in the suits out of which these civil revision petitions arise, the plaintiff should pay court-fee under S. 7, clause (iv) (a) of the Court-fees Act, on the basis of the cancellation of the decrees referred to in the plaints in those suits. The plaintiff contends that the order of the learned Subordinate Judge directing the payment of court-fee on the above basis, is without jurisdiction and seeks to revise the orders of the lower Court.

(2) Both the suits are for recovery of possession of immovable properties on the strength of title with rents or mesne profits. The plaintiff is the executive officer of the Mangalam Anchumarthi temple in Palghat taluk, appointed by the Hindu Religious Endowments Board and seeks to recover possession of the properties mentioned in the plaints on the strength of the title of the temple. In the plaints it is stated that the previous trustees have, without the sanction of the Hindu Religious Endowments Board, created mortgages over suit properties which culminated in decrees being passed for certain amounts charging the properties and as a result of such decrees, those properties were sold in Court auction and purchased by the defendants, some of whom have alienated the same to third parties. It is stated in the plaints that these mortgages and sales are not binding on the trust and therefore the executive officer, on behalf of the temple, is entitled to recover possession of the properties with past mesne profits and damages as claimed in the plaints.

(3) The learned Subordinate Judge held that the plaintiff being the present executive officer is not entitled to ignore these mortgages and sales but should pay court-fee as if for cancelling all these decrees and on that basis the plaintiff was asked to pay additional court-fee valuing the suits under S. 7, Clause (iv) (a) of the Court-fees Act. The previous hereditary trustees of the suit temple are arrayed among the defendants and the purchasers as well as their alienees are also made defendants. The learned Judge relied upon a decision of this Court in 'RAMASUBBA AIYAR v. AYYALU NAIDU', ILR (1941) Mad 708: 1941-1-M L J 414, where certain persons, representing the general body of worshippers in a temple, sued for a declaration that a decree obtained against the temple trustees was collusive and not binding on the temple and therefore wanted a declaration to that effect. In such a case, it was found that they are liable to pay court-fee under S. 7, clause (iv) (a) of the Court-fees Act. That decision proceeded on the basis that since the plaintiffs wanted to represent the temple itself and were not suing as individuals, they could do so only if the decree against the temple is cancelled. Mockett J. considered various cases of this Court including one by Venkataramana Rao J. in 'VALLABHACHARYULU v. RANGACHARYULU', 45 Mad L W 380 and came to the conclusion that the suit ought to be valued in that way. The learned Subordinate Judge distinguished the two cases cited on behalf of the plaintiff, viz., 'RAJAH OF KALAHASTI v. MUNI VENKATADRI RAO GARU', 53 Mad L J 533 and 'LAKSHMUDU v. RAMUDU', ILR (1940) Mad 123, on the ground that those cases related to a total prohibition regarding alienation and as such, any such alienation would not be binding on the properties or on the estate.

(4) It is quite clear that for a determination of the question as to what the proper court-fee is, the allegations in the plaints alone have to be looked into, though there is a body of

case law to the effect that the substance of the suit has got to be considered when ascertaining the proper court-fee. See 'CHIDAMBARANATHA v. NALLASIVA', 41 Mad 124. It has been held by a Bench of this Court in 'M. V. CHAPPAN v. P. RARU', 37 Mad 420, that where the trustee of a Malabar devaswom first executed an othi for Rs. 50 and subsequently renewed the same in a consolidated othi for Rs. 1650 and further created a purankadam (mortgage) for Rs. 1500 over the same property, and the succeeding trustee sued to redeem the othi for Rs. 50 treating the later mortgages as invalid and not binding on the trust, the suit as framed was maintainable, because the succeeding trustee was not bound to sue to set aside the later mortgages created by his predecessor. On the facts of that particular case, it happened that the trustee who created the first mortgage was a karnavan of a tarwad and the subsequent trustee was the succeeding karnavan because the hereditary trusteeship in the temple vested in the family. The learned Judges held that treating the case as that of a member of tarwad seeking to recover possession of properties mortgaged by his karnavan it is unnecessary for the member to set aside the mortgage granted by the karnavan. It is open to the succeeding karnavan to recover possession on the title of the tarwad and he would be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienations on the other members of the tarwad. The learned Judges further expressed the opinion that the case would be different where the plaintiffs themselves have executed the instrument under which the defendant claims. This decision has been considered as settling the law that where a succeeding karnavan of a tarwad impugns a previous transaction by his predecessor in office, it is open to him to ignore the transaction and recover the property on the strength of the title of the family or on the strength of any valid transaction binding on the tarwad. But the facts of the case show that the suit related to property which belonged to a temple and the karnavan was only a trustee. In my opinion that principle should be applied to cases of trustees of public temples also. If a trustee alienates property or creates an encumbrance over the property, which would not be binding on the trust, it is open to the succeeding trustee to ignore such a transaction and claim the property on the basis of the title of the temple. So far as public trusts are concerned, the principle governing the representation in suits is laid down in 'RATNAM PILLAI v. NATRAJA DESIKAR', 46 Mad L J 341 and that principle is that on the death or removal of a trustee impleaded in a suit what takes place is the devolution of the office, and the person entitled to be impleaded in the suit is the successor to the office. This is not affected by the fact that the office is hereditary which merely means that the office holder must be sought among the heirs or in the tarwad of the deceased. See 'SEKHARA MENON v. NARAYANAN', 59 Mad L J 714. As one trustee does not claim to succeed to the rights and obligations of another trustee, but simply comes into the Office as representing the trust, it cannot be said that the actions of a previous trustee can be held to be valid and binding on the succeeding trustee, if such actions would not bind the trust. It is also clear that a trustee himself is not estopped against his own actions. The learned advocate for the petitioner, in addition to relying upon the two cases quoted before the learned Subordinate Judge, also invited my attention to 'RAMU MUDALI v. SHOBAGMUL', AIR (27) 1940 Mad 628 and 'KATWARI v. SITARAM TIWARI', 43 All 547 (F B) to the effect that in the circumstances of a case like the present, the sale can be ignored. Wadsworth J. in 'RAMU MUDALI v. SHOBAGMUL', AIR (27) 1940 Mad 628, held that where, on the face of the decree, it can be seen that the Court which passed the decree had no jurisdiction, or if there are apparent reasons for doubting its jurisdiction to pass the decree, then the executing Court can go into the question whether or not the decree is a nullity; but the extent to which the executing Court can go into the validity of a decree, which is not on its face one passed without jurisdiction, is very limited. It is difficult to see how this decision can have any application to the facts of the present case, because on the face of the decree on the mortgage to which the then trustees were impleaded as parties, it cannot be held that it was void or inoperative. In the Allahabad case, 43 All 547 (FB), the learned Judges had to consider a sale of certain property in contravention of S. 20 of the Agra Tenancy Act, 1901, and they held that an executing Court is entitled to go into the question as to whether the decree for sale of the occupancy holding is contrary to S. 20 of the Agra Tenancy Act, 1901, even if the decree, on the face of it, is one directing the sale of the holding or is a simple money decree. This case is more analogous to the case in 'RAJAH OF KALAHASTI v. MUNI VENKATADRI RAO GARU', 53 Mad L J 533, where Odgers and Curgenven JJ. held that in view of the object of the Madras Impartible Estates Act of 1904, viz., the preservation of the estates included in the schedule to it in the hands of successive heirs as a measure of public policy, a succeeding holder of an impartible zamindary is entitled to raise the objection against the sale of any portion of the estate for a debt due from a previous zamindar for payment of arrears of land revenue on the zamindary. The fact that a final decree making the estate liable for such a debt in the hands of a successor has been passed without objection, or even by consent, in the absence of the Collector's consent in writing, is no bar to the executing Court holding, at the instance of the successor, that the decree is invalid and unexecutable as against the estate. This decision proceeded on the footing that the alienation of an impartible estate, in contravention of S. 6, is opposed to public policy. With regard to a Desabandham inam, it has been held in 'LAKSHMUDU v. RAMUDU', ILR (1940) Mad 123 at pp. 129 and 145 that the sale of such an inam-holding being void, as it is opposed to public policy, such a sale would not bind the properties. The exception to the general rule that an executing Court could not go behind a decree is further illustrated in the judgment in 'THAKER DAS v. ROSHAN DIN', AIR (20) 1933 Lah 397. Where a non-agriculturist to whom agricultural land has been mortgaged, applies for sale of the mortgaged property in execution of a decree which allows him to recover the mortgage money by sale of the

mortgaged property, the executing Court must hold its hand and not put to sale the property which has been rendered non-saleable by the Alienation of Land Act, Punjab, in spite of the fact that the decree-holder has obtained a decree for sale of the property. The principle enunciated here is precisely the same as that enunciated in 'LAKSHMUDU v. RAMUDU', I L R (1940) Mad 123. Reference may also be made to 'BAI SURAJ v. HARIBHAI', IJR (1943) Bom 19 for a similar proposition. But none of these cases can be of real help for considering the question now at issue because if the Endowments Board had granted sanction to the mortgage which was for the necessity and benefit of the trust, then the sale would be valid. All that S. 76 of the Madras Hindu Religious Endowments Act, II of 1927, states is that a mortgage, sale or exchange, and a lease for a term exceeding five years, of immovable property belonging to a temple, shall not be valid or operative unless such an alienation is necessary or beneficial to the temple and is sanctioned by the Board. Whether the alienations in question, which fructified into the mortgage decrees, are necessary or, are beneficial to the temple, and have been sanctioned by the Board are questions of fact which had to be decided in the suits and the mere fact that the plaints recite that such alienations have not been sanctioned by the Board and are not beneficial would not make them not binding on the temple at all.

(5) Mr. V. V. Raghavan for the Government Pleader invited my attention to a recent decision of the learned Chief Justice and Viswanatha Sastri J. in 'D. NARASAMMA v. D. SATYANARAYANA', C. R. P. No. 426 of 1949: (AIR (38) 1951 Mad 793) where this Court, after considering the various cases, held that where a minor questions the validity of a decree passed against him, it cannot be said that the decree was 'ex facie' void or one passed without jurisdiction, and therefore in a suit to set aside such a decree the proper Court fee payable is as if it is one for cancellation of the decree within the meaning of S. 7, Clause (iv) (a) of the Court-fees Act. The learned Judges also referred to rule (2) of the Court-fee rules framed under S. 9 of the Suits Valuation Act which came into force on 1-11-1943 and is printed at page 174 of a useful publication, "A Guide to the Law of Court-fees in Madras by Krishnamurthi and Mathurbhutham". Rule 2 states that in suits for a declaration, or for an injunction consequent on a declaration, that a decree for money, or any other property having a money value, is not binding on the plaintiff who was not a party to the decree, the subject matter of the suit shall, for purposes of jurisdiction and Court-fee, be valued at the amount or value of the property for which the decree was passed. This rule was not brought to the notice of the learned Judge in the lower Court. Reference was also made to observations in the judgment in 'RAMASWAMI v. RANGACHARIAR', ILR (1940) Mad 259 at pp. 260 and 278 (FB) regarding the liability of a quondam minor suing to set aside decrees obtained against the joint Hindu family of which he was a member. It was held therein that in respect of alienations by the father under which possession had passed to the alienees, as the minor was in effect asking for their being set aside and for his being placed in possession of his share of the property alienated, he must stamp his relief in accordance with the provisions of S. 7 (iv) of the Court-fees Act; and in respect of decrees passed against the minor in suits in which he had been 'eo nomine' impleaded as a party, he must pay Court-fee as prescribed by S. 7, Clause (iv) (a) of the Court-fees Act. Such decrees would bind the plaintiff until set aside and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. Therefore the learned Judges held that the plaintiff must be held to have impliedly asked for their cancellation and must accordingly stamp his plaint 'ad valorem' on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though limited to the extent of his share in the family estate. It seems to me that the principle enunciated therein, though analogous, cannot be applied 'ad idem' to the case of a trustee. A trustee cannot be said to have any beneficial interests in the trust property and therefore when he seeks to recover possession of property invalidly alienated by a preceding trustee, (by?) a suit for a declaration that a decree obtained against the trust was void so far as the trust was concerned, he cannot be deemed to be litigating on any title vested in himself. The correct principle applicable to matters of this kind is that a succeeding trustee may sue to recover possession of property ignoring an invalid or void alienation by the previous trustee and in such a case it is for the alienee to substantiate that the alienation or transaction by the previous trustee is valid and binding on the trust. If the alienee does not substantiate such a transaction, it is open to the succeeding trustee to recover the property as if such an alienation did not exist. The burden of proof in such a case should be on the alienee and not on the trustee.

(6) Therefore if the plaintiff in these cases had sued for recovery of possession of the properties on the strength of the title of the temple treating the defendants as trespassers liable to pay mesne profits, then the plaintiff need pay court-fee only for recovery of possession and mesne profits and nothing more. But the matter has been complicated by lengthy allegations in the plaints regarding the invalidity of the mortgages created by the previous trustees as well as the void nature of the decrees obtained against the previous trustees. As I have already stated, 'ex facie', it cannot be said that the Board did not grant sanction for the execution of the mortgages or that such mortgages are not necessary or beneficial to the trust. Those are matters to be gone into in the trial of the suits. Therefore, if the plaintiff persists in keeping those allegations in the plaint as framed, it cannot be said that the order of the lower Court is wrong. But if the plaintiff is prepared to delete those portions of the plaints by amending the same and simply sues to recover possession of the suit properties on the foot of the title of the temple, the court-fee he has paid would be sufficient. If he is so advised, he can amend the plaints and in such a case it would be the duty of the defendants to prove that the mortgages and the decrees are binding on the temple. In my opinion the order of the lower Court cannot be said to be without jurisdiction on the footing of the plaints

as now framed. The civil revision petitions are therefore dismissed, but in the circumstances, without costs.

C.R.K./R.G.D. Revisions dismissed.

A. I. R. 1952 Madras 552

BALAKRISHNA AYYAR J.

Ponnammal alias Guruvammal and others, Petitioners v. Kanthammal and others, Respondents.

Civil Revn. Petn. No. 1383 of 1950, D/- 16-4-1951.

Court-fees Act (1870), S. 7(iv) (c), and 7 (iv-A) (Mad) — Suit for possession and declaration that surrender deed was null and void — Court-fee payable — (Specific Relief Act (1877), S. 39).

A person who is not a party to a decree or a document is not bound to sue for its cancellation. In fact, it is logically impossible for a person who is not a party to a document or to a decree to ask for its cancellation. AIR 1940 Mad 113 (F B) and AIR 1939 Mad 894, Foll. (Para 2)

Where, therefore, a plaintiff sued to recover possession of property and there being doubt whether she was entitled to recover the property on her sole behalf prayed in the alternative for recovery of possession either for herself alone or on behalf of herself and defendant 1 and also prayed for a declaration that surrender deed executed by defendants 1 and 2 in favour of defendant 3 and the alienations made by these defendants were null and void.

Held that the relief which the plaintiff asked could be given without a cancellation of the document and therefore she was not required to pay court-fee for the cancellation of the document. (Paras 3, 4)

Anno : C. F. Act, S. 7(iv)(c) N. 5 Pt. 13; Spe. Rel. Act, S. 39 N. 3.

T. M. Krishnaswami Iyer and N. Sivaramakrishna Iyer, for Petitioners; The Government Pleader, T. R. Venkataraman, N. Vanchinathan and R. Ramamurthi Iyer, for Respondents.

Cases referred to :

('40) ILR (1940) Mad 73: (AIR 1939 Mad 894) (Pr 2)

('40) ILR (1940) Mad 259: (AIR 1940 Mad 113 F B) (Pr 2)

('41) ILR (1941) Mad 708: (AIR 1941 Mad 493) (Pr 3)

ORDER: Venkata Reddi and Bapu Reddi were two brothers. The former died in 1917 leaving two widows of whom only one, viz., the first plaintiff is now surviving. Bapu Reddi died in 1936 leaving behind him two widows who are defendants 1 and 2. Venkata Reddi and Bapu Reddi had a sister named Chinnammal and the 3rd defendant is the son of this Chinnammal. A few days after Bapu Reddi died defendants 1 and 2 executed a surrender deed of their entire interest in the estate in favour of 3rd defendant. It is alleged in the plaint that the mother of 3rd defendant also joined in the execution of the document. The plaint alleges that the law applicable is the Mitakshara law as it prevails in Travancore and that according to that system of law on the death of Venkata Reddi and Bapu Reddi their estate vested in all the widows together.

The plaint further alleges that the surrender deed executed by defendants 1 and 2 and Chinnammal is void and of no legal effect whatsoever. After the execution of the surrender deed various alienations were effected. The plaintiffs, therefore sued to recover possession of the entire estate from defendants 1 to 3 and their alienees. In view of the doubt whether the 1st plaintiff was entitled to recover the properties on her own sole behalf the prayer was cast in the alternative for recovery of possession either for herself alone or on behalf of herself and defendants 1 and 2. There was also a prayer for a declaration that the surrender deed executed on 5th October 1936 by defendants 1 and 2 in favour of 3rd defendant and the alienation made by defendants 1, 2 and 3 are null and void and of no effect whatsoever as against the plaintiffs. Court-fee was paid as in a suit for possession. The Court-fee Examiner took the view that the alternative prayer could not be granted without the cancellation of the surrender and other deeds and that in consequence the plaintiff should pay court-fee on the market value of the shares of the defendants in the suit properties. This objection was upheld by the learned Subordinate Judge of Tirunelveli and it is against this order that the present revision petition has been filed.

(2) The law in this province is perfectly clear that a person who is not a party to a decree or a document is not bound to sue for its cancellation. At page 279 in 'RAMASWAMI v. RANGACHARIAR', ILR (1940) Mad 259, the legal position has been thus explained.

> "If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

In fact it is logically impossible for a person who is not a party to a document or to a decree to ask for its cancellation. This is clearly explained by Wadsworth J. in the decision 'VELLAYYA v. RAMASWAMI', ILR (1940) Mad 73,

> "When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void 'in toto', and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled 'in toto'. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed."

In support of the decision of the learned Subordinate Judge it was argued: If the 1st plaintiff had been asking for possession of the properties only on her own behalf these decisions would apply and she could not have been required to sue for cancellation of the surrender and other deeds. But when she prayed in the alternative for possession on behalf of herself and also on behalf of defendants 1, 2 and 3 she was asking for a relief which the Court could not grant without cancelling the settlement and subsequent deeds and that, therefore, she must pay court-fee as if she had explicitly and in plain terms asked for the cancellation of those documents. It seems to me that there is a fallacy in this reasoning.

As has been already explained the first plaintiff was not a party to any of those transactions and logically it is impossible for her to ask that documents to which she was a stranger should be cancelled. What the plaintiff in effect says is this: By the arrangements which these third parties have entered into between themselves my rights are injured and I am damnified. I am entitled to get possession of those properties. If I cannot get them exclusively for myself and into my sole hands and I am required to take them along with defendants 1 and 2, well, give me such possession. I am not interested in the right and obligations as between defendants 1 and 2 and 3 'inter se', or between them and their alienees. If as a result of granting my prayer the alienees suffer they must be left to their devices whether by way of suits for damages or otherwise. In my opinion the relief which the plaintiffs ask can be given without a cancellation of the documents. The cancellation of a document implies the wiping out of the transaction even as between the parties thereto, they being relegated to their 'status quo ante'. If the prayer of the plaintiffs is granted without the documents being cancelled the alienors would be in the position of persons who have either broken their contract or are unable to carry out their obligations under the agreements. The document would not be wiped out.

(3) Mr. Ramamurthi who tried to support the decision of the Court below referred to me to the decision in 'RAMASUBBA v. AYYALU', ILR (1941) Mad 708. The facts in the case were: A grocer who had supplied goods brought a suit against a temple represented by its hereditary trustee. The suit was founded upon a promissory note and the promissory note had been executed in respect of goods supplied by the plaintiff. The plaintiff did not press the suit against the trustee against whom it was dismissed but he did obtain a decree against the temple. Three worshippers of the temple subsequently filed a suit in which they impugned the decree passed against the temple on the ground that the trustee had not been looking after the temple's interests but allowed them to be sacrificed in return for his being exonerated. The Court held that though the second suit was ostensibly by three worshippers it was really by the temple and that as the previous decree was against the temple the subsequent suit must be treated as one for cancellation of the earlier decree in the earlier suit and court-fee must be paid accordingly. The learned Judges who decided that case stressed one circumstance which distinguishes that case from the present one, viz., that in that suit the plaintiffs, the worshippers, did not claim any personal benefit. This point mentioned by Mockett J. was also explained by Wadsworth J. when he remarked:

> "That the plaintiffs did not ask for the protection of any interest of their own. By the simple device of putting both the temple and its present trustee into the array of defendants they hope to disguise the fact that they are in substance praying on behalf of the temple for the cancellation of a decree obtained against the temple."

It will be noticed that in the present case plaintiff is seeking to protect her own interests and there is no reason to suspect at this stage that she is in any manner acting for or on behalf of persons who are parties to execute documents. The decision cited by Mr. Ramamurthi does not, therefore, apply to the facts of this case.

(4) Plaintiffs were only bound to seek for a declaration and pay court-fee on that basis. That has been done. The objections taken by the Court-fee Examiner and upheld by the learned Subordinate Judge are in my opinion unsustainable. The revision petition is, therefore, allowed with costs.

C.R.K./V.R.B. Revision allowed.

A. I. R. 1952 Madras 553

SUBBA RAO J.

V. Thanappa Chetty, Petitioner v. Arcot Govindaswami Naicker and another, Respondents.

Writ Petn. No. 399 of 1951, D/- 6-11-1951.

† Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XV (15) of 1946), S. 7(3)(a)(ii) — "To the possession of which he is entitled" — Possession as tenant.

In the case of a non-residential building the landlord can evict a tenant only if he is not in possession of a non-residential building of his own or if he is not entitled to the possession of any such building. The tenant under the Act has a right to possession unless and until he is evicted under the provisions of the Act. Under the provisions of the Act, a landlord will not be entitled to the possession of his non-residential building if he is in possession of another non-residential building as a tenant; for, in such a case he is entitled to possession of that premises. Case law discussed. **(Paras 5, 14)**

D. Ramaswamy Iyengar and P. R. Varadarajan, for Petitioner; K. S. Rajagopalachari, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('49) AIR 1949 F C 124: (1949 FCR 262) (Pr 10)

('43) 1943-1 Mad L J 207: (AIR 1943 Mad 413) (Pr 12)

('49) 1949-1 Mad L J 452: (AIR 1949 Mad 765) (Pr 13)

('49) 1949-2 Mad L J 138: (AIR 1950 Mad 56) (Pr 13)

(1881) 7 A C 91: (51 L J P C 8) (Pr 7)

(1945) 1 K B 577: (1945-2 All E R 130) (Pr 11)

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Subordinate Judge, Chittoor in C. M. A. No. 41 of 1949.

(2) The petitioner is the owner of shop No. 7/9 in Bazar Street, Chittoor. The respondent is his tenant and has been carrying on business in pulses in the said shop. In the same street, the petitioner has been carrying on a similar business in another shop. That shop is owned by one Kandappa Chetti and the petitioner is his tenant. Kandappa Chetti filed an application under the Madras Buildings (Lease and Rent Control) Act, 1949 (hereafter referred to as the Act) for evicting the petitioner. That application was dismissed. Subsequent to the dismissal of that application, the petitioner filed an application under S. 7 of Act XV (15) of 1946 before the Rent Controller, Chittoor for evicting the respondent. The Rent Controller dismissed that application on the ground that the petitioner failed to establish that the respondent committed any act of waste or that he has been in arrears of rent. He filed an appeal to the Subordinate Judge of Chittoor. In appeal, the petitioner's right to evict was based upon the contention that he has no other non-residential building of his own or to the possession of which he is entitled. The learned Judge rejected his contention and confirmed the order of the Rent Controller. The present application is filed for issuing a writ of certiorari to quash that order.

(3) The learned Counsel for the petitioner argued that the petitioner is in possession of the house of Kandappa Chetty by reason of the privilege conferred on him under the Act and not by reason of any title in him and therefore he would be entitled under the provisions of the Act for evicting the respondent from the premises. The question raised in this case turns upon the construction of S. 7(3) of the Act. S. 7(3) reads:

"(a) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession of the building:

(i) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned;

(ii) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled."

(4) It will be seen from the aforesaid provisions that in the case of a residential building, a landlord can evict a tenant if he is not occupying a residential building of his own whereas in the case of a non-residential building he can do so only if he is not in possession of a non-residential building of his own or if he is not entitled to the possession of any such building. The antithesis is between the ownership of a building and a building to the possession of which he is entitled. To narrow the point further, is he entitled to the possession of a non-residential building? The dictionary meaning of the word "entitle" is to give a claim, right or title to. Can it be said that a person, who is in possession of a premises under the provisions of the Act, is a person, who is entitled to its possession? Tenant is defined under S. 2(4) as follows:

"Tenant means any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart stand or slaughter house or of rents for shops has been farmed out or leased by a Municipal Council or local board or the Corporation of Madras."

(5) The definition of the word "tenant" takes in persons, who are not strictly tenants under general law. The statute creates a statutory tenancy even in respect of persons continuing in possession after the termination of the tenancy in his favour. Landlord is defined under S. 2(3). The definition of landlord under the Act is comprehensive enough to take in persons, who are not strictly landlords in general law. The rights and liabilities 'inter se' between the landlord and tenant so defined are regulated and governed by the provisions of the Act. S. 4 prescribes the mode of fixing fair rent. S. 5 enables the landlord to raise the fair rent only under certain circumstances mentioned therein. S. 6 precludes the landlord to claim or receive or stipulate for the payment of any premium or other like sum in addition to the fair rent. S. 7 prevents a landlord from evicting a tenant except in accordance with the provisions of the section. S. 8 prohibits the landlord from cutting or withholding any of the amenities enjoyed by the tenant. S. 11 controls the power of the landlord from converting a non-residential building into a residential building and 'vice versa'.

It will, therefore, be seen that the relationship between the landlord and tenant even in cases in which such relationship terminated under the provisions of the Transfer of Property Act, continues subject to the provisions of the Act. The rights of the tenants as well as the landlord are defined. The tenant under the Act has a right to possession unless and until he is evicted under the provisions of the Act. Under the provisions of the Act, a landlord will not be entitled to the possession of his non-residential building, if he obtains an order for eviction against another tenant in respect of another non-residential building or if he is in possession of another non-residential building as a tenant; for in either case he is entitled to possession of that premises. The words used in the section, viz, "to the possession of which he is entitled" are wide and I do not see any reason why the latter category should be excluded from the express words used which in their ordinary meaning take in that class.

(6) The petitioner is a tenant of the non-residential building owned by Kandappa Chetty. It is said that the said Kandappa Chetty gave him notice to quit. But as aforesaid, his application to evict the petitioner under the provisions of the Act was dismissed. Whether his tenancy terminated under general law or not, he is entitled to be in possession under the Act.

(7) I shall now proceed to consider the cases cited by the learned counsel for the petitioner in support of his argument. In 'IN RE SUTTON GOLD-FIELD GRAMMER SCHOOL', (1881) 7 A C 91, the facts are:

"The Charity Commissioners framed two schemes by which it was proposed to withdraw from that part of the funds of the Corporation which were applicable to educational

purposes a sum equal to £15,000 to be applied as part of the foundation of the Sutton Gold-field Grammer School."

(8) It was said that having regard to the provision of 11th section of the Act of 1869, as amended by the 6th section of the Act of 1873, the scheme was open to objection for not preserving, or rather for abolishing or modifying the privileges or educational advantages to which persons of a particular class of life were entitled. The Judicial Committee held that S. 11 protects only vested interests.

(9) They observed:

"It is.....'Any privileges or educational advantages to which a particular class of persons' or (as extended by the later Act) persons in a particular class of life.....'are entitled' i.e., have a legal title. A person is not entitled simply because he has enjoyed, by the permission or the bounty of another, some benefit either for a longer or shorter period; and therefore the question is, whether the persons in this particular class of life are entitled to these educational advantages. Now, when we investigate the title, we shall find that the original charter gave no title at all to these particular persons or persons in this particular class of life."

(10) Neither the facts of the case nor the observations quoted above are apposite to the present case. But the learned counsel for the petitioner relied upon the observations and contended that the petitioner in the present case has no legal title but is permitted to continue in possession under what he called "the statutory bounty". As I pointed out, under the statute, the petitioner has a right to continue in possession till he is evicted under the provisions of the Act. The following observations of the Federal Court in 'KAI KHUSHROO v. BAI JERBAI', AIR (36) 1949 F C 124 at p. 128 are relied upon:

"With regard to the first part of the argument of the learned Counsel for the appellant, it may be pointed out that in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired."

(11) It was argued that a statutory immunity is different from a right to possession. But in my view a statutory immunity is not inconsistent with a right to possession. The statutory immunity itself creates a right in him to continue in possession till he is evicted under the provisions of the Act. Their Lordships neither considered nor expressed the opinion that a tenant has no right to possession under the statute. 'MORRISON v. JACOBS', (1945) 1 K B 577 relied upon by the learned Counsel has really no bearing on the question to be decided. There the learned Judges held that mere receipt of rent from a tenant, who continued to be in possession after the tenancy expired would not create a new contractual tenancy. Scott L. J. pointed out that:

"where, in such circumstances, the landlord desires to claim possession of the dwelling house on the ground that he reasonably requires the dwelling house for his own occupation as a residence, pursuant to S. 3, subsection 1 of, and para (h) of Sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933, he need not before suing serve any notice to quit on the tenant". The fact that a contractual tenancy expired and is not created afresh by the receipt of rent does not affect the question whether the tenant has a right to be in possession under a statutory tenancy till he is legally evicted.

(12) The decision of Horwill J. in 'VENKATASAMI NAICKER v. NAVANEETHAKRISHNA CHETTIAR', 1943-1 Mad L J 207 does not also afford any assistance in deciding the question raised in this case. There the plaintiff's predecessors-in-title brought the property to sale and purchased it in 1925. The auction purchaser applied for delivery in the same year. But the tenant in actual possession obstructed delivery of possession to the purchaser on the ground that the lease in his favour would continue for two more years. Symbolical delivery being declined, the application was dismissed and the plaintiff's predecessor-in-title took no further steps. In 1932 the plaintiff bought the property and filed the suit within 12 years from the date when the term of the tenancy expired. The learned Judge held that Art. 137 of the Limitation Act applied and that time would begin to run only from the date on which the plaintiff's predecessor-in-title was entitled to physical possession of the land, i.e., from the date when the term of the tenancy expired.

(13) The learned Judge held having regard to the provisions of Arts. 136, 137 and 138 of the Limitation Act that possession referred to in Art. 137 is actual possession and not constructive or symbolical possession. I do not see any relevancy in the citation of this case. Further the petitioner in this case has certainly a right to physical possession and indeed is in possession. The judgment of Rajamannar C. J. and Rajagopalan J. in 'ANANDAKRISHNA CHETTY v. M. K. & CO.', 1949-2 Mad L J 138 is not of any help as the learned Judges expressly left open that question. Nor does the decision of Rajamannar C. J. and Raghava Rao J. in 'MUHAMMADUNNY v. M. UNNIRI', 1949-1 Mad L J 452 bear on the point raised, for in that case the learned Judges only held that notwithstanding the provisions of the Act, a suit for eviction would lie. The aforesaid decisions do not support the learned counsel's contention before me.

(14) I therefore hold that the petitioner has a right to continue in possession of the non-residential building owned by Kandappa Chetty till he is duly evicted under the provisions of the Act and therefore he is not entitled to evict the respondent.

(15) The petition therefore fails and is dismissed with costs. Advocate's fee Rs. 100.

C.R.K./D.H. ***Petition dismissed.***

A. I. R. 1952 Madras 555

SUBBA RAO J.

A. C. Abdul Gaffoor, Petitioner v. The State of Madras, represented by the Secretary, the Department of Health, Fort St. George, Madras and another, Respondents.

Writ Petn. No. 494 of 1951, D/- 9-11-1951.

(a) Municipalities — Madras District Municipalities Act (VI (6) of 1920), S. 252 — Setting aside order without opportunity of explaining to affected party — Constitution of India, Art. 226.

The power given under S. 252 is quasi-judicial in nature and the Government cannot set aside the order of the Municipality without giving an opportunity to the applicant for explanation. The Government cannot ignore the only safeguard provided to the affected party under S. 36 of the Act, viz., giving an opportunity to the person concerned for an explanation. If the Government have set aside the order of the Municipality without giving notice to the party it is liable to be quashed. (Para 4)

(b) Municipalities — Madras District Municipalities Act (VI (6) of 1920), Ss. 36 and 252 — Distinction.

Where there is a specific provision and a general provision the specific provision shall prevail over the general provision. Under S. 36 the Government's jurisdiction to set aside the resolution or the order granting permission by the municipality is only on any of the grounds specified in that section. But S. 252 does not impose any such limitation on the powers of the Government to interfere with the order of the Municipality. (Para 3)

K. Umamaheswaran and S. Kulasekhara Reddi, for Petitioner; The Government-Pleader and Kondiah, for Respondents.

ORDER: This is an application for issuing a writ of certiorari to quash the proceedings of the Government in G. O. Ms. No. 3135 Health dated 11-9-1951.

(2) The petitioner is the proprietor of Prabhat Touring Talkies. On 2-6-1951 he applied to the Tadpatri Municipality under S. 250 of the Madras District Municipalities Act for permission to instal an oil engine to run the cinema. The second respondent who is the proprietor of Chand Talkies, Tadpatri, had also applied for a similar permission. On 11-7-1951, the Municipal Council, by resolution No. 89, granted permission to the petitioner. Permission to the second respondent was refused. The Government by order dated 11-9-1951, set aside the resolution of the Municipality and directed the Council to grant forthwith its permission to the second respondent. The present application is filed to quash that order.

(3) Learned counsel for the petitioner contended that the order of the Government in setting aside the resolution of the Municipality without giving an opportunity to the petitioner for explanation is invalid. The relevant provisions of the Madras District Municipalities Act may be read:

Section 36 (1): The Provincial Government may, by order in writing—

(i) suspend or cancel any resolution passed, order issued, or licence or permission granted or

(ii) prohibit the doing of any act which is about to be done or is being done in pursuance or under colour of this Act, if, in their opinion,

(a) such resolution, order licence, permission or act has not been legally passed, issued, granted or authorised, or

(b) such resolution, order, licence, permission or act is in excess of the powers conferred by this Act or any other law, or

(c) the execution of such resolution or order, the continuance in force of such licence or permission or the doing of such act is likely to cause danger to human life, health or safety, or is likely to lead to a riot or an affray;

Provided that the Provincial Government shall before taking action under this section on any of the grounds referred to in clauses (a) and (b) give the authority or person concerned an opportunity for explanation;

Provided further that nothing in this subsection shall enable the Provincial Government to set aside any election which has been held.

250. (1) Every person intending,

(a) to construct or establish any factory, workshop or workplace in which it is proposed to employ steam-power, water-power or other mechanical power or electrical power, or

(b) to install in any premises any machinery or manufacturing plant driven by steam, water or other power as aforesaid, not being machinery or manufacturing plant exempted by rules, shall, before beginning such construction, establishment or installation, make an application in writing to the municipal council for permission to undertake the intended work.

2. The application shall specify the maximum number of workers proposed to be simultaneously employed at any time in the factory, workshop, workplace or premises, and shall be accompanied by—

(i) a plan of the factory, workshop, work place or premises prepared in such manner as may be prescribed by rules made in this behalf by the Provincial Government, and

(ii) such particulars as to the powers, machinery, plant or premises as the municipal council may require by by-laws made in this behalf.

3. The Municipal Council shall, as soon as may be after the receipt of the application;

(a) grant the permission applied for, either absolutely or subject to such conditions as it thinks fit to impose or

(b) refuse permission, if it is of opinion that such construction, establishment or installation is objectionable by reason of the density of the population in the neighbourhood or that it is likely to cause a nuisance.

4. Before granting permission under sub-section (3), the municipal council:

(a) shall, if more than nine workers are proposed to be simultaneously employed at any time in the factory, workshop, workplace or premises, obtain the approval of the Inspector of factories appointed under the Indian Factories Act, 1911, having jurisdiction in the area of the municipality, or if there is more than one such inspector, of the inspector designated by the Provincial Government in this behalf by general or special order, as regards the plan of the factory, workshop, workplace or premises with reference, to:

(i) the adequacy of the provision for ventilation and light,

(ii) the sufficiency of the height and dimensions of the rooms and doors,

(iii) the suitability of the exits to be used in case of fire, and

(iv) such other matters as may be prescribed by rules made by the Provincial Government, and

(b) shall consult and have due regard to the opinion of the municipal health officer where the municipal council employs such an officer and of the district health officer in other cases, as regards the suitability of the site of the factory, workshop, workplace or premises for the purpose specified in the application.

252. The Provincial Government may, either generally or in any particular case, make such order or give such directions as they may deem fit in respect of any action taken or omitted to be taken under S. 250 or S. 251.

The scope of the aforesaid provisions is apparent. No machinery or manufacturing plant driven by steam, water or other power, can be installed in any premises without the permission of the municipality. If S. 252 is not in the statute book, under S. 36 of the Act, the local Government can only set aside the permission issued by the municipality after giving the authority or person concerned, an opportunity for explanation. But under S. 36 the Government's jurisdiction to set aside the resolution or the order granting permission by the municipality is only on any of the grounds specified in that section. But S. 252 does not impose any such limitation on the powers of the Government to interfere with the orders of the municipality. The Government may make such order, or give such directions, as they may deem fit, in respect of any action taken, or omitted to be taken, under S. 250. Where there is a specific provision and a general provision, it is a well-established principle that the specific provision shall prevail over the general provision. But the question remains whether under S. 252 the Government can ignore the only safeguard provided to the affected party under S. 36 of the Act, viz, giving an opportunity to the person concerned for an explanation.

(4) The learned Government Pleader contended that S. 252 confers unlimited powers on the Government and is not conditioned by any safeguards provided under S. 36 and therefore the Government can set aside the order of the municipality without giving an opportunity to the authority concerned, or to the person affected. If this argument be accepted, then it will lead to the anomaly that the Government in exercising a limited power has to give an opportunity to the party affected whereas in exercising an unlimited power it can act arbitrarily. That could not have been the intention of the Legislature. Under S. 252 the Government has certainly the power to set aside the order of the Municipality giving permission to the petitioner. But that order affects very valuable rights of the petitioner. The power given under S. 252 is quasi-judicial in nature and the Government cannot therefore set aside the order of the Municipality without giving an opportunity to the petitioner for explanation. As in this case the Government have set aside the order of the Municipality without giving notice to the petitioner, it is hereby quashed. This order does not preclude the Government from exercising its power under S. 252 of the Act after giving an opportunity to the petitioner for explanation. The petitioner will have his costs of this petition—Advocate's fee Rs. 100.

C.R.K./D.H. *Petition allowed.*

A. I. R. 1952 Madras 557

KRISHNASWAMI NAYUDU J.

S. V. Angidi Chettiar, Petitioner v. Nataraja Textiles Ltd., Respondent.

O. P. No. 409 of 1949, D/- 13-11-1951.

† Companies Act (1913), Sections 166 & 170—Fully paid up share-holder can maintain petition for winding up — There are not limitations apart from those imposed by statute — Pirma facie case that there are assets available in winding up in which he will have tangible interest, need not be shown—(Companies Act (1913), S. 158).

Though the definition of 'contributory' would raise a doubt as to whether the fully paid up share-holder would come within the term, he is a 'contributory' and can, under S. 166 file a petition for winding up as any other contributory. AIR 1930 Mad 240; AIR 1938 All 613, Relied on.

It is not necessary for him to allege and prove and show a 'prima facie' case that there are assets of the company of such amount that will be available in the winding up, and in which he will have a tangible interest. A petition by a fully paid up share-holder contributory must be treated as any other petition for winding up by any creditor or other contributory and each case must be disposed of on its merits. There is no compelling ground to depart from the terms of S. 166 to impose limitations on the right of a fully paid up share-holder to maintain a petition for winding up. The only limitations are those which are provided in S. 166. AIR 1942 Bom 231; AIR 1950 E P 328 and other English Case Law Discussed.

(Paras 1, 5, 7)

Anno: Companies Act, S. 166 N. 1; S. 170 N. 1.; S. 158 N. 1.

K. Veerasami and G. Ramanujam, for Petitioner; V. Thyagarajan and S. Kothandarama Nayanar, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('38) AIR 1938 All 613: (ILR (1938) All 957) (Pr 1)
('42) AIR 1942 Bom 231: (203 Ind Cas 116) (Pr 4)
('50) AIR 1950 E P 328: (52 Pun L R 415) (Pr 2)
('30) 53 Mad 38: (AIR 1930 Mad 240) (Pr 1)
(1866) 1 Ch 555: (35 L J Ch 809) (Pr 4)
(1881) 20 Ch D 442: (51 L J Ch 389) (Pr 2)
(1910) W N 13 (Pr 3)

ORDER: This matter has now been fully argued by counsel. It is established beyond any controversy that though the definition of 'contributory' would raise a doubt as to whether a fully paid up share-holder would come within the term, he is a 'contributory' and can, under Section 166 of the Indian Companies Act, file a petition for winding up as any other contributory. Apart from the English decisions, Indian Courts have placed this beyond any dispute. In 'SABAPATHI PRESS

CO. LTD. v. SABAPATHI RAO', 53 Mad 38, with reference to a similar argument raised on the definition of 'contributory' in S. 158 of the Indian Companies Act, a Bench of this Court held that a petition for winding up is maintainable by a fully paid up share-holder. It was however observed in that decision that the petitioners, who are fully paid up share-holders, have a tangible interest in the surplus assets. 'PARSHOTTAM DAS v. OFFICIAL LIQUIDATORS GORAKHPUR ELECTRIC SUPPLY CO. LTD.', AIR (25) 1938 All 613 is another case on the point.

(2) The point for determination, however, is whether a petitioner, who is a fully paid up share-holder, can ask for a winding up and maintain a petition, if he is unable to plead and show 'prima facie' that there will be a tangible surplus, which will be available to him towards payment of his share capital. That seems to be the view taken by the English Courts in the decisions which have been referred to at length in 'BHARAT BANK v. LAJPAT RAI', AIR (37) 1950 E P 328. The question is whether the statement of the law as expounded in the said decisions and, in particular the observations of Jessel M. R. in 'IN RE VRON COLLIERY CO.', (1881) 20 Ch. D 442 could still be said to be the correct position under the provisions of the English Companies Act of 1948 whatever may be the case prior to the enactment of S. 225 of the English Companies Act of 1948 and the corresponding provision in the earlier Companies Act. Section 225 was introduced for the first time in the Companies Consolidation Act of 1908 (VIII Edward VII C. 69) as S. 141. Under the Indian Act, this provision is incorporated and that section corresponds to S. 170 of the Indian Companies Act. Under this Section, on hearing the petition for winding up, the Court

> "shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets."

If the interest of a fully paid up share-holder to maintain a petition could only be his certain chance of getting paid from the surplus assets of the company, he must show that he has got not merely a nominal but a tangible interest in the surplus. It would amount to saying that a fully paid up share-holder cannot maintain a petition for winding up at all. But this conclusion would be against the recognition of a fully paid up share-holder as a contributory under S. 166 and yet he would not be able to maintain a petition. At the same, such a petition cannot be dismissed simply on the ground that the company has no assets; in short, on the ground that there will be no surplus. If a petition for winding up could not be dismissed on the ground of want of assets and a winding up order could be passed in spite of non-existence of assets, or where the assets would not be sufficient even to pay off any secured claim, there is no special reason to allow such a petition, if filed only by a creditor or a partly paid up share-holder, and not by a fully paid up share-holder. Whatever may be the position of a fully paid up share-holder even in English Law prior to the enactment of S. 141 of the English Companies Consolidation Act of 1908, after such enactment, it could not be said that such a restriction should be placed on a fully paid up share-holder in maintaining a petition, so as to make him allege and prove that he has a tangible interest in the surplus assets.

(3) Reference is, however, made in so far as the English law is concerned to 'Re KASLO SLOCAN MINING AND FINANCIAL CORPORATION LIMITED', 1910 W N 13, which is a case of a petition by the holder of 5000 fully paid-up shares in the company asking for a compulsory winding-up order, on the ground that the company had not assets and was insolvent, and that the whole substratum of the company was gone. With reference to the objection by the company that the petition was demurrable and that it was settled that a fully paid-up share-holder was not entitled to an order, where there were no assets unless he could show some tangible interest, learned counsel for the petitioner submitted that the cases which laid down that proposition are decisions before the Act of 1908 and that S. 141 applies to every winding-up petition and that want of assets is not now a sufficient objection to an order. Neville, J. in a short judgment of four lines dismissed the petition. It is obvious that the point was not considered by the learned Judge and this is pointed out in Palmer's Company Precedents, 15th Edition page 56:

> "A fully paid-up share-holder is a contributory and as such entitled to present a winding-up petition. It was held in several cases before 1907 that being under no further liability, he must satisfy the Court that there will be a substantial surplus of either actual or probable assets divisible among the share-holders.....but S. 29 of the Act of 1907 (replaced by S. 171 of 1929), provided that the Court shall not refuse to make a winding up order on the ground that the company has no assets. This section appears to apply to a contributory's petition. 'IN RE KASLO-SLOCAN MINING CO.', (1910) WN 13 it was held that a share-holder who merely proved insolvency was not entitled to an order; but this case is very shortly reported, and it should be noted that the petition was opposed by a large body of share-holders. Other cases show that the insolvency of the company does not debar a share-holder from obtaining an order where there is a case for investigation, or other good reason for a winding-up order."

(4) 'IN RE CINE INDUSTRIES & RECORDING CO.', AIR (29) 1942 Bom 231, Chagla J. in his judgment recognises the change and states what the law stands today at p. 238 in the following observations:

> "There is another important fact to be borne in mind. This is a share-holder's petition. It is true that as the law stands today, he is under no disability as compared with a contributory nor is he under any obligation, as he at one time was, to satisfy the Court that on a winding up there would be surplus assets."

A fully paid up share-holder's interest in the company cannot be said to be non-existent simply for the reason that he cannot show that there will be a surplus in which he will be entitled to be paid out. As pointed out by Turner L. J. 'IN RE ANGLESEA COLLIERY CO.', (1866) 1 Ch 555:

"The purpose of the Act is, 'inter alia' to adjust, the rights of all the members of companies which should be wound up under it. Indeed, I do not see how the rights of those members who have not paid up in full could be adjusted without the rights of those members who have paid up in full being taken into account. Throughout the Act we find members and contributories used interchangeably."

The presence of a fully paid share-holder contributory would be necessary for the adjustment of the share money among themselves as between a partly paid up share-holder and a fully paid up share-holder. Section 187 of the Indian Companies Act deals with the power of the Court to make calls from all or any of the contributories in the list of contributories to the extent of their liability in order to enable the payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves. In such adjustment the rights of a fully paid up share-holder contributory should also be considered and adjusted and to that extent, at any rate, irrespective of their being any surplus assets, a fully paid up share-holder contributory is interested in the winding up.

(5) Even apart from this, there is no compelling ground to depart from the terms of S. 166 of the Indian Companies Act to impose limitations on the right of a fully paid up share-holder to maintain a petition for winding up. The only limitations are those which are provided in S. 166 and the present objection does not come under the proviso to S. 166. There is no reason why an additional restriction or limitation should be placed on his right to present a petition for winding up. To place such a restriction would result in placing a share-holder, who has paid the full amount of his share, in a disadvantageous position when compared to that of a partly paid up share-holder, disentitling a person who has got a greater stake in the company from having a voice in seeing to the winding up of the company and scrutinising its affairs.

(6) There are other cases in which it could be shown that a fully paid up share-holder is interested in the winding up, as where there is a fraud of the directors in the management of the company, which requires to be gone into, in which case, the proper course would be to have the winding up of any company and an enquiry into the conduct of the directors, when the interests of the share-holders and the creditors can best be promoted and secured.

(7) In the circumstances I consider that no additional limitations than those prescribed in the statute, that is S. 166, need be imposed on a fully paid up share-holder to maintain a petition. Whatever may be the right of a creditor or contributory to present a petition for winding up, the ultimate authority for ordering a winding up is the Court, and in cases where it is reasonably shown that the circumstances do not require a winding up, the Court will certainly refuse to pass such an order. Apart from the interest of the petitioner, the general interest of the share-holders will also be considered, and if the majority of the share-holders 'bona fide' are of the opinion that winding up should not be made, Courts will be reluctant to interfere with the management of the company by ordering a winding up. I am, therefore, of opinion that a fully paid up share-holder can maintain a petition and it is not necessary for him to allege and prove and show a 'prima facie' case that there are assets of the company of such amount that will be available in the winding up, and in which he will have a tangible interest. A petition by a fully paid up share-holder contributory must be treated as any other petition for winding up by any creditor or other contributory and each case must be disposed of on its merits. I have already held that in this case a winding up order should be made.

(8) Therefore, I direct the winding up of the company and appoint the Official Receiver, Ramnad as Official Liquidator. Advertisement in one issue of the 'Tamil Nadu' Madura. Costs of both parties out of the assets. Advocate fee fixed at Rs. 250/- each.

C. R. K./R.G.D. Order accordingly.

A. I. R. 1952 Madras 559

SUBBA RAO J.

P. M. 'Desappa Nayanim Varu and others Plaintiffs-Appellants v. Ramabhaktula Ramiah and others, Defendants Nos. 1 to 6 and 8-Respondents.

Appeal No. 550 of 1947, D/- 12-12-1950.

Principal and Agent — Power of attorney — Construction — Special power to conduct pending suit in particular Court — Power to present it in proper forum — C. P. C., O. 3 R. 2 — Deed — Construction.

Where a special power of attorney said that the plaintiffs had filed a suit for possession of lands etc. on the file of the Court of the District Munsif of Tirupathi and as it was not possible for them to conduct the same personally, they appointed N. N. as an agent to conduct the said suit. He was also authorised to conduct the entire proceedings which had to be taken in the said suit.

Held that the document conferred an express power on N. N. to conduct a particular suit pending in a particular Court. It did not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule properties. Hence where the District Munsif returned the plaint on the ground that it was beyond the pecuniary jurisdiction of his Court, the agent had no power to institute and conduct the suit in a proper forum. (Para 4)

(Principles governing construction of a power of attorney stated). (Para 3)

Anno: C. P. C., O. 3 R. 2 N. 3.

D. Ramaswami Iyengar, for C. S. Venkatachariar, for Appellants; V. Sethu Madhava Rao, for Respondents.

JUDGMENT: This is an appeal against the judgment of the Court of the Subordinate Judge of Chitoor dismissing the suit filed by the appellants on the ground that the presentation of the plaint was not valid.

(2) The suit was originally instituted in the Court of the District Munsif of Tirupathi. The

plaint was signed by one G. Kanniah as the power of attorney agent of plaintiffs 1 and 2 and he also gave a vakalat in that capacity to an advocate practising in that Court. The District Munsif returned the plaint as he found that the subject-matter of the suit was beyond the pecuniary jurisdiction of that Court. The plaint so returned was represented in the Subordinate Judge's Court, Chitoor. One Narayanaswami Naidu claiming to be the power of attorney agent of plaintiffs 1 and 2 gave a fresh vakalat to the advocate on 2-6-1945 and it was duly accepted by him. The defendants raised the contention that under the power of attorney given to Narayanaswami Naidu, no power was conferred on him to engage an advocate or conduct a suit in the Subordinate Judge's Court. The learned Subordinate Judge accepted the contention of the defendants and dismissed the suit. The plaintiffs have preferred this appeal.

(3) The only question that arises in this appeal is whether, under the power of attorney given by plaintiffs 1 and 2 to Narayanaswami Naidu, he was authorised to conduct the suit in the Subordinate Judge's Court of Chittoor. The principle governing the construction of a power of attorney are succinctly stated in Bowstead on Agency (sixth edition). The learned author says as follows at page 73.

"Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:

1. The operative part of the deed is controlled by the recitals.
2. Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.
3. General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary and only when necessary for that purpose.
4. The deed must be construed so as to include all medium powers necessary for its effective execution."

Bearing the aforesaid principles in mind, the power of attorney will have to be construed to ascertain whether under that document a particular power was given expressly or by necessary implication. As the point argued turns upon the construction of the power of attorney filed in this case, it is as well the entire document is extracted:

"Special power of attorney executed and delivered on 23-11-1943 by the following two individuals, namely, Paliyagar Meghavarnam Nayanim Varu's sons (1) Desappa Nayanim Varu and (2) Ponnusami Nayanim Varu, Kshatriya Pliyagara, landlords residents of village of Nagari attached to Puthur Sub-Registry, Chittoor, Cuddapáh registration District, in favour of Kasala Narayanaswami Naidu, son of Abbayi Naidu alias Mutyalu Naidu, Balija, cultivator resident of Kothuru, hamlet of Mangadu village, attached to the aforesaid registration sub-district, is as follows:

We had filed a suit for possession of lands and for recovery of past profits in O. S. No. 314 of 1943 on the file of the Court of the District Munsif of Tirupathi against one Ramabhaktula Mamayya and others. As it is not possible for us to conduct the same personally on account of certain inconveniences, we have appointed you as our agent to carry on the said suit. We have hereby authorised you to conduct on our behalf the entire proceedings which have to be taken in the said suit on the file of the Court of the District Munsif of Tirupathi, to sign, affix your signature on the vakalatnamahs, affidavits, petitions, compromise decrees and withdrawal memos, etc., and file the same into Court in the manner you please, to take out execution proceedings as soon as the decree is passed in the aforesaid suit and realize the amount, to file a petition into Court and draw the amount, etc., that may be realized on the aforesaid suit, to attend the Court, give evidence, etc., & file statements which may be found necessary. Without your knowledge or consent, we shall not make any other arrangements, in the above suit. In case we do so, they shall not be valid. As regards all the aforesaid matters that may be attended to by you on our behalf, we agree to the same as having been done by us personally. To this effect is the special power of attorney executed and delivered by us as consent."

(4) This power of attorney is a special power conferred on Narayanaswami Naidu for a particular purpose. It says that the plaintiffs filed O. S. No. 314 of 1943 on the file of the Court of the District Munsif of Tirupathi & as it was not possible for them to conduct the same personally they appointed Narayanaswami Naidu as an agent to conduct the said suit. He is also authorised to conduct the entire proceedings which have to be taken in the said suit. The document therefore confers an express power on Narayanaswami Naidu to conduct a particular suit pending in a particular Court. It does not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule properties. But Mr. Ramaswami Ayyangar argued that such power must be inferred by necessary implication; as if the plaint is returned for want of jurisdiction or for any other similar reason, some such power is necessary to enable the power of attorney to re-present the plaint and conduct the suit in a proper forum. If that were the intention of the parties they would have expressly conferred such power also. Further it cannot be assumed that the parties contemplated any such contingency as when the plaintiffs filed the suit they must have filed it only on the basis that that Court had jurisdiction to entertain and dispose of the suit. If the contention put forward on behalf of the appellants is accepted, the Court will be introducing new words in the power of attorney and also confer a new power on him. When the plaintiffs expressly authorised Narayanaswami Naidu to conduct a suit in a particular Court. I cannot hold that they intended to empower Narayanaswami Naidu to conduct that suit in any other Court. I am therefore constrained to hold, on a fair construction of the express words used in the power of attorney, that Narayanaswami Naidu has no power, under the power of attorney, to institute and conduct the suit in the Subordinate Judge's

Court of Chittoor. In my view the conclusion arrived at by the Subordinate Judge is correct. The appeal is dismissed with costs.

C.R.K./V.B.B. Appeal dismissed.

A. I. R. 1952 Madras 561

PANCHAPAKESA AYYAR J.

In re M. S. Mohiddin, Appellant.

Criminal Appeal No. 866 of 1950, D/- 26-9-1951.

(a) Penal Code (1860), S. 161 — Trap case — Evidence — Corroboration — Distinction between legitimate and illegitimate traps — Evidence Act (1872), S. 133.

There are two kinds of traps 'a legitimate' trap, where the offence has already been born and is in its course, and an 'illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money, but goes to the police and the Magistrate and brings them to witness the payment, it will be a 'legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man.

But where a man has not demanded a bribe and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it it will be an illegitimate trap and, unless authorised by an Act of Parliament it will be an offence on the part of the persons taking part in the trap who will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, and the witnesses to the trap would in no sense be "accomplices", and their evidence will not require under the law to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinised carefully and accepted as true before a conviction can be had. AIR (5) 1918 Mad 738 and (1947)-2 All E R 572, Ref. (Para 6)

Anno: Penal Code, S. 161 N. 12.

(b) Criminal P. C. (1898), Ss. 363 and 423 — Appeal — Appreciation of evidence — Demeanour of witness — Importance of.

The findings of fact by the trial Court, which sees the witnesses, hears their evidence and observes their demeanour, should not be set aside by the appellate Court which sees the evidence only in cold print, unless (1) they are manifestly wrong and there is no evidence at all on record to support them; (2) the trial Court has overlooked and not adverted to clinching pieces of evidence running contrary to its findings; (3) the trial Court has not scrutinised the evidence properly and has simply jumbled the evidence together and come to a conclusion which is non-sequitur; and (4) where the appellate Court allows additional evidence of a clinching nature, contrary to the findings of the trial Court, to be admitted in appeal. (Para 8)

While a finding that a witness is speaking the truth is of the greatest value when it is made by a Judge who saw the witness and observed his demeanour, a finding by a Judge who never saw him is of very small value. The trial Court's view as to which set of witnesses is to be believed is to be adopted unless there are weighty reasons showing the trial Court's view to be clearly wrong. AIR (35) 1948 P C 108 and AIR (28) 1941 Cal 20, Foll. (Para 9)

Anno: Cr. P. C., S. 363 N. 1; S. 423 N. 14.

(c) Penal Code (1860), S. 161 — Gratification — Attitude of modern law towards bribery.

Modern law attaches little importance to terms like Mariada, mamool, etc., but will get into the core of the matter and see what the nature of the payment is and if it is "illegal gratification" or a bribe taken by an officer for doing a favour or abstaining from doing a disfavour it will come within the scope of S. 161, Penal Code. No doubt, some mamools like Pongal, Deepavali, Dasara and Christmas mamools, paid to peons as baksheesh may not come within the term "illegal gratification" or "bribe" as they are not paid for showing or forbearing to show favour or disfavour in the exercise of official functions. AIR (37) 1950 Mad 93, Foll. (Para 9)

Anno: Penal Code, S. 161 N. 4.

K. S. Jayarama Aiyar, for C. K. Venkatanarasimham, for Appellant; The Public Prosecutor, for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('48) 3 Dom L R (PC) 16: (AIR (35) 1948 PC 108) (Pr 9)

('44) 1944 Mad W N Cri 102: (AIR (31) 1944 F C 66: 45 Cri L J 755) (Pr 7)

('41) ILR (1941) 1 Cal 457: (AIR (28) 1941 Cal 20) (Pr 9)

('17) 1917 Mad W N 831: (AIR 1918 Mad 738: 19 Cri L J 29) (Pr 6)

('49) 1949-2 Mad L J 443: (AIR 1950 Mad 93: 51 Cri L J 386) (Pr 9)

(1947) 2 All E R 572: (45 L G R 654) (Pr 6)

JUDGMENT: This is an appeal by one Mohideen, who was a tram movement Inspector in the M. & S. M. Railway and had jurisdiction over all stations between Guntakkal and Bezwada and Macherla, against his conviction, under S. 161, I. P. C., by the Sessions Judge, Guntur, for having received Rs. 30 'mamool,' or bribe, from P. W. 7, the station master, Perecherla, for showing favour to him and not sending reports against him and bringing into trouble, and the sentence of six months rigorous imprisonment. He had been charged also with the offence of criminal misconduct "in the discharge of his duty by habitually accepting or obtaining or attempting to obtain illegal gratifications like that from P. W. 1 Chelapathi Naidu, while he was station master at Bethamcherla, for showing favour by not sending reports against him. and of bargaining to obtain a bribe of Rs. 200 from P. W. 3 for enabling him to transport green

chillies illegally and actually securing a part payment of Rs. 50 out of that bribe, an offence punishable under S. 5(2) of Central Act II (2) of 1947". The learned Sessions Judge found that the evidence regarding the alleged offence under S. 5(2) of Central Act II (2) of 1947 was false or unreliable and acquitted him of that offence while convicting him of the offence under S. 161, I. P. C., in appeal here.

(2) I have perused the entire records, and heard Mr. K. S. Jayarama Iyer, the learned counsel for the appellant, and the learned Public Prosecutor 'contra'. The facts are briefly these:

(3) The appellant, as train movement inspector, had the duty of checking train detentions, movement of luggage, including unauthorised luggage, and delays in loading and unloading of goods, and sending reports against railway officials regarding all these & suspected acts of misconduct. The reports sent by him would be inquired into by the authorities concerned and suitable punishment awarded to station masters etc. The prosecution alleged that, taking advantage of the power given to him by virtue of his post and underlying his power by sending reports against the station masters etc., and showing what he could do, the appellant was asking the station masters to pay bribes, which he called 'mamools', to him every month. He asked P. W. 7 to pay him a bribe or 'mamool' of Rs. 15 a month two or three months after he joined duty as station master at Perecherla in October 1948, in the same way as his predecessor was paying, so that he might cover up all irregularities & derelictions of duty and not send reports against him & bring him to trouble. P. W. 7 said that he was a man with a large family and with onerous liabilities, and could not afford to pay the bribe demanded.

(4) The appellant used to pass Perecharla station often and every time he passed he used to ask P. W. 7 for the 'mamool' bribe. P. W. 7 went on refusing. After two or three months, finding that P. W. 7 could not be induced to pay anything like Rs. 15 per month, the appellant climbed down and said that it would be enough if P. W. 7 would pay a bribe of Rs. 5 per month. Meanwhile, the appellant had also sent a report against P. W. 7 for sending ghee as luggage, against the rules, and P. W. 7 had been warned by the authorities for irregularity. P. W. 7, therefore, agreed to pay the lesser bribe demanded then. He said in Court that he agreed unwillingly and that he sent a petition about the appellant's demand for the bribe to the Anti-corruption Branch but the officer in charge of that branch stated that no such petition was received by him. Any way, P. W. 7 showed no eagerness to pay Rs. 5 every month, in spite of repeated demands by the appellant. Finally, in the middle of September 1949, P. W. 7 took leave for a week in order to attend to his wife's delivery at Guntur. Then, of course, the appellant saw that no time should be lost, and asked that at least Rs. 30, that is six months 'mamool' at Rs. 5 per month, should be paid to him, and P. W. 7 promised to pay it at Guntur on 15-7-1949 but got in touch with the Special Branch Police and the Magistrate (P. Ws. 11 and 9) and had a trap laid by them for the appellant.

(5) P. W. 19 the Stationary Sub-Magistrate, & P. W. 11, Sub-Inspector. Special Police establishment, got the numbers of the four currency notes representing Rs. 30 bribe noted, and asked P. W. 7 to go and pay them to the appellant at the Guntur railway station platform. P. W. 7 went to Guntur railway platform, where the appellant was waiting, and paid the four currency notes for Rs. 30 as bribe to the appellant at about 10 a. m. on 15-9-1949. P. W. 8, the Assistant Parcel Clerk of Guntur railway station and the brother-in-law of one Mangiah, said to be an enemy of the appellant owing to his strict enforcement of his duties, was also present on that occasion. The details of the occurrence were these: The appellant asked P. W. 7 whether he had brought the 'mamool' of Rs. 30 & P. W. 7 replied that he had, and paid the money. P. W. 8 heard the question of the appellant and the reply of P. W. 7, and witnessed the payment of the money, and went and told P. W. 9, the Magistrate, about the payment. P. Ws. 9 to 11 then went to the railway platform and saw the appellant there. P. W. 9 asked him, in the presence of P. Ws. 10 and 11 "where is the bribe amount you received from Santanam (P. W. 7)?" and the appellant at once took out the four currency notes from his purse and handed them over. He also handed over another sum of Rs. 52 and odd, with which we are not concerned in this case as they must, for the purpose of this case, be held to be the money of the appellant, whatever be the source. The appellant told P. W. 9 shortly afterwards that the Rs. 30/- given to him in the shape of four currency notes by P. W. 7 represented the return of a loan he had given to P. W. 7 on 13-9-1949 (on Ex. P. 7) but did not give the purpose of the loan or the names of the persons present then. In the committing Magistrate's Court he said that P. W. 7 had asked him to lend him that sum to meet the expenses in connection with his wife's confinement and that he lent it on 13-9-1949 but he did not say that D. Ws. 9 and 10 had seen him lend it. In the Sessions Court he examined D. Ws. 9 and 10 a chief guard and the manager of the book stall, to say that they saw the appellant give the loan of Rs. 30 to P. W. 7 on 13-9-1949 at about 7 p.m. on P. W. 7 asking him for a loan. The learned Sessions Judge was not at all impressed with the demeanour of these witnesses and rejected their testimony as untrustworthy and interested. He believed the prosecution evidence and held that the offence under S. 161, I. P. C. had been proved and convicted him and sentenced him, as stated above.

(6) Mr. Jayarama Iyer, for the appellant raised several contentions. The first was that this was a "trap case" where corroboration by untainted evidence would be required under the law, and there was no such corroborative evidence and as such the case must fail in view of the ruling in 'LAKSHMINARAYANA IYER v. EMPEROR', 1917 Mad W N 831 and the ruling in 'BRANNAN v. PEEK', (1947) 2 All E R 572, where Lord Justice Goddard has observed that unless authorised by an Act of Parliament no trap can be laid by the Police or the magistracy to find out whether a man will commit an offence, and that persons trapping him like that would be accomplices liable for punishment themselves. But I have held in several cases already that there are two kinds of traps 'a legitimate trap', where the offence has already been born and is in its

course, and 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be 'a legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man. But where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it it will be 'an illegitimate trap' and, unless authorised by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, like P. Ws. 9 to 11, and the witnesses to the trap, like P.W. 8 would in no sense be "accomplices" and their evidence will not require under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinised carefully and accepted as true before a conviction can be had. Therefore this contention fails.

(7) The next contention was that, under the ruling in 'H. T. HUNTLEY v. EMPEROR', 1944 Mad W N Cri 102 (F C), every reasonable possibility of innocence must be excluded before the accused is convicted, and that, in this case, all reasonable possibility of innocence has not been excluded because the appellant had stated that Rs. 30 given to him by P.W. 7 on 15-9-1949 was only the return of the loan given by him to P.W. 7 on 13-9-1949, as spoken to by D.Ws. 9 and 10, and that P.W. 7's own statement to the Sub-Magistrate in Ex. P. 5, a short time before the payment, contained a recital that he had not taken any loan from the appellant and that he owed nothing to him and that was a tell tale, confirmation of the story of the appellant regarding the loan. (His Lordship discussed the evidence and proceeded:) It was urged by Mr. Jayarama Iyer that the learned Sessions Judge was wrong in his finding of fact against the loan and in favour of bribe, and in believing the statements of P. Ws. 7 and 8 regarding the appellant's asking P.W. 7 whether he had brought the 'mamool' of Rs. 30, and the statement of P. Ws. 9 to 11 that P. W. 9 asked the appellant whether he had received the 'bribe' from P. W. 7, and the appellant's producing the currency notes without a word of protest of innocence. I cannot agree.

(8) The law regarding the findings of 'fact' by the trial Court is well settled by the Privy Council, Supreme Court and High Courts. The findings of fact by the trial Court, which sees the witnesses, hears their evidence and observes their demeanour, should not be set aside by the appellate Court which sees the evidence 'only in cold print', unless (1) they are 'manifestly wrong' and there is no evidence at all on record to support them; (2) the trial Court has overlooked and not adverted to clinching pieces of evidence running contrary to its findings; (3) the trial Court has not scrutinised the evidence properly and has simply jumbled the evidence together and come to a conclusion which is a 'non-sequitur'; and (4) where the appellate Court allows additional evidence of a clinching nature, contrary to the findings of the trial Court, to be admitted in appeal.

(9) In 'PEAREY LAL v. NANAK CHAND', 3 D L R (P C) 16, it has been observed by the Privy Council that while a finding that a witness is speaking the truth is of the greatest value when it is made by a Judge who saw the witness, and observed his demeanour, a finding by a Judge who never saw him is of very small value. In 'RAJANANDINI v. ASWINI KUMAR', ILR (1941) 1 Cal 457, it is rightly observed that the trial Court's view as to which set of witnesses is to be believed is to be adopted unless there are 'weighty reasons' showing the trial Court's view to be clearly wrong. (His Lordship then discussed the entire evidence and found that the evidence of the prosecution witnesses was true. His Lordship then proceeded:) It was lastly urged that there was no proof that the 'mamool' demanded by the appellant was an illegal gratification or a bribe. I have already held in 'IN RE VARADADESIKACHARIAR', 1949-2 Mad L J 443, that modern law attaches little importance to terms like 'Mariada, mamool', etc., but will get into the core of the matter and see what the nature of the payment is, and if it is "illegal gratification", or a bribe, taken by an officer for doing a favour or abstaining from doing a disfavour, it will come within the scope of S. 161, I. P. C. No doubt, some 'mamools' like 'Pongal', 'Deepavali', 'Dasara' and Christmas 'mamools', paid to peons as 'baksheesh', may not come within the term "illegal gratification" or "bribe" as they are not paid for showing or forbearing to show favour or disfavour in the exercise of official functions. Mr. Jayarama Iyer finally conceded that if this 'mamool', in the circumstances alleged, was proved, it will be nothing but a bribe or illegal gratification falling within the scope of S. 161, I. P. C.

(10) After a thorough scrutiny of the entire evidence I am satisfied that the conviction of the appellant under S. 161, I. P. C. is amply borne out by the evidence on record and that it is correct. I accordingly confirm the conviction. It was urged by Mr. Jayarama Aiyar that the sentence was far too severe, taking all the circumstances into consideration, and especially the fact that the appellant had put in 28 years of service and that this was his first offence, and that he is sure to be dismissed from service, and that the amount involved is only Rs. 30, and that P. W. 7 had himself promised to pay the amount and had fixed it for payment at Guntur platform on 15-9-1949 and then trapped the appellant and that there is no need to send the appellant back to jail to become a hardened criminal and a problem to society. I agree. After hearing the learned Public Prosecutor on the point, I modify the sentence passed on the appellant into imprisonment till the rising of the Court

and a fine of Rs. 500 or, in default, further rigorous imprisonment for three months. Time given till 3 p.m. on 25-10-1951 for the payment of the fine into the Sessions Court, Guntur, as prayed for.

C.R.K./V.B.B. *Sentence modified.*

A. I. R. 1952 Madras 564

BASHEER AHMED SAYEED J.

Mariyala Sambayya, Petitioner v. Narala Bala Subba Reddi and another, Respondents.

Civil Revn. Petn. No. 1618 of 1949, D/- 7-12-1950.

C. P. C. (1908), S. 88 — Interpleader suit — Who can file — Interest of plaintiff in subject-matter of suit.

Where the plaintiff in the interpleader suit is found to have any interest in the subject-matter of the suit or where he is found to have colluded with one of the claimants, then the right to file an inter-pleader suit cannot be availed of by him. In order to enable a party to file an inter-pleader suit the party should be in a position to walk out of the suit with a mere claim for costs and shall not be entitled to have any other matter of contest between himself and the claimants. (Para 3)

Anno: C. P. C., S. 88 N. 5.

N. Subramaniam, for Petitioner; W. Kothandaramayya, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.
(1862-63) 1 Mad HCR 360 3
('38) AIR 1938 Cal 287: (ILR (1938) 1 Cal 53) 3
('26) 4 Rang 465: (AIR 1927 Rang 91) 3

ORDER: The petitioner has preferred this revision petition against the order of the learned District Munsif overruling his objection to the inter-pleader suit filed by the 1st respondent in the revision. The suit filed by the petitioner was one for recovery of a sum of Rs. 600 due under a pronote executed by the 1st respondent in favour of Garudamma and transferred to him. In the written statement filed by the respondent to that suit by the petitioner he pleaded 'inter alia' that the original promisee, Garudamma was not in law entitled to transfer the pronote in question and that the adopted son of Garudamma was entitled to the amount and further that he had already paid Rs. 200 on behalf of the pronote amount to Garudamma in the presence of the petitioner himself, who is no other than the maternal uncle of the original promisee. Issues have been framed in the original suit. After the framing of the issues, in consequence of certain notices issued by the adopted son to the respondent claiming the amount due on the promissory note, the respondent filed an inter-pleader suit to which objections have been taken by the petitioner.

(2) In the plaint of the inter-pleader suit the respondent has pleaded more or less the same ground as set out in the written statement filed by him to the previous suit filed by the petitioner. Therein he raised the contention that the transfer was without legal authority that the original promisee was only the holder of life estate, that she was not entitled to dispose of any property, that the adopted son was the person properly entitled to claim the amount, and that he had discharged the pronote in part payment of a sum of Rs. 200 during the lifetime of the original promisee.

(3) The question now is whetherr this inter-pleader suit could be entertained and whether there is sufficient justification for allowing the respondent to file the suit. This suit is obviously filed under S. 88 of the Civil P. C. Mr. Neti Subramaniam the learned counsel for the petitioner has invited my attention to the decision reported in 'HARI KARMARKAR v. J. A. ROBIN', 4 Rang 465, which is more or less on facts similar to those contained in the present petition. In that decision it has been held that if the plaintiff in the inter-pleader suit was found to have any interest in the subject-matter of the suit or that if he was found to have colluded with one of the claimants, then the right to file an inter-pleader suit could not be availed of by him. On the facts of the present case it is evident both from the written statement filed by the 1st respondent as also the plaint filed by him in the inter-pleader suit that he has sufficient interest in seeing that the claim of the petitioner is defeated. The contents of the written statement as well as the plaint would point out only to that fact. Besides there is also ample evidence to show that the 1st respondent is in collusion with one of the claimants, namely, the adopted son. In this view I do not think that there is enough justification for allowing the 1st respondent to file the inter-pleader suit. In this connection Mr. Subramaniam has also invited my attention to a decision in 'NATIONAL INSURANCE CO. LTD. v. DHIRENDRA NATH', AIR (25) 1938 Cal 287. The principle laid therein is that in order to enable a party to file an inter-pleader suit the party should be in a position to walk out of the suit with a mere claim for costs and shall not be entitled to have any other matter of contest between himself and the claimants. In this case the fact that the 1st respondent is claiming to have paid Rs. 200 already to the original promisee and is also raising contentions which have to be gone into at length to find out whether the transfer is valid, whether the petitioner is a holder in due course and so forth will certainly not bring the inter-pleader suit within the scope of S. 88 of the Civil P. C. On the other hand, Mr. Kothandaramiah appearing for the respondent has referred to a decision in 'SECRETARY OF STATE v. MIR MUHAMMAD', 1 Mad H C R 360. I do not think the facts of that case apply to the facts in the present case. In my view the requirements of S. 88 are not satisfied in the present case so as to enable the 1st respondent to file the inter-pleader suit. The learned District Munsif, therefore is not right in having allowed the 1st respondent to file the suit. The order of the lower Court is set aside. This revision petition is, therefore, allowed with costs.

C.R.K./V.B.B. Petition allowed.

A. I. R. 1952 Madras 565

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

R. Balakrishnan, Petitioner v. State of Madras represented by the Director of Controlled Commodities, Khaleel Mansions, Mount Road, Madras, Respondent.

C. M. P. Nos. 6181 to 6183 of 1951, D/- 7-9-1951.

† (a) Cotton Textiles (Control) Order (1948), Cls. 12 (4) and 33 — Provisions of Cl. 12 (4) impose total prohibition of acquisition and installation of new looms and are not valid in view of Art. 19 (1) — They are not reasonable restrictions within Art. 19 (5) and (6) — If read with Cl. 33, it gives absolute and unfettered discretion to Textile Commissioner — This is not reasonable restriction — Rules for use of discretion should be framed — (Constitution of India, Arts. 19 (1) (5) and (6)).

Provisions of Cl. 12 (4) of the Cotton Textiles (Control) Order, 1948 imposes an absolute prohibition of acquisition and installation of new looms. Such a total prohibition would not be valid, having regard to the fundamental rights conferred on the citizen by Art. 19 (1) (f) and (g). Total prohibition from the exercise of any right, can never be justified as a reasonable restriction within the meaning of that expression as it occurs in Art. 19 (5) and (6). A total prohibition unless it be for a short and prescribed time will be invalid. There may be emergent situations when such absolute prohibition may be necessary. But such contingency is provided for by Art. 358 of the Constitution. In such a state of emergency a total prohibition of the exercise of the right conferred by Art. 19 may be valid, but otherwise, it would be unconstitutional. Clause 12 (4) by itself must therefore be held to be 'ultra vires' and void after the coming into force of the Constitution.

But if the clause is read along with Cl. 33 and if it be contended that thus read there is no absolute prohibition but only a restriction, it being left to the discretion of the Textile Commissioner to permit in particular cases the acquisition and installation of new looms, if this discretion is completely unfettered it can be said that the provision conflicts with the right of equal protection conferred by Art. 14. Such an arbitrary and unfettered discretion would not amount to a reasonable restriction within the meaning of Art. 19 (5) and (6). It would be unreasonable to gamble on the reasonableness of the Textile Commissioner. If the yardstick is only the personal opinion of the Officer concerned, it is plainly a case of a naked and arbitrary power. It is therefore not only desirable but also necessary that proper rules should be framed and general principles laid down to govern the discretion vested in the Textile Commissioner under Cl. 33. If that is done and individual cases are dealt with accordingly without making any discrimination there could be no valid complaint.

(Petitioner's application was directed to be disposed of without making any discrimination on any ground). AIR 1951 S C 118; AIR 1951 Mad 930; (1886) 118 US 356; AIR 1950 SC 124, Relied on. (Paras 15, 16, 17, 42)

Per Venkatarama Ayyar J.: The subjects have since the Constitution certain fundamental rights guaranteed to them and it is beyond the competence of the legislature to override them and if they do, the Courts can declare such legislation bad. The Cotton Textile Control Orders were notified under S. 3 (1) of Act 24 of 1946 long prior to the Constitution, under the influence of a different theory and from a different standpoint and it is not, therefore, a matter for surprise that some of these provisions do not fit in with the pattern of the Constitution. Clause 33 (3) and Clause 30 are survivals of the benevolent despotism of the pre-Constitution legislature and they are inconsistent with the fundamental rights guaranteed under the Constitution. The legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable. Clause 33 (3) is opposed to Art. 14 and therefore void. (Paras 38, 39)

† (b) Cotton Textile (Control) Order (1948), Cl. 30 — Clause confers on Textile Commissioner power to use his discretion arbitrarily in the matter of issuing directions under the clause — Petitioner alleging discrimination in the matter of allotment and citing instances — Since in time of acute shortage of essential goods it is not only desirable but also imperative that State should regulate their purchase and sale with a view to equitable distribution of goods amongst consumers, Cl. 30 though restrictive of free trade cannot be declared unconstitutional, so long as restrictions are necessary in interest of general public and the restrictions are reasonable — As the clause stands, however, there is nothing to prevent Textile Commr. from issuing arbitrary orders and discriminating from person to person—In the absence of any justification for discriminating against the petitioner in the matter, it was held that there was a breach of guarantee of equal protection of laws vouchsafed by Art. 14 and of fundamental rights declared by Art. 19 (1) — Clause 30 could not be declared totally void — Textile Commissioner asked to evolve a proper scheme for proper distribution which does not offend either against Art. 14 or Art. 19 (1) (f) and (g) read with Art. 19 (5) and (6) — State directed to reconsider petitioner's application for allotment of yarn on merits without discrimination. (Constitution of India,, Art. 19 (1) (f), (g) and Art. 19 (5), (6)).

(Paras 21, 23, 24, 43, 44)

K. V. Venkatasubramaniam and A. Ramachandran, for Row and Reddy, for Petitioner; Advocate-General, for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) 1950 S C J 328: (AIR 1950 S C 211: 52 Cri L J 550) (Pr 41)

('50) 1950 S C J 418: (AIR 1950 S C 124: 51 Cri L J 1514) (Pr 16)

('50) 1950 SCJ 571: (AIR 1951 SC 118) (Prs 11, 15, 40)

('51) AIR 1951 Cal 90 (Prs 10, 34)
('51) 1951-2 Mad L J 1: (AIR 1951 Mad 930) (Prs 10, 16, 34)
80 C L R 432: (Australia) (Prs 14, 34, 37)
49 Md 217 (Pr 10)
(1886) 118 U S 356: 30 Law Ed 220 (Prs 10, 16, 34)
(1894) 154 U S 362: 38 Law Ed 1014. (Pr 33)
(1940) 310 U S 573: 84 Law Ed 1368 (Prs 12, 20, 34, 36)
(1950) 338 U S 604: 94 Law Ed 381 (Prs 13, 20, 34, 35)

RAJAMANNAR, C. J.: In these two applications some of the provisions of the Cotton Textiles (Control) Order, 1948, were challenged as being opposed to certain articles of the Constitution of India. This order was made by the Central Government in exercise of the powers conferred by S. 3 of the Essential Supplies (Temporary Powers) Act, 1946. It came into force on 2nd August 1948 in the place of an earlier order of February 1948. Two classes of special officers to work the provisions of this order are contemplated. One is the controller who is the principal officer appointed by a provincial Government for the administration of the textile control and the other is the Textile Commissioner appointed by the Central Government. This order provides for the control of raw materials and stores as well as cloth and yarn. In these two applications we are only concerned with the provisions relating to cloth and yarn. Clause (12) of the order runs as follows:

"12 (1) No producer who has no spinning plant shall work or cause or permit to be worked,
(a) looms in excess of the number of looms working in the undertaking on the 30th September 1944.
(b) Any loom for a period which in any one month exceeds the average number of hours of work per loom per month in the undertaking during the year ending 30th September 1944.
(2) No producer who has a spinning plant shall in any quarter —
(a) purchase a quantity of yarn exceeding 1/4 of the quantity of yarn purchased by him in the year 1944;
(b) sell a quantity of yarn less than 1/4 of the quantity of yarn sold by him in the year 1944;
(3) No producer who has no weaving plant shall instal or cause or permit to be installed any loom in his undertaking.
(4) No person shall acquire or instal any loom to be worked by power as defined in S. 2(f) of the Factories Act, 1934.
(5) Any person having in his possession any loom which he is not entitled to work or cause or permit to be worked in accordance with this clause shall forthwith report the fact to the Controller and shall take such action as to its sealing or storage as the controller may direct."

(2) The clause has to be read subject to Cl. 33 which provides for exclusion from and modification and relaxation of its operation. Clause (1) runs as follows:

"The Textile Commissioner may by a general or special permit exclude from or modify or relax to such extent as may be specified by him, the operation of any such provision in respect of any person, act or thing or any class of persons, acts or things."

(3) Clause 30 confers certain powers on the Textile Commissioner in respect of the distribution of cloth and yarn. It is in the following terms:

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers —
(a) To sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify; and
(b) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify; and may issue such further instructions as he thinks fit regarding the manner in which the direction is to be carried out."

(4) The petitioner in these two petitions is the properietor of Sundararaj Textiles situated at Kalapalti Post Coimbatore district. It is exclusively a weaving mill and not what is referred to in the affidavits as a composite mill, i.e., both a spinning and a weaving mill. In 1944, the petitioner had 10 power looms installed in his factory. In 1946 he added another 14 power looms with the permission of the Government and ever since he has been manufacturing cloth in these 24 power looms. In July 1949 he applied to the Textile Commissioner who had his office in Bombay for permission to acquire and instal 50 more power looms, as such permission was necessary under the provisions of the Cotton Textile Control Order 1948. According to the petitioner, one important reason for this application to instal more looms was his desire to purchase, what is described as, a preparatory machinery for making, warping and sizing. This machinery was only available in units to serve 100 to 120 power looms in the count of yarn used by the petitioner's looms. As the petitioner had only 24 power looms he wanted to acquire further looms. The Textile Commissioner advised the petitioner to apply through the Provincial Textile Commissioner at Madras. The petitioner made an application accordingly on the 19th August 1949. This application was refused by the Government on 6th December 1949. He repeated his request and was informed by the Director of Controlled Commodities in his letter dated 17th March 1950, that permission for additional looms would not be granted in view of the meagre supply position of yarn in the State. The petitioner again made representations to the Minister for Industries with no success. On 5-7-1950 he received a communication from the Secretary to Government Development Department, that in view of the difficult conditions of yarn supply, the petitioner's request for permission to instal 36 additional looms would not be considered at present. Meanwhile the petitioner had purchased the preparatory machinery at a cost of about a lakh of rupees.

(5) In the affidavit filed in support of C.M.P. No. 6181 of 1951, the petitioner stated that after 25-1-1950, i.e., after the Constitution came into force, Clause 12 (4) of the Order became void as being inconsistent with the fundamental rights granted to him, more particularly by Art. 19 (1) (f) and (g). The ground of attack is that the said clause, namely, 12 (4) absolutely prohibits the acquisition of installation of power looms and the prohibition is arbitrary and unreasonable. He also submitted that the restriction, if any, imposed under that clause was an excessive restriction not necessary in the interest of the general public. Clause 33 of the Order is attacked as being contrary to Art. 14 of the Constitution inasmuch as it prescribes no standard of the basis on which any provision can be relaxed or excluded in respect of any person. The clause being discriminatory in character cannot be valid. In further support of his plea, the petitioner referred to other textile mill owners who had acquired and installed new power looms, though the petitioner was himself refused. This the petitioner says is discriminatory.

(6) The petitioner also complains against the conduct of the Government officers in their allot-

ment of yarn per loom per month. He was being allotted 400 lbs. of yarn per loom per month in 1949. In January 1950 this quantity of 400 was reduced to 200 and again in September 1950 it was further reduced to 150 lbs. and in April 1951 still further to 100 lbs. per loom per month. This restriction was apparently imposed under Clause 30 of the Order. This action on the part of the Government, i.e., the State as represented by the Director of Controlled Commodities is impugned as being unreasonable and arbitrarily discriminatory. The petitioner mentions concrete instances in which even purely weaving mills like the petitioner's were being given 300 to 400 lbs. of yarn per loom per month, though he was given considerably less. He alleges that with the amount of yarn allottment now being made it was not possible to run the mill. This might lead to even closing down the business. Both Arts. 14 and 19 (1) (f) and (g) of the Constitution were infringed and Clause 30 as well as the orders of Government were 'ultra vires' and invalid.

(7) The petitioner also complains that even the allotment of yarn made to him was not being regularly supplied every month. In C.M.P. No. 6181 of 1951 the petitioner's prayer is for the issue of Writ of a Mandamus or an order directing the respondent namely, the State of Madras represented by the Director of Controlled Commodities to forbear from and in any way interfering with the acquisition and installation by the petitioner of additional power looms in his mill. In the second application (C.M.P. No. 6182 of 1951), the petitioner prayed that a Writ or order may issue directing the respondent to allot and supply to the petitioner 400 lbs of yarn per loom per month.

(8) On behalf of the State an Upper Division clerk in the Office of the Director of Controlled Commodities swore to a counter-affidavit traversing the allegations and charges made by the petitioner in his affidavit. The learned Advocate-General confessed that the counter-affidavit could have been filed by some one more responsible than a clerk. The legal position taken up in this counter-affidavit was that the Textile Commissioner had full discretion to grant or refuse permission for acquisition and installation of new looms. The refusal to give to the petitioner permission to instal new looms was said to be due to the acute scarcity of yarn in the State. A reference is made to an All-India Yarn Distribution Scheme ' which provided for the internal distribution of cotton yarn to miscellaneous consumers including power looms. As regards the facts, the deponent of the affidavit put the petitioner to strict proof of several allegations in the affidavit.

(9) The petitioner filed a reply affidavit in which he mentioned in detail several instances in which there had been discrimination as regards the grant of permission to acquire and instal new power looms and as regards the allotment of yarn. A further counter-affidavit on behalf of the State was filed during the hearing of the applications by the Assistant Director of Cotton. In this affidavit, he set out the history of cotton and yarn control from 1943 onwards. Provisions in the earlier orders similar to the impugned provisions of the new order are referred to. Clause 30 was in place of Clause 18-B of the Cloth and Yarn Control Order, 1943. The purpose of this clause is said to be to secure proper distribution of yarn and proper distribution is understood to mean and means that the distribution is to be in accordance with the basic principles enacted in the order; that is to say, that while the scarcity continued, the distribution must be on the basis of the All India Yarn Distribution Scheme. As regards Clause 33, it is stated that exceptions are made under this clause after careful consideration of the various factors and almost always subject to the condition that supply of free yarn to the distribution pool is not impaired. The permissions are given according to the deponent only on specific recommendations received from the Provincial State Controller. Though there is no obligation cast on the Textile Commissioner or the Provincial Controller to feed new looms which are installed, it is pointed out that any unrestricted increase of looms will tend to affect the availability of free yarn to the pool and provide an incentive to mills and the merchants to take to blackmarket activities. The restrictive provisions to be found in Clause 18 of the Order is an attempt to limit such tendencies to a reasonable minimum. The petitioner filed a supplementary reply affidavit in which he gave instances of permission being granted to new factories, e.g., 200 power looms to a new factory in Virudhunagar and 20 power looms to a new mill in Cannanore. He also gave instances of unequal allotment of yarn among several mills.

(10) The argument of Mr. Venkatasubramania Aiyar, learned Counsel for the petitioner was in the main based on Art. 14 of the Constitution which ensures to all persons equality before the law and equal protection of the laws from the State. The definition of "State" in Art. 12 includes besides the Government and Parliament of India and the Government or Legislature of each of the States, also local or other authorities within the territory of India or under the control of the Government of India. Taking first the provisions regarding acquisition of looms, he contended that Clause 12 (4) of the Cotton Textiles Control Order, though in terms prohibits any acquisition or installation, must be read with Clause 33 which empowers the Textile Commissioner to exempt wholly or in part certain cases from the operation of the provision. The combined effect of Clauses 12 (4) and 33 (1) would therefore be that unless permitted by the Textile Commissioner no new looms can be acquired or installed. Clause 33 (1) does not mention the grounds or circumstances which should influence the Textile Commissioner in granting or withholding special permission. Ultimately, it comes to this, namely, that the Textile Commissioner's discretion is completely unfettered. The legal position taken up in the counter-affidavit filed on behalf of the State is just this. Learned Counsel contended that conferment of such arbitrary power on the Textile Commissinoer itself offends against the guarantee declared by Art. 14 of the Constitution as such power gives ample room for discrimination. He also contended that in actual practice also the orders of the Textile Commissioner have been discriminatory.

He strongly relied on the leading decision of the 'United States Supreme Court in 'YICKWO v. HOPKINS', (1886) 118 U S 356: 30 Law Ed 220. The city and county of Sanfranscico made an ordinance that it shall be unlawful for any person to engage in the laundry business within the corporate limits without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone. In Sanfrancisco there were about 320 laundaries managed by the Chinese. Of them only about 10 were in brick buildings. The remainder were in wooden buildings, with the result that so far as the majority of the Chinese laundries were concerned, it depended entirely on the pleasure of the Board of

Supervisors whether any of them would or would not be permitted to engage in the business in the wooden buildings. Actually it was found that the white launderers who were carrying on business in wooden buildings were given permission; the Chinese were refused permission. The validity of the Ordinance was challenged on the ground that it was capable of being and was so operated and enforced as to discriminate against the Chinese laundries and therefore offended S. 1 of the Fourteenth Amendment of the Constitution. The Supreme Court held that the ordinance was invalid because:

"It confers a naked arbitrary power upon the Board to give or withhold consent and makes all engaged in the business, the tenants at will as to their means of living under the Board of Supervisors."

The following passages from the judgment of Mr. Justice Matthews were relied on in particular by petitioner's Counsel, Ex. 1:

"When we consider the nature and theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power..... But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possession, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilisation under the reign of just and equal laws, so that in the famous language of the Massachussets Bill of Rights, the Government of the Commonwealth 'may be a Government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Mr. Justice Matthews quoted with approval the following observations made by the Court of Appeals of Maryland in the case of 'BALTIMORE v. RADECKE', 49 Md 217:

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld, may be actually benefited by what is thus done to their neighbours; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment and difficult to be detected and exposed it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

Learned counsel referred to the several instances mentioned in the affidavits filed by the petitioner as demonstrating the arbitrary nature of the power conferred on the Textile Commissioner by Clause 33. There is no use, Counsel urged, relying upon any presumption that the Textile Commissioner would not do anything improper or unjust or unreasonable. It is dangerous that the rights of persons should depend upon any personal quality of a particular officer. In a recent case 'M. B. NAMAZI v. DEPUTY CUSTODIAN OF EVACUEE PROPERTY, MADRAS', 1951-2 Mad LJ, 1, relating to the Administration of Evacuee Property Ordinance, XXVI of 1949, this Court was called upon to pronounce on the validity of certain of its provisions. S. 20 of the Ordinance prohibits an intending evacuee from transferring in any manner whatsoever any immovable property in which he has any right or interest except with the previous approval of the Custodian, and any transfer made in contravention of the section shall be void. It was conceded that there were no rules laying down the grounds on which any transfer could be approved or refused. Meeting the argument that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds, I said:

"But surely that would be gambling on the reasonableness of the Custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonable refusing to approve of any transfer by an intending evacuee."

Reliance was placed on these remarks by the learned Counsel for the petitioner. Reference was also made to the decision in 'ANUMATHI SADHUKHAN v. A. K. CHATTERJEE', AIR 1951 Cal 90 for the general proposition that deprivation of valuable rights of property without the necessity of giving any reasons for the action would be unconstitutional. Bose, J., observed in that case thus:

"An order which arbitrarily or excessively invades the right of an individual cannot be said to contain the quality of reasonableness. Clauses 9 and 13 of the Rice Mills Control Order which no doubt empower cancellation or refusal of a licence already issued and refusal to issue a new licence without assigning any reasons. But there can be no doubt that these provisions overstep the limits of reasonableness and must be held to be invalid in the face of the written Constitution of India. It is clear law that an arbitrary or capricious exercise of the power is no exercise at all. If no reasons are assigned it is not possible to know or judge whether the order is a valid or a mala fide or arbitrary order."

(11) More or less the same line of reasoning was adopted when the learned Counsel also invoked the provision of Art. 19 (1) (f) and (g) of the Constitution read with Art. 19 (5) and (6). It was contended that a total prohibition of acquisition and installation of looms would not be a reasonable restriction and the decision of the Supreme Court of India in 'CHINTAMANRAO v. STATE OF MADHYA PRADESH', 1950 S C J 571, was cited in support of the contention. In that case the impugned Act totally prohibited the carrying on of the business of manufacture of beedies in certain villages within the agricultural season. Their Lordships held that this was not in the nature of reasonable restriction within the meaning of Art. 19 (6). Mahajan, J., who delivered the judgment

of the Bench construed the phrase "reasonable restriction" in the following manner:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by Clause (6) of Art. 19, it must be held to be wanting in that quality."

(12) The learned Advocate-General did not completely endorse the legal propositions set out in the counter-affidavit filed on behalf of the State as regards the arbitrary and unfettered discretion of the Textile Commissioner. He relied in general upon circumstances which compelled the State to regulate the proper distribution of yarn and manufactured cloth and the acute shortage of yarn. He also relied on the circumstance that the main Act, Essential Supplies (Temporary Powers) Act, was itself a temporary measure. Any scheme devised by the Government for a fair and equal distribution of essential commodities cannot be said to be imposing unreasonable restrictions though the scheme may certainly affect prejudicially some persons. It will be difficult and improper for the Court to embark on the actual measure taken by the Government or its special officers to secure a fair and equitable distribution. He cited to us two decisions of the United States Supreme Court which dealt with this question of distribution.

In 'RAILRAOD COMMISSION OF TEXAS v. ROWAN AND NICHOLAS OIL CO.', (1940) 310 US 573:84 Law Ed 1368 the validity of an order promulgated by the Rail Road Commission of Texas came up for consideration. The statutes empowered the Railroad Commission to make rules and regulations for the prevention of waste of oil and natural gas. It was specially provided that in the exercise of the powers conferred on them, the commission shall in the event of any regulation was adopted limiting the production of oil and natural gas in any pool, prorate or apportion the allowable production of the pool among the various producers on a reasonable basis. The Railroad Commissioner made a proration order under which allowances were based upon the hourly potential capacity of the well. The result was a flat per well allowance to the producers. The validity of the Order was challenged on the ground that it was opposed to the Fourteenth Amendment because the proration order was not reasonable and it was arbitrary. An alternative mode of distribution was suggested as better than the principle adopted by the Railroad commission in their order. The Supreme Court held that the order in question was quite valid and that a Court in reviewing the action of an administrative agency to which the promotion and execution of State Policy has been entrusted must not substitute its notions of expediency and fairness for those which have guided such agency. Whether in prorating oil production, any particular system was better than the others was a question not for the Courts but for the administrative agency entrusted by the State with the duty of making such proration. Mr. Justice Frankfurter who delivered the opinion of the Court pointed out the innumerable difficulties in trying to adjust the many conflicting interests and that the commitments of a delicate process of adjustment to the administrative process will not escape challenge in Courts, but such cases, were only episodes in the evolution of adjustment among private interests and on the reconciliation of all the private interests with the underlying public interests in vital sources of energy.

(13) In the other American case, 'SECRETARY OF AGRICULTURE v. CENTRAL ROIG REFINING CO.', (1950) 338 U S 604:94 Law Ed 381, an order of the Secretary of Agriculture allotting sugar quota among various refineries under the provisions of the Sugar Act of 1948 came up for review. To counteract the serious evils resulting from an uncontrolled sugar market and to rationalise the mischievous fluctuations of a free sugar market, the legislature adopted the devise of a quota system and the volume of sugar moving to the continental United States Market was controlled to secure an harmonious relation between supply and demand. Under the Act of 1948, five sugar producing areas were defined and to each area was allotted an annual quota of sugar. Under S. 205-A of the Act the Secretary of Agriculture was authorised to allot the refined sugar quota as well as the inclusive allowance of a particular area among those marketing sugar on mainland from that area. The section inter alia provided that allotment shall be made in such manner and for such amounts as to provide a fair, efficient and equitable distribution of such quota or proration thereof by taking into consideration three factors (1) proceedings of sugar to which proportionate shares pertained, (2) past marketings; and (3) ability to market the amount allotted. An allotment made by the Secretary in exercise of the power conferred by the section was challenged on the ground that the Act itself was not valid under due process clause of the Fifth Amendment, besides other grounds. It was held that the Act did not offend the due process clause because of the alleged discriminatory character. Mr. Justice Frankfurter who delivered the opinion of the Court after referring to the old and obstinate sugar problem of the country and the necessity for some sort of regulation to ameliorate the effect of disorderly competition observed that it was not for the Court to substitute its notion of expediency and fairness for that of the Congress. He said:

> "It would be a singular intrusion of the Judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the due process clause express."

and again:

> "This Court is not a tribunal for relief from the crudities or inequities of complicated experimental economic legislation."

(14) The learned Advocate-General also cited to us a decision of the High Court of Australia in 'McCARTER v. BRODIE', 80 C L R 432. The Transport Regulation Act provided that a commericial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the Board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided, its convenience to the public, the adequacy of the existing transportation etc. It was held that the Act did not contravene S. 92 of the Constitution which provided that:

> "Trade, commerce and intercourses among the States, whether by means of internal carriage or ocean navigation shall be absolutely free."

It was held that S. 92 did not preclude the commonwealth or State Parliament from in any way

regulating or controlling inter-State trade and commerce and what was not permitted was prohibition and not regulation. Latham, C. J., posed the question in issue thus:

"Is the effect of a challenged Act in relation to inter-State trade and commerce direct or remote? If it is remote no question in relation to S. 92 arises. Next, where the effect of the Act is direct, is the Act in its true character regulatory and not merely prohibitive? If it is truly regulatory and not prohibitive it will not be invalidated by S. 92. The question, therefore, is whether the Transport Regulation Acts of Victoria are regulatory or prohibitive."

(15) I shall first take up Clause 12 (4). In terms this provision imposes an absolute prohibition of acquisition and installation of new looms. I have grave doubts if such a total prohibition would be valid, having regard to the fundamental rights conferred on the citizen by Art. 19 (1) (f) and (g). Can total prohibition from the exercise of any right be ever justified as a reasonable restriction within the meaning of that expression as it occurs in Art. 19 (5) and (6). I am inclined to think that a total prohibition unless it be for a short and prescribed time will be invalid. I quite realise that there may be emergent situations when such absolute prohibition may be necessary. But such contingency is provided for by Art. 358 of the Constitution. When the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, he may by proclamation make a declaration to that effect (Art. 352). While such proclamation is in operation nothing in Art. 19 shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in Part III of the Constitution be competent to make or to take (Art. 358). In such a state of emergency a total prohibition of the exercise of the right conferred by Art. 19 may be valid, but otherwise, I am of opinion that it would be unconstitutional. An illustration of this principle is to be found in the 'BEEDI CASE', 'CHINTAMAN RAO v. STATE OF MADHYA PRADESH', 1950 S C J 571. Clause 12 (4) by itself must therefore be held to be 'ultra vires' and void after the coming into force of the Constitution.

(16) But both sides argued before us on the footing that there was really no absolute prohibition but there was only a restriction, because Clause 12 (4) has to be read with Clause 33 which gave power to the Textile Commissioner to permit in particular cases the acquisition and installation of new looms. What the petitioners' Counsel urged before us was that there was nothing in Clause 33 to indicate the factors which should be taken into account in the exercise of the Textile Commissioner's discretion. If his discretion is completely unfettered, as was suggested in the counter-affidavit filed on behalf of the State, can it be said that the provision does not conflict with the right of equal protection conferred by Art. 14? Is there not scope for if the clause does not really invite discrimination? Can valuable rights of citizens be left entirely to the arbitrary discretion of the Textile Commissioner? I think that such an arbitrary and unfettered discretion would not amount to a reasonable restriction within the meaning of Art. 19 (5) and (6). It would be unreasonable to gamble on the reasonableness of the Textile Commissioner, to use the language in an earlier decision of this Court in 'M. B. NAMAZI v. DY. CUSTODIAN OF EVACUEE PROPERTY MADRAS', 1951-2 Mad L J 1. The salutary principle enunciated in 'YICK WO v. HOPKINS', (1886) 118 U S 356:30 Law Ed. 220, would render such a provision obnoxious to the Constitution. So long as the possibility of a provision like Clause 33 being applied in a manner not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void. As the Supreme Court observed in 'ROMESH THAPPER v. STATE OF MADRAS', 1950 S C J 418 at p. 428:

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such rights it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out; it must be held to be wholy unconstitutional and void."

(17) The petitioner has also mentioned concrete instances to show that there has been discrimination in the grant of exemptions under clause 33 of the order. It is not necessary for us to discuss whether the exemption in each case was justified or not. What is of significance is that there is scope for discrimination. In the absence of any statutory rules to indicate the manner in which the discretion of the Textile Commissioner should be exercised it is impossible to say whether his discretion in a particular case is or is not justified. If the yardstick is only the personal opinion of the Officer concerned, it is plainly a case of a naked and arbitrary power. It is therefore not only desirable but also necessary that proper rules should be framed and general principles laid down to govern the discretion vested in the Textile Commissioner under Cl. 33. If that is done and individual cases are dealt with accordingly without making any discrimination there could be no valid complaint.

(18) The proper order in the circumstances which I think should be passed on this petition (C.M.P No. 6181 of 1951) is to direct the respondent to deal with and dispose of the petitioner's application wihout making any discrimination on any ground, in the light of the observations made herein.

(19) In C.M.P. No. 6182 of 1951 relief is sought in respect of the allotment of yarn. Clause 30 of the Order already extracted above confers on the Textile Commissioner power to direct any manufacturer or dealer or any class of manufacturers or dealers to sell to specified person only such quantities of cloth or yarn as the Commissioner may specify, and likewise not to sell or deliver cloth or yarn except to specified persons. Besides the indication in the opening words of the clause, namely "with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order", there is no rule laid down as to the manner in which the proper distribution has to be effected among the several concerned persons. The petitioner complains that in actual practice the Textile Commissioner has discriminated between person and person but apart from actual discrimination, he also challenges the validity of the provision on the ground that it contravenes the principle of equal protection of the laws and also that it is not a reasonable restriction on the exercise of the right conferred by the Constitution under Art. 19(1)(f) and (g). In the original counter-affidavit filed on behalf of the State, except stating that the petitioner's request to allot 400 lbs. of yarn per month cannot be complied with in view of the acute scarcity of yarn in

the State and that supplies of yarn are being regulated to the power looms month after month on the basis of the yarn, allotments made to this State by the Textile Commissioner, Bombay, there is nothing else which gives us any information as to the principles on which the distribution is made. In the petitioner's affidavit it was definitely alleged that certain purely weaving mills i.e., mills belonging to the same category as that of the petitioner were still being given 300 to 400 lbs. of yarn per month and that he was being discriminated unreasonably and arbitrarily. In the counter affidavit, there is only a bare denial and the petitioner is put to strict proof of the allegations. I must confess that I am surprised at this attitude on behalf of the State. Even in the affidavit subsequently filed by the Assistant Director of Cotton, Bombay, there is no indication as to the basis on which the yarn is allotted to the several mills.

(20) I quite realise that during periods of acute shortage of essential goods and commodities, it is not only desirable but also imperative that the State should take steps to regulate their purchase and sale with a view to an equitable distribution among all the consumers. Legislation undertaken with this object, though it may in a sense, be restrictive of free trade, cannot be declared to be unconstitutional so long, of course, as restrictions are necessary in the interests of the general public and the restrictions are reasonable. It is also clear that legislation in the matter of controls cannot go into the minutest detail of the actual distribution. As Mr. Justice Frankfurter observed in 'RAILROAD COMMISSION OF TEXAS v. ROWEN AND NICHOLAS OIL CO.', (1940) 310 U S 573: 84 Law Ed. 1368, "merely writing laws is only the beginning of the matter. The Administration of these laws is full of perplexities". The commitment of the delicate task of adjusting many conflicting interests and overcoming innumerable difficulties in making an equitable distribution must needs be to administrative agency. But the question is whether the administrative agency should have an arbitrary and unfettered discretion or should be bound by certain broad principles and rules which it could not transgress. In 'SECRETARY OF AGRICULTURE v. CENTRAL ROIG REFINING CO.', (1950) 338 U S 604: 94 Law Ed 381 the same learned Judge (Mr. Justice Frankfurter) made the following illuminating observations in speaking of the administrative function entrusted to the Secretary of Agriculture in allotting sugar quotas,

> "He could not be left at large and yet he could not be rigidly bounded. Either extreme would defeat the control system. They could be avoided only by laying down standards of such breadth as inevitably to give the secretary leeway for his expert judgment. Its exercise presumes a judgment at once comprehensive and conscientious."

(21) It will be seen that in the two American cases above referred to on which the learned Advocate General placed reliance, the administrative officer was not left at large. In the Oil case there was a general rule of prorata allotment. In the sugar case the legislature laid down three factors which had to be taken into consideration in making the quotas. But in the present case no rules or principle have been made or laid down which should guide the Textile Commissioner in making a proper distribution of cloth or yarn. As the clause stands, there is nothing to prevent the Textile Commissioner from issuing any arbitrary order. He can exclude for no reasons certain persons altogether in his scheme of distribution. He can also discriminate. The petitioner's definite charge that mills placed in the same position as his mill have been allotted more quantities of yarn than his mill stands unrefuted.

(22) The question then is what this Court should do in these circumstances. Learned counsel for the petitioner asked us to declare clause 30 to be wholly ultra vires and void. The result of such a declaration would be to destroy the whole scheme of textile control. I spent anxious thought on the disastrous consequences of such a course. I have already said that during the periods of acute shortage of essential goods there could be indeed, there should be a certain amount of regulation with a view to ensure fair and equitable distribution. I have already referred to observations of learned Judges of the Supreme Court of the United States that the details of any scheme of regulation or control can only be worked out by administrative agency and not by definite provisions in the Statute. In this connection I found the following passage in Willis' Constitutional Law very suggestive,

> "Is it proper classification to put in one class those who get the consent of a board or of an official and into another class those who do not where no standard is set up to control the action of the board or official? Some cases answer this question in the affirmative, while other cases answer it in the negative. Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power but only by its arbitrary exercise by those upon whom conferred.
>
> If a Statute declares a definite policy, there is a sufficiently definite standard for the rule against the delegation of legislative power, and also for equality if the standard is reasonable. If no standard is set up to avoid the violation of equality, those exercising the power must act as though they were administering a valid standard. For this reason there is a need for a judicial review to see whether or not power delegated has been exercised arbitrarily."

(23) Clause 30 lays down the ultimate end in view, namely, a proper distribution of cloth and yarn. If in accordance with and in pursuance of this policy, the Textile Commissioner had arrived at a scheme of distribution on a certain and ascertainable basis which is free from any charge of discrimination and he had placed that scheme before this Court and convinced us that the petitioner before us has been allotted the proper quota in accordance with the scheme, then we would have been loth to interfere. Unfortunately however, and presumably in spite of the efforts of the learned Advocate General, we have not been informed of any such general scheme. There is no doubt a reference to an All India Yarn Distribution scheme in the counter affidavit filed on behalf of the State, but no particulars of the scheme have been put before us. We are unable to know if the quota allotted to the petitioner is covered by this scheme. The petitioner has stated in his affidavit that mills practically in the same category as his mill have been allotted 400 lbs. per loom per month. This allegation has not been shown to be wrong. Nor has it been shown that owing to other valid reasons, the quota of 400 lbs. should be reduced. In the absence of any justification for discriminating against the petitioner in this matter, we are compelled to hold that there has been a breach of the guarantee of the equal protection of laws vouchsafed by Art. 14 and of the fundamental right declared by Art. 19(1).

(24) At the same time I am not disposed in this application to declare that Cl. 30 is totally void. It appears to me that if in the exercise of the powers granted under Cl. 30, the Textile Commis-

sioner has evolved a proper scheme of distribution which does not offend either against Art. 14 or Art. 19(1)(f) and (g) read with Art. 19 (5) and (6) then there is no room for complaint by any person on the ground that his rights have been unlawfully affected to his prejudice. If till now the authorities concerned have not evolved any general scheme it will be open to them to hereafter at least lay down the general principles of distribution.

(25) In the circumstances I think the proper order for us to make is to direct the respondent to consider the application of the petitioner for allotment of yarn on its merits without making any discrimination and in accordance with general rules as to fair and equitable distribution that may be made on the subject.

(26) The petitioner will have his costs in the two applications; advocate's fee Rs. 250 in each.

(27) VENKATARAMA AIYAR, J.: These are petitions filed under Art. 226 of the Constitution raising the question of the validity of some of the provisions of the Cotton Textiles Control Order, 1948. The petitioner is the proprietor of a Weaving Factory called Sundararaj Textiles at Kalapatti in Coimbatore district. In 1944 the factory was equipped with ten power looms. In 1946 the petitioner applied to the Government for permission to instal 14 more power looms and the same was granted and the factory has been working ever since with 24 power looms. The Cotton Textiles Control Order, 1948, with which we are now concerned came into force on 2nd August 1948. Clause 12(4) of this Order runs as follows:

"No person shall acquire or instal any loom to be worked by power as defined in S. 2(f) of the Factories Act, 1934."

Clause 33(3) of the Order is in these terms:

"Notwithstanding anything contained in this order the provisions of the clauses specified in schedule C shall have the effect subject to the powers of the Textile Commissioner under subcls. 1 and 2 to withdraw or relax any order of all the restrictions enacted in those provisions."

Clause 12 is one of the provisions included in schedule C.

(28) In 1949 the petitioner applied under Cl. 33(3) for permission to instal 50 more power looms, but that was refused by a communication dated 6-12-1949. The petitioner made further representations in the matter to the Government and again permission was refused by an order dated 17th March 1950, the ground for refusal being the meagre supply position of yarn in the country. The petitioner contends that Cl. 12(4) is an invasion of the rights to acquire property and to carry on trade conferred on him under Art. 19 (1) (f) and (g) and that the power conferred on the Textile Commissioner to withdraw or modify the restrictions in Cl. 12(4) is arbitrary and discriminative and void under Art. 14 of the Constitution.

(29) The petitioner also complains that the quantity of yarn allotted to him by the Textile Commissioner has been undergoing a steady decline that starting with 400 lbs. per loom per month it has now been reduced to 100 lbs. per loom per month and that even that quantity is not regularly supplied and that under the circumstances it has become impossible to carry on business. Clause 30 of the Cotton Textile Control Order which empowers the Textile Commissioner to control the distribution of yarn is as follows:

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers

(a) to sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify,

(b) Not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify and may issue such further instruction as he thinks fit regarding the manner in which the direction is to be carried out."

The contention of the petitioner is that this clause also is repugnant to Art. 14 as it confers wide and arbitrary powers on the Textile Commissioner and that it is therefore void. Thus the points for determination are the validity of Cl. 12 (4), Cl. 33(3) and Cl. 30 of the Cotton Textile Control Order, 1948.

(30) I shall first set out the relevant legislative provisions bearing on the question. Under 9 and 10 George VI, Chap. 39 India (Central Government and Legislature) Act, the British Parliament conferred on the Central Legislature certain powers. In the exercise of those powers, the Indian Legislature passed the Essential Supplies (Temporary Powers) Act, XXIV of 1946. The preamble to the Act shows that the object of the Legislation was to continue the war-time control of the production, supply and distribution of essential articles for a further period.

(31) Section 3(1) enacts:

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability of fair prices, may by notified order provide for regulating or prohibiting the production, supply or distribution thereof and trade and commerce therein."

S. 3, Cl. (2) provides for the regulation of the production, manufacture, acquisition and transport etc., of the essential commodities by licences. Section 4 enacts that the Government might exercise these powers through any officer subordinate to the Central Government or through the Provincial Government or any officer subordinate to the Provincial Government as may be specified. Under S. 14(1) no order made in exercise of any power conferred by the Act could be called in question in any Court. The life of this Act has been extended from time to time by resolutions of the legislature dated 25-2-1948, 23-3-1949 and 20-12-1949 and finally it has been extended upto 31-12-1952 by Act LII of 1950. The Cotton Textiles Control Order now under consideration was made in the exercise of the powers conferred under S. 3(1) and came into force on 2-8-1948. There is no question but that this order was valid when it was made. What is in dispute is whether the impugned clauses have become void under the Constitution.

(32) It will be convenient to deal first with the question whether Cl. 33(3) is void under the Constitution. This clause undoubtedly confers on the Textile Commissioner a wide and unrestricted power to withdraw or modify Cl. 12(4) in such manner as he pleases. It lays down no principles which he has to observe in exercising this power. No rules have been made prescribing the conditions on which the applicant is to get exemptions or modification. No directions are given controlling in any manner the discretion of the commissioner. He is not bound to give any reasons for his orders. On the language of Cl. 33(3) there is nothing to prevent the commissioner from granting exemption to some and refusing it to others at his own will and pleasure. Indeed the petitioner complains in his affidavits that there has been such discrimination and he has given particulars therefor.

(33) The counter affidavit contains a general denial and avoids an answer to the particulars but it is unnecessary to decide whether the complaints of the petitioner are well founded and whether there has been discrimination or not, because the validity of the provisions does not depend upon the result of their working. A valid statute cannot be rendered void by the incompetence of the person who has been charged with its administration any more than a void statute can be rendered valid by an efficient officer working it to satisfaction. In either case the validity of the enactment should be determined on its own merits. If the impugned provisions confer an absolute and unrestricted power, discrimination is inherent in their very nature and they must be declared void without further investigation as to whether in fact there has been discrimination or not. The well-known observation occurring in 'JOHN H. REAGAN v. FARMERS LOAN & TRUST Co.', (1894) 154 US 362: 38 Law Ed 1014 at 1024, "This, as has been often observed, is a Government of laws and not a government of men" seems eminently adapted to this context.

(34) I shall now deal with the authorities cited on either side. Mr. K. V. Venkatasubramania Aiyar the learned advocate for the petitioner relied on the decisions in 'YICK WO. v. HOPKINS', (1886) 118 U S 356: 30 Law Ed 220, 'ANUMATHI SADHUKHAN v. A. K. CHATTERJEE', AIR 1951 Cal 90 and the observations in 'NAMAZI v. DEPUTY CUSTODIAN OF EVACUEE PROPERTY, MADRAS', 1951-2 Mad L J 1. In 'YICK WO. v. HOPKINS', (1886) 118 U S 356: 30 Law Ed 220 an order of the city and county of San Francisco provided that it would be unlawful for any person to engage in laundry business in buildings other than those constructed of brick or stone without the permission of the Board of Supervisors. No regulations were made prescribing conditions to be complied with for obtaining the consent. In holding that this provision was invalid Mathews J. delivering the unanimous opinion of the Court observed as follows:

> "There is nothing in the Ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer and actually do confer not a discretion to be exercised upon a consideration of the circumstances of each case but a naked and arbitrary power to give or withhold, consent, not only as to places but as to persons."
>
> "It is purely arbitrary and acknowledges neither guidance nor restraint." (Pp. 356-374).

In 'ANUMATHI SADHUKHAN v. A. K. CHATTERJEE', AIR 1951 Cal 90, the question was about the validity of an order passed under West Bengal Rice Mills Control Order, 1949. Clause 9 of this order is as follows:

> "Notwithstanding anything contained in this order the Commissioner may, without assigning any reason, direct any application for the issue of a licence or for the renewal of a licence be refused."

Under this clause an order was passed prohibiting the husking of paddy after 14-12-1950. In holding that this order was 'ultra vires' Bose J. observed as follows:

> "An order which arbitrarily or excessively invades the right of an individual cannot be said to contain the quality of reasonableness. Clauses 9 and 13 of the Rice Mills Control Order which no doubt empower cancellation or refusal of a licence already issued and refusal to issue a new licence without assigning any reasons. But there can be no doubt that these provisions overstep the limits of reasonableness and must be held to be invalid, in the face of the written Constitution of India. These provisions do not give any opportunity to the licence holder to make any representation against the action taken by the authorities concerned or to protect their interest against any wrongful action of the authorities and they further provide scope for the exercise of the power conferred on the authorities in an arbitrary and capricious manner, if they so choose to do it. It is clear law that an arbitrary or capricious exercise of the power is no exercise at all. If no reasons are assigned, it is not possible to know or judge whether the order is a valid or mala fide or arbitrary order."

Reliance is also placed on certain observations occurring in 'M. B. NAMAZI v. DEPUTY CUSTODIAN OF EVACUEE PROPERTY, MADRAS', 1951-2 Mad L J 1. Dealing with S. 20 of the Administration of the Evacuee Property Ordinance, No. XXVI of 1949 which provides that no intending evacuee shall transfer his property without the consent of the custodian, my Lord the Chief Justice referred to the absence of rules indicating on what grounds the transfer should be refused and then observed as follows:

> "It may be said that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds. But surely that would be gambling on the reasonableness of the custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonably refusing to approve of any transfer by an intending evacuee."

As against this the learned Advocate General relied on 'RAILROAD COMMISSION OF TEXAS v. ROWAN AND NICHOLS OIL CO.', (1940) 310 U S 573: 84 Law Ed 1368, 'SECRETARY OF AGRICULTURE v. CENTRAL ROIG REFINING, CO.', (1950) 338 U S 604; 94 Law Ed 381 and certain observations in 'MC CARTER v. BRODIE', 80 CLR 432 (Australia). In 'RAILROAD COMMISSION OF TEXAS v. ROWAN AND NICHOLS OIL CO.', (1940) 310 U S 573: 84 Law Ed 1368, the question was about the validity of the proration order issued by the commission regulating production of oil "on hourly potential basis" with exceptions in cases of wells with low productive capacity called "marginal wells". Bowen and Nichols Oil Company complained that the rules framed by the commission put the owners of the marginal wells in a favoured position and that the restrictions on production crippled the non-marginal owners in the enjoyment of their rights, that those restrictions were unreasonable and amounted to depriving them of their property without due process of law. It was held that certain rules and formulas having been adopted by the commission in a matter requiring special knowledge it was not within the province of the Court to interfere with them.

> "A controversy like this always calls for fresh reminder that Courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted,"

and dealing with the contention that there was discrimination in favour of the smaller owners the Court observed:

> "Plainly these are not issues for our arbitrament. The State was confronted with its general problem or proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day to day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors

that must enter into such judgments, the commission has observed established procedure. If the history of proration is any guide the present order is but one more item in a continuous series of adjustments. It is not for the Federal Courts to supplant the commission's judgment even in the face of convincing proof that a different result would have been better."

In that case there were definite rules framed with reference to various classes of wells and there was no question of any arbitrary exercise of power. What was decided was only that the Courts were not competent to sit in judgment on the propriety or fairness of the rules which had been duly framed under the statute. In this case no such rules have been framed.

(35) In 'SECRETARY OF AGRICULTURE v. CENTRAL ROIG REFINING CO.', (1950) 338 U S 604 : 94 Law Ed 381, the validity of certain provisions in the Sugar Act was in question. For the purpose of controlling Sugar market the quota system was adopted. The Secretary of Agriculture was empowered to make allotments after taking into consideration processing, past marketing and ability to market. The Act also fixed an annual quota of refined sugar which may be marketed from the off-shore areas but there was no such restriction on the mainland refiners. The validity of these provisions was contested on the ground that fixing 1935 to 1941 as the basic period operated harshly on the new comers and that fixing of quotas only for off-shore area refiners and not for the mainland refiners was discriminative and in violation of due process clause. In repelling this contention the Court observed:

"To fix quotas on a strict historical basis is hard on latecomers into the industry or on those in it who desire to expand. On the other hand, to the extent that new comers are allowed to enter or oldtimers to expand there must either be an increase in supply or a reduction in the quotas of others. Many other factors must plague those charged with the formulation of policy the extent to which projected expansion is a function of efficiency or becomes a depressent of wage standards; the wise direction of capital into investments and the economic waste incident to what may be on the short or the long pull over expansion of industrial facilities; the availability of a more suitable basis for the fixing of quotas etc. The final judgment is too apt to be a hodgepodge of considerations, including considerations that may well weigh with legislators but which this Court can hardly disentangle."

and again

"This Court is not a tribunal for relief from the crudities and inequities of complicated economic legislation."

(36) This decision also is similar to the one in 'RAILROAD COMMISSION OF TEXAS v. ROWAN AND NICHOLAS OIL, CO.', (1940) 310 U S 573 : 84 Law Ed 1368, and is based upon the same principle.

(37) The learned Advocate General relied upon certain observations in 'MC CARTER v. BRODIE', 80 C L R 432 (Australia). Under a certain transport regulation, Act passed by the State of Victoria no commercial vehicle could operate on public highways unless it had licence. There were detailed provisions prescribing qualifications and conditions under which licences could be granted. One of those conditions was the payment of licence-fee. It was contended that the imposition of a licence fee was a restriction on the right to trade "absolutely free" conferred by S. 92 of the Constitution Act. This contention was rejected and it was held that the legislature had power to regulate trade and that S. 92 was inapplicable to such regulations. In that connection Latham C. J. made the following observations on which the learned Advocate General relied:

"It has, however, been particularly objected that a power to regulate trade and commerce does not include a power to exclude any person from operations in trade and commerce. But it is obvious that any regulation which imposes conditions upon activities of individuals must exclude from those activities persons who are not prepared, or who are not able for any reason, to satisfy those conditions. In other words all regulations involve some degree of prohibition, and, further, all regulations operate upon persons."

In that case there were elaborate rules prescribed for granting licence and the Court held that the discretion of the Board was not unlimited and arbitrary. In fact the observations quoted above were relied on by the learned Advocate General only to show that the power to regulate carries with it restriction in some form.

(38) The result of the authorities may thus be summed up. The legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable.

(39) Conformably to the above principles the learned Advocate General sought to establish that the discretion conferred on the Textile Commissioner under Cl. 33(3) is not absolute and that in fact it is subject to reasonable limitations. He referred to the orders relating to Cotton Control Order made in the year 1943; then to the Control Order dated 29-4-1944 made under the Defence of India Act; to Cl. 18. B which corresponds to the present Cl. 30, to the Control Order of 1945 and to the evolution of All India Yarn distribution scheme. He argued that under Cl. 12, sub-cls. 1 to 3 the year 1944 was taken as the basic period for fixing quotas and it is implicit in Cl. 33(3) and Cl. 30 that the Textile Commissioner should exercise his powers on the basis of 1944 fixation. But I am unable to read any such limitation or condition in clause 33 (3) and Cl. 30. Indeed the counter affidavit takes the position that the orders of the Textile Commissioner are purely administrative and not liable to be questioned in Court. That undoubtedly would be the position in 1948 when the Control Order in question was issued. The British Parliament and the Indian Legislatures acting within the spheres allotted to them possessed plenary powers of legislation and the laws enacted by them could not be questioned in any Court on the ground that they deprived a person of his liberty or of his property. It is only with the Constitution that a change came over the situation. The principle of the American Constitution that it was necessary to safeguard the rights of the citizens against the despotism of the legislature was adopted and limitations imposed on the powers of the legislature, the most important of which are those set out in Part III. The subjects have now certain fundamental rights guaranteed to them and it is beyond the competence of the legislature to override them and if they do, the Courts can declare such legislation bad. Now the Cotton Textile Control Orders were notified under S. 3 (1) of Act 24 of 1946 long prior to the Constitution, under the influence of a different theory and from a different standpoint and it is not, therefore, a matter for surprise that some of these provisions

do not fit in with the pattern of the Constitution. Clause 33 (3) and Clause 30 are survivals of the benevolent despotism of the pre-Constitution legislature and they are inconsistent with the fundamental rights guaranteed under the Constitution. The counter-affidavit is in my opinion a frank admission of this. I am, accordingly of opinion that Clause 33 (3) is opposed to Art. 14 and void.

(40) I shall now deal with Clause 12 (4). The petitioner contends that he has a fundamental right to acquire property under Art. 19 (1) (f) and to trade under Art. 19 (1) (g) and that Clause 12 (4) is an infringement of these rights and is, therefore, void. The point to be decided is whether the clause can be held to be saved by Art. 19 (5) and (6) as being a reasonable restriction made in the interests of the general public. That the Control Orders have been made in the interests of general public cannot be and has not been controverted, but what is urged is that Clause 12 (4) absolutely prohibits the acquisition of property and, therefore, cannot be upheld as a restriction, much less reasonable restriction on the rights conferred under Art. 19 (1) Clauses (f) and (g). Reliance was placed on the decision of the 'Supreme Court in 'CHINTAMAN RAO v. STATE OF MADHYA PRADESH', 1950 S C J 571, where it was held that a prohibition on the manufacture of beedies during agricultural season was void as being unreasonable. It may be conceded that the restrictions contemplated by Art. 19 (5) are such as are incidental to regulation of the rights conferred under Art. 19 (1) (f) and (g) and that the total prohibition of the rights is not within its scope. But it must be remembered that the Cotton Textiles Control Order is an emergency legislation introduced for the purpose of regulating supply and demand under abnormal conditions following the termination of the War. It is statedly a temporary measure, its life being extended by successive resolutions of the legislature having due regard to the conditions of the market.

(41) In judging of the reasonableness of the prohibition it would be relevant to take into account that it is an emergency legislation of a temporary character. The following observations in 'N. B. KHARE v. STATE OF DELHI', 1950 S C J 328 would seem to lend support for the view that the prohibition might be valid. In that case the question was whether an order of externment was a reasonable restriction on the right conferred under Art. 19 (1) (d). In answering this question in the affirmative Kania, C. J., observed as follows:

"The further extension of the externment order beyond the three months may be for an indefinite period but in that connection the fact that the whole Act is to remain in force up to 14th August 1951 cannot be overlooked."

Mukherjee, J., observes as follows:

"It is not disputed that under Clause 5 of Article 19, reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such a standard which is sometimes described as an external yard stick the vesting authority in particular officers to take prompt action under emergency circumstances entirely on their own responsibilities or personal satisfaction is not necessarily unreasonable. One has to take into account the whole scheme of legislation and the circumstances under which the restrictive orders could be made."

(42) In view of these observations I should have had considerable difficulty in holding that Clause 12 (4) standing by itself would be void. But the matter, however, does not rest there. It is argued on behalf of the petitioner that Clause 12 (4) does not stand alone that it must be read along with Clause 33 (3) that the latter is invalid as offending Art. 14 and that in consequence the former also must be held to be invalid.

(43) I agree with this contention. The prohibition on the right to acquire property enacted under Clause 12 (4) and the power to exempt or modify its operation conferred under Clause 33 (3) are inseparable parts of a single scheme of control. Is it likely that the authorities would have enacted such an absolute prohibition as is contained in Clause 12 (4) if they had not also coupled it with a wide power of exemption such as is conferred under Clause 33 (3)? I find it difficult to believe that they would have. And if an absolute prohibition can be justified under Art. 19 (5) only by the existence of a state of emergency. how is that to be reconciled with the grant of such an absolute power of exemption under Clause 33 (3)? If A is to be prohibited from acquiring power looms on the ground of national emergency, the prohibition must apply equally to B and C and all the citizens. There cannot be an emergency as regards one citizen and not as regards others. Nor can an argument be founded on the setting of the two provisions under the Control Order. Clause 33 (3) confers a power to exempt not merely in respect of Clause 12 (4), but several other clauses which are all set out in Schedule C. It is as if it were enacted as part of every one of the clauses mentioned in that schedule. The proper view to take of the clauses is to regard them as licencing provisions, providing in substance that properties could be acquired under a licence and that the Textile Commissioner should have the authority to grant such a licence. The validity of Clauses 12 (4) and 33 (3) must then be judged by the principles applicable to the power to grant licences and, as already mentioned, such a power will be valid only if it is to be exercised in accordance with rules, and where there are no such rules it must be declared void as repugnant to Art. 14. That being my conclusion, I shall have now to consider that relief should be granted to the petitioner. To prohibit the Textile Commissioner from interfering with any acquisition of power looms by the petitioner generally which is what is prayed for in the petition will be too wide a relief to grant, and will amount to a negation of the power of the State to enact control regulations in the interests of the public. At the same time, to leave the petitioner without any remedy against the refusal of the Textile Commissioner to grant exemption under Clause 33 (3) would be to withhold protection against the invasion of fundamental rights in exercise of a naked and arbitrary power. To strike a proper balance between the demands of the State and the rights of the individuals it is desirable that an order should issue that the application of the petitioner for exemption under Clause 33 (3) should be heard and disposed of by the Textile Commissioner on principles in consonance with Art. 14. It is desirable that proper rules should be framed by the administration prescribing the conditions for granting permission, and if that is done there will be no ground for complaint under Art. 14 and this Court will not interfere with the exercise of discretion by the Textile Commissioner, however wide it might be so long as it is within the rules.

(43-a) The validity of Clause 30 may now be considered. This clause also confers absolute and unlimited powers on the Textile Commissioner. The learned Advocate-General relied on the words "with

a view to securing proper distribution of cloth or yarn" occurring in Clause 30 as imposing a limitation on the exercise of discretion by the Textile Commissioner, but these words only define the object of the control and not the mode and manner in which such object is to be carried out. This clause is of the same character as Clause 33 (3) and must for the same reasons be held to be void.

(44) The question is: what is the relief which should be granted to the petitioner. The prayer in the petition is that the respondent should allot and supply to the petitioner 400 lbs. of yarn per loom per month. For the reasons given by me (in C.M.P. No. 6181 of 1951) I am of opinion that such a relief could not be granted. But the application of the petitioner for supply of yarn should be directed to be considered by the Textile Commissioner and disposed of on principle consonant to Art. 14. I, therefore, agree that an order should issue in both the applications in forms mentioned in the judgment of my Lord the Chief Justice.

(45) Subsequent to the delivery of the judgments in these applications it was brought to our notice by the learned Advocate-General that on 9th July 1951 there was a notification by the Central Government under which for Clause 30 as it stood before, the following clause was substituted, namely:

30 (1) No producer shall sell or deliver any cloth or yarn which has been produced by him except to such person or persons and subject to such conditions as the Textile Commissioner may specify;

(2) Without prejudice to the provisions of Sub-clause (1) the Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer or any class of manufacturers or dealers:

(a) to sell to such person or persons such quantities of such description of cloth or yarn as the Textile Commissioner may specify;

(b) Not to sell or deliver any cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify.

3. The Textile Commissioner may issue such further instructions as he thinks fit in order to carry out the provisions of Sub-clause (1) or any direction under Sub-clause (2).

4. Every manufacturer or dealer, to whom a direction or instruction is issued under this clause, shall comply with any such direction or instruction."

(46) We are of opinion that neither the reasoning nor the conclusion in the judgments just delivered is in any way affected by this substitution.

(47) We certify that the case involves a substantial question of law as to the interpretation of the Constitution and in particular Art. 14 and Art. 19 (1) (f) and (g) read with Art. 19 (5) and (6).

Order accordingly.

C.R.K./R.G.D.

A. I. R. 1952 Madras 576

RAMASWAMI J.

In re. M. Malayandi Thevar and others, Petitioners.

Criminal Revn. Cases Nos. 989 to 991 and 1092 of 1951; Criminal Revn. Petns. Nos. 971 to 973 and 1070 of 1951, D/- 5-12-1951.

Madras Food-Grains (Intensive Procurement) Order (1950), Cl. 3 (2) — Collector's notification — Violation of.

Under the Order, the Collector is not empowered to lay down the principle for regulating or controlling but only to carry out the working of the principles and find out what the surplus is. Therefore, this is not a case of a delegation of delegated powers or a case of abdication or effacement of the State Government in the matter of carrying out the powers delegated to them by the Central Government but a mode of exercising these powers through their subordinates retaining full control of the powers vested in them. The Collector therefore has power by issuing a notification to call upon a person to surrender the surplus food-grains and the violation of such a notification is an offence. **(Paras 3, 9, 10)**

T. R. Srinivasa Aiyar, S. Krishnaswami, for Petitioners; The Asst. Public Prosecutor, for The State.

Case referred to:

('50) 1950-2 Mad L J 20 (N R C) (Pr 3)

ORDER: These are four criminal revision cases filed against the orders of the Sub-Divisional Magistrate, Tuticorin, in summary cases Nos. 289, 292, 290 & 176 of 1951, holding that the prosecutions launched against the criminal revision petitioners were competent and maintainable.

(2) There can be no dispute on the limited records before us at this stage concerning the facts, namely, that these petitioners did not comply with clause 3(2) of the Madras Food Grains (Intensive Procurement) Order, 1950, & the Collector's notification dated 15-7-1950 for surrender of surplus food-grains to the Government, and for which the petitioners have been charged under the Madras Food-grains (Intensive Procurement) Order, 1950, read with S. 7(1) of the Essential Supplies (Temporary Powers) Act, XXIV (24) of 1946.

(3) The point taken by them in the lower Court and here is set out by the criminal revision petitioners as follows: The Collector has no power by a District Notification to call upon the accused to surrender the surplus food-grains and that the violation of such an order is not an offence. The powers of the Central Government for regulating or prohibiting the production, supply and distribution trade and commerce in essential commodities under S. 3 of the Essential Supplies (Temporary Powers) Act, 1946, are delegated to the State Government. The State Government cannot further delegate such powers to its subordinate officers.

In support of this, the decision of our learned brothers Govinda Menon and Basheer Ahmed Sayeed JJ. in Cri M P 518 of 1950, 'MOHOMED SAHIB IN RE', 1950-2 Mad L J 20, (recent case) has been relied upon. Therein it was held that the fixation of prices of sugar must be done by the State Government by notified order as required under Ss. 3 and 4 of Act XXIV (24) of 1946 and the order of the State Government authorising the Collector to fix the price was illegal and not operative and that therefore the price fixation and the notification in the District Gazette were invalid. It is stated that the same principle applied to this case and that the Collector's demand on the accused is not valid.

(4) The learned Sub-Divisional Magistrate rejected this contention and hence these criminal revision petitions. I am also of the same opinion as the learned Sub-Divisional Magistrate and here are my reasons.

(5) Section 3(1) of Act XXIV (24) of 1946 lays down that the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-clause (2) provides that without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide.....(f) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order.

Section 4 provides that the Central Government may by notified order direct that the power to make orders under S. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercised by (a) such officer or authority subordinate to the Central Government, or (b) such Provincial Government as may be specified in the direction. S. 2(d) of the same Act defines a "notified order" to mean an order notified in the official Gazette. The term "official gazette" has been construed in relation to Madras as the Madras Fort St. George Gazette.

(6) On 1-7-1950 in the Fort St. George Gazette the following Madras Food-grains (Intensive Procurement) Order, 1950 (G. O. Ms. No. 1269 Food and Agriculture, 30th June 1950) has been published. The preamble states that this notification was in exercise of the powers conferred by S. 3 of the Essential Supplies, (Temporary Powers) Act, 1946, read with the Notification of the Government of India, Department of Food, No. PY. 603 (2)-1, dated 21st October 1946 and with the concurrence of the Government of India, by his Excellency the Governor of Madras.

(7) I must briefly summarize the eleven paragraphs of this notification relating to paddy (rice in the husk), rice (paddy husked), 'cholam, cumbu, ragi, korra, samai, varagu and varigalu'. Paragraph 1 gives the title of the order and Para. 2 defines the extent and defines foodgrains, purchase and sale. Para. 3 defines the categories of persons to whom this Notification is applicable and the categories of persons who can call upon the aforesaid persons to do the various things specified within the purposes set out above. Then sub-paragraph (3) of Para. 3 proceeds to meticulously set out the rules for determining the surplus which has got to be surrendered on demand.

Paragraph 4 provides for advance demands being made if it appears necessary for maintaining supplies of food-grains even before the determination of the surplus. Para. 5 provides for the mode of delivery and the payment of prices. Paragraph 6 relates to special conditions in regard to certain specified districts. Para. 7 deals with the powers invested by the Government in District Collectors and persons authorised by him on this behalf for declaration of stock of food-grains in specified circumstances and areas. Para. 8 deals with inspection of stocks and confers necessary facilities for the officers for doing the same. Para. 9 deals with sequestration of stocks in certain specified events. Para. 10 is the immunity clause in regard to officers carrying out the operations under this Order and forfeiture in defined circumstances. The Order finally wounds up by stating that

> "all proceedings commenced or deemed to have been commenced and all action taken or deemed to have been taken and all appointments made or deemed to have been made under the Madras Food-grains (Intensive Procurement) Order, 1948, as subsequently amended, shall be deemed to have been taken or made under the corresponding provision, if any, of this order, and shall, so far as may be continued accordingly."

This procurement order is applicable during fasli 1360 or future fasils.

(8) In this case there is no dispute that the Central Government had powers to delegate its authority to the State Government and the only point in dispute is that the State Government is not entitled to delegate their powers so got in favour of its subordinate officers, namely, the District Collectors.

(9) This contention is undoubtedly due to a confusion of thought as has been pertinently pointed out by the learned Sub-Divisional Magistrate. In this case the State Government has not delegated its powers to the Collectors and has in fact in exercise of its delegated powers passed various orders like the Food-grains (Intensive Procurement) Order 1948, 1950 etc., comprehensively laying down the principles on which the categories of persons to whom these Orders apply, the grounds on which the surplus should be determined, the mode of taking delivery and the payment as against delivery and providing for removal of difficulties in the way of getting at undisclosed stock etc., which have all been summarised purposely above.

In short, the Collector is not empowered to lay down the principle for regulating or controlling but only to carry out the working of the principles and find out what the surplus is. Therefore, this is not a case of a delegation of delegated powers or a case of abdication or effacement of the State Government in the matter of carrying out the powers delegated to them by the Central Government but a mode of exercising these powers through their subordinates retaining full control of the powers vested in them. Therefore, this is not a case of the State Government abandoning its functions in favour of an outside agency but only a case of emplyoing the machinery of Government for the purpose of enabling the State Government to discharge its duties properly and effectively. The responsibility entrusted to the State Government under this delegation remains intact and there is no abdication of its own delegated powers.

(10) It follows from the above considerations that the contention based upon the maxim 'delegatus non potest delegare' is not applicable to this case and that these revision cases must fail.

(11) These revision cases are accordingly dismissed. The trial of the cases so unnecessarily held up should be proceeded with expeditiously.

C.R.K./V.R.B. Revisions dismissed.

A. I. R. 1952 Madras 578

MACK AND SOMASUNDARAM, JJ.

In re M. Rajarama Reddi.

Criminal Misc. Petn. No. 2321 of 1950, D/- 4-2-1952.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 3 — Individual order of procurement does not require any notification.

An order by a Taluk Supply Officer served on an individual to supply at a fixed rate to the Government certain bags of paddy, does not require any notification. (Para 2)

(b) Constitution of India, Art. 228 — Entire Act challenged — No obligation on Government to file affidavit in reply.

Where an entire Act is called in question as 'ultra vires', there is no obligation on the State Prosecutor on the criminal side to file an affidavit at all seeking to uphold its validity and the onus is on the petitioner to satisfy the Court under Art. 228 that there is a substantial question of law as to the interpretation of the Constitution, in other words, that the Act can for some 'prima facie' substantial reasons be challenged in a Court of law. (Para 3)

(c) Constitution of India, Art. 228 — Procedure.

A subordinate Court should only make a reference to the High Court, when it is satisfied that a case pending before it involves a real or substantial question as to the validity of any Act or regulation. A mere plea that an act is 'ultra vires' will not suffice. If it is not so satisfied it should go on with the trial, leaving it to the aggrieved accused to move the High Court under Article 228, and to continue the trial until such an application is admitted and the trial stayed. (Para 4)

V. V. Srinivasa Aiyangar, M. K. Nambiar & V. Devarajan, for Petitioner; Public Prosecutor, for the State.

Cases referred to:

('50 55 Cal W N 45 (Pr 3)

('51) Cri R C Nos. 989 to 991 and 1052 of 1951: (AIR 1952 Mad 576) (Pr 4)

MACK, J.: This is a petition under Art. 228 of the Constitution of India by the petitioner, who has been charged in a criminal case, with an offence under Sec. 3(2) of the Essential Supplies (Temporary Powers) Act, dated 19th November 1946 and subsequently renewed, read with the Madras Foodgrains (Intensive Procurement) Order, 1948. This application was admitted in 1950 and referred by one of us (Somasundaram, J.) to a Bench for determination as to the correct procedure to be adopted in such cases.

(2) The first point for determination is whether the petitioner has satisfied us that a substantial question of law as to the interpretation of the Constitution is raised for determination. There is the broad allegation that the Essential Supplies (Temporary Powers) Act, 1946 is 'ultra vires.' This is sought to be founded on a defect in the order of the Taluk Supply Officer passed against the petitioner directing him to supply at fixed rate to the Government 239½ bags of paddy. He is prosecuted for failure to comply. It is urged that this order has not been notified, as it should have been under Sec. 3 of the Essential Supplies (Temporary Powers) Act. We are unable to find any decision to support the view that such an order served on an individual requires any notification. Other types of orders under the Essential Supplies (Temporary Powers) Act involving the regulation of prices and so on are required to be notified in Section 3, though the language used there did not specifically differentiate and particularise orders to be notified. This has in view of some judicial decisions been now clarified by Act LXXII of 1950; Section 2(1-A) which specifically says:

> "An order made under sub-section (1) shall (a) in the case of an order of a general nature or affecting a class of persons, be notified in the official gazette; and (b) in the case of an order affecting an individual person be served on such person by delivering or tendering it to that person."

We do not think that any Court would have, if the matter came up for determination prior to this amendment, held that an individual order of procurement was one which had, under Section 3(1) of the Essential Supplies (Temporary Powers) Act to be notified. We find, therefore, no substance as regards this point taken to undermine the validity of either the Procurement Order or of the Essential Supplies (Temporary Powers) Act itself.

(3) A preliminary point has been raised in this application on which, we think unnecessary time has been taken, viz. that the Government have not filed an affidavit in reply to this petition and that failure to do so makes it difficult for elaborate arguments to be addressed on the Constitutional issues involved. Our attention has been drawn to 'KHUDI PROSAD v. STATE OF WEST BENGAL', 55 Cal W N 45, as authority for the ruling that in a petition under Art. 226 of the Constitution the State as the respondent, must comply with the normal procedure of filing proper affidavits, particularly where the petitioner alleges 'mala fides' against Government, and raises serious questions of fact, which it would be impossible to deal with unless the State is represented in the proceedings. With great respect, we are in complete agreement with that decision which contemplates petitions under Art. 226. We are here dealing with Article 228, which is entirely different and makes a specific provision for cases, in which in a Subordinate Court a substantial question of law as to the interpretation of the Constitution is raised. We have no hesitation in saying that where an entire Act is called in question as 'ultra vires' there is no obligation on the State Prosecutor on the criminal side to file an affidavit at all seeking to uphold its validity & the onus is on the petitioner to satisfy us under Article 228 that there is a substantial question of law as to the interpretation of the Constitution, in other words, that the Act can for some 'prima facie' substantial reasons be challenged in a Court of law.

(4) So far as the validity of these Acts is concerned, our attention has been drawn to a recent decision in 'Cri. R. C. Nos. 989 to 991 and 1052 of 1951', by Ramaswami, J. sitting on the admission side—Malayandi Thevar In re (AIR 1952 Mad 576)—with which we are in agreement in which he considered a similar objection to the validity of Clause 3 of the Essential Supplies (Temporary Powers) Act and found a notification by the Collector under it to be valid. So far as the procedure to be followed is concerned matters have been clarified by Act XXIV of 1951, dated 1st May 1951, which substitutes a new section, Section 432 for the old one. The legal position now is that a subordinate Court should only make a reference to the High Court when it is satisfied that a case pending before it involves a real or substantial question as to the validity of any Act or regulation. A mere plea that an Act is 'ultra vires' will not suffice. If it is not so satisfied it should go on with the trial, leaving it to the aggrieved accused to move the High Court under Article 228, and to continue the trial until such an application is admitted and the trial stayed. We find no substance in this petition, which we dismiss with a direction to the Magistrate to give this case as expeditious a disposal as possible.

C.R.K./V.B.B. Petition dismissed.

A. I. R. 1952 Madras 579

SUBBA RAO, J.

Chandra Sreenivasa Rao, Appellant v. Korrapati Raja Rama Mohana Rao and another, Respondents.

Appeal No. 724 of 1948, D/- 17-4-1951.

Contract Act (1872), S. 23—Lending of money for celebrating marriage of minor — (Child Marriage Restraint Act (1929), Ss. 5, 6.)

The lending of money to a guardian to celebrate the marriage of her child is really for the purpose of enabling her to commit an act which is not only prohibited, but is made an offence under the Child Marriage Restraint Act. The purpose of borrowing is of such a nature that if permitted it would defeat the provisions of the Child Marriage Restraint Act as the money was lent to enable the guardian to celebrate the marriage contrary to the provisions of Sections 5 and 6 of the Act. The act of a guardian or parent in celebrating the marriage of his minor or ward is also against public policy. Therefore the object of the loan is also to enable the guardian to perform an act contrary to the public policy. Hence the purpose of the borrowing is unlawful within the meaning of S. 23. Case law discussed. (Paras 14, 15, 16)

Anno: C. M. R. Act, S. 5 N. 1, 2; S. 6 N. 1.

B. Manavala Chowdhury, for Appellant; K. Umamaheswaram and A. L. Narayana Rao, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('36) AIR 1936 All 852: (38 Cri L J 301) (Pr 11)

('39) AIR 1939 All 340: (182 Ind Cas 568) (Pr 11)

('33) AIR 1933 Bom 209: (149 Ind Cas 464) (Pr 7)

('06) 33 Cal 702: (10 Cal W N 755) (Pr 7)

('07) 34 Cal 289: (11 Cal W N 566 F B) (Pr 7)

('37) ILR (1937) 2 Cal 764: (41 Cal W N 1176) (Pr 13)

('36) 44 Mad L W 203: (AIR 1936 Mad 603) (Pr 13)

('33) 11 Rang 213: (AIR 1933 Rang 98: 34 Cri L J 696 F B) (Pr 13)

(1809) 170 E R 1110: (2 Camp 143) (Pr 13)

(1809) 10 R R 465: (11 East 180) (Pr 13)

(1813) 14 R R 738: (5 Taunt 181) (Pr 13)

JUDGMENT: The question in this appeal is a simple but interesting one, namely, whether the amount advanced under a promissory note for the purpose of celebrating a marriage contrary to the provisions of the Child Marriage Restraint Act of 1929, hereinafter referred to as the Act, is recoverable. The facts are simple and are not in dispute.

(2) The plaintiff is the brother-in-law of the first defendant, having married his sister. The second defendant is the mother of the first defendant. The second defendant borrowed a sum of Rs. 5000/- from the plaintiff for the purpose of celebrating the marriage of the first defendant and executed a promissory note, Ex. A. 1, dated 29th May 1944 in his favour as guardian of her minor son. As the first defendant was described in the promissory note itself as a minor and as the plaintiff was the brother-in-law, it cannot be disputed that he had knowledge of the fact that the money was borrowed for celebrating the marriage in contravention of the provisions of the Act. Indeed, no attempt has been made either in the Court below or before me to contend that the plaintiff had no knowledge of the said facts. The plaintiff filed O. S. No. 29 of 1947 on the file of the Court of the Subordinate Judge, Masulipatam, to recover the sum of Rs. 5956-2-6 alleged to be the principal and interest under the aforesaid promissory note.

(3) The learned Subordinate Judge held that the purpose of the borrowing was unlawful within the meaning of Section 23 of the Indian Contract Act; and therefore the suit promissory note was not enforceable. He also found that the promissory note was not executed for necessity and could not bind the estate of the minor. The above appeal was filed by the plaintiff against the said decree of the Subordinate Judge dismissing his suit.

(4) Mr. Manawala Chowdhury contended that the marriage in contravention of the provisions of the Act is not invalid and therefore the purpose for which the suit promissory note was executed was not unlawful within the meaning of Section 23 of the Indian Contract Act.

(5) The relevant provisions of the Indian Contract Act are as follows:

"Section 10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Section 23. The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

(6) Under Section 10, an agreement becomes an enforceable contract, if it is made for a lawful consideration and with a lawful object. Section 23 declares what kinds of considerations and objects are not lawful. If the object or consideration is unlawful for one or the other of the reasons mentioned in S. 23 the agreement is void. It is not contended that the consideration for the agreement is unlawful. Therefore, two matters of enquiry present themselves: (1) What is the connotation of the word 'object' in the section as contradistinguished from the word "consideration"? (2) Whether the object of the borrowing in the present case is unlawful?

(7) The case law on the subject indicates that the word "object" appears to be used in a very wide sense. The definition of that word is stated with clarity in 'JAFFAR MEHER ALI v. BUDGE BUDGE JUTE MILLS CO.', 33 Cal 702. The facts in that case are: One Kasim Karim assigned his interest under a contract to the plaintiff. The assignee sought to enforce his rights under the contract. The defendant company, the other party to the contract, contended 'inter alia' that the assignment was made with the object of defeating the creditors of the assignor, and therefore void against the defendant company, when it was contended on behalf of the plaintiff before the learned Judges that the words "consideration" and "object" used in Section 23 of the Contract Act did not mean two different things, but two different views of the same thing & that the object of the agreement was the same as the consideration, the learned Judges had no difficulty to reject the said contention. Sale, J. expressed his view on the meaning of the said term as follows:

> ".....In my opinion the word 'object' in Section 23 of the Contract Act was not used in the same sense as 'consideration', but was used as distinguished from consideration and means 'purpose or design.' If then the purpose of the parties was to defeat the provisions of the Bankruptcy Law, there can be no doubt, I think, that the assignment or transfer would be inoperative under the provisions of S. 6 of the Transfer of Property Act."

In appeal against the judgment of Sale J. a Full Bench of the Calcutta High Court confirmed his view. Vide 'JAFFAR MEHER ALI v. BUDGE BUDGE JUTE MILLS COMPANY', 34 Cal 289. The Bombay High Court in 'SABAVA YELLAPPA v. YAMANAPPA SABU', AIR 1933 Bom 209, accepted the view of the Calcutta High Court and applied it to a different set of facts. In that case the learned Judges held that a sale executed in consideration for past or future cohabitation is void under S. 6(h) of the Transfer of Property Act read with S. 23 of the Contract Act. At p. 212 Patkar J. observed:

> "The word 'object' in S. 23 of the Contract Act is distinct from 'consideration' and means something aimed at, and has been held to mean 'purpose or design' in the decision in 'JAFFAR MEHER ALI v. BUDGE BUDGE JUTE MILLS CO.', 33 Cal 702, confirmed by the appellate Court in 'JAFFAR MEHER ALI v. BUDGE BUDGE JUTE MILLS CO.', 34 Cal 289. If the object of the transfer of the property is immoral, the transfer is void, and there cannot be any conveyance of any interest effected by the transfer. The object of the sale-deed in the present case was for future cohabitation and might also be said to be a reward for past cohabitation."

The learned authors, Pollock and Mulla, in the Indian Contract Act (7th Edition) put the legal position in the same manner. They say at page 134:

> "The word 'object' in this section was not used in the same sense as 'consideration', but was used as distinguished from 'consideration' and meant 'purpose or design.'"

It follows that if the object or purpose of the borrowing in the present case is unlawful the promissory note would be entirely unenforceable.

(8) What then is the object or the purpose of the borrowing under the aforesaid promissory note? The object is expressly mentioned in the promissory note itself. Ex. A. 1 is the promissory note dated 29th May 1944. Under the said document the second defendant, as the guardian of the first defendant, borrowed the money for the expenses of the marriage of her son, Korrapati Raja Rama Mohan Rao. He was below 18 years and therefore the marriage was hit by the provisions of the Child Marriage Restraint Act of 1929 (Act XIX (19) of 1929). I shall now consider the relevant provisions of the Act to ascertain if the purpose or the object of the borrowing was unlawful under the provisions of that Act.

(9) The heading of the Act is "An Act to restrain the solemnisation of child marriages." "Child" has been defined to mean a person who, if a male, is under 18 years of age, and if a female, is under 15 years of age. "Child marriage" is described as a marriage to which either of the contracting parties is a child. Sections 3 and 4 provide the penalty for a male above 18 years if he contracts a child marriage. Sections 5 and 6 which are the relevant sections read:

> "Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine unless he proves that he had reason to believe that the marriage was not a child marriage.
>
> Section 6(1): Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to three months and also liable to fine, provided that no woman shall be punishable with imprisonment.
>
> (2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that when a minor has contracted child marriage, the person having charge of such minor has negligently failed to prevent the marriage being solemnised."

(10) Section 12 empowers a Court to issue an injunction against any of the persons mentioned in Sections 3, 4, 6 of the Act prohibiting such a marriage. It is manifest that the Child Marriage Act aims at the restriction of the solemnisation of the child marriages, though it does not affect the validity of the marriages contracted, notwithstanding the pro-

visions of that Act. The object of the Act is to prohibit child marriages, and to carry out that object any act of a male spouse's beyond a particular age and any act or intentional omission of any other person, which will further the celebration of such marriages, is made an offence. If a guardian of a minor borrows money for the express purpose of celebrating such a marriage and performs it, he or she commits an offence under this Act and is liable to imprisonment and also to fine. The purpose therefore in such a case is to commit an offence. The fact that notwithstanding that offence the marriage, when celebrated, will be valid does not affect the real question to be decided.

(11) I shall now consider the contentions of the learned counsel and the decisions cited by them. Mr. Manawala Chowdhury argued that the marriage contrary to the provisions of the Act is valid & therefore the object of the promissory note is not unlawful within the meaning of Section 23 of the Contract Act. Such a marriage is not void was held in 'MOTI v. BENI', AIR 1936 All 852 and 'RAM BARAN v. SITAL PATTACK', AIR 1939 All 340 and this legal position has not been questioned by the learned counsel for the respondents. The learned counsel also relied upon the following passage in Anson's Law of Contracts (19th Edn.), page 206:

> "The effect in such a case depends on the proper construction of the particular statute. But where the words of the statute leave room for doubt as to its intention, it is material to ask whether the object of the Act imposing the penalty is merely to protect the revenue, or whether its object, or one of its objects, is to protect the general public or some class of the general public by requiring that the contract shall be accompanied by certain formalities or conditions as for example, the registration in the case of money-lenders. In the latter case, it is probable that the act for the doing of which the penalty is imposed, is impliedly prohibited by the statute and therefore illegal."

(12) The learned author also has given various tests to find out whether the particular act is prohibited by the statute. In this case there is no ambiguity in the expression of the legislative intention. The express purpose of the Act was to restrain the solemnization of child marriages. The fact that the marriage when solemnized is not void does not affect the question. We are only concerned with the purpose for which the amount was borrowed. The purpose for which the guardian borrowed the amount is to celebrate the marriage of a child, which is an offence under the Act.

(13) The decision in 'JOHNSON v. HUDSON', (1809) 10 R R 465, has no real bearing on the question to be decided in this case. There, a factor, who had not entered himself with the excise office as a dealer in tobacco, sold a parcel of prize manufactured tobacco. Lord Ellenborough C. J. held that the factor could maintain the action against the vendee for the value of the goods sold and delivered, as he committed only a breach of the revenue regulation, which was protected by a specific penalty. This case is based upon the principle enunciated in Anson's Law of Contracts that no absolute prohibition to sell could be gathered from the relevant provisions of the Act. In 'HODGSON v. TEMPLE', (1813) 14 R R 738, it was held that a person who sold goods knowing that the purchaser intended to apply them in illegal trade, was nevertheless entitled to recover the price if he yields no other aid to the illegal transaction than selling the goods and obtaining permits for their delivery to the agent of the purchaser. Under Statute 26 Geo. III Cl. 73, Sec. 54,

> "No person licensed to sell brandy or other spirits by retail, or selling brandy or other spirits by retail, shall be proprietor or owner of any distillery or rectifying house, or have any part or share in any distillery or rectifying house, or be in a manner concerned in the trade, or business of a distillery, rectifier or compounder of spirits."

and the section then proceeds to impose a penalty of £ 200 for the offence. The plaintiff in that case supplied goods to the defendant with knowledge that the defendant intended to use it for the trade prohibited by S. 54. Despite that knowledge, the learned Judges held that the plaintiff would be entitled to recover the price. The judgments of either Mansfield C. J. or Heath J. do not disclose the reason for their view. It appears to me that they held, as they did, on the ground that the plaintiff was not 'participes criminis' for Heath J. distinguished another case where the vendor also aided the purchaser in the breach of the revenue laws. In my view, that decision is not of any assistance to solve the problem raised, which really turns upon the construction of the express provision of the sections of the aforesaid two Acts. In 'GREMAIRE v. LE CLARE BOIS VALON', (1809) 170 E R 1110, a surgeon who had not been licensed under 3 Hon. VIII, clause 11, filed a suit for a business done as a surgeon. Under the said Act no one shall practise as a surgeon in London or seven miles round without being licensed by the College of Surgeons under the penalty of £ 5 a month. It was argued in that case that there was no absolute prohibition of persons unlicensed acting as surgeons and that by paying a penalty of £ 5 a month the defect had been cured. The decision really turned upon the finding that the defendant did not prove that the plaintiff was not regularly licenced as a member of the College of Surgeons. This decision also is not of any real help in this case. I cannot, therefore, accept the argument of the learned counsel that there was no absolute prohibition in this Act against the guardian from celebrating the marriage of her son who was a "child" at that time. When such an act is made an offence, it is very difficult to say that there is no prohibition against the performance of the act. In 'KHALILUR RAHMAN v. KING EMPEROR', 11 Rang 213, Page C. J. though in a different context, states the law on the subject with his usual clarity as follows:

> ". . . . . As, however, it has strenuously been urged on behalf of the accused that an intention to give a child in marriage in contravention of Act XIX of 1929 is not 'unlawful purpose' within the exception to S. 361, we think it desirable that it should be understood that we have no doubt that such an intention is an 'unlawful purpose' within the exception upon the simple but sufficient ground that if the purpose is carried out, the person giving the child in marriage is liable to conviction and punishment for a criminal offence. It appears to us idle to contend that if a child is kidnapped for a purpose

which is prohibited and punishable by law, the purpose for which the child was kidnapped was not an 'unlawful purpose' within the meaning of that term as used in the exception to S. 361."

The same reasoning will apply with equal force to the present case. S. VAIRVA NADAR v. PETHIKACHALA NADAR', 44 Mad L W 203 was a case in which a suit was filed to recover the amount due on a promissory note executed by the defendant and five others to the plaintiff and the promissory note recited that the amount was borrowed "for our toddy shop business." Beasley C. J. held that as the business was one forbidden by law to the knowledge of the plaintiff, the promissory note was not enforceable. In 'RAM JASH AGARWALA v. CHAND MANDAL', ILR (1937) 2 Cal 764,' Mukerjee J. noticed the opposing views, though he did not express his final opinion. There, a mortgage deed was executed by the brothers and the mother of a minor to defray the marriage expenses of the minor. The learned Judge held that borrowing moneys to celebrate the marriage of a minor is not a legal necessity justifying the alienation of his properties. But he also considered the argument based upon S. 23 of the Indian Contract Act. At page 767 the learned Judge says as follows:

"But the question is — supposing a creditor advanced money to enable an infant to marry in violation of the Act, is the consideration rendered illegal under the provisions of S. 23 of the Indian Contract Act? Obviously, the creditor himself does not come within the mischief of S. 5 or S. 6 of the Child Marriage Restraint Act, which penalises those who perform, conduct or contract a child marriage or does any act to promote the marriage or permits it to be solemnised. It seems to me, therefore, that the advancing of the money by the creditor is not something which is 'per se' made punishable under the law. It may be said, however, that by advancing the money to the lawful guardian of the minor for the purpose of promoting the infant marriage, which the law disapproves of and for which penalty has been prescribed for the promoter and the guardian, the creditor was doing something which might directly enable the promoter to defeat the provisions of the law. I do not think it necessary for me to express any final opinion upon the subject."

(14) I agree with the opinion expressed by the learned Judge, viz., that the lending of money to a guardian to celebrate the marriage of her child is really for the puprose of enabling her to commit an act which is not only prohibited, but is made an offence under the Act. Now coming back to S. 23 of the Indian Contract Act, it will be seen that the purpose of borrowing in this case is of such a nature that if permitted it would defeat the provisions of the Child Marriage Restraint Act of 1929, for the money was lent to enable the guardian to celebrate the marriage contrary to the provisions of Ss. 5 and 6 of the Act.

(15) The borrowing is also opposed to public policy. Public policy is rather an elastic term and its connotation may vary with the social structure of a state. The limits and domain of the public policy are stated by Pollack and Mulla at page 155 in their book, Indian Contract Act, as follows:

"It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. (a) No Court can invent a new head of public policy, (b) it has even been stated in the House of Lords that public policy is always an unsafe and treacherous ground for legal decisions, (c) this does not affect the application of the doctrine of public policy to new cases within its recognised bounds; (d) but the test is always whether the enforcement of the impugned contract leads or is likely to lead to injurious action."

The Hindu law did not, in express terms, sanction marriages of boys. The express rule in Manu,

"Let a man of 30 years marry an agreeable girl of 12 years or a man thrice eight years, a girl of eight years; one marrying earlier deviates from duty."

has been whittled down by the commentators by explaining that Manu did not mean what he said but only recommended that the bridegroom should be older than the bride. The later usage also sanctioned such early marriages. But in the present century, enlightened opinion and results based upon experience changed the outlook of the public on the problem of early marriages. The Legislature which is the accredited representative of the public, recognising the strength of the feeling, enacted the Child Marriage Restraint Act. In the present social set up, I have no hesitation to hold that the act of a guardian or parent in celebrating the marriage of his minor or ward is against public policy. Therefore the object of the loan is also to enable the guardian to perform an act contrary to the public policy.

(16) For the aforesaid reasons, I hold that the purpose of the borrowing is unlawful within the meaning of S. 23 of the Contract Act, and, therefore, the promissory note is not enforceable.

(17) In this view, it is unnecessary to consider the question whether the promissory note is supported by necessity.

(18) In the result, the appeal is dismissed with costs.

C R.K./D.H. *Appeal dismissed.*

A. I. R. 1952 Madras 582

GOVINDA MENON AND PANCHAPAKESA AYYAR JJ.

Kandaswami Mudali, Appellant v. K. R. Narasimha Aiyar and others, Respondents.

Letters Patent Appeal No. 9 of 1948, D/- 18-10-1951 against the order of Chandrasekhara Aiyar J. reported in AIR 1948 Mad 280.

(a) Civil P. C. (1908), O. 21 R. 90 — Fraud in publishing or conducting sale — Meaning of.

The word "conducting" refers only to the action of the officer who makes the sale. Anything done antecedent to the order of sale has nothing to do with "conducting" the sale. The word "publishing" also refers only to what is done antecedent to the actual conduct of the sale but subsequent to the order directing the sale. AIR 1942 Lah 153 (FB); AIR 1948 Mad 67; 7 All 641, Rel. on; AIR 1918 Pat 297, not Foll. (Para 2)

Anno: C. P. C., O. 21 R. 90 N. 37.

(b) Civil P. C. (1908), O. 21 R. 92 — Contest between auction-purchaser and judgment-debtor — Fraud in bringing about sale — Refusal to confirm sale.

Where the application under O. 21 R. 90 is one between the judgment-debtor on the one hand and the decree-holder's representative, the auction-purchaser, on the other the contest is one that falls within the provisions of S. 47 and, therefore, no separate suit would lie. As no separate suit would lie it is the duty of the Court, where it comes to know before the sale is confirmed that a fraud has been perpetrated in bringing about the sale, to refuse to confirm the sale even if the fraud is not in the actual process of publishing and proclaiming the sale or in steps taken subsequent to such proclamation. AIR 1939 Lah 326, Rel. on. (Para 2)

Anno: C. P. C., O. 21 R. 92 N. 2.

(c) Civil P. C. (1908), O. 21 R. 2 — Application by judgment-debtor under O. 21 R. 90.

An application under O. 21 R. 90 by a judgment-debtor can be construed as an application for recording adjustment of the decree, which can be looked into and satisfaction recorded if the same is made within the time allowed by law. 36 Mad 357, Rel. on. (Para 2)

Anno: C. P. C., O. 21 R. 2 N. 15.

(d) Civil P. C. (1908), S. 151, O. 21 R. 92 — Refusal to confirm sale under inherent powers.

It is open to the Court, in its inherent jurisdiction, to refuse to confirm the sale when a fact that there had been a fraud perpetrated by the decree-holder in causing the sale to be held is brought to its notice. AIR 1923 Mad 635, Rel. on. (Para 2)

Anno: C. P. C., S. 151 N. 2; O. 21 R. 92 N. 2.

T. V. Balakrishnan, for Appellant; A. Srirangachari and P. Suryanarayana, for Respondents.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('85) 7 All 641: (1885 All W N 190) (Pr 2)
('39) AIR 1939 Lah 326: (41 Pun L R 220) (Pr 2)
('42) AIR 1942 Lah 153: (ILR (1942) Lah 559 FB) (Pr 2)
('13) 36 Mad 357: (12 Ind Cas 562) (Pr 2)
('23) 46 Mad 583: (AIR 1923 Mad 635) (Pr 2)
('47) 1947-1 Mad L J 252: (AIR 1948 Mad 67) (Pr 2)
('18) 3 Pat L J 645: (AIR 1918 Pat 297) (Pr 1)

GOVINDA MENON J.: This is an appeal against a judgment of Chandrasekhara Aiyar J. confirming the decision of the lower Court by which that Court set aside a sale at the instance of the judgment-debtor — 98th defendant in the suit. What happened was that, after the passing of a mortgage decree against various defendants the 98th defendant in O.S. No. 194 of 1928 on the file of the Sub-Court of Coimbatore had to pay a certain sum of money to the decree-holder plaintiff and he was in possession of a certain item of property. There was an agreement between the 98th defendant and the decree-holder that that property would not be sold because a certain sum of money was paid by the 98th defendant. The result was an adjustment and an agreement that the item of mortgaged property belonging to the 98th defendant would not be sold. In contravention of that agreement, a sale took place, and the proclaimed property was purchased by the present appellant. The respondent-98th defendant put in an application, under O. 21, R. 90, C. P. C. as well as S. 47 for setting aside the sale. The lower Court found in favour of the adjustment and also found that the purchaser was not aware of the agreement between the parties. Such being the case, when it had to choose between two innocent sufferers, the lower Court was of opinion that the person more affected, namely, the judgment-debtor, should be protected. The sale which had remained unconfirmed, was accordingly set aside. In appeal Chandrasekhara Aiyar J. agreed with the decision of the lower Court following the decision in 'MAULA BUX v. RAGHUBAR GANJHU' 3 Pat L J 645, where it has been held that the "conduct of the sale" means every step taken from the beginning to the end for the purpose of bringing the properties to sale. In those circumstances, the fact that the decree-holder and his assignee without bringing to the notice of the Court that there was an agreement between them and the 98th defendant not to sell the property brought the same to sale was enough to show that there was fraud in conducting the sale. On this reasoning the trial Court's judgment was confirmed.

(2) In appeal, it is contended before us, on the authority of 'SANJAMMA v. ANNA SAYANNA', 1947-1 Mad L J 252, 'RAMCHHAIBAR MISR. v. BECHU BHAGAT', 7 All 641 and 'GAURI v. UDE', AIR (29) 1942 Lah 153 that fraud in the publishing or conducting the sale does not include a fraud of the kind that had occurred in this case because the fraud must be in the actual process of publishing and proclaiming the sale or in steps taken subsequent to such proclamation. Mahmood J. in 'RAMCHHAIBAR v. BECHU BHAGAT', 7 All 641 at 645 observes that the word "conducting", in S. 311 of the old Code, equivalent to O. 21, R. 90 together with the word "conducted" in the old S. 286 makes it clear that it would refer only to the action of the office who makes the sale. Anything done antecedent to the order of sale has nothing to do with "conducting" the sale. Again, it is observed by him that the word "publishing" also refers only to what is done antecedent to the actual conduct of the sale but subsequent to the order directing the sale. This is also the view taken in 'GAURI v. UDE', AIR 1942 Lah 153, as well as by Yahya Ali J. in 'EARAMALLA SANJAMMA v. ANNE SAYANNA', 1947-1 Mad L J 252. We are inclined to think that there is considerable force in the argument of learned counsel for the appellant that the more correct view is that adumbrated in 'RAMCHHAIBAR v. BECHU BHAGAT', 7 All 641, and the other two cases referred to above. Therefore it might be that the reasoning on which the learned Judge based his judgment may not appeal to us. But in this case the judgment-debtor himself was the applicant to set aside the sale, the same having been made within 30 days. As the application is one between the judgment-debtor on the one hand and the decree-holder's representative, the auction purchaser, on the other the contest is one that falls within the provisions of S. 47, C. P. C. and, therefore, no separate suit would lie. If no separate suit would lie as has been decided in 'RAJALAL v. MAKHANLAL', AIR (26)

1939 Lah 326, it is the duty of the Court, when it comes to know before the sale is confirmed that a fraud has been perpetrated in bringing about the sale, to refuse to confirm the sale. We think the interests of justice require that the lower Court should have refused to confirm the sale, as it has done in this case. Moreover Sundara Aiyar and Ayling JJ. in 'BADRUDEEN v. GHULAM MOIDEEN', 36 Mad 357 at p. 360 were of opinion that a similar application by a judgment-debtor can be construed as an application for recording adjustment of the decree which can be looked into and satisfaction recorded if the same is made within the time allowed by law. Here, in this case, the application was made within one month, and there is no objection to treat the application as one for recording satisfaction of the decree under O. 21, R. 2, C. P. C. Moreover it is also open to the Court, as decided in 'RAGHAVACHARIAR v. MURUGESA MUDALI', 46 Mad 583 in its inherent jurisdiction, to refuse to confirm the sale when a fact that there had been a fraud perpetrated by the decree-holder in causing the sale to be held is brought to its notice. Therefore, for these reasons, we are of opinion that the lower Court's order, confirmed by Chandrasekhara Aiyar J. has to be upheld, though not on the reasoning contained in the learned Judge's judgment. We are, therefore, of opinion, that the Letters Patent Appeal has to be dismissed, but in the circumstances without costs and do so.

C.R.K./D.H. *Appeal dismissed.*

A. I. R. 1952 Madras 584

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

Canara Industrial and Banking Syndicate Ltd., Udipi, Applicant v. Commissioner of Income-tax, Madras, Respondent.

Case referred No. 24 of 1949, D/- 28-9-1951.

Income-tax Act (1922), S. 4 — Assessee, a banking syndicate issuing cash certificates — Premium received at time of issue — Whether revenue receipt or capital receipt.

The assessee, a Banking Syndicate issued cash certificates after the manner of postal cash certificates. The certificates were of five years' currency and were originally issued at a lower price but from 1937 they were issued at the prices of Rs. 8, 80, 400 and 800 and were repayable on maturity at Rs. 10, 100, 500 and 1000 respectively. They could be cashed at any time before maturity. The certificates contained a table showing the amounts repayable after different periods during the currency of the certificate held. During the relevant assessment years, they were issued at a premium of eight annas for a certificate of Rs. 10 and Rs. 5 for a certificate of Rs. 100, Rs. 25 for a certificate of Rs. 500 and Rs. 50 for a certificate of Rs. 1000. This premium was not refundable. The extra amount received by the lender at the end of five years on taking into account the premium paid in the beginning, amounted to a rate of interest almost equal to that charged on the fixed deposits:

Held that the premium was receipt in advance, from the lender to be set off against the interest, so as to reduce the ultimate burden of the interest while at the same time ostensibly keeping and continuing the high rate of interest under the cash certificates. The lender in effect returns, even at the time of the issue, part of interest which would be payable to him under the certificate. Consequently the premium received by the assessee at the time of the issue of cash certificate was a revenue receipt and assessable to income-tax. It was not a capital receipt. (1943) 25 Tax Cas 353, Applied. (Para 4)

Anno: Income-tax Act, S. 4 N. 10.

T. V. Viswanatha Iyer and C. R. Pattabhiraman, for Applicant; C. S. Rama Rao Sahib, for Respondent.

Case referred to:
(1943) 25 Tax Cas 353: (1943-1 K B 671) (Prs 3, 4)

JUDGMENT: At the instance of the assessee the question referred to this Court under Section 66 (1) of the Income-tax Act is:

> "Whether on the facts and circumstances of the case the premium received by the assessee at the time of issue of cash certificate is a revenue receipt and assessable to income-tax."

The assessee is the Canara Industrial and Banking Syndicate Ltd., Udipi, which is a scheduled Bank with its head office at Udipi. The Syndicate issued cash certificates after the manner of postal cash certificates from the year 1933. The certificates are of five years' currency and were originally issued at a lower price but from 1937 they were issued at the prices of Rs. 8, 80, 400 and 800 and are repayable on maturity at Rs. 10, 100, 500 and 1000 respectively. They can be cashed at any time before maturity and the certificate contains a table showing the amounts repayable after different periods during the currency of a certificate of the price of Rs. 8. The said table proportionately holds good from the certificates of other denominations. During the relevant assessment years, 1944-45, 1945-46 and 1946-47 they were issued at a premium of eight annas for a certificate of Rs. 10, Rs. 5 for a certificate of Rs. 100, Rs. 25 for a certificate of Rs. 500 and Rs. 50 for a certificate of Rs. 1000. This premium was not refundable. The certificates are not transferable and are repaid at the head office of the syndicate; but facility was provided to the constituents to send their deposits through any of the branches and arrangements were also made to cash them at the respective branches of the syndicate. The certificates are in other respects subject to the rules relating to depositors and deposits of the bank.

(2) During the assessment years now in question, the assessee contended that the premium collected at the time of issue was a capital receipt and was not taxable. This contention was not accepted by the department though different reasons were given for the conclusion by the Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal. The Tribunal was of the view that as the assessee carried on normal banking business the certificates were treated practically as equivalent to fixed deposit receipts and that as the interest payable at the end of five years was higher than what banks generally gave on fixed deposits, the extra interest was obviously paid because of the premium received which in substance must be treated as a recoupment in advance on account of the additional interest to be paid. The payment of interest at the end of five years being a revenue expenditure, the

Tribunal treated the receipt of premium at the time of issue of certificates as a revenue receipt.

(3) The question therefore for determination is whether the premium is a capital receipt or a revenue receipt. It is always difficult to decide in a case of this description whether the receipt of premium is the one or the other. The illuminating judgment of Lord Greene M. R. in 'LOMAX v. PETER DIXON & SON, LTD.', (1943) 25 Tax Cas 353, is of considerable assistance in solving the problem and in determining the quality that ought to be attributed to the sum in question. As pointed out by the learned Master of the Rolls in that judgment each case must be decided on its own facts and it is permissible to consider the evidence 'de hors' the contract, if the contract does not enable the Court to reach a solution. After an examination of the authorities, the learned Master of the Rolls summed up his conclusions in the form of propositions at page 367 as follows:

" 1. Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security, there is no presumption that a 'discount' at which the loan is made or a premium at which it is payable is in the nature of interest.

2. The true nature of the "discount" or the premium as the case may be, is to be ascertained from all the circumstances of the case and, apart from any matter of law which may bear upon the question (such as the interpretation of the contract), will fall to be determined as a matter of fact by Commissioners.

3. In deciding the true nature of the 'discount' or premium in so far as it is not conclusively determined by the contract, the following matters together with any other relevant circumstances are important to be considered, viz., the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, the extent to which, if at all, the parties expressly took or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the contract."

In the present case, the premium is not a payment received by the lender but paid by the borrower, the bank, at the time of the issue of the certificate so that for obtaining a certificate, for example of Rs. 10, a lender had to pay Rs. 8 and a premium of eight annas. There is no rate of interest mentioned in the contract but it cannot be disputed and indeed, it was not disputed before us that the difference between Rs. 10 and Rs. 8, viz., Rs. 2 represents the interest on Rs. 8 for a period of five years. It is open to the lender to cash the certificate even during the currency of the period of five years before maturity in accordance with the table provided in the certificate itself. There are also other principles gatherable from the judgment of the learned Master of the Rolls which enable us to draw the right inference from the above facts, for example, if the premium was calculated by reference not to any element of capital risk but to the period of the loan whatever it might turn out to be, the premium will be stamped with a revenue character. If A lends B £ 100 on the terms that B will pay him £ 110 at the expiration of two years on interpretation of the contract B's obligation is to make this payment and though the contract does not indicate the nature of the extra £ 10 payable at the end of the period, the obvious inference in the absence of any stipulation for payment of interest, is that the £ 10 represents interest for the two years on £100 and if the rate of interest worked out on the basis is a reasonable commercial rate the £ 10 is stamped with the character of interest. If the stipulation for the return of the capital is contained in the contract, the premium will undoubtedly be capital. In the case of debentures issued by a limited company generally if the credit of the company is good and the security is sufficient, the issue may be made at par with a normal and reasonable rate of interest. If the company's credit and security are exceptionally good, the issue can be made at a premium. If the credit of the company and the security are not particularly stable, the debentures may be issued below par or the rate of interest may be high or it may be both. Bearing in mind the discount or the premium on which the debentures are issued and the rate of interest stipulated to be paid which may be higher or lower than the ordinary commercial rate of interest the Court has always to find, as reflected in those features, the credit of the company and the soundness of the security which it offers for the debentures issued. According to the risk of the credit, sometimes the debentures are issued at discount, sometimes the premium is made payable on redemption and sometimes both things may happen. These are some of the factors which enter into the consideration of the question whether in a given case the receipt is a capital receipt or a revenue receipt.

(4) What is the position with reference to the cash certificates of the syndicate in the present case? The contract gives no indication why the premium was for the first time introduced in 1943 at the rate of four annas in the case of certificates of Rs. 10 and a proportionate amount in the case of other certificates and why later it was increased to eight annas in 1946. It cannot be said, nor is there any indication, that the credit of the syndicate began to become exceptionally good from 1943 onwards while it was not so good at the inception in 1933. The rate of interest which the certificate yielded excluding the premium from consideration, was as much as 5 per cent. while the interest payable by the bank on fixed deposits for a period of two years in 1937 was 5 per cent. in 1942 for a period of five years 3¾ per cent. and in 1946 for five years it was 3½ per cent. This information was furnished to us by an affidavit filed on behalf of the Syndicate under our directions. The attempt of the Syndicate in collecting this premium, it is not a far fetched inference to draw, was to bring the rate of interest under the certificates as near as possible to the interest payable on fixed deposits for a similar period. In other words, it is a receipt in advance, from the lender to be set off against the interest, so as to reduce the ultimate burden of the interest while at the same time ostensibly keeping and continuing the high rate of interest under the cash certificates. The lender in effect returns, even at the time of the issue, part of interest which would be payable to him under the certificate. No doubt it is true as was stressed on behalf of the assessee that if the cash certificates were to be cashed before maturity and immediately after the lapse of a year, the lender would lose. But that may be with a view to preventing the lender from cashing the certificates immediately after their issue. The scheme therefore of the syndicate revised under

the cash certificates issued by it is not very dissimilar to that of fixed deposits which it receives and in respect of which receipts are issued. It is rather difficult in these circumstances to accept the contention that the certificates were purchased by the lender at a premium by reason of the extraordinarily good and sound credit position of the Syndicate.

On the facts in 'LOMAX v. PETER DIXON AND SON LTD.', (1943) 25 Tax Cas 353, it was no doubt found that the discount and premium payable at the time of redemption were capital sums; but very good reasons were given for this conclusion by the Master of the Rolls. It was found that there was no ground for distinguishing the facts of the case from that of ordinary debentures issued by a trading company. There was an element of capital risk of a serious kind which was expressed in the form of capital rather than in the form of interest in the transactions and it was found to be a bona fide commercial transaction. The facts in that case were: the respondent company manufactured newsprint and in order to obtain a continuous supply of wood pulp in 1930 a Finnish company was formed. The respondent company advanced a sum of £319,600 to the Finnish Company. This debt had to be discharged and for that an arrangement was made in 1933 between the Finnish Company and the respondent. This agreement provided for the redemption of the loan over a number of years and in accordance with the arrangement the Finnish company gave to the respondent company 680 notes of £ 500 each totalling a face value of £ 34,000. The notes were issued at 94 per cent. and carried interest at the rate of one per cent. above the lowest discount rate of the bank of Finland. Of the 680 notes some were to be repaid each year and each note was to be redeemed at a premium of 20 per cent. above its par value if the profits of the Finnish company permitted. The above notes were paid off and the respondent company received in full the amount of their face value including the discount and the premium. The discount and premium received were carried by the respondent company to a reserve fund. The question was whether the discount and premium were assessable to income-tax as income arising from security. The special Commissioners were of opinion that the receipt was a capital receipt and was not taxable and that decision was reversed by Macnaghten, J. whose decision was reversed by the Court of appeal confirming that of the Special Commissioners. Referring to this arrangement it is stated at page 365 by Lord Greene M. R. as follows:

> "The parties to the transaction, faced with an existing debt which the Finnish company was obviously not in a position to repay there and then did what in effect amounted to writing down the capital value of the debt which by the terms of the agreement was now to be repaid over a long period of years, bearing interest in the meantime at a normal commercial rate. I can see no difference between writing down the capital value of an existing debt and writing down the capital value of a new debt which is what is done where a company makes an ordinary issue of debentures at a discount or repayable at a premium. Moreover, it is quite common for a company to issue debentures as security for an existing loan. This is often done in the case of a company's bankers who call for security, and also not infrequently under schemes of arrangement when debentures are issued to existing creditors of the company. In such case circumstances may well call for a writing down of the value of the debts."

The case therefore bears no analogy to the facts of the present case though the principles enunciated and gatherable from the erudite judgment of the learned Master of the Rolls have undoubtedly been of considerable assistance to us. It follows that the question referred to this Court must be answered in the affirmative and against the assessee. As the assessee has failed he must pay the costs of the Commissioner which we fix at Rs. 250/-.

C.R.K./R.G.D. Question answered in affirmative.

A. I. R. 1952 Madras 586

MACK AND SOMASUNDARAM JJ.

In re Mottai Thevar, Appellant.

Referred Trial No. 32 and Criminal Appeal No. 241 of 1951, D/- 6-9-1951.

Evidence Act (1872), S. 25 — Immediately after crime accused going to police station and confessing — Statement also forming first information of offence — Statement can be used in favour of accused — Desirability of amending law as to admissibility of confession to police, pointed out — Case diaries, use of — (Criminal P. C. (1898), Ss. 154, 162 and 172.)

Where the accused immediately after killing the deceased goes to the police station and makes a clear breast of the offence, and the statement forms the first information of the offence, though the statement cannot be used against the accused, S. 25, Evidence Act does not bar its use in his favour. Under S. 172 (2), Criminal P. C. the Court is entitled to look into the case diary of the police.

(Desirability of amending the law as to admissibility of confessions to police, so as to make such confessions admissible in certain circumstances pointed out by Mack J. though Somasundaram J. did not share his view). (Paras 5, 8, 9)

Looking into the confessional first information report, their Lordships found that it disclosed grave and sustained provocation which led the accused to commit the offence of murder. Considering this along with the young age (20 years) of the accused, their Lordships while convicting him of murder and sentencing him to transportation sent the confessional statement to the Government with a recommendation that the sentence be commuted to 7 years rigorous imprisonment and the case be considered under S. 10 (a), Madras Borstal Schools Act. (Para 8)

Anno: Criminal P. C., S. 154 N. 11; S. 162 N. 4; S. 172 N. 6; Evi. Act, S. 25 N. 3.

S. Obul Reddi, for Accused; Public Prosecutor, for The State.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('37) ILR (1937) Mad 695: (AIR 1937 Mad 618: 38 Cri L J 1027 FB) (Pr 8)

('48) ILR (1948) Mad 1: (AIR 1947 PC 67: 48 Cri L J 533) (Pr 8)

MACK J.: Appellant, a young man aged 20, has been found guilty under S. 302, I. P. C. and sentenced to death by the learned Sessions Judge of Coimbatore for the murder of one Muthuswami Goundan, who was incidentally sentenced to transportation for life in 1926. After serving his sentence, he returned to his village Andhiyur and lived with his younger brother P.W. 9. The deceased had the right, it would appear, to collect tolls at the Andhiyur shandy from hawkers.

(2) The prosecution case is that on 20-11-1950 on shandy day in this village, the appellant came to the Police station at about 2-30 p.m. with a blood-stained spear. The statement recorded from him by the Sub-Inspector (P.W. 15) was ruled out as inadmissible in evidence quite rightly but most unfortunately in this case as, under S. 25 of the Evidence Act, a confession made to a police officer cannot be proved against an accused. The Sub-Inspector immediately after recording the accused's statement and taking him into custody went to the Andhiyur shandy and found a blood-stained patch near the rice baskets of hawkers. The evidence shows that P.Ws. 4 and 5 two coolies in the employ of the deceased, who assisted in the collection of tolls from paddy stalls, carried the deceased to his house but that he died on the way. The Sub-Inspector found the corpse on the pial of the deceased's brother, P.W. 9, who in the meantime had made a separate complaint Ex. P. 8 timed at 3 p.m. to the village magistrate (P.W. 13) to the effect that the appellant and his father-in-law came together to the shandy where the appellant speared the deceased. The 2nd accused was later quite rightly struck out of the case as an accused.

(3) At the inquest held from 3-30 p.m. the Sub-Inspector examined three rice hawkers P. Ws. 1 to 3, who deposed that they heard a shout of stabbing and all they saw when they turned round in the direction of the shout was the appellant pulling a spear out of the deceased's back while he was standing and again stabbing him after he fell down. A petition writer (P. W. 14), who had his office room opposite to the police station, said he saw the accused entering the police station with M.O. 1 on which he saw blood at 2-30 p.m. that day.

(4) The motive actually disclosed in the evidence was the fact that a civil suit had been filed by the deceased against the appellant in the Gobichettipalayam District Munsif's Court on 27-9-1951 for a declaration and injunction in respect of a house. The appellant contested the suit in which he had filed a written statement and counter. The injunction application was posted to 22-11-1950 for hearing. The learned Sessions Judge observed that the main defect in the prosecution case was the absence of any proximate motive as this litigation by itself could not have furnished a motive for the appellant to spear the deceased. In the committing Court, the appellant was undefended and merely took refuge in a whole-sale denial of knowledge of anything, even as regards the civil suit filed against him. In the Sessions Court, where he was defended by a learned advocate, an astonishing line of defence was taken, involving an unwarranted attack on the integrity of the Police. The appellant, while pleading not guilty, went to the length of saying that there was no enmity between him and the deceased over the house, that three eye-witnesses had been bribed to give evidence against him and finally that some police men asked him to pick up M.O. 1, which was lying near the deceased, took him to the police station and beat him. There can be no doubt whatever that it was the appellant, who speared the deceased and that he is guilty of murder as found by the learned Subordinate Judge in agreeing with the four assessors. On the legally admissible evidence, the learned Sessions Judge can perhaps be scarcely blamed for sentencing the appellant despite his youth, to death.

(5) We have no doubt at all that the appellant, after spearing deceased at the shandy, went straight to the police station with the blood-stained spear and there made a clean breast of the offence and that this was the first information received in the case. Even assuming that he was caught by a constable going off with the blood-stained spear and taken to the police station, the statement he made there should certainly be considered in his favour. It is obvious that the learned Sessions Judge did not peruse the case diary as he was entitled to do under S. 172 (2), Cri. P. C. The result of our perusal of the confession recorded from him at the police station is that not only do we find mitigating circumstances to justify the imposition of the lesser punishment but we also feel justified in making a recommendation to the Government for commutation of the sentence.

(6) There was in 'fact' some further motive evidence in the suit of an eloquent nature apart from the mere filing of the suit by the deceased against the appellant. It was in evidence that the house belonged to the appellant's father Perumal Thevan, who also kept a concubine by whom he had a daughter Nanjammal examined as P. W. 12. Her evidence was to the effect that after Perumal Thevan died, the appellant's mother and her mother lived, each occupied a half of this house till they died two or three years ago. About three months before the offence, appellant asked her to vacate claiming the whole house as belonging to him as he wanted to occupy it as he had got recently married. Then P.W. 12 conveyed the whole house by a registered sale deed Ex. P. 9 on 7-9-1950 to the deceased for Rs. 250. That sale deed recites that the house belonged to her mother and that it had devolved on her as she had no male heir and it was on the basis of Ex. P. 9 that the deceased filed his suit against the appellant alleging that he was in possession of the whole house.

(7) The confession appellant made at the police station contains a recital of grave and sustained provocation by the deceased, of threats by him to murder him and his wife and of threats also against his father-in-law to compel him to vacate the house, which drove him in desperation to the commission of this crime. Under S. 25 of the Evidence Act, no confession made to a police officer shall be proved as against a person accused of any offence. There is nothing in the most unsatisfactory state of the law as regards confessions to police officers to stop the user of such a confession in favour of an accused person. The resultant impasse created by Ss. 25, 26 and 27 of the Evidence Act and S. 162, Cri. P. C. is

to shut out as legally inadmissible not merely any confession made to police officer but anything said to a police officer by an accused person in the course of an investigation. In this case, we are satisfied that the confession of the appellant was in fact the first information the police received of this offence and had it been admissible in evidence or had it been recorded by a Magistrate, the full recital of motive would have been entitled to credence and to be taken into the fullest consideration in the assessment of sentence.

(8) This is a concrete illustration of the anomalous and practical difficulties and grave injustice, which may be done to an accused person himself by the operation of Ss. 25, 26 and 27 of the Evidence Act enacted though they were in 1872 on distrust of the then existing police, and an apprehension that they may misuse extensive powers if confessions made to them by accused persons are admissible in evidence. There is a world of difference between a voluntary confession of this kind made to a Police officer, which constitutes the first information he receives of an offence and a confession made by an accused person while in police custody but even the law as it stands completely rules out a confession in the former category. Section 26 makes wholly inadmissible any confession made by a person while he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate. There is the important proviso to this contained in S. 27, which makes admissible information by an accused person, leading to discovery, whether it amounts to a confession or not, which relates distinctly to the fact thereby discovered which has undoubtedly given Courts and investigating police very great difficulty. In 'ATHAPPA GOUNDAN, IN RE', ILR (1937) Mad 695, a Full Bench of this Court attempted to broaden the scope of this proviso by holding that a statement connecting the object discovered with the offence was admissible and that for instance if an accused said "this is the spear with which I stabbed the deceased and then shows the spear in a place of concealment, the confession portion of that statement is admissible. But in 'KOTAYYA v. EMPEROR', ILR (1948) Mad 1 this decision has been overruled by the Privy Council. It discontinued a practice which had become a tradition with investigating police officers of working into confessions such incriminating adjectival clauses relating to all sorts of discoveries. Applying Ss. 25, 26 and 27 to the present case in the light of the Privy Council decision, all that is legally admissible in the confession made by the appellant at the police station was that he brought with him a blood-stained spear. Having tried sessions cases continuously from 1937 to 1948, bound as I was by the decision in 'ATHAPPA GOUNDAN, IN RE', ILR (1937) Mad 695 according to which chopped up confessions, leading to discovery with these incriminating adjectival clauses had to be admitted in evidence, there were many cases in which I felt that this unqualified admission of guilt worked into such a clause without relation to the rest of the confession which the accused is said to have made or the circumstances which led up to that confession while in police custody, worked injustice and hardship to the accused unless the case diary was carefully scrutinised in a manner we have had to do in the present case. The mere production of a knife or weapon in a murder case implies that the accused has made a confession. It is necessary and desirable that a Court should know in my view the full facts and the circumstances relating to the production of the article and all that the accused said when he produced it. A perusal of case diaries often shows a confession alleged to have been made by an accused. The confession is there and it cannot but prejudice the mind of an inexperienced Judge or Magistrate who is entitled to read the whole of the case diary, whereas if confessions which are alleged to have been made and do appear in case diaries have to be proved in full by the police officer in the witness box on his sworn testimony and substantiated under the fire of cross-examination, the view I have no hesitation in taking is that far fewer confessions will appear in case diaries. With the law relating to confessions being what it is, it has become extremely difficult for investigating police officers to give their evidence in a coherent manner in strict accord with truth, with the result that all the facts are not placed before a Court to enable it to arrive at a correct conclusion. I should like to give expression for what it is worth to the view, which I have had for sometime, that the distrust and apprehensions of the police founded on conditions of lack of education, character and integrity amongst the subordinate police in 1872 do not exist today, at any rate in the same degree, and that the time has come for a modification of these three sections and S. 162, Cri. P. C. and the bringing of the law relating to confessions more into line with that of the United Kingdom which permits a police officer to say in evidence what an accused person told him at the time of his arrest but rigorously shuts out any confession which the Court has no reason to think was not made voluntarily. It is my view that the removal of these shackles from police testimony is necessary if they are to be evolved into a responsible force, deserving of the confidence of the public, the Bar and the Courts, which can be relied upon to deal severely with any police officer found guilty of concocting a confession or giving false evidence in this direction. My learned brother does not think that the time is quite ripe for such a reform and still shares the apprehensions of the legislature, which enacted the Evidence Act of 1872. With the highest regard for his opinion, I would like to take this opportunity of expressing a different view in this case although we are in complete agreement with the guilt of one appellant and the sentence to be passed on him. We confirm his conviction for murder under S. 302, I. P. C. and, for reasons given supra, sentence him to transportation for life with a recommendation to the Government, to whom will be forwarded a copy of his confession recorded at the police station, that showing as it did grave and sustained provocation given to him by the deceased and also in consideration of his youth, the sentence be commuted to seven years rigorous imprisonment. The learned Sessions Judge has found accepting the Radiological Expert's evidence that the appellant was 20. We think under S. 10 (a) of the Borstal Act the State Government may favourably consider detaining him in a Borstal school.

(9) SOMASUNDARAM J.: I agree with the conclusions arrived at by my learned brother regarding the guilt and the punishment to be meted out to the accused. But with great respect to my learned brother, for whom I have great regard, I regret my inability to share his view regarding Sections 25 to 27 of the Indian Evidence Act. My learned brother has himself referred to my opinion in the judgment and I would like to add a few words to it.

(10) Section 25, Indian Evidence Act says that "no confession made to a police officer shall be proved as 'against' a person accused, of any offence". I underline (here in single quotation) the word 'against'. The confession does not therefore prohibit the use of it in favour of the accused. In the majority of cases the confessions are sought to be used only against the accused. The cases in which such confessions would or can be used in favour of the accused will be very few and they will be the exceptions to the general rule. The section therefore ought not to be repealed or modified for the sake of the few or the exceptions.

(11) In the present case, though we have used the confessions in favour of the accused, it cannot be said that that is the only view to be taken of the confession. It is possible to take a different view of the confession and that too in a telling manner against the accused. It depends therefore on the use, the Court is going to make of the confession. If it is to be used against the accused, then S. 25 is a bar and it cannot be admitted but if it is to be used in favour of the accused, I do not think that S. 25 is a bar and the confession can well be admitted.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. 1952 Madras 589

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Sri Raju V. Chandra Chudamani Dev Bahadur Varu and others, Petitioners v. Madras State represented by the Collector of Srikakulam and others, Respondents.

Civil Misc. Petns. Nos. 11740 of 1950, etc., D/- 28-9-1951.

Madras Estates Land (Reduction of Rent) Act (XXX (30) of 1947), Ss. 3(2) and 8 — Rent cannot be reduced under Act in respect of property which is not "estate" within meaning of S. 3 (2), Madras Estates Land Act, 1908 — Rent reduced in respect of property which is not estate — Remedy of aggrieved owner is by way of suit in civil Court — S. 8 does not prohibit such suit — Remedy under Art. 226, Constitution of India will not be granted when there is another adequate remedy — (Constitution of India, Art. 226) — (Civil P. C. (1908), S. 9).

If a particular property is not an estate within the meaning of the definition of term in S. 3 (2), Madras Estates Land Act (I (1) of 1908), such property would not be governed by the provisions of the Madras Act XXX (30) of 1947 and any order published by the Government under S. 3 (2) of the Act would not be of any legal consequence or force. In exceptional cases where on the face of the record or on admitted facts, it is clear that a particular property does not fall within the definition of an estate in S. 3 (2) of the Madras Estates Land Act, the High Court can quash the order of the Government passed under S. 3 (2). But in the majority of cases it may not be possible for the High Court with its limited scope of jurisdiction under Art. 226 of the Constitution to give relief to an applicant who alleges that this property does not fall within the definition. In such cases, the proper and adequate remedy would be by way of a suit. There can be no question that a suit to challenge the validity of an order of the Government made under S. 3 of the Act on the ground that the Act itself does not apply to the property concerned would be maintainable. There is nothing in the Act itself ousting the jurisdiction in this behalf. Section 8 of the Act according to which the validity of an order made under S. 3 (2) shall not be liable to be questioned in any Court of law will never apply to a case where there is initial lack of power in the Provincial Government to take any proceeding under the Act. Before S. 8 can apply, there must be an order which could be held to be a lawful order passed under the Act. If it is an order passed under the colour of the Act, the provision cannot obviously apply. Even in such cases it may be when a special statutory tribunal has been created by the Act invested with power and jurisdiction to decide any dispute as to whether any particular property falls within or outside the Act then, the jurisdiction of the civil Court is to that extent ousted. But since there is no such special tribunal a civil Court would therefore have the jurisdiction vested in it under S. 9, Civil P. C. to decide the question whether particular property is or is not an "estate" within the Act in a suit instituted by the aggrieved party. Where a suit is the proper and adequate remedy under the circumstances, as a rule an order under Art. 226 would not be made. AIR (27) 1940 PC 105, Rel. on. (Paras 3, 4, 5)

Anno: Civil P. C., S. 9 N. 62.

V. Vedantachariar, T. Rangaswami Aiyangar, T. Krishnaswami Aiyangar, K. Umamaheswaram, A. Kuppuswami, C. V. Dhikshitalu and K. V. K. Sarma, for Petitioners; Advocate-General, for The State.

Cases referred to:

('40) ILR (1940) Mad 599: (AIR (27) 1940 PC 105) (Pr 4)

('51) C M P No. 894 of 1951: (AIR 1952 Mad 203) (Pr 2)

RAJAMANNAR C. J.: These applications are directed against the orders issued by the Government under S. 3 (2) of Madras Act XXX of 1947 reducing the rates of rent payable in respect of the estates of the several applicants. Two main grounds were taken in these applications, namely, (1) that Madras Act XXX of 1947 was 'ultra vires' and in any event became void after the Constitution and (2) that the Act did not apply to the properties owned by the applicants because they did not fall within the definition of "estate" in S. 3 (2) of the Madras Estates Land Act, I of 1908.

(2) The first ground has since been disposed of by our judgment in 'RAMAKRISHNA RANGARAO v. STATE OF MADRAS', C M P No. 894 of 1951 (Mad) etc. adverse to the applicants. The second ground remains.

(3) The Act applies to all estates as defined in S. 3 (2). of the Madras Estates Land Act, 1908 (S. 1 (2)). The applicants deny that their properties fall within this definition. There is no provision in the Act itself under which any special Tribunal is appointed to decide a dispute as to whether a particular property is or is not an estate within the meaning of the Act. Under S. 2 (1) of the Act the Provincial Government is given the power to appoint a special officer in any estate or estates for the purpose of recommending fair and equitable rates of rent for the ryoti lands in such estate or estates. The rents as finally approved by the Govt. are published in the Fort St. George Gazette under S. 3 (2). It is obvious that if a particular property is not an estate, such property would not be governed by the provisions of the Act, and any order published by the Government under S. 3 (2) of the Act would not be of any legal consequence or force.

The question is: what is the remedy of the aggrieved owners of such properties when orders are published by the Government reducing the rates of rent in respect of them. In exceptional cases when on the face of the record or on admitted facts, it is clear that a particular property does not fall within the definition of an estate in S. 3 (2) of the Madras Estates Land Act, 1908, this Court can quash the order of the Government passed under S. 3 (2). But in the majority of cases it may not be possible for this Court with its limited scope of jurisdiction under Art. 226 of the Constitution to give relief to an applicant who alleges that his property does not fall within the definition. In such cases, the proper and adequate remedy would be by way of a suit. There can be no question that a suit to challenge the validity of an order of the Government made under S. 3 of the Act on the ground that the Act itself does not apply to the property concerned would be maintainable. There is nothing in the Act itself ousting the jurisdiction in this behalf. No doubt S. 8 of the Act says that the validity of an order made under S. 3 (2) shall not be liable to be questioned in any Court of law. But such provision will never apply to a case where there is initial lack of power in the Provincial Government to take any proceeding under the Act. Before S. 8 can apply, there must be an order which could be held to be a lawful order passed under the Act. If it is an order passed under the colour of the Act, the provision cannot obviously apply.

(4) It has been held over and over again that when executive authorities in exercise or under colour of a statutory power interfere with the property of a subject improperly and in excess of the limits authorised by law, the subject has a right to resort to the civil Court unless its jurisdiction has been taken away by express words or by clear implication. As their Lordships of the Judicial Committee observed in 'SECRETARY OF STATE v. MASK & CO.', ILR (1940) Mad 599 at p. 614 PC:

> "It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly or clearly implied. It is also well settled that even if jurisdiction is excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The Act expressly applies only to certain subject matter. If anything falls outside that subject matter, then it follows that the Act cannot apply to such a thing. Even in such cases it may be when a special statutory tribunal has been created by the Act invested with power and jurisdiction to decide any dispute as to whether any particular property falls within or outside the Act then, the jurisdiction of the civil Court is to that extent ousted. But in this case, as already pointed out, there is no such special tribunal. A civil Court would therefore have the jurisdiction vested in it under S. 9, Civil Procedure Code to decide the question whether particular property is or is not an "estate" within the Act in a suit instituted by any aggrieved party.

(5) A suit is the proper and adequate remedy under the circumstances, and as a rule an order under Art. 226 would not be made when there is another proper and adequate remedy. These applications will therefore be dismissed. There will be no order as to costs. Under instructions from the Government, the Advocate General states that in case any of the applicants intends to file a suit the Government would waive their right to two months' notice under Section 80 of the Civil Procedure Code.

C.R.K./R.G.D. *Applications dismissed.*

A. I. R. 1952 Madras 590

SUBBA RAO J.

Edpuri Rama Subbiah, Petitioner v. C. J. Cole and another, Respondents.

Civil Misc. Petn. No. 7387 of 1951, D/- 20-9-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XXV (25) of 1949), S. 11(2) — Applicability.

Section 11 can only be invoked for the purpose of securing the requisite permission from the Rent Controller to make the necessary repairs. It cannot obviously apply to a case where a tenant has made the repairs without taking the requisite permission and for getting an order from the Rent Controller for realising the amount so spent. (Para 1)

P. C. Parthasarathy Iyengar, for Petitioner.

ORDER.: This is an application for issuing a writ of 'certiorari' to quash the order of the District Munsiff of Kurnool setting aside the order of the Rent Controller, Kurnool. The petitioner is the owner of the house bearing Door No. 1/69, Bastian Road, Kurnool. The respondent is the tenant of that house. He filed R.C.P. No. 118 of 1949 on the file of the Rent Controller, Kurnool, under S. 11 (2) of Madras Act XXV (25) of 1949 praying for permission of the Rent Controller to effect repairs to the house and to deduct the costs thereof from the rent payable by him. The petitioner contended that he was not at all informed by the respondent about the repairs required for the building and that the latter had no power to make the repairs without complying with the provisions of S. 11 (2) of the Act. The Rent Controller dismissed the petition on the ground that the respondent has not applied for permission before undertaking the repairs as required by S. 11 (2) of the Act. The District Munsiff agreed with

the Rent Controller that the respondent made repairs without taking the permission of the Rent Controller. Notwithstanding that fact, he allowed the petition to the extent of about Rs. 93 by invoking certain equitable doctrines. Learned Counsel for the petitioner contended that there is no scope for the application of equities in construing a statutory provision and the respondent cannot ask for any relief contrary to the express provisions of S. 11. S. 11 (2) reads as follows:

> "If a landlord fails to make the necessary repairs to the building within a reasonable time after notice is given by the tenant, it shall be competent for the Controller to direct on application by the tenant that such repairs may be made by the tenant and that the cost thereof may be deducted from the rent which is payable by him."

The section therefore lays down two conditions before a tenant can make the repairs to a building: (1) the landlord should have failed to make the necessary repairs after notice is given by the tenant and (2) the Court should have given permission to him to make the repairs after the landlord made default after such notice was served by the tenant. In the present case neither of the conditions were complied with. The respondent did not serve the requisite notice on the landlord asking him to make the necessary repairs nor did he make the repairs with the previous permission of the Rent Controller. S. 11 can only be invoked for the purpose of securing the requisite permission from the Rent Controller to make the necessary repairs. It cannot obviously apply to a case where a tenant has made the repairs without taking the requisite permission and for getting an order from the Rent Controller for realising the amount so spent. The order of the Rent Controller is correct and that of the appellate authority is contrary to the express provisions of S. 11. The order of the District Munsiff is set aside and the respondent will pay the costs of the petitioner. Advocate's fee Rs. 50.

C.R.K./V.R.B. *Order set aside.*

A. I. R. 1952 Madras 591

FULL BENCH

SATYANARAYANA RAO, RAJAGOPOLAN AND CHANDRA REDDI, JJ.

Chintapalli Venkataratnam, Appellant v. Merla Seshamma, Respondent.

A. A. O. No. 460 of 1950 and Civil Misc. Petns. Nos. 8627 and 8384 of 1950, D/- 19-11-1951.

(a) Interpretation of Statutes — Provision giving retrospective operation — Construction — Rules as to.

In construing a provision which gives retrospective operation to a statute it is incumbent upon the Court to give effect to the plain language of the section and retrospective operation should not be unduly extended; nor should it be negatived or cut down if the language makes it imperative that such operation should be given. It is not open to a Court of construction in interpreting a statute either to add or to subtract from the language of the statute. As far as possible an attempt should be made to reconcile and interpret the provision of a statute in a manner so as to make none of the provisions ineffective or nugatory. If possible the provisions of the Act must be so construed so as to give effect to all the provisions. A provision can be rejected as unnecessary only if a Court is driven to such a situation and not otherwise. (Para 5)

Anno: C. P. C., Pre. N. 7.

(b) Debt Laws — Madras Agriculturists' Relief (Amendment) Act (23 of 1948), S. 16, Cls. (ii) and (iii) — Scope and applicability — Applicability of Clause (iii) to proceedings in which decrees or orders had become final before commencement of Act.

The two Clauses (ii) and (iii) are entirely independent and are intended to provide for different situations. (Para 5)

Clause (ii) applies to pending proceedings, that is, proceedings which were instituted before the commencement of the Act but which did not become final before such commencement. It implies that if the decree or order passed in a suit or proceeding becomes final before the commencement of the Act the provisions of the Act cannot be applied to such a suit or proceedings. But Clause (iii) is quite general and applies to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of the Act so that it seems to apply to decrees or orders even if they had become final before the commencement of the Act provided the decree or order has not been executed or fully satisfied. C. M. A. Nos. 316 and 391 of 1947 (Mad), OVERRULED. (Para 5)

The Legislature when it enacted these two provisions must have intended that even in the case of decrees or orders which have become final, having regard to the provisions of the new Act, relief should be had by the judgment-debtor so long as the decree or order was not executed or was not satisfied in full before the commencement of the Act. (Para 5)

A reading of the two clauses together would suggest that clause (iii) would apply exclusively to executable decrees or orders which though they have become final before the commencement of the Act are still in the stage of unfinished execution and at the stage at which satisfaction was not fully received. (Para 5)

C. Rama Rao, for Appellant; K. Umamaheswaram and T. Ramachandra Rao, for Respondent.

Case referred to:

('47) C. M. A. Nos. 316 and 391 of 1947 (Mad) (Prs 1, 4, 5)

SATYANARAYANA RAO, J.: This civil miscellaneous appeal has been placed before us under the directions of the Honourable the Chief Justice for a reconsideration of the decision in 'C.M.A. Nos. 316 and 391 of 1947 by our learned brethren Subba Rao and Somasundaram, JJ. As the case itself has been referred to us and not merely a question, it is necessary to state the facts out of which this appeal arises in order to appreciate the questions that arise for decision.

(2) The legal representative of the third defendant in O. S. No. 16 of 1939 and who is also her adopted son is the appellant in this appeal and also the petitioner in C.M.P. Nos. 8384 and 8627 of 1950. O. S. No. 16 of 1939 was instituted to

enforce a mortgage dated 6th November 1926 for a sum of Rs. 12,000, executed by defendants 1 to 3 and also by the first defendant as guardian of his minor son the fourth defendant. The first defendant is the husband of the second defendant and the third defendant is the first defendant's paternal uncle's widow. She adopted one of the sons of the first defendant. The mortgage (Ex. A) was executed to discharge certain earlier debts. The property covered by the mortgage belonged originally to certain Chintapam people who mortgaged the property to the plaintiff on 24th May 1920 for a sum of Rs. 5,000 (Ex. D). They were also indebted to the same plaintiff under a promissory note dated 1st December 1921 (Ex. E), the principal of which was Rs. 1,000. Under two documents dated 14th June 1925 (Ex. G) and 12th October 1925 (Ex. H) the property was purchased by the second defendant subject to earlier mortgage and also with an obligation attached that from and out of the consideration for the sale the debt due under the promissory note should be discharged by her. It is common ground that the purchase by the second defendant, the wife of the first defendant was for the benefit of the family. The suit was instituted on 15th October 1939 and in that suit the third defendant claimed, taking advantage of the provisions of Madras Act IV of 1938, that she was entitled to have the debt scaled down along with the other dependants who also claimed similar reliefs. She pleaded further that she was only a surety for the debt and her liability was co-extenstive with that of the principal debtors. The learned Subordinate Judge who tried the suit allowed the benefits of the Act to the third defendant also to the same extent as he had allowed to the other defendants who were the other mortgagors, that is, the debt was scaled down so as to reduce the debt due under the suit mortgage to the principal amounts due under Exs. D and E.

(3) There were two appeals against that decision to this Court one by the plaintiff which was A. S. No. 6 of 1942 and the other by the defendants 3 and 7, A. S. No. 516 of 1941. We may leave out of consideration A. S. No. 516 of 1941 as it has no bearing to the present controversy. In A. S. No. 6 of 1942 the plaintiff-creditor claimed that she was entitled to a decree against the third defendant for the principal sum mentioned in the suit mortgage with interest scaled down according to the provisions of the Act, and that the decree granted by the lower Court giving her also the benefits of the provisions of the Act so as to reduce the debt further as in the case of other mortgagors was not justified. This Court held that the third defendant was not entitled to the benefits of the Act in the same and to the same extent as the other defendants as she became a debtor for the first time only when she joined in the execution of the suit mortgage in 1926. The learned Judges were not satisfied that the position of the third defendant was that of a surety. The judgment of this Court was pronounced on 2nd December 1943. After this in the usual course, a final decree in the suit was passed on 27th March 1946. The creditor thereafter filed E. P. No. 148 of 1946 on 28th November 1946 to bring the mortgaged properties to sale. Apparently these proceedings dragged on for a long time for some reason or other and meanwhile the Madras Agriculturists' Relief Act was amended by Act XXIII of 1948 which came into force on 25th January 1949. Under the amended provisions a new explanation (Explanation III) to Section 8 was added by which the view taken by this Court regarding the requirements that go to constitute "the same creditor" and "the same debtor" within the meaning of the Act was radically altered. With a view to make this provision retrospective they introduced also Section 16, the construction of which is the subject-matter of this appeal.

Taking advantage of these provisions the third defendant in the first instance applied under Section 20 of the Act in E. A. No. 219 of 1949 to stay the execution of the decree which was granted by the Court on 28th June 1949; the petition itself having been filed six days earlier. This was followed, by an application to scale down the decree. This was I. A. No. 981 of 1949, dated 10th August 1949. The application was naturally opposed by the decree-holder on various grounds. The learned Subordinate Judge, who disposed of the matter finally rested his decision on the ground that as the decree that was ultimately passed namely the preliminary decree was one passed by the High Court, the remedy, if any, of the third defendant was to have moved this Court for scaling down the decree and that he had no jurisdiction therefore to deal with the matter. He also expressed his opinion on the other points also which was adverse to the third defendant.

In the result, the application, I.A. No. 981 of 1949, was dismissed by the learned Subordinate Judge on 6th March 1950. Against that decision the legal representative of the third defendant, the third defendant having died in the meanwhile, preferred C.M.A. No. 460 of 1950 on 18th July 1950 and by way of abundant caution on 14th August 1950 he also filed C.M.P. No. 8627 of 1950 to scale down the decree debt in A. S. No. 6 of 1942.

(4) When the appeal and the petition were posted before myself and Raghava Rao, J., the effect of Section 16 of the Madras Agriculturists Relief (Amendment) Act XXIII of 1948 was debated. It was contended on behalf of the appellant that Sub-clause (iii) of Section 16 of that Act enables the appellant to claim the benefits of the Act notwithstanding the earlier adjudication of this Court which has become final while for the respondent this position was contested and reliance was placed by the respondent on a decision of a Bench of this Court in 'C.M.A. Nos. 316 and 391 of 1947', in which the view which supports the respondent was taken. As we felt a doubt regarding the correctness of this decision the matter was referred to a Full Bench for reconsideration.

(5) It cannot be seriously disputed that the appellant is entitled to the benefits of the new Act if the provisions of Act XXIII of 1948 are held to be retrospective. If the appellant is entitled to the benefits of the new provisions the debt should be scaled down in accordance with those provisions. The point therefore for consideration is whether the Act is retrospective. In order to give retrospective effect to the provisions of the Act, Section 16 was enacted in the Act (XXIII of 1948). It is as follows:

"The amendments made by this Act shall apply to the following suits and proceedings, namely:

(i) all suits and proceedings instituted after the commencement of this Act;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement;

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act:

Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

The provisions of this section are clearly mandatory as the section itself says that the amendment made by this Act "shall apply" to the following suits and proceedings. The clause that is relied on in support of the contention advanced on behalf of the appellant by his learned Advocate Mr. Rama Rao is Clause (iii). He also at one stage of the arguments attempted to rely on Clause (i) but, when it was pointed out to him that there was no proceeding instituted after the commencement of this Act in the present case except the proceeding for scaling down which has been started after the new Act came into force he abandoned that contention and did not further press his contention based on Clause (i). Clause (i) therefore may be left out of consideration altogether. It cannot be doubted that the two Clauses (ii) and (iii) are entirely independent and are intended to provide for different situations. As has been rightly pointed out on behalf of the respondent by Mr. Kuppuswami in construing a provision like this which gives retrospective operation to a statute it is incumbent upon the Court to give effect to the plain language of the section and that retrospective operation should not be unduly extended; nor should it be negatived or cut down if the language makes it imperative that such operation should be given.

It is not open to a Court of construction in interpreting a statute either to add or to subtract from the language of the statute. As far as possible an attempt should be made to reconcile and interpret the provision of a statute in a manner so as to make none of the provisions ineffective or nugatory. If possible the provisions of the Act must be so construed so as to give effect to all the provisions. A provision can be rejected as unnecessary only if a Court is driven to such a situation and not otherwise. Bearing these principles in mind it is clear that Clause (ii) applies to pending proceedings, that is, proceedings which were instituted before the commencement of the Act but which did not become final before such commencement. This is made clear by the clause "in which the decree or order passed has not become final." It implies therefore that if the decree or order passed in a suit or proceeding becomes final before the commencement of the Act the provisions of the Act cannot be applied to such a suit or proceeding. But in Clause (iii) the words "in which the decree or order passed has not become final" do not occur. It is quite general and applied to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act so that it seems to apply to decrees or orders even if they had become final before the commencement of this Act provided the decree or order has not been executed or fully satisfied.

The view taken by the learned Judges in the civil miscellaneous appeals already referred to was that while the two clauses are independent, Clause (iii) has no application to proceedings in which the decrees or orders have become final before the commencement of the Act. It is this view which is also pressed now before us by the learned Advocate for the respondent. While we agree with the learned Judges in holding that the two clauses are independent, we are unable with great respect to accept the view that Clause (iii) applied only to cases in which the decrees or orders have not become final. If the decree or order has not become final before the commencement of this Act, Clause (iii) in our opinion seems to be unnecessary and as such the case would be covered by Clause (ii).

Further, it would be difficult to imagine that a decree or order which has not become final can be finally executed or can be finally satisfied. No doubt it is true that even when an appeal is pending a decree may be executed and satisfaction may be entered. But all that is only subject to the result of the appeal. If the appeal succeeds or the amount due by the defendant to the plaintiff is increased by the appellate Court fresh execution has to be started, the satisfaction must be reopened and the execution must proceed.

The Legislature, in our opinion, when it enacted these two provisions must have intended that even in the case of decrees or orders which have become final, having regard to the provisions of the new Act, relief should be had by the judgment-debtor so long as the decree or order was not executed or was not satisfied in full before the commencement of the Act. If however a decree was executed in part and before it was fully satisfied the debt was scaled down under the provisions of the Act as a result of which the creditor was found to have received more than what he was entitled to the proviso enacts that in such a situation the creditor should not be required to refund any sum which has been paid to or realised by him before the commencement of this Act.

The question is asked, and legitimately, as to which are the kinds of decrees or orders which have become final and which are sought to be excluded by implication in Clause (ii) of Section 16. It is of course not easy to give an exhaustive list of such decrees or orders. It may be that the Legislature contemplated that decrees and orders of a declaratory nature and which are not executable and which have become final before the commencement of the Act, need not be opened. A reading of the two clauses together would suggest that Clause (iii) would apply exclusively to executable decrees or orders which though they have become final before the commencement of the Act are still in the stage of unfinished execution and at the stage at which satisfaction was not fully received. The view which we take in our opinion, reconciles both the clauses and does not make any of the clauses unnecessary. For, if the view taken by the learned Judges and strongly pressed now before us by the learned Advocate for the respondent is accepted, it seems to us that Clause (iii) is wholly unnecessary. Such a construction of a statute should be as far as possible avoided if it is possible to avoid it. We are therefore of opinion that the view taken by the learned Judges in 'C.M.A. Nos. 316 and 391 of 1947', is erroneous and the decision must be overruled.

(6) The result of our view is that the legal representative of the third defendant is entitled to the benefit of the provisions of the Amending Act XXIII of 1948 and to have his debt scaled down in accordance with the provisions of the Act with reference to Exs. D and E also. As the amount has not been ascertained by the lower Court we think the best course is to allow the appeal and remand the application to the lower Court for the determination of the amount after giving credit to payments, if any, made by the third defendant or the third defendant's legal representative. I.A. No. 981 of 1949 is therefore remanded. The appellant is entitled to his costs in this Court.

(7) No orders are necessary on C.M.P. Nos. 8384 and 9627 of 1950.

C.R.K./V.B.B. *Case remanded.*

A. I. R. 1952 Madras 594

PANCHAPAKESA AYYAR J.

N. C. Ganapathi Chettiar, Petitioner v. Seth Chunilal, Respondent.

Civil Revn. Petn. No. 1145 of 1950, D/- 26-10-1951.

Presidency Small Cause Courts Act (1882), Section 38—Order, meaning of—Order returning plaint for presentation to proper Court is not order within Section 38.

An order passed by a Presidency Small Cause Court after hearing both sides and discussing many contentions and issues, returning the plaint for presentation to the proper Court having jurisdiction is not an order entitling the party for a new trial under Section 38, Presidency Small Cause Courts Act.

Every order in a suit, even if passed after contest, will not be an order in respect of which a new trial can be claimed under S. 38. Only when the merits of the suit claim are gone into and an order passed, can the order come within the meaning of the word 'Order' in Section 38. The phrase 'new trial' itself implies an old trial and disposal on merits. 26 Mad 163; AIR 1938 Cal 862, Rel. on. (Paras 4, 5)

It is wrong to contend that the orders which could be brought up for revision under S. 25 of the Provincial Small Cause Courts Act could also be brought up for new trial under the Presidency Small Cause Courts Act. The two Acts and sections are different, and S. 25 of the Provincial Small Cause Courts Act, dealing with revisions to the High Court, cannot be relied on for bolstering up a new claim for a new trial under S. 38 of the Presidency Small Cause Courts Act. (Para 4)

Anno : Pres. Sm. Cause Courts Act, S. 38 N. 1.

M. V. Ganapathi, for Petitioner; P. V. Subramaniam, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('38) ILR (1938) 2 Cal 637: (AIR 1938 Cal 862) (Prs 2, 3)

('03) 26 Mad 163 (Prs 2, 3)

ORDER: This petition raises an interesting question of law viz., whether when a Presidency Court of Small Causes orders a plaint to be returned for presentation to the proper Court having jurisdiction, the order in question will amount to an order entitling the party for a new trial under S. 38 of the Presidency Small Cause Courts Act.

(2) The facts are briefly these. The petitioner, Ganapathi Chettiar, a merchant of Erode, had filed S. C. S. No. 2627 of 1948 in the Court of Small Causes at Madras for refund of an advance of Rs. 400 paid by his son, on his behalf, to one Seth Chunilal a merchant or commission agent at Agra, for purchase of pulses, under a contract Ex. D. 1, dated 2-3-1948, on the ground that the pulses supplied were of inferior quality and he had repudiated the contract. The learned Judge of the Court of Small Causes, after hearing both sides, and discussing many contentions and issues, finally passed an order, on issue 3, returning the plaint for presentation to the proper Court, viz., the Court at Agra, holding that his Court had no jurisdiction to try this suit, as no part of the cause of action had arisen here. Against this, the petitioner filed N. T. Application No. 43 of 1948. The Chief Judge and another Judge of the Court of Small Causes heard the application, and on a preliminary point taken by the defendant before them, held that the petition would not lie under S. 38 as it was conceded before them that the order of the Small Cause Court would not amount to a "decree", and as they considered that it would not also be an "order", relying on the rulings in 'CHINNATHAMBI MUDALIAR v. VEERABADRIAH NAIDU', 26 Mad 163, and 'HAJI MOHAMED DEEN v. ALLEN', ILR (1938) 2 Cal 637. So they dismissed the N. T. Application. Hence, the civil revision petition.

(3) Mr. Ganapathi, for the petitioner, urges that the Full Bench of the Court of Small Causes erred in their view in holding that the order of the Small Cause Judge would not be an "order", under S. 38 within the meaning of the Calcutta ruling quoted by them, though it might not be a "decree". He urges that the order in question was an order which in some way or other "disposed of the suit" and so would come within the meaning given to the word "order" in the Calcutta ruling, as the order of the Small Cause Judge had "disposed of the suit" so far as his Court was concerned, by taking it off his file! The learned counsel for the petitioner admitted that the ruling in 'CHINNATHAMBI MUDALIAR v. VEERABADRIAH NAIDU', 26 Mad 163, was against him, and that that ruling bluntly says that the word "order" in S. 38 means "an order which has the effect of a decree", and that he was unable to quote before me a single ruling of this Court, in all the 100 years of the existence of the Presidency Small Cause Court, Madras, where an order of a Presidency Small Cause Court Judge returning a plaint has been held to be an "order" within the meaning of S. 38 or of the corresponding section which existed before the present Presidency Small Causes Act. The fact that the learned counsel for the respondent could not give a second ruling to the contrary (besides that in 26 Mad 163) is, no doubt true, but is not so significant. Where a right does not exist, we will not find a ruling in favour of it and we will find only a ruling or two the other way. Thus, a search in the Law Reports for a ruling giving a casual concubine a right of maintenance against her paramour will prove in vain, and there will be only a ruling or two the other way, it being so obvious. The only ruling of this Court on the point involved in this case is the ruling in 'CHINNATHAMBI MUDALIAR v. VEERABADRIAH NAIDU', 26 Mad 163, which is directly against the petitioner as even he admits that the order of the Small Cause Court Judge is not a decree and has not the effect of a decree. Merely returning a plaint for presentation to another Court will, in my opinion, also not be "disposing of the suit", within the meaning of the ruling in 'HAJI MAHOMED DEEN v. ALLEN', ILR (1938) 2 Cal 637, any more than removing a library from downstairs to upstairs of the same building, or to an adjacent building, will be "disposing of" the library. Only when the merits of the suit claim are gone into and an order passed can the order come within the meaning of the word "order" in S. 38. Surely, the phrase "new trial" itself implies an old trial and disposal on merits.

(4) The learned counsel for the petitioner relied on the wording of S. 25 of the Provincial Small Cause Courts Act, and contended that the orders which could be brought up for revision under S. 25, Provincial Small Cause Courts Act, could also be brought up for new trial under S. 38, Presidency Small Cause Courts Act. I cannot agree. The two Acts and sections are different, and Section 25 of the Provincial Small Cause Courts Act, dealing with revisions to this Court, cannot be relied on for bolstering up this new claim for a new trial under Section 38 of the Presidency Small Cause Courts Act.

(5) Then, the learned counsel for the petitioner urged that S. 38 simply mentions two conditions for claiming a new trial, viz., that the suit should have been contested, and that the order in respect of which the new trial is sought should be an "order" in the suit after contest and that the application for new trial should be filed within the time prescribed and that it is illegal and unreasonable to add to these conditions by virtue of the two rulings mentioned above. I cannot agree. Every order in a suit, even if passed after contest, will not be an "order" in respect of which a new trial can be claimed under S. 38, & the two rulings merely interpret the meaning of the word "order" in S. 38. Merely reading the wording of a section and putting the grammatical meaning on it, ignoring the interpretation put on it by High Courts, as in the Calcutta and Madras rulings quoted above, will not do, as law is a learned profession, and the words in Acts are words of art requiring to be interpreted. Every section and every material word in a section has to be construed in accordance with the authoritative interpretation put upon it by learned Judges of competent Courts after hearing the arguments of the learned counsel appearing in those cases. It is no use bringing a dictionary to a Court and reading out from it the meaning of the English words used in the Acts, and opposing them to the authoritative meanings given by competent Courts. Besides if the learned counsel's arguments were right, even an "order refusing an adjournment" in a small cause suit, passed after contest, i.e., after hearing both sides, will entitle the aggrieved party to claim a new trial! I need not discuss the matter further. In my opinion, the lower Court's order was correct though it is supported only by one ruling directly on the point. This petition deserves to be and is hereby dismissed, but in the circumstances, without costs.

C.R.K./K.S. Petition dismissed.

A. I. R. 1952 Madras 595

PANCHAPAGESA SASTRY J.

Tansukhrai M. Karundia, Applicant v. The Official Liquidator, Andhra Paper Mills Co. Ltd., (In liqn.), Respondent.

O. P. No. 235 of 1947 and Appln. No. 3309 of 1948, D/- 16-2-1949.

(a) Companies Act (1913), S. 109(f)—Floating charge.

A floating security is not a specific security it is only one which affects the assets included in it, which are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. (Para 3)

By a deed, a company pledged all its movable properties to its treasurer in consideration of his having agreed to lend to the company money for the purpose of carrying on its business and affairs and working its factory. The treasurer was given possession of the items pledged to him. As and when other movable properties came into his possession, they also stood pledged to him. The security itself was expressly stated to be a continuing one. On default of payment when demanded, he was given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him. The company was allowed to run its business, but it was only run by him as an agent under an irrevocable power of attorney:

Held that the element of possession, which was contemplated by the deed and which was actually given, was an important factor, which stood in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge. Therefore cl. (f) of S. 109 was not applicable and the document did not require registration as a floating charge. AIR 1927 Cal 682, Foll.; AIR 1926 Bom 427, Ref. (Para 3)

Anno: Companies Act, S. 109 N. 6, Pt. 1.

(b) Companies Act (1913), S. 231 — Petition for winding up — Money paid within three months prior to petition — Payment is not invalid.

The mere fact that the money was paid within three months prior to the presentation of the petition for winding up is not by itself sufficient to avoid the transfer or payment as invalid under S. 231. (Para 5)

Anno: Companies Act, S. 231 N. 1.

K. Narasimha Aiyar, for C. R. Krishna Rao and D. B. Jagannath Rao, for Applicant; V. Radhakrishnayya, for Short Bewes and Co., for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('32) 59 Cal 377: (AIR 1931 PC 245) 3

('42) ILR (1942) All 119: (AIR 1942 All 251 (1)) 3

('26) 50 Bom 547: (AIR 1926 Bom 427) 3

('27) 54 Cal 513: (AIR 1927 Cal 682) 3

(1910) 2 KB 979: (79 LJKB 970) 3

JUDGMENT: This is an application to vary the order of the Official Liquidator of the Andhra Paper Mills Co. Ltd. (in liquidation) disallowing the claim of the applicant to have a charge over the movable assets of the company for a sum of Rs. 1,01,172-15-2. The liquidator admitted that the amount claimed was due, but he disallowed the claim to rank as secured creditor on the ground that the document creating the security was not registered with the Assistant Registrar of Joint Stock Companies, Cocanada, as required by S. 109 of the Indian Companies Act. This order further states that in any event, the amount of Rs. 34,000 included in the claim representing payment made on 15th July 1947 to Messrs. Natwarlal Shamaldas and Co., cannot be treated

as a secured debt. No grounds for the same are however mentioned in the order.

(2) The applicant Tansukhrai M. Karundia claims to have advanced the aforesaid sums in circumstances set out below. The Andhra Paper Mills would appear to have issued debentures to the extent of eleven lakhs. By about 1945 interest on the same had accumulated to another six lakhs. The company having made default in payment under the terms of the debenture document, the debenture trustees had taken possession, but they were themselves unable to work the concern. They seem to have delivered over the premises again to the Mills on certain conditions, which were not fulfilled and the trustees again entered into possession of the debenture premises on the 14th February 1947. Certain proposals would appear to have been made by the trustees to the Board of Directors as to the terms upon which moneys could be borrowed for running the concern and at the suggestion of the trustees the company had agreed to execute deeds giving a lien or charge to any person who might be found by the debenture trustees to be willing to advance funds. A resolution to this effect was passed on 10th March 1947 (Ex. P. 1) and on the same day a draft agreement between the company and the company's banker and treasurer was also approved by them (Ex. P. 2). In pursuance of the draft so approved, Ex. P. 3 was executed on the 21st March 1947 between the company and the applicant, therein referred to as the treasurer. It is under this document that the applicant claims to have advanced moneys from time to time to the company and now claims to have a security over the properties mentioned in the document for the balance of the amounts due to him. In view of the contentions urged regarding the invalidity of the document, as against the liquidator, it is necessary to set out its main terms, which are as follows:

"These presents witness: That in consideration of the said Tansukhrai M. Karundia having agreed to lend and advance to the company such sums or moneys or credit of any nature and kind whatsoever for the purpose of carrying on the business and affairs of the company and working the factory at Rajahmundry, the company hereby agrees and binds itself as under:

1. All movable properties of every description in the treasurer's possession on the company's account, or for the time being held by the treasurer on company's behalf whether alone or jointly or with others in India or elsewhere including any bullion, deposit receipts, promissory notes, bills of exchange, hundies, bills of lading, railway receipts, other documents of title, to goods, any other negotiable or transferable instruments or securities, bills or other documents relating to supplies made or services rendered to Government or to any other person or mercantile documents of every description or contracts other than those pertaining to immovable properties requiring registration in India and other documents evidencing the company's title as creditors or members of any corporation, association, company or syndicate in India or elsewhere, are hereby hypothecated for and shall stand charged with, and
2. all marketable securities and goods coming into the treasurer's possession on the company's account or deposited with the treasurer or for the time being held by treasurer on the company's behalf, are hereby pledged for and shall stand charged with the due payment of the amount of any advance or credits with interest thereon at one per cent. over the bank rate with a minimum of 4 per cent. per annum with six monthly rests and all costs, charges and expenses incurred by the treasurer in connection with such advances or credits."

The document contains various other clauses which are also important in this connection. It is stated to be a continuing security to cover the amount of advance. It is provided that the treasurer shall not be responsible for any loss, damage or depreciation suffered by the movable properties, securities and books in his possession or in the course of realisation, nor bear loss or damage caused by theft or burglary. The company undertakes to maintain a margin on the said movable properties, securities or goods and failing repayment on demand of the amount of advance with interest etc., the treasurer is entitled, but not bound to sell or otherwise dispose of all or any of the movable property, marketable securities or goods by public auction or by private sale without reference to the company or without obtaining its consent. The proceeds of such sale should be applied in payment of all costs and in repaying the amounts due to the treasurer and, if there is any balance, to be paid over to the company. The treasurer is to carry on business and maintain the necessary staff for which the company will pay the salaries, wages and expenses. The company is to give an irrevocable power of attorney to the treasurer with necessary powers to manage the concern. The power is not to be revoked until all the moneys due to the treasurer are fully paid up. Another clause expressly provides that all movable property in any shape or form including raw materials, stores and finished products etc., shall be in the treasurer's possession and control and he shall be entitled to deal with the same as he thinks fit. The treasurer has a right to sub-delegate his powers under the power-of-attorney to be granted to him and to grant power-of-attorney on his own behalf to other persons. On the same date the company gave a power-of-attorney as contemplated to the applicant, a copy of which is Ex. P. 4. It is therein recited 'inter alia' that he has power to hold moneys, negotiable instruments, goods, hundies, promissory notes, cheques, bills of lading, railway receipts etc., and the proceeds thereof in his possession and to appropriate the same towards the moneys due to him as the company's banker. Further all moneys and all movable property belonging to the company, whether actually received or likely to be received by the treasurer and all goods actually held by the attorney or to be received by him on behalf of the company, are to be received, held and appropriated by him towards liquidation of the moneys advanced by the attorney. In pursuance of the power-of-attorney the applicant appointed one Mr. N. K. Gokhale as attorney to be in charge of the Mills at Rajahmundry and run the concern. This arrangement was acted upon until the company was ordered to be wound up by order of this Court dated 23rd September 1947 in O. P. No. 235 of 1947 filed on 22nd August 1947. The provisional liquidator, who was appointed,

took possession of the Mills on 6th September 1947 from the said Gokhale, who was admittedly in possession, till then on behalf of the applicant.

(3) The question for decision is whether the document, Ex. P. 3, is void against the liquidator for the reason that it has not been registered with the Assistant Registrar of Joint Stock Companies as required by S. 109. The applicant's advocate contends that this document created a pledge on the movable properties of the company and does not require registration under Section 109(1)(c). Although the order of the Official Liquidator does not refer to any particular clause of Section 109, in the counter affidavit filed by him in this application, it is stated that the document requires registration, as the applicant claims a charge on the stock-in-trade of the company. The learned advocate for the applicant conceded that a pledge on stock-in-trade would require registration, but he submitted that he was willing to give up his claim for security over stock-in-trade and was content with a declaration that he is entitled to have his security over all the properties covered by the document, Ex. P. 3, other than stock-in-trade. In the argument before me however, the advocate for the liquidator took a different line and contended that the entire document is void against the liquidator for the reason that it amounted to creating a floating charge and hence required registration under clause (f). He relied on the decision of the Judicial Committee in 'IMPERIAL BANK OF INDIA v. BENGAL NATIONAL BANK', 59 Cal 377 and that of the High Court of Allahabad in 'BABU NANDAN LAL v. PARSOTTAM SAHU', ILR (1942) All 119. As pointed out by Buckley L. J. in 'EVANS v. RIVAL GRANITE QUARRIES LTD.', (1910) 2 K B 979 at page 999, a floating security is not a specific security; it is only one which affects the assets included in it, which are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee.

> "A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security."

In the present case it will be noted that the applicant was given possession of the items pledged to him. As and when other movable properties come into his possession, they also stand pledged to him. The security itself is expressly stated to be a continuing one. On default of payment when demanded; he is given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him. No doubt, the company is allowed to run its business, but it is only run by him as an agent under an irrevocable power-of-attorney. This scheme was devised apparently to ensure his possession of the properties delivered to him and also his continued possession of all the movable properties covered by the document. These characteristic features are sufficient to negative the contention that this is a mere floating charge coming under clause (f) of Section 109. As pointed out by Rankin C. J. in 'JONES & CO. v. RANJIT ROY', 54 Cal 513, the element of possession, which is contemplated by the deed and which was actually given, is an important factor, which stands in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge. The decision in 'BANK OF BARODA v. SHIVDASANI', 50 Bom 547 is also in point. In the present case, the possession of the movable properties should be taken to be with the applicant in his capacity as pledgee and not merely and solely as an agent of the company. I am of opinion, therefore, that clause (f) is not applicable and that the document does not require registration, as a floating charge.

(4) If it is a pledge of movable properties other than stock-in-trade, the document does not require registration either under clause (e). In answer to a specific question from the Court the learned advocate for the liquidator admitted that the document can be given effect to as regards all movables contained therein other than stock-in-trade in spite of the inclusion of the stock-in-trade also in the document and its non-registration. It was not contended that the document is bad 'in toto.' As I stated already it was admitted that it may be enforced as creating a good security over the rest of the properties other than the stock-in-trade. In view of that admission, it is not necessary to deal with that point.

(5) It is next argued that, at any rate, a sum of Rs. 34,000 cannot be treated as a secured advance. No reasons are given why this amount is treated in a different manner from the rest of the advances either in the order of the liquidator, or in the counter affidavit filed by him. In the arguments, however, the advocate for the liquidator stated that this amount was advanced within three months prior to the winding up order and hence it was bad under Section 231 as a fraudulent preference. No evidence was let in to show that the payment was made by the applicant with a view to give that creditor a preference over other creditors. The mere fact that the money was paid within three months prior to the presentation of the petition for winding up is not by itself sufficient to avoid the transfer or payment as invalid under Section 231. When this was pointed out, the learned advocate for the liquidator tacitly gave up his contention, as he had no evidence to let in.

(6) In the result, the applicant is entitled to a declaration that he has a valid security over such of the movable assets of the company as are comprised in the document, Ex. P. 3, but excluding stock-in-trade therefrom for the total sum of Rs. 1,01,172-15-2. The order of the liquidator is varied accordingly to that extent. The applicant will get his costs from the respondent. The liquidator will have his costs from out of the company's funds. I fix advocate's fee for each side at Rs. 350/.

C.R.K./V.R.B. Application allowed.

A I. R. 1952 Madras 597

RAGHAVA RAO J.

Vajjula Anantharaman, Appellant v. Adapala Subba Reddi and another, Respondents.

Second Appeal No. 2249 of 1947, D/- 27-3-51.

Tort — Conversion — Damages — Earth dug up by wrong-doer from plaintiff's land converted into bricks — Assessment of damages.

Where a wrong-doer converts the earth dug up from the land of the plaintiff into bricks, then in addition to the expenses incurred by the plaintiff in manuring the plots dug out and for levelling up the pits created in the process of digging of the earth and the value of the crops that he would have been able to realise out of the lands in question and the value of the site prejudicially affected by digging of the pits, the plaintiff will be entitled to the value of the bricks. The value of the bricks is to be arrived at after deducting the making charges incurred by the defendant, if he has acted without fraud or negligence and quite fairly and honestly. AIR 1941 Cal 691, Ref. (Para 4)

R. Ramamurthi Iyer and P. S. Raghavarama Sastry, for Appellant; C. A. Vaidhyalingam & P. Ramachandra Reddy, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.
('41) ILR (1941) 1 Cal 285: (AIR 1941 Cal 691) 3
(1880) 5 AC 25: (42 LT 334) 4
(1932) AC 452: (101 LJKB 417) 4
(1941) 3 QB 440 4

JUDGMENT: The appellant in this second appeal was the plaintiff in the original Court. His suit was for recovery of certain damages and for an injunction. The damages related to the value of the earth said to have been dug from this land by the first defendant with the connivance of the second defendant, a tenant of the plaintiff. The earth dug was converted into bricks and the injunction was to restrain the defendants from entering, removing or interfering with the brick kilns. The kilns are situated in an area of 10 cents in a larger area of 70 cents from out of which there was the digging of the earth. The trial Court held that the plaintiff was entitled in damages to a sum of Rs. 400. How that was arrived at by the trial Court was that Rs. 300 was considered by it to be the value of the earth removed, Rs. 50 was regarded by it as the expense to be incurred by the plaintiff for manuring of the plots which were dug out and another Rs. 50 was reckoned to be the charge for levelling up of the pits which were created in the process of digging of the earth. On appeal the learned District Judge added a sum of Rs. 284 more to the amount of damages. The District Judge did so for the reason that he considered that Rs. 150 instead of Rs. 50 was the proper charge for manuring and that a like sum was the proper charge for levelling. He also held that the plaintiff was entitled to the value of the crops that he would have been able to realise from out of the lands in question for the years 1945-46 and 1946-47. The value of the crops according to the estimate of the learned Judge was Rs. 84. Both the Courts below refused the relief of injunction.

(2) In second appeal the point urged is that Rs. 684 is insufficient damages. It is said that that is so, because in addition to the Rs. 684 the plaintiff is entitled in law to the value of the bricks themselves into which the earth was actually converted. It was apparently considered by the Courts below that no claim for the value of the bricks should be allowed to be made when the value of the earth which was removed was itself being granted to the plaintiff. This it is contended by the learned counsel, is wrong because the injunction that was asked for in the plaint proceeded on the basis that the property into which the earth became converted was really that of the plaintiff. It is urged that where a wrong-doer has actually converted earth removed from the plaintiff's land into something else, the value of that something else is really what has to be taken into account by the Court for assessment of damages.

(3) In support of this contention reliance is placed by Mr. Ramamurthi Aiyar, for the appellant, on a decision of the Calcutta High Court reported in 'CARRIT MORAN AND CO. v. MANMATHANATH MUKHERJI', ILR (1941) 1 Cal 285. It is also urged by the learned counsel that the District Judge was wrong in supposing that the trial Court had out of the Rs. 400 granted by it, put down Rs. 300 as for value of the earth removed. The trial Court in fact, took into account the value of the whole property as with reference to the purchase price paid by the plaintiff in the year 1924 and roughly held the 70 cents, which according to it became useless for the plaintiff after the digging of pits in it by the first defendant, to be worth about Rs. 300. Mr. Ramamurthi Aiyar says that the test adopted by the trial Court is wrong.

(4) The Calcutta case relied upon by the learned advocate for the appellant was one in which tea leaves were converted by a wrong-doer who had plucked them from out of the estate of the owner into tea dust. On the question of conversion, Chief Justice Derbyshire who delivered the leading judgment of the Court observes thus at page 296 of the report.

"Shyam was far removed from the position of the defendant in 'WOOD v. MOOREWOOD', 1941-3 QB 440, where, in an action for trover for coal wrongfully got and raised, Parke B directed the jury that if the defendant was not guilty of fraud or negligence but had acted fairly and honestly in the full belief that he had a right to do what he did they might give the defendant credit for the cost of raising the coal — which the jury did."

Then at page 297 the learned Chief Justice observes:

"Be that as it may, it seems to me that the matter is concluded by a pronouncement of Lord Sankey L. C. in 'BANCO DE PORTUGAL v. WATERLOW AND SONS LTD.', (1932) AC 452 at p. 475. It was similarly stated by Lord Blackburn in the House of Lords in 'LIVINGSTONE v. RAWYARDS COAL CO.', (1880) 5 AC 25 at p. 39, in these words: 'Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'. There is no doubt as to the law."

In applying the legal principles thus enunciated by the learned Chief Justice to the case on hand we have to bear in mind the concurrent finding of both the Courts that the first defendant in this case acted without fraud or negligence, and quite fairly and honestly. Then in regard to the sum of Rs. 300 fixed by the trial Court as representing the value of the site which has been prejudicially affected by the

digging of pits, but which the learned trial Judge has wrongly supposed to be the value of the earth removed, the true position is that it really represents the value of the site prejudicially affected; and that position I accept. But in addition to that, there must also go to the plaintiff the value of the bricks into which the earth has been converted. The net value of the bricks, that is to say, the figure to be arrived at after deducting the making charges incurred by the first defendant according to the finding of the lower appellate Court, is a sum of Rs. 300. There is no reason why in the circumstances this sum of Rs. 300 should not be added to the sum of Rs. 684 granted by the lower appellate Court even on the assumption of bona fides about the conduct of the first defendant. This will mean a sum of Rs. 984 which the plaintiff is entitled to get; but then it is urged by Mr. Ramamurthi Aiyar that it is impossible to believe that on an investment of Rs. 4000 or so over the brick-making there should have been only a net profit of Rs. 300 realised by the defendant. This looks quite a reasonable argument although the point is one of fact on which the lower appellate Court has recorded its own finding. On the whole, it seems to me that the interests of justice will be properly met by fixing a sum of Rs. 1000 for damages to the plaintiff on all heads put together.

(5) I vary the decision of the lower appellate Court by directing the substitution of Rs. 1000 for the sum of Rs. 684. The plaintiff will be entitled to his proportionate costs right through in all the three Courts without any liability to pay costs to the first defendant. The memorandum of cross-objections is not pressed and is therefore dismissed, but without costs. No leave.

C.R.K./G.M.J. Decree varied.

A. I. R. 1952 Madras 599

PANCHAPAKESA AYYAR J.

The Public Prosecutor, Petitioner v. Ponnu Kudumban and others, Respondents.

Criminal Revn. No. 193 of 1951, D/- 26-4-1951.

Criminal P. C. (1898), S. 337 (3) — Approver kept in sub-jail is in judicial custody — Transfer to other sub-jail or central jail — Grounds for.

A sub-jail is in the custody of a Sub-Magistrate, a judicial officer, who is the sub-jail officer under the rules, and an approver kept in a sub-jail is in judicial custody, and not in police custody although there is a police guard for the sub-jail. Hence unless it is really proved that the approver is being tutored or influenced by the police officers acting as guards and the Sub-Magistrate is unable to prevent this from pusillanimous fear of the police, the approver cannot be transferred to other sub-jail or Central jail. (Para 3)

Anno: Cr. P. C., S. 337 N. 19.

The Public Prosecutor, for Petitioner; R. Jagannathan, for Row and Reddy, for Respondents.

ORDER: This is a revision case by the Madras State to revise the orders of the District Magistrate, Tirunelveli, dated 16-1-51 and 15-2-51.

(2) The facts are briefly these. The accused in R. C No. 4 of 1950 filed a petition before the District Magistrate of Tirunelveli for transferring the 'four approvers' in that case from the sub jail Tuticorin to either the sub jail, Kokkarakulam, or to any central jail. R. C. No. 4 of 1950 is a big conspiracy case involving some 97 accused. The main evidence in the case is going to be that of these four approvers. The accused apprehended that if these approvers were lodged in the sub jail, Tuticorin, which is located in the same building as the police station of Tuticorin and is guarded by a police guard, the approvers might be influenced by the police guard or other police officers to give a story unfavourable to the accused and so prayed that the approvers might be removed to the Central Jail beyond all reach of police influence, and in sole control of the jail authorities. The learned District Magistrate found, in his order dated 16-1-51, that there were 'absolutely no materials' from which it could be inferred that the police were exercising any unwholesome influence on the approvers lodged in Tuticorin sub jail, and also found that the approvers were only in 'judicial custody' in Tuticorin sub jail. But he thought that 'it was possible to argue' that the police, if inclined that way, could get at the approvers and advise and persuade them to give evidence against the accused. So he considered it advisable to have these approvers transferred from the Tuticorin sub jail and detained in the Kokkarakulam sub jail or in any central jail according to the convenience of the jail authorities, making provision also for 'communists' not to get at and persuade the approvers to give evidence the other way, and ordered accordingly. The Public Prosecutor, Tirunelveli, put in C. R. P 1 of 1951 in R. C. No. 4 of 1950 for revising, vacating and cancelling the order dated 16-1-1951. The learned District Magistrate, by his order dated 15-2-1951, found that he had no jurisdiction to revise, vacate or cancel his own order dated 16-1-1951 and found further that, even if he had jurisdiction, he would not have revised, vacated and cancelled the prior order, as sufficient reason was not shown for doing so. Hence this revision case here.

(3) I have perused the relevant records and heard the learned Public Prosecutor for the State and the learned counsel for the accused. The position in law is clear. A sub jail is in the custody of a Sub Magistrate, a judicial officer, who is the sub jail officer under the rules, and any person kept in a sub jail is in 'judicial custody', and 'not' in police custody. No doubt, there will be a 'police guard' for the sub jail. But the 'police are not in control of the sub jail'. The 'Sub Magistrate' is in control. The mere fact that police constables are guarding the sub jail means little. So also that it is located in the same compound as the police station. Often, judicial officers and Courts have police constables for guard duty. Even in the High Court sessions, constables come and guard the accused persons. Daily, constables are in attendance in the High Court compound to preserve order, regulate traffic, etc. Even in the most democratic conditions this is inevitable. No country can do without the police or the army for at least a hundred years to come. Nor do I see any harm in the police guards, escorts etc. If the police guard, or other police officers talk to the approvers about the case, or tutor them, that is a different matter. That is not the case here. Nor have the approvers complained of illtreatment, threat, questioning, coaching or tutoring. Any complaint of misbehaviour by the police in this matter may be brought to the notice of the Sub Magistrate (Sub jail officer) who will doubtless take prompt action. To say that he

will be afraid of the police guard is incredible, as, even in the wildest democracy, the dog wags the tail, and not the tail the dog. But, if it is proved that the Sub Magistrate is really afraid to do his duty, from pusillanimous fear of the police, that may be alleged and proved before the proper authorities. I see no reason to transfer the approvers to a Central jail on any such unproved and theoritical apprehension, as it will undoubtedly entail, unnecessary waste of public time, money and energy. Doubtless, the District Magistrate and other authorities will have the power to order the transfer of approvers to a central jail, even at the cost of public time, money and energy if it is really proved that the approvers are being tutored or influenced by the police officers acting as guard in that sub jail, and if it is impossible to prevent this kind of thing even by transferring the approvers to another sub jail. One should not confess defeat before trying the matter out, and I am not hopeless about sub jail officers and Sub Magistrates ensuring that approvers are free from such police persuasion or coercion in any sub jails under their control. As the learned District Magistrate has not stated that there was any such attempt by the police guard or other police officers to influence the approvers, and, indeed, says, that there were absolutely no materials from which it could be inferred that the police were exercising any unwholesome influence on the approvers, it is clear to me that his order directing the transfer of the approvers to a Central Jail or to Kokkarakulam Sub jail, which is, I understand from the learned Public Prosecutor, congested and has no cells to spare for lodging these people, is incorrect, especially as it is hedged about with somewhat unworkable directions, like keeping the accused 'free from communists influence' also. The learned District Magistrate seems to have been obsessed by theoretical fears of the police, on the one side, against the accused, and of the communists, on the other side, for the accused, and, so, has passed a somewhat unworkable order in an attempt to steer clear of the scylla and the charybdis.

(4) A far easier course is indicated in this case to solve all difficulties. The Tuticorin sub jail is too distant and too inconvenient for lodging these approvers, and the enquiry commences at Tinnevelly on 30-4-51. The learned Public Prosecutor, admits that 'Srivaikuddam sub jail' is only 14 miles from Tirunelveli. It is thus much nearer, and has got ample accommodation for these approvers, and these approvers can be kept there under the sole charge and custody of 'a non-police warder and guard', the sub jail officer of that jail getting, if necessary, non-police warder and guard for that purpose. So these four approvers are directed to be kept in Srivaikuntam sub jail, in 'two separate cells', under the sole control and custody of a non-police warder and guard, and the sub jail officer, Srivaikuntam, sub jail, is directed to pay his personal attention to this matter and see that no police officers ever get at the approvers or try to persuade them to depose against the accused. I understand from the learned Public Prosecutor that the enquiry by a Special First Class Magistrate is to begin on the 30th April positively at Tirunelveli. So, Srivaikuntam sub jail will suit excellently and all the four approvers will be transferred to it 'at once', and kept there as directed above. The learned counsel for the accused also agree to this. Of course for the purpose of escorting the approvers to Court, reserve constables or other constables may be used, as is usual even in the High Court, but except for this, and for the necessary guard duty in Court, the police should have nothing to do with these approvers.

(5) I may add finally, that it is very difficult to lay down a hard and fast rule regarding such matters applicable to all cases. Each case has to be dealt with on its own merits, in order to see that justice is not only done but appears to one and all to be done. District Magistrates and others will have undoubted power to order approvers to be confined in a central jail if that course is inevitable and is necessitated by the police getting at the approvers in other jails, and the impossibility or preventing that. But till such a state of things arises there is no need to waste public time, money and energy unnecessarily on any such general detention of approvers in central jails alone.

C.R.K./G.M.J. Order accordingly.

A. I. R. 1952 Madras 600

PANCHAPAKESA AYYAR J.

Gadikota Siva Narayana Reddi, Petitioner v. Badepalli Nagasubbamma and another, Respondents.

Civil Revn. Petn. No. 774 of 1950, D/- 19-7-51.

Civil P. C. (1908), O. 9 R. 13 — "Sufficient cause" — Guardian's negligence to appear — Civil P. C. (1908), O. 32, R. 3.

As the minors cannot appear in Court themselves, their guardian's negligence to appear and defend on their behalf at the trial is a "sufficient cause" under O. 9 R. 13. AIR 1949 Mad 46, Disting. (Para 2)

The fact that minors can, after they attain majority, agitate the matter again is no ground why they be denied their present remedy and relegated to a future remedy. (Para 5)

Anno: C. P. C., O. 9 R. 13 N. 20; O. 32 R. 3 N. 5.

K. Umamaheswaram, for Petitioner.

REFERENCES: Courtwar/Chronological/ Paras.
('47) 1947-2 Mad LJ 566: (AIR 1949 Mad 46) 4

ORDER: I have perused the entire records and heard the learned counsel for the plaintiff-petitioner. Nobody appears for the respondents-defendants, two minor girls aged 15 and 13. The plaintiff had brought O. S. No. 229 of 1948 against these minors for a declaration of his title to 9 acres of land and recovery of possession of them from these minor girls represented by some guardian on record who absented himself on the date of trial with the consequence that an 'ex parte' decree was passed against these minor girls. The lower Court removed the negligent guardian and appointed another guardian by name Bayya Reddi for them. Then, on an application, by this new guardian, Bayya Reddi, the maternal uncle of the minor girls, the lower Court set aside the 'ex parte' decree 'on terms' as there was "some sufficient cause" for the minors' absence at the time of the hearing resulting in the 'ex parte' decree against them, namely the negligence of the previous guardian. Hence this petition by the plaintiff.

(2) As the minors cannot appear in Court themselves, I cannot agree with Mr. Umamaheswaram, that their guardian's negligence to appear and defend on their behalf at the trial is not "sufficient cause" under O. 9 R. 13, Civil P. C. The contention that the law should make no discrimination in favour of minors is not acceptable. It has, does, and will go on making suitable provisions for protecting the Gods, Trusts, Charities, widows, lunatics and minors, and it is no use calling it "discrimination". Nothing in the Constitution of India or Bharat hits at it.

(3) It was then urged that the lower Court did not take evidence before holding the previous guardian to be guilty of negligence, and that the matter might be remanded to the lower Court, for taking evidence and giving a fresh finding. I see no force in this. Some things speak for themselves. The former guardian was removed by the lower Court 'for negligence', and a fresh guardian was appointed. So there was an enquiry and a finding. When a man's nose has been proved to have been cut already, there is no need to verify whether his nose is uncut!

(4) Mr. Umamaheswaram then relied on the ruling in 'VAITHILINGA NAIDU v. DEVANAI AMMAL', 1947-2 Mad LJ 566. That ruling will not apply to the facts of this case as there the non-appearance of the next friend was 'bona fide' and not due to culpable negligence, as here, and the minors were plaintiffs suing for a declaration that a Court sale was not binding on them, and not defendants in possession of properties claimed by another man like this plaintiff, to be his.

(5) It was finally urged that the minors could, after they attained majority, agitate the matter again and so the lower Court should not have set aside the 'ex parte' decree even on terms. I cannot agree. Why should the minors be denied their present remedy and relegated to a future remedy? Besides, they might, on being deprived of the suit property by virtue of the 'ex parte' decree and its execution even die of starvation before they attain majority. The law will not compel any person to adopt only one or two remedies, open to him. Nor will it act soullessly like an earthquake hitting saint and sinner alike. "Impersonal" means in law "without attachment or partiality to either side" and does not mean "soullessly and unintelligently like a stone."

(6) This petition deserves to be and is hereby dismissed

C.R.K./G.M.J. Petition dismissed.

A. I. R. 1952 Madras 601

MACK J.

Swarna Rajamma, Petitioner v. Thota Venkaiah, Respondent.

Civil Revn. No. 1793 of 1948, D/- 28-2-1949.

Civil P. C. (1908), O. 41, R. 5—Security to be furnished within time prescribed—Tender of security within time is sufficient compliance.

When stay is ordered by the appellate Court on security being furnished within a particular period what the Court contemplates is the tender of security within that time. It would be manifestly inequitable if for no fault of his, a petitioner obtaining such stay is penalised by time being taken for objections to a draft security bond and then finding himself in the position of not being able to file a fair security bond within the time prescribed. AIR 1947 Mad 70; AIR 1942 Mad 29, Followed. (Para 2)

Anno: C. P. C., O. 41 R. 5 N. 13.

A. Raghavayya, for Petitioner; K. Umamaheswaram, for Respondent.

REFERENCES: Courtwar /Chronological/ Paras.

('22) 15 Mad LW 186: (AIR 1922 Mad 330) 2
('41) 1941-2 Mad LJ 291: (AIR 1942 Mad 29) 1, 2
('42) 1942-2 Mad LJ 425: (AIR 1943 Mad 51) 2
('46) 1946-2 Mad LJ 217: (AIR 1947 Mad 70) 1

JUDGMENT: The petitioner obtained an order for stay in the High Court on 3rd September 1948 which was made absolute on her furnishing security in Rs. 3,000 to the satisfaction of the Sub-Court, Bapatla, within six weeks from that date and also depositing some costs and mesne profits within the same period. The petitioner tendered a draft security bond on 17th September 1948. Her application was returned with some objections. She represented it on 4th October 1948. It was then posted on 7th October 1948 to 18th October 1948 for objections. On that date the Subordinate Judge held that the time allowed by the High Court order had expired on 15th October 1948 and dismissed the petitioner's application and also disallowed time for filing objections to the draft security bond. This point has already been considered and decided by Yahya Ali J. in 'GANPATHI NAICKER v. GOVINDARAJULU NAIDU', (1946) 2 Mad LJ 217. He held following the view taken by Happell J. in 'RANGASAMI NADAR v. PICHAIMANI NADAR', (1941) 2 Mad LJ 291 that it was sufficient compliance with such an order if the security had been tendered in time and that it was not necessary that the testing of the security itself and the filing of the fair security bond should be made within the time prescribed.

(2) Mr. Alladi Kuppuswami has relied on the decision of Ramesam, J.: in 'BALAKRISHNA AIYAR v. PICHAMUTHU PILLAI', 15 Mad LW 186, followed by King J. in 'CHATHIYALAN KANAKURUP v. RAMAN NAIR', 1942-2 Mad LJ 425. That was a decision under S. 17 of the Provincial Small Cause Courts Act where a defendant against whom an 'ex parte' decree was passed on 26th January 1920 filed a draft security bond on 6th February 1920 which was ultimately accepted on 9th March 1920, and he only filed his fair bond on the 1st April 1920. It was held that the filing of the draft bond was not sufficient compliance with the requirements of S. 17 of the Provincial Small Cause Courts Act. King J. following this decision referred to the decision of Happell J. in 'RANGASWAMI NADAR v. PICHAIMANI NADAR (1941) 2 Mad LJ 291 but felt that the decision of Ramesam J. was logically correct because in S. 17 of the Act an alternative was given, namely, deposit or security which had to be complied with in 30 days and the statute contemplated something effectually being done within this period. I prefer in cases of this kind to follow the view taken by Happell J. and Yahya Ali J. that when stay is ordered by an appellate Court on security being furnished within a particular period what the Court contemplated was the tender of security within that time. It would be manifestly inequitable if for no fault of his, a petitioner obtaining such stay is penalised by time being taken for objections to a draft security bond and then finding himself in the position of not being able to file a fair security bond within the time prescribed.

(3) Mr. Alladi Kuppuswami has urged that the correct procedure contemplated in the decisions under S. 17 of the Provincial Small Cause Courts Act which should be followed in these cases also is that a fair security bond should be filed in the first instance; but at the same time he concedes that it is always open to the other side to object to the sufficiency of security. I am unable to see any difference, so far as finality is concerned, between a draft security bond and a fair security bond, if the latter can be objected to for want of sufficiency or on any other ground. This is a type of case of common occurrence, in which I think

it is sufficient if the security is tendered with a draft security bond within the time prescribed by the Court. This does not mean that in the event of the security tendered being found insufficient it is open to the petitioner to file fresh security. He must take his stand on the security that he furnishes, and if this is found to be insufficient then his petition for stay fails. It is up to him to see that sufficient and acceptable security is tendered by him in the first instance.

(4) In this view this petition is allowed, but there will be no order as to costs in view of the legal position taken by the Subordinate Judge. The lower Court will give time to the respondent to furnish objections, and dispose of the application tendering security in due course on the lines indicated.

C.R.K./G.B.S. Petition allowed.

A. I. R. 1952 Madras 602

SUBBA RAO J.

Doddapaneni Sitaramiah and others, Appellants v. Sanka Kanakaiah and others, Respondents.

Appeal No. 454 of 1947, D/- 5-12-1950.

T. P. Act (1882), S. 119 — Party deprived of property obtained in exchange — Other party not in possession — Nature of remedy.

Under S. 119 as amended in 1929 the right to the return of the thing transferred in exchange is limited only to the three classes of persons mentioned therein and so long as they continued in possession of the same. A right to a return of the thing exchanged implies a cancellation of the transaction and therefore the parties should be placed in the position in which they were before the transaction. Hence where A is deprived of a portion of the property got by him in exchange from B, but the property transferred by A to B has passed out into the possession of the trespasser, A is not entitled to the return of the property under S. 119. His only remedy is to claim compensation from B for the loss suffered. (Paras 4, 5)

Anno: T. P. Act, S. 119 N. 5.

B. V. Subramaniam, for Appellants; G. Chandrasekhar Sastri and K. B. Krishnamurthy, for Respondents.

REFERENCES: Courtwar /Chronological/ Paras.

('34) AIR 1934 Lah 934 (2) 4
('19) 42 Mad 690: (AIR 1920 Mad 812(1)) 4
('40) 1940-1 Mad LJ 248: (AIR 1940 Mad 426) 4
('34) AIR 1934 Nag 61: (30 Nag LR 208) 4

JUDGMENT.: This is an appeal against the decree and judgment of the Subordinate Judge, Tenali, in a suit filed by the first respondent for recovery of possession of the B schedule lands and for mesne profits. The plaint B schedule property of the extent of 2 acres 68 cents is agraharam land situate in the village of Balijepali. A schedule property of the extent of one acre 68 cents bearing D. No. 408/1, is situate in the village of Nelapadu. The B schedule property originally belonged to one Vankamamidi Balakrishnayya, the paternal grandfather of defendants 1 and 2. He was also the hereditary trustee of the temple of Sri Sitharamanjaneyaswami Varu. A schedule property was an endowment to the temple. On 17-3-1933 under Ex. A-1, Balakrishnayya sold the B schedule property to the plaintiff for Rs. 850. On 19-3-1933 by Ex. A-2, Balakrishnayya as trustee of the temple and the plaintiff executed an exchange deed whereunder the temple gave the A schedule property to the plaintiff in exchange of the B schedule properties which the plaintiff purchased from Balakrishnayya two days prior. Subsequently it transpired that the northern half of the A schedule property was mortgaged to one Choparala Lakshminarayana. He filed O. S. No. 63 of 1932 in the Court of the Subordinate Judge of Bapatla and in execution of the decree obtained therein, he purchased the property and took delivery of the northern half of A schedule lands with crops thereon on 7-12-1943. The plaintiff therefore was dispossessed of the northern half of the A schedule land, i.e., 87 3/4th cents in extent. Meanwhile, on 4th December 1934 Balakrishnayya sold the B schedule property along with some other lands in his personal capacity to the fifth defendant. The 6th defendant is the brother of the 5th defendant and both of them are alleged to be in possession of B schedule property. Defendants 1 and 2 are the grandsons of Balakrishnayya. Defendants 3 and 4 are the same persons but added in their separate capacity as the present trustees of the temple. The plaintiff, after having lost half of A schedule property he got under the exchange deed, filed this suit for recovery of possession of B schedule lands with mesne profits and alternatively for compensation from defendants 1 to 4 for the loss incurred by him by being dispossessed of half the lands he got under the exchange deed. Defendants 1 to 4 pleaded 'inter alia' that the sale-deed in favour of the plaintiff conveying the B schedule property was nominal and at any rate not binding on their shares of the property and that the exchange deed was void as it was brought about by fraud and collusion and in breach of trust. Defendants 5 and 6, apart from questioning the validity of the exchange, also contended that Balakrishnayya was the absolute owner of the B schedule property and therefore the fifth defendant acquired a valid title thereto under the sale-deed in his favour. The following issues reflect the contentions of the parties:

"1. Whether B schedule property was the self-acquired or joint family property of Balakrishnayya?

2. Whether the reunion set up by defendants 1 to 4 is true and valid?

2. (a) If the reunion is true, whether the sale dated 17-3-1933 is supported by consideration, valid and binding on defendants 1 and 2?

3. Whether the exchange deed dated 19-3-1933 between the plaintiff and late Balakrishnayya was beneficial to the deity and binding on it?

4. If the exchange deed is void, is the plaintiff entitled to any and what damages?

5. Whether the plaintiff is entitled to recover any and what portion of the B schedule property?

6. Whether defendants 5 and 6 are bona fide purchasers for value and whether they have acquired any title?

7. Whether the defendants 5 and 6 are entitled to any and what improvements?

8. Whether the plaintiff is entitled to any and what mesne profits?

(2) Pending the suit, the plaintiff filed I. A. No. 600 of 1947 for withdrawing the suit against defendants 1 to 4 with liberty to file a fresh suit for the reliefs against them and the petition was allowed on 9-7-1947. Thereafter, the suit proceeded against defendants 5 and 6 alone and the trial was confined to issues 5 to 8. The learned subordinate Judge on a consideration of the evidence,

held that the sale deed and exchange were not nominal transactions but were acted upon and that the plaintiff would be entitled to a decree for possession of B schedule property under Section 119 of the Transfer of Property Act. He also awarded mesne profits, past and future. Defendants 5 and 6 have preferred the above appeal. As the fifth defendant died pending the appeal the third and fourth appellants are added as his legal representatives along with the second appellant. The plaintiff is the first respondent and defendants 1 to 4 are also added as respondents 2 to 5.

(3) Learned counsel on behalf of the appellants raised before me two points. (1) On the findings arrived at by the lower Court, defendants 5 and 6 would be trespassers without title and therefore the plaintiff would not be entitled to possession under Section 119 of the Transfer of Property Act. (2) The lower Court should not have allowed the plaintiff to withdraw the suit as against defendants 1 to 4 at a late stage with liberty to file another suit as by that precedure, defendants 5 and 6 who were expecting defendants 1 to 4 to establish the defences raised by them, were taken unawares and therefore were prejudiced. If defendants 1 to 4 were on record and the issues framed at their instance were also decided in their favour, either on the ground that the sale-deed Ex. A-1 was nominal or did not bind the shares of defendants 1 and 2 or for the reason that the exchange deed Ex. A-2 was void for one reason or another, the suit would have been dismissed wholly or in part in which case defendants 5 and 6 would have acquired a valid title from Balakrishnayya to that extent.

(4) The first question turns upon the construction of Section 119 of the Transfer of Property Act. It reads:

> "If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration."

This section adopted the old English Common law doctrine and implies both a condition and a warranty of title giving rise to a right of re-entry on the thing exchanged and giving rise to compensation for damages sustained. Section 119 was substituted for the original section by Amending Act of 1929. The old section was in the following terms:

> "In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

There was a conflict of judicial opinion on the interpretation of the unamended section. The Madras High Court held that under that section a transferee for consideration would also be liable to return the thing exchanged if the other party lost the property given to him in exchange by title paramount — See 'SRINIVASA AYYANGAR v. JOHNSA ROWTHER', 42 Mad 690 and 'CHIDAMBARA THEVAR v. SWAMINATHA RAO', 1940-1 Mad L J 248, whereas the Lahore High Court has taken the view that the original section assumed a case in which the parties to the exchange had retained the properties exchanged and were in a position to restore them and therefore the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange: 'GANGA SINGH v. RAGHO RAM', AIR (21) 1934 Lah 934 (2). This view was also accepted by the Nagpur High Court which held that Section 119 can have no reference to the case of a third person who is not a party to the exchange and who is not in any way bound by it. 'SUJET KHAN v. SETH NAZAFALI', AIR (21) 1934 Nag 61. The amended section at the same time enlarges and limits the scope of the previous section. Under the amended section not only a party deprived but also his transferee can get back the thing transferred. He can recover the property not only from the other party to the exchange but also from any person claiming through him, his legal representative or a transferee from him without consideration. The unamended section was couched in general terms which gave scope for the argument that under the section the property could be recovered from persons who are bona fide purchasers for consideration and even from trespassers. But under the new section the right to the return of the thing transferred is limited only to the three classes of persons specified therein and that so long as they continued to be in possession of the same. It may also be mentioned that a right to a return of the thing exchanged implies a cancellation of the transaction and therefore the parties should be placed in the position in which they were before the transaction. It follows from the said proposition that a person who seeks to exercise his right of re-entry must also be in a position to restore to the other person the property he got under the exchange. Under Section 119 a party to an exchange who lost the property got by him thereunder will have a statutory right of re-entry subject to certain specified conditions and limitations and if he seeks to exercise that right he must be bound by the conditions and cannot import or rely upon other equitable considerations. If the aforesaid propositions are borne in mind the solution to the instant problem is not difficult. On the facts found by the learned Subordinate Judge, defendants 5 and 6 are in the position of trespassers as they purchased from a person who had no title to alienate the same.

(5) The contracting parties to the exchange were the plaintiff and the trustee of the temple. Defendants 5 and 6 are therefore neither the original parties nor their legal representatives nor transferees from them without consideration within the meaning of Section 119 of the Transfer of Property Act. The section therefore obviously cannot apply to them. It was argued with some plausibility that this construction would lead to anamolous results as a party to an exchange can exercise his right of re-entry against the other party to the exchange or his representatives but cannot recover the property from a trespasser who has no right at all to be in possession. This may be a lacuna but it is for the legislature to amend the section. But if the argument is accepted it will lead to equally curious results. Though a party to the exchange is deprived of part of the land he got under the exchange deed, he can recover the entire property given to the other party without at the same time giving up the property in his hands for the trespasser would not be entitled to that. The principle, viz., that on the happening of a contingency contemplated under Section 119 of the Transfer of Property Act both the parties should be placed in the position they occupied prior to

the exchange will certainly be violated. It cannot be said that the construction I am putting on this section which in my view is in accord with the express terms used therein, will necessarily lead to any hardship, for the party, who was deprived of the property, can exercise his alternative right viz., to recover damages from the other party. That alternative remedy certainly is given only to meet the contingency of the other party not being in possession at the time when the first party exercises his right of re-entry. I am therefore constrained to hold that Section 119 has no application and the plaintiff is not entitled to recover possession under that section. He could have, if he so wished, pressed his relief for compensation against the other defendants or taken other steps to enable the said defendants to recover possession from the trespasser; but he has chosen the course of withdrawing the suit against them and if he suffers it is only because of his action.

(6) In the view I am taking on the first point, the second question need not be gone into. The plaintiff withdrew his suit and it was dismissed against defendants 1 to 4. They did not prefer an appeal against the order of the lower Court allowing the plaintiff to withdraw the suit with liberty to file a fresh suit. The appellants before me obviously cannot have any grievance as the decree against them will be vacated.

(7) In the result the decree of the lower Court is set aside. The appeal is allowed with costs against the first respondent here and in the Court below.

C.R.K./K.S. *Appeal allowed.*

A. I. R. 1952 Madras 604

RAMASWAMI J.

The Public Prosecutor, Appellant v. Velayangat Devassia, Respondent.

Criminal Appeal No. 587 of 1950, D/- 24-10-1951.

(a) Madras Prohibition Act (X (10) of 1937), S. 38 (3) —Police thinking no enquiry necessary — Enquiry not made — Proceedings are not vitiated.

On the mere ground that no enquiry in respect of offence under S. 4(1)(a) was held when the police officer has a discretion to hold such an enquiry or not if he thinks on facts that no such enquiry was necessary or even possible, the proceedings cannot be said to be vitiated. The spirit of Section 38 (3) should be understood and applied. AIR 1923 Mad 339, Distinguished. (Para 8)

(b) Criminal P. C. (1898), S. 103 — Search witness — Man living at some distance from place of search.

The word "locality" has not been defined and in Malabar where houses are situated furlongs from one another there is nothing wrong in a man living at some distance being chosen as the search witness. (Para 9)

Anno: Cr. P. C., S. 103 N. 7.

Appellant in person; C. K. Viswanatha Aiyar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras ('23) 17 Mad LW 308: (AIR 1923 Mad 339: 24 Cri LJ 335) 8

JUDGMENT.: This is Criminal Appeal filed against an acquittal by the Joint Magistrate, Tellicherry, in C. A. No. 6 of 1950.

(2) The facts are: The accused (respondent before us) lives with his wife in Manathana Amsom. On 26-11-1949 at about 5-30 or 6 p.m. P. W. 1, the Sub-Inspector of Police, Peravur, searched the accused's house in the presence of P.W. 2 and other witnesses and recovered from inside a single room of the house one jar M. O. 1 containing 14 3/4th bottles of arrack and an empty bottle, M. O. 11 which was kept by its side. P.W. 1 took M. Os. 1 and 2 into custody under a search list, Ex. P. 1 in the presence of P.W. 2 and one Joseph Kutty who have attested Ex. P. 1. The accused was also in the house at the time of the search. P. W. 1 registered a case as Crime No. 25 of 1949 of the Peravur station, prepared the first information report and without further enquiry laid the charge-sheet on 6-12-1949.

(3) The case for the accused was that on 26th two police constables came to his house and asked him to accompany them to the police station, he started for the police station, that when they reached a place known as Pottanchura the constables took him to the forest nearby and pointed out M.O. 1 which was there and asked him what it was, that the accused stated that he did not know; that he was then asked to carry it to the station and he refused, that the police constables tied up his hands and carried M. O. 1 with the help of one Verghese to the Peravur police station.

(4) The accused examined two witnesses both of whom belonged to Manathana Amsom and their version has been summarised by the Sub-Magistrate as follows:

"D.W. 1 swears that about two months ago when he was going to Peravur at about 4 p.m., and was taking tea at Pottanchira two constables went to the shop and enquired about the location of the accused's house. D.W. 1 took the constables to the accused's house. The accused was there in the house. The constables told the accused that P.Ws. want him to go to Peravur station. The accused replied that he will go after sometime. They said that he should go at once and arrested the accused and took him away. The witness followed them. When they had gone about 1½ furlongs they took a jar from the forest and asked the accused to carry it which he refused. Then they tied the accused's hands and took him and the jar with them. After going another half a furlong they had M.O. 1 carried by a cooly by name Verghese. He further stated that the police did not measure the contents of M.O. 1 nor does he know what it contained. Joseph Kutty was not in the accused's house. About two months ago when he was sitting in his verandah he saw two policemen and another going to the accused's house and returning with the accused after a quarter of an hour. He did not see any jar with them. P.W. 1 was also not with them."

(5) The learned Sub-Magistrate found that the offence had been made out as charged by the prosecution and disbelieved the defence version and convicted the accused to undergo rigorous imprisonment for four months under S. 4 (1) (a) of the Madras Prohibition Act. The contraband was directed to be destroyed. There was an appeal therefrom and the Joint Magistrate, Tellicherry, came to the conclusion that the conviction and sentence of the lower Court could not be supported for two reasons namely that there was no enquiry in this case as contemplated by S. 38 (3) and secondly that a search in this case was bad and acquitted the respondent.

(6) The learned Public Prosecutor on instructions from the Government had filed the appeal against the acquittal on the ground that the learned Joint

Magistrate erred in holding that there was no compliance with the provisions of S. 38 (3) of the Madras Prohibition Act and secondly in holding that there had not been a valid search within the meaning of S. 103, Criminal P.C.

(7) I entirely agree with the contentions of the learned Public Prosecutor that on both points the learned Joint Magistrate completely went wrong.

(8) So far as the first point is concerned all that S. 38 (3) states is that such enquiry as the police officer thinks necessary shall be held. In this case there was nothing on which an enquiry could be held and the attention of the police officer was not also drawn to any matter on which he should enquire. In fact the entire enquiry was completed when the house was searched and contraband articles in the possession of the accused were seized and that all that remained was to register a case and prepare the first information report and despatch the charge-sheet. This has been done. This is not a case falling within the ambit of the decision referred to by the learned Joint Magistrate in 'In re: KUPPUSAMI NAIDU', 17 Mad L W 308, where there was necessary to make such an enquiry. Therefore on the mere ground that no enquiry was held when the police officer has a discretion to hold such an enquiry or not if he thinks on facts that no such enquiry was necessary or even possible, the proceedings cannot be said to be vitiated. The spirit of S. 38 (3) should be understood and applied as otherwise we would be merely reducing these provisions into an absurdity. The lower Court erred in holding that under S. 38 (3) of the Madras Prohibition Act the police officer should hold an enquiry in spite of the fact that he has himself investigated the case and filed the charge-sheet and that under the aforesaid circumstances any omission to hold an enquiry by P. W. 1 was made out and that there had been no valid institution of proceedings in respect of the offence punishable under S. 4 (1) (a) of the Madras Prohibition Act and in applying 'In re: KUPPUSAMI NAIDU', 17 Mad L W 308, which was a case firstly under the different Abkari Act and which decision has no application to the facts of this case.

(9) POINT 2: The lower Court was wrong in holding that there was no valid and proper search of the accused's house by the police officer in the case. The grounds of appeal challenging the search before the Joint Magistrate are grounds 2, 3 and 4 and are as follows:

"2. The lower Court ought to have held that there was no valid search of the premises in question either as regards the authority of the person searching or as regards the fulfilment of conditions precedent to search. The necessary formalities regarding the search have not been complied with either.

3. The search being illegal, the lower Court ought not to have relied on the results of such a search in inferring the guilt of the accused.

4. The lower Court ought to have held that P.W. 2 had not witnessed the search as a fact and was in any view unreliable."

On the other hand, the evidence in this case shows that none of these criticisms was justified. The word "locality" has not been defined and in Malabar where houses are situated furlongs from one another there is nothing wrong in a man like P.W. 2 being chosen as the search witness. Then this P.W. 2 has actually witnessed the search and seizure because he was able to see from the verandah all that went on in one room which constitutes the entire house and this is not a case of a search witness not seeing what actually happened and blindly attesting the mahazar. The Sub-Magistrate rightly found that all the formalities of a search had been complied with and the Joint Magistrate was not justified in holding that there had been no valid search within the meaning of S. 103, Criminal P.C., and in any event ought to have found that it was not such an irregularity which could vitiate the conviction in the case. The net result is that the acquittal of the Joint Magistrate cannot be supported.

(10) But in the circumstances of the case should I set aside this acquittal order in revision and convict the respondent? I do not think it is necessary to do so because the offence itself was in 1949 and the accused has stood the trial and appeal and has spent a portion of his time in jail and the offence itself was not accompanied by any aggravated circumstances. Therefore this is not a fit case for setting aside the acquittal order and convicting the respondent. With the observations made by me above which would clarify the legal position and prevent further public mischief this criminal appeal is dismissed.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. 1952 Madras 605

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Janab N. S. Sattar Sahib, Petitioner v. State of Madras, represented by the Secretary, Home Department, Fort St. George, Madras and another, Respondents.

Writ Petn. No. 276 of 1951, D/- 25-9-1951.

Constitution of India, Art. 226 — Order of inferior tribunal quashed on grounds not dealing with merits — It is incumbent on tribunal to take up and rehear the application — Advocate-General undertaking that application would be reheard — No necessity of mandamus.

When an order of an inferior tribunal on an application properly made to them is quashed by the High Court by a writ of 'certiorari' on any ground which does not deal with the merits of the case, it is not only permissible, but it is also incumbent on the inferior tribunal to take up the application and rehear the same. Where the Advocate-General appearing for the State whose order is quashed states that the Government was prepared to deal with the application before them in the light of the judgment of this Court, it is not necessary to grant a mandamus, directing the Tribunal to rehear the petition. (1951) 1 KB 711, Ref. (Paras 1, 2)

M. K. Nambiar, Naseem Amiruddin and R. S. Venkatachari, for Petitioner; Advocate-General, for the State Counsel; K. Bhashyam and T. R. Srinivasan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.
(1951) 1 KB 711 2

RAJAMANNAR, C.J.: By their order dated 17th April 1951, the Government of Madras, set aside an order of the Central Road Traffic Board, and Subba Rao, J., quashed this order of Government by his order dated 1st August 1951. The learned Judge quashed the order on the ground that it disclosed 'ex facie' that they passed their order after reading a petition from certain Congress workers which was not strictly permissible in law. Though the Government did not say that they acted upon the petition, inasmuch as they did not say that the

petition in no manner influenced them in coming to a conclusion, it could not be said that that petition might not have influenced the Government in passing their order. As matters extraneous to the application pending before them had been taken into consideration, the learned Judge was of the opinion that their order should be quashed.

(2) The question which now arises on an application taken out for a writ of 'mandamus' by the party who was successful before the Government on the prior occasion is whether after the quashing of their order, the Government should take up the application filed before them under S. 64-A of the Motor Vehicles Act and rehear the same. We have no doubt whatever in the matter that when an order of the inferior tribunal on an application properly made to them is quashed by this Court by a writ of 'certiorari' on any ground which does not deal with the merits of the case, it is not only permissible, but it is also incumbent on the inferior tribunal to take up the application and rehear the same. The learned Advocate General appearing for the State very properly admitted this position and stated that the Government was prepared to deal with the application before them in the light of the judgment of this Court. In these circumstances it is not necessary to grant a 'mandamus' as pointed out by Lord Goddard, C.J., in his recent judgment in 'REX v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL', 1951-1 K B 711 at p. 724. The learned Chief Justice says:

> "Once the order is quashed it follows that the applicant will be able to go back to the appeal tribunal."

In this case, once the order of the Government is quashed the applicant will be able to go back to the Government acting under Section 64-A.

C.R.K./R.G.D. *Order accordingly.*

A. I. R. 1952 Madras 606

GOVINDA MENON AND MACK JJ.

G. Narayanaswami Naidu, Petitioner v. Inspector of Police, Mayavaram and another, Respondents.

Criminal Misc. Petn. No. 1072 of 1948, D/- 31-8-1948.

(a) Criminal P. C. (1898), S. 491(1)(b) — Order of detention of petitioner by Provincial Government — Acts attributed to petitioner in order not believed by senior member of Servants of India Society—From this circumstance Government cannot be said to have acted mala fide. **(Para 2)**

Anno: Cr. P. C., S. 491 N. 7.

(b) Government of India Act (1935), S. 59(1) — Order of detention — Fact that it was issued under authority and by order of Governor not mentioned — Order signed by Chief Secretary — Defect held was one of form and not of substance.

Where the Government order of detention did not make mention of the fact that it was issued under the authority and by the order of His Excellency the Governor, but was signed only by the Chief Secretary to Government:

Held that the defect was only one of form and not of substance. AIR 1947 FC 38, Ref. **(Para 3)**

Anno: Government of India Act, S. 59 N. 1.

(c) Madras Maintenance of Public Order Act (I (1) of 1947), S. 2(1) and (2) — Order of detention by District Magistrate — Wrong section inserted therein — It cannot be said that District Magistrate did not bestow attention on action he took.

Where the operative portion of the detention order made definite mention that the petitioner was acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it was necessary to detain him.

Held that the mere circumstance that a wrong section, namely S. 2(2), instead of S. 2(1) was inserted in the order of detention could not by itself be taken as leading to the only conclusion that the District Magistrate did not bestow any attention on the action he took, but merely acted or purported to act in a stereotyped fashion. **(Para 4)**

A. K. Pillai, for Row and Reddy and S. Krishnamurthi, for Petitioner; Public Prosecutor, for the Crown.

REFERENCES: Courtwar/Chronological/ Paras.
('47) 1947 Mad WN Cr 85: (AIR 1947 FC 38) 3

GOVINDA MENON, J.: The Full Bench has now decided that the powers of this Court to interfere under S. 491, Criminal P.C., are strictly confined to various categories enumerated in the judgment and unless any one of such categories exists, this Court cannot interfere with an order of detention made by the Provincial Government. If the petitioner can bring his case within one of these instances, then according to the Full Bench, the detention is not one made in exercise of the powers conferred under the Act or in accordance with the provisions of the Act.

(2) Mr. A. K. Pillai contends that the Provincial Government in ordering the detention of the petitioner was actuated by 'mala fides' with the result that the third circumstance mentioned in the judgment of the learned Chief Justice can be invoked in his client's favour and that the petitioner is therefore entitled to be released. For this argument, he placed reliance on the affidavit of Mr. K. G. Sivaswamy, dated the 24th May 1948, wherein the deponent states that the grounds of detention served on the petitioner are not true to facts. It is pertinent to observe that Mr. Sivaswamy is a permanent resident of Madras having his abode in No. 8 Westcott Road, Madras, and the grounds of detention relate to facts and circumstances which occurred in the Tanjore district and therefore Mr. Sivaswamy could have had no personal knowledge of what happened in Tanjore. Even if we are to accept the statements contained in that affidavit they amount only to this, that Mr. Sivaswamy believes that the petitioner has not committed any of the acts mentioned in the order of detention. From the mere circumstance that a senior member of the Servants of India Society does not believe that the acts mentioned in the order of detention can be attributed to the petitioner, it cannot be said that the Provincial Government has acted 'mala fide.' We have carefully perused the grounds of detention submitted to the Provincial Government by the District Magistrate as well as the Government Order, dated 8th April 1948, Memorandum No. 334/ 48-8, and we cannot find any reason to doubt that the action of the Provincial Government was 'mala fide.'

(3) It is next contended by Mr. Pillai that the order of detention has been made by an authority

not competent to make it and if that is so, the provisions of Madras Maintenance of Public Order Act, 1947, cannot be invoked against the petitioner. Reliance is placed upon the circumstance that the Government Order referred to above does not make mention of the fact that it was issued under the authority and by the order of His Excellency the Governor, but is signed only by the Chief Secretary to Government. According to S. 59 (1) of the Constitution Act, all executive actions of the Government of the Province shall be expressed to be taken in the name of His Excellency the Governor and since on the face of the order of the Government it does not appear that the action was taken in the name of His Excellency the Governor, learned counsel strenuously contends that the order of detention does not conform to the Act. Even if this is a defect, we are of opinion that it is only one of form and not of substance. In 'GAS PLANT MANUFACTURING CO. LTD. v. EMPEROR', 1947 Mad W N Cr 85, the Federal Court has decided that where instead of the words "Governor-General in Council" a particular order referred to the Central Government, the contention that the order was invalid has to be rejected. The learned Public Prosecutor also invites our attention to Sub-section (2) of S. 59 of the Constitution Act which states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor. He also informs us that there are rules made under this Sub-section empowering the Chief Secretary to issue the order on behalf of the Governor. We are not inclined to accept the contention of the learned Counsel for the petitioner that the Government Order dated the 8th April 1948 was not issued by order of His Excellency the Governor as contemplated in S. 59 (1) of the Constitution Act. This contention has therefore no force.

(4) Another line of attack is that the detention order made by the District Magistrate on 13-3-1948 is expressed to be made under S. 2 (2) of the Madras Maintenance of Public Order Act, 1947, whereas the provision of law applicable is S. 2 (1) of the Act. It has to be observed that the District Magistrate was empowered by the Provincial Government to act under S. 15 of the Act which lays down that the Provincial Government may direct that any power or duty conferred or imposed on them shall, in such circumstances, and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority subordinate to the Provincial Government. That the District Magistrate of Tanjore was so empowered under S. 15 is not denied and when once that power is given to him, if he takes action under S. 2 (1), he has to report under S. 2 (2) to the Provincial Government of the action taken by him. The mere circumstance that a wrong section is inserted in the order of detention cannot by itself be taken as leading to the only conclusion that the District Magistrate did not bestow any attention on the action he took, but merely acted or purported to act in a stereotyped fashion, as suggested by the learned Counsel for the petitioner. The operative portion of the order makes definite mention that the petitioner was acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him. In view of this clear exposition, there is no necessity to make mention of any particular section of the statute. Even if it is obligatory to make mention of the particular section of the statute, we are far from satisfied that the mention of S. 2, Sub-section (2) is not opposite. This objection is overruled.

(5) The last contention of the learned Counsel is that the Madras Maintenance of Public Order Act, 1947, came into force on the 12th March 1947 and was to remain in force for a period of one year thereafter. The petitioner in this case was arrested by order dated the 13th March 1948, on which date unless the operation of the Act was extended by the Provincial Government, the Act would not have been in force. Since the Act could not have been in force for more than a year, the delegation to the District Magistrate under S. 15 of the Act also could not have enured for more than that period and therefore according to the petitioner at the time he was arrested, it was done by means of an order which was entirely null and void and without jurisdiction as the District Magistrate had become 'functus officio' by that time. The learned Public Prosecutor has invited our attention to G. O. Ms. No. 446 Public (General) dated 27-2-1948, printed in Part I, page 168 of the Fort St. George Gazette, dated 2nd March 1948, by which the operation of the Act was extended by His Excellency the Governor. In view of this order which extended the operation of the Act some days before it had automatically ceased to be in force, it cannot be said that at the time the District Magistrate passed the order, the Act was not in force and moreover it is not disputed that the delegation to the District Magistrate was a very general one which was to enure so long as the Act was to be in force. No materials have been placed before us nor has any attempt been made to substantiate the contention that the District Magistrate when he acted on 13-3-1948, was doing an act for which he was not given any authority. This contention has also to be rejected. We have not been shown how this order of detention offends against any of the categories mentioned in the judgment of the Full Bench. In these circumstances, it has to be held that the petitioner was validly and properly detained in accordance with the Madras Maintenance of Public Order Act, 1947, and this Court has no jurisdiction to interfere with that order and to release him under S. 491, Criminal P.C. The petition is accordingly dismissed.

(6) Mr. A. K. Pillai now states that he did not contend before us that the Act was not in force when the petitioner was arrested. But both of us understood his argument in the way stated in the judgment and the learned Public Prosecutor countered that argument by showing us the Gazette notification. Anyway we are making this note in response to Mr. Pillai's request.

C.R.K./V.R.B. *Petition dismissed.*

A. I. R. 1952 Madras 607

SOMASUNDARAM J.

Mundlapudi Durgaprasadarao and others, Petitioners v. C. Sundar Bhutt and another, Respondents.

Civil Revn. Petn. No. 1809 of 1948, D/- 7-11-1950.

Criminal P. C. (1898), S. 476 — Offence under S. 186, Penal Code.

Section 476, Cr. P. C. empowers the Court to complain only in respect of offence mentioned in Section 195 (1) (b) and (c) hence a complaint by the Court for an

offence under S. 186, Penal Code falling under S. 195 (1) (a), Cr. P. C. is not competent. (Para 1)

Anno: Cr. P. C., S. 476 N. 4.

N. Subramaniam and R. Sitharam, for Petitioners; Public Prosecutor, for Respondents.

ORDER.: No complaint for an offence under Section 183, Indian Penal Code can be filed by a Court, as Section 476, Criminal Procedure Code applies only to cases falling within Section 195 (1) Clauses (b) and (c) of the Criminal Procedure Code. This excludes cases falling under Section 195 (1) Clause (a) and Section 183, Indian Penal Code falls under Section 195 (1) (a). The trial Court therefore cannot file this complaint as Court.

(2) The complaint is therefore directed to be withdrawn. It is open to the Amin or the Principal Subordinate Judge as public servant to whom the Amin is subordinate to file the complaint.

Order accordingly.

C.R.K./K.S.

A. I. R. 1952 Madras 608

RAJAMANNAR C. J.
AND VISWANATHA SASTRI J.

T. Venkateswara Rao, Petitioner v. Masulipatam Municipal Council by Commissioner; S. Subbarao and another, Respondents.

Civil Misc. Petns. Nos. 7716 and 7717 of 1950. D/- 27-9-1950.

(a) Municipalities — Madras District Municipalities Act (V (5) of 1920), S. 23 — Scope.

Under S. 23 of the Act, two classes of committees are contemplated (1) committees to which the council delegates some of its powers and duties and functions and (2) committees which are constituted only to enquire into and report or advise on any particular matter referred to them. So far as the proceedings of the latter class of committees are concerned, undoubtedly the council can have the final word. The proceedings of such committees are only advisory. But the decisions and actions of the committees to which the council had delegated its powers, duties and functions in any behalf will be binding on the council. (Para 1)

(b) Municipalities — Madras District Municipalities Act (V (5) of 1920), S. 25 — Rules under Sch. III, R. 12 — Scope.

Schedule III, R. 12 does not affect the powers of the committee to which there has been a delegation of powers or functions in any behalf. It only provides for the recording of the proceedings in writing and for the submission of the proceedings recorded to the Council for information. (Para 2)

(c) Municipalities — Madras District Municipalities Act (V (5) of 1920), S. 23 — Municipal Council constituting committees and delegating some of its powers and functions to them — Delegation must be presumed to be validly made in absence of anything to show that Council exceeded its powers — Evidence Act (1872), S. 114. (Para 1)

Anno: Evi. Act, S. 114 N. 29.

S. Suryaprakasam and A. S. Prakasam, for Petitioner.

RAJAMANNAR, C. J.: The petitioner is not entitled to any of the reliefs which he seeks in this application under Art. 226 of the Constitution of India. Under S. 19 of the Madras District Municipalities Act, subject to the provisions of the Act the Municipal Administration shall vest in the Council. Section 23 provides for the council constituting committees for the purpose of exercising such powers, discharging such duties or performing such functions as it may delegate to them. It may also appoint individual councillors, or committees, to enquire into and report or advise on any matters which it may refer to them. Under S. 25, the Council is given power to make rules in regard 'inter alia' to the constitution and procedure of committees and the delegation of its powers, duties or functions to such committees. What the Municipal Council in this case did was to constitute committees and to delegate some of its powers and functions to these committees. This delegation was made by means of two resolutions dated 8th November 1948 and 9th March 1950. In the absence of anything to show that the Council exceeded its powers in making this delegation which prima facie it had power to make under S. 23 of the Act, we must presume that the delegation was validly made. The contention of the petitioner is that the proceedings of these committees should be sent to the Council to be discussed and if need be, to be modified or even set aside. We cannot agree with this contention. Under S. 23 of the Act, two classes of committees are contemplated (1) committees to which the Council delegates some of its powers and duties and functions and (2) committees which are constituted only to enquire into and report or advise on any particular matter referred to them. So far as the proceedings of the latter class of committees are concerned, undoubtedly the Council can have the final word. The proceedings of such committees are only advisory. But the decisions and actions of the committees to which the Council had delegated its powers, duties and functions in any behalf will be binding on the Council.

(2) Reliance was placed by the learned counsel for the petitioner on R. 12 of Sch. 3. This rule occurs among the rules regarding proceedings of the Council and the mode of transacting business. The rule runs thus:

"The proceedings of every committee appointed by the Council shall be recorded in writing and submitted to the Council."

This rule, in our opinion, does not affect the powers of the committee to which there has been a delegation of powers or functions in any behalf. It only provides for the recording of the proceedings in writing and for the submission of the proceedings recorded to the Council for information. The petitioner does not state in the affidavit filed by him in support of his application that the committees have failed to act according to R. 12. His real complaint is that these proceedings are made final and are not subject to further consideration by the Council. Rule 12 does not help the petitioner in any way. There is no ground therefore to either quash the two resolutions above mentioned or to direct the Council to place all the proceedings of the Committee before the Council.

(3) The applications are therefore dismissed.

C.R.K./K.S. Applications dismissed.

A. I. R. 1952 Madras 609

SUBBA RAO AND PANCHAPAKESA AIYAR JJ.

Gummalapura Tegginamatada Kotturuswami, Appellant v. Setra Viravva and others, Respondents.

Appeal No. 55 and C. M. P. No. 4364 of 1946, D/- 25-3-49.

(a) Hindu Law — Adoption — Authority — Construction — Principles of — Will authorising widow to adopt with approval of named trustees — Adoption with approval of sole surviving trustee held valid.

Where an authority to adopt is given by a husband, the presumption is strong that he desires to be represented by an adopted son. The Courts would not be astute to defeat an adoption not clearly in excess of the power given by placing a narrow construction on the words of the authority. AIR 1919 PC 75; 28 All 377 (PC), Ref.

A testator conferred on his widow authority to adopt as many times as would be necessary and further directed that she must adopt only a boy approved by five persons who were named as trustees. One of them declined to act and three others died one after another. The widow made an adoption with the consent of the surviving trustee. On a question as to whether the adoption was a valid exercise of the authority conferred on the widow:

Held that the paramount intention of the testator as disclosed in the will was to have an adopted son to continue the line of temporal and spiritual purposes and that the provision relating to the approval of the boy by the trustees was only recommendatory and not a condition precedent to the exercise of the power:

Held, further, that the approval and consent required to be given by the trustees was not a bare or naked power and it did not come to an end on the refusal of one of them to act or on the death of some of them. It was a power annexed to their office as trustee and could be exercised by the surviving trustee alone. 18 Cal 385; AIR 1915 PC 7; AIR 1937 PC 292; (1904) 1 Ch 139, Foll.; 37 Mad 199 (PC); AIR 1930 PC 242; 2 Bom 377; 1931 Mad WN 473, Dist. (Paras 8, 9, 12, 15)

(b) Civil P. C. (1908), S. 35A — Frivolous and vexatious suit — Suit requiring strenuous arguments on both sides and elaborate decisions is not frivolous — No compensatory costs.

The very fact that a suit had to be argued strenuously on both sides, in the lower Court and in High Court, and that the judgments have had to be elaborate after weighing the contentions on both sides shows that the suit is not frivolous and vexatious, and is not a case fit for awarding 'compensatory costs.' The past activities of the plaintiff in filing suits for getting properties should not be considered for this purpose. (Para 19)

Anno: Civil P. C., S. 35A N. 2.

Alladi Krishnaswami Iyer, K. Umamaheswaram and Alladi Kuppuswami, for Appellant; T. L. Venkatarama Iyer, K. Sheshagiri Rao and S. Srinivasan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

(1900) 27 Cal 996 (PC) 7, 10
('06) 33 Ind App 55: (28 All 377 PC) 8
('06) 33 Ind App 145: (29 Mad 382 PC) 8
('13) 37 Mad 199: (41 Ind App 51 PC) 8, 9, 10, 12
('15) 39 Bom 441: (AIR 1915 PC 7) 16
('19) 46 Ind App 259: (AIR 1919 PC 75) 8
('30) 57 Ind App 296: (10 Pat 187: AIR 1930 PC 242) 8, 9, 10, 12
('38) ILR (1938) 19 Lah 1: (AIR 1937 PC 292) 17
('77) 2 Bom 377 9
('91) 18 Cal 385 18
('31) 1931 Mad WN 473 9, 10, 14
('37) AIR 1937 Mad 699: (ILR (1937) Mad 948 FB) 4
('45) 1945-2 Mad LJ 442: (AIR 1946 Mad 159) 4
(1904) 1 Ch 139: (73 LJ Ch 74) 15, 16

PANCHAPAKESA AIYAR J: This is an appeal against the judgment and decree of the District Judge of Bellary dated 26th November 1945 in O. S. No. 39 of 1943. The suit was filed on behalf of all the reversioners by the appellant, Gummalapura Tegginamatada Kotturuswami head of the Lingayat Teginamutt at Kampli, claiming to be the nearest reversioner of the estate of his natural brother, Setra Kari Virappa, given away in adoption, for a declaration, that the adoption of Kotrabasayya, the second defendant, on 11th October 1942, by Setra Viravva, the first defendant and widow of Kari Virappa, was invalid, as not being in conformity with the will of Kari Virappa, Ex. P. 2(a) dated 10th October 1920 and on other grounds and not binding on the plaintiff and the other reversioners. The estate is worth about a lakh of rupees. Setra Kari Virappa was given in adoption to one Virappa Devaru and this was referred to in Verappa Devaru's will, Ex. P. 1, dated 4th February 1899. That adoption also had been contested, but unsuccessfully. Kari Virappa died on 23rd October 1920. He had been a 'Pattadhikari' or head of the Lingayat Tegginamutt before the plaintiff. By a curious custom in that 'mutt', as well as in many other similar Lingayat 'mutts' in Bellary district, a small boy is made the 'Pattadhikari' when he is a minor, and he puts on yellow robes; but when he attains majority, he may decide to marry and then can resign the 'pattadhikariship' to his nominee, marry and raise a progeny. The consequence is that his rights of inheritance in his family, whether natural or adopted, do not cease, as in the case of an ordinary Hindu 'Sanyasi' who becomes civilly dead, on assuming the yellow robes. The evidence of P. W. 13, a 'Pattadhikari' of a similar type, and of other witnesses, and the documentary evidence in the case proved this fully.

(2) The important clauses relevant for our purpose in Ex. P. 2(a), Kari Virappa's will, are in Paras. 3 and 14. In Para. 3, Kari Virappa said:

"I have no issue whatever for the purpose of continuation of my family, I have given permission to my wife, Viravva, to adopt a son. I have given her permission to adopt as many times as would be necessary, should the previous adoption be unsuccessful. But Viravva must adopt only a boy approved by the respectable persons appointed by me in

paragraph 14. Should Viravva die before making any adoption, the persons becoming trustees should arrange for the adoption of a boy for the continuation of my family in accordance with my 'kulachara" (family usage)."

The material portion of paragraph 14 runs as follows:

"For the purpose of duly carrying out after my death the arrangements proposed herein for securing a suitable boy and adopt him according to our religion; then to take charge of the properties and manage them properly during the minority of my adopted son and then make them over to my adopted son as soon as he attains majority, to look after the protection of my wife and my adopted son; for giving effect to the arrangements proposed in regard to the Sanskrit 'Patasala' referred to in para 10; for dealings with the properties of the adopted son in future by sale or otherwise, according as circumstances may require; for improving the said properties by the addition or acquisition of other properties; and, in general, for the purpose of working out the terms and conditions contained in this will after my death, I nominate the following gentlemen as Trustees:"

He then nominated Holayya, Gundappa, Malkambanna, Gurusanthappa and Huchappa (P. W. 10) as trustees and added:

"After me these trustees should carry through everything as directed herein. If any vacancy should occur among these trustees, the remaining trustees are empowered to co-opt any one they please."

One of the five persons thus appointed trustees declined to accept the job; the other four accepted; but died, one by one, leaving only P. W. 10, alive now.

* * *

(3) On 18th September 1942, the first defendant entered into an ageeement, Ex. D-25, with the natural father of the second defendant for the adoption of the second defendant by her. On 11th October 1942 she took the boy in adoption. But the adoption deed Ex. D-26 was executed only on 23rd June 1943. No invitation card was issued for the second adoption or a photograph taken on the occasion. The reason given by the first defendant's counsel in the lower Court was that, as the first boy, taken in adoption after the invitation card and photo, died prematurely, it was not considered proper to invite another stroke of fate by following a similar procedure regarding the second boy; the lower Court accepted that argument, in view of the superstitions prevalent in the country side regarding such matters. D.Ws. 1 to 5 and 7 swore that the prior approval of P. W. 10 the only surviving original trustee was taken for this adoption also, and that P. W. 10 attended the adoption with his wife, as on the previous occasion. P. W. 10, of course, denied this also; but the lower Court disbelieved his statement on oath and held that he must have approved the adoption and attended the ceremony with his wife as before.

(4) The plaintiff, of course, contended that the adoption was without the consent or approval of P. W. 10. the surviving original trustee, and was invalid on that account, that it was invalid also because there was not the joint approval of all the five original trustees as required under the will of Kari Virappa. He urged that if, for whatever reason, one of the original trustees did not join in the approval, the adoption would be invalid in law. He contended that P. W. 10 did not attend the adoption ceremony. He contended further that the approval of the three co-opted trustees was also required to make the adoption valid. He urged that the boy adopted was not of the same family, and was not even fit and suitable otherwise, and that the adoption was invalid for that reason too. He relied on the genealogy in Ex. P-11, a copy of a genealogical table filed in 1860, for proving that he was a reversioner of Kari Virappa and urged that all the nearer reversioners were dead, and, so, he was the nearest reversioner alive. The learned District Judge disbelieved him and holding that he was not even a relative or remote reversioner of Kari Virappa, being a man belonging to the Gundada family, and not to the Setra family of Kari Virappa. The first defendant had urged that the plaintiff was simply claiming to be a reversioner and relative because of the adoption of his natural brother, Kari Virappa, by the Setra family, and because of his natural father, Senapurappa, having migrated along with his son, Kari Virappa, to the richer Setra family after the adoption and described himself as Setra Sanapurappa by virtue of his new surroundings. The learned District Judge also held that even if the plaintiff was really related to Kari Virappa, the evidence proved that there were nearer reversioners alive, and that the plaintiff was not really suing on behalf of all the reversioners as he pretended, but only in his own selfish interests, and that the Court's discretion should not be exercised in his favour; and he allowed to maintain it as per the ruling in 'VELU SETHURAYAR v. KARUPAYAMMAL', 1945-2 Mad L J 442, since the circumstances for deviating from that rule laid down in 'LAKSHMIAMMAL v. ANANTHARAMA IYENGAR'. AIR 1937 Mad 699, were different from those in the present suit.

(5) Defendants 1 and 2 had, of course, vigorously contested the plaintiff's suit, and alleged that the plaintiff was neither a relative nor a reversioner; but an utter stranger not interested in Kari Virappa's properties. They also stated that the plaintiff was civilly dead, and was disentitled, as a 'sanyasi', from claiming any reversionary rights, even if he had any. They asserted that the adoption of the second defendant was perfectly valid and binding, as it was performed in pursuance of the imperative and insistent wishes of Kari Virappa, who wanted to provide for his spiritual and worldly welfare after his death, and was also approved of by P. W. 10, the only surviving original trustee, who alone was required to be consulted and whose approval was quite enough. Of course, they denied the truth and validity of the alleged co-option of three trustees. Defendants 6 and 7 were only persons who got some bequests under the will of Kari Virappa. Defendants 3 and 4 were two of the three co-opted trustees (the third one being the plaintiff himself.) & defendant 5 was the surviving original trustee (P. W. 10). Defendants 3 to 5 had vigorously supported the plaintiff's case.

* * *

(Their Lordships then reviewed the evidence and held that the plaintiff was an agnate and was entitled to maintain the action.)

(6) The next contention was that even if the factum of the adoption of the second defendant was proved, and that P. W. 10, the only original surviving trustee, approved of that adoption and attended the ceremony, the adoption would still be invalid under the will Ex. P-2(a), of Kari Virappa, since the will stipulated that the first defendant should adopt only a boy approved by the respectable persons appointed by him in paragraph 14 and so all the five persons named in paragraph 14 should give a joint approval, and that if anyone of those five persons did not accept the trusteeship, or died before the adoption, or refused to give their approval, the adoption would be invalid. Mr. Alladi Krishnaswami Aiyar, who urged this point as the strongest thing in favour of the appellant, relied on paragraph 965 of Halsbury's Laws of England, Volume 25, and some passages on pages 159 to 162 of Farwell on "Powers" and several Privy Council and Bombay and Madras rulings. Farwell remarks thus at p. 159:

> "The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power."

At pages 161 and 162, he remarks,

> "If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others dies, the power is gone."

Paragraph 965 of the Halsbury's Laws of England, volume 25 is only to the very same effect. Of course, this represents the law in England as well as in India in all cases where the consent of any person entrusted with a power is required, and where 'naked power' is given to such persons. At page 512 Farwell has remarked:

> "Mere powers, as distinguished from trusts, are strictly construed, and can only be exercised by the persons who are either expressly or by reference, designated as donees of the power."

He goes on to add that such powers cannot be exercised after the death of the persons designated, and that a bare power given to two or more cannot be executed by the survivor. But he and Hailsham and all others agree that where a power is annexed to an 'office', like executors, trustees, etc., all persons who fill that office can exercise that power.

(7) The learned advocate for defendants 1 and 2 urged that in the present case no 'power' at all was given to the persons appointed as trustees in paragraph 14 by the testator, but only their approval as trustees of the boy adopted by the widow was required. It was urged further by the learned advocate for defendants 1 and 2 that paragraph 3 of the will already extracted, showed beyond all possibility of doubt that the testator was very keen on adopting a son for his temporal and spiritual benefit to continue his line and to conform with his 'kulachara', and that this so obsessed him that he even made a provision for the trustees to adopt a boy for him if the first defendant should die without making any adoption—an illegal thing, as held in 'AMRITO LAL v. SURNOMOYEE DASI', 27 Cal 996 and showing by the very illegality of the provision his terrible anxiety that a child should be adopted for him to continue his line and fulfil the 'kulachara'.

(8) Mayne has remarked at page 215 of his Hindu Law & Usage "the rules of construction of authorities to adopt have been laid down by the Judicial Committee in 'VENKATANARASIMHA APPARAO v. PARTHASARATHI APPARAO', 37 Mad 199 (P C) and in 'RAJENDRA PRASAD v. GOPAL PRASAD', 57 Ind App 296. Apparently the construction will be more liberal whenever the paramount intention to be gathered from the language of the will or the authority is religious than when it is secular ('VENKATA NARASIMHA APPARAO v. PARTHASARATHI APPARAO', 41 Ind App 51 and 'RAJENDRA PRASAD v. GOPAL PRASAD', 57 Ind App 296). But both the objects viz. to secure spiritual benefit to a man & to continue his line are meritorious in the view of the Hindu law and both are in consonance with the feelings known to prevail throughout the Hindu Community (SURYANARAYANA v. VENKATRAMANA', 33 Ind App 145). Where an authority to adopt is given by a husband, the presumption is strong that he desires to be represented by an adopted son. The Courts would not be astute to defeat an adoption not clearly in excess of the power given by placing a narrow construction of the words of the authority 'BHAGVAN KOER v. DHANUKDHARI PRASAD SINGH', 46 Ind App 259; 'MUTSADDILAL v. KANDANLAL', 33 Ind App 55: 28 Allahabad 377. The learned advocate for defendants 1 and 2 urged that a liberal construction should be given to the words of para 3 of the will and paramount intention of the testator, to have an adopted son, carried out and the adoption upheld. He pointed out that an absolute and unlimited power was given to the widow to adopt as many times as would be necessary, should the previous adoption be unsuccessful; and that the direction that she must adopt only a boy approved by the respectable person appointed by him in paragraph 14 should be taken to be merely 'recommendatory' and not mandatory, that failure to go by that direction would not make the adoption invalid, that, in any event, the direction was intended only to operate regarding the five persons appointed by the testator himself as trustees in paragraph 14, and only the trustees alive at the time of the adoption need be approached by the widow for approving the adoption, and that as the approval of P. W. 10, the sole surviving trustee, to this adoption had been asked for and given, the adoption was perfectly valid in any event. We agree. There is no doubt whatever in our minds that the testator was very very anxious to have a boy adopted for him in order to continue his line for both temporal and spiritual purposes, the word "kulachara" indicating the spiritual motive, which is also further reinforced by the testator's having been a 'Pattadhikari' of a 'mutt' and having been deeply interested in the maintenance of a Sanskrit 'Patasala', named expressly in the will as a thing to be looked after carefully. Indeed, the very provision in the will for the trustees to adopt a boy for him in case his widow died without adopting one shows his anxiety to have an adopted son at all costs.

(9) No doubt, as per the rulings of the Privy Council in 'VENKATA NARASIMHA v. PARTHASARATHI', 37 Mad 199 and 'RAJENDRA

PRASAD v. GOPAL PRASAD', 10 Pat 187 and the rulings of the Bombay High Court in 'RANGUBAI v. BHAGIRATIBAI', 2 Bom 377 and of the Madras High Court in 'JANAKIRAMAYYA v. VENKATALAKSHMAMMA', 1931 Mad W N 473, a power to adopt must be exercised strictly in accordance with the terms, and the rules prevailing in England as to the construction of powers applicable thereto, though in construing a document, whether in English or the vernacular, the fundamental rule is to ascertain the intention from the words used and the circumstances are to be regarded only to show the intended meaning of the words used. We are satisfied from a reading of the will of Kari Virappa that he intended his widow to adopt as many times as was necessary, out of her own free choice, without restricting the choice to relatives etc., and without delegating the selection of the boy to the trustees or compelling her to select the boy in consultation with them. His intention was undoubtedly to enable her to select the boy she liked, but only to get the approval of that boy by the original trustees who happened to be alive and holding that office at that time.

(10) It is not a case here as in the case of 'VENKATA NARASIMHA v. PARTHASARATHI', 37 Mad 199, where the two widows of the testator were jointly given a power to adopt, and it was held, therefore, that one widow could not adopt by herself as she had not been given the sole power to adopt a boy, as in this case. Nor is this a case like 'RANGUBAI v. BHAGIRATHI BAI', 2 Bom 377, where the previous consent of the Government to the adoption was made a condition precedent. In this case, there is no condition precedent at all to the widow's adopting any boy she liked. She was only asked to adopt a boy who had the approval of the original trustees appointed under paragraph 14, meaning thereby the trustees in their 'official capacity' and enabling therefore a surviving trustee, like P. W. 10, to give the consent. Nor is it a case as in 'AMRITO LAL v. SURNOMOYEE DASI', 27 Cal 996, where a widow was authorised to adopt only in conjunction with two other executors, or as in RAJENDRA PRASAD BOSE v. GOPAL PRASAD', 10 Pat 187, where the widow was allowed to adopt only with the previous permission of the testator's father or as in the case of 'JANAKIRAMAYYA v. VENKATALAKSHMAMMA', 1931 Mad WN 473, where the widow was given the power to adopt only acting in conjunction with the testator's mother.

(11) We are satisfied that none of the rulings relied on by Mr. Alladi Krishnaswami Aiyar for holding the adoption invalid would apply to the circumstances of this case.

(12) The ruling in 'VENKATANARASIMHA v. PARTHASARATHI', 37 Mad 199, will not apply. There is no question of 'joint power' given to two widows here and the consequent necessity for both the widows to act jointly before adopting a person as in that case. It is because of the two widows jointly empowered that their Lordships held that to hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for and would be making an addition to his testamentary dispositions which no Court, construing a will, was entitled to do. Here, however, there are no two widows, but only a single widow. Nothing need be added to the testamentary dispositions of this testator for holding this adoption to be valid. Indeed, it will only be carrying out the testamentary dispositions of the testator and construing the will in the way he wanted. Nor was any power given to the five trustees appointed by the testator in paragraph 14 of his will to select a boy for adoption, much less to force that boy on the widow and disentitle her to adopt any boy other than the boy they selected. The so-called 'power' given to the trustees under the testator's will was simply a power to 'approve'; in other words, it is 'no real power' at all. The Canarese word used is "oppida", or approval, and not 'anumathi' or permission, much less "hakku" or right.

(13) In 'RAJENDRA PRASAD BOSE v. GOPALA PRASAD', 10 Pat 187, also, an adoption by the widow was expressly made subject to a condition precedent, namely, the approval of the testator's father and could not have been made by the widow herself acting alone. It was not a case of 'mere approval' as here. Their Lordships of the Privy Council remarked in that case,

> "It is important to bear in mind that Rama Prasad could not have married many years before the 'anumathpatra' was executed, and his wife was then only 13 or 14 years of age. It is unlikely that he could have ever wished that his girl-wife should have an unrestricted choice in the selection of his adopted son to the extent of allowing her to bring a stranger to inherit his property. In their Lordships' opinion, the words "with the permission of my father" created a 'condition precedent' to the exercise of the power of adoption certainly during the lifetime of the father, and there is no reason for holding that the words are to have a different effect after the death of Golak (the father)."

Here, the widow was not a young girl, when the testator died, as in that case, but was 31 years old at the time of the will and had lived with her husband, the testator, for many years. and had infused such confidence in him that he had asked her not to make one adoption but as many adoptions as necessary in order to carry out his paramount intention of having an adopted son to continue his line and fulfil the 'kulachara'.

(14) So too, in 'JANAKIRAMAYYA v. VENKATALAKSHMAMMA', 1931 Mad W N 473, one of the important reasons given for holding the adoption invalid, on construing the will, was that the will provided for the devolution of the properties in the contingency of no adoption by the widow, showing thereby that the testator had no paramount intention of having an adopted son in any event; whereas, here, the will does not provide for the contigency of no adoption by the widow except by asking the executors to adopt in case the widow did not adopt.

(15) It has been held in 'IN RE SMITH; ESTICK v. SMITH', (1904) 1 Ch 139, that when a testator appointed his wife, Mary Ann Smith, his brother, Charles Smith, and his friend, Robert Bell, executors and trustees for selling his estate, it must be presumed that the power was given to them 'ex officio', as an incident to their office, in spite of there having been ample indications of personal confidence in them, and

that the power given to the trustees passed to the office of the holder or holders thereof for the time being. Here, therefore, even if the five trustees appointed under paragraph 14 of the will are held to have a power to approve of the adoption, that power must be held to be given to the trustees 'officially', and to have devolved on the surviving trustee, P. W. 10, whose approval will be quite sufficient. We agree with the lower Court in holding that no trustees had been really 'co-opted' in 1934, as pretended, and that the evidence regarding such co-option is worthless and was rightly disbelieved, being unfit to be acted upon, these trustees having not joined in Ex. P-16, issued shortly after their appointment, and having done nothing after their supposed appointment, and even the resolution regarding their appointment being highly suspicious.

(16) Mr. Alladi Krishnaswami Aiyar's argument that all the five trustees appointed in paragraph 14 should give a 'joint consent' is unsustainable in this case, because the so-called "power" has been given to the trustees 'officially', and not to each personally, and, so, may be exercised by the holder for the time being, as held in 'IN RE SMITH; ESTICK v. SMITH', (1904) 1 Ch 139 and in paragraph 957 of Halsbury's Laws of England, Vol. 25 and also by Farwell. It has been expressly held by the Privy Council in 'BALA GANGADHAR TILAK v. SRINIVASA PANDIT', 39 Bom 441, that where a Hindu testator, by his will, appointed five trustees for his property and gave power to his widow to adopt a son with their consent and advice and one of the trustees declined to act, the consent of the declining trustee was not necessary and that the adoption made with the consent of the other four trustees was valid. Their Lordships did not decide the question as to what would have happened if only the majority of the trustees who functioned had agreed to the adoption. Possibly, that decision would have depended on the reasonableness of the refusal. An unreasonable refusal, motivated by corrupt or improper motives, might have been ignored, and the testator's paramount intention to adopt carried out, & the adoption upheld, if it was of suitable boy, as in this case. Though the plaintiff had urged at first that the boy adopted in this case, namely, defendant 2, was unfit in general and as not belonging to the testator's family group of agnates, this objection was not proved by any evidence and was not even pressed before us. The second defendant is obviously a fit and suitable boy from the same community, eligible for adoption, as spoken to by D. Ws. 1 to 5 and 7, and, as is clear from the approval of P. W. 10, the sole surviving trustee. That he was not the testator's agnate or relative is no ground for disqualification, even if true.

(17) In 'RATTANLAL v. BAIJNATH', ILR (1938) 19 Lah 1, the Privy Council has held that where a Hindu testator appointed four executors and provided, by a clause in his will, that the said executors should be competent to select a boy of good family in the neighbourhood and have him adopted by his wife on his behalf and one of the executors after consultation with the others selected a boy to be adopted, and the widow adopted him, the adoption was valid, even though the other three executors had not asked the widow to adopt that boy, or even expressed to her their approval of the adoption. In that case, the widow was not given the power to adopt a boy, as here, and the executors were asked to select the boy. It follows that in this case the adoption would have been easily held by their Lordships to be valid.

(18) In 'SURENDRA NANDAN v. SAILAJA KANT', 18 Cal 385, it was held that where a Hindu appointed one K, as manager of his property under his will, and added that his widow "will adopt a son with the good advice and opinion of the manager", and the widow wanted to adopt a boy and intimated her intention to the manager and requested him to come and see the ceremony performed, and he declined to receive the letter, and the widow eventually adopted the boy without his consent, the adoption was not invalid for lack of such consent, as such consent was 'not a condition precedent' to the validity of the adoption. But, of course, it is unnecessary to rely on that, as we are satisfied that P. W. 10 did approve of the adoption and did attend the function with his wife, as sworn to by D. Ws. 1 to 5 and 7. In the end, therefore, we have no hesitation in agreeing with the learned District Judge that the adoption of the second defendant by the first defendant was valid and binding on the plaintiff and other reversioners.

(19) The last contention was that the learned District Judge erred in awarding compensatory costs to the first defendant by making up his past record of litigation, and relying on it for that purpose, though no compensatory costs could have been awarded in the circumstances of this suit, which involved arguable and complicated questions of fact and law and could not be held to be frivolous and vexatious. We agree. The very fact that this suit had to be argued strenuously on both sides, in the lower Court and here, and that the judgments have had to be elaborate after weighing the contentions on both sides, will show that the suit was not frivolous and vexatious, and that this was not a case fit for awarding 'compensatory costs'. The past activities of the plaintiff in filing suits, and his propensity to file suits for getting properties, should not, in our opinion, have been considered for this purpose any more than the bad character of an accused can be considered for convicting him when there is no other evidence. So, we set aside the order regarding compensatory costs.

(20) In the end, therefore, we modify the judgment and decree of the lower Court by deleting the award for compensatory costs to defendant 1 and confirm them in all other respects. We dismiss this appeal, except to the extent indicated above, with full costs (one set) of the contesting respondents, defendants 1 and 2.

C.R.K./D.R.R. Appeal dismissed.

A. I. R. 1952 Madras 613

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and another, Petitioners v. The Commissioner, Hindu Religious Endowments, Madras and others, Respondents.

Civil Misc. Petn. No. 2591 of 1951 and Writ Petns. Nos. 379 and 380 of 1951, D/- 13-12-1951.

† (a) Madras Hindu Religious and Charitable Endowments Act (XIX (19) of 1951), Sections 20, 21, 25 (4), 26, 28, 29, 30 (2), 31, 53, 54, 55 (2), 56, 58 (3), 59, 63 to 69, 70, 76, 89 and 99 — Validity — (Madras Hindu Religious Endowments Act (II (2) of 1927) — Validity) — (Constitution of India, Arts. 19 (1) (f) and (5), 25, 26, 27, 204, 245, 246, Sch. 7, List III, Items 28 and 47.)

Sections 20, 21, 25 (4), S. 26 (to the extent S. 25 (4) is made applicable), Ss. 28, 29, 30 (2), 31, 53, 54, 55 (2), 56, 58 (3), 59, 63 to 69 in Chapter VI, Ss. 70 (2) (3) (4), 76, 89 and S. 99 (to the extent it gives the Government virtually complete control over the Mathadhipathis and Mutts) of the Madras Hindu Religious and Charitable Endowments Act (XIX (19) of 1951), are ultra vires the State Legislature in so far as they relate to Shirur Mutt in South Kanara District and other mutts of a similar nature. (Para 62)

(Obiter): The sections in the earlier Act viz., Madras Hindu Religious Endowments Act (II (2) of 1927), which correspond to the sections of the new Act XIX (19) of 1951 enumerated above as being ultra vires, will also be ultra vires). (Para 62)

The subject-matter of the impugned Act no doubt falls under item 28 of List III of the Seventh Schedule to the Constitution but unless the power to legislate has been exercised within the limits laid down by the Constitution the impugned Act cannot be upheld as valid law. (Para 27)

The impugned Act infringes Art. 19 (1) (f) of the Constitution. The effect of the legislation is practically to reduce the Mathadhipathi to the position of a servant, subordinate to the Government even in respect of rights relating to property. The executive administration replaces the statutory control by the Board. The mathadhipathi is bound to obey all lawful orders emanating from the Government down to the Assistant Commissioner. The premises of the Mutt and the places of worship and meditation are not immune from interference by the Government. (Para 33)

The power to hold property carries with it the power to enjoy and utilise the income in a manner in which the person holding the property is entitled to spend it under law. This power is unduly and unreasonably restricted by S. 54 of the new Act. (Para 33)

The Act leaves nothing in the Mathadhipathi except a vestige of a right to call himself a Mathadhipathi with no power to manage the property, to deal with its income, to apply its surplus for the objects of the institution at his discretion and choice which is a right well recognised and established. (Para 34)

The argument that the appointment of the manager or the executive officer paid or otherwise, and the notification procedure relate only to secular affairs of the mutt and do not trench upon the religious affairs, loses sight of the fact that a separation of religious affairs from secular affairs of a Mutt in such watertight compartments is not possible. The property of the mutt and its income exist for one purpose and only one purpose and that is the religious purpose. It has to be applied and utilised for the maintenance of the mutt, for carrying on the worship and for the propagation of the religion. (Para 34)

The restrictions imposed are so drastic in scope that they go beyond the object sought to be achieved. AIR 1950 SC 211 and AIR 1951 SC 118, Rel. on. (Para 35)

Sections 21, 23, 24 and 54 of the new Act undoubtedly vest very large powers in the commissioner and are certainly calculated to interfere with the practice of religion i.e. the carrying on of the worship and the propagation of religion by instructing the disciples and initiating them into the fold of religion and therefore constitute an infringement of the right under Art. 25 of the Constitution. (Para 39)

The Sivali Brahmin Community to which the Shirur Mutt belongs is a religious denomination entitled to the protection of the right guaranteed under Art. 26. The impugned Act in so far as it takes away the rights to administer the religious and secular affairs of the Shirur Mutt is invalid as infringing Art. 26. (Para 42)

Section 76 (1) of the new Act is ultra vires the State Legislature as it offends Art. 27 of the Constitution. (Para 57)

The levy of five percentum of the income of a religious institution provided for in S. 76 (1) of the new Act is a "tax" within the meaning of Art. 27. (Para 46)

The levy of contribution is not in direct proportion to the benefit any given religious institution may derive from the services rendered by the Government and their officers within the meaning of S. 76 (1). The services of the Government and their officers may not be in direct relation to the income either of any given religious institution. But the contribution bears a fixed proportion to the income of the religious institution. It is the capacity to pay and not the benefit conferred that seems to be the guiding principle of fixing the quantum of contribution a religious institution can be called upon to pay under S. 76 (1) of the new Act. That is more in accord with the "contribution" being viewed as a 'tax' rather than as a 'fee'. (Para 52)

The fee contemplated by item 47 of List III of the Seventh Schedule to the Constitution need not necessarily be nominal. But the element of compulsion which is an integral part of a tax need not always be present in the fee. (Para 52)

It is not really necessary that the Act imposing the tax should also provide for the appropriation of the proceeds of the tax before it can be brought within the mischief of Art. 27. In fact, such an appropriation is impossible within the scheme of the Constitution. When the Constitution

therefore speaks in Art. 27 of specific appropriation, it can only refer to the appropriation contemplated by Art. 204 of the Constitution and not any other independent or specific appropriation, not permitted or warranted by the Constitution. (Para 54)

It is not every item of the expenditure included in the maintenance of religious institutions that need come out of the tax, before a tax can be declared as offending the provisions of Art. 27 of the Constitution. That the tax was utilised specifically for meeting a portion of the expenditure of the maintenance of its affairs, is enough to bring it within the mischief of Art. 27. (Para 54)

The liability to pay the tax imposed by S. 76 (1) on the institution falls on the trustee under S. 78 of the new Act, and he is certainly a person within the meaning of Art. 27. (Para 55)

The audit fees prescribed by S. 76 (2) stands on a different footing and they cannot be treated as taxes. (Para 56)

The Pedu Dikshitars in whom the management of the temple at Chidumbaram in the South Arcot District is vested are both the managers and the archakas and they have a substantial beneficial interest in the income. (Para 77)

The Pedu Dikshitars who are Smartha Brahmins, form and constitute a religious denomination or in any event, a section thereof. They are even a closed body, because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services to God. It is their exclusive and sole privilege which has been recognised and established for over several centuries. The notification No. G. O. Ms. 894 Rural Welfare, Dated 28-8-1951 published in St. Fort George Gazette on 4-9-1951 seriously interferes with their right to manage the affairs in matters of religion to own and acquire movable and immovable property, and even to administer such property in accordance with law. A law which substantially deprives the religious denomination of its right to administer the property of the denomination leaving only a scintilla of the right in the denomination cannot be justified and upheld as an exercise of the power to regulate the administration of the institution. Nor is it reasonable restriction within the meaning of Art. 19 (5) of the Constitution. The provision, therefore, relating to the notification and the notification actually issued are opposed to the fundamental rights granted to the individual and guaranteed by the Constitution under Art. 19 (1) (f) and to the denomination under Art. 26 and, therefore, cannot be upheld. (Para 78)

The right of appeal to the Board under the earlier Act and the vesting of the exclusive jurisdiction without any remedy in the Commissioner and the Government to take the serious step of replacing the administration by the Dikshitars by an executive officer without a power of judicial review of any sort is to say the least, unreasonable and unjust. The limitations of the nature contained in Chapter VI of the new Act and Chapter VI-A of the earlier Act, cannot but be held to infringe the very fundamental principle of jurisprudence that no man should be a judge in his own cause and are, therefore unreasonable and unjust. (Para 78)

In the case of Sri Sabhanayakar Temple at Chidambaram, the position of the Dikshitars, labelled trustees of this temple, is virtually analogous to that of a Mathadhipathi of a Mutt, except that the Pedu Dikshitars of this temple, functioning as trustees will not have the same dominion over the income of the properties of the temple which the Mathadhipathi enjoys in relation to the income from the Mutt and its properties. Therefore, the sections which are held ultra vires in relation to Mutts and Mathadhipathis will also be ultra vires the State Legislature in relation to Sri Sabhanayakar Temple, Chidambaram and the Pedu Dikshitars who have the right to administer the affairs and the properties of the Temple. (Para 87)

(b) Madras Hindu Religious and Charitable Endowments Act (XIX (19) of 1951) — Act does not infringe Arts. 14 and 15 of the Constitution—(Constitution of India, Arts. 14, 15.)

The impugned Act does not violate either Art. 14 or Art. 15 of the Constitution of India. The classification of institutions and endowments based on religion, Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained viz., the better administration and management of such institutions. It is not a classification or division made for the first time by the State Legislature. The distinction existed for nearly a century. As the incidents and the nature of the institutions and endowments of different religions differ in several respects, it cannot be said that the classification is based solely on religion as the institutions included in the classification are religious as well as secular and having regard to the object in view, the institutions having several common features are rightly classified under one group. Art. 14 does not prevent the legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them reserving the other types of institutions for consideration to a future date. (Para 29)

(c) Constitution of India, Art. 19 (1) (f) — Property, meaning of.

'Property' as used in Art. 19 (1) (f) includes even incorporeal rights. The addition of the right to dispose of property in Art. 19(1)(f) along with the right to acquire and hold is not intended to give a definition of property so as to limit it to disposable property. Property may be inalienable but yet a person may be entitled to hold it as

in the case of inalienable service inams. AIR 1951 Bom 86, Rel. on. (Para 32)

The head of a mutt is not a bare trustee but occupies a peculiar position and has beneficial interest in the mutt property and its income. The head-ship of a mutt can therefore be considered as property within Art. 19 (1) (f).

An idol is a juristic person capable of taking and holding property. The right to possession and management, however, of the property endowed to the idol is in a manager or 'Dharmakartha' or shebait and the manager represents the idol in all transactions and suits. Usually, the dharmakartha has no beneficial interest and the property is not vested in him. The authority of the manager is analogous to that of a guardian of an infant heir and his liability in respect of his management is analogous to that of a trustee. But if the dharmakartha or the head of a Mutt has a beneficial interest in the property and its income, such rights are "property" within the meaning of Art. 19 (1) (f) of the Constitution. (Para 77)

(d) Constitution of India, Art. 26 — Scope — Denomination, meaning of.

The dictionary meaning of the word 'denomination' as given by Webster is "a collection of individuals classed together under the same name; now almost always specially a religious sect or body having a common faith and organization and designated by a distinctive name". There being several religions in India such as Islam, Christianity, Zorostrianism and Hinduism, it may not be wrong to take Hinduism and the members of that religion as constituting a religious denomination in a larger sense or if it should be taken in a limited sense Advaita, Dwaita, Visishtadwaita, Saivaites may be another classification and the members of each faith may be treated as members of one denomination. Even taking it in the sense as only a 'sect writ large' the division of the members of the Hindu religion based upon a system of phylosophy which is adopted by a group of members may be treated as a denomination or sect and any section of that denomination, and a division made either on territorial or sectional basis, may be treated as a section thereof. The contention that the denomination contemplated by Art. 26 is not identical with a religious sect or members of a religious persuasion but it must be a closed body like a Corporation cannot be accepted. It is rather difficult to dissociate the religious affairs of an institution from the property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up. (Paras 40, 41)

Article 26 is concerned with religious institutions and the consideration of the question whether there is any beneficial ownership in the properties of the institution by the members of the denomination is irrelevant as it is solely concerned with the institution which exists for spiritual and not for material benefit. (Para 42)

It is unnecessary, that in order to claim the benefit of Art. 26 a religious denomination should be capable of holding all the four rights in the four sub-clauses of that Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination. (Para 43)

(e) Hindu Law — Religious Endowments — Mutt — Mathadhipathi — Position of—Powers and duties of.

The head of a mutt is not a trustee in the sense in which that word is used in the law of Trusts and his position cannot be brought under any legal label known to English jurisprudence. He is not even a life tenant in respect of the properties permanently vested in the mutt or the religious institution. He has a right to the income but he has no power of disposition over the corpus unless necessity or benefit is established. He has large powers over the surplus of the income after meeting the demands of the institution such as its maintenance, the maintenance of the disciples and the performance of the daily worship etc. He has the discretion to use the surplus for spiritual objects and that discretion is unfettered so long as the surplus is not diverted to any immoral or wicked purposes. He has the liberty to accumulate the income. The 'padakanikas' are at his absolute disposal. If, however, it is established that any specific property has been vested as a trustee in the head of the mutt, to that extent and in respect of that property, he becomes a trustee. In other respects he is not liable to account for the income much less to the 'padakanikas.' He is a person with manifold rights and duties. He is the spiritual head; he is the teacher and the guru. He has to carry on the worship of the deity installed in the mutt, maintain the disciples and propogate the views of the religion of the institution. His life is one of discipline and non-attachment to worldly things and he is expected to meditate and study and further the creed of the mutt. Such institutions are autonomous bodies governed and controlled by the directions and orders of the head of the Mutt. He is treated almost as a representative of the Godhead by his disciples and the followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. These are some of the salient rights and duties of a Matathipathi. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt, the management of the properties may bear a secular aspect but the secular and the religious aspects

cannot be dissociated as they are inextricably mixed up when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers. Case law reviewed. (Para 21)

(f) Constitution of India, Art. 226 — New plea — Application under, for issue of a writ of prohibition against Hindu Religious Endowments Board, Madras, prohibiting it from proceeding to frame a scheme for administration of Shirur mutt— Objection that the Mutt in question is not really a public religious institution within the meaning of Section 1(2) of Madras Hindu Religious and Charitable Endowments Act, 1951 raised for the first time in course of arguments before High Court—Objection, held, could not be entertained at such late stage in absence of evidence on the point. (Para 25)

(g) Constitution of India, Art. 226 — Prohibition, writ of—Existence of alternative remedy is irrelevant consideration in granting writ.

A writ of prohibition lies to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law. It also lies if a provision of a statute is contravened by the tribunal or even if any principles of law are contravened. In deciding the question whether a writ of prohibition should issue or not, the existence of an alternative remedy is an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law. If the tribunal is permitted to exercise that jurisdiction which is objected to, if it exercises it wrongly, the mischief would be done before the alternative remedy is availed of. It is unnecessary to insist upon a party complaining that he should first suffer and submit himself to the jurisdiction which is being wrongly exercised or is wrongly exceeded and then take advantage of the alternative remedy. (Para 26)

(h) Constitution of India, Arts. 245, 246 — Powers of State legislature to enact laws — Extent of.

The Constitution proceeds on the assumption that sovereignty vested in the people of India and they, through the accredited representatives in the Constituent Assembly, gave themselves the Constitution. The State legislature, therefore, has no other independent sovereign right to legislate apart from what is contained within the four corners of the Constitution. (Para 27)

(i) Constitution of India, Arts. 19 (1) (f) and 31 — Applicability.

If a person is deprived of his rights to property under Article 19(1)(f), the proper Article to be considered is Art. 31. Article 19(1)(f) applies only so long as a person is not deprived of his property by a law enacted by a competent legislature. (Para 31)

(j) Constitution of India, Part III — Fundamental rights — Powers of Parliament and Legislatures to control — Powers of Court — Extent of.

The Constitution embodies the corporate will of the people and they have expressly elected through their representatives to surrender and forego in the larger interests of the State and for the welfare of the people, part of their rights to the State. The fundamental rights recognised in the Constitution no doubt to some extent constitute limitations on the powers of the Parliament and the State legislatures to enact laws and these were intended in the interests of and for the benefit of the minorities. To what extent the control should be permitted and whether the legislature in enacting a particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left open for the Courts to decide. Unlike the American Constitution where under the power known as "due process of law" the Courts have exercised and have been exercising a greater degree of freedom in declaring a law unconstitutional on the ground of its unreasonableness for deciding which no particular standard had been laid down by the legislature, under the Indian Constitution, the Court's function is circumscribed and limited to the extent of considering whether the restrictions are reasonable or not. (Para 30)

(k) Constitution of India, Art. 19(5) — Reasonable restrictions — Meaning of.

Reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive as well as procedural provisions. The possibility of the favour being abused in the hands of the executive may not be altogether irrelevant. AIR 1950 SC 211 and AIR 1951 SC 118, Rel. on. (Para 35)

(l) Constitution of India, Art. 25 — Scope.

Freedom of conscience is the minimum of religious liberty. It is intangible as it is subjective and is not capable of legal protection except that a person may not be compelled by law to abandon his belief, creed or opinion. A man may not only hold his religious opinions but may put them to practice and translate them into articulate force by profession, practice and propagation. Unless these are also protected there is no meaning in protecting freedom of conscience. It is very difficult to separate religious belief and practice from politics or ethics. But in the interests of the State it cannot be contended, at any rate at the present day that such practices cannot legitimately be prohibited by legislation though such legislation might infringe religious liberty. (Paras 36, 38)

K. Bhashyam, T. Krishna Rao, K. R. Karanth, S. Venkatakrishna, K. Umamaheswaram, Alladi Kuppuswami and C. V. Srinivasachari, for Petitioners; The Advocate-General and the Government Pleader, for the State. The Advocate-General, M. Seshachalapathi and T. K. Raman Nambisan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('83-84) 11 Moo Ind App 405: (8 WRPC 25) 17
('16) 43 Cal 707: (AIR 1916 PC 256) 17, 20
('17) 40 Mad 709: (AIR 1917 PC 33) 33
('21) 44 Mad 283: (AIR 1921 PC 84) 17
('21) 44 Mad 831: (AIR 1922 PC 123) 12, 17, 19, 20, 33
('22) 45 Mad 565: (AIR 1922 PC 325) 17
('27) 50 Mad 497: (AIR 1927 PC 131) 5, 33
('36) 71 Mad LJ 740: 63 Ind App 448: (AIR 1936 PC 318) 19, 32
('43) 1943-2 Mad LJ 70: (70 Ind App 57: AIR 1943 PC 89) 19, 32
('45) 8 FLJ 8: (AIR 1945 FC 25) 32
('46) 1946 FCR 67: (AIR 1947 FC 1) 27
('50) 1950 SCR 88: (AIR 1950 SC 27: 51 Cri LJ 1383) 31, 41
('50) 1950 SCJ 328: (AIR 1950 SC 211: 52 Cri LJ 550) 35
('50) 1950 SCJ 571: (AIR 1951 SC 118) 35
('51) 1951 SCJ 29: (AIR 1951 SC 41) 29, 31
('51) 1951 SCJ 363: (AIR 1951 SC 247) 43
('51) 1951 SCJ 394: (AIR 1951 SC 293) 19, 32
('51) 1951 SCJ 478: (AIR 1951 SC 318: 52 Cri LJ 1361) 29
('51) AIR 1951 Bom 86: (ILR (1951) Bom 473) 32
('33) 60 Cal 452: (AIR 1932 Cal 791 FB) 19, 32
('78-80) 2 Mad 175 14, 17
('87) 10 Mad 375 11, 12, 14, 17
('90) 13 Mad 524 11
('91) 14 Mad 103 71, 77
('04) 27 Mad 435: (14 Mad LJ 105) 12, 14, 17, 18
('10) 33 Mad 265: (5 Ind Cas 4 FB) 17
('17) 32 Mad LJ 271: (AIR 1918 Mad 1016) 17
('17) 32 Mad LJ 24: (AIR 1918 Mad 984 (2)) 20
('23) 44 Mad LJ 187: (AIR 1923 Mad 288) 5
('39) 1939-2 Mad LJ 11: (AIR 1939 Mad 682) 73
('41) ILR (1941) Mad 807: (AIR 1941 Mad 878) 61
('50) ILR (1950) Mad 451: (AIR 1950 Mad 103) 32
('50) C M P Nos 894 & 895 of 1951: (AIR 1952 Mad 203) 32
(1882) 7 AC 633: (52 LJQB 193) 15
(1911) AC 179: (80 LJKB 796) 61
(1920) 28 CLR 530 38
67 CLR 116 37
68 CLR 261 32
(1906) 1 Ir R 588 40
(1917) 2 KB 894: (87 LJKB 42) 43
(1879) 98 US 145: (25 Law Ed 244) 36
(1890) 133 US 333: (33 Law Ed 637) 36
(1940) 310 US 296: (84 Law Ed 1213) 36
(1943) 319 US 105: (87 Law Ed 1292) 36
(1947) 330 US 1: (91 Law Ed 711) 36
(1948) 333 US 203: (92 Law Ed 649) 36

JUDGMENT: (C. M. P. No. 2591 of 1951):— This and the other connected petitions relating to the Guruvayur temple and the Chidambaram temple were heard together as they all raised the question of the validity of the Madras Hindu Religious Endowments Act, 1926, Act II of 1927 (hereinafter called the "earlier Act"). While these petitions were pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (Act XIX of 1951) (hereinafter called the new Act) which repealed the earlier Act was brought into force by the Madras Government on 30th September 1951 by a notification in the Fort St. George Gazette. Leave to amend the petitions was granted to the petitioners and they have been permitted to canvass the validity of the new Act as well. Mr. M. K. Nambiyar who appeared for the trustee of the Guruvayur temple argued his petition first and Mr. Alladi Krishnaswami Aiyar and the learned Advocate-General replied to that petition after which the petition relating to Guruvayur temple was allowed to be withdrawn as the Government agreed to cancel the decision to notify the temple and to permit the trustee to function. The arguments addressed by Mr. Nambiyar were adopted by the petitioners in the remaining petitions and they further supplemented the arguments addressed by Mr. Nambiyar.

(2) It will be convenient to deal with C. M. P. No. 2591 first as it relates to a mutt & covers a wider field than the petition relating to the Chidambaram temple. Some of the arguments are common to both the petitions, particularly the scope of the articles of the Constitution relied on in support of the petitions as having been infringed by the earlier and the later Acts and also the effect of the two Acts on the rights of the petitioners.

(3) C. M. P. No. 2591 of 1951 was filed by the Matathipathi of Shirur Mutt in the South Kanara District, praying that this Court should issue a writ of prohibition prohibiting the respondent, viz., the Hindu Religious Endowments Board, Madras by its President from proceeding with O. A. No. 471 of 1950 to frame a scheme for the administration of the mutt. Under Section 103 of the new Act, the notifications and orders issued under the earlier Act are treated as notifications or orders made, issued and passed by the appropriate authority under the corresponding provisions of the new Act and as the place of the President, the Hindu Religious Endowments Board, Madras, was taken by the Commissioner appointed under the new Act, the Commissioner, Hindu Religious Endowments Board, Madras was added as a party in place of the Board by C. M. P. No. 11917 of 1951 with the leave of Court. The relief, therefore, claimed against the Board is treated as a relief against the newly appointed Commissioner of the Hindu Religious and Charitable Endowments, Madras.

(4) Acting under S. 62 of the earlier Act, the Board issued the notification dated 6th November 1950 stating that as the Board was satisfied that the endowments of the Mutt were mismanaged and that in the opinion of the Board a scheme for the administration of the Mutt and its endowments should be settled, 8th December 1950 was fixed for further enquiry into the matter and the notice also called upon the trustees and other persons interested in the said Mutt to appear and show cause why a scheme of administration should not be settled. The reasons alleged were:

"1. That the trustees of the Mutt had been borrowing moneys without necessity and spending them without taking the sanction of the Board on major constructions for which there are no approved estimates or plans. He has thus involved the institution into further debts and has utterly disregarded the directions issued to him in Memo No. 75887/46 Adt., dated 13-3-1947.
2. Properties belonging to the Mutt have been leased out on low rents and against the interests of the institution.
3. The trustees of the Mutt have, in many cases, acquiesced in the alienation of Mulgeni transfers containing forfeiture clauses against further alienations; owing to their neglect, properties comprised in

Patta No. 2437 in Uppur have been alienated.

4. The Manager has not been allowed to carry on his duties and the power of attorney granted to him has been cancelled without reference to the Board."

On the 24th January 1951 the Board issued a notice under S. 63(1) of the earlier Act to the head of the Mutt intimating that in the interests of the proper administration of the Mutt and its endowments, a scheme of administration should be settled and that further enquiry would be held on 15-2-1951 at 2 p. m. at the office of the Board in Madras, and asking the trustee and other persons having any interest in the said Mutt to make any representations in writing which they might wish to make in the said matter. To this notice a draft scheme was also attached. As the Board had decided to frame a scheme, the petitioner filed two applications on 12-2-1951, the present C. M. P. No. 2591 of 1951 and another C. M. P. No. 2592 of 1951 and obtained stay of further proceedings, and this Court issued a rule nisi in C. M. P. No. 2591 of 1951. C. M. P. No. 2592 of 1951 was filed for the issue of writ of certiorari to call for the records and quash the order of the Board dated 24th January 1951 deciding to frame a scheme. This application was dismissed as there was no order of the Board but there was only a notice and the petitioner was unable to produce a copy of the annexure in which the Board gave its reasons for the decision which they had reached. The petitioner was given an opportunity by this Court to get a copy of the order but the Board somewhat surprisingly seems to have refused to give a copy of the order on the ground that it was confidential. In support of this view of the Board, however, no rule or notification treating the annexure as confidential was referred to us. The petition was ultimately dismissed as withdrawn on 26-2-1951. The object of the present petition, therefore, is to prohibit the Commissioner of Hindu Religious and Charitable Endowments, Madras, from taking further steps in the matter of settling a scheme for the administration of the Mutt and its endowments.

(5) The petitioner's Mutt is known as the Shirur Mutt and is situated in Udipi, a small municipal town in the South Kanara District. The town is celebrated for its sanctity as there exists Sri Krishna Mutt with which is associated the name of Sri Madhwacharya, the well known propounder of Pluralistic Theism of the Hindu religion. Sanctity is attached to the idol of Sri Krishna which was made of Saligramam stone as it is reputed to have been made by Arjuna and worshipped by Sri Rukmini Devi at Dwaraka. The image was reputed to have been miraculously obtained by Swamiji from a vessel wrecked on the coast of Tuluva. It was carried by him and later after removing the gobichandana which was wrapped round it, it was installed at Udipi in the 12th century A. D. There are also three Saligrams in the Sri Krishna temple which it is claimed, were presented to Sri Madhavacharya by Vyasa when he took his commentary on Sri Bhagwat Gita for the approval of Vyasa at Badrinath. Besides the Sri Krishna Mutt the Swamiji also established eight mutts at Udipi each presided over by a Sanyasi or Swami. There is no matathipathi for the Sri Krishna Mutt but the Swami of each of the eight mutts in turn presides over the temple of Sri Krishna for a period of two years in every 16 years. At every change of a Swami at the end of two years, a festival known as Paryayam is celebrated on a very grand scale. These eight mutts are Palimar, Admar, Krishnapur, Puttige, Shirur, Sode, Kaniyur and Pejavar. The Mutts are linked together into four groups of two each as Dvandva mutts as the two mutts linked together should co-operate in all matters.

The South Kanara Manual, Vol. I, page 148 refers to the fact that the periodical change of the Swami presiding over the temple of Sri Krishna is the occasion of a great festival known as Paryayam when Udipi is filled to overflowing by a large concourse of devotees not only from the District but from distant parts especially Mysore State. The Paryaya Swami is under an obligation to feed the Pilgrims at this festival and he has to meet the expenses of feeding from the income of the temple of Sri Krishna, from the income of his Mutt and from contributions. The rest of the expenditure is met either from the accumulations of the income already made or by borrowing funds. It seems to be almost a usage that every Paryayaswami has necessarily to borrow large amounts to meet the expenditure of the Paryaya as he would always be unable to meet it from the income. This information can be gathered from the South Kanara Manual, Vol. I, pages 147 and 148 and from the decision of the Judicial Committee in 'VIBHUDAPRIYA v. LAKSHMINDRA', 50 Mad 497 PC, on appeal from 'LAKSHMINDRA v. VIBHUDAPRIYA', 44 Mad LJ 187.

The present Swami is the 29th disciple in the line of succession starting from the first Head who was a direct disciple of Sri Madhavacharya. Shivalli Brahmins who are the followers of Sri Madhavacharya claim this as their exclusive Mutt. These Brahmins are Tulu speaking Brahmins of the Smartha sect and are followers of Dwaita philosophy founded by Sri Madvacharya. The headquarters of these Brahmins is at Shivalli a few miles away from Udipi though some of them had migrated to other places in and outside the State. Sri Madhavacharya was born at Udipi but he also resided for sometime at Shivalli where he composed his 37 spiritual works — see the Manual at page 148 and also Thurston on Castes and Tribes, Vol. 1 page 378 where he describes the Shivalli Brahmins.

(6) The petitioner was installed as Mathadhipathi in the year 1919 during his minority and he assumed management only in 1926 when he attained majority. At that time, the Mutt was heavily indebted, the then income of the Mutt being only Rs. 18,000/- per year as estimated by the petitioner. During 1926-30, the indebtedness was reduced by the efforts of the Swami and also fresh acquisitions of property were made. 1931, however, was again a troublesome year. It was a period of his paryayam and he had to meet heavy expenditure of feeding the Brahmins on that occasion, which swelled the debt to about Rs. 85,000. This was followed by a period, 1932 to 1946, when by his efforts there was again a reduction in the debt. Then came the second paryayam at a time when the necessary commodities were controlled by the State and the price of food stuffs were very high. The Swamiji naturally was obliged to run into further debts.

At this juncture, the Board in exercise of the powers vested in it under S. 61 (a) of the earlier Act, required the Swami to appoint a

competent person as manager and to report the name of the person so appointed to the Board. Ultimately, one Sripathachar was appointed as agent under a power of attorney dated 24th December, 1948. The petitioner's complaint is that this action of the Board was instigated and goaded by one Mr. A. Lakshminarayana Rao, an advocate of Udipi who was anxious to obtain a controlling hand in the affairs of the Mutts. The agent, it is alleged, had his own way of management of the affairs of the Mutt without reference to the Swami and he even failed to submit the accounts to the Swami. Paragraph 11 of the affidavit gives particulars of the various charges of the Swamiji against his agent. Finally the Swami by registered notice dated 26th August 1950 terminated the management of the said agent and cancelled his power of attorney. He called upon the agent to submit the accounts and also to return the other documents in his possession and custody. On the 28th September, 1950 the agent sent a reply through his advocate Mr. A. Lakshminarayana Rao stating that the cancellation of the power of attorney was illegal as according to its terms, it could not be cancelled and he declined to hand over to the Swamiji the accounts and other documents. This was followed by a suit instituted by the Swami on 4-10-1950 O. S. No. 280 of 1950 in the Sub-Court, South Kanara for recovering possession of the accounts, documents and other movables.

It would appear however that a day prior to the institution of the suit on the 3rd October 1950, the agent perhaps anticipating the contemplated suit by the Swami, filed a petition before the Board under S. 18 of the earlier Act bringing to the notice of the Board the wrongful termination of his appointment and demanding a reply. On the succeeding day, 4th October 1950, the Board immediately issued a notice to the Swami proposing to enquire into the matter on the 24th October 1950 at 2 p.m. at Madras and requesting the Swami to appear either in person or by pleader. To this notice, the Swami filed a reply on 21st October 1950 inviting the attention of the Board to the fact of the institution of the suit which raised the same questions as before them and enclosing a copy of the plaint for the perusal of the Board. He complained also that on account of the absence of the accounts and the papers which were wrongfully withheld by the agent, he was not in a position to sufficiently answer the charges levelled against him by the agent in the petition. Without proceeding with that enquiry and without even waiting for the result of the suit, the Board 'suo motu' initiated proceedings under S. 62 of the earlier Act on the 6th November, 1950 for framing a scheme and for that end issued a notice to the petitioner to show cause why a scheme should not be framed setting out in the notice the reasons in support of the proposed action which were stated earlier in this judgment.

(7) The notice was served by affixture on the Swami and the enquiry into the matter of framing a scheme was posted by the Board at Madras on the 8th December 1950, on which date at the request of the counsel for the Swami it was adjourned to 21st December, 1950. On the 18th December, 1950 an application was filed on behalf of the Swami with a request to the Board to issue a direction to the agent to hand over the accounts and other documents in order to enable the Swami to file his objections. As the counsel for the Swami Mr. K. R. Karanth was ill, the matter was again adjourned to 10th January, 1951. The Swamiji was not ready with his objections even on the 10th as his advocate was still ill and a telegram was sent on the 9th requesting the Board to adjourn the matter further. This request was not granted & as no explanation was filed by the Swami, the enquiry was closed and orders reserved on the 10th.

Mr. Srinivasan an advocate of Madras filed on behalf of the Swami on 11th January 1951 a memo requesting the Board to re-open the matter which was declined. Thereafter, the Swami sent on the 13th January 1951 his written explanation to the Board which was admittedly received by the Board on the 15th. The notes paper shows that an order was passed directing the framing of a scheme by the Board which does not however bear any date. From the subsequent notice issued bearing date 24th January 1951, it may be assumed that the order was passed on that date. The notice issued thereafter to the Swamiji required him to state his objections for the proposed action of the Board. The order of the Board which was given as an annexure was attacked by the petitioner in these proceedings on the merits and also on the ground that it contravened and infringed and abridged the fundamental rights regarding religious liberty of individuals and denominations guaranateed by the Constitution. It was claimed that the Mutt belongs only to the Madhwa section of the Hindu community and particularly of Shivalli Brahmins.

(8) A counter affidavit was filed on behalf of the Board by its secretary traversing the material allegations and justifying the action of the Board on legal grounds and also on merits. A preliminary objection was also raised that the application was premature as the final orders settling the scheme were not passed and that in any event the petitioner had a remedy by way of suit after the scheme was framed and so this application should not be entertained.

(9) The Articles of the Constitution relied on by the petitioner as having been contravened by the impugned legislation are Arts. 14, 15, 19 (1) (f), 25, 26, 27 and 30. In the course of the arguments, the extreme contention that the Mutt was not a public mutt was for the first time raised. On the merits the order was attacked on the grounds:

1. that the Board acted with bias and this was founded on some allegations made in the affidavit supported by other affidavits against the President of the Board and one of the Commissioners who it was alleged were hand in glove with Mr. A. Lashminarayana Rao and Mr. Sripathachar when they visited Udipi on occasions;

2. that no mismanagement was established and indeed could not be established as the Swami was not in management for over 2 years but the management was exclusively with the agent;

3. that the grounds were vague and indefinite and that no reasonable opportunity was given to the petitioner to show cause;

4. that the order was perverse as it was solely based on the fact of removal of the manager Sripathachar without any enquiry into the charges levied against him by the Swamiji and even without waiting till the disposal of the suit in which the charges were bound to be considered;

5. that the order was perverse on various other grounds.

To these questions may be added the preliminary objection raised on behalf of the respondent that as there was another remedy open to the petitioner after the scheme was framed by way of suit, this Court should not interfere by issuing a writ of prohibition and that the application was also premature.

(10) It is not possible to determine whether any of the rights of the Mathadhipathi had been infringed, abridged or taken away without first ascertaining what those rights are. The material throwing light on the origin and the history and the functions of these Mutts in the Hindu polity is very meagre. The juristic relationship of the Mathadhipathi to the properties of the Mutt and its income has nowhere been precisely defined as the rights and duties of the Mathadhipathi and the succession to the headship is governed solely by usage and not by any code of legal principles. These rights, therefore, have to be deduced to a large extent from the judicial decisions by no means altogether reconcilable and the opinions of text writers.

(11) "Mutt" used as a transitive verb means literally "to dwell" or to inhabit. 'Mata' noun means hut, a small building inhabited by an ascetic or devotee, a monastery, a college.

"In its original and narrow sense, then, the term Mutt signified the residence of an ascetic or Sanniyasi or Paradesi."

See 'GIYANA SAMBANDA PANDARA v. KANDASAMI', 10 Mad 375 at p. 386. From very ancient times, the Sanniyasis had no fixed abode but were wandering from place to place receiving such lodgings and food as were provided by devotees. Even now to a large extent the same practice obtains except in cases where such sanniyasis are attached to a Mutt.

When Buddhism was in its ascendancy in India and when Budhistic monks became popular, Sri Jagadguru Adisankaracharya gave a new orientation and infused fresh blood into Hinduism and stemmed the tide of the rapid spread of Buddhism in India. He established the Adwaita or Vedantic system of philosophy with which his name is always associated. He was the first, so far as tradition goes, to establish Mutts for the propagation of his philosophy and the reclamation of Hinduism. Tradition has it that after conquering the rival faiths he established adwaita system of philosophy and founded four Mutts or seats of learning in the four corners of this vast sub-continent — Sringeri (Sharada Peeta) in Mysore in the South, with which, it is familiar knowledge, the name of that great and erudite scholar and philosopher Vidyaranyaswami is associated; Badrinath in the Himalayas in the North; Jagannath or modern Puri in the East and Dwarka in the Bombay Presidency in the West. In each of these Mutts as their heads, he installed his principal disciples and he himself assumed the headship of 'Sarvagna Peeta' or the central seat of knowledge at Kanchi, the modern Conjeevaram. This central peetam was first shifted to Tanjore and then to Kumbakonam from where it continues to function even the present day.

Following the lead of Sankara, the founder of Visishtadwaita, and others also founded Mutts with similar objects and for similar purposes. Nannuneri in the Tinnevelly District also known as Vanamamalai mutt and the Ahobila Mutt were founded, so goes the tradition, by the disciples of Sri Ramanujacharya. As adverted to already, the dwaita mutts at Udipi were founded by Sri Madvacharya. Ahobila Mutt was established for the spiritual instruction and benefit of the Vaishnava Brahmins of the Vadagalai sect. 'RANGACHARIAR v. YEGNA DIKSHITUR', 13 Mad 524, relates to this Mutt. Besides these, there are Saiva mutts of the Sudras and the Vira Saiva Mutts of the Lingayats. Of the Sudra mutts perhaps the Dharmapuram mutt is the largest.

(12) "The origin of these associations", to quote Muttusami Ayyar J. in 'GIYANA SAMMANDHA PANDARA v. KANDASAMI', 10 Mad 375 at p. 386,

"their constitution and development form part of the history of the establishment and spread of the Brahminical systems of religious doctrine among the Sudra communities in Southern India (referring to the Sudra Mutts). Originally the ascetic who renounced the world and devoted himself to religion, confined his attention to the study of theology, to imparting religious instruction to his disciples, and to complying with the ordinances prescribed for the guidance of his order."

In the well known case of 'VIDYAPURNA THIRTHASWAMI v. VIDHYANIDHI TIRTHA SWAMI', 27 Mad 435, Subramania Ayyar O. C. J. referring to these mutts described the object with which they were established as follows:

"Now there can be no doubt that institutions of the class under consideration were established as centres of theological learning and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. If any proof of this statement were necessary, that is furnished by the unquestionable connection which exists between some of the more important of this class of institutions and the leading exponents of the tenets of those creeds. As pointed out in Mr. Ghose's Hindu Law, page 680, no less than seven mutts, being among the most celebrated, owe their origin to the great Adwaita Philosopher Sankaracharya. Other mutts not less numerous or important following the tenets of the Visishtawaita system of Ramanujacharya are traceable to that teacher. The well-known eight muttts at Udipi, the centre of the Dwaita system of thought, are on all hands admitted to have been founded by Madhwacharya, the chief expounder of that system. The Sudra mutts of this Presidency, of which those at Dharmapuram and Tiruvaduthorai are the chief, represent what is known as the Saiva Sidhantam." (The reference to Seven mutts of Sankaracharya seems to be a mistake for five).

The learned Judge refers to the influence exercised by mutts as centres of learning in the next paragraph in the same page thus:

"The influence exercised by mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and well-known contributions made thereto by the famous Vidyaranya Swami of the Sringeri or Sarada Mutt, or under his auspices, are among the most conspicuous examples of this kind. There is scarcely a branch of learning considered by Hindus as important, to which Vidyaranya or the scholars whom he gathered round him, did not make valuable contributions, and it is to his

commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred books—the Rig Veda. Nor has the influence of the Mutts at Dharmapuram, Tiruvaduthurai, etc. on the Dravidian literature been inconsiderable."

To similar effect are the observations of Bashyam Ayyangar J. in his judgment in the same case. Referring to the mutts of Southern India, Ameer Ali J. says in 'VIDYA VARUTHI THIRTHA v. BALUSWAMI AYYAR', 44 Mad 831 at p. 840:

"In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian people under the religious rule of the Hindu system, colleges and monasteries under the names of mutt were founded under spiritual teachers of recognised sanctity."

(13) It is thus evident that the mutts are centres of theological learning especially for the study, practice and propagation of the cult of each system of philosophy and to train and equip a line of competent teachers whose duty is to go forth into the land bearing the torch of learning and spreading its light. They must have functioned & indeed in future must continue to function to fulfil the objects with which they were founded with foresight by the great teachers of the religion. If they had survived the onslaughts of other religions through centuries, it can only be due to their intrinsic merits and not to adventitious circumstances. It is the learning and piety of the head of the Mutt, the superior, which attracted disciples and induced even laymen to make munificent gifts of land and other properties placing them at the disposal of the Swami for the time being.

It is common knowledge that gifts are offered as padakanikas at the feet of the Swami. There are also permanent endowments of lands and villages made in ancient days by kings and Rajas without indicating the particular object for which such properties were endowed. It would perhaps be considered impudence on the part of the donor to impose any conditions or restrictions regarding the use of the income from the properties gifted to a personage whom he held in high religious esteem. The piety of the head to whom the gifts were made was a sufficient guarantee that the corpus and the income would not be frittered away for mundane purposes. These mutts, in short, are something like colleges established and founded for the study and teaching and for propagating the cult of the religion peculiar to the mutt.

(14) So much about the functions of these mutts in Hindu religion. The more difficult question for solution is the juristic relationship of the superior or the head of the Mutt to the property. The difficulty is enhanced when attempt is made to fit facts to notions borrowed from the English jurisprudence. Viewed from the juristic conception of a trust, it is difficult to infer that the Matathipahi is invariably a trustee of the properties. The properties might have been acquired under different circumstances for various purposes and unless the deed of endowment is forthcoming, it may not be possible to easily infer a trust. The succession, according to the invariable usage of these mutts, always devolves upon the disciple selected and nominated by the outgoing head or Matathipathi. It is not governed by the ordinary Hindu law relating to the properties belonging to a sanyasi as laid down by Mitakshara. The question was considered in a number of decisions of this Court and also by the Judicial Committee. These decisions may be examined to arrive at a conclusion on the question, as to the jural relationship of the Matathipathi to the properties and whether he is a trustee in the sense in which that term is understood in the Trust Act.

As Salmond points out in his book on Jurisprudence, 9th Edn., at p. 349:

"A trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust ownership; the latter is called the beneficiary, and his is beneficial ownership.....The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognizes the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large."

Though it is elementary knowledge, it is always useful to bear in mind the elements that go to constitute a trust. In 'SAMMANTHA PANDARA v. SELLAPPA CHETTI', 2 Mad 175, Muthusami Ayyar, J. considered that

"The property of the mattam does not descend to the disciples or elders in common; the preceptor the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own lifetime installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gaddi, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. 'It is in a certain sense trust property; it is devoted to the maintenance of the establishment but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution'." (The underlining (here in single quotation) is mine).

In the next case 'GIYANA SAMMANDHA PANDARA v. KANDASAMI', 10 Mad 375, the learned Judge observed:

"Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge & its endowment, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage."

According to his view therefore the property is held in trust the objects of the trust being the maintenance of the mutt, the support of the Head and his disciples and the performance of religious and other charities in connection with the Mutt. The learned Judge, however, added that the Matathipathi had a larger dominion over the property and was not even accountable for its management nor for the expenditure of the income, the only limitation being that he should not apply the income or the property for any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. It will be seen from this conception of the ownership that it is not strictly permissible to apply the notion of a trust to the fullest extent.

In 'VIDYAPURNA TIRTHA SWAMI v. VIDYANIDHI TIRTHA SWAMI', 27 Mad 435, the question received a critical examination by the two learned Judges, Subramania Ayyar and Bashyam Ayyangar JJ. According to their view the inalienability of the properties belonging to the Mutt flows from the fact that the property was given for the maintenance of charities, religious or otherwise, connected with the Mutt. The Swamiji of the Mutts were not mere employees or subordinates in the institution but heads thereof. Their duty was to promote learning and further the interests of the religion and they being ascetics are not prone to be affected by motives incidental to worldly life, requiring less restraint in dealing with property than ordinary men. On this reasoning the learned Judge concludes:

"It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the corpus it treated the individuals composing the line of succession as in the position of tenants for life."

He differs from some of the observations made by Muthuswami Ayyar J. in 'SAMMANDHA PANDARA v. SELLAPPA CHETTI', 2 Mad 175. The precise dual character of the heads of the institutions like the Mutts was compared to that of the temples by the learned Judge. In the case of temples undoubtedly the idol is the ideal person and juristic entity in whom the property is vested and the dharmakartha or the manager for the time being had no sort of benficial interest in the property which is entrusted to his care and management but he being undoubtedly in a fiduciary position his liability is strictly that of a trustee though he is not a trustee himself and he is not a trustee because the property does not vest in him. How does the position stand regarding the Mutts? The learned Judge deals with this question at page 442 and adverts to the fact that invariably in the Mutts there are idols connected with the worship, which is a secondary matter "the principal purpose" to quote the learned Judge,

"of such an institution being the maintenance in circumstances likely to command due respect and estimation of a line of competent religious teachers, who, as already shown, are given for the welfare of the foundation itself, a real and so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation."

The learned Judge goes on to observe:

"Having regard to these facts it is obvious that the correct view to be taken is that in the case of mutts the ideal person is the office of the spiritual teacher Acharya which, as it were, is incarnate in the person of each successive Swami who, for the time, is a real owner and not a mere trustee."

(15) In the same case, Bashyam Ayyangar J. expressed the definite opinion that the head of a Mutt as such is not a trustee in the sense in which that term is generally understood in the law of Trusts and that the principles regulating the appointment of new trustees are by analogy derived therefrom should not be invoked in determining the legal position of a Matathipathi with reference to his properties. He contrasts the position of a dharmakartha of a temple and the position of the head of a Mutt. At page 451 he pointed out that in the case of debutter property such as property belonging to devasthanams or temples which have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof, the management of such institutions is usually vested in one or more persons variously described as dharmakarthas, panchayats, uralans etc. but referred to in the Acts as trustees, managers or superintendents. He says:

"Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income. As already stated, the worshippers are beneficiaries only in a spiritual sense, and the endowments themselves are primarily intended for spiritual purposes, though indirectly and incidentally a good number of people derive material or pecuniary benefit therefrom as office holders, servants or objects of charity. In the decisions above referred to at length, the presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested. The question has not been suggested or considered, whether the community itself for whose spiritual benefit the institution was founded and endowed may not more appropriately be regarded as a corporate body forming the juristic person in whom the properties of the institution are vested and who act through one or more of the natural persons forming the corporate body, —these latter being the dharmakarthas or panchayats etc., charged with the execution of the trusts of the institution and possessing strictly limited powers of alienation of the endowments, as defined in the cases cited above. Though a fluctuating and uncertain body of men cannot claim a profit 'a prendre in alieno solo', nor be the grantee of any kind of real property (see 'GOODMAN v. MAYOR OF SALTASH', (1882) 7 AC 633, yet there is high authority for treating such a community as a corporation of juristic person in relation to religious foundations and endowments."

With reference to the heads of the Mutts he observes at p. 454:

"The position of the head of the mutt is thus not the same as or analogous to that of managers or dharmakarthas of devasthanams &

temples, but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or tasdik allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, i.e., the daily worship and the periodical ceremonies and festival — purposes defined and settled by usage, and custom and generally recorded in what is known as the dittam — and the dharmakarthas are mere trustees for the carrying out, or executing of such trusts. In the case of mutts, however, such defined and specific purposes immediately connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money offerings of its disciples and followers — which offerings as a rule are very considerable —is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law.....

> In legal contemplation, therefore, the head of a mutt as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. Over the corpus of the endowment, however, his power of disposition is very limited, as in the case of managers of temples and devasthanams. He cannot alienate or charge the corpus or the income beyond his own lifetime, so as to bind the mutt and his successors except for the purposes plainly necessary for the maintenance of the mutt."

(16) The conclusion of both the learned Judges therefore was that as regards mutt properties, i.e., the corpus the matathipathi has a life estate but over the income derived from various sources he has full power of disposition limited only to the objects of the institution. The corpus can be alienated only for purposes binding on the institution i.e., for necessity or benefit as in the case of dharmakarthas, managers of temples etc.

(17) There are three decisions which arose out of the same litigation & relate to the Tiruvannamalai Mutt. Two suits O. S. Nos. 1 and 2 of 1905 were instituted in the District Court, Madura with the consent of the Advocate General under S. 539, Civil P. C. corresponding to the present S. 92. The object of the suits was to have it declared that there was no lawful trustee for the Mutt. The object of filing the two suits was, some doubt was felt, whether the head of the Mutt was a trustee within the meaning of S. 92, C. P. C. Therefore in one of the suit a mere declaration was sought. In both the suits there was a common issue whether the first defendant, the de facto holder of the office was a mere trustee of the mutt or had a life estate in the Adhinam properties. Both the suits were dismissed by the District Judge on the authority of 'VIDYAPURNA TIRTHASWAMI v. VIDYANIDHI TIRTHA SWAMI' 27 Mad 435, holding that the Pandarasannadhi i.e., the head of the mutt was not a mere trustee and that therefore no suit lay under S. 539 of the Code.

There were appeals to the High Court which came up in the first instance before Munro and Abdur Rahim JJ. who referred the question: "Does the head of a mutt hold the properties constituting its endowment as a life tenant or as a trustee?" to a Full Bench as the learned Judges doubted the correctness of the decision in 'VIDYAPURNA TIRTHASWAMI v. VIDYANIDHI TIRTHASWAMI', 27 Mad 435, in view of the earlier decisions in 'SAMANTHA PANDARA v. SELLAPPA CHETTI', 2 Mad 175 and GIYANA SAMANDA PANDARA v. KANDASAMI', 10 Mad 375. The matter came up in 'KAILASAM PILLAI v. NATARAJA THAMBIRAN', 33 Mad 265, before a Full Bench consisting of Sir Ralph Sillery Benson O. C. J. Wallis & Sankaran Nair JJ. The question was fully examined by the learned Judges & the answer given by them was that it could not be predicated of the head of a mutt, as such, that he holds the mutt properties constituting its endowments either as a life tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well established usage and custom of the institution in respect thereto. The right of the head over the surplus income and his power to utilise it for the spiritual advancement of himself and his disciples or for the public was recognised.

Sankaran Nair J. observed at page 286:

> "His discretion in this matter is unfettered. He is not accountable to any one and he is not bound to utilize the surplus. He may leave it to accumulate. From the nature of the case he cannot be controlled by the Courts. In such cases there is no trust. Where the trust is clear the Courts will of course enforce it. But the embarrassment and difficulty that would be caused may be taken into consideration in deciding where there is a trust. Though the other members may not be entitled to demand that the surplus funds should be applied to any particular purpose, it may be that they have the power to check any expenditure for purposes entirely repugnant to the character of the institution, if it would diminish the fund out of which they have to be maintained and educated and the necessary expenses, payment of Government revenue etc., have to be incurred."

Of course, the learned Judges also recognised that lands held by the mutt could not be alienated except for necessary & binding purposes & that is for the reason not that it is trust property but that the mutt is a permanent institution the head of which for the time being is bound to pass it on to his successor without burdening it except for necessaries. The matathipathi undoubtedly is under a legal obligation to maintain the mutt, to support the disciples and to perform the indispensable services from and out of the income in his hands. In view of the answer given by the Full Bench, when the case went back to the Division Bench, the decision of the learned District Judge was reversed & the suits were remanded for ascertaining whether there was any specific evidence to establish that with reference to any particular property,

there was a trust created in the manner recognised by law. After remand, the matter was considered by the subordinate Judge to whom it was transferred and he recorded a finding that there was no evidence to show that the Pandarasannadhi was a trustee and he again dismissed the suits.

The matter came up again to the High Court and the decision is reported as 'KAILASAM PILLAI v. NATARAJA TAMBIRAN' 32 Mad L J 271. By this time, the Privy Council judgment in 'RAM PRAKASH DAS v. ANAND DAS', 43 Cal 707 (P C), was pronounced in which there were observations to the effect that the position of a mahant was that of a trustee. Attempt was made therefore to re-open the decision of the Full Bench and to canvass its correctness. But this attempt failed as the Division Bench refused to re-open the question rightly pointing out that the remedy of the aggrieved parties was by way of an appeal against the previous judgment to the Judicial Committee. The correctness of the finding of fact that there was no evidence of a trust, however, was not canvassed before the Division Bench. The Division Bench considered the other questions arising in the appeal regarding the validity of the appointment of the person in possession which is not material for this discussion. This decision was taken in appeal to the Judicial Committee in 'NATARAJA TAMBIRAN v. KAILSAM PILLAI', 44 Mad 283 (P C). Before the Judicial Committee no attempt seems to have been made to challenge the correctness of the decision in 'KAILASAM PILLAI v. NATARAJA TAMBIRAN', 33 Mad 265, and the finding that there was no evidence to show that the head of a Mutt was a trustee of the Mutt or its properties was accepted as correct and on that basis the case proceeded, and the only questions which their Lordships of the Privy Council were called upon to consider as necessary for the decision of the case was the question relating to the validity of the appointment of the Pandarasannadhi.

In the same volume in 'VIDYA VARUTHI THIRTHA v. BALUSAMI AYYAR', 44 Mad 831 (PC), there is another decision of the Privy Council relating to a Mutt situate in the Mysore State but which owned property in this presidency. The point that arose for decision no doubt was one of limitation in a suit to recover properties alienated by the previous head of a Mutt and the question debated was whether or not the head of the Mutt was a trustee within the meaning of Art. 134, Sch. I of the Limitation Act. In considering this point Mr. Ameer Ali reviewed the whole question in the light of the law applicable to Hindu and Muhammadan endowments and also considered the effect of the earlier decision of the Board in 'RAM PARKASH DAS v. ANAND DAS', 43 Cal 707 (PC).

This decision is important as a considered pronouncement of the Privy Council on the question now under consideration. The observations of the Judicial Committee in 'GREEDHAREE DOSS v. NUNDOKISHORE DOSS', 11 Moo Ind App 405 (PC), that the

"only law as to these Mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony,"

has again been reiterated at page 838. The word 'trustee' in the decision in 'RAM PARKASH DAS v. ANAND DASS', 43 Cal 707 (PC), it was explained, was intended to be used only in a general sense as a convenient and compendious expression to convey the general obligations. It was not intended by that expression to define the term or to hold that the word in its specific sense is applicable to the laws and usages in India. The decisions of this Court in 'VIDYAPURNA TIRTHASWAMI v. VIDYANIDHI TIRTHASWAMI', 27 Mad 435, and of the Full Bench in 'KAILASAM PILLAI v. NATARAJA TAMBIRAN', 33 Mad 265, were referred to in the course of the judgment without any disapproval, of the view taken by the Full Bench. In the case of temples, "the image or the deity of the Hindu pantheon", observed Mr. Ameer Ali

> "is, as has been aptly called, a 'juristic entity', vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity and gifts are made to them 'eo nomine.....When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligation and duties resting on him, he is answerable as a trustee, in the general sense for maladministration."

After a review of the decisions including 'VIDYAPURNA TIRTHASWAMI v. VIDYANIDHI TIRTHASWAMI', 27 Mad 435 and 'KAILASAM PILLAI v. NATARAJA TAMBIBIRAN', 35 Mad 265, the conclusion is stated at page 847 as follows:

> "From the above review of the general law relating to Hindu and Muhammadan pious institutions it would prima facie follow that an alienation by a manager or superior by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term."

Later on it was added that the expression

> "'Conveyed in trust' is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution."

It was therefore held that the head of a mutt was not a trustee within the meaning of Article 134. 'SRINIVAS CHARIAR T. P. v. C. N. EVALAPPA MUDALIAR', 45 Mad 565 (PC), drew a distinction between the position of a dharmakartha and that of a shebait of a religious institution. At p. 581 it is stated:

> "The position of a dharmakartha is not that of a shebait of a religious institution, or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character."

(18) In the very learned judgments delivered in 'VIDYAPURNA TIRTHASWAMI v. VIDYANIDHI THIRTHASWAMI', 27 Mad 435, the distinction between those functionaries is explained. But a dharmakartha is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

(19) To these weighty pronouncements may be added the latest decision of the Supreme Court in 'ANGURBALA v. DEBABRATE', (1951) SCJ 394, where it had to consider the question whether the Hindu Women's Rights to Property Act XVIII of 1937 as amended by Act XI of 1938, was applicable to the devolution of shebaitship. The Act would apply if the shebaitship is property. The answer given was that it was property within the meaning of that Act. Mukerjea J. at page 398 summarised the position of a shebait as follows:

"The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. It is settled by the pronouncement of the Judicial Committee in 'VIDYA VARUTHI v. BALUSWAMI', 44 Mad 831, that the relation of a shebait in regard to debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of cestui que trust. In a Hindu religious endowment on the other hand the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the Shebait or Mahant is a mere manager. But though a Shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the shebaitship as mere office. The shebait has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the Shebait has a share in the usufruct of the debutter property which depends upon the terms of the grant or upon custom or usage. Even where no emoluments are attached to the office of the Shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of shebaiti both the elements of office and property, of duties and personal interest are mixed up and blended together; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it the legal incidents of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in 'MONOHAR MUKERJEA v. BHUPENDRA NATH', 60 Cal 452, and this decision of the Full Bench was approved of by the Judicial Committee in 'GANESH CHUNDER v. LAL BEHARY', 71 Mad LJ 740: 63 Ind App 448 (PC), and again in 'BHABATARINI v. ASHALATA', (1943) 2 Mad LJ 70: (70 Ind App 57 P C). The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasize the proprietary element in the shebaiti right and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu law from an early date."

(20) The view taken in 'BALUSWAMI IYER v. VENKITASWAMI NAICKEN', 32 Mad L J 24, following the decision of the Privy Council in 'RAM PARKASH DAS v. ANAND DAS', 43 Cal 707, does not seem to be correct. It is this decision which went on appeal to the Privy Council in 'VIDYA VARUTHI v. BALUSWAMI AYYAR', 44 Mad 831, and was reversed by the Privy Council. It is therefore too late in the day to contend, as was done on behalf of the respondent, that this decision is still good law and it is unnecessary to refer to the other decisions in view of the weighty pronouncements of the Judicial Committee and of the Supreme Court.

(21) From this review of the authorities, it may be taken as established that the head of the mutt is not a trustee in the sense in which that word is used in the law of Trusts and his position cannot be brought under any legal label known to English jurisprudence. He is not even a life tenant in respect of the properties permanently vested in the mutt or the religious institution. He has a right to the income but he has no power of disposition over the corpus unless necessity or benefit is established. He has large powers over the surplus of the income after meeting the demands of the institution such as its maintenance, the maintenance of the disciples and the performance of the daily worship etc. He has the discretion to use the surplus for spiritual objects and that discretion is unfettered so long as the surplus is not diverted to any immoral or wicked purposes. He has the liberty to accumulate the income. The padakanikas are at his absolute disposal. If, however, it is established that any specific property has been vested as a trustee in the head of the mutt, to that extent and in respect of that property, he becomes a trustee. In other respects he is not liable to account for the income much less to the padakanikas.

He is a person with manifold rights and duties. He is the spiritual head; he is the teacher and the guru. He has to carry on the worship of the deity installed in the mutt, maintain the disciples and propagate the views of the religion of the institution. His life is one of discipline and non-attachment to worldly things and he is expected to meditate and study and further the creed of the mutt. Such institutions are autonomous bodies governed and controlled by the directions and orders of the head of the Mutt. He is treated almost as a representative of the Godhead by his disciples and the followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. These are some of the salient rights and duties of a Mathadhipathi. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt, the management of the properties may bear a secular aspect but the secular and the religious aspects cannot be dissociated as they are inextricably mixed up when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers.

(22) Before dealing with the various grounds on which the legislation is challenged, it may

be useful to briefly review the legislation by which the Government exercised control over Hindu religious and charitable endowments, & to refer to the relevant provisions of the earlier and the new Acts which have been attacked. In England, from earliest times, the King claimed the prerogative right of exclusive jurisdiction over all charities which was exercised through various channels. It is now being exercised through visitors and by the Charity Commissioners under statutory authority. Before Madras Regulation VII of 1817 was enacted, there is evidence that the British Government claimed the power of superintendence & management of the property and affairs of the temples which was exercised through the agency of the Collectors.

In 1810 in the Bengal Presidency and in 1817 in the Madras Presidency, the Government enacted regulations by which they assumed control of all public endowments, Hindu and Muhammadan, which were placed under the superintendence of the Board of Revenue. Madras Regulation VII of 1817 related to endowments of land and money granted in respect of mosques, Hindu temples or colleges or other pious and beneficial purposes. Secular charities and non-religious charities such as choultries and chatrams were also included in it. By S. 2 of that Regulation, the superintendence over the endowments was vested in the Board of Revenue. Mutts were not specifically included in it. The Board of Revenue was authorised to appoint local agents, the Collector of the District being ex officio one of such agents. The main object of the Regulation was to see that the income from the endowments was properly applied to the purposes for which they were established. The local agents had to keep watch over the endowments in their charge and to report to the Board. This system of management continued till about 1842 when owing to the agitation set on foot by Christian missionaries that a Christian Government should not administer Hindu and Muhammadan endowments, the supervision and control were given up by the Board of Revenue and the endowments were handed over to the respective trustees. As a result of the relinquishment of control it was experienced by the Government that there was mismanagement of the trusts which resulted in embezzlement and misappropriation of funds belonging to the various institutions.

The India Government took up the matter as result of which Act XX of 1863, known as the Religious Endowments Act of 1863, was enacted. It applied to Hindu as well as Muhammadan endowments and authorised the constitution of committees in every division or District which has to take the place of the local agents provided under Regulation VII of 1817 and the Committee was authorised to exercise the powers of the Board of Revenue under that Regulation. Provision was made to appoint a successor to the office of trustee, manager or superintendent whenever there was a vacancy & also to get a manager appointed by application to the Civil Court in cases where succession to the trusteeship was in dispute until such succession was established in a Court of law. Under S. 14 a right of suit was given to persons interested in any mosque, temple or religious establishment to sue the trustee, manager or superintendent for any misfeasance, breach of trust or neglect of duty. Even after a few years after this Act came into force, it was felt in Madras that the control exercised by the Committees was not adequate.

In 1877 when the Civil P. C. was enacted in respect of trusts created for public charitable purposes, a right of suit analogous to the right of suit under Section 92 was conferred under Section 539 which was later enlarged to suits in respect of trusts for public charitable and religious purposes by the Code of Civil Procedure, 1882. In 1920 the Central Government enacted the Charitable and Religious Trusts Act of 1920, Act XIV of 1920, with a view to provide more effectual control over the administration of charitable and religious trusts. The provisions of this Act are undoubtedly wider in scope as under the Act power was conferred in the case of trusts for charitable or religious purposes to apply to the District Court to furnish information and to get the accounts of the trusts audited. The trustee was empowered by Section 7 of the Act to apply for directions to the Court whenever necessary.

The Civil Procedure Code of 1908 enacted S. 92 which replaced the earlier section 539. It enlarged the scope of the suit in respect of trusts created for public purposes of a charitable or religious nature. Under this section in case of breach of trust two or more persons having interest in the trust with the previous sanction of the Advocate-General or Collector of the District were empowered to institute a suit in a Court having jurisdiction for removal of a trustee and for appointment of a new trustee and also for directions regarding accounts and enquiries. The Court is also empowered in such a suit to settle a scheme for the administration of the trusts. This section was taken advantage of by many of the worshippers of temples, and representative suits under O. 1, R. 8, C. P. C. were also instituted. The administration of a large number of temples and the conduct of the trustees was made the subject-matter of judicial enquiry in suits instituted in various Courts.

(23) The British Government throughout followed a policy of neutrality in matters of religion ever since the date of the Proclamation of 1858 by Queen Victoria. When Diarchy came in, the question of undertaking legislation for the administration of religious endowments received serious attention at the hands of the Madras Government. Earlier no doubt several attempts were made to introduce bills for the better administration of the endowments drafted by very eminent people such as Muthusami Ayyar, Chenchal Rao, Anandacharlu, and others. In 1925 the Madras Hindu Religious Endowments Act, 1923, (Act I of 1925) was passed by the local Legislature with the object of providing for the better governance and administration of certain religious endowments. The Act divided temples into what are known as Excepted and Non-excepted temples. It defined "mutt" as meaning

> "an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples & succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution."

A Board of Commissioners was constituted under the Act vested with powers enumerated

therein. Temple Committees for local areas were constituted. Section 34 made it obligatory on the part of every mutt and temple to maintain a register showing particulars regarding the past and present trustees, the usages of the institution, the particulars of the endowments, the scheme of administration and the dittam or scale of expenditure and so on. With regard to non-excepted temples under Chapter V, provision was made for fixing the dittam or the scale of expenditure for the submission of the budget and for settling schemes which could be modified later on sufficient cause shown or even cancelled by the Court on the application of the Board. Mutts and excepted temples, however, received a different treatment. The Act required trustees of mutts and excepted temples to submit a budget and an annual statement of actual receipts and disbursements and there was also a power to settle a scheme for their administration. The only power conferred upon the Board in settling scheme under the Act was to associate if necessary, any person or constitute any separate body for participating or assisting in the administration of such endowments along with the trustee or trustees. There were other provisions relating to finance including a power to levy contributions from mutts and temples not exceeding 1½ per cent. of its income as may be determined by the Board. The operation of Ss. 92 and 93 and Order I, Rule 8, C. P. C. was excluded in respect of suits claiming any of the reliefs under Section 69 (1) of the Act i.e., for appointing or removing a trustee of a mutt or excepted temple, vesting any property in a trustee and so on. The suit under S. 69 could be instituted by the Board or Committee having jurisdiction over the Mutt or temple or any person having interest with the consent of the Board. Power was also conferred by S. 74 to get possession of the property of the trust through Court.

Immediately after the Act came into force, its validity was challenged in suits instituted for the purpose on the ground that the Act was not validly passed. For this reason, the legislature enacted the Madras Hindu Religious Endowments Act, 1926, Act II of 1927, repealing Act I of 1925. Some alterations were also made in the provisions of the Act which was repealed and the same were re-enacted. In the case of Mutts and excepted temples, there was no provision for fixing the dittam and the trustee of a Mutt or excepted temple was required only to submit a budget and also a statement of the actual receipts and disbursements of the previous year. The provisions relating to the framing of a scheme were retained. There was no provision to remove a hereditary trustee of a Math or excepted temple except by a suit under Section 73 of the Act. The other provisions of the Act were continued though the numbering of the sections was altered.

This Act was amended from time to time. It is unnecessary to refer to the changes introduced later. Suffice it to say that the Act was amended by 1946 by as many as ten Acts I of 1928, V of 1929, IV of 1930, XI of 1931, XI of 1934, XII of 1935, XX of 1938, XXII of 1939, V of 1944 and X of 1946. A radical change was introduced, however, by Act XII of 1935. The Government was not satisfied with the powers of the Board then existing and they clothed the Board with an important and drastic power by introducing a new Chapter, Ch. VI-A, by which jurisdiction was given to the Board to notify a temple for reasons to be given by it. The trustee was to be given an opportunity to show cause against the application of the notification procedure and if the objection was overruled after enquiry, the Board was to issue a notification in the Fort St. George Gazette to the effect that it had decided to apply the provisions of the new Chapter. A novel feature of this chapter is that an appeal against the decision of the Board is provided to the Board itself consisting of the President and all the other Commissioners of the Board sitting together. If no appeal is prefererd or if it was preferred and was dismissed, then the local Government would issue a notification in the Fort St. George Gazette declaring the temple or endowment to be subject to the provisions of this Act whereupon the Board would be authorised to appoint a salaried executive officer professing the Hindu religion to take over the administration of the temple or the endowments. There is no right of suit and the order of the Government is final. This procedure, it must be noticed, did not apply to mutts under Act XII of 1935.

Act X of 1946 introduced several changes. This Act abolished the distinction between excepted and non-excepted temples and extended the provisions of the Act to religious endowments in the Presidency Town also. The definition of "religious endowments" has been amplified so as to give power to the Board over the property or endowments of a defunct temple. The powers of the Board have also been enlarged to a large extent. The provisions of Sections 38 and 39 of the Act regarding the preparation of registers of endowments and the annual verification of the register have been made applicable to Mutts also. In settling a scheme for temples under Section 57 of the Act the Board was empowered to remove an existing trustee or trustees whether hereditary or non-hereditary and the notification procedure was made applicable to temples governed by a scheme previously framed by the Board or settled by Court. So far as Mutts are concerned, the power of the Board was enlarged in various respects, the most important of which is the power to appoint a paid executive officer to take charge of the administration of a Mutt and its endowments. The surplus funds could also be diverted by direction of the Board in the scheme in accordance with the provisions of S. 67. The power of removal of an executive officer appointed under the scheme is vested exclusively in the Board.

Under new Section 61 substituted by Act X of 1946, in the case of Mutts it was required that the budget of every mutt should make adequate provision for the dittam or scale of expenditure for the time being in force and the other customary expenses of the mutt and for the due discharge of all liabilities in respect of the debts binding on the math. The budget may also provide for the application of the surplus for such religious or charitable purposes not inconsistent with the objects of the mutt.

Under Section 61-A it was open to the Board to require the trustee of a mutt to appoint a competent person as manager for the management of the secular affairs of the math. The contribution payable by a mutt was 3 per cent. of the income which was fixed by the earlier Act of 1944. The power to decide the amount of the income was vested solely in the Board. There were also provisions for the audit of accounts and for levying an audit fee. Sec-

tion 64-A made the provisions of Ss. 59 and 60 of the Act applicable also to mutts. Section 59 requires that the trustee should furnish accounts to the Board and Section 60 provides for the inspection by the President of the Board or any commissioner or Assistant Commissioner of the movable & immovable properties belonging to the institution & all records, correspondence etc. S. 79A provides that the Board should decide any matters mentioned in S. 79 and such power shall be exercised by a Committee of not less than two Commissioners including the President and finality is given to the decision of the Board. The matters referred to in S. 79 relate to the established usage of a mutt or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such mutt or temple. The jurisdiction to decide whether an institution is a mutt or temple and whether the trustee is a hereditary trustee as defined in the Act or not was exclusively vested in the Board and the jurisdiction of the Court to take cognizance of any such dispute in the exercise of its original jurisdiction is taken away. Appeal however is provided against the decision of the Board by way of application to the Court to modify or set aside such decision and the decision of the Court is made appealable.

(24) Drastic changes of a fundamental character in the law were introduced by Act XIX of 1951 which, as its preamble shows, is intended to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions & Endowments in the State of Madras. The ambit and scope of the Act are extended by making it applicable to charitable institutions as well and the endowments attached to them. Power is conferred by Section 2 of the Act to extend the provisions of the Act to religious institutions and endowments of Jains and the Act is to apply to charitable endowments only if a notification extending the provisions is issued by the Government.

The system of controlling and supervising the endowments through a statutory body hitherto known as the Madras Hindu Religious Endowments Board has been completely abolished & the administration of the religious and charitable institutions and endowments has been vested in a department of the Government, the Commissioner being the head thereof. Under him there are Deputy Commissioners and Assistant Commissioners and Area Committees. The State is divided into areas, at present three areas, and each area is in charge of a Deputy Commissioner to whom the powers of the Commissioner, which are permissible under the Act, may be delegated. The State is also divided into divisions and each division will be in charge of an Assistant Commissioner. Below the Assistant Commissioners are the Area Committees for all temples situate in an Assistant Commissioner's division or a part thereof; but in the case of temples falling within S. 38, the Area Committees have no jurisdiction i.e., religious institutions whose annual income as calculated for the purposes of the levy of contribution under S. 76 is not less than Rs. 20,000.

Power is given to the Commissioner under Section 18 to call for and examine the records of Commissioner, Assistant Commissioner, and Area Committee or any trustee not being the trustee of a mutt or of a specific endowment attached to a mutt, in respect of any proceeding under the Act not being a proceeding in respect of which a suit or an appeal to a Court is provided by this Act to satisfy himself as to the regularity, correctness or propriety of any decision or order. Some of the powers of the Commissioner, Deputy Commissioner and Assistant Commissioner are enumerated in Chapter XIX. Section 6 contains the definitions and a mutt is defined as a

> "Hindu religious institution with properties attached thereto and presided over by a person whose duty it is to engage himself in imparting religious instruction or rendering spiritual service to a body of disciples or who exercises or claims to exercise spiritual headship over such a body and includes places of religious worship or instruction which are appurtenant to the institution."

There is an explanation which is not relevant. A religious institution is defined as meaning a mutt, temple or specific endowment and a "religious endowment" means all property belonging to or given or endowed for the support of mutts or temples, or given or endowed for the performance of any charity or service of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution.

A "trustee" is defined as any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee. A perusal of the definition would disclose that the word 'trustee' is used in the Act in a sense totally different from the narrower meaning attached to it in the law of Trusts. It is intended to bring within its purview the 'Dharmakartha' or the manager of a temple and even 'Matathipathis' in whom the administration of religious institutions is vested. Even if a person is liable to answer in the same manner and to the same extent as if he were a trustee, such a person also would be a trustee within the meaning of the Act.

Chapter III contains general provisions applicable to all religious institutions. Section 20 vests the administration of all religious endowments and the general superintendence & control in the Commissioner. The power of superintendence includes within its ambit the power to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded or exist. Section 21 gives the right & authority to a Commissioner, Deputy Commissioner and Assistant Commissioner and such other officers as may be authorized by the Commissioner or the Area Committee in that behalf, the power to enter the premises of any religious institution or any place of worship for the purpose of exercising any power conferred or discharging any duty imposed by or under this Act. If resistance to the exercise of such power is offered in discharge of such duty, police help can be obtained by an application to a Magistrate having jurisdiction. The only restriction on this power is a person who is not a Hindu & is not entitled even if he be an officer authorized under the Act, to exercise this power. As would be seen, the power is very wide in its scope and does

not take into account the religious sentiments and sanctity attached by a religious denomination to a particular institution and irrespective of the fact whether the person exercising the power, though a Hindu, belongs to the particular sect or caste, he is authorized to enter the institution including the sanctum sanctorum.

Section 23 makes it obligatory on the trustee of a religious institution to obey all lawful orders issued under the provisions of this Act by the Govt., the Commr., the Dy. Commr., the Area Committee or the Assistant Commissioner. Section 24 lays down the standard of care required by the trustee in exercising his powers. Section 25 deals with the preparation of register for all institutions and the particulars which they should contain. The Commissioner is authorised to direct the trustee to make such alterations and omissions or additions in the register as he may think fit. Section 26 deals with the annual verification of the register. Section 27 lays a duty on the trustee to furnish accounts, returns, reports or other information relating to the administration of the institution and its funds etc. Section 28 authorises the Commissioner or any Officer or other person deputed by the Commissioner in this behalf to inspect all movable and immovable property belonging to the institution and all records, correspondence etc. Section 31 deals with the surplus funds and empowers the trustee with the previous sanction in writing of the Deputy Commissioner to appropriate such surplus or any portion thereof for all or any of the purposes specified in S. 59 (1) of the Act. Sections 32 to 51 do not apply to Mutts or specific endowments attached to Mutts.

Chapter IV which begins with S. 52 deals with Mutts. Section 52 provides for the removal of a trustee of a Mutt on the grounds specified therein by a suit instituted by the Commissioner or any two or more persons having interest in the Mutt and having obtained in writing the consent of the Commissioner. If succession to the headship is in dispute or when there is a vacancy which cannot be filled up immediately or when the trustee is a minor, the Board has to make interim arrangements for the administration after taking into consideration the claims of the disciples of the Mutt if any. S. 54 relates to dittams. The trustee is required to submit to the Commissioner proposals for fixing the dittam and the amounts to be allotted to the various objects connected with the institution. The proposals have to be published and after receiving suggestions, if any, the proposals will be scrutinised by the Commissioner and after necessary enquiry from the trustee, it would be open to the Commissioner if he thinks that a modification is required, to submit the case to the Government who shall pass orders thereon and the orders of the Government are final. Section 55 recognises the right of the trustee to spend at his discretion for purposes connected with the Mutt, padakanikas; but he is required to keep regular accounts of all receipts and disbursements regarding such pathakanikas.

Under S. 56 the Commissioner is empowered to call upon the trustee of a Mutt to appoint a manager for the administration of its secular affairs and to report the name of the Commissioner. In default of such appointment it is open to the Commissioner to appoint a person himself. The manager so appointed is of course a subordinate to the trustee of the Mutt and shall be responsible along with the trustee for the due submission to the Commissioner of the registers, accounts and budget of the Mutt and also for the performance of the statutory duties imposed upon the trustee by this Act.

Chapter V deals with inquiries into various questions connected with the institutions. Section 58 empowers the Deputy Commissioner to frame schemes for temples and Mutts as well. In the case of mutts, sub-s. (3) to S. 58 empowers the Deputy Commissioner, while framing a scheme, to appoint a paid executive officer who shall of course be a person professing the Hindu religion but need not necessarily belong to the same denomination. He is also authorised to determine what the properties of the religious institution are. The order of the Deputy Commissioner framing a scheme is appealable under S. 61 to the Commissioner. The Commissioner's order in appeal may be questioned in a suit instituted under S. 62. Section 59 provides for the division of the trust funds or funds of the religious institutions under the cypres doctrine. Section 62 provides for suits enabling a party aggrieved by orders passed by the Commissioner under S. 61 (1) and (2), 57, 58, 60 or under S. 57, S. 58 or S. 60 read with sub-s. (1) (a), (2) or (4) (a) of S. 19 or with sub-s. (3) or (4) of S. 80, within 90 days of the receipt of such order. A further appeal lay to the High Court.

Chapter VI deals with notified religious institutions and the Act, for the first time, includes within the ambit of that procedure, Mutts also. The power can be exercised notwithstanding the fact that the religious institution is governed by a scheme settled under the Act and the power is exercisable by the Commissioner. If the Commissioner decides after hearing objections following the procedure laid down in S. 63 that the institution should be notified, the matter is reported to the Government and it publishes a notification in the Fort St. George Gazette declaring the religious institution to be subject to the provisions of this chapter. Such notification remains in force for a period of five years. The effect of notifying a religious institution is to take over the administration and vest it in an executive officer appointed by the Commissioner. The Commissioner is to decide the power and the duties which the executive officer should exercise but subject to the proviso that only such power and duties as appertain to the administration of the endowments of the religious institution shall be assigned to the executive officer.

Chapter VII deals with budgets, accounts and audit. Budget is compulsory in the case of religious institutions and the trustee is enjoined to keep regular accounts which should be got audited by an auditor, the details of which need not be referred.

Chapter VIII deals with finance. Section 76 vests in the Government the power to levy an annual contribution not exceeding 5 per cent. of its income. It is stated that this is levied for services rendered by the Government and their officers to religious institutions and in the case of certain institutions getting a particular income there is also a further charge of 1½ per cent. for audit the contribution being 5 per cent. What was originally 3 per cent. has now been increased to 5 per cent.

Chapter IX deals with Tirumalai Tirupathi Devasthanams and Chapter X contains miscel-

laneous provisions. Section 92 states that nothing contained in this Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by cls. (a), (b) and (c) of Art. 26 of the Constitution and suits are barred except to the extent allowed by the Act intended to question the administration of a religious institution. Section 99 vests revisional jurisdiction in the Government to call for records and examine them to satisfy themselves as to the correctness, legality or propriety of any decision or order passed by any of the authorities. Section 100 contains the rule making power. Chapter XI deals with transitional provisions. Any reference to the Board or its President should be read as referring to the corresponding authority under the Act and the Hindu Religious Endowments Act of 1926 was repealed. Certain rules made under that Act are validated and continued in force. These are, in short, the provisions having particular reference to mutts.

(25) It is convenient at this stage to deal with two preliminary questions that have been raised in the arguments. Mr. K. Bhashyam, learned advocate for the petitioner, argued that the mutt in question is not really a public religious institution within the meaning of S. 1 (2) of the Act, and that therefore the Act cannot be applied. He emphasized the fact that Shirur mutt exists exclusively for the benefit of Shivalli Brahmins and every member of the public is not entitled as of right to enter into the mutt or to partake either in the religious instruction or in the worship carried on by the head of the mutt. Even among the members of the Shivalli Brahmin community, it is not all persons that are entitled to be taken into the inner fold of disciples. The choice of a person to be initiated to be made a disciple rests entirely in the discretion of the head, the Swami and no person has a right to insist that he is entitled to get his initiation from the Swami. It is an autonomous body existing for the spiritual benefit of the followers of the mutt. It is therefore claimed that it is solely and exclusively a private institution, something analogous to a college run under private management and therefore cannot be treated as a public religious institution. There is no doubt considerable force in this argument; but we are unable to entertain that objection at this stage as it was not raised before the Board and not even in the pleadings in this petition. The question whether an institution is a public institution or a private one has necessarily to be decided on evidence applying the tests recognised and established by decisions to distinguish a public institution from a private one. It is a well-known fact that the extent and nature of the rights and duties and every matter relating to a mutt is dependent exclusively upon established usage. If such usage had been established by evidence that the public or a section thereof have no right to enter into the mutt and to claim its benefits, it would have been a different matter. The objection, therefore, taken only in the course of the arguments cannot now be entertained.

(26) Mr. Seshachalapathi, learned counsel for the Endowments Board, raised the preliminary objection that we should not issue a writ of prohibition as the petitioner has his ultimate remedy by way of suit if a scheme were to be framed by the proper authorities under the new Act and that the application is therefore premature. It must be remembered that we are dealing with a writ of prohibition and not certiorari. A writ of prohibition lies to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law. It also lies if a provision of a statute is contravened by the tribunal or even if any principles of law are contravened. In deciding the question whether a writ of prohibition should issue or not, the existence of an alternative remedy is, in our opinion, an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law. If the tribunal is permitted to exercise that jurisdiction which is objected to, if it exercises it wrongly, the mischief would be done before the alternative remedy is availed of. It is unnecessary to insist upon a party complaining that he should first suffer and submit himself to the jurisdiction which is being wrongly exercised or is wrongly exceeded and then take advantage of the alternative remedy. In Halsbury, Vol. IX, page 822 (Hailsham edition), the position is thus stated:

> "The Court, in deciding, whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal lies against such absence or excess. Similarly the fact that an appeal on the merits of the case has already failed, or that the party applying for prohibition has himself initiated the proceedings in the inferior Court, is not material to the decision of the Court to grant or to refuse the writ."

Decisions in England, as is evident from this passage, have gone even to the length of helping a person aggrieved notwithstanding the fact that he was the very person who first initiated the proceedings and invoked the jurisdiction of the inferior Court. The objection raised by Mr. Seshachalapathi, in our opinion, has no force and must be rejected as it is not supported by any authority. The analogy of the position in the case of a writ of certiorari does not apply here.

(27) We may now examine the Articles of the Constitution which have been relied on as having been contravened by the impugned legislation. The power of the legislature of the State of Madras to enact the law now challenged is conferred by the Constitution by Articles 245 and 246 and item 28 of the concurrent list, List III of the seventh schedule. Article 245 is made expressly subject to the provisions of the Constitution and Art. 246 (2) enables a State Legislature specified in Part A to enact laws with respect to any matters enumerated in List III of the Seventh Schedule. Item 28 of that list is

> "Charities and charitable institutions, charitable and religious endowments and religious institutions."

In the Government of India Act, 1935, Item 34 of List II was "charities and charitable institutions, charitable and religious endowments". As religious institutions were not specifically mentioned in that item, a question was raised in 'MANIKKASUNDARA BHATTAR v. R. S. NAYUDU', (1946) FCR 67, that the Madras Temple Entry (Authorisation and Indemnity)

Act XXII (22) of 1939 was ultra vires. The contention, however, was overruled by the Federal Court. In order to obviate such difficulties in future, in the present Constitution, Item 28 expressly includes religious institutions. Power therefore under the present Constitution to enact laws with respect to matters enumerated in Item 28 of List III is conferred upon the State legislature but subject however to the provisions of the Constitution. The power of the State Legislature, it cannot be now contended, is part of any prerogative power or inherent right of the State to control and superintend religious institutions. It is an express power conferred by the Constitution upon the State legislature. What the limits to that power are is a matter to be determined by reference to the other Articles of the Constitution.

We are adverting to this aspect for the reason, that one of the counsel who appeared for the Commissioner, attempted to rest the power also on the prerogative right exercised by the British Government before India became independent and claimed to have been inherited by the State i.e., the power to legislate for the better administration and superintendence of religious and charitable endowments and institutions. The Constitution proceeds on the assumption that sovereignty vested in the people of India and they, through their accredited representatives in the Constituent Assembly, gave themselves the Constitution. The State legislature, therefore, has no other independent sovereign right to legislate apart from what is contained within the four corners of the Constitution. Therefore, what the British Government did earlier may not be very relevant except to consider the extent to which the temples and mutts allowed themselves to be subjected to extraneous control and supervision when religious liberty was not guaranteed by any written constitution.

(28) The power of the State Legislature to enact a law in respect of religious and charitable endowments and institutions being undoubted, it remains to consider whether that power had been exercised within the limits laid down by the Constitution, and whether the fundamental rights claimed on behalf of the petitioner have been infringed so as to take away or abridge all or any of them. It is claimed on behalf of the petitioner that the right to equality before the law and the equal protection of laws guaranteed under Art. 14 have been denied to him, that there was unreasonable discrimination based solely on religion which offends Art. 15, that the right to acquire and hold and dispose of property under Art. 19 (1) (f) has been unreasonably restricted and that the right to freedom of religion conferred under Arts. 25 and 26 has been unduly restricted and circumscribed practically denying the liberty granted by the Constitution. The levy of contribution under S. 76 of the new Act is, it was contended, in the nature of a "tax" within the meaning of Art. 27 which is unconstitutional.

(29) The conditions, the violation of which would bring a given legislation within the mischief of Art. 14, have now been authoritatively settled by two decisions of the Supreme Court by which we are bound viz., 'CHARANJIT LAL v. THE UNION OF INDIA', 1951 SCJ 29 and 'THE STATE OF BOMBAY v. BALSARA', 1951 SCJ 478. In the second of these cases, the principles to be borne in mind when applying Art. 14 have been analysed and stated in the form of propositions by Fazl Ali J. at page 491 as follows:

"(1) The presumption is always in favour of the Constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

(2) The presumption may be rebutted in certain cases by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

(3) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

(4) The principle does not take away from the State the power of classifying persons for legitimate purposes.

(5) Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

(6) If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(7) While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis."

In view of this clear pronouncement of the highest authority, it is needless to refer to the authorities so copiously cited at the bar to illustrate one or the other of the principles enunciated above. The gravamen of the charge is that while the Christian and Muhammadan religious and charitable institutions and endowments were excluded, Hindu religious and charitable endowments and institutions alone were selected for special treatment and that such a discrimination is unwarranted, unreasonable and unjust. The classification of institutions and endowments based on religion, Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained viz., the better administration and management of such institutions. It is not a classification or division made for the first time by the State Legislature. The distinction existed for nearly a century. As the incidents and the nature of the institutions and endowments of different religions differ in several respects, it cannot be said that the classification is based solely on religion as the institutions included in the classification are religious as well as secular and having regard to the object in view, the institutions having several common features are rightly classified under one group. Article 14 does not prevent the legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them

reserving the other types of institutions for consideration to a future date.

It is impossible to accept the contention that the impugned Act violates either Art. 14 or Art. 15.

(30) The right to acquire, hold and dispose of property is conferred on the citizen by Art. 19 (1) (f). This right, however, as many of the fundamental rights enumerated in the Constitution, can only be exercised subject to reasonable social control in the larger interests of the State and for its welfare. This principle is recognised by Cl. (5) of Art. 19 which states that the recognition of the right does not prevent the State from making any law imposing reasonable restrictions on the exercise of the right in the interests of the general public or for the protection of the interests of any Scheduled tribe. The Constitution embodies the corporate will of the people and they have expressly elected through their representatives to surrender and forego in the larger interests of the State and for the welfare of the people, part of their rights to the State. The fundamental rights recognised in the Constitution no doubt to some extent constitute limitations on the powers of the Parliament and the State Legislatures to enact laws and these were intended in the interests & for the benefit of the minorities. To what extent the control should be permitted and whether the legislature in enacting a particular law transgressed its limits without any justification and whether such transgression is within reasonable bounds are matters left open for the Courts to decide. Unlike the American Constitution where under the power known as "due process of law" the Courts have exercised and have been exercising a greater degree of freedom in declaring a law unconstitutional on the ground of its unreasonableness for deciding which no particular standard had been laid down by the legislature, under the Indian Constitution, the Courts' function is circumscribed and limited to the extent of considering whether the restrictions are reasonable or not.

(31) At the outset in considering Art. 19 (1) (f) the Court has to be satisfied that the right claimed by the petitioner is "property" within the meaning of that sub-clause. Property is nowhere defined in the Constitution. It has now been clear by the decision of the Supreme Court in 'CHARANJIT LAL CHOWDHURY v. THE UNION OF INDIA', 1951 SCJ 29, that the relief by way of a writ could be granted only in favour of a person whose right has been infringed. A person who is not aggrieved and who is not personally affected cannot set the law in motion. In view of the decision in 'A. K. GOPALAN v. THE STATE OF MADRAS', 1950 SCR 88, and applying the reasoning in that case, if a person is deprived of his rights to property under Art. 19 (1) (f), the proper article to be considered is Art. 31. Article 19 (1) (f) applies only so long as a person is not deprived of his property by a law enacted by a competent legislature. It was contended on behalf of the respondent that trusteeship as understood in the law of trusts is not property contemplated by the Article. Willis in his book on Constitutional Law at page 815, in dealing with property that may be taken under the power of eminent domain, says:

"In general it may be said that any and all property may be taken. Land, buildings, water, an easement as distinguished from general property, a contract, and a franchise may be taken."

Weaver in his book on Constitutional Law at page 374 says:

"Property is ownership. It consists of the free enjoyment of one's acquisitions without control or diminution save by the law of the land. It consists not merely of ownership and possession but in the unrestricted right of use and disposal. Anything which destroys any of these elements to that extent destroys the property itself. The right of property is a natural right and neither the Federal Government, nor the State Government can deprive its owner of it or its possession except by the due process of law.

"Property includes not only real estate and personal property, but also incorporeal rights such as patents, copyrights, leases, accounts and choses in action, and every other thing of an exchangeable value which one may have."

(32) It is not disputed on behalf of the respondent that property includes even incorporeal rights. In 'DWARKADAS v. SHOLAPUR S. & W. CO., LTD.', AIR 1951 Bom 86, the question was considered by Chagla C. J. at page 90, where he expressed the opinion that property used in Arts. 19 and 31 need not necessarily be tangible property but may be even intangible property and might include incorporeal rights. The word 'property' occurs in Placitum 31 of the Australian Constitution and Nicholas in his Book on the Australian Constitution at page 201 states that:

"the word 'property' in placitum (XXXI) is of the widest connotation: it is 'nomen generalissimum'. It covered the acquisition for an indefiinte period of the exclusive right to use certain vacant land on which the claimant had erected a car park station with the permission of the owner; 'MINISTER OF STATE FOR THE ARMY v. DALZIEL', 68 CLR 261."

In the case referred to in the above quotation Rich J. stated at page 285:

"The meaning of property in such a connection (i.e. S. 51 p. xxxi) must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to Sheppard's Touchstone. The language used is perfectly general. It says the acquisition of property is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property."

A trustee in the legal sense is the owner of the property, but has no beneficial interest. The argument is that property is used in Arts. 19 (1) (f) and 31 in the sense of property which can be beneficially enjoyed and which can be validly disposed of as in Cl. (f) not only the right to acquire, but also to hold and dispose of property is enumerated. As trusteeship even of a hereditary kind could not be alienated under law, it is not property. This was the argument on behalf of the respondent.

The manager of a temple who is commonly called 'Dharmakartha' or some other equivalent name is not a trustee in the sense in which it is understood in the law of trusts nor is the head of a mutt such a trustee. The decisions in support of this have already been noticed. A 'Dharmakartha' very often has no beneficial interest in the property in his possession but his office is hereditary (we are of course not

referring here to non-hereditary trustees). We have considered the decisions in extenso on the jural relationship of the mathadhipathi to the mutt and its properties. He is not a bare trustee, but he occupies a peculiar position and has beneficial ownership to some extent in the property and the income. The mathadhipathi therefore cannot be correctly described as a "trustee" owning no beneficial interest in the property under his management. Even if the argument, therefore, of the respondent were accepted, the mathadhipathi satisfies that test and has beneficial interest in the property. Even in the case of a dharmakartha or the manager of a temple, there may be instances where such a dharmakartha is not merely a manager but also has beneficial interest in the property. In such a case also, the test laid down on behalf of the respondent would be satisfied. If there be however an instance where the dharmakartha has no beneficial interest of any sort but is a mere manager with hereditary rights, there is no reason to exclude such a hereditary right of management even from the scope of property; but however it is not necessary to express a final opinion on this.

In the judgment of Mukherjea J. in 'ANGURBALA v. DEBABRATA', 1951 SCJ 394, already referred to, dealing with the word "property" in the Hindu Women's Rights to Property Act, reference was made to the decision of Varadachariar J. in 'UMAYAL ACHI v. LAKSHMI ACHI', (1945) 8 FLJ 8, where the learned Judge took the view that a bare trusteeship with no beneficial or personal interest in the trust properties is not property though for certain purposes as conceded even by the learned Judge, trusteeship may be property. Mukherjea J. distinguishes shebaitship from trusteeship as shebaitship always carried with it an element of beneficial or personal interest in the properties in his charge. The learned Judge therefore distinguished the case in 'UMAYAL ACHI v. LAKSHMI ACHI', (1945) 8 FLJ 8, from the case before him on this ground. The learned Judge also approved of the decision of this Court in 'SURYANARAYANACHARYULU v. SESHAMMA', ILR (1950) Mad 451, where it was held that the office of archaka which is a hereditary religious office in which the holder for the time being is beneficially interested to enjoy the income of the endowed property is "property" and that therefore the decision of the Federal Court was inapplicable. On this reasoning, a Mathadhipathi's position cannot be worse than that of either a shebait or an archaka of a temple.

The view taken by Mukherjea J. is based upon a Full Bench decision of the Calcutta High Court in 'MONOHAR MUKERJI v. BHUPENDRANATH MUKERJI', 60 Cal 452, which was approved by the Judicial Committee in 'GANESH CHUNDER v. LAL BEHARY DHUR', 71 Mad LJ 740: 63 Ind App 448 and 'BHABATARINI v. ASHALATA', 1943-2 Mad LJ 70: 70 Ind App 57. It may be an anomalous position, but as observed by Mukherjea J. it is an anomaly which has been admitted into Hindu Law for a long time from which there is no escape. The addition of the right to dispose of property in Art. 19 (1) (f) along with the right to acquire and hold is not intended to give a definition of property so as to limit it to disposable property. Property may be inalienable but yet a person may be entitled to hold it as in the case of inalienable service inams. The person holding such an inam is entitled to enjoy its income so long as he holds it, though he will not be entitled to dispose it of either by will or by gift 'inter vivos'; but must allow the property to pass on to the next office holder according to the law of succession governing such property. The argument that if the headship of a mutt is considered to be property, in no case can the mathadhipathi be removed even if it is established that he is disqualified from holding the position or proved that he is unworthy to hold it, overlooks the fact that in such an event, Art. 31 (1) clothes the legislature with power to enact a law depriving a person of the property. Of course such a legislation should not contravene or infringe any of the other liberties or fundamental rights recognised by the Constitution. The distinction between Arts. 19 (1) (f) and 31 (1) is the difference between plucking the feathers of a bird one by one and killing it. In such a case Art. 31 (2) does not come into play as it would not be "acquisition" meaning transfer of property from the owner to the State but deprivation of property within the meaning of Art. 31 (1). For a further discussion of the meaning of the word 'acquire' reference may be made to the decision of the learned Chief Justice and Venkatarama Iyer J. in the judgment relating to Rent Reduction Act in 'RAMAKRISHNA RANGA RAO v. STATE OF MADRAS', C. M. P. Nos. 894 and 895 of 1951.

(33) If Art. 19 (1) (f) applies, as we hold it does, the next question for consideration is whether the restrictions on the rights to property imposed by the impugned legislation are reasonable, and the interests of the general public demand them, there being no question of the protection of any Scheduled Tribes here.

The effect of the legislation is practically to reduce the Mathadhipathi to the position of a servant, subordinate to the Government even in respect of rights relating to property. The executive administration replaces the statutory control by the Board. The Mathadhipathi is bound to obey all lawful orders emanating from the Government down to the Asst. Commissioner. The premises of the Mutt and the places of worship and meditation are not immune from interference by the Government. All officers of Government have a right to enter any part of the religious institution and place of worship in the discharge of their duties and for the purposes of the Act and any resistance in the exercise on such power entails penal consequences. The only safeguard is the person so entering must be a Hindu but it is very often ineffective and useless. It is a well known fact that there are mutts belonging to different sects and creeds, the adwaita mutts, the Visishtadwaita, dwaita and saiva mutts and smartha-mutts and Zangam or Veerasaiva mutts. A Vaishnavite will not be permitted to enter the premises or at any rate to enter the place of worship, in a Veerasaiva mutt. There are differences even among Vaishnava sects between Vadagalais and Thengalais, and the customs and usages in the mutts vary. The place where the deity is installed is not allowed to be entered even by the ordinary worshippers. The officer even if he is a Hindu, may not be a believer in the faith of that particular Mutt and may have no respect for it and may even enter the premises in the western style with his shoes on. All these are matters of detail which can be better imagined than described.

In the utilisation of the surplus funds, the discretion of the head or the mathadhipathi is seriously interfered with by the provisions of the Act. In incurring expenditure under S. 30 of the new Act for the health, safety or convenience of the disciples, pilgrims or worshippers the voice of the Mathadhipathi is not final. Surplus funds may be diverted for other purposes alien to the objects of the institution. While under law he is entitled to use it at his discretion for any purposes which cannot be described as wicked or immoral, his discretion is now taken away. In the application of the funds for the daily expenditure, he has to conform to the dittam and the opinion of the Commissioner regarding the fixation of the scales of expenditure which has to be submitted to Government who has to pass orders, is final. The routine expenditure in the institution consists usually in the feeding of the disciples and the head, the cost of carrying on of the worship of the deity and the feeding of the visitors and others according to the usage of the Mutt. There may be periodical special services or worship and the scale at which the amount has to be spent is usually at the discretion of the head of the Mutt.

In this institution it has been the usage to perform the 'paryayam' for example on a large scale as the feeding of the Brahmins on that occasion cannot be avoided and the Judicial Committee in the case of this very Mutt in 'VIBHUDAPRIYA v. LAKSHMINDRA', 50 Mad 497, decided that the 'Mathadhipathi' was justified in incurring debts for the performance of the paryayam.' In this view they differed from the narrow view taken by this Court based on economy and upheld the binding nature of the debt. It was observed by two learned Judges of this Court that the expenditure on such a large scale was not justified and one of the learned Judge stated that

> "It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these maths existed or even in the earlier years of the last century,"

and in support of that view a passage in 'PALANIAPPA CHETTY, K. P. L. S. v. SREEMATH DEVASIKAMONY PANDARA SANNADHI', 40 Mad 709, was relied on. In considering these observations, Mr. Ameer Ali observed at page 506:

> "The learned Judge seems to have misapprehended the effect of their Lordships' judgment in Palaniappa Chetty's case."

It was further observed that the High Court overlooked the observations of the Privy Council in 'VIDYA VARUTHI v. BALUSWAMI IYER', 44 Mad 831 PC, to the effect that the superiors

> "have ample discretion in the application of the funds of the maths but always subject to certain obligations and duties equally governed by custom or usage."

The learned Judge proceeds to observe in the same page:

> "These Mathadhipathis have a difficult task to perform; unaided by any established rule they are expected to exercise control over the numbers of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The obligations under which they labour are regulated by custom, which are of longstanding and have been observed for centuries."
>
> "What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and secondly, whether the moneys so borrowed were legitimately applied for those purposes."

It follows therefore that if there is a customary obligation like the feeding of the Brahmins who visit the mutt at the time of the paryayam, that obligation cannot be got rid of by the Mathadhipathi and even if he incurs debts for discharging such an obligation, the debts will bind the math and so long as those moneys are not applied for the personal use of the Swami nobody can question the extent or the necessity for the large scale of expenditure incurred by the Mathadhipathi. Customs and usages vary from mutt to mutt and an attempt to apply the axe and cut down the expenditure purely from a secular angle of vision is not to view the matter in the proper perspective. It is this vision, as pointed by the Judicial Committee in the above case, that this Court did not have and the necessity for setting matters right arose before the Judicial Committee. The same mistake and the same error might be repeated by the Government and the Commissioner under the Act as the decision of the Govt. in settling the dittam is stated to be final. The power to hold property carries with it the power to enjoy and utilise the income in a manner in which the person holding the property is entitled to spend it under law. This power is unduly and unreasonably restricted by S. 54 of the new Act.

(34) Again, take the pathakanikas under S. 55. It is common knowledge that they are the property of the Matathipathi. While the Act recognises the Matathipathi's right and discretion to spend it for purposes connected with the mutt, he is kept under an obligation to keep regular accounts of the receipts and disbursements. Regarding the management of the properties, it is open under the Act to the Commissioner to require and insist that the Swamiji should appoint a manager and in default, power is given to the Commissioner himself to appoint one. A person is entitled to manage his own property as its incident. There are two other modes by which this right of the matathipathi to manage his properties can be taken away under the Act. One is by an attempt to frame a scheme as in the present case which enables the Commissioner to appoint a paid executive officer to take over the management and there is the second and more dangerous weapon, viz., the power of notification by which without any remedy by way of judicial review, the executive is empowered to take the drastic step of depriving a Matathipathi of his right to manage his own affairs. The decision of the Government is final and the notification continues in force for a period of five years. These modes practically leave nothing in the Matathipathi except a vestige of a right to call himself a Matathipathi with no power to manage the property, to deal with its income, to apply its surplus for the objects of the institution at his discretion and choice which is a right recognised and established by the deci-

sions of the highest tribunal which we have already adverted to. It cannot be seriously contended and indeed, no decision in support of such a serious invasion has been placed before us. It may be suggested that the appointment of the manager or the executive officer paid or otherwise, and the notification procedure relate only to secular affairs of the mutt and do not trench upon the religious affairs. This argument has been repeatedly urged before us in justification of the drastic provisions of the Act.

In our opinion, a separation of religious affairs from secular affairs of a Mutt in such watertight compartments is not possible. The property of the mutt and its income exist for one purpose and only one purpose and that is the religious purpose. It has to be applied and utilised for the maintenance of the mutt, for carrying on the worship and for the propagation of the religion. It is not merely a question of leasing the lands and realising and paying the income into the hands of the head, but extends to the receipt of the income and the disbursements thereof over which practically the Matathipathi has no control. He has no deciding voice in the matter of the selection of the various items of expenditure for the purposes of the mutt and cannot give priority to one over the other. His hands with reference to the property, are tied completely. It does not stop at merely requiring him to prepare the budget and submit it and the accounts; but goes further and takes over the management itself into the hands of the Government through their appointed agents. It cannot therefore be seriously contended that the restrictions so imposed are reasonable and that they are required in the interests of the general public.

(35) In construing the expression 'reasonable restriction' it has been pointed out by the Supreme Court in 'DR. N. B. KHARE v. STATE OF DELHI', 1950 SCJ 328, that the word reasonable in clause (5) of Article 19 goes with 'restrictions' and not with 'law' and that in deciding the reasonableness or otherwise of the restrictions, the Court need not be confined to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent, but it is open to look into the circumstances under which or the manner in which the restrictions have been imposed. Reasonable restrictions on the exercise of the right conferred by Art. 19 may contain substantive as well as procedural provisions. The possibility of the favour being abused in the hands of the executive may not be altogether irrelevant. In 'CHINTAMAN RAO v. STATE OF MADHYA PRADESH', 1950 SCJ 571, it was observed at p. 573:

> "The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1) (g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality."

The same reasoning would apply equally to Article 19 (1) (f) and 19 (v). The restrictions imposed are so drastic in scope that they go beyond the object sought to be achieved.

(36) Now we come to religious freedom. It is often said that the conception underlying our Constitution is a secular State and that the goal is a welfare State. But it is argued further, as it is a secular State, it should not possess legislative power to control and supervise religious institutions and religious freedom. This argument proceeds on a misconception. America, Australia and the Irish Free State are all secular States and they all guarantee religious freedom subject to limitations and subject to the power, to control, such liberty for the welfare of the State. Secular State implies that the bond of union is not based on religion but on citizenship as distinguished from a theocratic State. In England there is an established Church and the King is considered as the supreme head on Earth. He is the Head of the Church of England and also the patron of all Archbishops and Bishops within the United Kingdom. The Crown, therefore, enjoys the right of patronage in resepct of several churches in the Kingdom. In America and other countries such as Australia and the Irish Free State, the position is different. Under the American Constitution, "a wall of separation between the Church and the State" is recognised and this was due to the fact that the American people, before the framing of the Constitution, suffered centuries of religious oppression and persecution and as the bitterness of that sufferings was still fresh in their memory, the wall of separation was erected. The First Amendment enacted:

> "The Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."

Unlike Arts. 25 and 26 of the Indian Constitution, this Amendment is framed more as a restriction on the legislative power of the Congress rather than from the point of view of the individual. Under the Constitution of the Irish Free State, Art. 8 on which Art. 26 of our Constitution was modelled; is:

> "Freedom of conscience and the free profession and practice of religion are subject to public order and morality guaranteed to every citizen." (the rest of the article is omitted).

Art. 116 of the Australian Constitution is:

> "The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The right to freedom of religion under Art. 25 of the Indian Constitution is conferred upon all persons and is not confined to citizens. Article 26 relates to the freedom of a religious denomination to manage its own religious affairs. Under Art. 25 the guarantee is freedom of conscience and the right freely to profess, practice and propagate religion. It is subject to public order and morality and health and Art. 26 also is subject to a similar limitation. In Article 25 power is conferred on the State to make any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and sub-clause (2) (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Freedom of conscience is the minimum of reli-

gious liberty. It is intangible as it is subjective and is not capable of legal protection except that a person may not be compelled by law to abandon his belief, creed or opinion. A man may not only hold his religious opinions but may put them to practice and translate them into articulate force by profession, practice and propagation. Unless these are also protected there is no meaning in protecting freedom of conscience. Religion has been defined by Field J. in 'DAVIS v. BEASON', (1890) 133 US 333: (33 Law Ed 637), as meaning a man's

"views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the 'Cultus' or form of worship of a particular sect, but is distinguishable from the latter."

Profession of religion implies, in our opinion, the right of the person who believes in a religion to state his creed and also to propagate it either by speech or by writing or by any other visible means. The practice of religion is the practical expression of his belief in the particular form of private or public worship. He may himself carry on worship or partake in a worship carried on by others. The exercise of these rights, however, is not altogether free from restrictions. It cannot be doubted that in the public interests and in the interests of and for the welfare of the State, the expression of one's religion should not be allowed to degrade into licentiousness or to perpetrate a crime or endanger public order, morality or health. In other words, to use an expression familiar to American law, it is subject to the police power of the State. Clauses (a) and (b) of sub-cl. (2) of Art. 25 reserve also a power to regulate or restrict any economic, financial. political or other secular activity associated with religious practice and also in the interests of social welfare and reform and for throwing open religious institutions to the Harijans. That these restrictions are imperative and are justified is established by a number of decisions of American Courts which illustrate the manner in which and the extent to which social control has been exercised in America, restricting the religious liberty of the citizen.

In 'REYNOLDS v. UNITED STATES', (1879) 98 US 145: (25 Law Ed 244), polygamy though justified by the tenets of a religious sect, was allowed to be restricted by legislation in the interests of society. Polygamy was considered meritorious by the Mormon religion. 'DAVIS v. BEASON', (1890) 133 US 333: (33 Law Ed 637), is another instance where a similar law was upheld. In 'CANTWELL v. STATE OF CONNECTICUT', (1940) 310 US 296: (84 Law Ed 1213), the question was whether a statute prohibiting solicitation of contributions to any philanthropic, religious or charitable cause without the approval of the Secretary of the Public Welfare council offended against religious liberty. This is one of the cases relating to the Jachova's witnesses. At page 1218 it is stated:

"The Constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forstalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts. Freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a statute may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."

The statute was held unconstitutional. It may be mentioned that so far as the states are concerned, though there is no express provision as the First Amendment is applicable only to Congress it has been held that the same liberty is attracted by Amendment 14 of the Constitution which applies to States. This was decided in 'EVERSON v. BOARD OF EDUCATION', (1947) 330 U S 1: 91 Law Ed 711 and 'ILLINOIS v. BOARD OF EDUCATION', (1948) 333 US 203: 92 Law Ed 649. The wall of separation between Church and State is attributed to Jefferson as is stated in 'EVERSON v. BOARD OF EDUCATION EURING', (1947) 330 US 1: 91 Law Ed 711. In 'MURDOCK v. PENNSYLVANIA', (1943) 319 U S 105: 87 Law Ed 1292, it was stated that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment. A fee imposed for the privilege of canvassing or soliciting within a municipality was held to be an unconstitutional invasion of the right of freedom of religion. These are merely illustrations of the kind of control that is permissible.

(37) In the Australian Constitution it has been held that notwithstanding the absolute nature of the prohibition in S. 116 preventing the Commonwealth from making any law for establishing any religion etc., it is open to the Court to consider and determine whether the freedom of religion has been unduly infringed by a particular legislative provision. In justification of this view, the decisions of the American Courts already referred to were relied on. Without such restrictions it might lead to anarchy and make it difficult, if not impossible, to maintain the rule of law. On this principle it was held that the provisions of the National Security (Subversive Associations) Regulations were not invalid notwithstanding that such regulations prohibited the advocacy of doctrines or principles in pursuance of religious convictions which are however prejudicial to the prosecution of the war in which the Commonwealth was engaged. The judgment of Latham C. J. in 'ADELAIDE COMPANY OF JEHOVAH'S WITNESSES v. THE COMMONWEALTH', 67 CLR 116, contains a useful and illuminating discussion of the ambit of religious liberty. At page 123 speaking about religion he says:

"It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious obervance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds. At all times there are many who agree with the reflective comment of the Roman Poet — "Tantum religio potuit suadere malerum".....

"Almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the every day life of the individual — all these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a Court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character."

The picture of religion so aptly drawn applies to the religious beliefs in this country as well. Later on at page 125 the learned Judge catalogues instances of religious practices which are considered by a majority of people as wicked. He says:

"At all periods of human history there have been religions which have involved practices which have been regarded by large number of people as essentially evil and wicked. Many religions involve the idea of sacrifice and the practice of sacrifice has assumed the form of human sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reproved in the Old Testament; it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammedans, Hindus, and other races in Asia. The criminal religions in India are well-known. The thugs of India regarded it as a religious duty to rob and kill. The practice of Suttee, involving the immolation of the widow upon the funeral pyre of her husband, was for centuries a part of the Hindu religion."

(38) These illustrations show that it is very difficult to separate religious belief and practice from politics or ethics. But in the interests of the State it cannot be contended, at any rate at the present day that such practices cannot legitimately be prohibited by legislation though such legislation might infringe religious liberty. Article 25 uses the word "freely" while Art. 116 of the Australian Constitution used the word "free". The Illustrations given by Latham C. J. at page 127, establish that the meaning of the word which is vague and indeterminate takes its colour from the context. To quote his words:

"Compare for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed in 'MC. ARTHUR'S CASE', (1920) 28 CLR 530. Free love on the contrary means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs. Thus there is no dictionary meaning of the word 'free' which can be applied in all cases."

It must always be treated as subject to the law for there could be no freedom except freedom in accordance with law as otherwise, there will be no ordered society and it would be impossible for society to function. It was pointed out by John Stuart Mill in his Essay on Liberty which is quoted at page 131 of the same report:

"The sole end of which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. It may be going too far to say that self-protection is "the sole end" which justifies any governmental action. But I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil Government or prejudicial to the continued existence of the community. The constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered Government."

The ultimate decision whether a given law infringes religious freedom or not must rest with the Court.

(39) The Mathadhipathi's right freely to practise and propagate religion, it is contended, has been interfered with by some of the provisions of the new Act. The power to enter the religious institutions under S. 21 and the very wide power conferred under Ss. 23 and 24 of the Act to issue lawful directions to be obeyed, the right to interfere with the dittam or scale of expenditure under S. 54 are stated as instances of such infringement. These provisions undoubtedly vest very large powers in the Commissioner and are certainly calculated to interfere with the practice of religion i.e. the carrying on of the worship and the propagation of religion by instructing the disciples and initiating them into the fold of religion. The Swami-

ji's tranquillity and peace of mind which are so essential for deep contemplation may also be disturbed. The holiness and the sanctity of the institutions are destroyed. That the provisions may be abused is not based, merely on speculation and imagination but on facts is made clear by the instructions issued by the Board under the earlier Act.

In memorandum dated the 1st October, 1945, the Mathadhipathi of Kaniyoor Mutt was asked to state whether the Board's sanction was obtained to present a Japamala to a devotee and a silver kalasa to a Swamiar. It turned out ultimately that the japamala was actually given to a doctor for having treated the Swamiji for asthma during the course of a whole year without fees and the silver kalasa was actually purchased by the Mutt and not presented to anybody. The Swamiji, it will be seen, is not only accountable and answerable to the properties and the income of the mutt under the provisions of the earlier Act and the new Act but he is also answerable to things he wears on his body such as japamala. Another instance is by an order of 17th October, 1949 the Mathadhipathis were prevented from presenting clothes and paying bonus to temple servants from out of the funds of the religious institutions for deepavali. In another order of 7th May, 1947 the Board directed that as the wages of labour have increased instead of using human agency for carrying the deity in procession, the authorities of religious institutions should construct 'sagadams' and use them by engaging a very few persons or a pair of bulls to drag them.

On 13-3-1946 instructions were given that in view of the acute food situation expenditure on food grains should be cut down and the rituals and festivals should be reduced to their barest minimum. On 22-9-1950 the Board requested executive authorities in charge of Hindu religious institutions to use all available tanks for pisciculture unless there is a usage or custom in any particular locality against the utilisation of the tanks for such purpose. Then the order was later on modified by restricting it only to tanks which have hitherto been ordinarily used or leased out for fishing. This modification was on 3rd July 1951. Regarding the application of the surplus funds, the Board gave directions or issued orders to utilise them for various purposes wholly foreign to the objects for which the religious institutions were established e.g. for the Balamandir. On 28th October, 1950 an order was issued that surplus funds within the meaning of S. 67 of the earlier Act may be contributed to the support of the Balamandir and if there is no provision in the budget application may be made to the Board and they were directed to send the contributions to the Hony. Secretary. Rupees 10/- was directed to be sent to Sarada Vidyalaya, T. Nagar and also for the Provincial Welfare fund for Guild of Service and so on. These are instances of the possible "lawful" orders that may be issued by the Commissioner and which the trustees in whatever form the orders may be clothed are bound to treat as obligatory in order to avoid the displeasure of the Commissioner. The contention that the sections of the Act above referred to constitute an infringement of the right under Art. 25 seems to be well-founded.

(40) Article 26 which relates to religious denominations is also relied on. It runs as follows:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law."

The dictionary meaning of the word 'denomination' as given by Webster is

"of action of naming from or after something; giving a name to, calling by a name; a characteristic or qualifying name given to a thing or class of things; that which anything is called; an appellation, designation or title; a collection of individuals classed together under the same name; now almost always specially a religious sect or body having a common faith and organization and designated by a distinctive name."

There being several religions in India such as Islam, Christianity, Zoroastrianism and Hinduism, it may not be wrong to take Hinduism and the members of that religion as constituting a religious denomination in a larger sense or if it should be taken in a limited sense Advaita, Dwaita; Visishtadwaita, Saivitea may be another classification and the members of each faith may be treated as members of one denomination. In an Irish case 'MAC LAUGHLIN v. CAMPBELL', (1906) 1 Ir R 588, the meaning of "denomination" was given by Fitz Gibbon L. J. as only a 'Sect Writ Large'. Even taking it in that sense, the division of the members of the Hindu religion based upon a system of philosophy which is adopted by a group of members may be treated as a denomination or sect and any section of that denomination, and a division made either on territorial or sectional basis, may be treated as a section thereof.

Every religious sect therefore under the Article has the right to establish and to maintain institutions for religious and charitable purposes and to manage its affairs in the matter of religion. It is also permissible for such a sect to own and acquire movable and immovable property and to administer such property in accordance with law. The right to maintain implies the right to continue the institution according to the established usage, to carry on the worship and to make it function in the manner in which it has been functioning according to long established usage. Except on the ground of public order and morality and health, this right cannot be in any manner affected by legislation. The religious sect or denomination considered as an autonomous body has got an unquestioned right to manage its own affairs in matters of religion. Whether an uncertain and fluctuating body could own and acquire property or not, a religious denomination being a definite body is permitted by the Constitution to own and acquire movable and immovable property also and to administer such property but in accordance with law.

(41) It is contended that the denomination contemplated is not identical with a religious sect or members of a religious persuasion but it must be a closed body like a Corporation. This argument however was not supported by any authority, and in view of the clear language of the Article, it is difficult to accept it. It is rather difficult to dissociate the re-

ligious affairs of an institution from the property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up. It was however argued that under clause (d) of the Article the legislature has undoubted power to enact a law regulating the administration of the property. The expression 'in accordance with law' must now be understood in the light of the decision in 'A. K. GOPALAN v. THE STATE OF MADRAS', (1950) SCR 88, as meaning statute law or law enacted by a competent legislature.

The argument, however, did not go to the length of maintaining that this clause would enable a legislature not only to regulate the administration of the property but even to deprive or to destroy the right. It may well be conceded that the law need not necessarily be the established law such as the law relating to trusts or property as was contended on behalf of the petitioner but may even extend to any statute law that may be enacted by a competent legislature providing for the regulation or the administration of the properties. But regulation does not mean destruction or annihilation of the right. It is a question of degree whether in a given case the enacted law merely regulates or substantially takes away the right leaving to the denomination a mere vestige of the right. It need not be a total deprivation of the right. It would be enough if there was a substantial deprivation of the right to administer the property. In such a case the law, it must be admitted, cannot be upheld.

(42) The difficulty however is whether the mutt in question can be held to be a mutt belonging to a religious denomination. The petitioner contends that the mutt belongs to Shivalli Brahmins as it is for their benefit and for their spiritual enlightenment that the institution exists and that it should be treated as a religious institution established & maintained for the religious benefit of this community. The community has the right to the continued existence of the mutt for serving the spiritual needs of its members and the head of the mutt is the person in whom the power to administer the religious affairs and the administration of the property are vested. The superior is also a member of the community. The Article is concerned with religious institutions and the consideration of the question whether there is any beneficial ownership in the properties of the institution by the members of the denomination is irrelevant as it is solely concerned with the institution which exists for spiritual and not for material benefit. There is no difficulty therefore in treating the Shivalli Brahmin community as a denomination entitled to protection of the right guaranteed under the Article. The right to administer religious and secular affairs has been unduly interfered with as the head may not have even an effective voice in the appointment of persons to carry on the administration under him. The appointment of an agent or manager requires the approval of the Commissioner and if it was decided to frame a scheme or notify a temple, the Commissioner or the Government as the case may be, has the sole and exclusive right to appoint a paid executive officer. It is a substantial deprivation of the right to administer the property in accordance with law and the impugned Act in so far as it takes away the rights to administer the religious and secular affairs of the mutt must be held to be invalid as infringing Art. 26, Secs. 18(2) and (3), 25(4), 28, 29, 58(4), 59 and 76. The Sections of the impugned new Act which are ultra vires will be specified at the end of the judgment.

(43) It is also urged on behalf of the respondent that all the four clauses must be satisfied by a religious denomination which claims a right under Art. 26 & as the fluctuating body like the religious denomination cannot hold property under law, it must be inferred that religious denomination means only a closed body like a Corporation. In the first place the rights of a religious denomination are not like fishery rights. A claim based on lost grant in favour of a fluctuating body was not upheld as in the case of 'BRAJA SUNDAR DEB v. MONI BEHARA', (1951) SCJ 363. In 'SIMMONDS v. ELLIOTT' (1917) 2 K B 894, it was assumed that the church of England was a religious denomination. The very article of the Constitution empowers the denomination to own and acquire property. The objection, therefore, has no basis in view of the clear language of the Article. It is unnecessary, in our opinion, that in order to claim the benefit of Article 26 a religious denomination should be capable of holding all the four rights in the four sub-clauses of that Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.

(44) The next point for consideration is, whether Section 76 of the new Act (Act XIX of 1951) is 'intra vires' the State legislature or whether it offends Article 27 of the Constitution, and is therefore, unconstitutional. S. 76 runs thus:

"1. In respect of services rendered by the Government and their officers, every religious institution shall from the income derived by it pay to the Government annually such contribution not exceeding five per centum of its income as may be prescribed.

2. Every religious institution the annual income of which in the fasli year immediately preceding as calculated for the purposes of levy of contribution under subsection (1) is not less than Rs. 1000/- shall pay to the Government annually for meeting the costs of auditing its accounts such further sum not exceeding 1½ per centum of its income as the Commissioner may determine."

Sub-clauses 3 and 4 of S. 76 need not be referred to for the present.

(45) Article 27 of the Constitution of India runs:

"No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

(46) The first question is, whether the levy of five per centum of the income of a religious institution provided for in Section 76(1) of the new Act is a "tax" within the meaning of Article 27.

(47) After analysing the concept of a tax in Chapter VI Vol. III of his Principles of Political Economy, Professor Nicholson said at p. 264:

"Professor Bastable's definition of taxation sums up in a convenient form the principal

results of the foregoing analysis. 'A tax is a compulsory contribution of the wealth of a person or body of persons for the services of the public powers'."

(48) It was the same idea cast in different words that found favour with Cooley in his book on Constitutional Limitations. In a foot note at page 986, the learned author observed:

"A tax is a contribution imposed by the Government on individuals for the services of the State. It is distinct from a subsidy certain and orderly which is shown in its derivation from Greek, order or arrangement. Jacob, Law Dictionary; Bouvier, Law Dictionary. "The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of the remainder." Montesquieu, Spirit of the Laws b. 12, c-30. In its most enlarged sense the word 'taxes' embraces all the regular impositions made by Government upon the person, property, privileges, occupations and enjoyments of the people for the purpose of raising public revenue."

Willoughby on the Constitution of the United States. Vol. II at p. 666 adopts Cooley's definition when he says:

"Taxes have been defined by an eminent authority to be 'burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.' The same author in another work observes that they 'differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of Government."

(49) No doubt, what S. 76(1) authorised was a levy of contribution, the maximum of which was prescribed at 5 per centum of the income of a religious institution. The section itself left it to the Government to prescribe rules for the levy of this contribution from time to time within the permissible maximum of five per centum. It is also true that the section itself specifically stated that this levy was in respect of the services rendered by the Government and its officers.

(50) If this levy is tested by the definition given by Professor Bastable, it would appear to satisfy all the known tests of a tax. It is a compulsory contribution. It is a uniform contribution. Section 76(1) itself directs that every religious institution shall pay the contribution. If any doubt could arise as to the uniformity of the levy, to which every religious institution was made subject by Section 76(1), sub-cl. 3 of Section 76 should remove it. It says:

"The annual payments referred to in sub-sections (1) and (2) shall be made notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the religious institution concerned."

That this levy of contribution, as it is called by Section 76(1), is "for the services of the public powers" should also be clear. No doubt every religious institution is entitled to the services of the Government and their officers in accordance with the several sections of the new Act. But the liability of any given religious institution to pay the contribution authorised by Section 76(1) is not fixed with specific reference to the services enjoyed by that institution. As we have pointed out, it is a uniform levy that is contemplated and authorised, a liability imposed alike on every religious institution subject to the provisions of the new Act. Therefore, the expression "in respect of the services rendered by the Government and their officers" as used in Section 76(1) of the Act would really be the same as a "compulsory contribution for the services of the public powers" within the scope of Professor Bastable's definition of tax.

(51) We have already pointed out that item 28 of the Concurrent List, List III of the Seventh Schedule to the Constitution, has given the State Legislature legislative competence to enact laws in respect of religious institutions. Item 47 of the same list gives legislative competence to the State Legislature to enact laws in respect of "fees in respect of any matters in this list, but not including fees taken in any Court." One of the contentions put forward was that the contribution referred to in S. 76(1) was a fee within the meaning of item 47 of List III of the Seventh Schedule of the Constitution. Whether it is such a fee or a tax within the meaning of Art. 27 is the question for determination.

(52) Neither the compulsory nature of the levy nor the uniformity of the levy may each by itself or even cumulatively help in deciding the question, whether the contribution up to a maximum of 5 per centum is a tax or is only a fee. The quantum of the levy however is a relevant factor in deciding whether the contribution is a tax or a fee. The old Act, it should be remembered, fixed the maximum of the contribution at 3 per centum of the annual income of the religious institution. The new Act fixed the maximum at 5 per cent. We have already pointed out that the levy of contribution is not in direct proportion to the benefit any given religious institution may derive from the services rendered by the Government and their officers within the meaning of S. 76(1). The services of the Government and their officers may not be in direct relation to the income either of any given religious institution. But the contribution bears a fixed proportion to the income of the religious institution. It is the capacity to pay and not the benefit conferred that seems to be the guiding principle of fixing the quantum of contribution a religious institution can be called upon to pay under Section 76 (1) of the new Act. That is more in accord with the "contribution" being viewed as a tax rather than as a fee. No real attempt was made by any of the learned counsel for the respondents — the Government, Board and the Commissioner, to establish that the contribution of five per cent. bore any just relation to the expenses to be incurred by the Government and its officers in exercising the powers conferred on them by the Act. The fee contemplated by item 47 of List III of the Seventh Schedule to the Constitution need not necessarily be nominal. But the element of compulsion which is an integral part of a tax need not always be present in the fee.

(53) Another contention put forward by the respondents was that it is not every tax that is prohibited by Art. 27 of the Constitution, but only the taxes

"the proceeds of which are specifically appropriated in payment of expenses for the promotion of maintenance of any particular religion or religious denomination."

And the learned counsel pointed out that there

was no proof of any such appropriation with reference to the contribution authorised by Section 76 (1) of the new Act. This argument appears to overlook the provisions of the Constitution regulating the method by which the revenues of the State are merged in a Consolidated Fund, and thereafter appropriated by Appropriation Acts. Article 266 of the Constitution requires that all the revenues received by the State including the loans raised should form into a Consolidated Fund to be entitled the Consolidated Fund of the State and that no moneys out of the Consolidated Fund so constituted should be appropriated except in accordance with law and for the purpose and in the manner provided in the Constitution. Under Article 204, after the grants under Art. 203 have been made, a bill has to be introduced to provide for an appropriation out of the Consolidated Fund of the State of all moneys required to meet the grants so made by the Assembly and the expenditure charged on the Consolidated Fund of the State, but not exceeding in any case the amounts shown in the statement previously laid before the House or Houses. Without a specific provision in the Appropriation Act, no amount can be spent out of the Consolidated Fund of the State, unless it be under Article 205 of the Constitution. Section 76 (1) of the new Act imposes the liability to pay the contribution on every religious institution. Sub-clause (4) of Section 76 provides for the expenditure to be incurred by the Government to pay the salaries, allowances etc. of the officers and the establishment the Government has to maintain to give effect to the provisions of the new Act. Section 76 (4) obviously cannot be the appropriation contemplated by Art. 204. The payment of salaries etc. directed by Section 76 (4) will have to be met from out of the Consolidated Fund of the State but only under a specific Appropriation Act.

(54) We have already held that though the levy is called the contribution for services rendered in S. 76 (1) of the new Act, it is really a tax. It is not really necessary that the Act imposing the tax should also provide for the appropriation of the proceeds of the tax, before it can be brought within the mischief of Art. 27. In fact, such an appropriation is impossible within the scheme of the Constitution. When the constitution therefore speaks in Article 27 of specific appropriation, it can only refer to the appropriation contemplated by the Constitution and not any other independent or specific appropriation, not permitted or warranted by the Constitution. Sub-clause (1) and sub-clause (4) of Section 76 between them, in our opinion, bring the tax within the mischief of Art. 27. Sub-clause (4) of S. 76 imposes the liability on the Government to meet the expenditure of the Services of the Government and its officers referred to in sub-clause (1) of Section 76. Section 76(4) lays therefore a statutory obligation on the Government to provide for the necessary appropriation in the Appropriation Acts to be passed by the Legislature. What Section 76 (1) provides for is a tax the proceeds of which are "specifically appropriated"—the appropriation is not the one contemplated by Art. 204 of the Constitution— for payment of expenses for the maintenance of Hindu religious institutions. That supervision of the Hindu Religious institutions is part of the maintenance within the meaning of Art. 27 can admit of no doubt. It is not every item of the expenditure included in the maintenance of religious institutions that need come out of the tax, before a tax can be declared as offending the provisions of Art. 27 of the Constitution. That the tax was utilised specifically for meeting a portion of the expenditure of the maintenance of its affairs, is enough to bring it within the mischief of Art. 27.

(55) Section 76 (1) no doubt imposes the liability to pay the tax on the religious institution. What Art. 27 guarantees is the freedom of a person against compulsion to pay a tax prohibited by that Article. It is not necessary at present to go into the question whether a religious institution in S. 76 (1) of the new Act is a person within the meaning of Art. 27, Section 76(1), as we said, subjects the religious institution to the liability to pay the tax. Section 78 of the new Act provides for the discharge of that liability by the trustee of the religious institution. The petitioner, the matathipathi of the Shrirur mutt, is certainly a trustee as that expression has been defined in the new Act. The liability to pay the tax imposed by Section 76 (1) on the institution thus falls on the trustee under S. 78 of the new Act, and he is certainly a person within the meaning of Art. 27.

(56) What we have said above refers only to the tax imposed by S. 76 (1) of the new Act. The audit fees prescribed by S. 76 (2) stand on a different footing and they cannot be treated as taxes.

(57) In our opinion, the requirements of Art. 27 of the Constitution are fully satisfied in the case of the tax imposed by S. 76(1) of the new Act. It offends Art. 27. The levy is unconstitutional and ultra vires the State Legislature.

(58) Only one other question has to be disposed of under this head. The learned counsel for the respondents urged that the question whether Section 76 (1) of the new Act is intra vires or ultra vires the State Legislature does not arise in this petition because there has been no levy so far. The writ asked for in this petition by the Matathipathi of the Shirur Mutt is, as already pointed out, one to prohibit the Govt. and its officers from exercising any of the powers vested in them by the new Act. The liability of the mutt, of which the petitioner is the Matathipathi, to pay the tax which Section 76 (1) imposed arose on the very day the Act came into force. Section 76 (1) leaves no discretion to the Government to impose or refrain from imposing the tax on the mutt. Section 4 of the new Act does not apply. Once that liability arose, the petitioner as the Matathipathi of the mutt, whose will eventually be the liability to pay the tax under the provisions of Section 78, is entitled to invoke the powers vested in this Court to declare that the liability under S. 76 (1) imposed on the religious institution is unconstitutional and could not be enforced even under S. 78 of the new Act. Besides, this petition was heard along with other petitions and it was the entire scheme of the new Act as also the specific sections thereof that came up for discussion; and we cannot, therefore, refuse to deal with the contention that Section 76 (1) is ultra vires the State Legislature.

(59) There is very little substance in the argument that Art. 30 comes in aid of the petitioner as the right under that Article is in no way infringed.

(60) Now coming to the merits of the decision of the Board to frame a scheme, it is rather difficult to accept the petitioner's contention, that the board acted with bias when it decided to initiate proceedings to frame a scheme and ultimately decided to frame one. The petitioner filed, in support of the allegations in his affidavit, the affidavits of others suggesting that the President of the Board and one of the Commissioners were hand in glove with Mr. A. Lakshminarayana Rao and Sripadhachar when they visited Udipi. It is no doubt true that officers having control and supervision over such institutions should not give room to any reasonable apprehension in the minds of a litigant by moving closely with the persons of the rival party. The allegations made, even if true, would not justify an inference of bias on the part of the Board.

(61) In arriving at a decision that a scheme was necessary the Board failed to take into consideration the objections sent by the Swami by post on the 13th before the Board made up its mind even though it cannot be said, having regard to the dates on which adjournments had been granted from time to time on behalf of the Swami that the Board failed to give a reasonable opportunity to hear the petitioner. When the objections were in fact filed, there was nothing preventing the Board from taking into consideration the statement filed on behalf of the Swami. It must be remembered that Sripadhachar was in management as agent of the Swami for a period of two years and the Swamiji removed him and instituted a suit for recovery of the documents and accounts. The mismanagement on which the decision to frame a scheme was founded must have been partly due to Sripadhachar and he cannot altogether be absolved from responsibility. When the complaint of the Swami that Sripadhachar acted in defiance of his authority was the subject-matter of a suit, it would have been most appropriate for the Board to have stayed its hands until the result of the suit was known, and until it was established whether the termination of the power of attorney by the Swamiji was or was not justified in the circumstances.

The Board, it must be remembered, in the first instance initiated proceedings under Section 18 to enquire into the matter, but for reasons best known to themselves dropped them perhaps when it became known that a suit was filed for it was in evidence that the Swamiji sent during the proceedings under S. 18 a copy of the plaint to the Board. It was open to the Board to have enquired into the matter first before rushing through the proceedings to frame a scheme initiated after the filing of the suit by the Swamiji. It suggests that it was intended more to stifle the suit than to adjudicate upon the dispute raised by the Swamiji. That has given rise to the contention that the order of the Board was perverse as it was based mostly, if not solely, on the fact that the services of Sripadhachar were terminated and also the further fact that the statement actually filed by the Swamiji before the order was made deciding to frame a scheme was in the hands of the Board and the Board did not consider it. It seems to us that in the circumstances the power exercised by the Board is an abuse of its powers and the decisfon of the Board is undoubtedly a perverse one.

It had been held by this Court in 'DEVASIKAMANI PONNAMBALA DESIKAR v. COMMISSIONER FOR H. R. E. ENDOWMENTS, MADRAS', ILR (1941) Mad 807, that a decision which is perverse really amounts to a non-exercise of the jurisdiction entrusted to the authority concerned. For this position, reliance was placed upon the decision in the 'BOARD OF EDUCATION v. RICE', (1911) AC 179. What happened in the first case was while a scheme for the administration of a temple was in force, the Board initiated proceedings under Chapter VI-A, the notification proceedings under the earlier Act with the object of taking over the management from the hands of the trustee. The reasons given by the Board in support of the procedure adopted were examined by this Court and it was found that there were no valid reasons to justify the action of the Board in taking the drastic step of applying the notification proceedings in Chapter VI-A. The power of notification, it was pointed out, should not be exercised without a grave reason, as it was a drastic step calculated to deprive the trustee or the head of the Mutt of his right to management of the office. It seems to us that the hasty action taken by the Board in disregard of the complaint of the Swamiji and without considering his objections, & even without waiting for a final adjudication by the Court in which proceedings were pending on the matters in controversy between the Swamiji and Sripadhachar is a perverse exercise of the jurisdiction of the Board; and the decision to frame a scheme cannot be supported even on the merits. The order of the Board is without jurisdiction both on the merits and also on the constitutional objections which we have upheld in the course of this judgment.

(62) To sum up, we hold that the following sections are ultra vires the State Legislature in so far as they relate to this mutt; and what we say will also equally apply to other Mutts of a similar nature. The sections of the new Act are: Sections 20, 21, 25 (4), S. 26 (to the extent S. 25 (4) is made applicable), S. 28 (though it sounds innocuous, it is liable to abuse as we have already pointed out earlier in the judgment), S. 29, Cl. (2) of S. 30, S. 31, S. 53 (because Courts have ample powers to meet these contingencies), S. 54, Cl. (2) of S. 55, S. 56, Cl. (3) of S. 58, S. 59, Ss. 63 to 69 in Chapter VI, Cls. (2), (3) and (4) of S. 70, S. 76, S. 89 and S. 99 (to the extent it gives the Government virtually complete control over the Mathadhipathis and Mutts). Since S. 5 of the new Act has repealed the earlier Act, the Madras Hindu Religious Endowments Act, Act II (2) of 1927, and since we are not holding the whole new Act ultra vires, it is unnecessary to go into detail in examining which of the provisions of the earlier Act were ultra vires the State Legislature tested by the fundamental rights guaranteed by the Constitution. If a decision were necessary, we should say that the sections in the earlier Act which correspond to the sections of the new Act enumerated above as being ultra vires will also be ultra vires.

(63) The rule nisi must be made absolute.

(64) The petitioner is entitled to his costs. Advocate's fee Rs. 250.

(65) This is a fit case for appeal to the Supreme Court as it involves important questions regarding the interpretation of the Constitution. A certificate will issue under Art. 132 of the Constitution.

(66) Writ Petitions Nos. 379 and 380 of 1951: These two petitions relate to the temple at Chidambaram in South Arcot District and were filed for the issue of a Writ of Certiorari or direction or order in the nature of such a writ of certiorari against the first respondent, the State of Madras, calling for the records relating to the notification No. G. O. Ms. 894, Rural Welfare dated 28-8-1951 published in the Fort St. George Gazette on 4-9-1951 in the matter of Sri Sabhanayakar Temple, Chidambaram and quashing the said proceeding or in the alternative to issue a writ of mandamus, or direction or order in the nature of such a writ of mandamus directing them to rescind the said notification. The second respondent in the petitions as originally filed was the Hindu Religious Endowments Board, Madras. When the Madras Hindu Religious and Charitable Endowments Act (Act XIX (19) of 1951), came into force on 30-9-51, the petitioners obtained leave to amend the petitions by substituting the Commissioner, Hindu Religious and Charitable Endowments in place of the Board and also included a prayer for the issue of a writ of mandamus or an order in the nature of such a writ directing the respondents to forbear from taking further proceedings under Act XIX (19) of 1951 and from giving effect to the order of the 2nd respondent dated 31-8-1951. Leave was granted for the amendment as there was no objection.

(67) The temple at Chidambaram, Chit and Ambalam (the atmosphere of wisdom), is a public temple of great antiquity sacred to Saivites all over India. According to the South Arcot Manual of the year 1878, the area occupied by the temple is about 39 acres in the centre of the town. Of the five Lingams of Siva, corresponding to the panchabhuthas, earth, water, light, air, and akasa (ether), the Lingam in this temple is Akasa Lingam. In fact, no Lingam exists but a curtain is hung before a wall on which some Bhijaksharas were written and when people go to worship, the curtain is withdrawn to see the "Lingam". Offerings are made before the curtain. This is generally known as 'Chidambara Rahasyam' the secret of Chidambaram. The Manual at page 401 refers to a legend going back to the fifth Manu, one of whose sons Shwetha Varma, who was a leper and refused to rule over the country, the Kingdom of Gouda allotted to him by his father. Leaving his kingdom, he set on foot on a pilgrimage and came to Conjeevaram where he met a hunter who informed him that there was a famous rishi nearby with tiger's paws who lived in a jungle near a 'Kovil' where an invisible deity dwelt. Near the kovil there was also a pool. Shwetha Varma out of inquisitiveness met the rishi who was called Vyagrapada. With his divine foresight the Rishi came to know of the arrival of Shwetha Varma and asked him to bathe in the pool. Thereupon, the dreadful disease vanished and his skin obtained a golden hue. In consequence he was known thereafter as Hiranya Varma.

(68) The Dikshitars who live nearby are Brahmins having some peculiar customs of their own and the pagoda is practically treated as their property. They claim a divine origin for themselves and the story is that Brahma took them from Tillai (Chidambaram) to perform 'Yagnam' near Benares where they stayed till these were invited by Hiranya Varma to Chidambaram at the suggestion of the deity at Chidambaram. Tillai Muvayirattar or the three thousand men of Tillai, known as the Dikshitars arrived at Chidambaram and to their amazement and distress, it was discovered that their number was less by one. Thereafter, the Akhasa Vani or the voice of the sky announced that he was the God himself that was missing i.e., Sabha Nayakar which is the present name of the presiding deity in the temple. Professor Wilson in his glossary says that the Dikshitars are really a branch of the Kanouj Brahmins whose abode is the modern Allahabad.

(69) This temple has many peculiar features which are not common to the other temples in India. The management of the temple all along vested in the Dikshitars of whom there were 253 families at the time of the Manual now reduced to 250. Every married male member of the sect has an equal voice and control in the management of the temple. The right of management does not go by succession but is acquired by birth and marriage so much so every born and married becomes entitled to share the privilege and perquisites incidental to the management which is terminable only at his death. This is an inducement to early marriage of boys even at the age of 5. It is a close community as they do not marry from any outside families but only from among themselves. Hence the proverb noticed by Thurston Vol. I Castes and Tribes page 338, that a "Tillai girl never crosses the boundary line".

The management is by turns. They are the dharmakarthas as well as the Archakas of the temple. They framed rules for the management of the temple, for the custody of the properties particularly the jewels even as early as 1849 and a printed copy of that has been filed as an exhibit in these proceedings. They are generally on duty in the pagoda 20 at a time, and each batch of 20 stays on duty for 20 days. Though every married male is entitled to take part in the management, till he attains 25 he is not considered to be qualified for performing the principal rituals in the shrine when he is initiated in a ceremony called 'Diksha'. The Temple has five Sabhas or halls called the Chitt Sabha, the Kanaka Sabha, the Deva Sabha, the Nirutta Sabha and the Raja Sabha. There are also the Amman Koil and the Moolasthanam besides a Vishnu Koil and a Pillayar Koil. The Chitt Sabha is the seat of the presiding deity, Sabhanayaka or Nataraja and unless service is first held in it, according to usage, it cannot be held in any other shrine.

(70) The temple has very little property of its own and the system of providing the necessary material for the various abhishekams, archanas and naivedyams during the seven kalams and for the Brahmotsavam and other utsavams is somewhat peculiar. The worship in the temple is according to vedic rights and not in accordance with agamasastras as in other temples. The expense of conducting the seven kalotsavams is provided by podu Kattalaidars or common kattalaidars who instead of money, supply the articles necessary for the abhishekam, archana and naivedyam etc. The seven kalams are: milk naivedya between 6 and 7 a.m. at the principal shrine; 'Kalasandhi' between 8 and 9 a.m.; 'Irandam Kalam' between 10 and 11 a.m.; 'Uchi Kalam' 12 noon; 'Sayaraksha' 6 p.m.; night 'Irandam Kalam' 8 p.m. and 'Ardha jamam' 10 p.m. At all the six kalams except the first, abhishekam is done to the Spatika Lingam called Chandramouliswara. Abhishekam to the 'Marakatha' murthy otherwise known as Rath-

nasabhapathy is done only at Irandam kalam between 10 and 11 a.m. No abhishekams are done to the principal deity Nataraja Murthi and Sivakamiamman except on special occasions. For all these the Podu Kattalaidars provide the materials.

There are also the Utsava Kattalaidars whose duty it is to meet the cost of the utsavams. Besides these the Dikshitars undertake, on behalf of religious minded people, to perform an archana or abhishekam on stated days when cooked food is offered in the name of the devotee. The Dikshitar receives for this purpose a sum of money annually. He sends Vibhudi prasadam to the devotees, the food offering being taken by him. The Podu Dikshitars have nothing to do with this. It is the individual right of the Dikshitar who carries on the worship on behalf of the devotee. These are individual kattalais.

There is yet another kind of kattalai for performing an archana, mainly on janma nakshatram days or any special days according to the choice of the devotee. Every Dikshitar has got his own clients for this purpose and he carries out the duties in return for which he obtains periodical payments from his clients, with this also the Podu Dikshitars have nothing to do. The only property owned by the temple besides the premises of the temple is 'TIRUVITAKKU MANYAM'. These manyams were originally of the extent of about 200 acres distributed in various villages and consisted of wet and dry lands and also topes. Of these, lands to the extent of 100 acres have been resumed by the Government and a beriz deduction of Rs. 330-10-4 is given out of which the Podu Dikshitars receive only Rs. 94-14-0 on behalf of the Devasthanam and the balance is paid to other persons. For over a period of 75 years these lands, it is common ground, have been in the possession of tenants from whom collection of melwaram is made on behalf of the temple by the Podu Dikshitars either directly or by leasing the right to collect among themselves to the highest bidder.

(71) The Dikshitars have no other emoluments and they combine in themselves the functions of a trustee as well as an archaka. They have no inams and they have to devote their time exclusively to look after the affairs of the temple and carry on the worship in it by an internal arrangement made by them over a century ago as evidenced by the rules which have been framed by them and which are in vogue even at the present day. They are prohibited from taking up any other avocation and therefore they must necessarily depend for their livelihood consisting of as many as 250 families of 1500 members on what they receive at the temple either as dakshina or as offerings of food known as pavadai and other offerings made to the deity. They are bound up with the temple and service to God is the only source of their lievlihood. These in brief are the usages of the temple obtaining for several centuries. These materials can be gathered from the District Manual at page 400, the decision of this Court in 'NATESA v. GANAPATHI', 14 Mad 103 and Thurston's Castes and Tribes, Vol. I, page 238 and from the affidavits filed in the case.

(72) When the Hindu Religious Endowments Act of 1923 (Act I of 1925) came into force, on behalf of the Dikshitars a memorial was submitted to his Excellency the Governor in Council, Fort St. George, in which they referred to the history of the temple and its endowments and the usages obtaining in it. They requested the Government to grant exemption to the temple from the operation of the Act by virtue of the power conferred on the Local Government under Section 2 of the said Act. This request of the petitioners was granted by the Government in G. O. 3750 L. and M. dated 28th August 1926 which states that the Government are pleased to exempt the Sri Sabha Nayakar temple at Chidambaram from the operation of all the provisions of the Madras Hindu Religious Endowments Act (Act I of 1925) except Sections 38, 57, 58, 59, 64, 65, 66, 69 and 70. Section 38 dealt with hereditary trustees, 57 with submission of budgets and annual accounts, 58 and 59 related to schemes, 64 and 65 and 66 to finance and contribution and 69 and 70 to the removal of a trustee and costs.

(73) In 1931 some of the worshippers moved the Board to frame a scheme and the Board started proceedings to frame a scheme in O. A. 644 of 1931, but owing to some technical defects the proceedings were dropped. On 2nd February 1932 the Board took up the matter 'suo motu' in O. A. No. 73 of 1932 and settled a scheme on 8th May 1933. The Dikshitars instituted O. S. 16 of 1923 in the District Court South Arcot questioning the scheme. The District Judge confirmed the scheme with certain modifications by the decree dated 9th September 1936. There was an appeal to this Court in A. S. 306 of 1936 and this Court agreed with the District Judge and confirmed the scheme with a slight modification. The judgment of this Court is dated 3rd April 1939 and is reported as 'PONNUMAN DIKSHITAR v. H. R. E. BOARD, MADRAS', (1939) 2 Mad L J 11. The scheme was directed to be enforced from 1st June 1939.

(74) The main features of the scheme as modified by the District Court are the trusteeship is vested in the Podu Dikshitars, the active management being vested in a committee of whom six were to be elected by the Podu Dikshitars from among themselves and three to be chosen from among the Podu Dikshitars by turn or murai. The six trustees elected should not stand for re-election for a period of five years from the termination of their office. The Managing Committee was enjoined to appoint a manager subject to the approval of the Board on a salary basis. The Managing committee was enjoined to establish 'hundials' for the deposit of voluntary and compulsory offerings & also to fix the rates for the performance of archana and special worship. Their duties are defined under the scheme. They were required to lease out temple property invariably by public auction. They are bound to maintain accounts and the Board was authorised to appoint one or more of the worshippers as honorary trustees who shall attend to the inspection of the accounts, ascertain whether the kattalais are being performed regularly and bring to the notice of the Managing Committee any irregularities in such matters. The Committee was required to prepare a list of jewels and submit a copy of the same to the Board. The vacant sites belonging to the temple, it was directed, should be utilised for putting up temporary sheds during the time of the festival.

(75) During the pendency of the suit and before the judgment of the District Court was pronounced on 28th August 1936, the exemption granted in 1926 was annulled. The Board

attempted to notify the temple by proceedings initiated under Chapter VI-A of the earlier Act on 1st May 1936. As a result of the observations in the judgment of the High Court, these proceedings were however dropped on the 20th March 1940. The High Court then observed:

"It seems to us very undesirable that the Board should have taken any steps in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustees in charge of a temple from their office. The scheme was framed in 1933 and proceedings relating to its notification were pending in the District Court and the scheme had not been given any fair trial. It would not possibly be said that the scheme was not worked satisfactorily by the trustees and that therefore in the interests of proper administration of the temple it was necessary for the Board to take the drastic step of having the temple notified. We trust and hope that the Board would drop all proceedings in the matter and allow the scheme as modified by the District Court and as modified by us to be given a fair trial and would give the trustees a fair opportunity to carry on the administration in accordance with the scheme."

Again in 1946 the Board seems to have revived the idea of starting proceedings under Chapter VI-A but they were again dropped on 11th August 1947. In 1950 proceedings under Chapter VI-A which terminated in the notifications now challenged were initiated by the Board and the Board after hearing the objections of the petitioners decided on 21st March 1951 to notify the temple as they were satisfied that a case for such a step was made out. There was an appeal as provided under the Act to the full Board and it was disposed of by order of the Board dated 11th July 1951. This was immediately followed by the notification by a further order of the Board dated 31st August 1951 appointing an executive officer. The Government approved the proposed action of the Board and issued a notification in the Fort St. George Gazette on 28th August 1951.

(76) The notification is attacked both on constitutional grounds and also on the merits. The same articles as were relied on in C. M. P. No. 2591 of 1951 (Sirur mutt case) were also relied on in this case.

(77) As we have considered the Article of the Constitution elaborately in C. M. P. No. 2591 of 1951, it is needless to repeat the reasoning and the conclusions reached by us in that case. They are equally applicable to this case. The idol, it is now well established, is a juristic person capable of taking and holding property. The right to possession and management, however, of the property endowed to the idol is in a manager or 'Dharmakartha' or shebait and the manager represents the idol in all transactions and suits. Usually, the dharmakartha has no beneficial interest and the property is not vested in him. The authority of the manager is analogous to that of a guardian of an infant heir and his liability in respect of his management is analogous to that of a trustee. We have held in C. M. P. No. 2591 of 1951 that if the dharmakartha or the head of a Mutt has a beneficial interest in the property and its income, such rights are "property" within the meaning of Article 19(1)(f) of the Constitution. It is not disputed that the Podu Dikshitars in whom the management of the temple is vested are both the managers and the archakas and they have a substantial beneficial interest in the income.

It was observed in 'NATESA v. GANAPATHI', 14 Mad 103, that the Dikshitars hold both the offices in the institution and the net income of the temple which is derived from general offerings is their recognised means of livelihood—see at page 104. The only remuneration for the services rendered by the archakas is the right to share in the joint income and to enjoy the proceeds of the income from individual kattalais which each Dikshitar derives. The income of Rs. 800/- from the Tiruvilakku manyam is utilised for the lighting in the temple and if there is any surplus, it is distributed among the Dikshitars. Except the Tiruvilakku manyam the temple does not own any other properties from which it derives income and which is received by the Dikshitars. 250 families of about 1500 members have to be fed and maintained from out of the earnings made by the Dikshitars from the temple. The Dikshitars, therefore, are collectively and individually entitled to the beneficial interests in the offerings made to the God & in the collections made for the archanas and the other aradhanas. Some of the collections are the joint property of the community of Podu Dikshitars while the others are their individual income. In the light of what has been said in C. M. P. No. 2591 of 1951 and in view of the authorities examined therein, it follows that the Dikshitars who are the citizens of India have individual proprietary rights and the question is whether the notification takes away or abridges any of their proprietary rights and whether such notification is an unreasonable restriction on their right to acquire, hold and dispose of property.

(78) Looking at it from the point of view, whether the Podu Dikshitars are a denomination, and whether their right as a denomination is to any extent infringed within the meaning of Article 26, it seems to us that it is a clear case, in which it can safely be said that the Podu Dikshitars who are Smartha Brahmins, form and constitute a religious denomination or in any event, a section thereof. They are even a closed body, because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services to God. It is their exclusive and sole privilege which has been recognised and established for over several centuries. The notification seriously interferes with their right to manage the affairs in matters of religion to own and acquire movable and immoveable property, and even to administer such property in accordance with law. A law which substantially deprives the religious denomination of its right to administer the property of the denomination leaving only a scintilla of the right in the denomination cannot be justified and upheld as an exercise of the power to regulate the administration of the institution. Nor is it reasonable restriction within the meaning of the Art. 19 (5) of the Constitution.

The procedure to notify a temple under the earlier and the new Acts is undoubtedly a drastic innovation, which encroaches upon the rights of the Dikshitars to manage the property belonging to the denomination. It completely supersedes the machinery of management by the Dikshitars established and regulated from time to time by rules framed by the denomina-

tion in 1849 and reprinted in 1900 which have been filed and exhibited in the litigation in which the scheme was questioned. They are also filed as exhibits in this case. The rules cover every detail of the administration of the temple by the Podu Dikshitars and it is really surprising how more than a century ago they could have thought of framing detailed rules regarding the administration by them with a view to make it more effective. The notification procedure, as has been pointed out by this Court often, should be resorted to only when there has been gross mismanagement in the administration and the machinery provided for its management has broken down. This was the situation before the Constitution came into force.

A deprivation of the right to manage by the Dikshitars and vesting it in an executive officer appointed by the Government and the new Act making the administration a Governmental department is a serious inroad upon the rights of the Dikshitars. The Board under the earlier Act when satisfied by its own enquiry that there was mismanagement could exercise the power notwithstanding that the religious institution was governed by a scheme settled by Court or by the Board even. The power to finally decide the advisability of notifying an institution is vested exclusively in the Board. No doubt, there is a right of appeal to the full Board provided under the earlier Act and under the new Act even that illusory right of appeal has been abolished. There is no right of suit permitted to question the action of the Board either under the earlier Act or under the provisions of the new Act. The Commissioner's decision is communicated to the Government under the new Act and the Government publishes the notification declaring the institution to be subject to the provisions of Chapter VI. The right of appeal to the Board under the earlier Act and the vesting of the exclusive jurisdiction without any remedy in the Commissioner and the Government to take the serious step of replacing the administration by the Dikshitars by an executive officer without a power of judicial review of any sort, is to say the least, unreasonable and unjust. It is a well established principle that a person cannot be a Judge in his own cause. This is a principle recognized by the jurisprudence of all civilized nations. Even in England where the substitution of administrative justice has now become a common feature, this principle has been adopted and applied. Robson in his book on Justice and Administrative Law summarises the position at p. 56 as follows:

"Underlying this condition that the Judge must be free from certain obvious and crude forms of interest in the case which he is called upon to decide, is the fundamental principle that a man cannot be judge in his own cause. Nor can he be both accuser and judge. 'If there is on a tribunal anyone who is an accuser, and who, although he is accuser, acts also as judge', said Charles J. 'his presence on that tribunal is fatal to its jurisdiction.' It is of no importance that had he been absent the decision would have been the same. His mere presence vitiates the decision. 'The object of the rule', the late Lord Atkin more recently remarked, 'is not merely that the scales be held even; it is also that they may not appear to be inclined'. This is one of the most deeply rooted ideas in all systems of justice. So essential is it to English legal notions that it has been suggested that not even an Act of Parliament could make a man judge in his own cause and that a Statute would be void if it attempted to do so. Whether that is or is not sound constitutional law is not likely to be put to the test. In modern times the tendency has been rather in the other direction; and there are several recent measures on the statute book in which Parliament has applied the common law rule to whole departments of State. For example, where a local authority proposed to acquire land compulsorily for housing purposes, and the taking of it was resisted by the owner, the Minister of Health was required by statute to appoint 'an impartial person, not in the employment of any Government department' to inquire whether the land was suitable and whether it could be acquired without undue detriment to the owners and adjoining landowners."

The learned author also gives other examples where this principle has been applied. If that is the position in England where there is no written Constitution recognising fundamental rights and the power of Parliament to enact a law is supreme & is subject to no limitations, it cannot be said that where legislative power should be exercised subject to limitations recognised and embodied in the Constitution, the limitations of the nature contained in Chapter VI of the new Act and Chapter VI-A of the earlier Act, cannot but be held to infringe the very fundamental principle of jurisprudence that no man should be a judge in his own cause and is therefore unreasonable and unjust. One has to only peruse the provisions of the notification dated 31st August 1951 to convince himself that the Podu Dikshitars' rights have been unjustly abridged and unreasonably restricted. The executive officer appointed under the notification is given the power and control over the properties and the servants of the temple and is vested with the right to conduct the festivals and other religious rites and rituals, of course, according to custom and usage. He is authorised to establish hundials for the collection of the voluntary and other offerings in the temple. He is given the right of suspending, removing or dismissing the servants of the temple and is empowered to receive all the incomes of the devasthanam and make all disbursements on its behalf, which must be brought into account. This provision shuts out to the Dikshitars the only source of their livelihood. No remuneration is provided even for the services which they render in the temple, the only saving clause being that the trustee shall be entitled to receive the customary personal honours which they have been receiving till now from the Devasthanam. The clause is vague and does not in any manner and to any extent clearly and definitely state or save the surplus income and the other individual income which they have been and ought to have been receiving as the only remuneration for the services rendered by them. It will reduce them, if the income is taken away by the executive officer, to starvation and the 250 families consisting of 1500 members whom their religious usage renders unfit to pursue any other profession or avocation are doomed to starvation and eternal perdition. Under the guise of the power vested in the legislature, a law which permits such deprivation cannot indeed be said to be either reasonable restriction on the power to acquire, hold and dispose of property under

Art. 19 (1) (f) or a valid exercise of a power intended solely for the regulation of the administration of the properties of the temple. An abrogation of a right by a law is not a regulation by it. It is annihilation and not regulation. The provision therefore, relating to the notification and the notification actually issued are opposed to the fundamental rights granted to the individual and guaranteed by the Constitution under Article 19 (1) (f) and to the denomination under Art. 26 and therefore cannot be upheld.

(79) The right to contribution under S. 76 of the new Act has been held by us in C. M. P. No. 2591 of 1951. as unconstitutional as it is opposed to Art. 27.

(80) The notification, in our opinion, is also bad on the merits. The order of the Board in the first instance deciding to notify the temple and the order of the full Board on appeal proceeded on grounds which cannot be justified. There is already a scheme framed by the Board and finalised by the Court. It came into force on 1st June 1939. The scheme, it is said, did not help in putting an end to the mismanagement by the Dikshitars and certain provisions of the scheme have not been given effect to, notwithstanding the directions of the Board. It is also stated among the reasons that a register of jewels was not maintained & was not made available for the inspection of the officers of the Board. That the temple was in bad state of repair; that the Dikshitars did not take steps to enforce the Podu Kattalais; that no steps were taken to recover possession of the Tirvilakku manyam lands; that chit system for archanas was not introduced; that the vacant sites of the temple were not leased out for the sheds; that the electrical lighting arrangements in the temple were insufficient and of a temporary nature; that the drains around the temple and inside the shrine were not kept in a sanitary condition; that the D. C. B. was not maintained and so on, which are enumerated seriatim in the annexure to the Board's order dated 21-3-1951.

These objections were answered by the Dikshitars. The full Board and the Board which considered the matter in the first instance agreed in concluding that there were acts of mismanagement established which necessitated a notification of the temple. The appellate order concedes that except the Tiruvilakku manyam lands, there was no other property which was endowed for the performance of kattalai or services in the temple and the kattalaidars, meaning the Podu kattalaidars, were not shown to have created any endowments and that therefore they do not come under the definition of specific endowments. At the very early stage of the enquiry, the Dikshitars requested the Board to issue notice to the kattalaidars as they were necessary parties to the enquiry as the question relating to kattalaidars was also raised. This request was not granted for the reason that the kattalaidars have not created any endowments and that there are therefore no specific endowments. There is no complaint at any stage that the kattalaidars defaulted in providing the materials for the carrying on of the worship at the seven kalams and the utsavams of the temple. The temple not having owned any lands except the Tiruvilakku manyam, there is no income received by the Podu Dikshitars from any property. In view of the finding of the full Board, the entire reasoning of the first order of the Board regarding kattalais, seems to us was not justified.

(81) Nor is there necessity to keep elaborate accounts of the income as the kattalaidars do not pay any amount into the hands of the Dikshitars but they themselves provide the necessary material at the time of each worship or aradhana. This is a fundamental fact peculiar to this temple and if this is borne in mind, the foundation for most of the charges falls to the ground e.g. how are the Dikshitars to get large amounts required for the repairs to the temples. They cannot be expected to starve themselves and carry out the repairs which require a large outlay. It is not as if the Dikshitars were not alive to the necessity of putting the temple in proper repair. The income from the Tiruvilakku manyam was only Rs. 800/- and on this basis, it was that the Board was levying contribution and therefore that may be taken as the correct income. That would be wholly insufficient to contribute anything for the repairs of the temple.

By the efforts of the Dikshitars a Sabha known as Tirumathil Tiruppani Sabha was constituted for the collection of subscriptions and donations for the repairs of the temple. It is through their efforts that they were able to find a benefactor to renovate the Pandya Naicken temple in 1948. The first and second prakarams of the temple were renovated by the benefactions of Nattukottai Chettiars. It is to such benefactors that the Dikshitars and the temple must look for the major repairs and for renovation wherever necessary. There are no other means of getting large income to the temple and to encroach upon what the Dikshitars receive for the archanas and worship and which is utilised by them for their sustenance and to require them to contribute from out of it large sums for the repairs and renovation of the temple seems to us wholly unjust.

The introduction of the system of archana chits and the hundials for collections has been a source of trouble between the Dikshitars and the Board ever since the scheme was framed. No doubt the scheme directed the establishment of the hundials and the introduction of the chit system. But the scheme was not clear as to between whom and in what proportion should these collections be divided. Time and again the Dikshitars pointed out this difficulty whenever the Board insisted upon the introduction of the hundials and the chit system. It must be remembered that this is not a temple like the Tirupathi or Palani temple where in fulfilment of vows taken by the worshippers, money or other offerings are made in the hundials. The scheme referred to voluntary and compulsory offerings for the hundials. If however any amount is paid into the hands of the Podu Dikshitars alone, it was brought into account in cases where it is earmarked as a gift to the God. But where the payment is only for the services rendered by the Dikshitars either for the archana or aradhana, they themselves were appropriating it as that was the only emolument which they are entitled to for the services.

On 28th March 1940 and again in 1946, the Dikshitars sent up memorials to the Board regarding the hundials and the introduction of the chit system; but the Board did not then and even up to this date decide to whom the collections should go. The apprehension of the Dikshitars that they will be deprived of their

source of living was not unreasonable and unjust. The Board's orders themselves disclose that the income received by them in the temples is the sole source of their livelihood. In 1947 when an attempt was made to initiate notification proceedings on these very grounds, they were immediately dropped when representations were made, as stated by the Dikshitars in the affidavit, to the then Chief Minister Sri O. P. Ramaswami Reddiar. Between 1940 and 1946 no directions were given by the Board in this behalf. They left this question in a nebulous state without deciding one way or the other and this is now made the chief ground for the issue of a notification. It was open to the Board to have moved the Court for a modification of the scheme or for themselves to have decided on the complaint made by the Dikshitars from time to time.

(82) Another ground which was strongly relied upon relates to the Tiruvilakku manyam. It was originally 200 acres of which 100 acres were resumed by the Government and a beriz deduction was given out of which a portion was being paid to the temple. The remaining extent is only 100 acres. This is borne out by the orders of the Board itself. The lands were in the possession of tenants from whom collections were being made by the Dikshitars. Though the title deeds to these lands which are distributed in several villages stand in the name of the deity, it is not known whether the grant consists of melwaram and kudiwaram or melwaram alone. For over 75 years the tenants have been in undisturbed possession of the lands. They have been paying melwaram on the land to the temple. It is therefore not an unreasonable inference to draw that the grant consisted only of melwaram and that the tenants had the kudiwaram interest in the lands and the right to recover possession might have been barred. It has been represented to us in the course of the arguments that in fact the Podu Dikshitars consulted a lawyer who gave the opinion that it would be a sheer waste of money to institute suits for the recovery of possession of lands. This fact, it was stated was represented to the Board and it is alleged in the affidavit filed before us and was not seriously denied. The criticism therefore by the full Board in their order on appeal that the Podu Dikshitars persisted in refusing to take action for recovery of possession and they did not even obtain legal opinion on the advisability of recovering possession of the property and the lands seems to us to be unwarranted. It is needless to state that in those circumstances, it would have been wholly inadvisable to have launched the temple in an unnecessary and costly litigation when there is very little chance of success.

(83) Regarding the jewels, there seems to be a misconception on the part of the Board when they state in the appellate order:

> "Admittedly no jewel register is maintained and facilities were not given to the officers of the Board to verify and check the jewels with the list given in the Section 38 register."

This charge, in our opinion, is not well founded. A jewel register in triplicate was submitted to the Board by the Dikshitars in 1949. The jewels were got weighed and checked under the personal supervision of the biggest bullion merchants in Chidambaram. Jewels were in fact inspected by the Officers of the Board. The Dikshitars in their affidavit stated that they gave full lists in 1940 soon after the scheme came into force and in 1946 a list of all the additional jewels received was also given together with a box. The jewels were again weighed and valued and a fuller list was prepared and given to the Board on 30th July 1949. The lists are in books which have been produced before us from the custody of the Board. We have personally inspected the book which has been produced before us by the Board and we are fully satisfied that not only the lists were complete and exhaustive but that they were also checked by the Assistant Commissioner on 21-10-1950. We are unable to notice any discrepancies.

The selvanam box contains unusable and broken articles such as gold pieces, gems etc. It is not usually opened but about 35 or 40 years ago out of the materials in the box a makara kandikai valued at Rs. 75,000 was got made. A list was made of the other broken and unusable jewels and it was given to the Board on 26-9-1946. This is all borne out by the register which has been produced before us. The charge therefore seems to us to proceed without an appreciation of the true facts. The rules book maintained by the Dikshitars regulates the management of the temple affairs, secular and spiritual and contains specific rules framed as early as 1849 regarding the jewels. Of these rule 12 says:

> "Two complete lists should be prepared of all the jewels, vessels, clothes and other movable property in the temple, one of which should be kept in the safe room called Asthanthiram of the temple and the other should be in the custody of the turnholders who do pooja."

This rule has got several sub-rules providing for the safe handling of these articles & for their safe custody; they also lay down varying grades of punishment for loss of jewels by theft or negligence. The 10th rule in 1849 book is to the following effect:

> "Special jewels worn by the deity on occasions of Brahmotsavams i.e., in June and December of each year are provided for in this rule. A meeting of all the Dikshitars is to be convened and the keys have to be produced by key holders and in the presence of the entire Podu Dikshitars two lists are to be prepared, one signed by the Utsava Moraikar should be kept in the safe room and the other should be kept by the Karyakar."

This rule also has got several clauses providing for safe custody and also how loss owing to theft or negligence is to be punished. When the temple was renovated between 1885 and 1892, the safe room was considerably altered and strengthened and the 1900 rules make provision for safe custody of the jewels. Groups of ten Dikshitars have to be in charge of these special jewels for six months ending with the Tamil months of Ani and Margazhi (now, the number is twenty). They get their right by rotation according to the morai list; each is provided with a different lock and key and the Asthana room is locked with all the locks. Whenever occasion arises for taking out the jewels such as Brahmotsavam or to enable a distinguished visitor to see them, a special meeting of all the Poduvars is convened and the Asthana Moraikars are directed to assemble at a particular hour with their keys to open the safe room, take out the jewels and after the purpose is over, put them back again. All this has to be done in the presence of the Poduvars. There were also elaborate rules for handing

over and taking over charge from one set of turnholders to the other after the months of Ani and Margazhi. The system devised by the Dikshitars is undoubtedly a very safe system making it almost impossible for the jewels to be lost and no one could have devised a better system than that. The elaborate discussion therefore by the Board in the first order and the conclusion of the appellate Board regarding the jewels seems to us unwarranted. There is therefore very little justification for the charge which has been taken as a serious ground for the issue of the notification.

(84) The appellate order refers that indiscriminate payments were exacted from worshippers by the Dikshitars as remuneration for archanas. The only evidence is that Rs. 1-4-0 a month is charged for archana and this cannot be said to be indiscriminate or exorbitant. By introducing the chit system and hundi collections under the guise of regulating the worship it really commercialises worship in the temple. It is common knowledge that in most of the temples, it is almost impossible for poor men to get darsan if he is not able to pay the required amount. The value of the worship and the spiritual significance are lost when it is treated as a saleable commodity which should be controlled and exploited for the purpose of earning income for a temple.

(85) These are the reasons on which the appellate order was based. It is unnecessary to deal with the grounds elaborately as we are satisfied that the order on which the notification was issued is without any foundation and proceeded on a total misconception of the facts.

(86) These are the facts appearing on the record and it is somewhat surprising that the Board should have taken the serious step, as has been held by this Court, of notifying this temple which procedure ought not to be lightly resorted to unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustee in charge of a temple from his office. In such circumstances it is open to us to issue a writ to quash an order which proceeds on grounds which are so perverse as to amount to a non-exercise of the jurisdiction entrusted to it. The notification therefore must be quashed even on the merits.

(87) In C. M. P. No. 2591 of 1951 we have enumerated the sections of the impugned new Act which are ultra vires the State Legislature in so far as they are made applicable to Mutts and Matathipathis and to the religious denominations for which those Mutts exist. In the case of Sri Sabhanayakar Temple at Chidambaram, with which we are concerned in this petition, it should be clear from what we have stated earlier in this judgment, that the position of the Dikshitars, labelled trustees of this temple, is virtually analogous to that of a Matathipathi of a Mutt, except that the Podu Dikshitars of this temple, functioning as trustees, will not have the same dominion over the income of the properties of the temple which the Matathipathi enjoys in relation to the income from the Mutt and its properties. Therefore, the sections which we held ultra vires in relation to Mutts and Matathipathis will also be ultra vires the State Legislature in relation to Sri Sabhanayakar Temple, Chidambaram and the Podu Dikshitars who have the right to administer the affairs and the properties of the temple. As we have already pointed out even more than the case of the Shivalli Brahmins, it can be asserted that the Dikshitars of Chidambaram form a religious denomination within the meaning of Art. 26 of the Constitution.

(88) The rule nisi must be made absolute.

(89) The petitioner is entitled to his costs in the petition. Advocate's fee Rs. 250. We certify under Art. 132 of the Constitution that it is a fit case for appeal to the Supreme Court.

C.R.K./K.S. Rules made absolute.

A. I. R. 1952 Madras 650

GOVINDA MENON
AND BASHEER AHMED SAYEED JJ.

Vasudeva Rao, Appellant v. C. K. Rangai Gounder, Managing Trustee of Sri Koniyamman Devasthanam and others, Respondents.

Appeal No. 92 of 1946, D/- 18-8-1950.

Hindu Law — Will — Construction — Dedication to temple committee — Right of committee to maintain suit — Hindu Religious Endowments Act (XX (20) of 1863).

The relevant portion of a will ran as follows: "My wife P shall, after my life-time, enjoy the undermentioned property till her life-time without effecting any alienation whatsoever ....She shall, after deducting the amount utilised for the expenses of her maintenance from out of the income thereof, spend according to her pleasure a sum of not less than Rs. 70 (Rupees Seventy) every year from out of the balance left over and conduct Skanda Shashti and Soorasamhara festival for Sri Subramaniaswami at Coimbatore.....After her life-time, the Hindu Religious Endowments Committee, Coimbatore taluk as the Dharmakarthas (trustees) of the above Devasthanam shall take possession of the undermentioned property and shall from out of the balance left over after deducting from the income thereof the expenses of repairs and municipal tax in respect of the building, erect a mantapam in front of my house and conduct mandapa Kattalai every year for the Amman for ten days during the time of Radhotasavam (car festival) in the month of Masi (February-March) in Sri Koniamman temple". Provision was also made for conducting certain festivals in other temples. In a suit by the trustees of Sri Koniamman Temple Devasthanam for declaration of title and recovery of possession of property after the death of P.

Held (i) that what the testator contemplated was the creation of a trust in favour of the various temples as specified in the will and the utilization of the income for those expenses. The provisions of the will could not be read as amounting to a dedication of the income for certain purposes and the right in the corpus remaining with the testator's widow and after her life-time vesting on the heirs at law. Case law Ref. (Para 4)

(ii) that Ss. 5 and 7 of Act XX (20) of 1863 read with the preamble to Regulation VII and Clause XV of the Regulation contemplate that the Committee can receive and hold property. Hence, the dedication of the property and the constitution of the temple committee to manage as dharmakartha could not be questioned. (Para 7)

(iii) that if the committee could function as a trustee, it was a body that was

in existence on the 15th January 1944 when the plaint was filed and therefore none of its powers could have been exercised by the trustee of the Koniamman temple after getting the sanction of the Hindu Religious Endowments Board. Such being the case, the plaintiff in this case, when he filed the suit, had no 'locus standi' and had no authority to come to Court for the purpose of reliefs asked for in the plaint.

(Para 9)

S. Ramachandra Iyer, for Appellant; K. S. Desikan and M. R. Narayanaswami, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.

('21) 43 All 291: (AIR 1921 PC 20) 5
('37) ILR (1937) 2 Cal 447: (AIR 1937 PC 185) 5
('41) ILR (1941) Mad 175: (AIR 1941 PC 1) 5
('43) ILR (1943) 2 Cal 137: (AIR 1943 PC 89) 10
('21) 43 All 503: (AIR 1921 All 37) 5
('89) 12 Mad 366 7
('12) 23 Mad LJ 278: (14 Ind Cas 520) 7
('16) 39 Mad 700: (AIR 1917 Mad 551) 7
('28) 54 Mad LJ 272: (AIR 1928 Mad 190) 5
('31) 1931 Mad WN 193: (AIR 1931 Mad 340) 9
('39) ILR (1939) Mad 121: (AIR 1938 Mad 999) 5
('41) 1941-1 Mad LJ 488: (AIR 1941 Mad 591) 5
('46) 1946-1 Mad LJ 181: (AIR 1946 Mad 416) 5

GOVINDA MENON, J.: The suit out of which this appeal arises was for a declaration of the plaintiff's title and right of management as well as for recovery of possession, of the suit house together with past and future rent or damages by way of use and occupation. The Subordinate Judge of Coimbatore has held that the plaintiff is entitled to the property claimed by him with all the rights of management of the said property; but the relief for possession was disallowed. There is a further direction that the plaintiff is entitled to collect the rents from such of the defendants as are occupying portions of the suit house and utilise the funds for the ceremonies stipulated in the will of Ranoji Rao. There were directions regarding deposit of rent by the second to the fourth defendant along with the order to pay future rent at the same rate. Other minor reliefs were awarded to the plaintiff which it is not necessary to mention in detail. The first defendant has appealed against that decision of the learned Subordinate Judge and the second defendant has filed a memorandum of cross-objections against that portion of the decree which went against his contentions.

(2) The basis of the plaintiff's title is that he has been appointed as the managing trustee of Sri Koniamman Devasthanam by the Hindu Religious Endowments Board and as such he is entitled to ask for the relief claimed by him in the plaint. The first defendant is said to be the nearest heir of Ranoji Rao who was originally the owner of the property. On the 25th October 1918, Ranoji Rao executed a will by which he made certain bequests and the question for consideration is whether that will created a trust so far as the bequests are concerned. It is common ground that Ranoji Rao's wife Parvathi Bai who was a legatee of some of the items died only in July 1943. The plaintiff states that the widow Parvathi Bai was in possession and enjoyment of the suit house according to the provisions of the will and died in July 1943. Before her death she had leased out portions of the house to defendants 2 to 4 separately. The first defendant is the son of Parvathi Bai's sister and as stated in the plaint he got into possession of the properties after the death of Parvathi Bai and is managing the same. Though the plaintiff, as the managing trustee of Sri Koniamman Temple to which the property has been dedicated in the will, demanded from the first defendant such possession as he was entitled to have, he sent a reply repudiating the will and containing false allegations. Therefore the plaintiff prayed that as the trustee of Sri Koniamman Devasthanam he is obliged to file a suit for declaration of title & recovery of possession of the suit house. The Hindu Religious Endowments Board has granted him sanction to file the suit by its order dated 21st October 1943.

(3) The first defendant's plea as set forth in the written statement is that the plaintiff has no cause of action and that there was no dedication or creation of a trust by Ranoji Rao and consequently on his death and on the death of his widow Parvathi Bai, the property must, in law, be held to have passed to the heirs of Ranoji Rao. Therefore, neither the Koniamman Devasthanam nor the Hindu Religious Endowments Committee nor any trustee, has any manner of right to the suit property and as such the plaintiff's claim for possession was unsustainable. The alternative case set up by the first defendant was that even on the footing that the properties have been allotted for religious and charitable trusts, Parvathi Bai was the sole person entitled to the management thereof and in the absence of any provision for the management of the charities made by the founder, after Parvathi Bai's lifetime, the right of management passes on to the heirs of the founder, especially as before the death of Parvathi Bai, the Taluk Devasthanam Committee named in the will has ceased to exist. Therefore in any event there has been an intestacy in respect of the suit property and the major portion of the income. In any view of the case it was contended that as there has been an intestacy in respect of the suit property and the major portion of the income barring the sums directed to be spent for specified purposes, the property should, in law, be deemed to have passed to the heirs of Ranoji Rao subject to a charge for the performance of specific charities. Defendants 2 to 4 who were tenants of the suit property were willing to pay the rent into Court and they further said that during the lifetime of Parvati Bai they had paid all the rent to her.

(4) On these pleadings the Subordinate Judge framed five issues of which the most important one for consideration was whether the dedication is true and valid and whether the suit by the plaintiff is maintainable. Though in the trial court the question of the genuineness of the will was raised by the contesting defendants and the Judge gave a finding that it was the last will and testament of late Ranoji Rao, that contention has not been seriously raised in this Court. What we have therefore to decide is whether there was a valid dedication of the property in favour of the trust, and secondly even if there is a valid dedication, whether the plaintiff is entitled to bring this suit. The revelant portions of the will are as follows:

"My wife Parvathi Bai Ammal shall,after my lifetime, enjoy the undermentioned property till her lifetime without effecting any alienation whatsoever. If she were to effect any such alienation, it shall not be valid. She shall, after deducting the amount utilised for the expenses of her maintenance from out of the income thereof, spend according to her pleasure a sum of not less than Rs. 70 (Rs. seventy) every year from out of the balance left over and conduct Skanda Shashti and Soorasamhara festival for Sri Subramaniaswami at Coimbatore Fort. My gold and silver jewels as well as other movable properties shall belong only to my wife. After her lifetime, the Hindu Religious Endowments Committee, Coimbatore taluq, and the Dharmakarthas (trustees) of the above Devasthanam shall take possession of the undermentioned property and shall from out of the balance left over after deducting from the income thereof the expenses of repairs and municipal tax in respect of the building, erect a mantapam in front of my house and conduct mandapa kattalai every year for the Amman for ten days during the time of Radhotsavam (car festival) in the month of Masi (February-March) in Sri Koniamman temple, offer neivethya Prasadam and deeparadhana at a cost of not less than Rs. 30 (Rs. thirty) on the tenth day darshan and distribute the prasadam to the people. Further, on the day of Vinayaka Chaturthi in the month of Avani of every year Sri Vinayakar deity in Sri Subramaniaswami temple at Fort shall be taken round in procession from the temple by spending a sum of not less than Rs. 15 (Rs. fifteen). Abhishekam and archana shall be conducted in my name and in the name of my wife for Sri Sangameswaraswami during the time of festival at a cost of Rs. 15 (Rs. fifteen). Further repairs etc. shall be effected to the aforesaid temple. And during the time of festival in the month of Panguni (March-April) & the festival on the day of Arudra Darshanam in Sri Nataraja Devasthanam at Perur, abhishekam and archana shall be conducted every year in my name and in the name of my wife Parvathi Bai Ammal at a cost of not less than Rs. 40 (Rs. forty) for each festival. The Hindu Religious Endowments Committee and the Dharmakarthas shall, in co-operation duly perform all the above acts without fail, maintain proper account and submit every year without fail the abstract of the balance sheet in respect of the account of each year to the District Court or the Subordinate Court of Coimbatore."

In the translation furnished it is conceded that there is some slight mistake & that is that the will does not make any distinction between the Hindu Religious Endowments Committee and the dharmakartha of the Devasthanam. What the will contemplates is that the Hindu Religious Endowments Committee shall be the Dharmakartha so far as the performance of the various charities is concerned. The exact Tamil expression is as follows:

(Original in Tamil omitted—Ed.)

The correct interpretation of this sentence is that the testator does not make any distinction between the Hindu Religious Endowments Committee and the Dharmakartha. What the testator contemplates is the conferment of the right of Dharmakartha or trustee of these charities on the Hindu Religious Endowments Committee. Therefore his intention was that after the death of his wife, the Hindu Religious Endowments Committee of Coimbatore taluk shall function as the dharmakartha of the Devasthanam for the performance of the charities, viz, the erection of the mantapam in front of the house and conducting the mantapam katalai every year for the Amman for ten days during the Radhotsavam in the month of Masi in the Sri Koniamman temple and offering neivethya prasadam and deeparadhana at a cost of not less than Rs. 30. The dharmakartha was to take in procession the Sri Vinayakar deity in Sri Subramaniaswami temple at Fort in the month of Avani on the Vinayaka Chaturthi day, The trustee has to conduct the abhishekams & archanas in the names of the testator & his wife at a cost of Rs. 15 in the Sri Sangameswaraswami temple and lastly; during the festival in the month of Panguni and on the Andra Darsanam day in the Sri Nataraja Devasthanam in Perur, the trustee has to conduct the abhishekams and archanas in his name and in his wife's name. It is conceded that the Koniamman temple trustee, the Subramaniaswami temple trustee, the Sangameswarswami temple trustee and the Nataraja Devasthanam trustee at Perur are all different individuals. Therefore what we have to find is whether for the purpose of these religicus ceremonies in each of these temples, the Hindu Religious Devasthanam Committee of Coimbatore is made the trustee. It cannot for a moment be contended that Parvathi Bai had any absolute right in the property. The question whether the Devasthanam Committee becomes the dharmakartha for the performance of these religious ceremonies will arise only after Parvathi Bai's death. On a careful reading of the above provisions in the will, we have no doubt whatever that what the testator contemplated was the creation of a trust in favour of the various temples as specified in the will and the utilisation of the income for those expenses. Whatever might be said with regard to the spending of the amount during the lifetime of Parvathi Bai, after her lifetime the person mentioned in the will has to take up the management and administer the trust.

(5) The chief contention of the learned counsel for the appellant is that the will does not transfer ownership to any of the religious institutions in respect of which directions have been given by the testator providing for the performance of the specified kattalais or ceremonies. What we have to see is whether there has been any transfer of ownership in favour of the trustee. We do not read the aforesaid provisions of the will as amounting to a dedication of the income for certain purposes and the right in the corpus remaining with the testator's widow and after her lifetime vesting on the heirs at law. The appellant's contention is that it is only intended as a charge for the performance of the various ubayams. For this purpose our attention was invited to a passage in page 922 of Mayne's Hindu law, 10th Edn. as well as to decisions in 'ISHWAREE BHUBANESHWARI THAKURANI v. BROJONATH DE', I L R (1937) 2 Cal 447; 'RAMAPPA NAIDU v. LAKSHMANAN CHETTIAR', 54 Mad L J 272; THIRUVENGADAMUDAYANAIYA v. NARASIMHASWAMIYA', 1941-1-Mad L. J. 488 and 'JAINAMBUKANNIAMMAL v. RUTHRAPATHI PILLAI', (1946)

1-Mad LJ 181. On the other hand, the learned counsel for the respondents relied upon the earlier passage in page 922 of Mayne's Hindu law and contended that the appropriation of the income for the specific purpose was tantamount to dedication of the property to the trust. What is mentioned in the document, reading it as a whole, is that a legal agency, viz, the Hindu Religious Endowments Committee, was constituted to take charge of the property and perform the ceremonies mentioned in the various temples and such agency as takes possession should be the trustee and as such the Hindu Religious Endowments Committee shall be the trustee & the dharmakartha. It is further contended that a vested right is created in favour of the committee. At page 922 in paragraph 791 of Mayne's Hindu law it is stated that in order to create a valid dedication, a trust is not required and that an appropriation of property for a specific religious or charitable purpose is all that is necessary for a valid dedication. In our opinion that is what has been done in the present case. There is a direction that the income of the property should be appropriated for specific religious and charitable purposes and as such there has been a valid dedication. The learned author cites a number of cases, viz., 'RAMDHAN v. PRAYAG NARAIN', 43 All 503; 'NAGAPPA CHETTIAR v. O R. M. O. M. S. P. FIRM', I. L. R. (1939) Mad 121, which was confirmed by the Privy Council in 'O. R. M. O. M. S. P. FIRM v. NAGAPPA CHETTIAR', ILR (1941) Mad 175 and other cases. It is unnecessary for us to discuss any of these cases because in our opinion what has been done is not the earmarking of the income for a specific purpose but there has been a complete direction to appropriate the property for specific religious purposes. The argument of Mr. S. Ramachandra Aiyar for the appellant that we should read this document as a partial dedication, where a charge is created on the property, or there is a trust to receive, and apply a portion of the income for religious purposes is in our opinion, unsound. What is decided here is that the property is given out and out for the performance of the religious purposes and the testator does not retain any proprietary rights in the property in favour of any of his heirs at law. The observations of their Lordships of the Judicial Committee in 'ISHWAREE BHUBANESWAREE THAKURANI v. BROJONATH DE', I L R (1937) 2 Cal 447 P C at p. 455, do not in any way help the appellant's contention. Their Lordships there observe:

> "The effect of a valid deed of dedication is to place the property comprised in the endowment 'extra commercium' and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebait and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property".

Their Lordships further draw the distinction between absolute and partial dedication and on the facts of that case they agreed with the lower Court that the deed in question effectively dedicated the properties to the service of the idol. We do not think that the learned advocate for the appellant can give any support for his contention from the observations of their Lordships. The facts of the case in 'RAMAPPA NAIDU v. LAKSHMANAN CHETTIAR,' 54 Mad L J 272 are absolutely different. It was found there that the charities which were detailed in the will would not consume any considerable portion of the income even if they were conducted on a lavish scale and that a very large amount of the income was left intact for the enjoyment of the family; nor was it satisfactorily shown that all other properties were given to the son of the testator by the will at all. On these facts, the learned Judges, Madhavan Nair and Curgenven JJ. were of opinion that the properties covered by the will were not absolutely dedicated to the trust but were only charged with carrying out the trust as the dominating purpose and the intention of the testator, in executing the will, was to provide for the members of his family, and the maitnenance and conduct of the charity was only of subsidiary importance. The facts of the present case are absolutely different from what the learned Judges had to consider therein. Similarly, if we look at the facts of the case in 'THIRUVENGADAMUDAYANIAH v. NARASIMHASWAMIYA', (1941) 1 Mad L J 488, it will be seen that the surplus income from the property, after expending a portion of the same for certain charitable purposes, was far greater than what was required to comply with the directions of the testatrix with regard to the religious and charitable purposes and under those circumstances the proper inference was that the property was merely charged to charitable uses and that the residuary legatee took the property subject to the charge. It is difficult to see how the decision in 'JAINAMBUKANNIAMMAL v. RUTHRAPATHI PILLAI', (1946) 1 Mad LJ 181. can be of any assistance to the appellant. What the learned Judges held was that on reading the settlement deed as a whole, there was no gift of the surplus income to the sons or the members of the family in general and that the charity itself is the true beneficiary and that the testator's son-in-law should be considered to be a trustee of the charity and the only obligation of the trustee, for the time being, was to utilise the surplus income, if any, for the maintenance of the three specified relatives after whose death or effacement otherwise, there will be no obligation on the trustee to utilise any part of the income from the property for any object other than the charitable object mentioned in the document. There are observations in the judgment which tend to show that the proper construction was that there was a dedication of the property to charity. As observed by Rajamannar J. as he then was, in that case after quoting the decision of the Judicial Committee in 'HAR NARAYAN v. SURJA KUNWARI,' 43 All 291, in such cases the only rule which appears to be established is that there cannot be any fixed and absolute rule to construe the effect of any particular document.

(6) We do not think that any of these cases cited by the appellant's Counsel is against the interpretation which we are inclined to put upon the will. We have no doubt whatever that on the death of Parvathi Bai the testator intended that the Hindu Religious Endowments Committee of Coimbatore taluk, as the dharmakartha of these charities, should take over possession of the house and utilise portions of the income for the specific objects mentioned in the will. The reason why it was found necessary to appoint the Hindu Religious Endow-

ments Committee as the dharmakartha was that the religious ceremonies were to be conducted in, or with respect to, institutions of which the trustees were different individuals and not one and the same. It is also important to note that the entire income has to be utilised for the various religious ceremonies. The document does not show that any surplus is to be had after meeting the expenses and as such, even according to the decisions cited by the appellant's learned Counsel to which we have referred, when there is no surplus income to be enjoyed by the legatees or the heirs of the testator, the only inference that is possible is that the entire property is dedicated as a trust.

(7) It is next contended by the appellant that even if the intention of the testator was that after the death of his widow Parvathi Bai the Hindu Religious Endowments Committee of Coimbatore shall be the dharmakartha and perform these religious kattalais in the various institutions mentioned therein, the taluk endowments committee, as constituted, was not a body competent to hold any property on behalf of the trust and such being the case the trustee designated under the will was incapable of holding property and therefore the trust failed on the death of Parvathi Bai. For this contention, our attention was invited to various provisions of Act XX of 1863, Viz., an Act to enable the Government to divest itself of the management of religious endowments. We were invited to consider the scope and effect of Ss. 3, 4, 7, 11, 12 and 13. S. 3 contemplates that the local Government should make provision respecting temples and mosques with regard to their management because Regulation VII of 1817, so far as Madras Province was concerned, related to the appointment of managers, trustees & superintendents. S. 5 provided the procedure in case of disputes as to right of succession to vacate trusteeship & to apply to the civil Court to appoint a manager of such mosque, temple or religious institution and the manager so appointed shall exercise all the powers under the Act which the trustee, manager, or superintendent under regulation VII of 1817 had. We may, in this connection, refer to S. IV of the Act which contemplates transfer of property to independent trustees etc. belonging to their trusts etc., remaining in charge of Revenue Board or others. It contemplates transfer to a trusteee if there is one and if not to the committee. Section XI prohibits any member of a committee from acting as the trustee or manager or superintendent of a mosque or temple; and S. XII lays down that on the appointment of a committee, the Board and local agents shall transfer properties to the committee. Section XIII provides for keeping of accounts of receipts and disbursements. According to Regulation VII of 1817 which was repealed by Act XX (20) of 1863, the Board of Revenue was the supervisory body but when Act XX (20) came into existence and a committee was constituted, the supervisory power was given to the committee. The learned counsel for the appellant contends that according to clause VII, Regulation VII of 1817, which enacted that to enable the Board of Revenue to better carry into effect the duties entrusted to them by this regulation, local agents shall be appointed in each zillah, subject to the authority, control, and orders of that Board, it might have been possible for a local agent to hold property but not to the Board & when this regulation was repealed by Act XX (20) of 1863, the Committee that was constituted could not take up itself the trusteeship of any religious endowment. We do not think that there is any absolute prohibition so far as the functioning as trustee by the committee is concerned. Sections V to VII of Act XX (20) of 1863 by implication allow the committee to hold the property. Section XII speaks of the management of the affairs. We may also refer to the preamble in Regulation VII of 1817, viz., the collection of rents and profits and clause XV of the Regulation which provided that the Board had the right to appropriate the income, which meant that it had the power of management as mentioned in clause XII. On a careful consideration of the various provisions of Regulation VII of 1817, and Act XX (20) of 1863, we are not satisfied that the contention of the learned counsel that the Hindu Religious Endowments Committee cannot hold the property as trustee, is sound. No doubt S. XI of Act XX (20) of 1863 states that no member of a committee shall act as trustee, manager, etc., of a temple, mosque or religious establishment for the management of which such committee shall have been appointed. The literal meaning of this section is that any person who happens to be a member of a committee which was a collective body cannot function as a trustee of an institution over which the committee as such has got superintendence. But in 'PANDURANGA v. NAGAPPA' 12 Mad 366 at pages 367 and 368, Muttuswami Aiyar and Parker JJ. have held that the plaintiffs there, who were members of a temple committee appointed under Act XX (20) of 1863, were not entitled to claim possession of the temple and its properties from the hereditary trustee even if it were found to be subject to their jurisdiction because the learned Judges say that it is provided by S. 11 of Act XX (20) of 1863 that no member of a committee shall be capable of being, or shall act, as the trustee of a temple for the management of which such committee shall have been appointed. The learned Judges have interpreted the prohibition to possession of the temple and its properties as trustee, to the collective body of the temple committee & not only to the individuals. In 'RAMANATHA CHETTIAR v. SWAMINATHA AIYAR', 23 Mad L J 278, the learned Judges, Benson and Sadasiva Aiyar JJ. have considered the powers of a committee appointed under the Hindu Religious Endowments Act and at page 281 they refer to 'PANDURANGA v. NAGAPPA', 12 Mad 366. In the opinion of the learned Judges if the committee members usurp the powers of a temple trustee, such usurpation cannot prevent the trustee, from claiming and taking back the powers at any time; the usurping committee members are trustees 'de son tort' and as such are liable for the trust monies to the 'cestui que trust'. One thing is deducible from this decision and it is that if the members of a committee begin to function as trustee, they are liable to be proceeded against as trustees. In the well-known Srirangam case, 'SITHARAM CHETTY v. SUBRAMANIA AIYAR', 39 Mad 700, the powers of a temple committee are discussed and considered by Wallis C. J. and Seshagiri Aiyar J. Seshagiri Aiyar J. at page 717 considered this

aspect of the case and held that the intention of the Legislature was not to give larger powers to the committee than were possessed by the Revenue Board under Regulation VII of 1817. Here also reference has been made to a number of cases. In none of these cases has the question been considered or decided as to whether the committee as such can accept and hold property on behalf of the trust. As we have already remarked Ss. V and VII of Act XX (20) of 1863 read with the preamble to regulation VII and clause XV of the Regulation contemplate that the Committee can receive and hold property. We are, therefore of opinion that the dedication of the property and the constitution of the temple committee to manage as dharmakartha cannot be questioned.

(8) The further point arising from this conclusion is whether, assuming that the committee can accept the trusteeship as an obligation and function as such on the death of Parvathi Bai in 1943, the rights and obligations did not devolve upon the Hindu Religious Endowments Board and as such the plaintiff could not have been invested with any powers to file the suit by the Hindu Religious Endowments Board. The earliest of the Hindu Religious Endowments Act was Act I (1) of 1925 which was repealed & re-enacted as a consolidated Act by the Madras Act II (2) of 1927. Section 4 of Act I (1) of 1925 which corresponds to S. 8 of the Act XX (20) of 1927 repealed the Hindu Religious Endowments Act of 1863 and Madras Endowment and Escheat Regulations of 1817, Regulation VII of 1817, in so far as they apply to Hindu Religious Endowments in the Province of Madras. Section 6 of Madras Act II (2) of 1927 repealed Madras Act I (1) of 1925. Section 79 of the Madras Act I (1) of 1925 which corresponds to S. 83 of Madras Act II (2) of 1927, laid down that every committee established under the Religious Endowments Act, 1863, which was in existence at the commencement of Act I (1) of 1925, shall be deemed to have been duly constituted under the provisions of that Act. Such being the case the Devasthanam Committees which were in existence when Madras Act I (1) of 1925 came into force should be deemed to have been constituted under the provisions of the Madras Hindu Religious Endowments Act. The result is it cannot be construed that those committees were continued in existence but that such committees were newly constituted after the notional dissolution of the existing committees, especially since the words of the section are "shall be deemed to have been duly constituted under the provisions of this Act". There can therefore be no devolution or perpetuation of the old committee under S. 79 of Act I (1) of 1925 but only the creation and the continuation of new committees under this Act. Section 5, sub-s. (2) of Madras Act I (1) of 1925 corresponding to S. 9, sub-s. (2) of Act II (2) of 1927, states that the "committee" means "a committee as constituted under S. 16 of Act I (1) of 1925 corresponding to S. 20 of Act II (2) of 1927". Section 16 of Madras Act I (1) of 1925 which is 'ad idem' with S. 20 of Act II (2) of 1927 empowers the local Government by notification, to direct the constitution of a committee for any temple or temples or for any class of temples, and varying the strength or the jurisdiction of any such committee. There are provisos to that section which we need not refer at present. Under S. 32 of Madras Act II (2) of 1927, every committee shall, by such name as the local Goverment may determine, be a body corporate and shall have perpetual succession and a common seal and shall, by the said name, sue and be sued, so that temple committees are corporation as constituted under the Act. The Hindu Religious Endowments Act II (2) of 1927 was further amended by Madras Act V (5) of 1944, which by S. 34 omitted S. 83 of Madras Act II (2) of 1927, which, as we have said, corresponded to S. 79 of Madras Act I (1) of 1925. The result of this is that all the committees constituted either under Madras Act I (1) of 1925, or under Act II (2) of 1927, have got dissolved and did not have any legal existence after the coming into operation of Madras Act V (5) of 1944, which received the assent of the Governor on the 7th March 1944 and was published in Fort St. George Gazette on the same day. Therefore, on and after the 7th March 1944, in the Province of Madras, there could have been no temple committee constituted or created by any Hindu Religious Endowments Act.

(9) Granting therefore that on the death of Parvathi Bai in 1943, the Coimbatore Taluk Devasthanam committee began to function as the trustee of the various endowments charged with the duties of conducting the religious ceremonies in the temples, this committee became dissoived and was 'functus officio' by the enactment of S. 34 of Madras Act V (5) of 1944. There are provisions in Madras Act V (5) of 1944 by which the Hindu Religious Endowments Board itself could, in certain cases, assign the duties of the committee to various officers. But it has to be borne in mind here that the committee ceased to exist on the 7th March 1944, whereas in the present case the suit was filed by the plaintiff on 15th January 1944. when the committee was in existence. In 'LAKSHMANA AIYAR v. R. S. NAYUDU', 1931 Mad W N 193, this Court held that under S. 79(1) of Madras Act I (1) of 1925, any committee established under the Act of 1863 in existence at the commencement of the Act of 1925 is to be regarded by law as if it were one constituted under S. 16 of the latter Act and the local Government has, by virtue of S. 16, power to vary or abolish such a committee. It was further held that even if the local Government has no power to vary or abolish the committee under the Act of 1925 still, under Act II (2) of 1927, under S. 20(1) such powers have become vested in the Government. This decision was cited in support of the contention that the committee could have filed a suit so far as the trust in question is concerned. In our opinion there is nothing that can be gathered from this judgment which can be of any help for the decision of the present case. As we have remarked, if the committee could function as a trustee, it was a body that was in existence on the 15th January 1944 when the plaint was filed and therefore none of its powers could have been exercised by the trustee of the Koniamman temple after getting the sanction of the Hindu Religious Endowments Board. Such being the case, the plaintiff in this case, when he filed the suit, had no 'locus standi' and had no authority to come to Court for the purpose of reliefs asked for in the plaint. In this view it seems to us that the suit was filed by an

unauthorised person who had no power to do so when he initiated the proceedings.

(10) The appellant further contended, relying on paragraph 811 at page 945 of the 10th Edn. of Mayne's Hindu law and 'BHABA TARINI DEVI v. ASHALATA DEBI', ILR (1943) 2-Cal 137, that trusteeship is property and that the first defendant here, the appellant, should be considered to be a trustee. We do not think it necessary in the view which we take of the disability attaching to the plaintiff for the filing of the suit, to consider the merits of this question. As we have held that the plaintiff has no right to maintain the suit the appeal has to be allowed and the suit dismissed with costs throughout. The plaintiff will pay one set of costs in this appeal to the first defendant-appellant and another set to the contesting defendants-tenants. The memorandum of cross objections does not arise as we are dismissing the suit and is therefore dismissed but in the circumstances without costs. The appellant will pay the court-fee to the Government.

C.R.K./V.B.B. Appeal allowed.

A I. R. 1952 Madras 656

CHANDRA REDDI, J.

Pentakota Ayodharamayya and others, Appellants v. Pentakota Venkata Krishnam Naidu, Respondent.

A. A. A. O. No. 83 of 1949, D/- 28-9-1951.

Civil P. C. (1908), S. 144—'Place the parties in the same position' — Decree for possession of land reversed — Measure of damage done to land is value of depreciation.

Where A who has obtained possession of land from B under a decree digs out earth from the land, manufactures bricks therefrom and sells them at a profit, but the decree is subsequently set aside in appeal, the fair basis on which restitution should be allowed to B would be to award him the value of depreciation in the land due to the action of A. The value of the earth dug out from the land by A would not represent the true measure of damages in such a case and the net profits of the bricks manufactured would not represent the value of the earth dug out. AIR 1952 Mad 597, Dissent. Case law referred. (Para 12)

Anno: C. P. C., S. 144 N. 20.

E. Venkatesam and E. L. Bhagirathi Rao, for Appellants; U. Sethumadhava Rao, for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('30) 57 Cal 170: (AIR 1930 Cal 113) (Pr 10)
('31) AIR 1931 Cal 462: (133 Ind Cas 109) (Pr 9)
('41) ILR (1941)-1 Cal 285: (AIR 1941 Cal 691) (Pr 9)
('47) S. A. No. 1341 of 1947 (Mad) (Prs 7, 9)
('47) S. A. No. 2249 of 1947, AIR 1952 Mad 597 (Pr 8)
(1880) 5 A C 25: (42 L T 334) (Pr 9)
(1932) A C 452: (101 LJKB 417) (Pr 9)

JUDGMENT: This second appeal arises out of E. A. No. 188 of 1946, in O. S. No. 103 of 1940 in the Court of the District Munsif of Visakapatnam, for restitution.

(2) In a suit for partition instituted by the sons of one Goteti Subba Rao, the present first respondent was directed to put the appellants in possession of 44.3/4 cents of land which was found to be in excess of the property to which he was entitled and which, according to the trial Court, belonged to the appellants. An appeal was filed by the present first respondent against this direction which was dismissed by the Subordinate Judge of Vizagapatam. But this Court in S. A. No. 2154 of 1944, reversed the decisions of the Courts below holding that

> "those portions of the lower Court's decree which do not relate to the plaintiffs shall be deleted and the rights of the defendants inter se be and hereby are left to be adjudicated upon, if necessary, in a different litigation."

(3) Consequently, the first respondent, in addition to applying for redelivery of that property, inter alia, claimed a sum of Rs. 2000 as the value of 2 lakhs of bricks and 2 lakhs of tiles prepared by the present appellants from out of the earth dug from the 44.3/4 cents of land.

(4) Dealing with this claim the trial Court held that the only relief which the present first respondent could get was a direction to the present appellants to fill up the pits dug in the land at their cost within 15 days from the date of the order.

(5) The first respondent herein who was aggrieved by this order, filed an appeal to the Subordinate Judge of Vizagapatam. The lower appellate Court, which confirmed the findings of the trial Court on other issues, held that the proper direction in working out the rights of the parties, so far as the claim for damages in respect of the pits dug on the land of the first respondent, was concerned, was to direct the present appellants to pay the money value or the compensation for the earth dug and utilised by them and allow the present first respondent to fill up the pits in the manner he thought best as it thought that there were various difficulties in working out the direction of the trial Court as regards the filling up of the pits. But in valuing the earth dug and utilised by the appellants the lower appellate Court took into consideration the net profits realised by the appellants by the sale of the bricks and the tiles which were manufactured out of the earth dug from the land in question.

(6) In this appeal filed against the order of the learned Subordinate Judge, Mr. Venkatesam, the learned counsel for the appellants urges that the basis adopted by the lower Court in assessing the value of the earth was erroneous, that the profits realised by the appellants have no bearing or relevancy on the question of the value of the earth utilised by them in manufacturing the bricks. It is argued by Mr. Venkatesam that the proper measure of damages to be awarded in cases like this is either the value of the earth dug out of the land or the value of the depreciation that was caused by the act of his clients, viz., the digging of pits in the land, and that in any event the first respondent is not entitled to the net profits derived by his clients from the sale of the bricks.

(7) In support of his contention he places reliance on a judgment of Govinda Menon J. in 'PERIYAYYA MOOPAN v. MARUDAI KONAR', S. A. No. 1341 of 1947 (Mad). In dealing with the question as to how a person that is put to loss by the act of the parties against whom damages are sought should be compensated, the learned Judge observed:

"I am of opinion that at the utmost the first defendant would be liable to pay the price of the mud and silt at the time he utilised them for manufacturing the bricks."

The learned Judge also stated that the net profits of the bricks manufactured out of the mud and silt would not represent the value of the mud and silt used for manufacturing the bricks.

(8) Mr. Ramanarasu, learned counsel for the respondent relies upon a decision of Raghava Rao J. in 'V. ANANTHARAMAN v. A. SUBBA REDDI', S. A. No. 2249 of 1947 (Mad), in support of his plea that his client is entitled to the net profits made by the appellants in this case. It was laid down by Raghava Rao J. in that case that the defendants who trespassed upon the land of the plaintiff, dug out earth from that land and utilised the same for manufacturing bricks, were liable to pay the net profits made by them to the plaintiff. It is very doubtful whether the principle enunciated by the learned Judge in that case is applicable to a claim arising under S. 144 of Civil P. C., for in an application for restitution only such damages as would restore the person seeking restitution to the position which he would have occupied but for the wrong decree should be directed to be paid. It could not be said that if the wrong decree was not passed by the trial Court in this case, the person seeking restitution would have made this amount. Even otherwise with respect I must express my disagreement with the view taken by the learned Judge in that case, as it does not seem to be in consonance with the principle applicable to such cases.

(9) Mr. Ramanarasu next cited to me a decision of the Calcutta High Court in 'CERRITT MORAN & CO. v. MANMATHA NATH', ILR (1941) 1-Cal 285. I do not think this decision carries him very far. There the point which the learned Judges were considering was wheher a person who committed trespass, plucked tea leaves from the estate, manufactured them and transported the same, was entitled to deduct the cost of plucking, manufacturing and transporting the tea, in a claim for damages by the plaintiff against the trespasser. The learned Judges held that the defendant, who was guilty of fraud or negligence, would not be entitled to a deduction of the expenses incurred by him for the process of plucking, preparing and transporting them for sale but the only reasonable deduction to which he was entitled was the commission paid by the defendant trespasser to the brokers. In support of his conclusion Derbyshire C. J. with whom Lort-Williams J. agreed relied upon the following passage in the judgment of Lord Sankey L. C. in 'BANCO DE PORTUGAL v. WATERLOW AND SONS LTD.', (1932) A. C. 452 at p. 475, which in my opinion does not countenance the contention put forward by Mr. Ramanarasu:

"It was similarly stated by Lord Blackburn in the House of Lords in 'LIVINGSTONE v. RAWYARDS COAL CO', (1880) 5 A. C. 25 at p. 39, in these words 'Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. There is no doubt as to the law . . . . . ."

The test to be adopted in awarding damages even in cases of trespass is laid down in several decisions of English Courts and also of Indian Courts. In Volume 10 of Halsbury's Laws of England, Hailsham Edition, at page 134 the following passage occurs:

"In respect of injuries done to the land by trespass the measure of damages is the depreciation in the selling value of the land, or in the selling value of the plaintiff's interest in it, and not the amount required to put the premises in repair.....The amount recoverable, however, will not necessarily be the cost of reinstatement, the true measure of damage being the difference between the money value of the owner's interest before and after the injury."

In support of this statement of law the learned author relies upon a number of English decisions which it is unnecessary for me to refer now. In the same volume at page 137 the learned author says:

"If the defendant was guilty of fraud or negligence, the plaintiff is entitled to recover the value of the minerals at the time they first became chattels—that is, their value at the pit's mouth — allowing for the cost of raising them to the surface. If the defendant acted honestly and without negligence, the plaintiff is only entitled to the value of the minerals at the pit's mouth after allowing for the cost of getting them as well as that of raising them to the surface."

These passages were quoted with approval not only by Govinda Menon J. in 'PERIYAYYA MOOPAN v. MARUDAI KONAR', S. A. No. 1341 of 1947, but also by a Bench of the Calcutta High Court in 'KRISHNALAL v. RADHIKA MOHAN', AIR (18) 1931 Cal 462.

(10) In Salmond on the Law of Torts, tenth Edn. at page 210 the learned author says:

"When a trespass has caused physical damage to the land, the measure of damages is the loss thereby caused to the plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement—the cost of restoring the land to the condition in which it formerly was—a cost which may greatly exceed the actual diminution in the value of the land."

In 'CURRIMBHOY & CO. LTD. v. L. A. CREET', 57 Cal 170, the measure of damages to be awarded to a co-owner who dug out more than his share of the coal was considered. At page 201 the point is dealt with thus:

"The measure of damages in a case like this is the fair market value of the coal (be it remembered that Creet was a part owner of the coal) at the pit mouth at the time when it was served subject to just allowances.

As to what allowances there shall be depends on the conduct of the parties and the other circumstances of the case. There are two rules—(1) the harsher, under which only the cost of bringing the coal to bank is allowed and (ii) the milder under which the expense of hewage and haulage, i.e., the cost of working and severing as well as of bringing to bank is allowed."

In that case the milder rule was applied as the learned Judges thought that the co-owner was not guilty of misconduct of a substantial character.

(11) On this discussion it follows that the basis adopted by the learned appellate Judge for arriving at the value of the earth was wrong.

(12) Mr. Ramanarasu maintained that the value of the earth dug out from the land belonging to the first respondent would not represent the true measure of damages in a case like this and that his client would be restored to the position which he would have occupied but for the wrong decree only if he is paid the value of the depreciation sustained by him as a result of the action of the present appellants. Mr. Venkatesam concedes that this is the fair basis of allowing restitution in a case like this.

(13) Consequently the order of the lower appellate Court has to be set aside and the case remanded to the trial Court for an enquiry as to the value of the depreciation. For this purpose the parties are at liberty to adduce such evidence as may be necessary to prove their respective cases. The enquiry is to be confined to the value of the property before the digging of the pits and value thereof immediately after the digging. The costs of this second appeal will abide and follow the result of the enquiry in the trial Court.

(14) The memorandum of cross-objections is dismissed and is dismissed without costs. (Leave refused).

C.R.K./K.S. Case remanded.

A. I. R. 1952 Madras 658

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Messrs. Mohamed Ali Sarafali and Co., Madras, Applicants v. The Commissioner of Excess Profits Tax, Madras, Respondent.

Case Referred No. 30 of 1949, D/- 27-9-51.

Excess Profits Tax Act (1940), S. 5, Proviso 3 — Contracts whether entered in Native State — Burden of proof — Part of business in Native State — Loss in business — Apportionment of loss.

Where it is the department that is claiming to apply the proviso (3) to S. 5 it is for them to establish by evidence that the contracts were in fact entered into in the Native State. (Para 4)

The assessee firm carried on business in cotton at Madras as well as at Nanded in Hyderabad State, but accounts were maintained only at Madras. During the accounting year the assessee incurred a loss in respect of his business in Hyderabad State. Out of the five transactions, the Appellate Tribunal was of opinion that in respect of two transactions only the contracts were entered into at Madras, but purchase price was paid and delivery effected at Nanded and therefore under Proviso 3 the loss should be apportioned in respect of those two transactions. The loss was apportioned, one-third as representing delivery of goods and receipt of the price at Nanded and two-thirds as representing the contracting for the sale of goods at Madras. In respect of the other three transactions the Tribunal held that not only the purchase price was paid and delivery effected at Nanded but the contracts also were entered into at Nanded.

Held that the splitting up of the loss by the Tribunal was not erroneous in law. (Paras 1, 3)

Held further that in the absence of any evidence, it must be presumed, in respect of the three transactions, that the assessee followed the practice which he had applied in the case of other transactions and therefore stood on the same footing as the other two transactions and part of loss in respect of them also accrued or arose in an Indian State. (Para 4)

Anno: E. P. T. Act, S. 5 N. 1.

T. V. Viswanatha Aiyar, for Applicants; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: Two questions were referred to us for decision by the Appellate Tribunal under S. 66(1) of the Indian Income-tax Act.

"1. Whether on the facts and in the circumstances of the case, the loss in respect of the transactions 3, 5 and 6 accrued or arose in an Indian State, within the meaning of proviso 3 to S. 5 of the Excess Profits Tax Act?

2. Whether the splitting up of the loss relating to 308 bales into two-thirds as representing the contracting for the sale of goods and one-third as representing delivery and receipt of the price is erroneous in law."

(2) The facts as they appear from the statement of the case were: The assessee is a registered firm and carried on business at Madras in cotton and other goods. It carried on business in cotton in Hyderabad State as well as in British India. The accounts relating to the cotton business also were maintained at Madras. During the relevant chargeable accounting periods, the assessee bought cotton through Sanjivappa and Sons a firm at Adoni. A portion of the goods purchased from Sanjivappa and Sons could not be brought from Hyderabad as there were no transport facilities, and so they were stocked at Nanded where the assessee owned a godown. The cotton was subsequently sold by the assesee, and the process adopted was, according to the assessee, that when the customer came to Madras for purchase of cotton the contracts were entered into at Madras sometimes written and sometimes oral and delivery of the goods and payment of the price were at Nanded where a clerk or some representative of the firm of the assessee went to deliver the goods. The goods were otherwise in the custody of a watchman at Nanded.

During the chargeable accounting period, the assessee incurred a loss in respect of his dealings relating to the cotton at Hyderabad. The Excess Profits Tax Officer declined to allow the

assessee to set off the loss in respect of the goods delivered at Hyderabad State and adjust it against the profits earned by him in British India. On appeal to the Appellate Assistant Commissioner, however, he allowed the claim in full as the entire loss occurred in British India itself and no part of it outside British India. On appeal to the Appellate Tribunal, this decision was modified. There were six transactions during the chargeable accounting periods of which transaction 4 may be left out of consideration, as it was merely a speculative contract in respect of which the differences were adjusted. As regards transactions 1 and 2 relating to 308 bales of cotton, the opinion of the Appellate Tribunal was that the contracts were entered into in British India at Madras, but the purchase price was paid at Nanded where the goods were delivered.

The Appellate Tribunal concluded that part of the business was outside British India in a Native State and therefore under proviso 3 to S. 5 of the Excess Profits Tax Act, the loss should be apportioned in respect of the transactions 1 and 2. The loss was apportioned, one-third as representing delivery of the goods and receipt of the price at Hyderabad and two-thirds as representing the contracting for the sale of the goods at Madras. As regards transactions 3, 5 and 6 the Appellate Tribunal held that the contracts also were entered into in Hyderabad State and that the delivery of the goods and payment of the price were in Hyderabad. It was, therefore, held that to the extent indicated in the decision of the Appellate Tribunal, the assessee was not entitled to have the loss accrued in Hyderabad adjusted against the profits in British India.

(3) In this reference it was argued on behalf of the assessee by his learned advocate, Mr. Viswanatha Aiyar, that the accrual of the loss even in respect of transactions 1 and 2 was entirely in British India, as the assessee practically did not carry on any business at Nanded. The accounts were maintained at Madras. The contracts were entered into at Madras. The control of the entire business was at Madras. And all that was done at Nanded was as the goods were there, delivery under the contract had to be made there and the price recovered. We do not think that the effect of the delivery of the goods and the payment of the price at Nanded in respect of the contracts entered into in British India could be so belittled as to reduce the activities at that place to ministerial acts having no reference to the business.

Under the provisions of the Sale of Goods Act, unless there is a contract to the contrary, the price for the goods is payable only against delivery and it is for that reason, in respect of transactions 1 and 2 the price was paid at Nanded, where alone the delivery was effected. Therefore part of the business was done under the contracts in Hyderabad State. We, therefore, think that the view taken by the Appellate Tribunal that part of the business was carried on in a Native State, viz., Hyderabad, was correct. We do not see any reason for altering the proportion fixed in respect of these two transactions by the Appellate Tribunal. Nothing has been shown to establish that that proportion was unreasonable or was not warranted by the facts and circumstances of the case. The answer, therefore, to question No. 2 must be in the negative and against the assessee.

(4) There remain, however, transactions 3, 5 and 6. As regards these the finding of the Appellate Tribunal, that the contracts were entered into in Hyderabad was vigorously attacked by learned advocate for the assessee on the ground that there was absolutely no evidence on record in support of that finding and the finding of the Appellate Tribunal was based on pure speculation. The department it is that is claiming to apply the proviso (3) to S. 5 of the Excess Profits Tax Act and it is for them to establish by evidence that the contracts were in fact entered into in the Native State. There is nothing in the accounts maintained by the assessee which were produced before us under our direction to indicate or suggest that these contracts were entered into in the Hyderabad State, nor is there any evidence to establish that there was an accredited representative clothed with authority and power to enter into contracts on behalf of the assessee at Hyderabad.

In these circumstances it must be presumed that the assessee followed the practice which he had applied in the case of other transactions and there is no reason, in our opinion, to differentiate transactions 3, 5 and 6 from transactions 1 and 2 except the fact that in respect of those two transactions there was a written contract. Whether the contract was written or was oral, it makes no difference as it is not thereby established that the oral contract must have been entered into in a Native State. It is a fact which must be ascertained and established from positive evidence on record of which there is none in the present case. It, therefore, follows that there is no justification in support of the finding of the Appellate Tribunal in respect of transactions 3, 5 and 6. They also stand on the same footing as transactions 1 and 2 and for the reasons given by the Appellate Tribunal for holding that part of the business in respect of transactions 1 and 2 accrued and arose in a Native State, it follows that in respect of these transactions also the same inference must be drawn. There is no reason for not working out the proportion of the loss in the manner in which it was done in the case of transactions 1 and 2.

We, therefore, direct the apportionment of the loss even in respect of transactions 3, 5 and 6 in the proportion of one-third as representing delivery of goods and receipt of the price and two-thirds as representing the contracting for the sale of the goods in British India. The answer, therefore to the first question that is referred to us must be as stated above and is answered partly in favour of the assessee and partly in favour of the Commissioner. We think that in the circumstances of the case, there should be no order as to costs.

C.R.K./V.R.B. Order accordingly.

A. I. R. 1952 Madras 659

SUBBA RAO J.

M. K. Ranganathan and others, Petitioners v. The Madras Electric Tramways (1904) Ltd. and another, Respondents.

Writ Petn. No. 17 of 1952, D/- 12-2-52.

(a) Constitution of India, Art. 226 — Other remedy — Right of appeal under Art. 136.

It is true that the writ of certiorari will not be issued if a party has other effective remedies. Under Art. 136 of the Constitution of India the Supreme Court's residuary power to grant special leave cannot be an effective remedy which the petitioners could have resorted to, for apart from the fact that the granting of special leave is within the discretion of the Supreme Court, it is not likely that the Supreme Court will grant special leave unless there are extraordinary circumstances. (Para 2)

(b) Constitution of India, Art. 226 — Scope of jurisdiction to issue writs.

The jurisdiction to issue a writ does not depend upon the mere location of a tribunal but depends upon the subject-matter and the parties to the dispute in regard to which such a tribunal purports to exercise jurisdiction. To put in other words though the tribunal is situated outside the territorial jurisdiction of the High Court if it purports to exercise jurisdiction in regard to the parties or the subject-matter which are within the territorial jurisdiction of the High Court the tribunal must be deemed to have functioned within the jurisdiction of the High Court. The jurisdiction conferred by Art. 226 of the Constitution is to protect the fundamental and other rights of parties within the territorial jurisdiction of the High Court. The Article does not expressly say that the authority or tribunal interfering with such rights should reside physically within the territorial jurisdiction. If a tribunal or authority exercises jurisdiction within the territories affecting such rights it may reasonably be construed that the authority or the tribunal functioned within the territorial jurisdiction of the High Court and, therefore, is amenable to its jurisdiction. Further the labour appellate tribunal under the Industrial Disputes (Appellate Tribunal) Act (1950) though it has its headquarters at Bombay is an itinerant body functioning in different parts of the country and where in a case it functioned during some part of the enquiry at any rate within the ferritorial jurisdiction of the Madras High Court, the High Court has jurisdiction to issue a writ of certiorari against the order of the Labour Appellate Tribunal. AIR 1943 PC 164, Rel. on. (Para 3)

(c) Industrial Disputes (Appellate Tribunal) Act (1950), S. 7 — Substantial question of law — Scrutiny by High Court — Constitution of India, Art. 226.

The order directing reinstatement does not come under any of the heads narrated in clause (b) of S. 7 of the Act. Therefore an appeal will lie to the Appellate Tribunal only if the appeal involves any substantial question of law. When a statute confers conditional jurisdiction on a tribunal, it cannot by wrongly deciding with regard to the existence of that condition clutch at jurisdiction which it has not. The condition whether there is a substantial question of law is not a part of the issue to be decided by the Appellate Tribunal. The existence of a substantial question of law and the solution of that question are essentially different. The existence of such a question is, therefore, collateral to the actual matter to be decided by the Appellate Tribunal. Though it has preliminary jurisdiction to decide whether such a question exists to enable it to solve the question raised, whether such a question existed conferring jurisdiction on the Appellate Tribunal is subject to the scrutiny of the High Court in a writ of certiorari. If there was no point involving any substantial question of law the Appellate Tribunal would have no jurisdiction to entertain the appeal. (Para 4)

(d) Industrial Disputes (Appellate Tribunal) Act (1950), S. 7 — Substantial question of law.

When there is a limited right of appeal on a substantial question of law, if the appellate tribunal does not differ on the question of law but goes into the facts and interferes with the discretion of the lower tribunal which it has undoubtedly under the statute, the appellate tribunal will be indirectly clutching at jurisdiction which the statute has not conferred on it.

The Second Industrial Tribunal, Madras did not hold that the management had been guilty of victimisation or unfair labour practice or was actuated by any ulterior motive in coming to its decision. It also found that the workers indulged in an illegal strike and that they were shouting slogans and that they did not leave the company's premises when they were told more than once to do so and that they were also shouting slogans, drawing caricatures and defacing the walls of the company's premises. It also found on the evidence that the attitude of workers and their general behaviour was quite correct in the beginning though it was somewhat rowdy at a later point of time. It was further found that there were no assaults or acts of intimidation or picketing or interference with non-strikers. There was also no damage or injury to the property or person of the company. Taking the entire picture of events the tribunal was of the view that the punishment of dismissal by the company was rather harsh. It, therefore, directed the reinstatement of the dismissed workers but without back pay:

Held that the question of law that arose on those findings was whether when there was no victimisation or unfair labour practice, a tribunal could interfere, having regard to all the circumstances, with the discretion of the management in dismissing the labourers, on the ground that the punishment was unduly harsh. On the question there was no conflict of opinion between the various labour tribunals. The appeal did not involve any substantial question of law. The only question was whether pursuant to the accepted principles the tribunal exercised its discretion correctly in directing reinstatement of the labourers without back pay. The Appellate Tribunal had, therefore, no jurisdiction to entertain the appeal. 1951-2 LLJ 314 (Cal), Rel. on. (Paras 6, 7)

(e) Industrial Disputes Act (1947), S. 2(k) — Tribunal's right to direct reinstatement.

The Industrial Disputes Act substitutes for free bargaining between the parties a binding award by an impartial tribunal. The tribunal is not bound by contractual terms between the parties but could make a suitable award for bringing about harmonious relations between the employers and the workers. The position of the management cannot be equated to that of a domestic tribunal and it cannot be said that the jurisdiction of the tribunal is confined only to matters extraneous to the merits of the punishment except when it is unduly harsh and disproportionate. In such a set up the doctrine of domestic tribunal cannot easily fit in. When an impartial tribunal working in the realm of arbitration and unfettered by contractual terms entered into between the parties is empowered to settle the disputes between the parties it would appear incongruous that one of the parties to the dispute could sit in judgment over the other and bind the hands of the tribunal empowered to decide impartially the dispute between them. It would obstruct the work of the tribunal and prevent it from discharging its difficult task of bringing about harmonious relations between the parties. The industrial tribunal is not fettered by any such limitation on its power. The only limitation on its power is to bring about harmonious relationship between the employers and the workmen. Having regard to all the circumstances the tribunal can direct reinstatement if it thinks that it is necessary to the interests of industrial peace. AIR 1949 FC 111, Foll.

(Paras 11, 12)

A. Ramachandran, for Row and Reddy, for Petitioners. C. Doraiswami for King and Partridge (for No. 1) and V. P. Sarathi, for Govt. Pleader (For No. 2), for Respondents.

REFERENCES: Courtwar/ Chronological/ Paras.

('44) ILR (1944) Mad 457: (AIR 1943 PC 164) 3
('49) AIR 1949 FC 111: (ILR (1949) Bom 686 FC) 11
('48) 50 Bom LR 744: (AIR 1949 Bom 134) 5
('51) 1951-2 LLJ 314 (Cal) 6
('51) 1951-2 Mad LJ 222: (AIR 1951 Mad 969 FB) 5

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Labour Appellate Tribunal of India at Bombay. The petitioners who are 46 in number were workmen employed by the Madras Electric Tramways Ltd. On the 17th of February 1950 some of the workers met the Agent of the Company and discussed with him their disputes relating to bonus for the year 1949, reinstatement of 13 discharged men and the cancellation of fine on the motormen. After some discussion they dispersed. On the afternoon of 20th February, a large number of workers gathered near the entrance and passages leading to the Agent's room. The management contended that the adjourned meeting was fixed to take place on the 18th whereas the labourers stated that it was adjourned to 20th. On the 20th, the Agent refused to receive their representatives unless the five representatives who met him on the 18th came again.

The labourers insisted upon two of their leaders, Ranganathan and Subramaniam to be members of the deputation. The Agent refused to meet them as they belonged to an Association banned by the Government. In the evening the Agent asked them to disperse and even threatened to bring in police help if they did not go outside the office building. Though the labourers left the office building they spent the night in the open space nearby. Next morning some other workers joined them. The strikers were estimated to be about 200 strong. On the 22nd instead of giving to the workers the time-sheets the management gave them certain memoranda wherein it was stated that time-sheets would not be given until the explanation called for was submitted and accepted by the management. At about 9-30 or 10 a.m. the Deputy Commissioner of Police came to the spot and persuaded the Agent to receive the deputation. The workers met the Agent but the meeting did not yield any successful result. The Agent explained to them the difficulties of the management to meet out their demands but the labourers were dissatisfied and they did not leave the premises.

The management wrote to the Commissioner of Police requesting him to take necessary steps to remove the strikers. At 6 p.m. on the 22nd the police arrived on the scene and arrested 51 men who were sitting in the maidan. During this period the workers were shouting slogans "Down with the Agent", "Down with the Labour Officer", and "Down with the Traffic Manager" and were also creating noise which must have disturbed the office working. But there was no violence and no untoward event happened. The strike involving about 100 illiterate labourers, whether their grievances were true or only imaginary went off peacefully. The arrested persons were produced before the Presidency Magistrate. The Magistrate found all the 51 persons guilty under Ss. 71(16) and 75 of the City Police Act and sentenced them to one month's rigorous imprisonment under each count with the direction that the sentences should run concurrently. The Magistrate held that they behaved in a disorderly manner in the office of the Madras Electric Tramways Ltd.

Section 71(16) relates to the affixing or causing to be affixed of a bill, document or paper upon any building without the consent of its owner or in any manner defacing or disfiguring the building. S. 75 of the Act relates to violent, disorderly or indecent behaviour in any Court, office or station. The Magistrate held that the workers pasted or caused to be pasted on the company's walls notices bearing their slogans and demands without the consent of the Madras Electric Tramways Ltd. the owner of the building. In revision the High Court set aside the convictions on the ground that no reasonable opportunity was given to the accused persons to defend themselves and that they had no fair trial. The petitioners were acquitted. On the 13th of March 1950 the workers approached the management and requested to reinstate them on the ground that the High Court had acquitted them of all the charges. The management gave them extension of time for submitting their explanation. A form of charges framed also appears to have been handed over to them. On the 14th of March 1950 all the workers replied stating that the charges were vague. After some cor-

respondence the labourers reiterated their objections to the charges framed and also communicated their request to adjourn the enquiry till the disposal of the criminal revision case in the High Court. The Agent passed an order on the 10th of April dismissing the workers on the ground that they are guilty under the company's Standing Order No. 24(3). Subsequently the enquiry was reopened. Fresh enquiries were started with fresh charges. Finally they were dismissed on the 22nd of May 1950. On the 20th of September 1950 the Government of Madras in their G. O. Ms. No. 3730, Development, referred the dispute between the workers and the management in respect of the reinstatement of the workers to the Second Industrial Tribunal, Madras. Sri T. D. Ramaiya held an elaborate enquiry and gave his award which was notified by the Government on the 18th of December 1950.

The Tribunal did not find that there was any violation of the principles of natural justice in the course of the enquiry or that the management had been guilty of victimization or unfair practice or that it had been moved by ulterior motive in coming to its decision. The Tribunal found that the workers should not have been asked to answer the charge of wilful neglect of duty under Standing Order No. 24(3) though he held that the charge of insubordination was made out. He pointed out that there was no evidence against any of the workers that they in any manner interfered with the loyal workers of the company. He found that they were guilty of disobedience of the Agent's order directing them to leave the company's premises. He could not find any excuse for their shouting of slogans, drawing of caricature of the Agent and defacing the walls by writing slogans and demands and the annoyance and disturbance caused. He took notice of the circumstance that there were no assaults or acts of intimidation or picketing or interference with non-strikers.

He also pointed out that the management had conceded that there was no damage or injury to person or property of the company. Looking at the entire picture of events from the 17th of February 1950 to the events of the 22nd of February he was of the opinion that though the workers indulged in an illegal strike for which the management could have taken reasonable and appropriate action, there was no ground whatever to visit them with the punishment of dismissal. On that finding he directed that the petitioners be reinstated but declined to grant them any back pay or allowances. The management preferred an appeal to the Labour Appellate Tribunal of India at Bombay. The Appellate Tribunal allowed the appeal in respect of the present petitioners.

The workers filed an application for issuing a writ of certiorari to the Bombay High Court. Shah J. quashed the order of the appellate Tribunal but a Division Bench of the Bombay High Court allowed the appeal against the order of Shah J. holding that the High Court of Bombay had no jurisdiction to entertain a writ as the subject matter was outside Bombay High Court. The present petition has, therefore been filed in this Court for quashing the order of the Labour Appellate Tribunal of India.

(2) The learned counsel appearing for the management raised before me two preliminary points. He contended that the petitioners have other adequate remedies and, therefore, following the usual practice this Court should not issue a writ of certiorari. He also raised the plea that the High Court of Madras had no jurisdiction to entertain this application as the Tribunal whose order is sought to be quashed is not situated within the territorial jurisdiction of this Court. The first contention is based upon the provisions of Art. 136 of the Constitution of India which read as follows:

> "Notwithstanding anything in this chapter (Chapter IV) the Supreme Court may in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India."

It is contended that the petitioners could have preferred an appeal against the judgment of the Appellate Tribunal to the Supreme Court and they having failed to do so would not be entitled for the issue of a writ of certiorari. It is true that the writ of certiorari will not be issued if a party has other effective remedies but under Art. 136 of the Constitution of India the Supreme Court's residuary power to grant special leave, in my view cannot be an effective remedy which the petitioners could have resorted to, for, apart from the fact that there is no right of appeal to the petitioners and the granting of special leave is within the discretion of the Supreme Court, it is not likely that the Supreme Court will grant special leave unless there are extraordinary circumstances. I cannot, therefore, accept the first contention.

Nor am I satisfied that there are any merits in the second contention either. It is indeed curious that such a contention should have been raised by the party who objected to the jurisdiction of the Bombay High Court to entertain the writ petition on the ground that the proper Court is the Madras High Court and having succeeded on that point should now question the jurisdiction of this Court. The argument was based upon the provisions of Art. 226 of the Constitution of India which reads:

> "Notwithstanding anything in Art. 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any Government within those territories, directions, orders or writs, including writs in the nature of 'habeas corpus', mandamus, prohibition, 'quo warranto' and certiorari, or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose."

It is said that the Tribunal is not within the territory in relation to which the High Court exercised jurisdiction. Before I consider this argument some relevant facts may be stated:

(3) The Appellate Labour Tribunal though it has its head office in Bombay is itinerant and holds its sittings in different parts of the country. It also held a sitting within the jurisdiction of this Court in connection with an appeal filed by the first respondent and also disposed of some interlocutory applications in connection with that appeal. Further the dispute arose in the territory within the jurisdiction of this Court and all the parties to the dispute reside within such a territory. In 'RYOTS OF GARABHANDO v. ZAMINDAR OF PARLA-

KIMEDI,' ILR (1944) Mad 457, the Judicial Committee had elaborately considered the question whether the Madras High Court could issue a writ of certiorari quashing the order of the Revenue Board fixing fair and equitable rent in respect of lands in three villages belonging to the Zamindar of Parlakimedi in Ganjam district.

At page 497 their Lordships observed:

"The question is whether the principle of that case can be applied in the present case to the settlement of rent for land in Ganjam merely upon the basis of the location of the Board of Revenue as a body which is ordinarily resident or located within the town of Madras or on the basis that the order complained of was made within the town. If so, it would seem to follow that the jurisdiction of the High Court would be avoided by the removal of the Board of Revenue beyond the outskirts of the town and that it would never attach but for the circumstances that an appeal is brought to or proceedings in revision taken by the Board of Revenue. Their Lordships think that the question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing certiorari to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court in the matter of the settlement of rents for ryoti holdings in Ganjam between the parties not otherwise subject to its jurisdiction which it would not have had over the Revenue Officer who dealt with the matter at first instance."

The above passage indicates that the jurisdiction to issue a writ does not depend upon the mere location of a tribunal but depends upon the subject-matter and the parties to the dispute in regard to which such a tribunal purports to exercise jurisdiction. To put in other words though the tribunal is situated outside the territorial jurisdiction of the High Court if it purports to exercise jurisdiction in regard to the parties or the subject-matter which are within the territorial jurisdiction of the High Court the tribunal must be deemed to have functioned within the jurisdiction of the High Court. But it is said that the Judicial Committee were not considering a case where the subject-matter and the parties are within the jurisdiction of the High Court but the tribunal whose order is sought to be quashed is situate outside its jurisdiction. But the principle laid down in that decision, namely, that the question of jurisdiction must be regarded as one of substance if applied would support the aforesaid view.

The jurisdiction conferred by Art. 226 of the Constitution is to protect the fundamental and other rights of parties within the territorial jurisdiction of the High Court. The Article does not expressly say that the authority or tribunal interfering with such rights should reside physically within the territorial jurisdiction. If a tribunal or authority exercises jurisdiction within the territories affecting such rights it may reasonably be construed that the authority or the tribunal functioned within the territorial jurisdiction of the High Court and therefore, is amenable to its jurisdiction. Further in this case it is not necessary to invoke any fiction as the appellate tribunal though it has its headquarters at Bombay is an itinerant body functioning in different parts of the country and indeed in this case it functioned during some part of the enquiry at any rate within the territorial jurisdiction of this Court. I, therefore, hold that this Court has jurisdiction to issue a writ of certiorari against the order of the Labour Appellate Tribunal.

(4) Learned counsel for the petitioners argued that the Appellate Tribunal has no jurisdiction to entertain the appeal against the order of the Second Industrial Tribunal directing reinstatement of certain workers. The Industrial Disputes (Appellate Tribunal) Act, 1950 (Act XLVIII (48) of 1950) came into force on 23-5-1950. Section 7 of Act (XLVIII (48) of 1950 confers a right of appeal to the Appellate Tribunal from an award or decision of the Industrial Tribunal subject to certain conditions. The section reads:

'Subject to the provisions of this section an appeal shall lie to the Appellate Tribunal from any award or decision of an Industrial Tribunal if (a) the appeal involves any substantial question of law; or (b) the award or decision is in respect of any of the following matters namely: (1) Wages, (2) bonus or travelling allowance, (3) any contribution paid or payable by the employer to any pension fund or provident fund, (4) any sum paid or payable to or on behalf of the workman to defray special expenses entailed on him by the nature of his employment, (5) gratuity payable on discharge, (6) classification by grades, (7) retrenchment of workmen, (8) any other matter which may be prescibed."

The order directing reinstatement does not, therefore, come under any of the heads narrated in clause (b) of S. 7 of the Act. Therefore, an appeal will lie to the Appellate Tribunal only if the appeal involves any substantial question of law. The point, therefore, is whether there was an appeal before the Appellate Tribunal in the present case involving any substantial question of law. But before I consider that question it will be convenient to dispose of the contention raised by the respondent that, whether there was a substantial question of law, was a question within the jurisdiction of the Appellate Tribunal and whether it held rightly or wrongly in regard to the existence of such a question of law this Court cannot question that finding. To put in other words the contention was that the question whether the condition conferring jurisdiction on the Appellate Tribunal existed or not was within the exclusive jurisdiction of that tribunal itself. I cannot agree.

The law on the subject is succinctly stated in Halsbury's Laws of England, Vol. 9 at page 881 as follows:

"The case is more difficult where the jurisdiction of the Court below depends not upon some preliminary proceedings, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower Court has to try, that Court cannot by a wrong decision with regard to it give itself jurisdiction which it would not otherwise possess. The lower Court must, indeed, decide as to the collateral fact in the first instance but the superior Court may upon certiorari inquire into the correctness of the

decision and may quash the proceedings in the lower Court if such decision is erroneous or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral but a part of the very issue which the lower Court has to inquire into certiorari will not be granted although the lower Court may have arrived at an erroneous conclusion with regard to it."

It was contended that the present case falls within the second part of the aforesaid statement, namely, that the question whether there is a substantial question of law is not collateral but a part of the very issue which the Appellate Tribunal in this case has to enquire and therefore the writ will not be granted. When a statute confers conditional jurisdiction on a tribunal, it cannot by wrongly deciding with regard to the existence of that condition clutch at jurisdiction which it has not. The condition in this case, namely, whether there is a substantial question of law is not part of the issue to be decided by the Appellate Tribunal. The existence of a substantial question of law and the solution of that question are essentially different. The existence of such a question is, therefore, collateral to the actual matter to be decided by the Appellate Tribunal. Though it has preliminary jurisdiction to decide whether such a question exists to enable it to solve the question raised, whether such a question existed conferring jurisdiction on the Appellate Tribunal is subject to the scrutiny of the High Court in a writ of certiorari. I would, therefore, hold if there was no point involving any substantial question of law the Appellate Tribunal would have no jurisdiction to entertain the appeal.

(5) The next question is whether the appeal before the Tribunal was one involving a substantial question of law. Before it is answered it will be relevant to consider what the words "substantial question of law" mean. A Full Bench of this Court in 'SUBBARAO v. VEERAJU', 1951-2-Mad L J 222 (FB), recently decided that point. The learned Judges were construing the words "substantial question of law" occurring in Art. 138 of the Constitution of India. The learned Chief Justice summarised his view on the meaning of the said words at page 227 as follows:

"It is neither possible nor useful to attempt to exactly define terms like "Substantial" "reasonable" and "just and equitable". Ultimately it resolves itself into their meaning that the Court considers to be substantial, reasonable or just and equitable. The use of the adjective "substantial" makes it clear that any question of law as such would not justify the grant of a certificate under S. 110. It must be a substantial question that is to say, the question must have some substance, i.e., worth or merit.

Bearing this in mind consideration of the authorities which I have cited leads to the following general principles. When a question of law is fairly arguable, when there is room for difference of opinion on it, then such a question would be a substantial question of law. If this Court thought it necessary to deal with a question of law at some length and discuss alternative views which can be taken on the point, then, I think such a question would be a substantial question. When a point of law is practically covered by a decision of the highest Court, say, like the Privy Council or the Supreme Court then it would not be a substantial question. If the general principles to be applied in determining a question are well-settled a mere application of such principles would not involve a substantial question of law. I am inclined to hold that when a particular set of facts can lead to alternative findings in law, then a substantial question of law would be involved.

"If the principle to be applied or the point of law arising in the case is not well established, then certainly that would be a substantial question of law. With great respect to the learned Judges who appear to hold to the contrary, I am of opinion that if there is conflict of judicial opinion among the High Courts and there is no direct decision of the highest Court on any question of law, then that would be a substantial question of law, though the decisions of the particular High Court of which leave is sought might have been uniform on the question. That fact may be a very good ground for dismissing a second appeal if the lower Courts had followed the rulings of the High Court, but for an application for leave to appeal to the Supreme Court, I think the very fact of divergence of opinion among the High Courts is conclusive evidence of the existence of a substantial question of law.

"I find more or less a similar statement of the principles in the recent decision of the Bombay High Court in 'KAIKHUSHROO PIROJSHA v. C. P. SYNDICATE LTD.', 50 Bom L R 744: AIR 1949 Bom 134.

"The only answer to the question that we can usefully give is that any question of law affecting the rights of parties would not by itself be a substantial question of law. An important or difficult question would, of course, be a substantial question but even if a question is not important or difficult if there is room for reasonable doubt or difference of opinion on the question, then it would be a substantial question of law within the meaning of Art. 133 of the Constitution of India."

Applying the aforesaid principles can it be said that the appeal before the Appellate Tribunal involved a substantial question of law. To ascertain whether such a substantial question of law was involved it is necessary to notice what was the view expressed by the Second Industrial Tribunal Madras. It did not hold that the management had been guilty of victimisation or unfair labour practice or was actuated by any ulterior motive in coming to its decision. It also found that the workers indulged in an illegal strike and that they were shouting slogans and that they did not leave the company's premises when they were told more than once to do so and that they were also shouting slogans, drawing caricatures and defacing the walls of the company's premises. He also found on the evidence that the attitude of workers and their general behaviour was quite correct on the 17th though it was somewhat rowdy on the 20th. It was further found that there were no assaults or acts of intimidation or picketing or interference with non-strikers. There was also no damage or injury to the property or person of the company.

Taking the entire picture of events the tribunal was of the view that the punishment of

dismissal was rather harsh. He, therefore, directed the reinstatement of the dismissed workers but without back pay. The question of law that arose on those findings was whether when there was no victimisation or unfair labour practice, a tribunal could interfere, having regard to all the circumstances with the discretion of the management in dismissing the labourers, on the ground that the punishment was unduly harsh. On the question there does not appear to be any conflict of opinion between the various labour tribunals.

(6) In 'BUCKINGHAM AND CARNATIC MILLS LTD. v. THEIR WORKERS', 1951-2-L L J 314 (Cal), the Appellate Tribunal observed as follows:

"If after scrutiny on the aforesaid lines it is found by the Tribunal that it ought not to interfere with the findings of the management that the charge has been proved the tribunal must next consider whether it should interfere with the punishment. The management with the knowledge and experience of the problems which confront it in the day to day work of the concern, ordinarily ought to have the right to decide what the appropriate punishment should be, but its decision is liable to be revised if the tribunal is of opinion that the punishment "is so unjust that remedy is called for in the interest of justice". It must, however, be remembered that it is essential that the matter should not be viewed altogether subjectively from the point of view only of the employer or employee but also objectively in the interest of industry for bringing about a harmony in the relationship between the two."

In the present case the tribunal did not contravene this principle. Even the Appellate Tribunal in the present case made the same observations in regard to the question of law raised before them.

"Ordinarily the management, acting 'bona fide' and with knowledge and experience of the problems which confront it in the daily work of the concern, ought to be considered to be well-qualified to Judge what the appropriate punishment should be. But the rule that the punishment given by the management shall stand, is subject to this qualification; that the punishment must not be unduly excessive for the particular offence; and here again the tribunal should not substitute its own judgment for the judgment of the management unless it is apparent that the requirements of discipline and good conduct would not be prejudiced if a lesser punishment were awarded. Each case must, of course, be decided on its own merits; and no two cases are likely to be completely alike, but it is essential that these matters should not be viewed altogether subjectively from the point of view of the employee or of the employer, but also objectively in interests of discipline and good management. Applying these tests to the case before us we are satisfied that the tribunal below was not justified in interfering with the decision of the management to dismiss these employees."

The Tribunal in the present case applied the very same principles though it did not say in so many words. A perusal of the entire judgment indicates that the tribunal had bestowed careful consideration on the question of punishment. The tribunal has not ignored the interests of discipline and good management but having regard to the entire picture, the conduct of the management, the behaviour of the workers, the stress and strain of the situation, the controlled action of the labourers and particularly the fact that no injury or damage to the person or property was caused and similar other factors held that the punishment of dismissal was excessive. The appeal, therefore, did not in my view involve any substantial question of law. The only question was whether pursuant to the accepted principles the tribunal exercised its discretion correctly in directing reinstatement of the labourers without back pay.

(7) When there is a limited right of appeal on a substantial question of law, if the appellate tribunal does not differ on the question of law but goes into the facts and interferes with the discretion of the lower tribunal which it has undoubtedly under the statute, the appellate tribunal will be indirectly clutching at jurisdiction which the statute has not conferred on it. When the statute conferred a right of appeal with regard to specified disputes the appellate tribunal has by a circuitous procedure interfered with the findings of the tribunal in regard to other matters which are made final by the statute. The Appellate Tribunal in this case, has, therefore, no jurisdiction to entertain the appeal.

(8) The next question is whether the principle of law laid down by the Appellate Tribunal is correct. The following passages in the judgment of the Appellate Tribunal bring out its view on the question raised:

"On the face of it the punishment is in keeping with the nature of the offence, and the Tribunal below has not found that there was any violation of the principles of natural justice in or about the enquiry or that the management had been guilty of victimisation, or unfair labour practice or was moved by any ulterior motive in coming to its decision."

"There is here a substantial question of law affecting the industries in general, namely, the grounds on which a tribunal would be justified in interfering with the decision of the management in or about the internal administration of the concern.

"What we have to consider is whether interference by the tribunal below with the decision of the management was justified. Ordinarily, the management, acting bona fide and with knowledge and experience of the problems which confront it in the daily work of the concern ought to be considered to be well-qualified to judge what the appropriate punishment should be. But the rule that the punishment given by the management shall stand, is subject to this qualification that the punishment must not be unduly excessive for the particular offence; and here again the Tribunal should not substitute its own judgment for the judgment of the management unless it is apparent that the requirements of discipline and good conduct would not be prejudiced if a lesser punishment were awarded. Each case must of course be decided on its own merits, and no two cases are likely to be completely alike; but it is essential that these matters should not be viewed altogether subjectively from the point

of view of the employee or of the employer, but also objectively in interests of discipline and good management."

On a combined reading of the aforesaid passages the law enunciated by the Appellate Tribunal may be put thus:

(9) In the absence of any violation of principles of natural justice or victimisation or unfair labour practice on the part of the management the Tribunal cannot interfere with the discretion exercised by the management in dismissing the employees unless it is apparent that the punishment inflicted is unduly excessive and it is apparent that the requirements of discipline and good conduct would not be prejudiced if a lesser punishment is awarded. The excessive character of the punishment should be judged not only from the subjective standpoint of the employer and employee but also from the objective stand-point namely whether the punishment is necessary in the interests of discipline and good management. To put in other words the position of the management is equated to that of a domestic Tribunal and the jurisdiction of the Tribunal is confined only to matters extraneous to the merits of the punishment except when it is unduly harsh and disproportionate. The question, therefore, is whether the principles so stated are correct and this limitation of the Tribunal's jurisdiction invoking the doctrine of domestic Tribunal is correct and consistent with the labour legislation.

To give a satisfactory answer to this question it is necessary to notice briefly the history of the labour legislation, the nature of the disputes which the legislation was intended to settle and the scope of the enquiry before the Tribunals constituted. The history of the long drawn struggle between the employer and the labourer in other parts of the world need not be detailed. It is enough to state that the labourer's rights to organise themselves and to protect their interests in case of victimisation by their employers and their right to resort to strike as a means to enforce their demands are now well recognised. Social legislation was introduced in other countries to smoothen the labour disputes in the interests of not only the parties concerned in the dispute but also to bring about industrial peace and in the interests of the public at large who would ultimately be affected. India also followed suit.

Pursuant to that policy the Industrial dispute (employment) standing Orders, 1940, the Industrial Disputes Act, 1947 and other local statutes of a like nature were passed. The Industrial Disputes Act of 1947 provides for constitution of special tribunals to settle industrial disputes. The nature of the disputes that would fall within their jurisdiction the procedure to be followed, the scope of enquiry before such Tribunals and the range of their decision are all regulated by the provisions of the said Act. Unlike civil Courts they are not confined within the bounds of legal rights but can shape their decisions to meet exigencies of varying situations. They work in the realm of arbitration rather than in that of law. Contractual terms will not bind them. They adjust the rights between two contracting parties, the employer and the labourer on an equitable plane.

(10) The Industrial Disputes Act of 1947 lays down the scope and also the limits of the Tribunal's jurisdiction. The preamble to the Act gives wide scope when it says that it is expidient to make provisions for the investigation and settlement of industrial disputes and for certain other purposes appearing therein. The Industrial Dispute has been defined in S. 2 Cl. (k):

" "Industrial Disputes" means any dispute or difference between employers and employers or between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person."

If a dispute as defined arises between the employer and the workmen the State Government is authorised to refer the same to an industrial Tribunal for adjudication. The Industrial Tribunal settles disputes between the parties and gives a binding award.

(11) The Tribunal's rights to direct reinstatement of discharged workmen fell to be considered by the Federal Court in 'W. I. A. ASSOCIATION v. INDUSTRIAL TRIBUNAL, BOMBAY', A I R 1949 F C 111. The question for determination in that case was whether the definition of the expression "Industrial dispute" given in the Act included within its ambit a dispute in regard to reinstatement of dismissed employees. As regards the scope of the Act the learned Judges observed at page 115 as follows:

"The Act is stated in the preamble to be one providing for the investigation and settlement of industrial disputes. Any industrial dispute as defined by the Act may be reported to Government who may take such steps as seem to it expedient for promoting conciliation or settlement. It may refer it to an industrial Court for advice or it may refer it to an industrial Tribunal for adjudication. The legislation substitutes for free bargaining between the parties a binding award by an impartial tribunal."

Later on they proceed to say:

"Any dispute connected with employment or non-employment would ordinarily cover all matters that require settlement between workmen and employers, whether those matters concern the causes of their being out of service or any other question and it would also include within its scope the reliefs necessary for bringing about harmonious relations between the employers and the workers."

The learned Judges held after considering the relevant provisions that the Industrial Tribunal has power in appropriate cases to direct reinstatement of the dismissed workmen. Finally they concluded the judgment with the following words:

"The tribunal has jurisdiction to adjudicate on the dispute and it can be trusted to do its duty and it cannot be said that it will give the reinstatement relief unless it thinks it is necessary to do so."

(12) In "Labour disputes and collective bargaining" (Vol. II) by Ludwig Teller at page 852, the learned author says as follows:

Section 319: "In several cases involving discriminatory discharges or strikes caused or prolonged by unfair labour practices, the contention has been advanced that because of violent or unlawful conduct upon the part of the employees involved the Board ought not to require their reinstatement. The Board's power of reinstatement is discre-

tionary in nature, to be exercised in the light of all the circumstances of each case in the manner best calculated to effectuate the policies of the Act. In the exercise of that discretionary power, the Board considers the probable effect of the restoration of the working relationship upon future relations between the employer and the employees."

It is, therefore, clear that the Industrial Disputes Act substitutes for free bargaining between the parties a binding award by an impartial tribunal. The tribunal is not bound by contractual terms between the parties but could make a suitable award for bringing about harmonious relations between the employers and the workers. In such a set up, in my view, the doctrine of domestic tribunal cannot easily fit in. When an impartial tribunal working in the realm of arbitration and unfettered by contractual terms entered into between the parties is empowered to settle the disputes between the parties it would appear incongruous that one of the parties to the dispute could sit in judgment over the other and bind the hands of the tribunal empowered to decide impartially the dispute between them. It would obstruct the work of the tribunal and prevent it from discharging its difficult task of bringing about harmonious relations between the parties.

I would, therefore, hold that the industrial tribunal is not fettered by any such limitation on its power. The only limitation on its power is to bring about harmonious relationship between the employers and the workmen. Having regard to all the circumstances the tribunal can direct reinstatement if it thinks that it is necessary to the interests of industrial peace. I am, therefore, of opinion, that the principle laid down by the Appellate Tribunal is not correct. As the Appellate Tribunal interfered with the order of the Tribunal on the question of reinstatement of workers in regard to which no appeal lies to it I have no option but to issue a writ quashing that order. I hereby quash the order of the Appellate Tribunal. The petitioners will have their costs. Advocate's fee Rs. 200/-

C.R.K./D.H. Application allowed.

A. I. R 1952 Madras 667

RAMASWAMI J.

Sakuntala Bai, Petitioner v. Venkatakrishna Reddi, The Customs Inspector of Reddichavadi Custom Chouki, Cuddalore Taluk, Respondent.

Cri. Revn. Case No. 107 and Cri. Revn. Petn. No. 106 of 1951, D/- 6-2-1952.

(a) Criminal P. C. (1898), S. 197 — Sea Customs Act (1878), S. 198 — Act in discharge of official duty — What is — Customs Inspector losing temper and assaulting respectable woman on suspicion of smuggling — Act not in discharge of duty — Notice under S. 198, Sea Customs Act or sanction under S. 197, Cr. P. C. not necessary.

Accused, a customs Inspector asked a respectable lady to remove her gold bangles and gold golusu and on her refusal to do so, abused her and assaulted her by slapping her on face as well by giving blows on her back with his leather belt. He then forcibly removed the bangles and golusu and detained her in chowky for some hours until she paid a fine of Rs. 1000/-. On a complaint by her, it was contended that notice under S. 198, Sea Customs Act, 1878 and sanction under Section 197, Cr. P. C. was necessary before the complaint could be filed:

Held (1) that when the Sea Customs Act itself prescribed the procedure to be followed in such cases the Customs Inspector could not administer summary condign punishment and assault a respectable woman with hands and belt and cause injuries to her. Therefore it was not an instance of "an act done or purporting to be done in execution of duty as a servant of the Crown" and there could be no question of failure to follow the procedure prescribed under S. 198, Sea Customs Act. AIR 1939 FC 43 and AIR 1948 PC 128, Rel. on. (Paras 6, 7)

(2) that in order to make out the prerequisite of sanction under S. 197, Cr. P. C. it must be established that the act which was done was an act done by the official while acting or purporting to act in the discharge of his official duties. A prosecution for an offence arising out of the abuse of official position by an act not purporting to be official, did not require sanction under S. 197, Cr. P. C.: AIR 1917 Mad 344 and AIR 1927 Mad 566, Rel. on. (Paras 9, 10)

Anno: Cr. P. C., S. 197 N. 6.

(b) Criminal P. C. (1898), S. 197 — Question whether public servant is protected by S. 197 is mixed question of fact and law.

The question whether an accused who is a public servant would be protected under S. 197, Cr. P. C. is not a pure question of law but a mixed question of fact and law and has to be decided after investigation and cannot be short-circuited by summarily throwing out the complaint. (Para 11)

Anno: Cr. P. C., S. 197 N. 1.

(c) Criminal P. C. (1898), S. 197 — Accused a Customs Inspector — Person other than central Government can dismiss him — Sanction of Central Government not necessary. AIR 1935 Mad 442, Rel. on. Case law referred. (Obiter). (Para 12)

Anno: Cr. P. C., S. 197 N. 4.

T. R. Srinivasan, for Petitioner; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras.

('48) 1948-2 Mad LJ 6: (AIR 1948 PC 128: 49 Cri LJ 503 PC) 7
('39) AIR 1939 FC 43: (40 Cri LJ 468) 6
('43) AIR 1943 FC 18: (44 Cri LJ 466) 12
('16) 1916-1 Mad WN 384: (AIR 1917 Mad 344: 17 Cri LJ 168) 9, 12
('27) 50 Mad 754: (AIR 1927 Mad 566: 28 Cri LJ 539) 9
('34) 1934 Mad WN 370 12
('35) 58 Mad 787: (AIR 1935 Mad 442: 36 Cri LJ 1241) 12

ORDER: This is a criminal revision petition filed against the order of discharge made by the learned District Magistrate (Judicial) of South Areot at Cuddalore in C. C. No. 399 of 1950.

(2) The facts are: One Sakunthala Bai travelled in a bus from Pondicherry to Cuddalore on 17-4-1950. It is stated that she was on her way to her husband's house. The bus was stopped at Reddichavadi Customs Chouki for inspection by the customs authorities. This Sakunthala Bai states that she was examined by the woman customs guard and was sent out and that while she was about to get back into the bus she was called by the accused Venkatakrishna Reddi, the Inspector of the Reddichavadi Customs Chouki and asked to remove the gold bangles and the gold golusu worn by her and that she refused to do so. Thereupon the accused is said to have abused her and also assaulted her by giving a slap on her face and a few blows on her back with his leather belt and that he forcibly removed the gold bangles and golusu from her hands and detained her in the Chouki till 8-15 p.m. until she paid a fine of Rs. 1000. On the foot of that she filed a complaint against the accused on 26-4-1950. This case was filed before the Stationary Sub-Magistrate of Cuddalore under Ss. 355, 323 and 342, I. P. C. in C. C. No. 1414 of 1950 and the learned Sub Magistrate after examining the complainant on oath took the complaint on file under S. 355, I. P. C. and issued summons to the accused.

(3) Then on a petition (C. M. P. No. 24 of 1950) filed by the accused the case was transferred to the file of the District Magistrate and numbered as C. C. No. 399 of 1950. I may point out here that the complainant sought to corroborate her case by a medical certificate also.

(4) The accused took a preliminary objection under S. 197, Criminal P. C., and also under S. 198, Sea Customs Act. His case was that as Inspector of Customs attached to the Central Government appointed under S. 3 of the Sea Customs and Land Customs Act, he was a public servant not removable from office even by the local Government and that to prosecute such an officer for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties sanction will have to be obtained from the Central Government and that under S. 197 Criminal P. C., the Court could not take cognizance of the offence against him except with the previous sanction of the Central Government. The contention under S. 198 of the Sea Customs Act is that

> "no proceeding other than a suit shall be commenced against any person for anything purporting to be done in pursuance of the said Act without giving to such person a month's previous notice in writing of the intended proceeding and of the cause thereof; or after the expiration of three months from the accrual of such cause."

There is no dispute in this case that this procedure was not followed in the sense that notice was not given though the complaint was filed within three months of the accrual of such cause. These contentions found favour with the learned District Magistrate (Judicial) of Cuddalore and the complaint was dismissed and the accused was discharged.

(5) The two points which fall for consideration before me are whether S. 198, Sea Customs Act and S. 197, Criminal P. C. apply to this case.

(6) 'Point 1:' So far as S. 198, Sea Customs Act is concerned the learned District Magistrate was not at all justified in holding that that section applied to the facts of this case. The reasoning of the learned Judicial District Magistrate is that the accused got wild and assaulted the lady as she refused to remove the jewels from her hands and surrender them and that therefore that even if the accused had assaulted the complainant it was an act done or purporting to be done by the accused in the discharge of his official duties. I am astonished that such an argument should have found countenance with a Judicial District Magistrate as nowhere does the Sea Customs Act permit the Customs authorities to beat a respectable lady not only with hands but also with a belt as part of their official duty. Chapter XVII of the Sea Customs Act lays down the procedure in regard to such cases. It was open to the Inspector to arrest this lady on his suspecting that she was trying to smuggle dutiable goods and then produce her before the nearest Magistrate or Customs Collector and seize the articles liable to confiscation etc. It is no part of the duty of a Customs Inspector to lose his temper and do any of the acts attributed to him in the complaint and if he does so it will certainly be an act not done or purporting to be done in the discharge of his official duties. This point has been elaborately dealt with in two leading judgments of the Privy Council and the Federal Court. In 'HORIRAM SINGH v. EMPEROR', AIR 1939 F C 43, the phrase "act done or purporting to be done in execution of the duty as servant of the Crown" was fully discussed. Their Lordships of the Federal Court laid down that

> "the test is not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at that time. Moreover, an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently."

This has not been the case here. If for instance the complainant woman tried to run away or resist the removal of the ornaments by the female guard who should naturally be employed in seizing the articles, one can understand if force is used to prevent the woman running away or overcome her resistance. That application of force could be an act done or purporting to be done in execution of his duty though negligence might have been displayed and more force than was necessary was used. But when the Sea Customs Act itself prescribes the procedure to be followed in such cases this Customs

Inspector could not administer summary condign punishment and assault a respectable woman with hands and belt and cause injuries to her. Therefore, applying the principles laid down in this Federal Court decision this is certainly not an instance of "an act done or purporting to be done in execution of duty as a servant of the Crown".

(7) Then turning to the decision of the Privy Council in 'H. B. GILL v. KING EMPEROR', 1948-2 Mad L J 6, their Lordships have held that

"a public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act."

In other words, their Lordships of the Privy Council while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. Therefore, as I have stated, it is an astonishing fact that the learned Judicial District Magistrate should have thought that beating a would be smuggler not for the purpose of seizure but for ventilating his outburst of temper is an act done in the course of official duty or purporting to be done in the course of official duty by a servant of the State. The less we protect such public servants the better and the more we allow citizens to ventilate their just grievances the better. On this construction there is no question of failure to follow the procedure prescribed under S. 198, Sea Customs Act.

(8) 'Point 2': Then turning to S. 197, Criminal P. C., as I have pointed out above two contentions are advanced, viz., that first of all this is an offence for which sanction is required and secondly that the sanction should be given by the Central Government. In my opinion, both these contentions are devoid of any substance.

(9) In order to make out the pre-requisite of sanction it must be established that the act which was done was an act done by the official while acting or purporting to act in the discharge of his official duties. To some extent this point has been discussed while dealing with S. 198, Sea Customs Act. The test to be applied in such cases has been well laid in two decisions of this Court. In 'ABDUL KADIR SAHIB v. EMPEROR', 1916-1-Mad W N 384; Coutts-Trotter, J. pointed out that S. 197, Criminal P. C. is intended to apply to those cases in which the offence is an offence which can be committed by a public servant only, that is, cases in which his being a public servant is a necessary element in the offence. Thus, where a Judge commits an offence from the Bench which could be committed by anybody and which entails consequences neither in the way of penalty nor anything in the least different because a Judge committed it from what it would entail if committed by anybody else. Sanction is not required for his prosecution under S. 197, Criminal P. C. In 'RAJA RAO v. RAMASWAMI', 50 Mad 754, Jackson, J. pointed out as follows:

"Section 197, Criminal P. C. presents no difficulty if the obvious intention of the legislature is borne in mind. It is no part of British policy to set an official above the common law. If he commits a common offence he has no peculiar privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction, for the obvious reason that otherwise official action would be beset by private prosecution. Judges would be charged with defamation, policemen with wrongful restraint, and distrainers with theft. This privilege of immunity from prosecution without sanction only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge."

(10) In other words, a prosecution for an offence arising out of the abuse of official position by an act not purporting to be official, does not require sanction under S. 197, Criminal P. C.

(11) In this case two points are involved, viz., first of all whether the Customs Inspector did assault this Sankunthala Bai as alleged by her and which she was prepared to prove by means of medical certificate and otherwise and secondly, whether in the event of her affirmatively and satisfactorily proving that the accused did assault her then whether it was for one of the purposes which would have made out that it was a case of use of reasonable force for discharging an official duty and then the question of sanction would arise. So on the mere contention of the accused that even if he is assumed to have assaulted the complainant he would be protected under S. 197, Criminal P. C., is meaningless. It is not a pure question of law but a mixed question of fact and law and has to be decided after investigation and cannot be short circuited by summarily throwing out the complaint.

(12) Then in regard to this accused being a servant of the Central Government, it is of academical importance in view of the fact that I have held that 'prima facie' at present stage no sanction is necessary. But assuming that such a sanction is necessary, the sanction of the Central Government is not necessary because the Customs Inspector is removable by a delegated authority. It is admitted that the Customs Inspector can be dismissed by a person other than the Central Government. There is a Bench decision of this Court on this point: 'PICHAI PILLAI v. BALASUNDARA MUDALI', 58 Mad 787. It was held there as follows:

"The expression 'any public servant who is not removable from his office save by or with the sanction of a local Government or some higher authority' in S. 197 (1), Criminal P. C. will not include public servants when some lower authority has by law or rule or order been empowered to remove. The section clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the local Government to their prosecution be necessary."

In this decision 'ABDUL KADIR SAHIB v. EMPEROR', 1916-1 Mad W N 384 and 'NARA-

YANA v. EMPEROR', 1934 Mad W N 370, were dissented from. See also 'AFZALUR RAHMAN v. EMPEROR', AIR 1943 F C 18.

(13) The order of the lower Court, therefore cannot be supported and the dismissal and discharge are set aside and the present learned District Magistrate is directed to take the case on file and dispose of it according to law in the light of the observations made above.

C.R.K./D.R. Revision allowed.

A. I. R. 1952 Madras 670

SUBBA RAO J.

Narayana Chandrasekhara Shenoy and Bros. by sole Proprietor Narayana Shanbog, Appellant v. R. Palaniappa Mudaliar, Respondent.

Second Appeal No. 1907 of 1948, D/- 7-3-1952.

Contract Act (1872), Ss. 56 and 73 — Defendant contracting to supply jaggery by rail — Delivery by rail becoming impossible by issue of Government notification controlling movement of jaggery by rail — Plaintiff refusing to bear additional expenditure entailed by change in mode of transport — Held that even assuming that contract had not become impossible of performance, defendant did not commit breach of the contract.

Where the defendant had agreed to deliver jaggery to the plaintiff at a particular station by railway, but due to Government order controlling the movement by railway of jaggery, the goods could not be delivered by railway and the plaintiff refused to bear the additional expenditure which the change in the mode of transport would have entailed, it cannot be said, even assuming that the contract had not become impossible of performance that the defendant committed the breach of the contract. AIR 1945 PC 144, Referred. (Para 5)

Anno: Contract Act, S. 56 N. 2; S. 73 N. 20.

K. Sanjeevi Kamati, for Appellant; M. C. Srinivasan, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.
('45) 1945-1 Mad LJ 417: (AIR 1945 PC 144) 4

JUDGMENT: This second appeal arises out of O. S. No. 601 of 1945, a suit filed by the appellant for recovering from the defendant damages for breach of contract.

(2) On 6-10-1944, the defendant and the plaintiff entered into a contract whereunder it was agreed that the defendant should deliver 151 bags of Kannady quality jaggery at Rs. 20 per bag free on railway Karur. The defendant despatched the goods in Karur and they reached Calicut on 22-10-1944. The plaintiff on inspection of the goods discovered that they were not in accordance with the quality agreed to be delivered. It appears that the agent of the defendant who was in Calicut persuaded the plaintiff to take the goods at Rs. 19 per bag with a promise that the defendant would deliver the goods of the requisite quality in accordance with the terms of the contract dated 6-10-1944.

(3) Both the Courts found that by reason of the aforesaid agreement the defendant had agreed to deliver the goods under the earlier contract. Unfortunately on 25-10-1944, the Board of Revenue, Madras, issued a Press Note controlling the movement by rail of cane jaggery from any station in Trichinopoly District to Calicut. The effect of this notification was that the defendant could not put the goods on rail at Karur. Then correspondence passed between the parties in regard to the manner of delivery. Exs. D. 4 and D. 5, letters written by the plaintiff to the defendant, show that the plaintiff was not inclined to bear the additional expenditure he might incur in case the goods were delivered by lorry or otherwise. Whatever ambiguity there might be in the letters Exs. D. 4 and D. 5, in a reply to the letter by the defendant to the plaintiff, Ex. D. 6 dated 6-1-1945, wherein the defendant wrote to the plaintiff to come over to Karur and take delivery of the bags, the plaintiff wrote that he was not willing to do so. As P. W. 1 he admitted in his chief-examination that in the reply notice the defendant said he would deliver the goods at Karur but that he was not prepared for it.

(4) On these facts the question is whether the defendant was exonerated from his liability to carry out the terms of the contract. The governing section of the Contract Act is S. 56 which reads:

> "An agreement to do an act impossible in itself is void: A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful ... ..."

Learned counsel for the appellant contended that the issue of the notification by the Board of Revenue, Madras, did not make the performance of contract impossible; for he said that the contract could be performed otherwise than by putting the goods on rail at Karur. The judgment of the Judicial Committee in 'TWENTSCHE OVERSEAS TRADING CO. LTD. v. UGANDA SUGAR FACTORY LTD.,' 1945-1 Mad LJ 417 lays down the principle underlying the doctrine of impossibility. Their Lordships said that whether a frustration occurs or not depends upon the nature of the contract and on the events which have occurred. They pointed out that a contract will in law be deemed to be frustrated if the common basis on which both the parties entered into the contract has failed. To put in other words, a contract would be frustrated if there is a failure of what in the contemplation of both the parties would be the essential condition or purpose of the performance. Relying upon the aforesaid principles, learned counsel contended that in the present case the notification only affected the mode of carrying out the contract but did not displace the basis of the contract.

(5) In this case it is not necessary to decide whether the contract has become impossible of performance or otherwise frustrated. Assuming that the contract had not become impossible of performance, can it be said, having regard to the circumstances of the case, that the defendant committed a breach of the contract. It is said that the goods could have been sent by some other means. But, as I have already stated, the correspondence and the oral evidence disclose that the plaintiff was not willing to bear the additional expenditure which the change of the mode of transport might entail. Both the Courts found that the plaintiff refused to agree to the alternative mode of delivery suggested by the defendant. In the circumstances it cannot be said that the defendant committed

breach of the contract. The findings of the lower Courts are correct. The second appeal fails and is dismissed with costs.

CRK/RGD Appeal dismissed.

A. I. R. 1952 Madras 671

RAJAGOPALAN AND CHANDRA REDDI JJ.

Masum Vali Saheb and others, Appellants v. Illuri Modin Sahib, Respondent.

Second Appeal No. 2071 of 1947, D/- 7-12-1951.

† (a) Transfer of Property Act (1882), S. 54 — Oral transfer by husband in favour of wife in lieu of her dower debt does not convey title — (Muhammadan law — hiba bil ewaz).

A transfer of immovable property by a Muhammadan husband in favour of his wife for her dower debt does not involve two reciprocal gifts but is only one contract. The hiba bil ewaz so called in India is a sale within the meaning of S. 54 and unless made by a written instrument, duly registered, will not convey title to the person, in whose favour such a conveyance is made. Consequently an oral conveyance of immovable property worth more than Rs. 100 by a Muhammadan husband in favour of his wife in lieu of her dower is not valid. Case law reviewed. (Paras 16, 21, 26)

Anno: T. P. Act, S. 54 N. 4.

(b) Civil Procedure Code (1908), O. 21 Rr. 97 and 100 — Persons never in possession of suit property cannot maintain application under. (Para 27)

Anno: Civil P. C., O. 21 R. 97 N. 1; R. 100 N. 2.

M. V. Nagaramayya, for Appellants; A. Kuppuswami, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('76-77) 2 Cal 184: (31 Ind App 291 PC) 23A
('28) 7 Pat 500: (AIR 1928 PC 112) 21
('81) 3 All 266 (PC) 14, 20
('78-80) 2 All 854 12
('83) 5 All 65: (1882 All WN 175) 13, 24
('11) 33 All 421: (10 Ind Cas 727) 12
('31) 1931 All LJ 951: (133 Ind Cas 901) 13
('36) AIR 1936 All 600: (164 Ind Cas 515) 14, 15, 18, 19, 22
('37) ILR (1937) All 285: (AIR 1937 All 25) 18, 19, 20, 22
('51) AIR 1951 All 86: (1950 All LJ 917 FB) 19
('09) 13 Cal WN 160: (4 Ind Cas 466) 8, 12
('27) 54 Cal 754: (AIR 1927 Cal 808) 9
('34) 38 Cal WN 743: (AIR 1934 Cal 703) 9
('28) 9 Lah 428: (AIR 1928 Lah 516) 10
('35) 16 Lah 177: (AIR 1936 Lah 307) 10
('68-69) 4 Mad HCR 115 12
(1900) 23 Mad 70 23A
('11) 21 Mad LJ 958: (12 Ind Cas 457) 12
('22) 45 Mad 612: (AIR 1922 Mad 311 FB) 23
('49) ILR (1949) Nag 426: (AIR 1951 Nag 428) 11
('27) 1 Luck 83: (AIR 1926 Oudh 186 (2)) 20, 21
('27) 2 Luck 575: (AIR 1927 Oudh 204) 21
('49) AIR 1949 Pat 237: (26 Pat 561) 10

CHANDRA REDDI J: This second appeal has come before us as it was referred to a Bench by one of us, having regard to the divergence of Judicial opinion on the main point involved in the appeal.

(2) Defendants 1 to 8 are the appellants in this second appeal. The facts, so far as is necessary to appreciate the question involved in the second appeal, may be briefly stated:

(3) The suit house orginally belonged to Khasim Peeran. This was built by him on a portion of a plot of land shown as A B C D E F G in the plan attached to the plaint. In the family division amongst the brothers, the site, on which the suit house is built, was allotted to Khasim Peeran and, subsequently, he built thereon the suit house. In discharge of a dower debt, Khasim Peeran transferred this house to his wife, Basiri Bibi. Basiri Bibi, in her turn, sold this house to the plaintiff in or about the year 1941 for a consideration of Rs. 250. After the death of Khasim Peeran, a creditor of his filed a suit on the foot of a promissory note, S. C. No. 54 of 1941 on the file of the District Munsif's Court of Prodattur and obtained a decree thereon. In execution of the decree, 1/4 share in A B C D E F G was sought to be attached. Thereupon, the defendants intervened with a claim petition, Ex. P. 5. which was allowed with the consequence that what was sold was the site marked C D E F in the plan on which the suit house stood. This was purchased by the decree-holder himself. The defendants once again came forward with a claim petition for redelivery of the properties, as though they were once in possession and were dispossesed by the auction purchaser. Evidently, this was not resisted by the auction purchaser, with the result that the claim was allowed. Since the present plaintiff was not a party to that claim petition, another application, E. A. No. 617 of 1943, which has given rise to this second appeal. was filed by the defendants impleading the present plaintiff as a party, for removal of obstruction and for re-delivery. This application though it purports to be under S. 141 or 151 Civil P. C. seems to be really one under O. 21 R. 100. Despite the opposition of the present plaintiff, the claim petition was allowed by the District Munsif of Prodattur and the plaintiff was directed to put the defendants in possession thereof. This led the present plaintiff to institute a suit for a declaration of his title to the property based on a sale deed executed by the widow of Khasim Peeran in his favour and also for a declaration that the property was not liable to be redelivered to the defendants.

(4) The suit was resisted on various grounds. the chief of them being, that the plaintiff hac no title to the suit property as the oral conveyance in favour of his vendor by her husband in consideration of her dower debt was not valid.

(5)The trial Court, while holding that the transfer of the suit house in favour of his wife by Khasim Peeran in consideration of the former's dower debt is not valid, as it was not evidenced by an instrument duly registered decreed the suit on the ground that the plaintiff was entitled to a possessory lien till the dower debt of his vendor was discharged. In the result, a decree was granted in terms of the reliefs prayed for in the plaint.

(6) On appeal by the defendants, the Subordinate Judge confirmed the decison of the trial Court, not only on the ground of possessory lien, but also on the additional ground that the transfer by Khasim Peeran of the suit property in favour of his wife, in consideration of her dower debt, was "hiba-bil-ewaz" and, therefore though not evidenced by a registered instru-

ment, was effective with the consequence, the vendor of the plaintiff had a valid title to the suit house, which he could convey to the present plaintiff. The defendants, who were aggrieved by this judgment, have preferred the present second appeal.

(7) The main question that this second appeal raises is one touching the validity of the oral transfer of the suit house by Khasim Peeran to his wife in consideration of her dower debt. On this question, the preponderance of authority seems to be in favour of the view, that such a transaction is a sale within the meaning of S. 54 of the Transfer of Property Act and will not be valid unless it is accompanied by a registered document.

(8) The leading case on the subject is 'ABBAS ALI v. KARIM BAKSH', 13 Cal W N 160, which is the foundation of several decisions not only of that Court, but also of other High Courts. There one Shikdar made an oral gift of a portion of his property in favour of his wife, both in satisfaction of her dower debt and a share she would have on his death. The validity of the gift fell to be considered in the suit. When the matter went up in appeal to the High Court, a Bench of that Court regarded the transaction as a 'hiba-bil-ewaz' of India, though strictly, it was not a 'hiba-bil-ewaz', and held that it was a sale governed by the provisions of S. 54 of the Transfer of Property Act, and not a pure 'hiba' or gift.

(9) This was followed in 'SATULAL BHATTACHARJEE v. ASIRADDI SHEIKH', 38 Cal W N 743 and also in 'SARIFUDDIN MAHOMED v. MOHIUDDIN MAHOMED', 54 Cal 754.

(10) The same view was adopted by the Patna High Court also. In 'MAHOMED USMAN v. AMIR MAIN', AIR 1949 Pat 237: 26 Pat 561 a Bench of that Court held that such a transaction was a sale, falling within the scope of S. 54 of the Transfer of Property Act. This principle is affirmed by the Lahore High Court in a number of cases, and it is sufficient to refer to two of them. 'FATEH ALI SHAH v. MAHOMED BAKHSH', 9 Lah 428 and 'GOPALDAS v. SAKINA BIBI', 16 Lah 177. In 'FATEH ALI SHAH v. MAHOMED BAKSH', 9 Lah 428, one Shah Muhammad executed a deed, which purported to gift to his wife certain of his properties, to which she was to have absolute title, in lieu of her dower debt as well as her right of maintenance. The learned Judges before whom the matter came up in appeal expressed the opinion that though the transaction was described as a gift, it was really a 'hiba-bil-ewaz', which was tantamount to a sale. This was followed by another Bench of that Court in 'GOPALDAS v. SAKINA BIBI', 16 Lah 177.

(11) In ZAINAB BI v. JAMALKHAN', ILR (1949) Nag 426, a Bench of the Nagpur High Court held that a transfer of immovable property by a Muhammadan husband in favour of his wife, in discharge of her dower debt was a sale and not a pure 'hiba' or gift.

(12) We may now refer to a decision of our High Court in 'KHAMRUNISSA v. HAZARATH SAHIB', 21 Mad L J 958. In that case, under a registered instrument a Muhammadan husband conferred a life-estate on his wife in some property in consideration of the latter's dower debt and which had to devolve on her death on his heirs. After her death, her grand daughters claimed that property, under a gift deed from her, on the ground that under the Shafi school of Muhammadan law, a gift for life could not be made and, therefore, such a gift should be construed as a gift of an absolute estate. Sundara Aiyar and Phillips JJ. before whom the appeal came on for hearing, thought that it was unnecessary to decide that question as in their opinion, it was not a gift but a sale and, therefore, a life estate could be conveyed under that document. This is what they observe at page 960:

> "It has been decided both by this Court and by other High Courts that a transfer of property to a Muhammadan lady for a term by her husband in consideration of dower must be regarded as a sale—See 'SAHIBA BEGUM v. G. ATCHEMMA', 4 Mad H C R 115; 'GULAM MUSTAFA v. HURMAT', 2 All 854; 'ABBAS ALI v. KARIM BAKSH', 13 Cal W N 160 and also 'Baillie's Digest p. 122'. Such a transfer was regarded as unimpeachable in 'MUBARAK-UN-NISSA v. MAHOMED MUNSUB HASAN KHAN', 33 All 421. There is nothing in the Muhammadan law, so far as we are aware, against the legality of such a transfer."

(13) A different note was struck in some of the decisions of the Allahabad High Court, though the statement of law contained in earlier rulings of that Court is in accordance with the principle stated above. In 'FIDA ALI v. MUZAFFAR ALI', 5 All 65, Mohmood J. delivering the judgment on behalf of the Bench, held that a transfer of immovable property by a Muhammadan husband in favour of his wife in consideration of her dower debt was a sale giving rise to a right of pre-emption. The same view was shared by Sulaiman C. J. and Banerji J. in 'SAIFUR BIBI v. ABDUL AZIZ KHAN' 1931 All L J 951. The learned Judges decided that transfer of property made in lieu of an existing debt in cash would be a transfer for price, so as to bring it within the meaning of S. 54 of the Transfer of Property Act .

(14) But in 'MT. KULSUM BIBI v. SHIAM SUNDER LAL', AIR 1936 All 600, a Bench of the same High Court differed from the earlier view and came to the conclusion that a transaction called "hiba-bil-ewaz" was not a sale but a gift. The grounds, upon which the learned Judges reached that decision, was that the transaction involved two reciprocal gifts (i) gift of immovable property by the husband in favour of the wife, and (ii) gift by the wife of her dower debt in favour of the husband and secondly, in 'KAMARUNNISSA BIBI v. HUSSANI BIBI', 3 All 266 (PC), the Judicial Committee decided that a transfer of immovable property in favour of his wife in discharge of the dower debt was not a sale but a gift.

(15) We shall first refer to the decision of the Judicial Committee in 'KAMARUNNISSA BIBI v. HUSSANI BIBI', 3 All 266 (PC). In that case, two issues were raised (i) whether there was consideration for the transfer of property and (ii) whether the gift was accompanied by delivery of possession of the property. The trial Court held that there was neither consideration for the transfer nor delivery of possession and therefore no title passed to the wife. On appeal, the High Court held that though there was no consideration for the transaction, the gift was valid, inasmuch as the donee was put in possession of the property.

On further appeal to the Privy Council, their Lordships of the Judicial Committee held that it was valid, both as a gift for consideration and also as a pure gift, since the gift was accompanied by delivery of property. At page 268 of the report, their Lordships observed that, if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration. It is thus clear that their Lordships were not considering the question whether the 'hiba' was a sale, and, therefore, required registration, or, was merely a gift. All that their Lordships decided was that the transaction was in either way a valid one. Further, it must be remembered that this decision was given prior to the enactment of the Transfer of Property Act. So, we do not see how this decision can lend any support to the view taken by the learned Judges in 'MT. KULSUM BIBI v. SHIAMSUNDER LAL', AIR 1936 All 600.

(16) As regards the ground that the transaction involved two reciprocal gifts, we do not think there is any basis for the view. It looks to us that there is only one transaction, both the transfer of property and the discharge of the dower debt forming parts of the same transaction. In dealing with the question whether it involved two reciprocal gifts or was only one transaction, Ameer Ali in his book on Muhammadan Law (4th Edn.) vol. 1 page 162 states:

"And the rules stated above do not, therefore, apply to what in modern times is called a 'hiba-bil-ewaz', which is a transaction of quite a different nature, and partakes to a certain extent of the second kind of 'ewaz' mentioned in the Fatawai Alamgiri, viz., where it is stipulated in the contract. In this kind of 'Hiba-bil-ewaz', the consideration is directly opposed to the object of the gift, both being 'in case'; there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction. A 'hiba-bil-ewaz', therefore, is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid and the terms in which a contract of this kind is entered into imply "that the articles opposed to each other are present" and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property and the law, therefore, annexes to it the quality of a sale both with regard to the condition and the effect."

It is thus clear that a transfer of immovable property by a Muhammadan husband in favour of his wife for her dower debt does not involve two reciprocal gifts but is only one contract.

(17) It is not necessary to refer to the various decisions, which have dealt with this question and laid down that both the acts form only one transaction and that they do not involve two reciprocal gifts.

(18) The ruling of the Allahabad High Court in 'MT. KULSUM BIBI v. SHIAMSUNDER LAL', AIR 1936 All 600, was followed by another Bench of the same Court in 'MT. KULSUM BIBI v. BASHIR AHMED', ILR (1937) All 285. The reasoning adopted by the learned Judge was in effect the same as in 'KULSUM BIBI v. SHIAMSUNDER LAL', AIR 1936 All 600, and it is not, therefore, necessary to deal with it.

(19) The conflict between the earlier view and the later view of the Allahabad High Court was resolved by a Full Bench of the Allahabad High Court in 'GHULAM ABBAS v. RAZIA BEGUM', AIR 1951 All 86 (FB). In that case, there is a learned discussion of the subject and all the leading cases are collected. The opinion expressed by the Full Bench is in conformity with the view prevailing in the High Courts of Calcutta, Patna, Lahore, Nagpur etc. The learned Judges overruled the two Bench decisions of the Allahabad High Court in 'MT. KULSUM BIBI v. SHIAM SUNDER LAL', AIR 1936 All 600 and 'MT. KULSUM BIBI v. BASHIR AHMED', ILR (1937) All 285. It was laid down there that the dower debt, when ascertained, was a debt the discharge of which will amount to payment of "price" within the meaning of S. 54 of the Transfer of Property Act, and therefore, the transfer for consideration of such a debt is a sale, which requires a written instrument duly registered.

(20) We shall now turn to the decisions of the Lucknow Court, whose view is similar to that taken in 'MT. KULSUM BIBI v. SHIAM SUNDER LAL', AIR 1936 All 600 and 'MT. KULSUM BIBI v. BASHIR AHMED', ILR (1937) All 285. We may first refer to the decision of that Court in 'BASHIR AHMAD v. MT. ZUBAIDA KHATUN', 1 Luck 83. In that case the question that arose for consideration was whether the transfer of immovable property by a Muhammadan husband in favour of his wife in consideration of her dower debt is subject to the right of pre-emption. The learned Judges held that a Muhammadan wife entitled to property under such a transaction was not entitled to the right of pre-emption as, in their opinion, the transaction was not a sale. This decision is based both on 'KAMARUNNISSA BIBI v. HUSSANI BIBI', 3 All 266 (PC) and on the dictum that the discharge of the dower debt is not a price within the meaning of S. 54 of the Transfer of Property Act. According to the learned Judges, the claim for a debt, being a "chose in action" no payment of money or promise to pay money is involved in the transaction. The learned Judges observe thus:

"A claim for a debt is a "chose in action" and has well-known legal incidents—See 'RYALL v. ROWLES', and notes under it in White and Tudor's Leading cases, Vol. I p. 98, 8th Edn. Where does then payment of money or a promise to pay money come in this transaction? Nowhere."

We do not think that we can agree with the learned Judges in their conclusion that the discharge of an existing debt, which is an ascertained sum does not amount to a price within the meaning of S. 54 of the Transfer of Property Act. Suffice it to say that in a number of cases, the expression price came to be judicially interpreted and the opinion expressed by learned Judges in the various cases was that the discharge of a pre-existing liability, if it is an ascertained sum is "price" within the meaning of S. 54 of the Transfer of Property Act. Vide 'SAIFUR BIBI v. ABDUL AZIZ KHAN 1931 All L J 951 and 'MADAN PILLAI v. BADRAKALI AMMAL', 45 Mad 612.

(21) In 'BASHIR AHMED v. MT. ZUBAIDA KHATUN', 1 Luck 83; the learned Judges quote the following passage from Hedaya:

> "If a man marries a woman without settling on her any dower and afterwards settles on her a house as a dower the privilege of 'shuffa' does not take place, the house being considered in the same light as if it had been settled on the woman at the time of marriage. It is otherwise where a man 'sells' his house in order to discharge his wife's dower either proper or stipulated; because here exists an exchange of property for property.

Then, they posed the question "what difference in principle can it make whether the property is transferred as dower, or in lieu of dower." We have only to observe that they have overlooked the difference, which is an obvious one. In one case, i.e., where the property transferred is by way of dower, no question of any fixation of price arises because the property itself is given as dower and there is no transfer of any property in exchange for a price, whereas in the other case of dower, the property is exchanged for a price. In the latter case, the price is an ascertained sum of money, which was payable to the vendee. The decision 'CHAUDHRI TALIB ALI v. MT. KANIZ FATIMA BEGUM', 2 Luck 575, followed the earlier decision in 'BASHIR AHMED v. MT. ZUBAIDA KHATUN', 1 Luck 83. It may be observed that these two decisions are in conflict with some of the earlier rulings of that Court. In this context, we may quote the observations of the Judicial Committeee of the Privy Council in 'HITENDRA SINGH v. MAHARAJAH OF DARBANGA', 7 Pat 500 at p. 508. "Under Muhammadan law, a transfer by way of 'hiba-bil-ewaz' is treated as a gift". We may now usefully refer to a passage from Baillee's Digest of Muhammadan law, which is only an abbreviated reproduction of Fatwa Alamgiri:

> "Hiba-bil-ewaz means, literally, gift for an exchange and it is of two kinds, according as the 'ewaz' or exchange is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts; first, the original gift, and second, the 'ewaz' or exchange. But in the 'hiba-bil-ewaz' of India, there is only one act; the 'ewaz' or exchange, being involved in the contract of gift as its direct consideration and all are agreed that if a person should say "I have given this to thee for so much", it would be a sale; for the definition of sale is an exchange of property and the exchange may be effected by the word "give" as well as by the word "sell". The transaction, which goes by the name of 'hiba-bil-ewaz' in India is, therefore, in reality not a proper 'hiba-bil-ewaz' of either kind, but a sale and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it though absolutely necessary in gift and what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done or by either of the forms of the true 'hiba-bil-ewaz'."

On these authorities both judicial and textual, we have come to the conclusion that the 'hiba-bil-ewaz' so-called in India is a sale within the meaning of S. 54 of the Transfer of Property Act and unless made by a written instrument, duly registered, will not convey title to the person, in whose favour such a conveyance is made and an oral conveyance of immovable property worth more than Rs. 100 to the wife by a Muhammadan husband is not valid.

(22) On behalf of the respondents, Mr. Kuppuswami tried to support the judgment of the lower appellate Court that such a transaction is not a sale. The learned counsel adopted the reasoning of the learned Judges in 'MT. KULSUM BIBI v. SHIAM SUNDER LAL', AIR 1936 All 600 and 'MT. KULSUM BIBI v. BASHIR AHMED', ILR (1937) All 285 and the Lucknow cases, which have been referred to. It is not necessary for us to deal with these arguments as we have already disposed of the same, while dealing with the decisions in 'MT. KULSUM BIBI v. SHIAM SUNDER LAL', AIR 1936 All 600 and the intermediate Allahabad view and the Lucknow view.

(23) In addition Mr. Kuppuswami relied on a decision of this Court in 'MADAM PILLAI v. BADRAKALI AMMAL', 45 Mad 612 (FB). According to the learned counsel, the ruling in 'MADAM PILLAI v. BADRAKALI AMMAL', 45 Mad 612 (FB), is authority for the proposition that actual payment of money is necessary to constitute "price" within the meaning of S. 54 of the Transfer of Property Act. We do not think we can agree with this argument. All that is laid down in 'MADAM PILLAI v. BADRAKALI AMMAL', 45 Mad 612 (FB), is:

> "Price includes money only, for if the thing given in exchange for land consists of goods and not money there is no sale but an exchange. A transfer not made in exchange for a money consideration e.g., a transfer made in pursuance of a compromise of a family dispute would not be a sale and might be altogether outside the provisions of the Act."

Far from supporting the contention of the learned counsel, it lays down that price can be the discharge of a pre-existing debt. The observations of the learned Chief Justice at page 617 disposes of this contention of Mr. Kuppuswami.

> "Now, price has a well defined meaning. It means money but not necessarily money handed over in current coin at the time but includes money, which might be already due or might be payable in the future."

(23A) The ruling in 'MUHAMMAD ESUPH RAVUTAN v. PATTAMMA AMMAL', 23 Mad 70, is relied on for substantiating the contention that 'hiba-bil-ewaz' is not a sale but a gift. We do not think there is any scope for this contention because nowhere in the decision is any such statement of law made. All that was decided there was that a gift for consideration could be valid even though it was not accompanied by delivery of possession of the property. They described such a transaction as a gift for consideration, which can only mean a sale. The passage in that judgment, which was called in aid by Mr. Kuppuswami is this:

> "That in such a case transfer of seizin is unnecessary is clear from the Privy Council case of 'RANEE KHAJOOROONISSA v. MT. ROWSHAN JEHAN', 2 Cal 184 (PC) cited for the respondent. The Muhammadan law rules relating to sales and exchanges, on which the appellant's vakil laid much stress have really no bearing in a case like this."

We do not think this passage can give rise to the contention that 'hiba-bil-ewaz' is not a sale within the meaning of the Transfer of

Property Act. There, it was decided that though the donee was not put in possession of the property, a valid title passed to the donee. That can only be on the basis that it was not a gift but a transaction supported by consideration i.e., a sale.

(24) Mr. Kuppuswami next urged that Ameer Ali in his book on Muhammadan Law (4th Edn.) at page 713 said that the decision of Mahmood, J. in 'FIDA ALI v. MOUZUFFAR ALI', 5 All 65, is erroneous. The relevant passage at page 713 may be extracted:

"When a property is conveyed to a wife in discharge of the dower debt, there is also no right of pre-emption. But when a house is sold to a third person in order to enable the husband to satisfy with the proceeds thereof the dower of his wife, the right of pre-emption comes into operation."

At the footnote, it is added that the decision in 'FIDA ALI v. MOZUFFAR ALI,' 5 All 65, appears to proceed on a wrong interpretation of the law. In this case, it must be remembered that the learned author was dealing with the question whether a conveyance of immovable property in favour of his wife in discharge of dower debt gives rise to a right of pre-emption We are not concerned in this case with the question whether such a transaction is subject to the right of pre-emption. So, it is unnecessary for us to consider, which of the two views is correct. The reason of the learned author for the view that such a transaction is not subject to the right of pre-emption is stated in the following words:

"The wife conveying to the husband and 'vice versa' do not thereby introduce a stranger among co-sharers or neighbours."

Our decision is confined to the question whether it is a sale within the meaning of S. 54 of the Transfer of Property Act.

(25) Next reliance was placed by Mr. Kuppuswami on a passage in Mulla's Transfer of Property Act, at p. 297 (3rd Edn). Referring to the decisions, which have taken the view that such a transaction as involved in his case, is sale within the meaning of S. 54 of the Transfer of Property Act, the learned author remarked thus:

"But in some cases such a transaction has been held to be a sale on the ground (submitted to be erroneous) that the extinction of the dower debt is equivalent to the payment of price."

Despite the high authority of the book and the great respect we have for the learned author, we are afraid we cannot agree with the opinion that these decisions are erroneous. In this context we may refer to a passage at p. 305 in the same book.

"The transaction called the 'hiba bil ewaz' of India has been held to be a sale, so that if the property is immovable property of the value of Rs. 100 or upwards, it must be effected by a registered instrument."

At this place, the learned author does not express any opinion of his.

(26) In this situation, we have to reject the contention put forward on behalf of the respondents. It follows that the view of the lower appellate Court that the transaction is valid, despite its not having been evidenced by a registered instrument cannot be sustained. Therefore the suit of the plaintiff, so far as it claims declaration of his title based on the oral sale in favour of the vendor by her husband is concerned, should fail.

(27) But this does not dispose of this appeal. We have next to consider whether the order in E. A. No. 617 of 1943 is sustainable, or, has to be vacated. On the findings that the plaintiff and his vendor were in possession of the property throughout, i. e. ever since the transfer of the property to the plaintiff's vendor by Khasim Peeran and that the plaintiff and his vendor have remained in possession of the property, we do not think that the summary order directing the removal of the obstruction, said to have been caused by the plaintiff and the redelivery of the property is sustainable. We do not understand how the defendants could maintain an application either under O. 21, R. 97 or O. 21, R 100 of the Civil P. C. It must be remembered that they were never in possession of the suit property. Hence they have no right to maintain an application either under O. 21, R. 97 or O. 21 R. 100, Civil P. C. In this view of the matter, it is unnecessary for us to decide whether even otherwise, E. A. No. 617 of 1943 was not liable to be rejected.

(28) In this second appeal, it is not necessary for us to consider whether the plaintiff is entitled to be in possession of the property till the vendor's dower debt is discharged and whether the plaintiff has got a possessory lien or not. This question may be relevant in other proceedings, i. e. when the defendants seek to dispossess the plaintiff. Consequently, the order of the District Munsif in E. A. No. 617 of 1943 has to be vacated with the result that the plaintiff is allowed to retain possession of the property till he is dispossessed in other and appropriate proceedings. The decrees of the Courts below will be confirmed subject to the deletion of Cl. 1 of the trial Court's decree. In view of the fact that the plaintiff has succeeded partially, we think it is desirable that the parties bear their respective costs throughout.

CRK/RGD Order accordingly.

A. I. R. 1952 Madras 675

RAGHAVA RAO J.

T. K. Shanmugasundara Mudaliar, Appellant v. S. C. Sivalinga Mudaliar and another, Respondents.

City Civil Court Appeal No. 55 of 1949, D/- 3-10-1950.

(a) Contract Act (1872), S. 63 — Agreement to release — Validity (Release).

A remission in 'praesenti' which is suspended until a certain future event occurs is valid but an agreement to remit in 'futuro' requires consideration if it is to be a binding contract. If in a case the plea amounts to an agreement to remit, proof of the agreement is unavailing to the party as the agreement must fail for want of consideration although the agreement may not offend against S. 92, proviso (4), Evidence Act. (Paras 3, 4, 6)

Anno: Contract Act, S. 63 N. 1, 6, 7; Evidence Act, S. 92 N. 28.

(b) Evidence Act (1872), Sec. 92, Proviso (4) —Collateral agreement (Oral evidence — Exclusion).

A plea that notwithstanding the recitals in the promissory note for interest the parties at the time of its execution agreed that no interest should be charged comes within the mischief of S. 92. It is a collateral agreement altering the legal effect of an instrument. (Para 7)

Anno: Evidence Act, S. 92 N. 28.

C. Narasimhachariar and M. E. Rajagopalachariar, for Appellant; M. S. Ramaswami Iyer, for Respondents.

REFERENCES: Courtwar / Chronological / Paras

('38) AIR 1938 PC 198: (32 Sind LR 810) 7
('04) 28 Bom 66: (5 Bom LR 689) 4
('11) 34 Mad 156: (20 Mad LJ 383) 2
('28) 55 Mad LJ 1: (AIR 1928 PC 99) 4
('30) 53 Mad 127: (AIR 1929 Mad 794) 4, 6
('36) 1936 Mad WN 205: (AIR 1936 Mad 380) 5, 6
('36) 71 Mad LJ 850: (AIR 1937 Mad 261) 6

JUDGMENT: This appeal arises out of a suit for recovery of the amount due under a promissory note executed by the defendants in favour of the plaintiff on 2-3-1948 for Rs. 2750 payable with interest at 9 per cent. per annum. The answer of the defendants was that although they had executed the promissory note it was unenforceable on account of an agreement in bar of the suit, which they detailed as follows in their written statement:

(2) "The plaintiff along with Rudrakoti Mudaliar, Kuppuswami Mudaliar and Arumuga Mudaliar are carrying on business in partnership under the name and style of Ganapathi Palaighat Company. They owned a casuarina tope planted on land belonging to the local temple. The first defendant is carrying on business in firewood in Madras and the second defendant is only working under him. In or about February 1948, the plaintiff and his partners agreed to sell the tope to the first defendant for Rs. 7750 with an advance of Rs. 500. At this time there was considerable dispute between the trustees of the temple and the villagers that land belonging to the temple was leased out for a nominal rent in the name of a son of one of the trustees and they sub-leased it to the plaintiff and his partners and made a huge secret profit. There was also control restrictions about the sale of firewood. In this state of things the plaintiff and his partners insisted on a separate agreement showing that the sale of the tope was for Rs. 2000 only and two pronotes for Rs. 5000 and Rs. 2750 making it appear that the pronotes were executed for cash consideration borrowed for business. Accordingly the second defendant herein executed an agreement of sale of the tope in favour of Arumuga Mudaliar. Two pronotes, one for Rs. 5000 dated 26-2-1948 and the suit pronote for Rs. 2750, dated 3-3-1948, were also executed by the defendants, the former in favour of Rudrakoti Mudaliar and the latter in favour of the plaintiff herein. It was then distinctly agreed and understood between the parties that in case these defendants sustained any loss owing to relaxation of control and other causes the plaintiff and his partners should remit Rs. 2000 out of the sale price.

(3) Within a month or two after the sale all control restrictions were removed and the defendants sustained very heavy loss. The plaintiff and his partners in the presence of respectable panchayatdars reiterated the original agreement that they would forego Rs. 2000 and receive the balance of Rs. 5500 only. The defendants paid various amounts from time to time amounting to Rs. 5000 and the pronote for Rs. 5000 was returned to him on 2-12-1948. As regards the suit pronote the plaintiff agreed that on payment of Rs. 750 only he would discharge the suit pronote and return the same to the defendants. As the defendants could not make up the said sum immediately there was some delay. In the meanwhile at the instigation of others and for reasons not known the plaintiff sent a notice dated 11-11-1948, demanding the full amount and before the defendants had time to reply the plaintiff has instituted this suit on 17-11-1948.

(4) These defendants submit that though there was a recital in the pronotes for interest it was agreed between parties at the time of the execution of the pronotes that no interest should be charged and the terms will not be enforced. Rs. 5000 was paid without interest and it was accepted."

The issue framed on the pleadings was: "whether the agreement pleaded is true & valid." As the suit was taken up for trial, there was a preliminary objection taken on behalf of the plaintiff that no proof of such agreement could be adduced by the defendants in bar of his suit. The objection found favour with the Judge below who accordingly decreed the suit as prayed for. It was contended in this appeal by Mr. Narasimhachariar that the view taken by the Court below is wrong.

(2) Learned counsel placed strong reliance on a ruling of this Court reported in 'MATHEW HENRY ABRAHAM v. THE LODGE "GOOD WILL", 34 Mad 156, in support of his attack against the judgment of the Court below. In that case the learned District Judge of Bellary dismissed the suit there in question brought by Mr. Henry Abraham as executor of Mathew Abraham for recovery of money due on a promissory note executed on the 12th November 1891 in the latter's favour by certain office bearers of the Lodge "Good Will", No. 465, of Bellary on the ground that although the document marked as Ex. IV in the case and executed by Mathew Abraham on the 21st February 1902 was not operative as a release, yet, since the Lodge regarded it as such, being led so to regard it by the conduct of Mathew Abraham at the time of its execution and completed the building of the Lodge premises on the faith of such belief, the plaintiff was estopped from enforcing his claim. No estoppel having been pleaded in the suit or raised by the issues or at any rate, proved by any evidence, this Court held that the District Judge was wrong in dismissing the suit on the ground of estoppel. The real question which thereupon this Court (Munro and Abdur Rahim JJ) had to consider was whether the District Judge was right in holding that Ex. IV was not a good and effective release. The judgment of the Court was delivered by Abdur Rahim J. who at page 157 of the report sets forth the document in these words in which it ran:

"Know all men by these presents that I, Mathew Abraham, proprietor of Messrs. Abraham and Co. Bellary, do covenant and

agree with the Worshipful Master and Wardens of Lodge Good Will No. 465, for the time being, that if the Masonic Lodge building which has been burnt down is resuscitated, I shall have no claim, whatever, upon the building or any of the property of the said Masonic Lodge."

Dealing with the argument that the document could not be treated as a good release because there was no mention of the promissory note there, the Court held that where a deed of release was silent as to the claim released, evidence 'aliunde' was admissible under S. 95 of the Evidence Act to show what claim was intended to be released. After coming to the conclusion that the promissory note claim was intended to be released by the document in question the Court proceeded to consider the further question of law — which is the one material to the present case—whether under S. 63 of the Indian Contract Act, the release in question could be regarded as invalid. The Court ruled, after discussing the authorities bearing upon the point, that it was not the intention of the legislature in enacting S. 63 of the Contract Act to depart from the English law, under which releases, contingent on the happening of a future event are valid, and that such releases are valid under the Contract Act, the only difference between the English Law and the Indian Law being that the former requires consideration in the case of releases not under seal, while the Contract Act requires no consideration in the case of releases.

(3) The distinction sought to be made by Mr. Narasimhachariar on the basis of this decision between a remission in 'praesenti' which is suspended until a certain future event occurs and an agreement to remit 'in futuro' which clearly requires consideration, if it is to be a binding contract, is no doubt well-founded. however tenuous it may be on the facts of a particular case to which it may have to be applied. The distinction in my opinion is nonetheless real because thin. Reference may in this connection be made to Pollock and Mulla's Commentary on Indian Contract and Specific Relief Acts (7th edn.) at page 339:

"An agreement to remit 'in futuro' clearly requires consideration, if it is to be a binding contract. But this must be distinguished from a remission or dispensation which is made contingent on the happening of a future event. In such a case the remission is 'in praesenti', though it is suspended until the event occurs. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim 'if the lodge building which has been burnt down is resuscitated'. He cannot sue on his note after the lodge is rebuilt. It would be monstrous if he could."

(4) To turn to the agreement pleaded in the written statement in the present case in order to see how far the ruling relied upon by learned counsel is applicable, we have first to take note of the fact that so far as the agreement pleaded in paragraph 2 is concerned, it is something contemporaneous with the execution of the promissory note and directly offends against S. 92 of the Indian Evidence Act. So far as the agreement referred to in paragraph 3 of the written statement is concerned, it is said to have been a reiteration of the original agreement that the plaintiff and his partners would forego Rs. 2000 and receive the balance of Rs. 5500. Assuming that notwithstanding the reference in paragraph 3 of the written statement to a reiteration of the original agreement within a month or two after the sale, the agreement referred to in paragraph 3 has to be treated as something distinct and different from that referred to in paragraph 2 of the written statement, there still remains the obstacle in the way of the appellant arising out of the allegation in paragraph 3 that as regards the suit promissory note the plaintiff agreed that on payment of Rs. 750 only he would discharge the promissory note and return the same to the defendants. The plea deducible from the written statement is therefore one of agreement to remit and not of remission. The distinction between the two is lucidly drawn by Ramesam J. in the judgment delivered by him on behalf of the Court consisting of himself and Jackson J. in 'BALASUNDARA NAICKER v. RANGANATHA AIYAR', 53 Mad 127. At p. 135 of the Report we have these observations of the learned Judge which are relevant:

"What S. 63 of the Contract Act permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say 'I do not want the rest. You need not pay any more'. This last thing is therefore the essence of the transaction. A discharge extinguishing a debt, though on receipt of a smaller sum than that strictly due, is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. Though such a discharge extinguishing a debt is generally effected by creditors on the importunity or the request of the debtors, still it cannot be said to amount to a contract which binds two persons and puts them to further obligations. Where there is nothing more to be done, the whole thing is practically an act of grace on the part of the creditor. The request of the debtor is immaterial, and in law it is not a case of consensus of two minds ending in a contract, but merely a liberal act on the part of the creditor only.....The observations of the Privy Council in 'FIRM CHHUNNAMAL RAMNATH v. FIRM MOOL CHAND RAM BHANGAT', 55 Mad L J 1 disapproving the decision in 'ABAJI SITARAM v. TRIMBAK MUNICIPALITY', 28 Bom 66. show that a remission of debt under S. 63 is not an agreement between two persons, it is really the act of one person discharging at his will and pleasure the obligation of another."

In view of this distinction I am clearly of opinion that although the agreement pleaded in paragraph 3 of the written statement being not contemporaneous with the execution of the promissory note but subsequent thereto is capable of being proved without the provisions of S. 92 (4) of the Indian Evidence Act being offended against, such proof must of course be unavailing to the defendants.

(5) Learned counsel has drawn my attention to a decision of Venkataramana Rao J. reported in 'LAKSHMINARASIMHARAO v. RAGHAVAMMA', 1936 Mad W N 205. Therein ans-

wer to a suit on a mortgage, the mortgagor pleaded an arrangement by which the mortgagee was to enjoy one item of the mortgaged property for five years in full satisfaction of the mortgage. The plaintiff mortgagee contended that the arrangement was inadmissible in evidence under S. 92(4) of the Evidence Act. It was held that the arrangement was admissible, for S. 92(4) of the Evidence Act prohibits only the admissibility of a subsequent oral agreement to rescind or modify any contract, grant or disposition of property which is by law required to be in writing or which has been registered according to the law in force for the time being as to the registration of documents, but does not preclude the admissibility of any transaction or contract in satisfaction or discharge of the obligation arising thereunder. No question as to the legal inefficacy of a mere agreement to remit as contrasted with an actual remission fell to be considered in that case.

(6) One other decision which has been cited to me is 'KRISHNASWAMI RAO v. SRINIVASA DESIKAN', 71 Mad L J 850. That decision of Varadachariar & Horwill JJ. is practically to the same effect as the decision in 'LAKSHMINARASIMHARAO v. RAGHAVAMMA', 1936 Mad W N 205, already dealt with. There what the learned Judges decided appears from the headnote which is as follows:

"Section 92 of the Evidence Act does not preclude evidence being let in in proof of an oral agreement, otherwise valid and enforceable, under which the mortgagee orally agreed that the mortgage amount should be settled at a certain figure—somewhat less than the amount due on the mortgage on a proper calculation—and that in full discharge or satisfaction of the claim under the mortgage deed he would take certain properties by way of a sale for the amount. This arrangement does not contradict, vary, add to or subtract from the mortgage document."

The words "otherwise valid and enforceable" occurring in the sentence quoted are worth nothing, and if it is perfectly clear, as I have already held it is, that in view of the law as laid down in 'BALASUNDARA NAICKER v. RANGANATHA AIYAR', 53 Mad 127, an agreement to remit has no legal efficacy about it, no useful purpose will be served by allowing evidence to be adduced of an agreement which is bound to fail. In the case in 'KRISHNASWAMIRAO v. SRINIVASA DESIKAN', 71 Mad L J 850, it is true that the question whether even if it should be found that the agreement pleaded was true and valid, the agreement could be a defence to the action, when admittedly the agreement remained executory, was left expressly open. In my opinion the evidence of the agreement sought to be adduced by the defendants was rightly ruled out by the learned Judge below.

(7) I may add one word in conclusion with reference to the agreement referred to in paragraph 4 of the written statement, namely, that notwithstanding the recitals in the promissory notes for interest the parties at the time of their execution agreed that no interest should be charged. That clearly is an agreement contemporaneous with the execution of the promissory note which varies the terms of the original contract between the parties as reduced to writing. Clearly it is within the mischief of S. 92 of the Evidence Act, and there could be no evidence in proof of it. As ruled by Lord Wright in delivering the judgment of the Judicial Committee in 'ROWLAND v. ADMINISTRATOR GENERAL OF BURMA', AIR (25) 1938 P C 198,

"It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note."

The agreement as to the non-liability for interest pleaded in paragraph 4 of the written statement is, in my opinion, one which falls under the former category and is outside the latter category of agreements referred to by Lord Wright in that case. For the reasons indicated in the foregoing I am clearly of opinion that the evidence sought to be adduced by the defendants was rightly shut out and the suit was rightly decreed by the Court below.

(8) The appeal fails and is dismissed with costs.

C.R.K./D.H. Appeal dismissed.

A. I. R. 1952 Madras 678

SUBBA RAO AND PANCHAPAKESA AYYAR JJ.

D. S. Duraiswamy Naidu, Appellant v. A. M. Muhammad Abbas Sahib, Respondent.

Appeal No. 203 of 1947, D/- 7-9-50.

Transfer of Property Act (1882), S. 55(4)(b) — Interest on purchase money.

Section 55(4)(b) does not give the vendor an absolute title to interest in all cases irrespective of equities, and interest on the purchase money cannot be claimed so long as the vendor remains in possession of the property sold. (Para 3)

Anno: T. P. Act, S. 55 N. 12.

N. Gopala Menon, for Appellant; V. C. Veeraraghvan, for Respondent.

REFERENCES: Courtwar/Chronological Paras
('12) 35 Mad 625: (10 Ind Cas 662) 3

SUBBA RAO, J.: This is a plaintiff's appeal against the decree and judgment of the Subordinate Judge of Dindigul in O. S. No. 46 of 1945 in so far as the decree was against him. The plaintiff sold to the defendant a house in Dindigul. The sale-deed is dated 22-8-1945 and was got compulsorily registered on 1-10-1945. The suit was filed for recovery of a sum of Rs. 15,500 being the balance of the unpaid purchase money due to the plaintiff under that sale-deed with interest thereon. The defendant contended that the plaintiff made default and that, in any view, the plaintiff would not be entitled to interest for the period before the defendant was put in possession of the property sold to him. The learned Subordinate Judge, on a consideration of the evidence, held that there was no default on the part of the plaintiff in respect of the delivery of possession and therefore the suit for recovery of the balance of the purchase money was maintainable; but

he gave interest to the plaintiff only from 8-11-1946 when the defendant was put in actual possession. The plaintiff contends that the said order was wrong and that he would be entitled to interest from the date of the sale, or at any rate, from the date when the defendant refused to take possession.

(2) It is clear from the evidence that the plaintiff handed over the key of the house to the defendant only on 8-11-1946 during the pendency of the suit. But the plaintiff's case is that he was ready and willing to put the defendant in possession from the date of the sale-deed itself and that indeed, he had kept the house vacant and permitted a retired sub-inspector and his family to live in the suit house as care takers. But it is also clear from the evidence that P. W. 1 himself kept in an upstair room of this house, under lock and key, his box, his bedding and a gun which he removed only on 23-11-1946, i.e., a fortnight after the key was so handed over to the defendant. In this state of the evidence, we must hold that the plaintiff continued to be in possession of the suit building till 8-11-1946. We have no doubt that the idea of the sub-inspector being a care-taker is an after thought and that it is only an ingenious attempt to get over the fact that the plaintiff continued to be in possession of the building.

(3) The question of interest on the unpaid purchase money is governed by S. 55 (4) (b) of the Transfer of Property Act. It reads:

"The seller is entitled,

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration, or any transferee with notice of the non-payment for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered."

The words are clear and unambiguous, and do not lend scope for any argument. The plaintiff would be entitled only to interest from the date on which possession has been delivered. In this case, as possession was delivered only on 8-11-1946, the plaintiff would be entitled to interest only from that date. The words "from the date on which possession has been delivered" after the words "interest on such amount or part" have been added by the Amending Act XX (20) of 1929. Even on the section as it stood before the amendment, this Court held in 'MUTHIAH CHETTI v. SINNA VELLIAM CHETTI', 35 Mad 625, that S. 55 (4) of the Transfer of Property Act does not give the vendor an absolute title to interest in all cases irrespective of equities, and that interest on the purchase money cannot be claimed so long as the vendor remains in possession of the property sold. The reason of the rule is stated at page 627 as follows:

"As observed in Fry on Specific Performance, page 591, 4th edn., it is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase money. The estate and the purchase money are things mutually exclusive."

The Amending Act accepted this principle and embodied it in the section.

(4) The judgment of the learned Subordinate Judge is correct and the appeal is dismissed with costs.

C.R.K./R.G.D. Appeal dismissed.

A. I. R. 1952 Madras 679

PANCHAPAGESA SASTRY J.

G. Madar Sahib, Appellant v. The Governor-General of India in Council having his office at New Delhi (deleted) and others, Respondents.

Appeal No. 547 of 1947, D/- 11-12-1950.

(a) C. P. C. (1908), S. 80 — Notice under is mandatory and its terms cannot be ignored — Sufficiency of notice — Notice to Government — Suit against Railway administered by Central Government — Notice addressed to Secretary, Central Government, Railway Board, New Delhi held proper. AIR 1951 Mad 416 and AIR 1951 Mad 502, Foll. (Para 4)

Anno: C. P. C., S. 80 N. 10, 13.

(b) Railways Act (1890), S. 72 — Delay in delivery — Consignment under Risk Note B 1 — Delay not only unexplained but efforts to get at materials to establish actual misconduct frustrated by non-production of relevant documents by deliberate act of Railway concerned — Misconduct held must be taken to be established and Railway could not escape liability under terms of Risk note apart from the proviso in risk note. I. A. Nos. 57 and 87 of 1947, Rel. on. (Para 6)

Anno: Railways Act, S. 72 N. 11.

K. Bhashyam, A. C. Sampath Ayyangar and T. K. Subramania Pillai, for Appellant; King and Partridge, for Respondents.

REFERENCES: Courtwar / Chronological / Paras

('46) 1946-1 Mad LJ 267: (AIR 1946 Mad 366) 4
('50) 1950-2 Mad LJ 656: (AIR 1951 Mad 416) 4
('52) A. S. No. 543 of 1947: (AIR 1952 Mad 502) 4
I. A. Nos. 57 and 87 of 1947 6

JUDGMENT: This is plaintiff's appeal against the decree of the Subordinate Judge, Chittoor, dismissing his suit for recovery of value of mangoes sent by him for transport from Damalacheruvu on the M & S M Railway to Victoria Terminus, Bombay, on the G. I. P. Railway and for freight charges paid by him. The goods were consigned on 5-8-1945 and he paid a very large amount of Rs. 1024-6-0 for freight charges. The baskets of mangoes contained Neelam, Rumani and Thotapuri varieties. The plaintiff claims Rs. 6450. His case is that the mangoes reached Bombay in a damaged condition owing to considerable delay on the part of the railways which he attributes to their misconduct either on the part of their administration or their servants. The suit as framed is one for value of the mangoes sent plus the freight charges and he reserved his right for damages. In substance, however, I think the case may be treated as one for damages caused to him by the whole transaction. The Governor-General in Council is the first defendant and two railway systems, the M. & S. M. and the G. I. P. Railways, defendants 2 and 3.

(2) Substantially the written statements admitted the delay in transit of the suit consignments over the G. I. P. Railway but denied the liability to make good any amount to the plaintiff. They took their stand on the terms of the risk note and in particular they stated that the claim was for an exaggerated amount and without prejudice to their offer of Rs. 2642 in full settlement, they contested the case. Later on the written statement was allowed to be amended and there was a specific plea that no valid and proper notice of the suit under S. 80, Civil P. C., was served upon the Governor-General in Council. This plea of want of notice under S. 80, Civil P. C., was allowed to be raised by the first defendant, who was originally 'ex parte'. The written statement of the second defendant was also allowed to be amended and the amended statement appears to have been, adopted by the 1st defendant.

(3) The lower Court has found that the notice under S. 80, Civil. P. C., is bad. As regards the damage caused actually by the misconduct of the railway servants it has fixed it at Rs. 4575 apart from the freight charges. The lower Court was also of the opinion that the company was liable and the risk note does not protect the defendants. The suit was, however dismissed, because of its findings with regard to S. 80, Civil P. C., notice. Plaintiff has come on appeal, and there is a memorandum of cross-objections by the respondents with respect to costs disallowed and also raising, the grounds objecting to the correctness of the finding as regards the value of the mangoes sent. The points for determination are: (1) Is the suit bad for want of proper notice under S. 80, Civil P. C.? (2) What is the correct amount of the value of the mangoes and what should be the amount to be given to the plaintiff in case the defendants are liable? (3) Are the defendants protected by the terms of the risk note? (4) Is the order as to costs correct?

(4) 'Point No. 1'. Notice under S. 80, Civil P. C., is, no doubt, mandatory and its terms must be fully and properly complied with and cannot be ignored as observed by me in 'SUBRAMANYAM v. THE UNION OF INDIA', 1950 2 Mad L J 656. Though it has been held that S. 80 can be waived, in the present instance, the written statement was allowed to be amended before trial and I cannot disregard that plea. The objection under S. 80 is that it is not so stated in the notice and though it is addressed to the Secretary, Central Government, Railway Board, New Delhi, it does not state that the Governor-General-in-Council will be sued. I have had to deal with this matter in the case already referred to and also in a recent appeal, 'SANKUNNI MENON v. SOUTH INDIAN RLY.', A S No. 543 of 1947, decided by me a fortnight ago. I was of opinion that the decision in 'GOVERNOR-GENERAL-IN-COUNCIL v. KRISHNASWAMI PILLAI', 1946 1-Mad L J 267, was clearly distinguishable and that the notices in question in those cases were valid. Following those decisions I hold that the notice in the present case also is not objectionable. It was, however, sought to be argued that the notice itself did not say that it was under S. 80, Civil P. C., and that might make a difference. In the present case even the amended statement proceeds on the footing that it is really a notice under S. 80 but it is not a valid and proper notice. Even the defendants do not say that there was no notice at all under S. 80, but only state that its terms were not proper. It may be that in some cases where there is some ambiguity, the absence of the reference to S. 80 might have a bearing, but in the present case, having regard to the fact that the defendants themselves never stated at any time before that there was no notice at all under S. 80 and all that they stated in the additional statement was that there was no valid and proper notice, that is they raised an objection to the legality of the notice and not to the absence of the notice at all, I am of opinion that the present plea is no good.

(5) The next question for consideration is what is the proper value of the mangoes sent. (After discussing the evidence, the judgment proceeded:) I. therefore, confirm, but with some hesitation, the figure arrived at by the lower Court. To this must be added the freight charge, admittedly, and the whole amount will now come to Rs. 5399-6-0.

(6) A larger question was raised at the instance of the defendants that there is no proof of misconduct on the part of the railway administration or its servants and all that was admitted was a mere delay in the transit. It was argued that as this was a consignment under risk note B. 1, the proviso casting the duty or disclosure upon the railway administration will not apply, and that it is the first part of the risk note which applies to it. According to it the consignor undertakes to hold the railway administration harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the railway administration or its servants. The argument was that delay is not the same as misconduct and that there is no proof in this case of any misconduct other than any inference to be drawn from the delay. This it was stated was not permissible. Reliance was placed upon a number of decisions to explain the meaning of the term "misconduct". In my opinion it is unnecessary to go into the matter elaborately as I find that in this particular case this conduct is to be taken as established. I agree the proviso cannot apply. But the failure on the part of the railway authorities to produce the necessary documents which were summoned for and which their counsel undertook to produce and their refusal to answer interrogatories which they were directed to answer as per the order in 'I. A. Nos. 57 and 87 of 1947' are sufficient to justify an adverse inference being drawn against the railways concerned. The delay is not only unexplained, but all efforts to get at the materials to establish, if possible, the actual misconduct, were frustrated by the non-production of the relevant documents by the deliberate act of the railway concerned. In these circumstances it is not surprising that the lower Court came to the conclusion that the railway cannot escape liability under the terms of the risk note apart from the proviso. I agree with it.

(7) In the result, there will be a decree for the plaintiff for Rs. 5399-6-0 with proportionate

costs here and in the Court below. It is unnecessary to deal with the memorandum of cross-objection, which is also dismissed but without costs.

C.R.K./V.B.B. Appeal allowed.

A. I. R. 1952 Madras 681

GOVINDARAJACHARI J.

Girjaram Singh, Appellant v. Moopu Samban and others, Respondents.

Second Appeal No. 1591 of 1945, D/- 16-7-1948.

(a) Debt Laws — Mad. Agrits'. Rel. Act (IV (4) of 1928), S. 8—Appropriation — Mortgagee holding two mortgages — Arrangement for their discharge by sale of certain properties to mortgagee — Document embodying arrangement stating amount due on mortgage — Further statement that portion out of that amount to be raised by sale should be credited towards debt — Facts held did not constitute appropriation.

Mere payment of money towards a debt on the passing of a receipt acknowledging such a payment is not appropriation. There must be an overt act from which appropriation can be reasonably deduced or inferred. AIR 1944 Mad 93; AIR 1941 Mad 571; AIR 1941 Mad 697 and AIR 1941 Mad 403, Rel. on. (Paras 8, 10)

Where by an arrangement embodied in a document the two mortgages held by a mortgagee were to be discharged by sale of certain properties to him and the document stated that the amount of principal and interest due under the mortgages amounted to Rs. 6130 and that the several sale-deeds that were contemplated would be for the aggregate amount of Rs. 5344.

Held that a calculation of the amount of principal and interest due and a statement that a portion out of that amount to be raised by sale of properties should be credited towards the debt was not sufficient to constitute appropriation. (Para 11)

(b) Debt Laws — Mad. Agrits' Rel. Act (IV (4) of 1928), S. 8 — Appropriation — Mortgagee executing release deed — Deed stating that mortgagee gave up his mortgage right under two mortgages in consideration of certain sale-deed — Sales given effect to and vendee taking possession — Fact has no bearing on question of appropriation of several sale amounts towards mortgages. (Para 11)

(c) Debt Laws — Mad. Agrits' Rel. Act (IV (4) of 1928), S. 8 — Appropriation — Payment made in excess of interest due — To extent of excess there is appropriation towards interest — Rest of payment is open payment.

Where a payment made is in excess of the interest due, to the extent of the excess of the payment over the interest there is an appropriation towards the principal and it is open to neither party thereafter to change the destination of that excess; 'eo instanti' it reduces the amount of the principal. As regards the rest of the payment however it is an open payment which is liable to be appropriated, at the instance of the debtor or the creditor according to the well-known rules of law relating to appropriation either towards the principal or towards the interest or partly towards the principal and partly towards the interest; and it is only if there is no such appropriation between the date of payment and 1st October 1937 that that portion of the amount finally gets adjusted towards the principal. AIR 1943 Mad 236, Expln. (Para 18)

R. Gopalaswami Iyengar and N. T. Raghunathan, for Appellant; T. L. Venkatarama Iyer, for Repondents.

REFERENCES: Courtwar/Chronological/ Paras

('40) ILR (1940) 21 Lah 470: (AIR 1940 PC 63) 16
('41) 1941-1 Mad LJ 9: (AIR 1941 Mad 403) 9
('41) 1941-1 Mad LJ 295: (AIR 1941 Mad 571) 9
('41) 1941-1 Mad LJ 833: (AIR 1941 Mad 697) 9
('43) ILR (1943) Mad 563: (AIR 1943 Mad 236) 14, 16, 19
('43) 1943-2 Mad LJ 436: (AIR 1944 Mad 93) 9, 12
('48) 1948-1 Mad LJ 441: (AIR 1948 Mad 434) 12

JUDGMENT: This is a creditor's appeal and the main point that arises is under Madras Act IV (4)) of 1938.

(2) Most of the material facts are not in dispute. In 1930 the first defendant executed in favour of the plaintiff (appellant) three deeds of mortgage, Exs. A, B and C, for Rs. 1500, Rs. 1500 and Rs. 900 respectively. Admittedly, no payments were made towards any of the mortgages till August 1935 when an arrangement was arrived at between the plaintiff and several persons who had purchased portions of the hypotheca from the first defendant. This arrangement was embodied in Ex. E dated 19th August 1935. After reciting the mortgages it is stated in Ex. E that the balance in respect of those debts on 19th August 1935 stood at the figure of Rs. 6130. It is then provided that

> " a sum of Rs. 5344 should be credited therefor in the mortgage deeds...and towards that the properties mentioned hereunder in accordance with the particulars mentioned in paragraph 2 ..... should be sold."

It was expected that seven sale deeds would be altogether executed for the purpose of raising the amount of Rs. 5344 mentioned in Ex.E but only five out of these were executed & the other two transactions were not put through.

(3) In the suit out of which this second appeal arises the appellant claimed Rs. 2828-12-0 as the amount due under the three mortgages, Exs. A, B and C. The suit was decreed substantially as prayed by the learned District Munsif but on appeal the learned Subordinate Judge held that Exs. B and C were completely discharged and that there remains still due under Ex.A a sum of Rs. 483, as on 1st October 1937.

(4) Two questions arise in this second appeal (1) whether Ex. C was completely discharged by the execution of the sale deed, Ex.F. 2; and (2) whether the amounts mentioned as consideration for the other four sale deeds, namely, Exs. F, F. 1, F.3 and F. 4 were open payments towards Exs. A and B or whether there was an appropriation in respect of those amounts.

(5) The first question can be shortly dealt with. It is common ground that on the 29th August 1935 when Ex. F. 2 was executed the amount due under Ex. C exceeded Rs. 1300. Ex. F. 2 purports to be for a sum of Rs. 1000 only. In the document as originally written it was stated that the consideration was to go towards the discharge of the mortgage evidenced by Ex. C. This was, however, corrected into a statement that the amount was to go in discharge of the mortgage. It was suggested that the amount of the purchase money was really Rs. 1300 and odd but that for the purpose of reducing the stamp duty payable on the document the parties stated the reduced figure of Rs. 1000. In dealing with this part of the case the learned Subordinate Judge bases his final conclusion that Ex. C was fully discharged on several alternative bases and this has come in for some cirticism by Mr. Gopalaswami Aiyangar the learned advocate for the appellant. It is however quite clear from the judgment of the learned Subordinate Judge that he found in effect that the agreement between the parties was that the plaintiff should take items 4 and 7 which were conveyed under Ex. F. 2 in full satisfaction of the mortgage, Ex. C, and that the correction in Ex. F. 2 was necessary for giving effect to and did give effect to the initial agreement between the parties. This finding of fact, for which there is considerable support in the evidence, seems to me to conclude the case against the appellant in this respect. It has been argued that this finding overlooks the fact that Ex. C is still with the plaintiff. This is claimed as a circumstance to show that Ex. C could not be taken to have been completely discharged but as Mr. Venkatarama Aiyar, the learned advocate for the respondent has rightly pointed out, this circumstance was never adverted to in either of the Courts below and can perhaps be met by the statement of the 16th defendant in the course of his evidence that Ex. C was not available at the time when the sale deeds were executed. It must therefore be taken that Ex. C was fully discharged by the execution of Ex. F. 2.

(6) It now remains to deal with the contention relating to the manner in which the amounts representing the consideration for Ex. F, F. 1, F. 3 and F. 4 should be dealt with. Ex. F states that Rs. 442 out of its consideration should be credited towards the mortgage deed, Ex. A and Rs. 1123 should be similarly credited towards the mortgage, Ex. B. The provision in Ex. F. 1 is that Rs. 575 out of the consideration should be endorsed as paid on the mortgage deed, Ex A. It is provided in Exs. F. 3 and F. 4 that the amounts of Rs. 345 and Rs. 200 forming the consideration respectively for those two sales were to be regarded as paid towards Ex. B. I have not set out the exact wording in the several documents but this is the effect and purport of the relevant clauses in the sale deeds.

(7) It has been strenuously argued by Mr. Gopalaswami Aiyangar, that there was on the 29th August 1935, when all these sale deeds were executed, an appropriation within the meaning of Madras Act IV (4) of 1938; and that the payments made under those documents or what is equivalent to payment namely the conveyance of properties cannot be regarded as being or amounting to open payments within the meaning of the law relating to the scaling down of debts due by agriculturists. There is of course no dispute that the concerned defendants are all agriculturists entitled to the benefits of Madras Act IV (4) of 1938.

(8) I find it difficult to infer an appropriation of these several amounts towards the mortgages. It is unnecessary to define what constitutes an appropriation for the purposes of the Madras Agriculturists' Relief Act. Cases which have arisen under that Act have however laid down what would and what would not amount to appropriation. It is obvious that mere payment of money towards a debt is not appropriation. The passing of a receipt acknowledging such a payment takes the matter no further.

(9) In 'SANNAYA v. BALARAMA HANDE', 1943-2 Mad L J 436, it was held that the execution of a release deed which contained reference to "the balance after deducting the previous payments" did not amount to an appropriation. It is of course not necessary that there should be an adjustment of the amount paid towards the principal or towards the interest or in stated proportions or amounts towards principal and interest. If there is an appropriation the burden of showing that the appropriation was made in a manner most favourable to himself lies on the debtor. In a number of cases it has been held that the recording of part satisfaction towards a decree debt and the taking out of execution for the balance would amount to an appropriation. See 'RAMASWAMI AIYAR v. RAMAYYA SASTRIGAL', 1941-1-Mad L. J. 295 and 'SRINIVASACHARIAR v. KRISHNAYYA', 1941-1 Mad L J 833. The recording of part satisfaction to the extent of the amount realised by the sale of the hypotheca under a mortgage decree accompanied by an application for the passing of a personal decree for the balance was similarly held in 'VENKITESWARA AIYAR v. RAMASWAMI AIYAR', 1941-1 Mad L J 9 to amount to appropriation.

(10) From this short review of the effect of the cases which have arisen under the Act it is apparent that there must be an overt act from which appropriation can be reasonably deduced or inferred.

(11) It is apparent from the language of Ex. E already set out as also from the language of Exs. F, F. 1, F. 3 and F. 4 that all that was said was that the amount that was to be, or that was, raised by the sales was to be credited towards, and go in discharge of the amounts due under Exs. A and B. The relevant portions of these documents go no further. It is true that Ex. E states that the amount of principal and interest due under Exs. A, B & C amounted on that date to Rs. 6130 and that the several sale deeds that were contemplated would be for the aggregate amount of Rs. 5344. A calculation of the amount of principal and interest due on that date and a statement that a portion out of that amount to be raised in the manner indicated should be credited towards the debt is, in my opinion, not sufficient to constitute appropriation. Mr. Gopalaswami Aiyangar relied on the further facts that the plaintiff executed a release deed, Ex. 1 & took possession of the properties covered by the several sale deeds. As regards the release deed it has now been held—& that finding cannot be challenged in second appeal—that the

parties intended that it should come into effect only if all the documents as per Ex. E were executed and that since they were admittedly not executed. Ex. 1 cannot be given effect to. But apart from this, the language of Ex. 1 is insufficient to constitute any appropriation. In its material portion all that is stated is that the mortgagee gives up his mortgage right under Ex. A and B over the properties described in the schedule attached to Ex. 1 in consideration of a certain sale deed executed by the releasee, the 16th defendant, in favour of the mortgagee. The mere fact that the sales were given effect to and that the vendee took possession of the properties conveyed to him has no bearing on the question of the appropriation of the several sale amounts towards the mortgages. The facts relied on by Mr. Gopalaswami Aiyangar would only go to show that the several sales were acted upon, but that leaves altogether untouched the question as to whether there was such adjustment or payment of the amounts realised by the several sales as would amount in law to appropriation. In my opinion, none of these facts taken individually or cumulatively would amount to appropriation.

(12) Considerable reliance has been placed by Mr. Gopalaswami Aiyangar on the decision in 'DURAISWAMI MUDALIAR v. MUHAMMAD AMIRUDDIN', 1948-1 Mad L. J. 441, wherein it was held that a receipt acknowledging payment of "Rs. 5400 only being the part payment in respect of the decree debt in C. S. No. 500 of 1930" would amount to an appropriation. The case was perhaps somewhat peculiar on its facts and it is unnecessary to decide whether the decision was or was not correctly given in the circumstances of that case; but if it is to be regarded as laying down that every time a receipt is passed acknowledging part payment of a debt there is an appropriation, I must with great respect, point out that this is opposed to a long line of decisions given by Wadsworth and Patanjali Sastri JJ. in dealing with cases arising under Madras Act IV (4) 1938. 'SANNAYA v. BALARAMA HANDE', 1943-2 Mad L. J. 436 is referred to by the learned Judges in 'DURAISAMI MUDALIAR v. MAHAMMAD AMIRUDDIN', 1948-1 Mad L. J. 441 as being opposed to the view that they were themselves inclined to take. They however put it aside on the ground that the learned Judges in 'SANNAYA v. BALARAMA HANDE', 1943-2 Mad L. J. 436 were dealing with a preliminary mortgage decree. I am unable to see how that circumstance makes any difference for the purpose of deciding the question of appropriation. It would appear that the Counsel in 'DURAISWAMI MUDALIAR v. MUHAMMAD AMIRUDDIN', 1948-1 Mad LJ 441, admitted that 'SANNAYA v. BALARAMA HANDE', 1943-2-Mad L. J. 436 was the only case he could rely on. This admission can be said to be hardly accurate because there have been a very large number of decisions, reported and unreported, holding that the mere statement that a certain amount was received in part satisfaction of a debt is no appropriation. It is otherwise impossible to sustain the correctness of the innumerable judgments which have been given on the footing that a payment which is endorsed as towards a debt or towards the principal and interest due on a debt is an open payment. Mr. Gopalaswami Aiyangar characterised the transaction here as bilateral and said that that would alter the case but all that has happened here is that the creditor has accepted certain properties as amounting to payment of certain named amounts. I do not see how this differs in principle from a payment in cash made by a debtor and accepted by the creditor in partial satisfaction of his debt. In fact every time that payment is made and accepted and an endorsement of that payment is made on the document of debt, the transaction can be described as bilateral because it cannot possibly happen without the consent of the creditor. I do not therefore, regard this case as differing in any respect from the cases of payments towards a debt.

(13) The result is that there was no appropriation either on the date of Ex. E or on 29th August 1935 when the several sale deeds were executed. It is not suggested that there was any subsequent appropriation before the 1st of October 1937.

(14) Mr. Gopalaswami Aiyangar then raised an alternative argument based on the decision in 'RAGHAVA v. DEVARAJULU', I. L. R. 1943 Mad 563. In that case it was held by King J. agreeing with Patanjali Sastri J. and differing from Wadsworth J. that where a payment made is in excess of the interest due on that date, to the extent of the excess there is an appropriation towards the principal of the debt. It was pointed out that the amounts credited towards Ex. A under Exs. F and F. 1 came to Rs. 1017 while the interest due on Ex. A on that date namely 29th August 1935 was only Rs. 942. In regard to Ex. B it was similarly pointed out that under Exs. F, F. 3 and F. 4 the total amount paid towards Exhibit B on 29th August 1935 was Rupees 1668 while the interest then due was only Rs. 952-8-0. Since the payments exceeded the interest due in each case there was, it was said an appropriation of the payment themselves.

(15) This point was not raised in either of the Courts below; but as it is a question of law and as the material facts are not in dispute I permitted it to be raised.

(16) The argument however must fail on its merits and in my opinion it misconceives the effect of the decision in 'RAGHAVA v. DEVARAJULU', I. L. R. (1943) Mad 563. All that was held in that case was that there is an appropriation in regard to the excess of the payment over the interest then due. That decision says nothing as to the appropriation of that portion of the payment which is equal to the interest due at the time. In fact, it was held in subsequent decisions which have not however been reported that that part of the payment is an open payment which is liable to be subsequently appropriated in a manner favourable either to the creditor or the debtor; and that in the absence of such appropriation it would continue to be an open payment down to the 1st October 1937. Patanjali Shastri J. whose view was accepted by King J. in 'RAGHAVA v. DEVARAJULU.' ILR (1943) Mad 563, himself decided several cases on that footing and it is enough to refer to one which I am myself able to recall namely the decision given by him in S. A. No. 678 of 1942. It was argued that it is difficult to conceive of a payment which is partly appropriated and partly not, and against that if the excess of the payment over the interest due goes towards the principal it would only

be logical to hold that to the extent of the interest due, there is an adjustment of such portion of the payment as may be necessary, against such interest. The correct description of the payment to the extent that it is in excess of the interest has also been debated; is it an actual appropriation or necessary appropriation or presumed appropriation? King J. uses the expression "actual appropriation". In their decision in 'RAMA SAH v. LALCHAND,' ILR (1940) 21 Lah 470, which is the main basis and support of the judgment in 'RAGHAVA v. DEVARAJULU,' ILR (1948) Mad 563, their Lordships of the Judicial Committee seem to regard it as a presumed appropriation and in one place they use the expression that the appropriation must of necessity have been intended.

(17) It would however be mere hyper criticism to object to any particular description of the appropriation, now that it is established that there is, in such circumstances, an appropriation. The more material question is as to the extent of such appropriation; and here it seems to me that though, on a first impression it may not look quite logical, the decisions are to the effect and rightly too that there is an appropriation only as regards the excess of the payment over the interest and no appropriation at all as to the balance. I do not think it is permissible to go behind the position thus established.

(18) If the excess is to be appropriated towards the principal and if by another process the payment to the extent of the amount of interest is to be regarded as open payment to be finally adjusted towards the principal on the 1st October 1937, it may seem as if the process of splitting the payment is a futile process because ultimately the entire amount is adjusted towards the principal. This, however, is not the correct position in law. To the extent of the excess of the payment over the interest if it is held in law that there is an appropriation towards the principal it is open to neither party thereafter to change the destination of that excess; 'eo instanti' it reduces the amount of the principal. As regards the rest of the payment however it is an open payment which is liable to be appropriated, at the instance of the debtor or the creditor according to the well-known rules of law relating to appropriation either towards the principal or towards the interest or partly towards the principal and partly towards the interest; and it is only if there is no such appropriation between the date of payment and 1st October 1937 that that portion of the amount finally gets adjusted towards the principal. It may be that cases of subsequent appropriation are not frequent; but that, however, does not alter the true legal position.

(19) Mr. Venkatarama Aiyer, the learned advocate for the respondent also pointed out that it would be somewhat difficult to apply the rule in 'RAGHAVA v. DEVARAJULU,' ILR (1943) Mad 563, to Ex. A because the amount adjusted towards Ex. A under Ex. F was Rs. 442 and the amount adjusted under Ex. F 1 was Rs.575, neither of these amounts taken separately being in excess of the interest due on Ex. A on that day. The answer on the other side is that they were part of a single transaction and must be taken as if there was only one sale deed comprising both items of property for an aggregate consideration of Rs. 1017. Whether this is so, or not, it is unnecessary to consider in view of what has already been stated regarding the true scope and effect of 'RAGHAVA v. DEVARAJULU,' ILR (1943) Mad 563.

(20) The learned Subordinate Judge was therefore, correct in holding that the payments under Exs. A and B were open payments with the result that Ex. B must be taken to have been completely discharged by the application of Madras Act IV (4) of 1938, while there will be due on Ex. A on 1st October 1937 only a sum of Rs. 483 towards the principal for which appropriate provision has been made in the decree of the lower appellate Court.

(21) The second appeal fails and is dismissed with costs. No leave.

C. R. K./ V. R. B. Appeal dismissed.

A. I. R. 1952 Madras 684
SUBBA RAO J.

Narayanan Nambudripad, Petitioner v. Rajagopala Naidu and others, Respondents.

Civil Revn. Petn. No. 1327 of 1948, D/- 14-9-1950.

(a) Tenancy Laws — Madras Tenants and Ryots Protection Act (24 (XXIV) of 1949), Section 4 (1) (b) — Interpretation.

The words of S. 4(1)(b) are wide enough to include in its scope the sale of a holding though the rent is not due in respect of that holding but in respect of different holding. (Para 1)

(b) Tenancy Laws — Madras Tenants and Ryots Protection Act (24 (XXIV) of 1949), Section 4(2) and (2A) — Stay of appeal — Deposit of rent decreed by trial Court if sufficient.

Where an appeal in which the sale of the holding of the tenant or the right for recovery of rent is claimed, is pending the tenant would be entitled to stay under S. 4 (2A) if within two months from the commencement of the appeal, he deposits rent due at the rate found by the trial Court and not at the rate claimed in appeal. The reason is that the rent for two years immediately preceding such commencement need not be at the rate claimed in the suit or appeal. (Para 1)

D. A. Krishna Variar, for Petitioner; C. S. Swaminathan, for Respondents.

ORDER: The petitioner before me filed the application No. 204 of 1947 on the file of the District Court of South Malabar for staying A. S. No. 345/46 under Act XVII of 1946. The rent due according to the plaintiff was 1099 paras and 2 edangalis of paddy for Kanni. But the respondent deposited the value of only 999 paras and 3 edangalis of paddy. It is said that the difference represents deduction at one per ten on account of shrinkage. The lower Court found that the amount deposited by the respondent was the rent payable by him according to the finding of the first Court. The petitioner is no doubt questioning that finding in the appeal. Mr. Variar contended before me that the respondent should have deposited the rent in accordance with the claim made by his client in the appeal, and as he had only deposited the amount as found by the first Court he would not be entitled to stay under the Act. Pend-

ing the revision Madras Act XXIV of 1949 was enacted and it is agreed that the provisions of that Act governed the question to be decided in this case.

The relevant provision may be read:

"Section 4 (1). 'All suits, proceedings in execution of decrees or orders and other proceedings (a) for the eviction of tenants from their holdings or land as the case may be, or in which a claim for such eviction is involved, whether in addition to a claim for rent or not, or (b) in which the sale of the holding of a tenant or ryot for recovery of rent is claimed and which stood stayed up to the commencement of this Act or which may be instituted after such commencement in any Civil or Revenue Court, shall continue to stand stayed or shall stand stayed as the case may be, subject to the provisions of the following sub-sections."

The section as originally enacted did not provide for any rent being deposited as a condition precedent for granting of stay. So Act VIII of 1950 was passed and under S. 3 of the Act 2-A was introduced after sub-section 2 to Section 4 of Act XXIV of 1949. Under that sub-section,

"In the case of a suit or proceeding for the sale of a holding to recover rent, or of a proceeding in execution of a decree or order obtained in any such suit or proceeding or of a proceeding in execution of a decree or order for eviction, where the decree or order provides for the payment of rent (i) if the suit or proceeding was instituted before the commencement of the Madras Tenants and Ryots Protection (Amendment) Act, 1950 and no deposit has been made in pursuance of Section 4, sub-section (3) of the Madras Tenants and Ryots Protection Act, 1946, the tenant or ryot shall deposit in Court for payment to the landlord, within two months from such commencement, (a) the amount claimed in the suit or proceeding or the amount payable under the decree or order, or (b) the rent for two years immediately preceding such commencement, whichever is less, or (ii) if the suit or proceeding is instituted after such commencement, the tenant or ryot shall deposit in Court for payment to the landlord, within two months from the date on which notice of the suit or proceeding is served on him by the Court (which service shall be the duty of the Court), (a) the amount claimed in the suit or proceeding or the amount payable under the decree or order, or (b) the rent for two years immediately preceding the date as aforesaid whichever is less, together with such interest as may be payable under law, custom, or agreement up to the date of deposit."

A combined reading of these provisions shows that in the case of an appeal in which the sale of the holding of the tenant or the right for recovery of rent is claimed, the respondent would be entitled to a stay if within two months from the commencement of that appeal, the amount claimed in the suit or the rent for two years immediately preceding such commencement, whichever is less, is deposited in Court. Mr. Variar raised two points before me. (1) Section 4 (1) (b) has no application as his client is not seeking sale of the holding in regard to which rent is payable. (2) That the respondent to be entitled to relief under the Act must pay two years' rent as claimed in the appeal. There is considerable force in the first contention advanced by him but the words are wide enough to take in the sale of holding though the rent is not due in respect of that holding but in respect of a different holding. Further the intention of the legislature in enacting in quick succession so many Acts is to provide relief to tenants so that their holdings may not be sold before the contemplated Tenancy Legislation becomes law. If that is the intention there cannot be distinction on principle between the sale of the holding for rent payable in respect of the holding and for the recovery of rent payable in respect of a different holding. In either case the holding of the tenant would be lost to him before the legislature brought in the contemplated legislation. In the circumstances I am inclined to put upon the words used in cl. (b) of sub-s. (1) of S. 4 a wider interpretation which would bring within their scope a sale of a holding for rent due in respect of a different holding. I cannot also agree with his second contention. Under Act XVII of 1946, Section 4 (2) (i) says that:

"In the case of a suit instituted before the commencement of this Act, the arrears of rent accrued due until the date of the commencement of this Act, at the rate claimed in the plaint or an amount equivalent to rent for two years at the rate aforesaid whichever is less."

Section 4 (2) Act XXIV of 1949 omitted the words 'at the rate aforesaid' after the words 'rent for two years immediately preceding such commencement'. It, therefore, follows that the rent for two years immediately preceding such commencement need not be at the rate claimed in the suit or in the appeal. In this case the rate of rent payable was found by the District Judge and that amount was deposited. The deposit so made satisfied the condition under S. 4 (2-A).

(2) In the result the order of the lower Court is correct and the revision is dismissed without costs here.

C.R.K./K.S. Revision dismissed.

A. I. R. 1952 Madras 685

CHANDRA REDDI J.

T. Kunhikkalavan, Appellant v. E. Kochuraman and others, Respondents.

Second Appeal No. 1918 of 1947, D/- 17-11-1950.

Hindu Law — Will — "Legatee and his descendants" — Succession Act (1925), S. 97.

Though the provisions of S. 97, Succession Act do not in terms apply to Hindu wills, yet the principle embodied in that section applies to such a will.

The provision in a will that the legatee and his descendants will enjoy the property and look after the daughters of the testator cannot mean that the legatee gets only a life estate under the will while his children get a vested remainder under the provision. The legatee gets an absolute

estate. AIR 1944 Mad 22; 5 Ind App 1 (PC) and 47 Cal 683 PC, Foll. (Paras 6, 7)
Anno: Succession Act, S. 97 N. 1.

P. C. Raghavan and M. Sekhara Menon, for Appellant; S. Venkatachala Sastry and N. Sundaram Ayyar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras.
('80) 5 Ind App 1: (1 Cal LR 318 PC) 6
('43) 1943-2 Mad LJ 332: (AIR 1944 Mad 22) 6

JUDGMENT: The plaintiff, whose claim to recover the suit property was dismissed by the District Munsif of Chowghat and confirmed by the Subordinate Judge of Ottapalam, has preferred this second appeal. The suit came to be instituted by the appellant in the following circumstances: The suit properties originally belonged to one Kunhikalavan. He executed a will marked Ex. P. 1 in the case, on the 26th of July 1895 giving a life estate to his wife, Kunhikurumba, and the remainder to his nephews, that is, his brother's sons, Raman and Kunhayappan. The will recited that after the death of his wife Kunhikurumba the sons of his younger brother Paru, namely, Raman and Kunhayappan, and their descendants should enjoy the properties. There was also a pious wish expressed therein that these legatees and their descendants will look after his daughters. During the lifetime of Kunhikalavan one of the legatees, Kunhayappan, died with the result that Raman became the sole legatee under the will. On the death of Kunhikalavan and his widow Kunhikurumba Raman got into possession and enjoyment of the properties.

(2) In execution of a decree in a small cause suit, one Aydross, the predecessor in interest of the present respondent, brought the suit properties to sale and purchased them himself in Court auction in or about the year 1932, and a sale certificate was issued to him on 24th October 1932.

(3) Twelve years later, that is, in the year 1944, the appellant instituted the present suit for recovering the suit property on the basis that under the will, Ex. P. 1, Raman and his brother had only a life estate in the suit properties and the vested remainder was given to the children of Raman and Kunhayappan by the testator and, therefore, the only interest which the decree-holder auction-purchaser acquired in the suit properties by virtue of the court-sale, is only what Raman had in the property namely life estate which came to an end with the death of Raman and that, in any event, since the children of Raman acquired a joint interest along with Raman under the terms of the will, the purchaser in the Court auction sale was entitled only to the share of Raman. The suit was resisted by the defendant on the ground that the bequest to Raman and Kunhayappan under the will was a vested remainder and not a mere life estate, and therefore the auction purchaser acquired the absolute right possessed by Raman in the suit properties by virtue of the court-sale. Another defence raised to the suit was that since the debts incurred by Raman were not incurred for any illegal or immoral purpose, the sale in pursuance of the execution of the decree obtained for these debts was valid and binding upon the sons.

(4) Accepting the contentions advanced on behalf of the defendants, the trial Court dismissed the suit, which was confirmed on appeal by the District Judge. The defeated plaintiff has preferred this second appeal. In this appeal it is contended by Mr. Raghavan on behalf of the appellant, that the construction placed upon the will by the Courts below is erroneous and the will conferred on Raman only a life estate, the remainder having been given to his descendants. According to him, the intention of the testator, as could be gathered from a reading of the relevant clauses in the will, was not to confer an absolute estate upon the legatees, Raman and Kunhayappan, but only to give them a life estate, and he lays particular stress on the passage in paragraph 6 of the will, which recites that the legatees and their descendants will enjoy the properties and look after his two daughters to whom some provision was made for maintenance under the will.

(5) I do not think that I can accept this contention. The words "Raman and Kunhayappan and their descendants will enjoy the property" cannot lend themselves to the construction that the legatees, Raman and Kunhayappan, were given only a life estate, while their children should get a remainder in those properties. In this connection a reference may be made to the provisions of S. 97 of the Indian Succession Act which provides that where property is bequeathed to a person and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will. One of the illustrations given under that section is "a bequest to A and his heirs". The section lays down that in such a case A takes the whole interest which the testator had in the property.

(6) Though the provisions of this section, do not in terms apply to Hindu wills, yet the principle embodied in that section applies to such wills. Vide 'DAMODARA MOOTHAN v. AMMU AMMA', 1943-2 Mad LJ 332. It has been laid down in a number of decisions that where the testator makes a bequest to a person and his heirs, or to a person and children or descendants, it confers an absolute estate on that person. These words do not mean that a life estate alone was given to the legatee and a vested remainder conferred on his children or his descendants. Such conventional expressions are used to convey the intention of the testator to convey an absolute estate upon the legatee and they are only words of inheritance. These words are frequently employed in Hindu wills and have acquired the force of technical words conferring an alienable and heritable estate. They do not indicate that the heirs of descendants of the legatee were denoted as direct objects of a distinct and independent gift. The decision in 'DAMODARA MOOTHAN v. AMMU AMMA', 1943-2 Mad LJ 332, is apposite in this context. Reference may also be made in this connection to the principle laid down in 'BRIJ INDER BAHADUR v. RANI JANAKI', 5 Ind App 1 (PC), 'RAM NARAYAN SINGH v. RAM SARANLAL', 47 Cal 683 P. C. (sic). In all these cases it was held that the words "legatee and his heirs" or "legatee and the heirs of his body", or legatee and "the children born of his loins" etc. only indicate the intention of the testator to confer an absolute estate on the legatee. Not a single case has been cited, before me, laying down the contrary principle,

and the principle stated above cannot be seriously disputed.

(7) Mr. Raghavan argued that the recitals in the will show that the intention of testator was to give only a life estate to his nephews and the remainder to his descendants and reliance for this contention was placed on the passage in paragraph 6 of the will wherein the testator desired that the legatee and their descendants will take possession of the property and look after his daughters. I do not think this would give any indication of the testator's intention to give only a life estate to the legatee. In this view of the matter it is not necessary for me to go into the question whether the sale is also valid on the ground of the theory of pious obligation.

(8) This second appeal fails and is dismissed, but having regard to the circumstances of this case, I direct each party to bear his costs in this Court. (Leave refused).

C.R.K./D.H. Appeal dismissed.

A. I. R 1952 Madras 687

GOVINDA MENON J.

Chunduru Kanniah Gupta and another, Defendants 1 and 3 Appellants v. Pallamparthi Subbarami Reddi, Plaintiff-Respondent.

Second Appeal No. 723 of 1946, D/- 15-2-1949.

(a) Specific Relief Act (1877), S. 15 — Agreement for sale of land belonging to joint family — Agreement signed by one member — Member not making condition of validity of such agreement that it should be signed by all — Agreement enforceable to extent of share of such member.

Where an agreement for the sale of a certain piece of land belonging to the joint family of A and B, though intended to be executed by both in favour of C, was in fact signed by A only.

Held that as A did not make it a condition of the validity and enforceability of the document unless B also had signed it, the agreement could be enforced as regards the share of A in the joint family property. Case law discussed. (Para 8)

Anno: Specific Relief Act, S. 15, N. 4.

(b) Waiver — What amounts to — Express mention of circumstances necessary — Evidence Act (1872), S. 115.

In order that a legal remedy which a party is entitled to enforce should be deemed to have been waived or abandoned by him there must be an express mention of the circumstances by the party either by word or by deed or there should be clear indication by his conduct from which it can be implied that there has been such a waiver or abandonment. (Para 9)

Anno: Evidence Act, S. 115 N. 47.

K. Umamaheswaram and B. Srinivasa Murthy, for Appellants; M. Seshachalapathy, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('22) 65 Ind Cas 594 (Cal) 5
('42) AIR 1942 Lah 86: (199 Ind Cas 720) 7
('02) 25 Mad 389: (12 Mad LJ 17) 5, 7
('08) 31 Mad 114: (3 Mad LT 308) 7
('11) 34 Mad 314: (12 Ind Cas 499) 7
('14) 26 Mad LJ 257: (AIR 1914 Mad 369 (1)) 5
('14) 27 Mad LJ 176: (AIR 1915 Mad 590 (1)) 7
('17) 39 Mad 597: (AIR 1916 Mad 692) 7
(1940) AC 366: (1940-1 All ER 485) 8
(1879) 11 Ch D 121: (48 LJ Ch 361) 8

JUDGMENT: Defendants 1 and 3 are the appellants in this Second Appeal. The plaintiff's suit was for specific performance of a contract, Ex. P-2, dated 27-4-1942, for sale of certain piece of land belonging to the joint family of defendants 1 and 2. This agreement though it was intended to be executed by both the defendants, was, in fact, signed only by the first defendant. The second defendant is alleged to have later entered into another agreement with the plaintiff, Ex. P-1 dated 25-5-1942, but the finding of the lower Courts is that this is not a document which could be enforced as it has not been proved to be genuine. On the 6th of August 1942, defendants 1 and 2 sold the same property to the third defendant under Ex. P-5 and the present suit for specific performance of the contract, Ex. P-2, was filed, making the purchaser under Ex. P-5 also a party.

(2) The trial Court found that the entire document, Ex. P-2, is unenforceable because, according to the learned District Munsif, certain decisions of this Court are to the effect that the document cannot be enforced even as against the first executant. On that ground the suit was dismissed even though there were findings that the third defendant was not a person who can claim protection according to the provisions of Section 27 of the Specific Relief Act.

(3) On appeal by the plaintiff, the learned Subordinate Judge, Nellore, agreed with the trial Court as regards the applicability of S. 27 of the Specific Relief Act and also as regards the unenforceable nature of Ex. P. 1 but came to the conclusion that Ex. P-2 can be enforced against the first executant and therefore granted a decree for specific performance of the first defendant's share of the suit property, on the plaintiff fulfilling the necessary conditions regarding the payment of the balance of purchase money and other matters.

(4) Three points have been raised by the learned advocate for the appellants, the first of them being that Ex. P-2 was only an inchoate agreement and not a completed transaction and as such unenforceable even as against the first defendant. The second point was that in the lawyer's notice Ex. P-3 dated 19-5-1942 the plaintiff had agreed to resort only to his remedy, in the event ot the first defendant not executing the conveyance as agreed to under the document, to have the liquidated damages mentioned in that document in addition to the return of the advance payment made under the agreement. The contention is that the relief regarding the specific performance must be deemed to have been impliedly relinquished by not specifically being asked for in this registered notice. As a subsidiary contention to this point Mr. K. Umamaheswaram raised a further argument that since the third defendant purchased the property after Ex. P-3 was received by the first defendant it should be deemed that the plaintiff is estopped from saying that the remedy by way of specific performance was still existing: and lastly he argued that the direction by the lower appellate Court that the plaintiff should pay the second

defendant his costs is unjustifiable, for the person who is really to get the costs is the third defendant and not the second defendant.

(5) I shall deal with these points seriatim. To justify his contention that the agreement cannot be enforced even as regards the first defendant, well known decisions of this Court beginning with 'SIVASWAMI CHETTY v. SEVUGAN CHETTI', 25 Mad 389, have been brought to my notice. In that case Bashyam Aiyangar J. held that where a document which was intended to be signed by more than one person was signed only by some of them, the others having refused to execute the deed when asked to do so, and the defence was that no suit could be brought on the document inasmuch as it was not completed as the younger of the brothers who had agreed to sign had not signed it, it constituted merely a proposed agreement which had never been perfected. It was further held that if the parties intended that all the persons intended to execute the document should execute it, the document could not take effect even against the persons who have executed it for the reason that the person who had alone executed it happened to be the managing member. The learned Judge relied on certain English Cases and came to that conclusion. At page 393 it is mentioned as follows:

> "If the parties intended that all the members of the family should execute the document it cannot take effect by reason that the person who alone executed the document happens to be the managing member and that the debt is recited to have been incurred for the benefit of the family."

In another passage the learned Judge holds:

> "If one intends to be a joint and several obligee or only a joint obligee with others there is a right of contribution against his co-obligees, if his intention be carried out, but if he becomes a mere several obligee, he has no right of contribution."

This decision was subsequently followed in 'AMIRTHAM PILLAI v. NANJA GOWNDAN' 26 Mad LJ 257, where Sadasiva Ayyar J. held that where it was intended that two persons should jointly execute a promissory note and should become jointly liable and one of them alone executes it, the note is not enforceable even as against the other. The decision of the Calcutta High Court reported in 'RAM SARAN ROY v. SHOSHI BHUSAN GHOSE' 65 Ind Cas 594 (Cal), also to the same effect, was brought to my notice. The learned Judges Chatterjea and Panton JJ. held as is seen from the head note thus.

> "In a suit for specific performance of a contract alleged to have been entered into by defendants 1 and 2 to sell certain property, it was found that it was agreed between the plaintiff and first defendant that the latter and the second defendant would sell the property to the plaintiff.
>
> 'Held': that as the agreement proposed was between the plaintiff on the one hand and defendants 1 and 2 on the other and as the second defendant had not agreed there was no completed contract which could be specifically enforced even as regards the first defendant."

(6) Now, these cases proceed on the basis that if the original intention was that more than one person should execute the document but only one of them actually executed it, the document cannot be enforced even as against the actual executant.

(7) The principle so broadly stated came up for criticism and consideration in later decisions of this Court, Coutts Trotter J. (as he then was) in 'NETHIRI MENON v. GOPALAN NAIR', 39 Mad 597, had to deal with a similar case: and there, the Bench consisting of Spencer and Coutts Trotter JJ. held that if a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will become incomplete and inoperative till all have done so; but it is a question of fact in each case as to what was the intention of the parties. During the course of the discussion, a distinction was pointed out and it was held that if the person who actually, executed the document did so on the understanding that it would become operative only if the others had signed it, then, it would become inoperative if the others did not put in their signature; and as it is held that the question of intention in each case is a question of fact it was not a matter for interference in second appeal unless the finding of the lower appellate Court is not justified by the evidence on record. To the same effect are the earlier cases in 'KRISHNAMACHARIAR v. NARASIMHACHARIAR', 31 Mad 114 and 'SETHURAM SAHIB v. VASANTHA RAO', 34 Mad 314. In 'BANGARASWAMI AIYANGAR v. SOMASUNDARAM CHETTIAR', 27 Mad LJ 176, Sadasiva Aiyar and Tyabji JJ. held that where a document recites that it was executed by A, B and C but only A and B executed it, actually, the question whether A and B agreed to be liable only if C also joined is a question of fact to be decided according to the circumstances of each case and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the Court below. The learned judges considered the cases in 'SIVASWAMI CHETTY v. SEVUGAN CHETTY', 25 Mad 389 and 'KRISHNAMACHARIAR v. NARASIMHACHARIAR', 31 Mad 114. A clear exposition of the principle of law applicable to such cases can be found in 'UMAR BAKHSH v. MUL RAJ', AIR (29) 1942 Lah 86, where, Dilip Singh J. put the point in the following way:

> "If the intention of the parties to an agreement to sell is that nobody would agree to sell his share, unless all the others also agreed to sell their shares, it cannot be held that where one of them had failed to sign the document it was a complete document. On the other hand if the sales are not independent in the sense that each vendor might well have sold his share of the property without reference to the sale by others and what really should have been a number of separate sales are rolled into one because of convenience then the fact that in the agreement to sell one of the vendors had not joined would not affect its validity as between the vendee and the vendor who had signed the agreement to sell. The question of intention has to be settled by reference to the terms of the document and to the circumstances of the case."

I am in perfect agreement with the proposition of law stated there. It is also useful in this connection to refer to a recent pronouncement of the House of Lords in 'LADY NAAS v. WESTMINSTER BANK LTD.', 1940 AC 366, where all the Noble Lords who took part in that decision were of opinion that the statement of Sir George Jessel M. R. in 'LUKE v. SOUTH KENSINGTON HOTEL CO', (1879) 11 Ch D 121, that

> "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute"

is expressed far too widely. At page 389 Lord Russel of Killowen discusses this aspect of the case and in the same tenor discussion is found in the speeches of the other noble Lords as well especially that of Viscount Maugham the presiding noble Lord. In view of the repeated pronouncements of this Court explaining the principle, it is unnecessary to deal at great length with this House of Lords pronouncement; but since the earlier cases in India had been based to some extent upon the dictum of Sir George Jessel M. R., I think it is advisable to show how that dictum has been later on criticised and considered by the House of Lords.

(8) Applying the principles of law as stated above, we have to ascertain whether in the case under consideration, it was the intention of the first defendant to sign the document and make it effective only if the second defendant had also executed the same. The learned Subordinate Judge after discussing the evidence of the witnesses was of the view that the first defendant was quite prepared to execute the agreement by himself alone but that it was only by way of abundant caution that the plaintiff wanted that the second defendant's signature also should be got to Ex. P-2 by the elder brother. We have also the evidence of the first defendant examined as D. W. 1 and he stated that P. W. 2 agreed that he would get the signature of the second defendant without the assistance of the first defendant. The first defendant further stated that he never undertook that he would get the sale deed executed on behalf of his brother also; whether he agreed with it or not and that there was no reference whatsoever to that fact in case the brother did not agree to sign Ex. P. 2. In cross-examination also he made certain statements but the purport of the whole thing is that the first defendant did not make it a condition of the validity and the enforceability of the document unless the second defendant had also signed it. Such being the case, I agree with the learned Subordinate Judge that the document can be enforced as regards the share of the first defendant.

(9) On the second question whether there was election on the part of the plaintiff and whether the plaintiff is estopped, I do not find any difficulty whatsoever. Ex. P-3 simply mentions that if the document is not executed, then recourse to the remedy by way of damages which had been liquidated in the deed would be taken. I do not think that this is either an express election or an election can be implied and abandonment of the remedy of specific performance can be inferred from this lawyer's notice. In order that a legal remedy which a party is entitled to enforce should be deemed to have been waived or abandoned by him there must be an express mention of the circumstances by the party either by word or by deed or there should be clear indication by his conduct from which it can be implied that there has been such a waiver or abandonment. Moreover, the question has not been so clearly put forward as an issue in the trial Court and considered in that light. I do not think I need say more on this subject as I am of opinion that it is impossible to infer from Ex. P-3 that there has been an abandonment, much less is there any estoppel because it is nowhere stated that the third defendant was induced to purchase this property as a result of the statement contained in Ex. P-3. We do not find any plea put forward by the third defendant that he purchased the property after knowing that the plaintiff had sent the registered notice, Ex. P-3. On the other hand, the third defendant's case throughout has been that he was a 'bona fide' purchaser of this property for proper and valuable consideration without knowledge of the previous agreement between the first defendant and the plaintiff and therefore he is protected under the provisions of S. 27 of the Specific Relief Act. In these circumstances I find it difficult to accede to the contention of Mr. Umamaheswaram that the question of estoppel can be raised in this case.

(10) With regard to the last contention I am of opinion that the learned advocate is entitled to succeed. The second defendant's conduct has been criticised in severe terms by the lower Court as unscrupulous and such being the case I do not see any reason why the second defendant should be entitled to get the costs from the plaintiff. In substitution of the lower Court's order directing the plaintiff to pay the second defendant's costs, I would direct that the plaintiff should pay the costs of the third defendant instead of the second defendant: but the plaintiff should get his own costs from the first defendant throughout. The third defendant is entitled to stand in the shoes of the second defendant as regards costs. The second appeal therefore fails subject to the small modification mentioned above and is dismissed with costs.

(11) Leave is refused.

C.R.K./D.H. Appeal dismissed.

**** A. I. R. 1952 MADRAS 689**

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

Commissioner of Income-tax, Excess Profits Tax, Madras, Applicant v. Rama Sugar Mills Ltd. Bobbili, Respondent.

Case Ref. No. 29 of 1948, D/- 27-5-1951.

**** Income Tax Act (1922), S. 10 (2) (v) and (xv)—Revenue or capital expenditure—Current repairs, meaning of — Sugar manufacturing business carried on by assessee in its own factory — Replacement of old worn-out boiler by new similar boiler — Cost of replacement whether permissible deduction under S. 10 (2).**

The assessee, a sugar manufacturing company, owned a factory in which three boilers were used for the manufacture of sugar. During the crushing season which extended nearly for six months in the year, the factory undoubtedly had to work for 24 hours and during such period two boilers had to be constantly in use. The third

boiler was necessary and had to be used when any one of the other boilers had to be cleaned up at intervals and had to be given rest. One of these three boilers deteriorated in its efficiency during the relevant accounting period and the assessee was obliged to purchase another boiler having the same pressure and working capacity at a cost of Rs. 86,496. On a reference under S. 66 (1):

Held (Per Satyanarayana Rao J. agreeing with the decision of the Appellate Tribunal, Raghava Rao J. dissenting), on the facts and in the circumstances of the case that the expenditure incurred in the purchase, erection and fitting of the new boiler for replacing the old one was not a capital expenditure but a revenue expenditure within the meaning of section 10 (2) (xv) of the Indian Income-tax Act, 1922 and, therefore, a permissible deduction under that section. AIR 1933 PC 222; 1926 AC 205 and (1911) 1 KB 905 Applied.

Per Satyanarayana Rao J.: In order to establish that the expenditure is of a capital nature, one must be satisfied that the new boiler is an improvement on the old one producing bigger outturn of sugar or that it is not a part of the machinery used for the purpose of such production. The boiler which was substituted was exactly similar to the old one and by this expediture, the assessee company did not bring any additional advantage to the trade or business which they were carrying on and there was no improvement. It could not be suggested that by using a new boiler for an old one, the productive capacity of the sugar manufacturing unit was in any manner increased. (Para 10)

A renewal may be a repair or a reconstruction. Renewal is a repair if it is only restoration by renewal or replacement, of subsidiary parts of a whole. If, on the other hand, it amounts to a reconstruction of the entirety or of substantially the whole of the subject-matter it is not a repair but a reconstruction. The test, therefore, which decides the question whether a thing is a "repair" or not is to see whether the act actually done is one which in substance is a replacement of defective parts or a replacement of the entirety or a substantial part of the subject matter: (1911) 1 KB 905 Rel. on. (Para 6)

The expression 'current repairs' in S. 10 (2) (v) Income Tax Act, is not confined only to 'petty repairs'. The dictionary meaning of the word "current' is not petty, but it means 'belonging to the present time, prevailing": 1951-19 ITR 324 (All) dissented from. (Para 11)

Per Raghava Rao J.: All repairs effected in relation to plant or machinery while the plant or machinery is in a running condition must be regarded as current repairs, whereas if the repairs effected are after the machinery or plant comes to a standstill and ceases to run, they must be regarded as not current repairs. Whether the repairs involve a high or low degree of expenditure does not matter, so long as the machinery or plant is actually running and the consideration of pettiness is really immaterial. In this sense, the replacement of the worn-out boiler which had not ceased to function altogether, by the new one could not reasonably be regarded as 'current repairs' within the meaning of S. 10 (2) (v), Income Tax Act. (1933) 17 Tax Cas 93 Rel. on.; 1951-19 ITR 324 (All) diss. from. (Paras 21, 32)

The new boiler had come in substitution for the old boiler which was part of the fixed capital of the company and therefore partook of the character of such capital. It might or might not be of superior quality or calibre to that of the old boiler, but it certainly had resulted in a substantial extension of the period of serviceableness of the machinery and in the creation of an asset of lasting advantage or enduring benefit to the company in the nature of a fresh fixed capital asset. The expenditure incurred by the assessee was therefore a capital expenditure: Case law discussed. (Paras 34, 35)

Anno: Income Tax Act, S. 10, N. 13.

C. S. Rama Rao Sahib, for Applicant; N. Subbaraya Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('33) 1933 AC 368: (AIR 1933 PC 222) 6, 7, 10, 19, 23, 25, 29, 33
('51) 1951-19 ITR 324 (All) 11, 21, 31
('35) 62 Cal 87
('26) 2 ITC 294 (Mad) 5, 32, 33
(1878) 3 AC 552 17
(1881) 6 AC 315: (51 LJQB 626) 26, 29, 31
(1915) AC 433: (84 LJKB 417) 29
(1926) AC 205: (10 Tax Cas 155) 10, 27, 28, 29, 31, 33
(1911) 1 KB 905: (80 LJKB 713) 6, 7, 10, 18, 19, 22, 23
(1934) 1 KB 548: (103 LJKB 619) 31
(1895) 2 QB 212: (62 LJQB 583) 6
(1889) 2 Tax Cas 485: 16 R 950 7, 23, 30, 33
(1910) 5 Tax Cas 529: 1910 SC 519 10, 27, 29
(1926) 11 Tax Cas 372 28
(1929) 13 Tax Cas 1: (1927 SC 705) 26
(1932) 16 Tax Cas 253: (1932-1 KB 124) 29
(1933) 17 Tax Cas 93 8, 22, 23, 33
(1935) 19 Tax Cas 481 8, 9, 23, 25, 33
(1903) 19 TLR 203 6

SATYANARAYANA RAO J: At the instance of the Commissioner of Income-tax and Excess Profits Tax, Madras, the Appellate Tribunal referred to us the following question for our decision.

"Whether, on the facts and in the circumstances of the case the expenditure of Rs. 86, 496 incurred in the purchase, erection and fitting of the new boiler for replacing the old one was capital expenditure within the meaning of section 10(2) (xv) of the Indian Income-tax Act, 1922".

The assessee is Sri Rama Sugar Mills Ltd., Bobbili. The company manufactures sugar at two factories owned by it, one at Bobbili and another at Sithanagaram. The machinery for manufacturing sugar included among other things, boilers. The factory at Bobbili owned three boilers which were used for the manufacture of sugar. During the crushing season which extends nearly for six months in the year, the factory undoubtedly has to work for 24 hours and during such period two boilers have to be constantly in use. The third boiler is necessary and has to be used when any one of the other boilers have to be cleaned up at intervals and have to be given rest. One of these three boilers deteriorated in its efficiency during

the relevant accounting period and the assessee was obliged to purchase another boiler at a cost of Rs. 86,496 and the old boiler was sold for a sum of about Rs. 15000.

(2) The assessee company claimed this sum as a deduction from and out of its profits as expenditure chargeable to revenue. The deduction was not allowed by the Income-tax Officer and the Excess Profits Tax Officer and his decision was confirmed by the Appellate Assistant Commissioner. They held that it was a capital expenditure and not an expenditure chargeable to revenue. On a further appeal, the Appellate Tribunal reversed this decision and upheld the claim of the assessee company. Hence this reference.

(3) The question whether the expenditure incurred for the purpose of trade is properly debitable to the incomings of the trade or is capital expenditure is not always easy to decide. The scheme under the Indian Act adopted in section 10 in computing the profits of a business is the allowances enumerated in sub-s. (2) which are treated as permissible deductions and therefore chargeable to the receipts from the business. Of these allowances, sub-clause (v) relates to current repairs to buildings, machinery, plant or furniture and subclause (vi) relates to depreciation of such buildings, machinery, plant and furniture and clause (xv) is in the nature of a residuary clause which permits a deduction in respect of expenditure laid out or expended wholly and exclusively for the purpose of such business, profession or vocation but is subject to the qualification that such expenditure should not be in the nature of capital expenditure or personal expenses of the assessee. While Section 10 enumerates the permissible allowances there is no indication either in that section or elsewhere regarding the mode and the manner in which the profits of a business have to be computed for the purpose of assessing such profits to income-tax. It is, however, understood that apart from the allowances indicated in the section, the profits have to be determined by the ordinary principles of commercial accounting. It is here that what one might call a residuary clause. Clause (xv) affords useful guidance in determining whether a particular item of expenditure could be legitimately charged to the revenue or not. If it is a revenue expenditure, it is permissible to deduct it, but if it is not, it cannot be excluded.

(4) To understand the decisions in England under the corresponding provisions in Sch. D and the rules applicable to cases I and II of that schedule, particularly rule 3, it may not be out of place to remember the scheme adopted by those rules. Under the English Act, two things are clear. An item of expenditure is deductible only if it is not expressly prohibited by statute or if it is not considered proper on the ground that it is not an expenditure authorised by the ordinary principles of commercial accountancy. The English Act adopts the method of enumerating the deductions which are prohibited in computing the amount of the profits or gains to be charged to income-tax unlike the Indian Act which specifies the permissible deductions. Even if there is no prohibition regarding the expenditure claimed as a deduction, under the English Act, it does not prevent the revenue authorities from establishing that even according to the general principles of commercial accountancy the deduction must be treated as in the nature of a capital expenditure, while it is equally open to the assessee to show that it is chargeable to the incomings of the business.

(5) Bearing these principles in mind, it would be convenient now to consider the decisions cited at the Bar to elucidate the distinction between capital and revenue expenditure. Though in the question formulated and in the arguments before the Income-tax Officer and the other authorities which dealt with this question, the point was considered only from the point of view of clause (xv) to sub-section (2) of section 10, in the arguments before us, reference was made to sub-clause (v) of that sub-section relating to repairs and also to clause (xv). If the substitution of the new boiler for the old by the assessee can aptly be described as a "repair" of the machinery, the claim for allowances must be upheld under clause (v) of section 10(2) and no further question whether it is in the nature of capital expenditure or expenditure which is to come out of revenue arises for consideration. It has been held by this court very early in 'RATAN SINGH v. COMMR. OF INCOME-TAX, MADRAS', 2 ITC 294 (Mad) that these clauses are disjunctive and even if an assessee fails to establish his claim under clause (v), he would still be entitled to rely upon clause (xv) in support of the deductions claimed by the assessee company.

(6) In order to understand and appreciate the full implication of what constitutes in law "repair", one cannot do better than refer to the opinion of Buckley L. J. in 'LAURCOTT v. WAKELY', (1911) 1 KB 905. The question that actually arose for decision in that case however related to the extent of a tenant's liability under a covenant to repair and was not a decision under the Income-tax Act. But the Privy Council referred to this decision with approval in 'RHODESIA RLY. LTD. v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 (PC), a case under the Income Tax laws. By "repair" of a thing is meant that it is brought to its original condition. Says Buckley L. J. in the above decision:

> "'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part, of a subordinate part. A skylight leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary new bricks or stone. 'Repair is restoration by renewal, or replacement of subsidiary parts of a whole.' (The underlining (here in inverted commas) is mine). Renewal, as distinguished from repair, is reconstruction of the entirety meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace. That has been affirmed by 'LISTER v. LANE', (1895) 2 QB 212 and 'WRIGHT v. LAWSON', (1903) 19 TLR 203, at p. 510. But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole."

On a careful analysis of this passage of Buckley L. J., it would be seen, a renewal may be a repair or a reconstruction. Renewal is a repair if it is only restoration by renewal or replacement, of subsidiary parts of a whole. If, on the other hand, it amounts to a reconstruction of the entirety or of substantially the whole of the subject-matter it is not a repair but a reconstruction. The test, therefore, which decides the question whether a thing is a

"repair" or not is to see whether the act actually done is one which in substance is a replacement of defective parts or a replacement of the entirety or a substantial part of the subject-matter. A reconstruction of a wall, it was held in that case, was a repair and was covered by the obligation of the tenant who was under a covenant to repair the leasehold property. The reason given for this conclusion appears at page 927. It was held to be a "repair" because it merely restored the stability and safety of a subordinate part of the whole like replacing a new floor of a house.

(7) The Judicial Committee had occasion to consider a similar question under the Bechuanaland Income-tax Proclamation — see 'RHODESIA RAILWAYS LTD. v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 (PC). That case related to a claim by a railway company to take out of its profits a large amount spent by them in the year of assessment in renewing 74 miles of its railway track out of 394 miles of the total length of the track owned by them. The rails and the sleepers were replaced as they were worn out. The Proclamation provided that sums expended for the repairs of property occupied for the purpose of trade or in respect of which income is receivable and sums expended for the repair of machinery, implements, utensils, and articles employed by the tax-payer for the purpose of his trade were permissible deductions. There is also a provision in that Proclamation, corresponding to clause (xv) of section 10(2) of the Indian Act. The contention of the assessee was upheld by the Judicial Committee which applied the test laid down by Buckley L. J. in 'LAURCOTT v. WAKELY', (1911) 1 KB 905 to determine whether the replacement of the rails and sleepers constituted a "repair" or not and at p. 374 Lord Macmillan gives the reasons for upholding the contention of the assessee in these terms:

> "The periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration. The fact that the wear although continuous is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear, and represented the cost of restoring them to a state in which they could continue to earn income. It did not result in the creation of any new asset; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present."

The decision in 'HIGHLAND RLY. CO. v. BALDERSTON', (1889) 2 Tax Cas 485 in which a distinction between when an act done amounts to a repair or an improvement of corpus was pointed out was referred to in the course of the judgment. At page 376 Lord Macmillan adds:

> "The contrast between the cost of relaying the line so as to restore it to its original condition and the cost of relaying the line so as to improve it is well brought out in the passage just quoted, and while the former is recognized as a legitimate charge against income the extra cost incurred in the latter case in the improvement of the line is equally recognised as a proper charge against the capital."

The distinction drawn in 'HIGHLAND RLY CO. v. BALDERSTON', (1889) 2 Tax Cas 485 was that if what was done was a substitute of one kind of rail for another, steel rails for iron rails, that would have been a material alteration and an improvement in the corpus of the heritable estate of the company and in such a case, the cost of such an improvement, would be a charge against capital. If, however, the old rails were replaced by substantially the same kind of rails and no improvement in the corpus was effected, it would follow that there was no creation of any new asset, to use the language of Lord Macmillan, but the expenditure would merely be one incurred to maintain the existing line in a state to earn revenue. It was therefore held that it was both a repair within the meaning of S. 15, sub-section 1(b) of the Proclamation and also a revenue expenditure within the meaning of sub-section (a) of S. 15. It would be noticed that the amount spent by the railway company in that case was a large amount and replacement of the rails extended to 74 miles. The alteration effected by the acts of replacement was confined only to a subsidiary part of the whole railway line and it did not bring about any improvement in the sense of substituting one kind of part by a totally different kind of part. That is exactly the test laid down by Buckley L. J. in 'LAURCOTT v. WAKELY', (1911) 1 KB 905.

(8) In the light of these principles it would be noticed that the decision in 'MARGRETT v. LOWESTOFT WATER AND GAS CO.', (1935) 19 Tax Cas 481, on which strong reliance was placed by Mr. Ramarao Sahib for the Commissioner can easily be explained. The reservoir was replaced in that case at a different place after abandoning the old reservoir and the capacity of the new reservoir was twice the capacity of the old one and was undoubtedly an improvement on the old reservoir. The whole of the expenditure, therefore, was if I may say so with respect, rightly treated as capital expenditure not deductible from the profits. The decision of Rowlatt J. in 'BULLCROFT MAIN COLLIERIES LTD. v. O'GRADY', (1933) 17 Tax Cas 93, which related to the construction of a chimney, does not help us in evolving a new principle and must be treated as an authority confined to the facts of that case.

(9) It was contended by Mr. Ramarao Sahib, learned counsel for the Commissioner of Income Tax, that the boiler in question should be treated as a separate unit in the sugar manufacturing plant. He would divide each part of the machinery intended to produce a particular result in the various stages of the manufacture of sugar as individual units and the replacement of any unit would more or less be capital expenditure analogous to the construction of the reservoir in 'MARGRETT v. THE LOWESTOFT WATER & GAS CO.', 19 Tax Cas 481. He, however, was not able to cite any authority to justify the process of such a dissection of manufacturing plant. On the contrary, the Income Tax manual issued under the authority of the Central Government at page 306 treats "sugar works" as one unit for the purpose of fixing the percentage of depreciation allowable as a deduction under the Act. If such a process of splitting the machinery of a composite unit is permitted, there is no reason why one should stop at a particular point and not proceed with the division further. A fly wheel may be treated as one unit because it performs one function in the larger unit. If such a fly wheel is replaced, the expenditure incurred in that behalf if the argument is correct may as well be treated as capital expenditure as it amounts to replacement of a unit. But Mr. Ramarao Saheb is not prepared to go so far and is driven to accept the position that in such a case the expenditure will be a revenue expenditure as it is a repair and not a capital expenditure.

(10) The test laid down by Viscount Cave in 'BRITISH INSULATED AND HALSBY CABLES LTD. v. ATHERTON', (1926) AC 205 to distinguish an expenditure which is in the nature of a capital expenditure from an expenditure properly debitable against incomings of a trade in computing profits has been adopted and applied in later decisions and that test holds the field even today. Lord Dunedin in "VALLAMBROSA RUBBER CO. v. FARMER', (1910) 5 Tax Cas 529 laid down a rough test that capital expenditure was a thing that was going to be spent once for all while revenue expenditure was a thing that was going to recur every year. But as pointed out by Viscount Cave it is not always a decisive test and instances where that test was not applied, were adverted to at page 213. After a consideration of the authorities on the point, the learned Lord Chancellor summarises the test at page 213 as follows:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

This is practically the test adopted by the Judicial Committee in 'RHODESIA RLY. LTD. v. INCOME-TAX COLLECTOR, BECHUANALAND', 1933 AC 368 (PC), i.e. the expenditure should have been incurred with a view to bring into existence an asset or an advantage for the enduring benefit of a trade. If there is no such advantage or improvement or an additional or better asset, the expenditure cannot be treated as capital expenditure. If therefore the test laid down by the Judicial Committee in 'RHODESIA RLY. LTD. v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 and by Viscount Cave in 'BRITISH INSULATED AND HALSBY CABLES, LIMITED v. ATHERTON', 1926 AC 205 and by Buckley L. J. in 'LAURCOTT v. WAKELY AND WHEELER', (1911) 1 KB 905 are borne in mind, there would not be any difficulty, in my opinion, in answering the question which we are called upon to decide in this case. The boiler which was substituted was exactly similar to the old one and by this expenditure, the assessee company did not bring any additional advantage to the trade or business which they were carrying on and there is no improvement. As stated by the Appellate Tribunal in the statement of the case:

> "In order to establish that the expenditure is of a capital nature one must be satisfied that the new boiler is an improvement on the old one producing bigger outturn of sugar or that it is not a part of the machinery used for the purpose of such production."

If it is merely a replacement or a repair or putting into the original state, the machinery by the use of which the process of manufacture was carried on, no additional advantage is thereby derived. It cannot be suggested that by using a new boiler for an old one, the productive capacity of the sugar manufacturing unit was in any manner increased. It therefore follows that the Appellate Tribunal applied the correct test and came to a right conclusion on the facts in holding that the amount claimed was a revenue expenditure deductible under section 10(2)(xv) of the Indian Income-tax Act and not a capital expenditure.

(11) Our attention was drawn to a decision of the Allahabad High Court in 'RAMKISHEN SUNDERLAL v. COMMISSIONER OF INCOME-TAX, U. P.', 1951-19 ITR 324 (All) where it was held that the expression "current repair" occurring in S. 10(2)(v) of the Indian Income-tax Act is confined only to "petty" repairs usually carried out periodically and will not include repair or renewal costing a large sum of money which was spent after the machine has been run for a number of years. The dictionary meaning of the word "current" is not petty, but it means "belonging to the present time, prevailing" and with great respect to the learned Judges, it is difficult to accept such a restricted construction of the expression 'current repair' in the clause.

(12) The answer to the question referred to us must, therefore, be in the negative and against the Commissioner of Income-tax. As the Commissioner of Income tax has failed in this reference, he must pay the respondent his costs which we fix at Rs. 250.

(13) RAGHAVA RAO J.: The facts of this case are singularly simple. They have been stated by my learned brother in his judgment and need not be repeated. The question which arises for determination is whether the replacement of the old boiler of the sugar factory by a new boiler in this case is in the nature of an expenditure not of a capital nature within the meaning of S. 10(2)(xv) of the Indian Income-tax Act. The Income-tax Officer and the appellate Assistant Commissioner on appeal in concurrence with him, held the expenditure in question to be capital in nature while the Income-tax Appellate Tribunal has reversed them and held in favour of the assessee.

(14) The findings of fact relevant to the determination of the reference are as found in the statement of the case by the Tribunal as follows:

> "(1) that the replacement of the old boiler is by a new one 'having the same pressure which the old one possessed when it was new' and 'doing the same work which the old one was doing previous to its deterioration'.
>
> (2) that the boilers were part of a unit of the machinery required for the manufacture of sugar and so could not be treated as a separate unit by themselves".

(15) The law in the light of which the effect of these findings on our decision in this case has to be judged has given rise to considerable debate before us. I must confess, however, that all the cases cited do not reveal any single or uniform test capable of straight and easy application to any and every case. The difficulty has only stood enhanced by the further research into case law made by me after reserving judgment. All that emerges is that it is not possible to lay down any hard and fast rule or to enunciate a rigid and scientific principle which can be applied as the criterion for determining whether a particular expenditure is capital expenditure or not. The question essentially seems to be one of fact depending for its determination upon the circumstances of each given case. The point of view very strongly pressed upon us by the learned counsel for the department is that the replacement of the old boiler by the new is in the nature of a lasting advantage for the enduring benefit of the trade in relation to what must be considered as itself a separate and important unit of the machinery required for the trade.

(16) Before dealing with the more important of the cases bearing on the matter it is as well to draw attention to the material provisions of the Indian Income-tax Act. After providing in S. 10(1) that:

> "The tax shall be payable by an assessee under the head 'profits and gains of business'.....in respect of the profit or gains of any business.... carried on by him."

The statute proceeds in sub-section (2) to provide for specified allowances to be taken into account in computing the profits or gains. Of the allowances

so provided for the one with which we are directly concerned is that contained in clause (xv) of subsection (2) which runs as follows:

"any expenditure (not being in the nature of capital expenditure.....of the assessee) laid out or expended wholly and exclusively for the purpose of such business....."

This is the provision with reference to which the matter has been considered so far in all the stages of the case. There is another provision which has also entered into the argument before us and that is the one in clause (v) which runs thus:

"in respect of current repairs to such..... machinery, plant.....the amount paid on account thereof."

It is common ground that if the expenditure incurred in the purchase of the new boiler is in connection with current repairs to the plant installed in the sugar factory it is beyond doubt a permissible deduction. It is also common ground that if it is an expenditure not being in the nature of capital expenditure laid out or expended wholly and exclusively for the purpose of the business it is equally a permissible deduction. It is open to the assessee to claim the deduction either under the one head or under the other. Only if the case is to be dealt with as under the latter head the question of capital expenditure or no necessarily arises for consideration. I am inclined to think that although the matter was presented for determination in the earlier stages only with reference to clause (xv) we are called upon on the arguments advanced before us to deal with clause (v) as well as clause (xv). Clause (xv) apparently contemplates two kinds of expenditure laid out or expended wholly and exclusively for the purpose of the business: (1) such expenditure not being in the nature of a capital expenditure; (2) such expenditure being of such nature. The latter stands excluded from the sphere of deductions while the former is statedly included therein. It is also clear that where the repairs on account of which the amount paid is sought to be claimed as a deduction under clause (v) are not current repairs, whatever the meaning of the word 'current' in the context may be, which I shall consider presently, the repairs may well come under clause (xv) provided that the expenditure over such repairs is not to be regarded as in the nature of capital expenditure within the meaning of that clause.

(17) To view the matter first from the standpoint of clause (v), it is the amount paid on account of current repairs as such as I have just said that comes in for deduction. The repairs are to the buildings, machinery, plant or furniture as mentioned in the sub-clause. We are here concerned not with repairs to buildings or furniture but with repairs to machinery or plant. Can or cannot money spent over the replacement of the old boiler by the new be regarded as money spent over 'repairs' to the machinery or plant & if it can be, can or cannot it be regarded as money spent over 'current' repairs. In order to answer these questions properly, it is necessary to canvass the meaning of the word 'repairs' as well as the meaning of the word 'current'. The concise Oxford Dictionary treats 'repair' and 'renovate' as interchangeable terms and annotates one as equivalent to the other. Etymologically 'repair' is derived from (OF 'reparer' which in its turn is derived from (L. 're parare') i.e., again to make ready;) while 'renovate' is derived from L. 'renovare' i.e., make new again). The two terms are therefore not terms of mutual contrast or antethesis but of interchangeableness and equivalence. 'Repair' is a comprehensive word which means 'to make good defects' and which therefore must include renewal where that is necessary. 'INGLIS v. BUTTERY', (1878) 3 A. C. 552. A covenant to 'repair' may well stand satisfied by 'patching where patching is reasonably practicable, but where it is not, you must put in a new piece' (Per Lord Blackburn, Ibid, 579-vide Stroud's Judicial Dictionary, page 1719).

(18) In relation to a building as such what a covenant to repair exactly means has had to be considered by the Court of Appeal in England in 'LARCOTT v. WAKELY', (1911) 1 K. B. 905. That was a case of covenant between landlord and tenant which required the latter to substantially repair and keep in thorough repair and good condition the demised premises". Shortly before the expiration of the term the London County Council served a notice on the owner and occupiers requiring them to take down the front external wall of the house to the level of the ground floor as being a dangerous structure, and the plaintiff, the owner, called upon the defendants, the assignees of the leasehold interest, to comply with this notice which they failed to do. After the expiration of the term, the plaintiff in compliance with a demolition order of a police magistrate, took down the wall to the level of the ground floor, and then in compliance with a further notice of the London County Council, took down the remainder of the wall and rebuilt it in accordance with modern requirements. The house was very old and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it. It was held on those facts that the defendants were liable under the covenant to recoup the plaintiff the cost of taking down and rebuilding the wall. Buckley L. J. in a passage in his judgment in that case which has been regarded in later cases as the leading exposition on the subject of the difference between 'repair' and 'renew' observed at pages 923 and 924 of the report thus:

" 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight leaks; repair is effected by hacking out the patties, putting in new ones; and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or are missing; to make good the flashings, and the like. Part of a garden wall tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary new bricks or stone. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject matter has become impossible, a covenant to repair does not carry an obligation to renew or replace".

(19) If the replacement of the old boiler by the new in the present case is regarded as in the nature of a restoration of the machinery or plant of which the boiler is a part by a renewal of it, that obviously is tantamount to repair within the meaning of Buckley L. J's exposition, as well as within the dictionary meaning of the word 'repair' as an equivalent of 'renovate' to which I have already adverted. It is true that Buckley L. J. was not dealing with a case under the Income-tax Act but I see no reason after the careful consideration I have bestowed upon the matter since reservation of judgment why our interpretation of the word 'repairs' occurring in the relevant provision of the Indian Income-tax Act now under consideration should not be guided by Buckley L. J's interpreta-

tion of the expression which undoubtedly has been accepted by the Privy Council as a clue to the proper interpretation of the expression in the Bechuanaland Protectorate Income tax Proclamation in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR BECHUANALAND', (1933) A. C. 368 (PC). Lord Macmillan in delivering the judgment of the Judicial Committee in that case observed as follows, after quoting the passage from Buckley L. J's judgment in 'LORCOTT v. WAKELY', (1911) 1 K. B. 905 just reproduced by me:

"The periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration."

The replacement of a worn out boiler in a whole machinery relating to sugar works cannot be regarded as on principle distinguishable from the periodical renewal of sections of the railways and sleepers of the railway line as they wear out by use, dealt with by the Privy Council in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 (PC).

(20) Holding therefore the replacement of the old boiler by the new to be a case of 'repairs' as that word is used in clause (v) of S. 10(2) of the Act, I have still to consider whether it is in the nature of 'current repairs' within the meaning of the clause. As I have already stated, if it is of the nature of 'current repairs' it falls within clause (v); but if it is not, one will have to consider the question whether expenditure in connection with it is or is not 'in the nature of capital expenditure' as that expression is used in clause (xv). If it is not in the nature of capital expenditure, it falls within clause (xv) whereas if it is in the nature of capital expenditure it falls outside the clause.

(21) Our attention has been drawn to a case of the Allahabad High Court in 'RAMKISHAN SUNDERLAL v. COMMISSIONER OF INCOME-TAX', (1951) 19 ITR 324 (All) where the expression 'current repairs' has been interpreted as meaning 'petty recurring expenditure'. I am not sure that a discrimination as between petty and not petty is really helpful. On such a test the line is difficult to draw. Petty or not, what is it that attached to repairs the quality of 'current'? 'Current' according to the Concise Oxford Dictionary literally means 'running'. It is derived from OF. 'corant', present participle of 'courir', from L 'currere', run. All repairs effected in relation to plant or machinery while the plant or machinery is in a running condition must in my judgment be regarded as current repairs, whereas if the repairs effected are after the machinery or plant comes to a stand-still and ceases to run, they must be regarded as not current repairs. Whether the repairs involve a high or low degree of expenditure does not matter, so long as the machinery or plant is actually running and the consideration of pettiness or contra of which the Allahabad case makes a point is really immaterial. Whatever the bigness or smallness of the repairs, so long as they are 'current' repairs they fall within clause (v), while if they are not that, they fall outside it. If the worn-out boiler became at the time of its replacement something with which it was impossible to run the plant or machinery of which it was a part, it seems to me that the replacement cannot reasonably be regarded as in the nature of current repairs. On the other hand, any repairs to any part of the machinery or plant such as may lie in a patching up during the running of the machinery or plant for the business, must, in my opinion, be regarded as in the nature of 'current' repairs.

(22) This meaning of the expression 'current repairs' gains point in my opinion from what Rowlatt, J. has said in 'O'GRADY v. BULLCROFT MAIN COLLIERY LTD.', (1933) 17 Tax Cas 93, at page 101:

"As regards the chimney, I think it is really very clear. Of course, every repair is a replacement. You repair a roof by putting on new slates instead of the old ones, which you throw away. There is no doubt about that. But the critical matter is — as was pointed out in the passage read from Buckley L. J.'s judgment, in the case which has been referred to 'LURCOTT v. WAKELY', (1911) 1 KB 905 at p. 923 — what is the entirety? The slate is not the entirety in the roof. You are repairing the roof by putting in new slates. What is the entirety? If you replace in entirety, it is having a new one and it is not repairing an old one. I think it is very largely a question of degree, but it seems to me the Commissioners have taken the only possible view here. What was this? This was a factory-chimney to which the gases and fumes, and so on, were led by flues and then went up the chimney. 'It was unsafe and would not do any more.' What they did was simply this: They built a new chimney at a little distance away in another place; they put flues to that chimney and then, when it was finished they switched the gases from the old flues into the new flues and so up the new chimney. I do not think it is possible to regard that as repairing a subsidiary part of the factory. I think it is simply having a new one. And they had them both. Perhaps they pulled down the old one; perhaps they kept it, because they thought it was an artistic thing to look at. There is no accounting for tastes in manufacturing circles. Anyhow, they simply built a new chimney and started to use that one instead of the old one. I think the chimney is the entirety here and they simply renewed it. I think they are right on this point."

It will be seen from what the learned Judge has said, particularly in the sentence underlined by me, (here in single quoted) that when the old chimney became unsafe and would not do any more, the replacement of it by a new chimney was in the nature not of ordinary repair or to use the language of the Indian statute 'current repair' but something more than that — namely, a complete renewal of the old chimney.

(23) The question next is whether in terms of clause (xv) of the Act the expenditure incurred in the purchase of the new boiler is or is not in the nature of capital expenditure. In support of his contention that it is, the case most strongly relied upon by Mr. Rama Rao Saheb is the one reported in 'MARGRETT v. LOWERTOFT WATER & GAS CO.', (1935) 19 Tax Cas 481, where the question arose with reference to the cost of replacement of a reservoir which was part of the apparatus for water supply by the respondent company to Lowestoft and district. It was held by Finlay J. that there was no evidence upon which the commissioners could arrive at their conclusion that any part of the cost of the reservoir was other than capital expenditure. At page 487 of the report, the learned Judge first observes thus as the reasoning of his conclusion:

"What strikes one who is familiar with the long line of cases on this sort of subject is that this looks like the plainest case of capital expenditure. 'If a reservoir is antiquated or worn out and the people responsible, instead of repairing it and letting it go on for a bit longer, discard it or scrap it and build a new, a better and different, reservoir elsewhere, one would have thought that that was, as I say, the plainest possible case of capital expenditure'."

Then he refers to the case before Rowlatt J., in 'O'GRADY v. BULLCROFT MAIN COLLIERIES LTD.', (1933) 17 Tax Cas 93, as a case very close to the one before him. He proceeds next to refer to 'RHODESIA RAILWAYS LTD. v. COLLECTOR OF INCOME-TAX, BECHUANALAND', (1933) AC 368 (PC) and 'LURCOTT v. WAKELY', (1911) 1 KB 905. Of the former, he says that it does not seem to him to throw any real light on the case before the Court. From the decision in the latter, he quotes the passage of Buckley L. J., which I have already quoted in this judgment and observes thus:

"Now here the subject-matter under discussion seems to me to be the reservoir, and I cannot think that it is material, though it is undoubtedly the fact, that the reservoir is part only of the Respondents' whole physical undertaking. It is a part perfectly clearly divisible from the rest, and it is the part with which we are dealing here. If authority were needed for that I should find it in the decision of Mr. Justice Rowlatt, to which I referred a moment ago, of 'O'GRADY v. BULLCROFT MAIN COLLIERIES LTD.', (1933) 17 Tax Cas 93 because the reservoir here is more clearly a separate and distinct thing than was the chimney in 'O'GRADY v. BULLCROFT MAIN COLLIERIES LTD.', (1933) 17 Tax Cas 93."

Then the learned Judge winds up the discussion thus:

"I think that the expenditure on the new reservoir was a perfectly simple example of capital expenditure and was not in any sense an expenditure upon repairs. If they had repaired the old reservoir they would have incurred a certain amount of expense, but it seems to me that that does not make it possible to dissect the capital sum which they spent upon the new reservoir & to say that that amount which would have been spent in repairing the old reservoir can notionally be treated as being a sum expended for repairs. The answer is that that is not what happened. 'They have chosen not to repair the old but to build a new reservoir, and that is just capital expenditure'."

This case is, to my mind, directly in point and must mean that the department should succeed, if it stood by itself. The two sentences underlined (here single quoted) by me in the passages from the decision quoted go to show that if when the boiler becomes worn out or antiquated it is replaced and "let go on for a bit longer" the expenditure over such a step which is in the nature of current repair is revenue expenditure, while if it is replaced by a new boiler the expenditure incurred is capital expenditure. As I read the decision, if the replacing boiler is a new one, that is enough to make the expenditure capital expenditure. Of course, if it is a better or different one — which was an accident of fact in that case — that is 'a fortiori' a case of capital expenditure. But then there is the case of the Privy Council in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', 1933 AC 368 (PC) which I must consider in this connection. It is true that Finlay, J. said of this case that it did not seem to him to throw any real light upon the case before him. There is no reason given by the learned Judge for saying so of the Privy Council decision. Whether right or wrong Lord Macmillan in the Privy Council case does give reasons for his view that the expenditure there in question was not of a capital nature. Apparently, Finlay J. who could not but be alive to those reasons would not accept them, though he does not say so in so many terms. In order to understand the reasoning of the Privy Council, it is necessary to state the facts of the case before their Lordships. The appellants there were assessed to income-tax under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in respect of profits from 394 miles of their railway line in the Protectorate. It was claimed by them that they were entitled to debit 252,174 pounds which they had expended in the year of assessment in renewing 74 miles of the railway track. The work, which was part of a general scheme of renewal, included the supply of new rails, sleepers, and fastenings, where necessary; steel sleepers were used in place of wooden sleepers for about half the line renewed. The renewal brought back the worn track to normal condition; as renewed it was not capable of giving more service than the original line. It was held on those facts that the appellants were entitled to the deductions claimed because (1) the sum expended was an outgoing 'not of a capital nature' within S. 15, sub-s. (1)(a), of the Proclamation, and (2) it was 'expended for repairs of property occupied for the purpose of trade or in respect of which income is receivable' within S. 15(1)(b). With the latter ground of the decision, I have already dealt. With the former which matters for the present aspect of the discussion I have to deal. Looking at the judgment at page 374 of the report this is what we find:

"The fact that the wear although continuous is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of the previous years on which tax had been paid without deduction in respect of such wear, and represented the cost of restoring them to a state in which they could continue to earn income. It did not result in the creation of any new asset; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present."

Then again at pages 375 and 376 of the report this is what we find:

"Their Lordships find an excellent illustration of the accepted practice in such matters in the United Kingdom, to which the appellants' chief accountant spoke, in the case of the 'HIGHLAND RY. CO. v. SPECIAL COMMISSIONERS OF INCOME TAX (1889) 16 R 950: 2 Tax Cas 485. There the Highland Railway Company had relaid a portion of their main line and in doing so had substituted steel rails of greater weight for the previous iron rails. No question was raised as to the cost of relaying the rails except as regards the additional weight and cost of the improved rails as compared with the original rails. The railway company claimed to deduct the additional cost as a proper charge against revenue on the ground that no permanent improvement of their property had been effected by the substitution of the heavier and costlier steel rails and that they derived no additional revenue from the outlay. The Lord President (Inglis) in rejecting the company's contention said: ('HIGH RY. CO. v. SPECIAL COMMISSIONERS OF INCOME-TAX', (1889) 16 R 950: 2 Tax Cas 485.) 'It must be kept in view that this is not a mere relaying of line after the old fashion. It is not taking away rails that are worn out or partially worn out and renewing them in whole or in part along the whole line. That would not alter the character of the line; it would not affect the nature of the heritable property possessed by the company. But what has been done is to substitute one kind

of rail for another—steel rails for iron rails. Now, that is a material alteration, and a very great improvement in the corpus of the heritable estate belonging to the company, and so stated, surely is a charge against capital. All that is done, it will be observed from the details given with reference to this matter, is to charge the price of the rails and chairs — that is to say, the weight in addition to what was the original weight of the rails and chairs. That is the whole charge, and that is a charge made entirely for the improvement of the property — the permanent improvement of the property. Now, how that can be anything but a charge against capital, I am unable to see.'"

Lord Macmillan then winds up the discussion with these remarks:

"The contrast between the cost of relaying the line so as to restore it to its original condition and the cost of relaying the line so as to improve it is well brought out in the passage just quoted, and while the former is recognised as a legitimate charge against income the extra cost incurred in the latter case in the improvement of the line is equally recognised as a proper charge against capital. In the present instance, the renewals effected constituted no improvement; they merely made good the line so as to restore it to its original state. As such, in their Lordships' opinion, they were 'repairs' within the meaning of S. 15, sub-s. 1(b) of the Proclamation and the cost of them did not constitute an outgoing of a capital nature within the meaning of S. 15, sub-s. 1(a). It follows that the sum of 252,174 pounds expended on this work by the appellants is deductible from their income for the purpose of ascertaining their taxable income."

(24) Carefully scanning the passages quoted from the judgment, it is clear to my mind that the whole reasoning is of a composite character; that is to say, that the renewals effected were repairs within the meaning of S. 15(1)(b) and did not, therefore, constitute an outgoing of a capital nature within the meaning of S. 15(1)(a) of the proclamation there in question. After finding that they were repairs because

"The periodical renewal by sections of the rails & sleepers of a Rly. line as they were out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration." (vide page 374 of the report)

Lord Macmillan held as a corollary that the cost of them did not constitute an outgoing of a capital nature especially in view of the circumstance that tax had been paid in previous years without deduction for wear and tear. On the scheme of the proclamation there in question the Privy Council seems to have thought that what had to be regarded as repairs within one provision of it could not be regarded as an outgoing of a capital nature within another part of it with the result that the analogy of a wasting asset relied upon by the court below could not be accepted by the Privy Council as germane to the case before them. At the same time, it is also clear to my mind that as to what capital expenditure means, the test suggested is whether or not it has resulted in the creation of a new asset as distinct from the mere maintenance of an existing asset, in other words, whether or not the expenditure has merely restored the situation to its original condition or improved it by extra quality.

(25) Applying to the case on hand this test of the Privy Council ruling, with which I shall have to deal further, later in the course of this judgment, it may seem as clear that the department should fail, as that it should succeed, as already observed by me on the application of 'MARGRETT v. LOWESTOFT WATER & GAS CO.', (1935) 19 Tax Cas 481. The question is, between which of these two decisions if indeed irreconcilable have I to choose? That leads me on to a consideration of the basic ideas which underlie 'Capital expenditure'. As pointed out in the Concise Oxford Dictionary "capital funds" or "capital stock" means "the original principal fund or stock with which a company or person enters into business". No business clearly can be started without an initial outlay of expenditure which is generally known as capital. The income actually produced by the utilisation of capital in any particular business is usually known as profits of the business. The capital employed may be circulating capital which in the language of Mill 'fulfils the whole of its office in the production in which it is engaged by a single use' or fixed capital which in the language of the same author 'exists in a durable shape and the return to which is spread over a period of corresponding duration'. (Vide, Alfred Marshall's Principles of Economics. 8th Edition, page 75).

As remarked in Principles of Economics by F. W. Taussig, Volume I, 3rd Edition, the set of things to which we apply the term "capital" or 'producer's capital' are things such as iron ore, and steel bars, timber and wool and cotton factories and railways and shops, stocks of all sorts in warehouses, and commodities ready for sale in the retailers' shops, while the set of things which are called consumers' goods or wealth that is not capital are things such as houses, furniture, clothing and food in the hands of those using them for the satisfaction of wants. The first set we may speak of as unfinished goods; the second set as finished and enjoyable goods. For some purposes of economic analysis, they are similar; for other purposes dissimilar. The difference between them is essentially one of degree, yet is so great as to justify a distinction. (Page 69 Ibid) Capital then, that is, producer's capital, is not in enjoyable form; it is not now a source of satisfaction; it exists for the purpose of increasing consumer's wealth. Its relation to enjoyable goods is twofold: On the one hand, it may be said gradually to 'ripen' into such goods; on the other hand, it is a means of increasing their supply. It is easy to see that raw materials, as they are commonly called, 'ripen' into finished commodities. Wool is converted by successive steps into clothing, grain into bread, stone and timber into a house, but a process, the same in essentials, takes place with tools and machinery. Suppose a printing machine lasts for one year only being worn out and worthless at the close of the year. The books printed with its aid are the product not only of the labour applied to make the paper and other materials and of that applied by the compositors and other workmen in the printing office, but also of that applied in the construction of the printing machine itself, which in fact in due course may disappear by wear and tear. So of all machinery and all plant. It wears out sooner or later and may be said sooner or later to ripen into goods that satisfy our wants. (Page 70, ibid).

All forms of material wealth wear out in course of time. Some sorts of capital are indeed very durable, such as irrigation dams and granite docks; some last a considerable time as buildings and machinery; others are used up very quickly as the coal which is burnt under the boiler. All need to be replaced as time goes on, some slowly in proportion as they last long, some quickly in proportion as they are rapidly used up. (Page 77 ibid). Commonly capital is maintained intact, not in the sense that the same machinery or materials are maintained indefinitely, but in the sense that as they wear out other machi-

nery and materials are regularly produced to take their place. The surpluses which are put aside to balance depreciation are again invested in the same enterprise and the same instruments or in some other. (Page 78 ibid). The repair of capital as well as its complete replacement when worn out calls for the recurrent exercise of saving. Some kinds of apparatus must be touched up a little from day to day in order to be put in good working order. Such is the case with the road — bed of a railway which needs almost hourly attention and would become quite unusable if neglected for a few weeks. The locomotive of a railway again is subjected to constant heavy strain and needs to be sent to the machine shop at frequent intervals until finally after perhaps a generation of alternate using and patching it goes to the scrap heap and has to be replaced with a new one (page Ibid).

Viewing the matter from this standpoint of distinction between producer's capital or fixed capital used for producing finished goods and consumer's capital in the nature of the finished goods themselves and distinction again between repair and replacement of the producer's capital or fixed capital it seems but reasonable to hold that when the original capital stock gets exhausted by use and needs to be replaced the expenditure incurred in the process is in its turn further capital outlay in connection with the business and therefore in the nature of capital expenditure within the meaning of clause 15 of S. 10, sub-section (2) of the Indian Income-tax Act. It is in my opinion quite legitimate to bear in mind and give effect to these considerations well recognised in the field of Political Economy, in the interpretation of the relevant provision of the Income Tax Act, unless there is anything to be found therein which is repugnant to such a process of interpretation. The case of the road-bed of a railway needing almost hourly attention which is referred to by Taussig, it may be noticed, helps us to understand the distinction between repair and replacement of a railway line, the former being revenue expenditure normally and the latter being capital expenditure normally, so as to help us to understand aright the reasoning behind the Privy Council decision in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR BECHUANALAND', (1933) AC 368 (PC). In the light of what is said by Taussig, it is easy to understand why Lord Macmillan in delivering the judgment of the Privy Council in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 emphasises the consideration that the expenditure of which deduction was sought by the assessee in that case really represented the cost of repairs from year to year for which no deduction had been claimed in the matter of the tax paid in previous years. It is also easy to understand in that light why His Lordship rejects the analogy of a wasting asset relied upon by the Special Tribunal in that case which would really be applicable only to a case where a particular asset got completely exhausted by wear and tear in the process of use, not merely antiquated or worn out just to be repaired and "let go on a bit longer", to use the language of Finlay, J. in 'MARGRETT v. LOWESTOFT WATER & GAS CO.', (1935) 19 Tax Cas 481.

(26) In a case reported in 'COLTNESS IRON CO. v. BLACK', (1881) 6 AC 315 the question arose whether a tenant of minerals, though he might be under a constant vanishing expense in sinking new pits as the old ones became exhausted, was entitled in computing the profits for assessment of income-tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which had become exhausted by the year's working. It was held that he was not, and that was because as pointed out in the speech of Lord Penzance the Act then in question contemplated the case of a mine as within schedule A to the Act which was the schedule applicable to "property". The only question therefore was how exactly the annual value of that species of property had to be ascertained. The case is not strictly material to the one before us, and counsel relied upon it only for the general proposition that quite apart from any specific heads of deductions enumerated in the Income-tax Act no legitimate head of deduction could be ignored which would have to be taken into account for the ascertainment of profits in the true sense of the term and according to the basic conception of profits as the assessable factor. But there is a passage at page 328 of the Report which occurs in Lord Blackburn's speech & to which it is worthwhile to refer at this juncture. Says His Lordship:

> "The sum of £9027 claimed as a deduction from the assessment by the Appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2s. a ton on iron made, and 1½d. a ton on coal sold during the year; it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which has been exhausted by the year's working. The cost of making bores and sinking pits is charged in the books of the company to an account called "sunk capital account", and is written off annually by a sum computed at the respective rates above specified, on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals, after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern.
>
> The phrase "capital exhausted" does not occur anywhere in the Income-Tax Acts. It is taken from a passage in Mr. McCulloch on Political Economy, where he says:
>
> 'Profits must not be confounded with the produce of industry primarily received by the capitalist. They really consist of the produce on its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted, and after the capital wasted and used in the undertaking has been replaced. If the produce derived from an undertaking after defraying the necessary outlay, be insufficient to replace the capital exhausted, a loss has been incurred; if the capital is merely sufficient to replace the capital exhausted, there is no surplus, there is no loss, but there is no annual profit, and the greater the surplus is, the greater the profit'.
> I do not feel at all inclined to dispute the sufficiency of this definition."

It is clear from this passage in the speech of Lord Blackburn that while according to the author of the Work on Political Economy referred to by His Lordship if the produce derived from an undertaking after defraying the necessary outlay is insufficient to replace the capital exhausted it must be considered that a loss has been incurred, the learned Lord is at the same time making a distinction for the purpose of the Income-tax Acts between what may be called the capital charges involved in expenditure over pit-sinking which may be exhausted by the year's working and the working charges deducted and allowed in ascertaining the profits for assessment which include the whole cost of getting and raising the minerals, after the pits

are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern. On principle and of its own nature it does not seem to me that capital exhausted stands on any different footing from fresh capital invested in regard to its character as capital expenditure, as distinguished from working expenses. The latter kind of capital is really a counter-part of the former although the former is liable to deduction under S. 10(2)(vi) of the Indian Act, whereas the latter is not, on the principle recognised by Lord Blackburn in the passage from his speech just quoted. The latter kind of capital is really in the nature of capital employed to replace the capital already wasted and used in the undertaking. That being the true position of the replacement of any old worn-out machinery by a new one, it is clear that money spent over the latter must be held to be so far related to the original capital stock with which the business started that it must in itself be regarded as in the nature of further capital outlay. That is why, as I understand it, Lord Sands in his speech in the Court of Session, Scotland (First Division) in 'COMMISSIONERS OF INLAND REVENUE v. GRANITE CITY STEAMSHIP CO. LTD.', (1929) 13 Tax Cas 1 at page 14 observes:

> "Broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment";

"a substantial replacement of equipment" in this connection seems to my mind, to include "a substantial replacement of the machinery and plant which constituted part of the fixed capital with which the business started".

(27) The leading case in England on the subject of what is capital expenditure and what is not is 'BRITISH INSULATED AND HELSBY CABLES v. ATHERTON', (1926) A C 205. In that case the question arose thus:

> "A company, which carried on the business of manufacturers of insulated cables, established, under the powers of its memorandum of association, a pension fund for its clerical and technical salaried staff. The fund was constituted by a trust deed which provided that members should contribute a percentage of their salaries to the fund and that the company should contribute an amount equal to half the contributions of the members; and further that the company should contribute a sum of 31,784 1 to form the nucleus of the fund and to provide the amount necessary in order that past years of service of the then existing staff should rank for pension. This sum was arrived at by an acturial calculation on the basis that the sum would ultimately be exhausted when the object for which it was paid was attained. On the winding up of the fund the whole amount was to be distributed among the members. The company, having paid the sum of 31,784 1 out of current profits, claimed that it was an admissible deduction in computing its profits for the purpose of assessment to income-tax for the financial year, 1917-18".

On those facts it was held (by Viscount Cave, L.C. Lord Atkinson and Lord Buckmaster; Lord Carson and Lord Blanesburgh dissenting) that the payment was in the nature of capital expenditure and was therefore not an admissible deduction. It will be seen that the kind of expenditure in question in the present case was not what the House of Lords had to deal with in that case. The amount of 31,784 1 which had been taken out of the current profits was contributed to a pension fund so as to form its nucleus. The expenditure was made not only once and for all which was the test of capital expenditure propounded by Lord Dunedin as Lord President of the Court of Session in 'VALLAMBROSA RUBBER CO. v. FARMER', 1910 S C 519:5 Tax Cas 529, but with a view to bringing into existence an asset or an advantage for the enduring benefit of the trade. The majority of the Law Lords held that without the contribution the fund could not have come into existence at all, and that the object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff. So it was held that the expenditure in question was in the nature of capital expenditure, and that the deduction of the amount from profits although not expressly prohibited by the English Act had been rightly held by the Court of Appeal not to be admissible.

(28) As distinguished from the case of buying an asset or purchasing an enduring advanage as in 'BRITISH INSULATED & HELSBY CABLES v. ATHERTON', (1926) A C 205, there is the case of the removal of the possibility of a recurring disadvantage illustrated by 'B. W. NOBLE LIMITED v. MITCHELL'.; 'MITCHELL v. B. W. NOBLE LIMITED', (1926) 11 Tax Cas 372. This latter was a case in which the question arose whether a certain payment made to a retiring Director who had been dismissed by the Company in order to avoid publicity injurious to the Company's reputation was or was not expenditure of a capital nature. Rowlatt, J. in the first instance and the Court of Appeal presided over by Lord Hanworth, M.R. in confirmation of Rowlatt, J. held that the amount was not in the nature of capital expenditure.

(29) A similar result was reached in the case in 'ANGLO-PERSIAN OIL CO. LTD. v. DALE (H. M. INSPECTOR OF TAXES)', (1932) 16 Tax Cas 253 where the facts were as follows:

> "By agreements made in 1910 and 1914 the Appellant Company appointed another limited company as its agents in Persia and the East for a period of years, upon the terms (inter alia) that the agents should be remunerated by commission at specified rates.
> With the passage of time the amounts payable to the agents by way of commission increased far beyond the amounts originally contemplated by the Company, and after negotiation between the parties, the agreements were cancelled in 1922, the agent company agreeing to go into voluntary liquidation and the Company agreeing to pay to the agents £ 300,000 in cash. This sum was in fact paid and the Company contended before the Special Commissioners that it was an admissible deduction in computing the Company's profits for purposes of Income Tax and Corporation Profits Tax.
>
> The Special Commissioners rejected this contention and the Company appealed".

Rowlatt, J. in the first instance and the Court of Appeal presided over by Lord Hanworth, M.R., in confirmation of Rowlatt, J.'s decision held that the payment to the agents was not in the nature of capital expenditure but was an admissible deduction for purposes of Income Tax and Corporation Profits Tax. The case in 'BRITISH INSULATED & HELSBY CABLES v. ATHERTON', (1926) A C 205, is referred to in the judgment of Rowlatt, J. at page 262 of the Report as follows:

> "But to say that it is a capital expenditure because it secured an enduring benefit by getting

rid of an onerous contract is not to state the material thing; and it is completely inconclusive.

"I think I know where that phrase comes from, and that is from the speech of Lord Cave in the case of 'ATHERTON v. BRITISH INSULATED & HELSBY CABLES LTD.', (1926) A C 205 which is reported in (1926) 10 Tax Cas 155 at p. 192, where he said this: 'when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade,' then it is capital. But the fallacy is in the use of the word 'enduring'. What Lord Cave is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures; not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment. It means a thing which endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures. I think that the Commissioners, with great respect, have been misled by the way in which they have taken 'enduring' to mean merely something that extends over a number of years".

From the foregoing, it will be seen that we have the "once and for all test" of Lord Dunedin in 'VALLAMBROSA RUBBER CO. v. FARMER', (1910) S C 519:5 Tax Cas 529, the "lasting advantage" or "enduring benefit" test of Viscount Cave, L.C. in 'BRITISH INSULATED & HELSBY CABLES v. ATHERTON', (1926) A C 205, and the permanent improvement test of Lord MacMillan in the Privy Council case in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) A C 368 (PC). Besides these tests, it will be seen from a careful perusal of the two dissentient judgments of Lord Carson and Lord Blanesburgh in 'BRITISH INSULATED AND HELSBY CABLES v. ATHERTON', (1926) A C 205, that there are just one or two more tests which may also have to be borne in mind. The speech of Lord Carson dealing with the fund in question before the House of Lords contains this observation a page 225 of the report:

"It is clear from the terms of the trust deed, as already pointed out, that in no sense was the sum an investment, that it would be eventually exhausted in payment of the pensions, and that in the event of a winding up of the company it could never form any part of the assets of the company".

The tests suggested by the observation are, (i) whether the sum in question is one which gets eventually exhausted over payments required to be made for the actual working of the business, and (ii) whether in the event of a winding up of the company the sum in question could ever form any part of the assets of the company. Then to turn to the speech of Lord Blanesburgh the same considerations are brought out at page 236 of the Report. After pointing out at an earlier page (233) in terms of Lord Loreburn's statement of the law in the case of 'USHER; USHER'S WILTSHIRE BREWERY v. BRUCE', (1915) A C 433 that:

"profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it, subject to the limitations prescribed by the Act"—

a statement of the law which is not dissimilar to what has been quoted by me earlier from the House of Lords case of 'COLTNESS IRON CO. v. BLACK', (1881) 6 A C 315, the noble and learned Lord observes thus at page 236:

"In no sense of the word 'capital', circulating, working or fixed, did this expenditure involve any withdrawal. It was made out of gross receipts in a year in which, working capital and, a fortiori, fixed capital, remaining intact, a large surplus still emerged. Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the company of the nature of a fixed capital asset or any other. The learned Lord Justice (Scrutton, L.J.) does not more closely describe this so-called asset or, fixed though it was, did he attach to it a name by which it could be recognized. He did not suggest that it resulted in an enhanced goodwill. He could not, in my judgment, have done so with reason, because it has never, I think, even been suggested that a contented personnel is an element in goodwill, whatever else it may be. In that state of things, it has occurred to me, my Lords, that the existence or non-existence of this so-called asset might fairly be submitted to the prosaic test of asking what in a liquidation would be forthcoming in respect of it when a liquidator essayed his statutory duty to realize the company's assets and divide the proceeds amongst his constituents. Certainly no part of the fund. That in its entirety is completely alienated. And I can myself think of nothing else".

That the lasting advantage or enduring benefit to the company which is propounded as the test by Viscount Cave, L.C. has to be regarded from the standpoint of its relation to the fixed capital of the company, is the point of Lord Blanesburgh's observation which I have quoted. If the expenditure in question in any relevant sense creates a new asset of the company in the nature of a fixed capital asset or any other, then the expenditure is in the nature of capital expenditure according to Lord Blanesburgh, and then it will be within the ambit of the process of distribution in a liquidation of the company's assets, not otherwise. While creating a new asset in the nature of lasting advantage or enduring benefit to the company, the expenditure in order not to be entitled to the deduction contemplated by the Income-tax Act must according to Lord Blanesburgh result in the creation of an asset in the nature of a fixed capital asset or any other.

(30) I may add in this connection that there is just another test suggested by 'HIGHLAND RAILWAY CO. v. BALDERSTON', (1889) 16 R. 950:2 Tax Cas 485, a case decided in Scotland in the court of Exchequer, First Division. In that case, there was an acquisition by a railway company of a certain section of the railway line which they needed to bring up to the standard of the rest of the main line in their ownership to make of the whole thing a continuous railway line. There was also certain expenditure incurred over the alterations of the main line itself. The expenditure under the two heads was shown in the account books of the company as capital expenditure. The contention however was that it was in the nature of expenditure chargeable against income. The contention was overruled. The Lord President (Inglis) observes thus with reference to the way in which the account books deal with the expenditure:

"I think it is a pretty good indication to the Commissioners upon their part that they could not properly make it a charge against income at all. At the same time, although this is the condition of the Appellant's books, I do not by any means say that it is conclusive, if they can show what they have made a charge against capital ought really to have made against income,

and properly constitutes a charge against income, and therefore the question remains for consideration whether these charges as described in their book could with any propriety be dealt with otherwise than they have dealt with them themselves".

So, Lord Mure observes at page 489 of the Report:

"It is certainly a remarkable fact that these charges are entered against capital in the company's books. I agree with your Lordship that that is not conclusive of the question, but it cannot be thrown altogether out of view".

With reference to the first head of expenditure it was held to be of a capital nature for the reason that what was paid for the Sutherland and Caithness line which had to be brought up after the purchase to the standard of the main line was something lower than what would have had to be paid, had the line acquired been in perfect condition. The Lord President observes at page 487 bottom and 488 top thus:

"It appears to me, therefore, that they must have purchased or acquired this Sutherland and Caithness line at a lower figure than it would otherwise have brought in consequence of its being in that imperfect condition; and if they did so it appears to follow of necessity that the renewal of improvement of this Sutherland and Caithness line to bring it up to the proper standard is just part of the cost of that line to work along with the main line. If it had been brought up to that standard before they bought it, they would have had to pay so much the more for it; and finding it in that condition, and knowing that they could not use it in connection with the main line without expending this large sum of money upon it, just shows that, although it cannot be said in a proper sense to be part of the price of the line, it is certainly part of the cost of acquiring that line to be wrought along with the main line".

Then with regard to the alterations in the main line itself it is pointed out by the Lord President further down at page 488 of the Report:

"..it must be kept in view that this is not a mere relaying of the line after the old fashion; it is not taking away rails that are worn out or partially worn out, and renewing them in whole or in part along with the whole line. That would not alter the character of the line; it would not affect the nature of the heritable property possessed by the Company. But what has been done is to substitute one kind of rail or another, steel rails for iron rails. Now that is a material alteration and a very great improvement on the corpus of the heritable estate belonging to the Company, and so stated is surely a charge against capital".

From the foregoing, it seems to me that the entries in the account books of the assessee as showing expenditure either under the head of capital expenditure or under the head of revenue expenditure are 'prima facie', though not conclusive, evidence of the character of the expenditure in question in any particular case. Further, it also follows from the quotations that I have made that where the price paid for the acquisition of an asset is something lower than what it would have been, had the asset been in perfect condition, any improvement of the asset in order to repair the deficiencies of the condition in which it was purchased would be in the nature of capital expenditure. Further again, where the heritable corpus of a company is so far improved that in quality or calibre something better replaces it, that is a material alteration which is in the nature of capital expenditure.

(31) The variety of tests suggested by the case law so far discussed only indicates how true it is — what the Master of the Rolls observed in 'GOLDEN HORSE SHOE (NEW) LD. v. THURGOOD', (1934) 1 KB 548:

"The test of circulating as contrasted with fixed capital is as good a test in most cases to my mind as can be found; but that involves the question of fact; was the outlay in the particular case from fixed or circulating capital?

After careful consideration of the present case, in the course of which my mind was fluctuated on either side, I think it is to be decided upon its own facts — that none of the tests suggested afforded a strict rule of guidance."

In the case in 'GOLDEN HORSE SHOE (NEW) LD. v. THURGOOD', (1934) 1 KB 548 the facts were as follows: A company which was formed for the purpose acquired the right to take away and retreat very large dumps of residual deposits resulting from the working of a gold mine and called "tailings". These tailings were known to contain a certain amount of gold, and by a new process of treatment some of this gold was recovered and sold. Finlay, J. on those facts posed the question for determination at page 555 of the Report as follows:

"Was it (the sum paid for the tailings) like money used to acquire a mine which was to be worked, in which case it was clear that it would not be deductible; or was it like money which a draper expended in order to stock his shop, in which case it would be clear that it would be deductible."

Finlay, J. concurring with the Commissioners held that it was not deductible. The company appealed, and the Court of Appeal presided over by Lord Hanworth M. R. reversed Finlay, J. In so doing, the Learned Master of the Rolls referred to a number of cases on the subject including the case in 'COLTNESS IRON CO. v. BLACK', (1881) 6 AC 315 which I have already discussed in the foregoing, and wound up the discussion with what I have just quoted from his judgment. In my opinion, no particular test can be regarded as sufficient by itself for the purpose of the determination of each and every case; nor are we to suppose that the tests propounded by the majority of the Law Lords in 'BRITISH INSULATED AND HELSBY CABLES LTD. v. ATHERTON', (1926) AC 205 are entitled to greater weight than the tests suggested by the minority of the Law Lords in that case. In relation to each particular case it may be that one or more particular test or tests necessarily appeal to one's mind as the thing or things of predominant significance and therefore most relevant and conclusive. That is why Costello, J. in his judgment in 'IN RE IMPERIAL CHEMICAL INDUSTRIES (INDIA), LTD.', 62 Cal 87 in which his colleague Lort-Williams, J. concurred, after quoting from Lord Hanworth M. R.'s judgment in 'GOLDEN HORSE SHOE (NEW) LD. v. THURGOOD', (1934) 1 KB 548 observes as follows:

"That is only to say once more that the matter really resolves itself in the last resort into question of fact in each particular case, and there is no sure touch-stone which can be applied universally to solve a problem of the kind involved in the present proceedings."

(32) In this connection, I may also advert to a case of this court reported in 'RATAN SINGH v. COMMISSIONER OF INCOME-TAX', 2 ITC 294 (Mad) which was originally dealt with by Sir Murry Coutts-Trotter, Kt. C. J. and Beasley, J. as an Original Side Appeal from the judgment of Kumaraswami Sastri, J. and later dealt with by those two learned Judges as well as by Curgenven, J. on a reference by the Income-tax Commissioner. That

was a case in which clause (ix) which corresponds to the present clause (xv) of sub-section (2) to Section 10 of the Act came up for consideration and treatment in relation to the facts of the case there thus:

"A much more difficult point is raised with regard to the second matter which relates to certain items which were disallowed by the income-tax authorities as being of the nature of capital expenditure which is excluded from deduction by section 10(2)(ix). That sub-section allows any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits or gains of the business. The latter comes to a total of Rs. 3,296-2-2, and it seems reasonably clear that the first three items were additions to the machinery and plant used by the firm, which can clearly be classed under the head of capital expenditure."

So far the point of view suggested by the learned Judges seems, if applied to the present case, to make of the purchase of the boiler an addition to the machinery which is to be classed under the head of capital expenditure. There occurs afterwards in the judgment a further observation in relation to other items of expenditure thus described:

"The largest item is one of Rs. 1,925, which is described as the cost of an old car purchased from Tirali Srinivasa Aiyangar. The evidence of the assessee about that, which seems to have been accepted, is that he bought the car not to use it as a car but to resolve it into its component elements and use the parts for casual repairs to his existing fleet of cars. The remaining items are for the renewal of various parts of the cars actually engaged in the business of the assessee."

Dealing with the case of these items from the standpoint of section 10, sub-section 2, clause (v) the learned Judges say:

"It is obviously arguable that most of the repairs in this case can be described as current repairs though of course the matter is one of degree. If a carburetter of a motor car ceases to function, we should incline to the view that the renewal of the carburettor in order to enable the car to keep the road is properly described as a running repair. On the other hand, if a car, as a result of an accident, has nothing left but a wheel and everything else had to be renewed, clearly the sensible view would be that the renewal of the car could only be described as 'an increase of capital'. But apart from that, we have the provision of sub-section (2)(ix) which speaks in general terms of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. Without committing ourselves to a view as to what are current repairs within the meaning of clause (v), we think it reasonably clear that the cost of repairs set forth in the list that was handed up to us must be treated as an expenditure incurred for the purpose of earning the profits or gains of the business, and we do not think that it can properly be treated as capital expenditure which is excluded from the operation of clause (ix)."

This part of the judgment which deals with the question of the application of Section 10, sub-section (2), clause (v) I need not dilate upon as I have already considered the question in the present case with reference to this statutory provision and come to the conclusion that the repair in question here which is the replacement of the old worn out boiler by a new one cannot be regarded as current repair because the old boiler had not ceased to function altogether by the time that it came to be replaced by the new one. The thing that matters, in this judgment in 'RATAN SINGH v. COMMISSIONER OF INCOMETAX', 2 ITC 294 (Mad) for the further purpose of the present case is really what I have already set forth and remarked about, namely, the passage relating to the first three items which were additions to the machinery and plant used by the firm and which the court held liable to be classed under the head of capital expenditure. Curgenven, J., the third Judge, who dealt with the matter on reference refers to the questions formulated by the Income-tax Commissioner as follows:

"(1) Whether the substitution of new parts in the place of old and worn out ones in the machinery is capital expenditure, or is it in the nature of repairs or revenue expenditure, and
(2) Whether such replacements are not in the nature of working expenses under Section 10 (2)(ix) of the Indian Income-tax Act."

Then he proceeds to observe:

"The answer to both these questions depends upon the primary question, whether the expenditure is in the nature of revenue expenditure. I would say in reply to the first question, that ordinarily the substitution in a machine of new parts for old and worn out parts is in the nature of repairs or revenue expenditure. This is quite evidently true of the substitution, e.g., of new tyres for old and worn out tyres in a motor car. But the statement needs to be qualified in some manner, because it is clear that by successive substitutions, an old motor car might be converted into a new one and that process would really be equivalent to selling the old car and buying the new one, a matter of capital expenditure. The question is really one of degree and it may perhaps be said that the cost of any substitution of new parts which substantially change the identity of the machine, effect a substantial improvement or result in a substantial extension of the period of the serviceableness, would be capital rather than revenue expenditure. But even such tests as these are not absolute, and the question whether any given item of expenditure is of the one or the other kind can only be answered on a consideration of the circumstances, is, in other words, and in other than extreme cases of misapplication of principle, a question of fact. The same remark applies, in my view, to expenditure not being in the nature of capital expenditure, which may be allowed for under clause (ix)."

It is contended by Mr. Rama Rao Sahib for the Department that applying the tests of Curgenven, J. in the passage quoted the sum spent over the purchase of the new boiler in replacement of the old changed the identity of the machine, effected a substantial improvement and resulted in such substantial extension of the period of serviceableness as to be liable to be regarded as capital rather than revenue expenditure according to the test of Curgenven, J. irrespective of the superiority of quality of the new boiler as compared with the old. I am not satisfied, I must say, that any change in the identity of the machine has come about within the language of the test of the learned Judge by reason of the sum so spent. The argument of learned counsel that the expenditure has resulted in the kind of substantial improvement or substantial extension of the period of serviceableness contemplated by the learned Judge seems however to stand on a different and stronger footing. The view of the two other Judges who dealt with the matter on the Original Side Appeal and affirmed the opinion therein expressed in their judgment after the reference seems to my mind to be even more favourable to the contention of learned counsel, because

dealing with the items relating to additions to machinery and plant, as I have already stated, those learned Judges held that they could be classed under the head of capital expenditure.

(33) This view resulting from the application of 'RATAN SINGH v. COMMISSIONER OF INCOME-TAX', 2 ITC 294 (Mad) to the case on hand is also on the whole in accord with the English authorities to which I have already referred, and I should, pausing there, give effect to it. The only question however remaining is whether the substitution of the new boiler for the old which undoubtedly has extended the period of serviceableness is to be regarded as not capital expenditure for the reason that according to the test of Lord Macmillan in the case in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 the replacement has only resulted in the restoration of the machinery to its original condition and not in an improvement of it in quality or calibre. Right or wrong, it is true that a Privy Council decision was bindng authority on Courts in India till the other day when the Constitution came into force. It is true too that, right or wrong, a Privy Council decision remains of great weight as persuasive if not binding authority, notwithstanding the Constitution. I am however not prepared to follow the case in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', (1933) AC 368 (PC) as concluding the matter before me for more reasons than one. In the first place, it does not appear in the P. C. case that the new materials supplied in place of the old were in replacement of old ones after they had become completely worn out and unfit for use. A general scheme of renewal seems to have been undertaken by the Railway Company in that case which included the supply of new rails, sleepers and fastenings wherever found necessary by the Railway Company. New things were used in place of the old ones for about half the line renewed, and the renewal seems to have brought back the worn track to a normal condition, and as renewed it was not capable of giving more service than the original line. That state of facts, to my mind, raises the question of law in a different form to the one which arises here for consideration. Here the boiler became completely worn out and could no longer be used. Moreover, in the Privy Council case if the sums spent could really be regarded as for repairs within one part of the Proclamation there in question, they would according to the reasoning of their Lordships certainly stand excluded from the sphere of capital expenditure in relation to the other part of the Proclamation. That was the way in which the Privy Council dealt with the matter of the two parts of the section of the Proclamation together, and arrived at the conclusion that the renewals were repairs within the meaning of S. 15, sub-section 1(b) of the Proclamation and the cost of them did not constitute an outgoing of a capital nature within the meaning of section 15, sub-section 1(a).

In the present case, the fact that the cost of the new boiler is not, within 'current repairs' of one part of the statute does not necessarily involve that it is or is not of a capital nature within the other part of the Statute. The latter question has to be considered on its own merits, and considering it so, and applying the principles of the English cases in 'O'GRADY v. BULLCROFT MAIN COLLIERY LTD.', (1933) 17 Tax Cas 93 and 'MARGRETT v. LOWESTOFT WATER & GAS CO.', (1935) 19 Tax Cas 481 as well as of the Madras case in 'RATAN SINGH v. COMMISSIONER OF INCOME TAX', 2 ITC 294 (Mad) I am of opinion that the Reference at the instance of the Dept. should succeed. The present case is on the whole, in my opinion, more analogous to the case of chimney in 'O'GRADY v. BULLCROFT MAIN COLLIERY LTD.', (1933) 17 Tax Cas 93 and to the case of the reservoir in 'MARGRETT v. LOWESTOFT WATER & GAS CO.', (1935) 19 Tax Cas 481 than to the case of the railway rails and sleepers in 'RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', 1933 AC 368, which as already noticed in the course of this judgment followed and applied the principles laid down in 'HIGHLAND RAILWAY CO. v. BALDERSTON', (1889) 2 Tax Cas 485, a decision which I have also separately discussed in detail in the foregoing. It is also worth noticing that the Privy Council decision does not refer to the precise test of Viscount Cave in 'BRITISH INSULATED AND HELSBY CABLES v. ATHERTON', (1926) AC 205, as the one which governed the matter before their Lordships. In fact the P. C. decision does not even so much as refer to the House of Lords' decision. After a careful study of the two decisions in 'BRITISH INSULTED & HELSBY CABLES v. ATHERTON', and RHODESIA RAILWAYS v. INCOME-TAX COLLECTOR, BECHUANALAND', 1933 AC 368, I feel clear that the test suggested by the latter is not identical with the one laid down by the majority of the Law Lords in the former. The lasting advantage or enduring benefit test of Viscount Cave, one of the majority Law Lords, seems to my mind to be sufficiently satisfied in the present case by the replacement by the new boiler of the old worn out boiler rendered completely unfit for further use. The permanent improvement test of Lord Macmillan which suggests that the new boiler ought to be of superior quality to the old is not, in my opinion, within either the express language or the necessary implication of Viscount Cave's test, nor is it applicable to the case before us, consistently with Viscount Cave's more general test notwithstanding that here the new boiler served merely to ensure the functioning of the business on the same degree of efficiency as before the replacement. Lord Macmillan seems to have propounded the true test applicable to the case before the Privy Council in a rather qualified form conceived in due relation to the facts of that case and to the language of the enactment there under consideration. That apparently is the reason why His Lordship does not refer at all to the authority of 'BRITISH INSULATED AND HELSBY CABLES v. ATHERTON'. In His Lordship's opinion on the facts of the case before the Privy Council the test which applied was the one which His Lordship deduced from 'HIGHLAND RY. CO. v. SPECIAL COMMISSIONERS OF INCOME-TAX', (1889) 2 Tax. Cas. 485 with which I have already dealt.

(34) In the light of all this discussion of the law on the matter, the finding of the Appellate Tribunal that the boilers were part of a unit of the machinery required for the manufacture of sugar and so could not be treated as a separate unit by themselves is of no materiality whatsoever even if well founded. It may be that as Mr. Subbaraya Ayyar has rightly pointed out the entire sugar works is treated as a single unit or class of asset for the determination of the allowance under the head of depreciation contemplated by S. 10, Sub-section 2 (6) of the Act. (Vide page 306 of the Income-tax Manual issued by authority of the Central Govt. 10th Edn. Parts II and III). But that, in my opinion, does not throw any light on the question whether for the purpose of the applicability of S. 10(2), clause (XV) of the Act the boiler can or cannot be regarded as a separate divisible unit. Nor is it material that as found by the Tribunal the replacement of the old boiler is by a new one just

having the same pressure which the old one possessed when it was new and doing the same work which the old one was doing previously to its deterioration. The new boiler has come in substitution for the old boiler which was part of the fixed capital of the company and therefore partakes of the character of such capital. It may or may not be of superior quality or calibre to that of the old boiler, but it certainly has resulted in a substantial extension of the period of the serviceableness of the machinery and in the creation of an asset of lasting advantage or enduring benefit to the company in the nature of a fresh fixed capital asset. As pointed out in the Law and Practice of Income-tax by Kanga and Palkhivala, page 328:

> "An item of disbursement may be regarded as capital expenditure when it is referable to fixed capital or capital assets; it is revenue expenditure when it is referable to circulating capital or stock-in-trade".

In the same work, miscellaneous instances of capital expenditure are noticed by the authors at page 341, amongst which the cost of fitting machinery, the cost of equipment and apparatus, the cost of constructing a new reservoir are also included.

(35) Having prepared the above as my judgment, I have had the opportunity of since looking into the judgment of my learned brother just delivered, to which, I have given my careful and respectful consideration. I have however for the reasons given in the forgoing, although not without regret that I am differing from my learned brother, arrived after an anxious consideration of the whole matter, at the conclusion that the assessee is not entitled to the deduction claimed by him. It is true that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden upon him. On the other hand, it is equally true that tax and equity are strangers, and an equitable construction cannot be put upon the words of a taxing statute, which is not justified by accepted canons of legal interpretation of such words. For the reasons given in the foregoing, I answer the question referred in the affirmative.

(36) SATYANARAYANA RAO J:- As there is a difference of opinion between us, my judgment which agrees with the opinion of the Tribunal prevails under S. 98 C. P. C. read with S. 66A of the Income-tax Act.

A/CRK/KS Answer in the negative.

A. I. R. 1952 MADRAS 704

CHANDRA REDDI J.

Palakkadvath Chanthu's children Achuthan and others, Appellants v. Poothakandiyil Choyi, Respondent.

A. A. A. O. No. 117 of 1950, D/- 29-11-1950.

Tenancy Laws — Malabar Tenancy Act (14 (XIV) of 1930), S. 3 (j) — Intermediary — Usufructuary mortgagee parting with part of mortgaged property — If entitled to benefits of Madras Tenants and Ryots Protection Act (24 (XXIV) of 1949) as amended by Mad. Act (8 (VIII) of 1950).

Section 3 (j), Malabar Tenancy Act applies only to a case where the mortgagee has parted with possession of the entire extent of land mortgaged to him and does not cover a case where only a portion of the property mortgaged to him is transferred. Hence a usufructuary mortgagee who has parted with a portion of the mortgaged property is not an intermediary within the meaning of S. 3(j) so as to be entitled to the benefits of the provisions of Madras Tenants and Ryots Protection Act, 1949 as amended by Madras Act VIII of 1950.

(Paras 11, 13, 14)

K. Bhashyam and M. C. Sridharan, for Appellants; Advocate-General and K. N. Karunakaran, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras.

('43) 1943-2 Mad LJ 642: (AIR 1944 Mad 164) 10

('44) C. M. A. No. 367 of 1944 (Mad) 10, 11

('44) C. M. S. A. No. 207 of 1944 (Mad) 10

JUDGMENT: The main question that falls to be decided in this case is whether the usufructuary mortgagee who parted with a portion of the mortgaged property is an intermediary within the meaning of Cl. (j) of S. 3 of the Malabar Tenancy Act so as to be entitled to the benefits of the provisions of Act 24 of 1949 as amended by Act VIII of 1950. The judgment-debtors in O. S. No. 309 of 1942 are the appellants in the appeal.

(2) The circumstances that culminated in this Civil Miscellaneous Second Appeal may be briefly mentioned. The respondents herein filed a suit O. S. No. 309 of 1942 for redemption of the usufructuary mortgage created by them in favour of the appellants. The suit was contested on various grounds but ultimately it was decreed and the time for redemption was fixed. While this matter was pending appeal in this Court, an attempt was made to have the proceedings in appeal stayed by making a deposit under S. 4 of Act 24 of 1949. But it proved infructuous as no deposit was made in time as contemplated by provision of that section. Ultimately when the plaintiff decree-holder levied execution the appellants applied for stay of execution of the decree under S. 4 (1) of the Act 24 of 1949.

(3) This was opposed by the decree-holder on the ground that the provisions of S. 4 (1) of Act 24 of 1949 as amended by Act 8 of 1950 have no application to a decree for redemption of the usufructuary mortgage, that the judgment-debtor having only sub-mortgaged a portion of the property mortgaged, this case is not governed by the provisions of S. 4 (1) of Act 24 of 1949 or sub-sections (2-A) or (2-B) of S. 4 as amended by Act 8 of 1950 as they apply only to a case where the usufructuary mortgagee has leased out the property to a third party and that in any event the judgment-debtor is not entitled to the benefit of the Act as he has not parted with the entire extent of land mortgaged to him and therefore does not come within the meaning of "intermediary" under S. 3 (j) of the Malabar Tenancy Act. These objections found favour with the trial Court which dismissed the application of the judgment-debtors for a stay of execution of the decree.

(4) On appeal the District Judge while upholding the contention of the judgment-debtor that the provisions of sub-sections (2-A) or (2-B) of S. 4 of Act 24 of 1949 are applicable to a decree for redemption of the mortgage confirmed the decision of the trial Court agreeing with his reasoning on other aspects of the case. The present appeal is filed against the decree and judgment of the District Judge.

(5) In this appeal Mr. K. Bashyam, the learned counsel for the appellants, raised three contentions. First is that the lower Court, having held that the trial Court erred in assuming that the usufructuary mortgagee has only sub-mortgaged the property, proceeded on the basis that the provisions of these enactments have no application to the case of a sub-mortgage without either considering himself that point on the material on record or calling for a finding. It was next argued that even assuming that the judgment-debtor only sub-mortgaged the property mortgaged to him still the appellant could claim relief under the provisions of Act 24 of 1949 as he comes under the definition of an intermediary. And lastly he contended that the expression "such possession" in the definition of "intermediary" in clause (j) of S. 3 of the Malabar Tenancy Act covers not only the case where a mortgagee has parted with the possession of entire extent of the land mortgaged to him but the case of a mortgagee who has transferred only a portion of the land. According to him the expression "such possession" does not refer to the extent of the possession but only to the nature of the possession.

(6) On the other side the learned Advocate General seeks to support the judgment of the Courts below on alternative grounds, namely, that the provisions of sub-sections (2-A) or (2-B) of S. 4 as amended by Act 8 of 1950 have no application to a decree for redemption of the usufructuary mortgage.

(7) I shall first take up the last argument of Mr. Bashyam, the learned counsel for the appellants, as that will dispose of this appeal. An answer to this question depends upon the interpretation to be put to the expression "such possession" in the definition of an intermediary in S. 3 (j) of the Malabar Tenancy Act.

(8) Mr. Bashyam urges that the expression "such possession" can only have reference to the kind of possession which the mortgagee himself had and cannot refer to the entire extent of the land. I am not able to understand what the nature of possession can mean in that context. It can only have reference to the extent of the land which is in his possession. In order to appreciate the relative contentions of the parties it is useful to set out the relevant provisions of the S. 2 of the Madras Act 24 of 1949. Section 2 (b) of the Act says:

"The expressions 'Eviction', 'Holding', 'rent' and 'tenant' shall in relation to cases governed by the Malabar Tenancy Act 1929 have the same meanings respectively as in that Act."

Now I shall refer to definition of tenant as given in the Malabar Tenancy Act.

" 'Tenant' means any person who has paid or has agreed to pay rent, or other consideration, for his being allowed by another, to enjoy the land of the latter and includes an intermediary, a Kanamdar, a Kuzhikanamdar and a verumpattamdar of any description."

Intermediary is defined in clause (j) of the same section as

"any person who not being a jenmi, has an interest in land, and is entitled, by reason of such interest, to possession thereof, but has transferred such possession to others."

(9) Mr. Bashyam contends on this point that the expression "transferred such possession to others" can only mean 'transferred such kind of possession to others which he himself had in it", and therefore it is not necessary in order to get the benefits of the Act, that the person who had an interest in the land and entitled by reason of such interest to possession thereof to part with the possession of all the land that was in his possession.

(10) For the other side, the learned Advocate General urges that the expression "has transferred such possession" cannot apply to the case where the mortgagee with possession has transferred possession of only a part of the property usufructuarily mortgaged to him. In support of these arguments he relies upon three decisions of this Court. They are 'PATILLATH KARNAVAN v. NARAYANA', 1943-2 Mad LJ 642, and an unreported decision of a single Judge of this Court in C. M. A. No. 367 of 1944, and a connected 'C. M. S. A. No. 207 of 1944'. In 'PATILLATH KARNAVAN v. NARAYANAN NAMBOODIRI', 1943-2 Mad LJ 642, Wadsworth and Patanjali Sastri JJ. held that the words "is in possession of the property mortgaged" in S. 10 (2) of the Madras Agriculturists Relief Act can only mean is in possession of the entire extent of the property mortgaged and even if a very small portion of the property mortgaged was not delivered to the mortgagee it was not a usufructuary mortgage which would attract the provisions of S. 10 (2) of the Act and therefore the mortgagor was entitled to the benefits of the Madras Agriculturists Relief Act.

(11) In the unreported decision in 'C. M. A. No. 367 of 1944' Kuppuswami Aiyar J. held that an assignor of a portion of the Kanam property was not entitled to a renewal of the Kanam. On the analogy of these decisions, the Advocate-General maintains that unless the usufructuary mortgagee has parted with the possession of the entire property he will not be an intermediary within the meaning of clause (j) of S. 3 of the Malabar Tenancy Act. The principle underlying these decisions renders this interpretation more acceptable. Further an analysis of provisions of clause (j) leads me to the conclusion that unless the mortgagee parts with possession of the entire extent of land he would not come within the purview of that clause

(12) A person is an intermediary within the meaning of clause (j) who not being a jenmi has an interest in the land and is entitled to possession of such land by virtue of his interest but transferred such possession to others. That it covers the case of an usufructuary mortgagee does not admit of any doubt. But when does he become an intermediary as defined in that clause? In other words what is the connotation of the words "such possession"? They can only mean the possession of the land which he himself is entitled to. Since he is entitled to the possession of all the land mortgaged to him, the expression can have reference only to the entirety of the land to the possession of which the mortgagee is entitled by virtue of the interest which he has in the land.

(13) If the legislature intended to apply this to a case of transfer of a portion of interest which the mortgagee has in the lands mortgaged to him it would have certainly made specific provision for that purpose as is done in some of the sections of the same Act. In this connection the learned Advocate General drew my attention to the definition of holding in

clause (h) in Malabar Tenancy Act which specifically provides for a portion of the holding and also to Ss. 14, 20 and 33, which contain a reference to portions of a holding, and argues tnat as in those cases specific provision for transfer of a portion or part of such property mortgaged would have been made if it was meant to include within the ambit of the clause mortgagees who have parted with a portion of the mortgaged property. It is manifest from this sub-clause and from reference to the scheme of the Act that it applies only to a case where the mortgagee has parted with possession of the entire extent of land mortgaged to him and does not cover a case where only a portion of the property mortgaged to him was transferred. If I accept the contentions sought to be placed by Mr. Bashyam on clause (j) of S. 3 it will lead to the frustration of the very object of the enactment. The usufructuary mortgagee by transferring a small fraction of the property mortgaged to him may claim the benefit of the provision of this Act which does not seem to have been intended to be conferred upon such persons. No doubt a Court has to give effect to the provision of enactments irrespective of a consideration of the hardship involved to the persons affected thereby but a Court will not be justified in enabling persons to circumvent the provisions of the Act and get undeserved benefit by placing strained construction. I do not think I will be placing reasonable interpretation on the words "who has transferred such possession to others" if I should hold that it includes a usufructuary mortgagee who has parted with a portion of the property mortgaged to him.

(14) I, therefore, should hold that the conclusion of the Courts below that the judgment-debtor is not entitled to any relief under the provisions of Act 24 of 1949 as amended by Act 8 of 1950 is correct and ought to be affirmed. In this view of the matter it is not necessary for me to go into other contentions raised on behalf of the respondents or the appellants.

(15) The Civil Miscellaneous Second Appeal fails and is dismissed with costs. No leave.

C/C.R.K./K.S. Appeal dismissed.

A. I. R. 1952 MADRAS 706

SATYANARAYANA RAO AND RAGHAVA RAO JJ.

P. B. Krishnamachariar and others, Appellants v. G. N. Ramabadran and others, Respondents.

Appeal No. 521 of 1947, D/- 6-12-1950.

(a) Hindu Law — Widow — Alienation — Legal necessity — Obligatory and optional acts — Doctrine of moral obligation of last owner becoming legal obligation in hands of limited owner — Marriage and nuptial of daughter's daughter are legal necessity — Reasonable expenses are justified.

A limited owner like the widow inheriting her husband's estate or a daughter inheriting the father's estate may alienate the property purely for secular purposes or for religious or charitable purposes. To support the alienation for secular purposes, the necessity for such an alienation or the benefit to the estate conferred by it must be established. The religious and charitable purposes are divided into two categories the 'nityakarma' or obligatory acts and 'kamyakarma' or optional acts. The obligatory religious duties are the obsequies and the periodical ceremonies such as the annual ceremonies of the last male-holder, the performance of which cannot be dispensed with. In respect of such acts, if the income from the estate is inadequate to meet the expenditure, the limited owner is entitled to sell the whole of the property if necessary as the duties must be performed. As regards non-obligatory or non-essential acts, it is not incumbent on the limited owner to perform them. They are not indispensable acts or duties but the performance of such acts if commended as they would confer 'punya' or spiritual benefit and are conducive to the bliss of the soul of the deceased. In respect of such acts, however, the power of the limited owner is not as large as in the case of indispensable acts. In such case, the sale or other alienation cannot be upheld unless it is reasonable in the circumstances of the family and the properties sold bear only a small proportion to the property inherited from the last owner. The obligations which the last owner would have been only morally bound to discharge may become legal obligations in the hands of the limited owner who inherits the estate. The terms, necessity and benefit, must therefore be confined to alienations made by a limited owner for what are termed secular or worldly purposes. The alienations however for spiritual necessity can be justified only either if they were made for meeting the indispensable acts or duties which must be performed such as the 'shraddah' ceremonies or the marriage of the daughter and the like or even if they were made for securing the merit or spiritual bliss to the deceased in the other world, it must be shown that the extent alienated was a reasonable portion of the property inherited.

The reasonableness, of course, must be decided according to the circumstances of the family. The limited owner, even in respect of non-obligatory duties is not required to keep herself inactive and is not prevented from making any attempt to contribute for the spiritual welfare of the deceased if the estate permits. The persons who were dependants upon the last owner as members of the family and who were poor and were being maintained by the last owner who was under a moral obligation acquire a legal obligation when the estate devolves upon the limited owner. If the daughter's family is indigent, the widow is bound to maintain her and also to perform the marriage of the daughter's daughter and marriage and upanayanam of the daughter's sons and for these purposes would be entitled to alienate a reasonable portion of the property. On the same analogy, the daughter who inherits the father's estate is also empowered to incur debts and alienate property for the purpose of performing the marriage and upanayanam of her own sons and of the marriage of her daughter and even of her grand-daughter. Consequently where the object of the alienation is the performance of marriage and nuptial ceremony of the daughter's daughter, who is indigent, the alienation by the widow would be justified. Case law and Hindu Texts reviewed. (Paras 8, 10, 12)

But the expenditure incurred must bear a reasonable proportion to the estate and

have regard to the circumstances of the family and Hindu notions regarding the propriety of the expenditure. I. L. R. 1942 Mad 42, considered. (Para 13)

Held on facts that having regard to the circumstances that the daughter's marriage and nuptials were performed at a large expense of Rs. 18,000/- in 1910, it could not be said that one third of the amount spent for the marriage and nuptials of her daughter in 1928 was extravagant and did not bear a reasonable proportion to the estate which the widow inherited from her husband. (Para 13)

Raghava Rao, J.: The piety of kanyadana is undoubted and there is no question of any distinction here between an act of piety conducive to the spiritual bliss of the husband and an act of piety conducive to the spiritual bliss of the widow. (Para 22)

The doctrine that a moral obligation on the part of an ancestor becomes a legal obligation of the descent of his estate, on his heir, can only apply to cases where the obligation even as a moral one did arise during the original owner's lifetime. To fasten on the estate in the hands of the heir a liability not in 'esse' but only in 'posse' during the lifetime of the original owner is, to go further than is warranted by the decisions on the subject on the ratio thereof. The principle is, no doubt, one peculiar to Hindu jurisprudence which insists that not merely legal but also moral obligations to the propositus must be fulfilled by the taker of the estate after his death in the interests of his spiritual benefit and welfare. The principle is certainly not one of which the courts ought to fight shy because there is a high liberality of spiritual outlook underlying the doctrine which no Hindu ought by any means to feel abashed about. The principle, however, should not be extended to any merely moral obligation which did not concretely exist during the lifetime of the original owner because the person claiming enforcement of such obligation against the later taker of the estate was not in existence at all during the lifetime of the original owner. Moreover, it is doubtful how far the liability to meet the expenses of marriage and garbhadhanam of a daughter's daughter is to be regarded as within the ambit of a person's moral obligation according to the texts to maintain her during his lifetime. The principle, is one which is or is not to be applied to a particular case according to the view that the Court takes on its own merits. It will have to be determined in each case whether having regard to the relationship, the means and various circumstances of the party claiming maintenance the late proprietor was according to the principles of the Hindu law and to the usage and practice of the Hindu people morally bound to maintain that party. Even assuming a person's liability to meet marriage expenses of his daughter's daughter may be treated as on the same footing as an obligation to merely maintain her, there is, no inexorable logic about the situation that although the daughter's daughter came into being only after the death of the person, his heir or heiress would be bound by the obligation as a legal obligation into which a moral obligation of the person might well become converted on the devolution of his estate on his heir or heiress. The extension of the doctrine in the manner suggested is calculated to introduce sometimes a complication into the situation by reason of too many burdens for the estate to bear coming into existence over an undefined period of time after the death of the original owner against the estate in the hands of the later taker. Far from operating as a rule of spiritual benefit to the original owner, the extension may work, sometimes too much to the prejudice of the later taker to leave him any inducement to minister even to the fundamental spiritual needs of the deceased. (Para 24)

Quantitative ratio test of reasonableness laid down. (Paras 19, 22)

(b) Hindu Law — Widow — Alienation — Duty of alienee — Alienee's duty is to satisfy himself whether there are outstanding debts in fact and whether the purpose of alienation is justified — He need not further see that the expenditure incurred was reasonable.

RAGHAVA RAO, J.: A bona fide alienee from a widow need not go further than to satisfy himself that there were outstanding debts in fact and indeed incurred by the widow as for the marriage and for the later allied ceremony of garbandhana of her daughter's daughter. To call upon him to go further and satisfy himself that the expenditure incurred was one which a court of law would hold reasonable, should the transaction of sale be later challenged, is to impose on him an onerous and undue responsibility not easily feasible of discharge in a matter on which if there were more courts than one dealing with the question they may not for aught one knows find themselves agreeing in the same conclusion. To say that such an alienee must either take the risk of the court deciding adversely to him on the question of the reasonableness of the expenditure or refrain from going in for the property altogether is not a canon of practical justice and equity. Except in a case of proved fraud on the power in the sense of its exercise for a sinister or ulterior purpose or in a case of proved collusion between the alienor and the alienee in order to defeat the reversion, the court ought not, to be astute or anxious to invalidate the transaction. The alienee must stand protected so long as the 'causa causans' inspiring the transaction is an indebtedness for a lawful and binding purpose. (Para 23)

R. Gopalaswami Iyengar and K. R. Krishnaswami Ayyar, for Appellants; K. V. Ramachandra Iyer, for T. L. Venkatarama Iyer and G. N. Rangaswami Iyengar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
(1854-57) 6 Moo Ind App 393: (18 WR 81 PC) 23
(1859-61) 8 Moo Ind App 529 (PC) 8, 19
('22) 44 All 503: (AIR 1922 PC 261) 8, 11, 19
('89) 11 All 194: (1889 All WN 30 FB) 11
('96) 18 All 474: (1896 All WN 155) 11
('90) 17 Cal 373 24
('95) 22 Cal 506 19, 22
('35) AIR 1935 Lah 440: (159 Ind Cas 205) 11
('09) 3 Ind Cas 77: (6 MLT 158) 11
('11) 34 Mad 288: (6 Ind Cas 240) 19
('30) 58 Mad LJ 127: (AIR 1930 Mad 287) 11
('32) 62 Mad LJ 39: (AIR 1932 Mad 28) 11
('34) 57 Mad 772: (AIR 1934 Mad 432) 11, 20
('41) ILR (1941) Mad 13: (AIR 1940 Mad 804 FB) 8, 11

('42) ILR (1942) Mad 42: (AIR 1942 Mad 106) 10, 13, 25
('43) 1943-2 Mad LJ 664: (AIR 1944 Mad 156) 22
('50) 1950-1 Mad LJ 90: (AIR 1950 Mad 337) 11, 18

SATYANARAYANA RAO J.: This appeal raises the question of the binding nature of an alienation on the reversioners to the estate of one Srinivasa Raghavachari. The applicants, defendants 3 to 6, who are the representatives of the alienee, substantially failed, though the findings of the learned Judge are mostly in their favour and hence this appeal.

(2) In the suit, the plaintiffs impeached also another alienation in favour of the 7th defendant They succeeded in the trial court but there is no appeal by the unsuccessful defendants.

(3) Notwithstanding the extraordinary precautions taken by the alienee and the assurances given at the time of the alienation by the plaintiff's father who is a graduate and their maternal granduncles, who are advocates, the alienee could not but face a litigation, unrighteously, as it seems to us, instigated and conducted by the plaintiff's father who was responsible largely for bringing about the alienation for his own benefit. This Court, however, not being a court of morals, is not entitled to decide the case on these considerations and we have to mete out justice according to well-established principles of Hindu law. Srinivasaraghavachari, the last male owner, died in 1898 and left behind him the first defendant then a young widow aged 17 years and a daughter, the second defendant. The estate then consisted of 35 acres of wet land and 35 acres of Punja in Devanathan village and 250 acres roughly in Paruthipattu village near Avadi. These 250 acres consisted of wet and dry lands. There were also two houses, one in Big Street, Kumbakonam and the other in Sannadhi Street, Conjeevaram besides some shops in Conjeevaram. He left also debts to the tune of Rs. 4000 to 5000 and cash in G. P. Notes of Rs. 12000 and jewels worth about Rs. 4000 to 5000. There was also the mother of Srinivasaraghavachari who survived him and the G. P. notes of the value of Rs. 12000 were utilised in settling her maintenance claim. In or about 1910, the marriage and nuptials of the 2nd defendant were performed at a cost of nearly Rs. 18000 for which purpose the lands of the extent of 250 acres in Paruthipattu near Avadi were sold. The estate which the first defendant inherited from her husband was looked after and managed by her father till 1905 when he became a 'sanyasi'. The father also was a rich man owning properties worth two lakhs. After the death of the father, the first defendant managed her estate and perhaps after the marriage of the 2nd defendant, the son-in-law also assisted her in the management. It is in evidence that the estate was not fetching sufficient income to meet the requirements of the family. There were also litigations pertaining to the estate which involved the estate in heavy expenditure. The first defendant's son-in-law, the 2nd defendant's husband, started in 1920 a cinema business which resulted in loss and the mother-in-law purchased the lands of the son-in-law in Kannivakkam and discharged his debts to the extent of about Rs. 20000.

As the result of the property of the son-in-law having been lost, his family became entirely dependant upon the first deft. & the estate of Srinivasaraghavachari. The 2nd defendant has a number of children, three boys and five girls leaving out a child which died. The maintenance and education of the children and the medical expenses of the 2nd defendant who was constantly ill was(?) as well as her husband Sundaravaradachari had to be met by the first defendant from estate. In 1928, the eldest of the daughters of the 2nd defendant, Komalavalli, had to be married and expenses had to be incurred for that marriage and later for her nuptials in 1930. The first defendant has got five brothers, the maternal uncles of the 2nd defendant. Of these Mr. C. V. Rajagopalachari, D. W. 2 is an Advocate at Madras and C. V. Jagannathachari is a leading member of the Bar at Kumbakonam. As there were pressing debts to be paid, the pltffs' father and their maternal grand-uncle Mr. Rajagopalachari, D. W. 2, approached in 1932, D. W. 1, Srinivasachariar, an Advocate, practising at Conjeevaram who was also a Government Pleader for over 20 years. As Sundaravaradachari and D. W. 2 wished to sell the house and shops at Conjeevaram they hoped that D. W. 1's client and the head of a Mutt, P. B. Ananthacharyaswami would buy the property. This Ananthacharyaswami had a number of 'sishyas' and was the head of a Tenkalai Mutt at Conjeevaram. He is the father of the 3rd defendant and defendants 4 to 6 are the sons of the 3rd defendant. The attempts of the two advocates and Sundaravaradachari were successful and a sale deed for Rs. 7500 was executed on the 30th September 1932, Ex. D. 1(a), by defendants 1 and 2 and Sundaravaradachari as guardian of his minor sons, the plaintiffs. This document is attested by the maternal uncle of the 2nd defendant, D. W. 2 and D. W. 1 the pleader of Conjeevaram and two others. A security of immovable property was also given for this sale securing the properties which the 1st defendant purchased from the son-in-law, Sundaravaradachari.

The Swamiji was at that time on tour and he apparently wanted to be satisfied about the 'bona fides' of the sale and it was after his return that the consideration was paid in full discharge of two of the seven items of debts agreed to be discharged in part under the terms of the sale deed. The two debts which were fully discharged are the debts due to C. S. Narayanaswami Iyer of Kumbakonam which is item 2 in the sale deed and which is stated, according to the recitals, to have been incurred in 1928 for the marriage of Komalavalli, the principal amount of which was Rs. 3000. The second debt that was fully discharged was the debt due to the Kumbakonam bank. On the 4th November 1932, the Kumbakonam bank wrote to D. W. 2 stating that there was no written representation by the borrowers at the time the loan was advanced, but one V. Krishnaswami Aiyangar told the Bank about the purpose of the loan. The bank enclosed with that letter Ex. D. 3, addressed to the vendee Anantachariar in which it is mentioned that the loan of Rs. 3000 was taken from the bank by Lakshmi Ammal, the 1st defendant and Sundaravaradachariar and that it was understood that the said loan was taken for the purpose of the marriage and nuptials of the daughter of Sundaravaradachariar. The letter gave also particulars regarding the balance of the principal and interest due in respect of that loan. On 25-4-1934, after the Swami returned from his tour, defendants 1 and 2 and Sundaravaradachariar as father and guardian of the plaintiffs gave a letter to the vendee authorising the vendee to discharge the two debts, i.e., the debt due to the Kumbakonam Bank and the debt due to Narayanaswami Iyer of Kumbakonam which were incurred for the expenses of the marriage and nuptials of the grand-daughter of the 1st defendant, i.e., Komalavalli. This is intended to vary the stipulation in the sale deed that these and other debts should be discharged in part from the consideration for the sale payable by Ananthachariar to the vendors. The amount was thereafter paid and C. S. Narayanaswami Iyer gave a

letter to Ananthachariar on 1st May 1934, Ex. D. 7, acknowledging receipt of the full payment of the debt which had by then riped into a decree in O. S. No. 9 of 1934, Sub-Court, Kumbakonam. Narayanaswami Iyer undertook in that letter to enter up full satisfaction of the decree after the Court reopened after summer recess. The letter also added that the loan of Rs. 3000 was taken from him by Sundaravaradachari and C. V. Rajagopalachari, D. W. 2 on 16th July 1938 on the representation made to him that it was required for meeting the bills of expenses incurred in connection with the marriage of Komalavalli, the daughter of the 2nd defendant. This letter is attested by Mr. S. Panchapakesa Sastri, advocate (now a Judge of this court). The amount due to the Kumbakonam Bank was also paid and the debt discharged and there is no dispute regarding that.

(4) The plaintiffs instituted this suit on the 21st October 1944 and it is in evidence, which is not contradicted on the plaintiffs' side, that at the time of the institution of the suit and even subsequently, the plaintiffs and defendants 1 and 2 and Sundaravaradachariar were living as members of one family. In this, the validity of the sale is challenged on the ground that it is beyond the power of the first defendant to sell property and that there was no valid and binding necessity to support the sale. The plaintiffs also went to the length of impeaching the sale on the ground that it was not supported by consideration. What they claim in the suit is a declaration that the sale deed dated 30th September 1932 was not valid and binding upon the reversionary interests of the plaintiffs beyond the lifetime of defendants 1 and 2. The vendee Ananthachariar Swami died and the 3rd defendant, his son and father of defendants 4 to 6 filed a written statement setting out in detail the circumstances under which the sale deed came to be executed and the consideration was paid and also maintained that the sale is binding on the reversion. The plaintiffs beyond filing some documents, did not adduce any rebutting evidence. On the defendant's side, a number of documents including the letters Ex. D. 14 series have been filed and D. Ws. 1 and 2, the two attestors to the document who along with the plaintiff's father took the principal part in arranging the sale, have been examined.

(5) The learned Subordinate Judge found that the entire consideration for the sale was paid and that the two debts which were discharged by the vendee were debts incurred for the marriage and nuptials of Komalavalli and that the sale, in view of certain decisions of this court, is binding on the reversioners. He, however, found, taking every circumstances into consideration including the status of the parties, that the widow was not justified in spending such a large amount for the marriage and nuptials and that a sum of Rs. 1000 for the marriage and Rs. 500 for the nuptials would be just and proper and that out of the consideration of Rs. 7500 this amount of Rs. 1500 alone is binding on the plaintiffs as reversioners. He therefore held that the sale does not bind the plaintiffs but that the reversioners whoever they may be at the time the reversion opens, will be entitled to recover possession of the property on payment of Rs. 1500 to the alienee before recovering possession.

(6) The appeal is by the defendants 3 to 6, the representatives of the alienee and there is also a memorandum of cross objections filed by the plaintiffs disputing the findings of the learned Subordinate Judge that Rs. 1500 out of the consideration is binding on the reversion.

(7) The question that falls to be determined is therefore the binding nature of the alienation under Ex. D. 1(a) on the reversion. As regards the payments of consideration and the discharge of the debts and the purpose for which the debts were incurred, the findings of the learned Subordinate Judge are in favour of the appellants. These findings are, in our opinion, fully justified by the evidence on record. There are the undoubted representations made to the alienee evidenced by the letters which the creditors gave, Ex. D. D. 3, D. 4 and D. 7 and by the recitals in the sale deed Ex. D. 1(a) which sets out the history of the family from the time of the death of Srinivasaraghavachari to the date of the deed. In the sale deed there is a recital that Komalavalli, the eldest daughter of the 2nd defendant, was married in 1928 and her nuptials and marriage was performed in 1930 and that in connection with these two ceremonies, debts had to be incurred. With reference to the debt due to Narayanaswami Iyer, there is also an express recital that that debt was borrowed for the marriage of Komalavalli. No such recital, however, is expressly made with reference to the debt borrowed from the Kumbakonam bank.

The point that was stressed during the course of the arguments on behalf of the plaintiffs was that the borrowing from Narayanaswami Iyer was not a debt incurred on behalf of the estate as the promissory note was executed, as admitted by D. W. 2, by himself and Sundaravaradachari. The widow, it is said, was therefore not justified in alienating property for discharging the debt due from these two people to C. S. Narayanaswami Iyer. The subsequent suit by Narayanaswami Iyer was also against the executants of the promissory note, D. W. 2 and Sundaravaradachariar. D. W. 2 explains in his evidence that he had secured the loan from Narayanaswami Iyer and that at the outset Narayanaswami Iyer was willing to take a letter from the first defendant but he had subsequently changed his mind and wanted a promissory note executed by him and the son-in-law, Sundaravaradachari. He obtained the money and paid it into the hands of Sundaravaradachari who applied it for discharging the various pressing debts incurred for the marriage such as piper, the pandalman and so on. The letter which he took from his sister to Narayanaswami Iyer was, as the evidence shows, handed over to Narayanaswami Iyer but that letter is not now forthcoming nor is the promissory note but there is no reason to disbelieve the evidence of this witness D. W. 2 and it was accepted by the trial Judge.

The debt due to the Kumbakonam Bank arose out of a loan obtained by the first defendant and Sundaravaradachari and that was for the nuptials of Komalavalli. D. W. 2 was a surety for the bank on behalf of his sister. D. W. 1, the Conjeevaram Pleader, who arranged the transaction expressly states in his evidence that representations were made by the defendants 1 and 2 and by Sundaravaradachariar and Rajagopalachari and that he had believed those representations as he had no reason to doubt them. He acted as the agent of the vendee and when he was satisfied that the amount was needed for the purposes indicated in the sale deed, he advised the vendee to pay the amount to discharge the debts. The vendee took the precaution of including the plaintiff's father also as the guardian of the minor plaintiffs in executing the sale deed and there were the attestations of D. Ws. 1 and 2 besides the letters from the Kumbakonam bank and Narayanaswami Iyer. The fact that in the sale deed the debt borrowed from the Kumbakonam bank was not expressly stated to be in connection with the expenses of the nuptials of Komalavalli does not, in our opinion, entitle us to disbelieve the evidence of D. W. 2 par-

ticularly as there is a clear recital in the sale deed that debts were incurred for the marriage and nuptials of Komalavalli. Though the debt borrowed from Narayanaswami Iyer was advanced on the personal credit of D. W. 2 and Sundaravaradachari, it is obvious that they borrowed this amount for the benefit of the first defendant and for the purpose of the marriage. D. W. 2 did not get the benefit of the loan and undoubtedly Sundaravaradachari and the 1st and 2nd defendants it was that had the full benefit of that loan. It therefore comes with ill-grace from the plaintiffs to argue that this loan was a personal debt of D. W. 2. It therefore follows that the sums aggregating to Rs. 6000 were borrowed for the marriage and nuptials of Komalavalli which were performed in 1928 and 1930 respectively.

This leads us to the question whether the debt was justified under Hindu law, and whether the alienation can be upheld. At the time the debts were incurred Sundaravaradachari's family was undoubtedly in indigent circumstances having practically no property of its own and all were living as members of the family of the first defendant & were entirely dependant upon her and the estate which she inherited from her husband. All the persons connected with this transaction were educated people and two of them are lawyers. The plaintiff's father himself is a graduate and though he was conducting the suit on behalf of the plaintiffs along with an old clerk of his father as stated by the learned Subordinate Judge, he did not venture to go into the witness box though he could have given very valuable evidence on some of the important points that arise in the case. It must therefore be assumed that except the estate inherited by the first defendant, Sundaravaradachari had no other means of performing the marriage and nuptials of Komalavalli and of maintaining himself and his large family.

(8) The power of a limited owner like the widow inheriting her husband's estate or a daughter inheriting the father's estate to make an alienation of the properties comprised in the estate has been the subject-matter of several decisions of the P. C. and the High Courts. She may alienate the property purely for secular purposes or for religious or charitable purposes. To support the alienation for secular purposes, the necessity for such an alienation or the benefit to the estate conferred by it must be established. The religious and charitable purposes are divided into two categories, the 'nitya-karma' or obligatory acts and 'kamyakarma' or optional acts. The obligatory religious duties are the obsequies and the periodical ceremonies such as the annual ceremonies of the last male-holder, the performance of which cannot be dispensed with. In respect of such acts, if the income from the estate is inadequate to meet the expenditure, the limited owner is entitled to sell the whole of the property if necessary as the duties must be performed. As regards non-obligatory or non-essential acts, it is not incumbent on the limited owner to perform them. They are not indispensable acts or duties but the performance of such acts if commended as they would confer punya or spiritual benefit and are conducive to the bliss of the soul of the deceased. In respect of such acts, however, the power of the limited owner is not as large as in the case of indispensable acts. In such case, the sale or other alienation cannot be upheld unless it is reasonable in the circumstances of the family and the properties sold bear only a small proportion to the property inherited from the last owner. The obligations which the last owner would have been only morally bound to discharge may become legal obligations in the hands of the limited owner who inherits the estate. The terms, necessity and benefit, must therefore be confined to alienations made by a limited owner for what are termed secular or worldly purposes. The alienations however for spiritual necessity can be justified only either if they were made for meeting the indispensable acts or duties which must be performed such as the 'shraddah' ceremonies or the marriage of the daughter and the like or even if they were made for securing the merit or spiritual bliss to the deceased in the other world, it must be shown that the extent alienated was a reasonable portion of the property inherited. The reasonableness, of course, must be decided according to the circumstances of the family. These principles are deducible from the decisions of the Privy Council in the 'COLLECTOR OF MASULIPATAM v. CAVALY VENCATANARRAINA', 8 Moo. Ind. App. 529 at 550 and 551 and 'SARDAR SINGH v. KUNJ BIHARILAL', 44 All 503 and the Full Bench decision of this court in 'AMBU BAI v. SONIBAI', I. L. R. (1941) Mad 13.

(9) The acquisition of spiritual merit or 'punya' as the object of life in this world has been emphasised by the 'Smriti' writers. Manu says in Chapter IV, para 238:

धर्मं शनः संचिनुयाद्वल्मीकमिव पुत्तिकाः ।
परलोकसहाय्यार्थम् सर्वभूतान्यपीडयन् ॥

(Giving no pain to any creature, let him slowly accumulate spiritual merit, for the sake (of acquiring) a companion to the next world, just as the white ant (gradually raises its) hill.

239 नामुत्रहि सहाय्यार्थम् पिता माता च तिष्ठतः ।
न पुत्र दारा न ज्ञातिः धर्मस्तिष्ठति केवलम् ॥

(For, in the next world neither father, nor mother, nor wife, nor sons, nor relations stay to be his companions; spiritual merit alone remains (with him).

240 एकः प्रजायते जन्तुरेक एव प्रलीयते ।
एकोऽनुभुङ्क्तेसुकृतमेक एव च दुष्कृतम् ॥

(Single is each being born; single it dies; single it enjoys (the reward of its) virtue; single it suffers (the punishment of its) sin.)

241 मृतं शरीरमुत्सृज्य काष्ठलाष्टसम क्षितौ ।
विमुखा बान्धवा यान्ति धर्मस्तमनुगच्छति ॥

(Leaving the dead body on the ground like a log of wood, or a clod of earth the relatives depart with averted faces; but spiritual merit follows the (soul).

242 तस्माद्धर्मं सहाय्यार्थं नित्यं संचिनुयाच्छनैः ।
धर्मेण हि सहाय्येन तमस्तरति दुस्तरम् ॥

(Let him therefore always slowly accumulate spiritual merit, in order (that it may be his) companion (after death); that with merit as his companion he will traverse a gloom difficult to traverse).

243 धर्मप्रधानं पुरुषं तपसा हताकिल्बषम् ।
परलोक नयत्याशु भास्वन्तं स्वशरीरिणं ॥

((That companion) speedily conducts the man who is devoted to duty and effaces his sins by austerities, to the next world, radiant, clothed with an ethereal body).

(10) It is for this reason that the Shastras enjoined the various modes by which a person can acquire spiritual merit or 'punya'. The dedication of a small extent of property to God to perpetuate

the name of the husband and to have 'archana' performed in a temple in the name of the deceased, gifts to Brahmans on occasions like the 'pushkarams' of various rivers, not to speak of such gifts at the 'sraddah' ceremonies, feeding of 'athithi' and 'abyagathi', maintaining dependants and various other deeds have been praised. The limited owner, therefore, even in respect of non-obligatory duties is not required to keep herself inactive and is not prevented from making any attempt to contribute for the spiritual welfare of the deceased if the estate permits. According to Manu

"the father, the mother, the guru (elderly relation, worthy of respect), a wife, an offspring, poor dependant and guest and a religious mendicant are declared to be the group of persons who are to be maintained".

and Brihaspathi says

"the widow inheriting her husband's estate should honour with food and presents for their benefit the husband's paternal uncle and the like venerable elderly relation, daughter's son, sister's son and maternal uncle, the aged and helpless persons, guests and females of the family".

These two texts undoubtedly indicate that poor dependants and the female members of the family should be maintained and should be honoured with food and presents. No doubt, the obligations so enumerated in the texts cannot be treated as obligatory but they are certainly acts which conduce to the spiritual welfare and contribute to the acquisition of spiritual merit in the other world. The persons who are dependants upon the last owner as members of the family and who are poor and were being maintained by the last owner who was under a moral obligation acquire a legal obligation when the estate devolved upon the limited owner. All the matters enumerated in the two texts may not be enforceable in the present day. It is for that reason, I think, that the decisions have established that if the daughter's family is indigent, the widow is bound to maintain her and also to perform the marriage of the daughter's daughter and the marriage and upanayanam of the daughter's sons and for these purposes would be entitled to alienate a reasonable portion of the property. On the same analogy, the daughter who inherits the father's estate is also empowered by decisions to incur debts and alienate property for the purpose of performing the marriage and upanayanam of her own sons and of the marriage of her daughter and even of her grand-daughter. The performance of the marriages of the female members of the family when the limited owner is not under an obligation to get married is considered to be conducive to the spiritual welfare of the last male owner as 'kanyadanam' is considered, according to Hindu Shastras, as a meritorious act from a religious point of view. In the case of a destitute 'kanya' who though not so closely related to the family to claim a legal obligation against the estate to meet the expenses of her marriage if however, the limited owner spends money and performs the marriage of such a maiden provided the amount spent is reasonable in the circumstances, the debt incurred for such a purpose would be binding on the estate and an alienation to discharge such debts would equally be binding. The texts bearing on this question have been subjected to an elaborate and critical examination by Venkataramana Rao J. in 'SRINIVASARAO v. SESHACHARLU', I. L. R. (1942) Mad 42 a case relating to an alienation of the whole of the estate by a daughter who inherited her father's estate to defray the marriage expenses of her daughter's daughter, her grand-daughter when the parents of the girl were indigent. The alienation to the extent to which it was reasonable was upheld.

Besides the texts referred to by Venkataramana Rao J., there are also other texts of Smriti writers such as Manu, Marichi, Samvarta, Brihaspati and Vasishta in which the gift of a 'kanya' is stated to confer merit upon the giver. The texts are:

अग्निहोत्रादिकं त्रियतेस्याद्दीक्षित ब्राह्मणस्य च।

तत्कन्यां विधिवद्दत्वा फलमाप्नोति मानवः ॥

(Manu cited in Viramitrodaya Chowkhamba Edn. p. 831) (A man giving a maiden in marriage according to precept will get the fruit that a Brahmin engaged in Diksha will get through the performance of Agnihotra and other rites).

नाग्निश्चिन्नरकं याति न कन्यादो न तत्सुतः।

विश्वजित्संमितो यज्ञः कन्यादानं महाफलम् ॥

(Marichi cited in Smritichandrika, Mysore Edn. Vol. 43 p. 214, (One who does Agnichayana, the giver of a maiden in marriage, and his son, these three never go to hell. The gift of a maiden yields enormous fruits. It is an Yajna equal to the Visvajit sacrifice).

ज्योतिष्टोमातिरात्राणां शत शतगुणीकृतम्।

प्राप्नोति कन्यकाम् दत्वा होममन्त्रैश्च संस्कृताम् ॥

(Samvarta cited in Smritichandrika, Mysore Edn. Vol. 43 page 214) (One who gives a virgin sanctified with the mantras of homa gets hundredfold the fruit of a hundred Jyotishtoma and Atiratra saccrifices).

सहस्रसंमिता धेनुरनड्वान् दश धेनवः।

दशानड्वत्समं यानं दशयान समो हयः।

दश वाजिसमा कन्या भूमिदान च तत्समम् ॥

(Brihaspati cited in Smritichandrika, Mysore Edn. Vol. 43, page 214) (The gift of a cow is equal to that of a thousand (gold coins), the gift of a bull to that of ten cows; the gift of a vehicle to that of ten bulls; and that gift of a 'kanya' to that of ten horses and the gift of land stands on a par).

सर्वेषामेव दानानामेकं जन्मानुगं फलं।

हाटकं क्षितिगौरीणां सप्तजन्मानुगंफलं ॥

(Vasishta cited in Hemadri (Asiatic Society of Bengal Edn.) Danakanda, page 679) (The benefits accruing from all other gifts last for a single birth. The fruit of gifting gold, land and a maiden lasts for seven births).

अलं कृत्यतु यः कन्यां भूषणाच्छादनादिभिः।

दत्वा स्वर्गमवाप्नोति पूज्यते वासवादिभिः ॥

कूपदश्चाश्वमेधी च प्राणदाता ययेषु च।

समं यान्ति रथा एषां त्रयो वै नात्र संशयः ॥

(Samvarta cited in Viramitrodaya, page 832) (One who gives a 'kanya' providing her with jewels clothing etc. attains Heaven and is worshipped by Indra and others. A koopada i.e., one who gifts a maiden decked with jewels, the performer of the Asvamedha Sacrifice and one who saves another's life in danger — these three march together on parallel cars (to Indra's abode).

आत्मीकृत्यसुवर्णेन परकीयां तु कन्यकाम्।

धर्म्येण विधिना दातुमसगोत्रोऽपि युज्यते ॥

(Skanda Purana cited in Hamadri's Danakhanda page 680) (It is proper even for a man belonging to a different Gotra to make one's own another's

daughter by the gift of gold and give her in marriage according to the Sastraic injunctions).

(11) We do not propose in this judgment to subject the decisions once more to a critical examination as the texts and the law have been more than once examined by this court and a recent instance of such an examination is the decision in 'PARISA MUDALIAR v. NATARAJA UDAYAR', 1950-1 Mad LJ 90. The earliest of the decisions which related to the marriage of the daughter's daughter is that of the Allahabad High Court in 'RUSTAM SINGH v. MOTI SINGH', 18 All 474. The family being poor and the father of the girl being unable to meet the expenses of the marriage, it was held that the daughter inheriting the father's estate was entitled to alienate the property for the marriage of her daughter. This was followed by this Court in 'CHUDAMMAL v. NADAMUDI NAIDU', 3 Ind Cas 77 (Mad) and the Lahore High Court followed these two decisions in 'JAIRAM v. BHAGAT RAM', AIR 1935 Lah 440. Devadoss J. thought that the daughter was not justified in alienating the property inherited by her from her father for performing the marriage of her son but his decision & the subsequent decision of Ananthakrishna Aiyar J. in 'ANANDARAO v. VENKATASUBBARAO', 58 Mad LJ 127 which related to the upanayanam of the daughter's son were dissented from and disapproved by Venkatasubba Rao J. in 'MALLAYYA v. BAPIREDDI', 62 Mad LJ 39 which was a case of a marriage of a daughter's son. The learned Judge examined the legal position and principles and observed in the course of the judgment that the marriage of a daughter's daughter is an 'a fortiori' case. The learned Judge referred to the decision of the Privy Council in 'SARDAR SINGH v. KUNJ BEHARI LAL', 44 All 503 and the distinction pointed out in that judgment between obligatory religious duties and non-obligatory duties. The learned Judge rested his decision on the principles that the daughter's son occupies a peculiar position under Hindu law, and that he confers spiritual benefit on the maternal ancestors and therefore the upanayanam and the marriage which qualify the daughter's son to perform & take part in the religious ceremonies were considered essential. He however confined his decision to the case of the family of daughter's son being in indigent circumstances. When the decision of Ananthakrishna Aiyar J. in 'L. ANANDRAO v. Y. VENKATASUBBA RAO', 58 Mad LJ 127 was taken in Letters Patent Appeal, the learned Judges reversed that decision in 'VENKATASUBBA RAO v. ANANDARAO', 57 Mad 772 and upheld the alienation made for the purpose of performing the upanayanam of the daughter's son even though the family was not in indigent circumstances. This is undoubtedly based on the peculiar position which the daughter's son occupies. It must be remembered that the position which the daughter's son occupies in the order of inheritance is due to Vignaneswara as he interpreted the particle एव in Yagnavalkya's text as including the daughter's son after the daughter and for this he relied on the texts of Vishnu and Manu who treat the daughter's son as equivalent to a son's son. The case in 'PARISA MUDALIAR v. NATARAJA UDAYAR', 1950-1 Mad LJ 90 is a case of a marriage of daughter's son, the family being in indigent circumstances. The Full Bench in 'AMBUBAI AMMAL v. SONIBAI AMMAL', ILR (1941) Mad 13 upheld the right of a widowed indigent daughter for maintenance against the father's estate following the principle of the Full Bench decision in 'JANKI v. NANDRAM', 11 All 194 that the moral obligation in the hands of the father became a legal obligation by his death and consequently a liability on the estate of the widow.

(12) There are therefore two lines of cases. One line of cases relating to daughter's son whether it is marriage or upanayanam and the obligation, when the family is indigent or even if it is not indigent, based upon the spiritual benefit which the daughter's son confers upon the maternal ancestors. In case of marriages of the daughter's daughter or the daughter's grand-daughter, however the alienations are supported on the ground that the gift of a destituted 'kanya' in marriage is conducive to the spiritual welfare and confers spiritual merit on the last male owner as his funds are utilised for the performance of the marriage. It may possibly be rested on the footing that here these girls, whether it is the daughter's daughter or the daughter's grand-daughter, are practically members of the father's family when they are indigent and poor as in the present case, a moral obligation ripens into a legal obligation for, if the last male holder had been alive he would certainly have felt it his duty to dispose of his own daughter's daughter or his own daughter's grand-daughter in marriage where the families of these girls were not in affluent circumstances to perform the marriage. I do not however rest the decision on this ground and express no final opinion without a fuller examination of the point. The authority therefore is overwhelming and the object of the alienation in the present case for the performance of the marriage and nuptial ceremonies of Komalavalli is perfectly justified.

(13) The learned Subordinate Judge does not differ from this view but he set aside the alienation on the ground that the widow was not justified in spending as much as Rs. 6000 for the two ceremonies. It is not disputed that the amount was in fact spent for these purposes. The decisions which we have adverted to including the latest decision of Venkataramana Rao J. in 'SRINIVASARAO v. SESHACHARLU', ILR (1942) Mad 42 have held that the expenditure incurred must bear a reasonable proportion to the estate and have regard to the circumstances of the family and Hindu notions regarding the propriety of the expenditure. In the decision in SRINIVASARAO v. SESHACHARLU, I. L. R. 1942 Mad 42 the widow alienated the entire property which she had inherited. We have ourselves examined the printed records in that case and we are unable to find anything to justify the alienation of the entire estate inherited by the widow. No doubt, under these circumstances the alienation of the entity of the estate may not be justifiable. In the present case, the plaintiffs' father assumed a wholly unhelpful attitude and did not place any material before the Court regarding the necessity for the expenditure. The point itself was not taken in the pleadings nor was there any suggestion in the cross examination of the witnesses who have been examined on the defendants' side, D. Ws. 1 & 2. They are respectable members of the Bar and they are themselves relations; at least one of them is a relation of the family and belongs to the same community as the alienee. We have no material on which to decide the status and the circumstances of the family and the reasonable amount which could have been spent for the marriage and nuptials of Komalavalli. The learned Judge if he thought that the alienation could not be justified to the extent of Rs. 6000, the principal, he should have given an opportunity to the parties to enlighten the Court as regards the propriety of the expenditure. But this course was not adopted and the defendants were not in a position to adduce evidence and were at a disadvantage as the point was not taken. Though Sundaravaradachari had lost all his property and was mainly dependent up-

on the family of the first defendant, it cannot be said that the status of the first defendant's family was such as to lead to the inference that the expenditure was extravagant. It is common knowledge that in middle class famiiies the expenditure for marriage and nuptials is very high. It is unfortunately due to various circumstances including the amount of 'katnam' and presents extracted by the sons-in-law from the unwilling parents-in-law; but it cannot be avoided as the parents of the girl would be anxious to place the girl in a family which is comparatively in affluent circumstances. In 1928 and 1930, the family of the 1st and 2nd defendants had good property though the income was not sufficient to meet its expenses. Having regard to the circumstances that the 2nd defendant's marriage and nuptials were performed at a large expense of Rs. 18000 in 1910, it cannot be said that one third of the amount spent for the marriage and nuptials of Komalavalli was extravagant and does not bear a reasonable proportion to the estate which the 1st defendant inherited from her husband. All the members of the family, D. W. 2, and his brother and D. W. 1 considered that the expenditure was not such as to lead to the inference that it was extravagant. In these circumstances, we think that we would not be justified in setting aside the alienation on the ground that the expenditure was extravagant and the property alienated was unreasonably large having regard to the facts set out above. We disagree therefore with the finding of the learned Subordinate Judge and uphold the alienation in favour of the appellants in its entirety.

(14) The result is that the appeal is allowed with costs, the decree of the Subordinate Judge is set aside and the suit as against these appellants is dismissed with costs. In this view it is unnecessary to consider the memorandum of cross-objections which is dismissed but without costs.

(15) RAGHAVA RAO J.: I agree in the conclusion of my learned brother, but wish to add a few words on the legal aspect of the question for determination.

(16) Learned counsel for the respondents did not dispute the power of the 1st defendant to make an alienation of her husband's estate within the limits allowed by the Hindu law for meeting the expenses incurred in connection with the marriage of her daughter's (i.e., 2nd defendant's) daughter. Nor did he dispute the legitimacy of any expenditure for the 'garbhadhana' ceremony as such, i.e., as apart from the expenditure for the 'vivaha' ceremony which preceded it by some years. His argument was firstly, that the expenses for the 'garbhadhana samskara' not being recited in the sale deed could not be accepted as true and secondly that the expenses for that samskara and the 'vivaha samskara' even if incurred in the aggregate sum of Rs. 6000 could not be treated as reasonable in measure in the eye of law so as to justify the alienation under challenge, but must be regarded as too extravagant to support it.

(17) The existence in law of a power of the kind exercised by the 1st defendant in the present case could not indeed be disputed because of the long settled law and the subject which has been examined by my learned brother in his judgment from its very foundation in the smritis in so far as they not only enjoin on an individual 'punya-sanchayana' in general, but also acclaim the virtue of 'kanyadana' in particular as a highly meritorious act. I need only add that 'kanyadana' like 'godana' is an important part of the vedic obsequial ritual observed on the 12th day of the death as one of the 'shedasamahadanas' to be made by the Karta after 'sapindikarana'. To incur expenditure in connection with any 'kanyadana' as an act of piety calculated to promote the spiritual bliss of her husband is undoubtedly within the competency of a Hindu widow and a fortiori so where the 'kanya' is that of an indigent family. The relationship of the 'kanya' to the female holder of the estate as her daughter or daughter's daughter does not certainly take away from but if at all only add to the spiritual bliss of the father or husband as the case may be; nor does the fact of indigence or affluence of the parents of the girl matter, except perhaps on a question of the relative measure of the meritoriousness which can never be precisely assessed or estimated and need not be enquired into, and certainly on a question of the measure of the expenditure to be incurred which must, of course, vary according to the status of the parents of the girl to be married.

(18) The question of indigence or affluence has been held immaterial by the learned Chief Justice and Krishnaswami Nayudu J. in 'PARISA MUDALIAR v. NATARAJAH UDAYAR', 1950-1 Mad L J 90 which related to the marriage of a daughter's son of the last male holder, and there is no reason why it should be held material in the case of the marriage of a daughter's daughter of the last male holder except as I think either case to the extent and in the sense indicated just now by me. The learned Judges in that decision rightly observe:

> "We do not think there is any real justification in making a distinction between the alienations for marriage expenses of a daughter's daughter and (for marriage expenses of) a daughter's son."

In both the cases, it is only a measure of expenditure which the court can consider reasonable that can support the alienation and support it pro tanto.

(19) The test of this reasonableness has been propounded in the cases in terms of a quantitative ratio by no means certain or definite, which the court has to apply to the facts of each case as best as it can. In 'SARDAR SINGH v. KUNJ BIHARILAL', 44 All 503 P. C., which related to an alienation by the widow of which the avowed object was to offer food to an idol, Mr. Ameer Ali in delivering the judgment of their Lordships of the Board of the Judicial Committee of the Privy Council first calls attention to the 'locus classicus' in 'COLLECTOR OF MASULIPATAM v. CAVALI VENKATANARAYANAPPA', 8 Moo Ind App 529 at pp. 550, 551 where the Master of the Rolls in delivering the judgment in the latter case said as follows:

> "It is admitted on all hands that if there be collateral heirs of the husband the widow cannot of her own will alienate the property except for special purposes. For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

Mr. Ameer Ali proceeds to refer afterwards to 'RAMKAMAL SINGH v. RAM KISHORE DAS', 22 Cal 506 where the alienation was not for the maintenance of an idol which had been established by the husband of the widow and the dedication was held prima facie to be for the widow's own spiritual welfare and not for the husband. His Lordship then enunciates the distinction between the two kinds of spiritual acts for which the Hindu female can make alienations of the inherited estate — compulsory and optional acts — in that in the case of the former, if the income of the property or the property itself is not sufficient to cover the expenses she is entitled to sell the whole of it, while in the

case of the latter she can alienate a small portion of the estate inherited for the pious or charitable purposes contemplated by her. His Lordship then quotes with approval the following passage from 'TATAYYA v. RAMAKRISHNAMMA', 34 Mad 288 at p. 291:

"We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the (disposition or) expenditure is reasonable & proper according to the common notions of the Hindus it is justifiable and cannot be impeached by the reversioner."

(20) Referring to the quantitative ratio herein suggested this is what Jackson J., in delivering the judgment of the Bench consisting of himself and Butler J. observes in 'VENKATASUBBARAO v. ANANDARAO', 57 Mad 772 at p. 775:

"The quantitative ratio approved in this judgment is not at first sight easy to understand. If a small gift to an idol is conducive to the husband's spiritual bliss would not a larger gift be still more conducive? Presumably human nature being what it is, courts are not prepared to sanction transactions which offend ordinary commonsense and good husbandry. If a widow devotes the whole of an estate to the idol there will be suspicion of fraud or undue influence. In our present case there is no suggestion of undue extravagance and it must be remembered that the quantitative ratio works in both directions. Her pious duty for her husband's satisfaction is to honour her daughter's son and some meagre gift for the ceremonies which would only make him ridiculous in the eyes of the neighbours would not fulfil this obligation."

(21) At page 774 of the Report, earlier, there is another observation of the Court also worth noting in this connection:

"Where the piety of purpose about the alienation by the female holder is impeached in any given case on the ground of the absence of sincere religious feeling in the mind of the alienor, asks Mr. Justice Jackson "Who is to distinguish between sincere religious feeling and idle sentiment?"

The learned Judge then proceeds thus:

"All that can be safely said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud the benefit of the doubt should be given to religious feeling. It is not for a court of law to disparage the pious acts of devout people."

(22) It may be interesting to observe, pausing here, rather parenthetically that judicial conception of Hindu piety has gone indeed so far as to sanction within the limits of the operation of this quantitative ratio test an alienation by a Hindu family manager by way of a gift to a Roman Catholic Church. It has been held in this court by Chandrasekhara Aiyar J. in 'KOLANDAI v. GNANAVARAM', 1943-2 Mad LJ 664 that where the family owned considerable properties and the land gifted by the manager to a Roman Catholic Church is a very small fraction measuring 1 acre, 20 cents worth Rs. 50 and remaining uncultivated, the other coparceners would be bound. Says the learned Judge at page 157, 1st column of the report:

"The Hindu religion has been the most tolerant religion of the world and the very idea that pious and charitable purposes should refer to and mean objects that can be said to promote a particular faith, creed or degree is foreign to its ideals. True piety transcends castes and creeds and whatever is done to advance belief in God and His rule over the Universe can be said to be an act of broad-minded piety."

The piety of 'kanyadana' with which we are concerned in this case is undoubted and there is no question of any distinction here between an act of piety conducive to the spiritual bliss of the husband and an act of piety conducive to the spiritual bliss of the widow as such as in 'RAMKAMAL SINGH v. RAMKISHORE DAS', 22 Cal 506. The only point for consideration therefore is whether the first defendant in making the alienation complained of in the present case exceeded the limits allowed to her by the law according to the quantitative ratio test laid down by the decisions. My learned brother has given reasons with which I agree for holding that she did not. It is significant that the daughter and the son-in-law, the mother and father respectively of the plaintiffs joined in the transaction and that neither of them, and in particular the latter, has gone into the box. No "ulterior motive or fraud" and no "undue extravagance of expenditure" within the meaning of the decisions has been pleaded, much less proved.

(23) It seems to me too that a bona fide alienee like the father of the third defendant need have gone no further than to satisfy himself that there were outstanding debts in fact and indeed incurred by the first defendant as for the marriage and for the later allied ceremony of garbadhana of her daughter's daughter. To call upon him to go further and satisfy himself that the expenditure incurred was one which a court of law would hold reasonable, should the transaction of sale be later challenged, is to impose on him an onerous and undue responsibility not easily feasible of discharge in a matter on which if there were more courts than one dealing with the question they may not for aught one knows find themselves agreeing in the same conclusion. To say that such an alienee must either take the risk of the court deciding adversely to him on the question of the reasonableness of the expenditure or refrain from going in for the property altogether does not appeal to me in the slightest as a canon of practical justice and equity which this court should endorse. Except in a case of proved fraud on the power in the sense of its exercise for a sinister or ulterior purpose or in a case of proved collusion between the alienor and the alienee in order to defeat the reversion, the court ought not, in my opinion, to be astute or anxious to invalidate the transaction. The alienee must, I am inclined to think, stand protected so long as the 'causa causans' inspiring the transaction is an indebtedness for a lawful and binding purpose. The principle of equity recognised from as early as the Privy Council decision in 'HUNOOMAN PERSAUD'S CASE', 6 Moo Ind App 393 (PC) in favour of a bona fide alienee or creditor acting on the representation of a lawful purpose by the limited estate holder is not merely that he stands absolved from the obligation to prove the real existence of an alleged and reasonably credited necessity as a condition precedent to the validity of the transaction, but also that such alienee or creditor is not affected by the precedent mismanagement of the estate. This latter aspect of the principle has been expressed by the Privy Council in 'KILADIRI SENU v. CHATURBUJDAS' 6 Pat. 139 which related to an alienation by the head of a mutt in the terms that only the immediate and not the remote cause, the 'causa causans' of the borrowing is the thing to be considered. This aspect of the doctrine is, in my opinion, equally applicable to an alienation by a widow holding a limited estate. That in such cases the anterior mismanagement does not affect the bona fide alienee or creditor is an integral part and parcel of the equitable doctrine expounded

by K. T. Bruce, L. J., in HANOOMAN PERSAUD'S case, 6 M.I.A. 393 and, in my opinion, the sale impeached in the present case must in this view also stand. We are now concerned with the rights of an alienee under a sale effected for the discharge of a debt already incurred for a lawful and binding purpose by the holder of the limited estate, not with the rights of a creditor simple or secured for the first time advancing a loan for such a purpose.

(24) As regards the principle discussed before the court below as well as before us that a moral obligation on the part of an ancestor becomes a legal obligation of the descent of his estate, on his heir, I must own to some amount of doubt in regard to its applicability to the present case. Although the doctrine has become too well settled in Hindu law to be disputed at this time of day I am inclined to think that it can only apply to cases where the obligation even as a moral one did arise during the original owner's lifetime. To fasten on the estate in the hands of the heir a liability not in 'esse' but only in 'posse' during the lifetime of the original owner is, I am afraid, to go further than is warranted by the decisions on the subject on the ratio thereof. The principle is, no doubt, one peculiar to Hindu jurisprudence which insists that not merely legal but also moral obligations to the propositus must be fulfilled by the taker of the estate after his death in the interests of his spiritual benefit and welfare. The principle is certainly not one of which the courts ought to fight shy because there is, in my opinion, a high liberality of spiritual outlook underlying the doctrine which no Hindu ought by any means to feel abashed about. I am not prepared to extend the principle, however, to any merely moral obligation which did not concretely exist during the lifetime of the original owner because the person claiming enforcement of such obligation against the later taker of the estate was not in existence at all during the lifetime of the original owner. Moreover, I entertain some doubt how far the liability to meet the expenses of marriage and 'garbhadhanam' of a daughter's daughter is to be regarded as within the ambit of a person's moral obligation according to the texts to maintain her during his lifetime. The principle, as observed in 'KAMINEE DASSEE v. CHANDRA PADE MONDLE', 17 Cal 373 is one which is or is not to be applied to a particular case according to the view that the court takes on its own merits. It will have to be determined in each case whether having regard to the relationship, the means and various circumstances of the party claiming maintenance the late proprietor was according to the principles of the Hindu law and to the usage and practice of the Hindu people morally bound to maintain that party. Even assuming a person's liability to meet marriage expenses of his daughter's daughter may be treated as on the same footing as an obligation to merely maintain her, there is, as I have already indicated, no inexorable logic about the situation such as compels me to say as at present advised that although the daughter's daughter came into being only after the death of the person, his heir or heiress would be bound by the obligation as a legal obligation into which a moral obligation of the person might well become converted on the devolution of his estate on his heir or heiress. The extension of the doctrine in the manner suggested is calculated to introduce sometimes a complication into the situation by reason of too many burdens for the estate to bear coming into existence over an undefined period of time after the death of the original owner against the estate in the hands of the later taker. Far from operating as a rule of spiritual benefit to the original owner, I cannot help feeling that the extension may work; sometimes too much to the prejudice of the later taker to leave him any inducement to minister even to the fundamental spiritual needs of the deceased.

(25) Lastly I agree with my learned brother in his view of 'SHRINIVASA RAO v. SESHACHARLU', ILR. (1942) Mad 42 that the alienation in that case which was of the whole property inherited by the widow could not be upheld in its entirety consistently with the quantitative ratio test discussed in the foregoing.

A/C.R.K./R.G.D. Appeal allowed.

A. I. R. 1952 MADRAS 715

RAJAMANNAR, C. J.
AND VENKATARAMA AIYAR, J.

The Lotus Industrials, Kallai, Malabar by sole Proprietor Mr. Velayudha Menon and others, Petitioners v. The State of Madras Development Department Madras, represented by the Secretary and others, Respondents.

Civil Misc. Petn. No. 5524 of 1951 and Writ Petn. No. 635 of 1951, D/- 5-12-1951.

† (a) **Constitution of India, Arts. 14 and 132 (1) — Equality before law — Preferential treatment to "consumer quota holders" — Cotton Textiles (Control) Order (1948), Cl. 30.**

There is nothing in the Constitution which precludes a classification even by bodies other than the legislature. Having regard to the wide definition of "law" in Art. 13 (3) as including any rule, regulation and notification having the force of law, it is obvious that any method of distribution which the State adopts in pursuance of a Control Order should not contravene the provisions of Art. 14. There is nothing in the classification adopted in the All India Yarn Distribution Scheme which contravenes the principles laid down in AIR 1951 S C 318. It is true that one way of distribution among several consumers is by adopting the 'pro rata' basis. But that basis need not always be the most equitable basis. This basis has been to a certain extent adopted so far as the new entrants are concerned. But consumers of long standing who had, during the normal years and during the first control period, managed to obtain standing contracts directly with the mills and who had been more or less continuously in the trade were apparently considered to deserve a preferential treatment. Such a view is not unfair or discriminatory. It cannot also be said that this basis has no reasonable and just relation to the object sought to be attained, namely, a proper distribution of yarn. Thus, the preferential treatment accorded to "consumer quota holders" cannot be held to be discriminatory and in contravention of the principle underlying Art. 14, especially taking into consideration the fact that the total number of bales allotted to these "consumer quota holders" which include consumers of different classes is only 1850 out of the aggregate allotment to the Madras State of about 16000 to 18000 bales. (Leave to appeal to the Supreme Court was granted under Art. 132 (1) of the Constitution, as this involved a substantial question of law concerning the interpretation of the Constitution). AIR 1951 SC 318, Foll.; (1950) 94 Law Ed 381, Rel. on. (Paras 6, 7, 9, 11)

(b) Constitution of India, Art. 14 — Equality before law — Exclusion from list of "Consumer Quota holders".

Where some of the master-weavers, though they were getting supplies direct from the mills during the basic period of 1940-42, were excluded from the list of "consumer quota holders" because they had not been doing business in the first control period, there is nothing unreasonable in this policy of the Government. Such persons ought to be really included among the newcomers. (Para 13)

D. Narasaraju and P. C. Kurian, for Petitioners; The Advocate-General for State Counsel, K. Umamaheswaram for Alladi Kuppuswami, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('50) 1950 SCR 869: (AIR 1951 SC 41) 7
('51) 1951-2 Mad LJ 141: (AIR 1951 SC 318: 52 Cri LJ 1361 SC) 7
('51) C. M. P. Nos. 6181 and 6182 of 1951: (AIR 1952 Mad 565) 8
(1950) 94 Law Ed 381: 338 US 604 8

C. P. M. No. 5524 of 1951.

RAJAMANNAR C. J.: This is an application for the issue of an order in the nature of a prohibition directing the Government of Madras to forbear from enforcing any system of rationing of yarn with regard to some only of the consumers and to issue an order in the nature of a writ of 'mandamus' directing the Government of Madras to distribute yarn allotted to the Madras State equally between all the consumers in proportion to the looms employed by them. The affidavit in support of this application is filed by one M. Velayudha Menon representing the two petitioners, namely, (1) The Lotus Industrials, Kallai, Malabar, of which he is the sole proprietor, and (2) the Calicut Handloom Owners' Association of which he is the Honorary Secretary.

(2) Distribution of yarn in this State is made under the Cotton Textiles (Control) Order, 1948, by officers specially appointed for the purpose. Clause 30 of that Order directly relates to the distribution of yarn. It runs as follows:

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers:

(a) to sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify;

(b) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify; and may issue such instructions as he thinks fit regarding the manner in which the direction is to be carried out."

This clause as well as other clauses relating to the acquisition and installation of power looms came up for discussion before this Court in C. M. P. Nos. 6181 and 6182 of 1951. In the latter of these petitions, I remarked that there was nothing in the affidavit filed on behalf of the State to give any information as to the principles on which the distribution of yarn is being made.

While realising that during periods of acute shortage of essential goods and commodities it is not only desirable but also imperative that the State should take steps to regulate their purchase and sale with a view to an equitable distribution among all the consumers and also that provisions relating to Controls cannot go into the minutest detail of actual distribution, I said as follows:

"Clause 30 lays down the ultimate end in view, namely, a proper distribution of cloth and yarn. If in accordance with and in pursuance of this policy, the Textile Commissioner had arrived at a scheme of distribution on a certain and ascertainable basis which is free from any charge of discrimination and he had placed that scheme before this court and convinced us that the petitioner before us has been allotted the proper quota in accordance with the scheme, then we would have been loth to interfere. Unfortunately, however, and presumably in spite of the efforts of the learned Advocate General, we have not been informed of any such general scheme. There is no doubt a reference to an All India Yarn Distribution Scheme in the counter affidavit filed on behalf of the State, but no particulars of the scheme have been put before us.....It appears to me that if in the exercise of the powers granted under clause 30, the Textile Commissioner has evolved a proper scheme of distribution which does not offend either against Art. 15 or Art. 19 (1)(f) and (g) read with Art. 19(5) and (6), then there is no room for complaint by any person on the ground that his rights have been unlawfully affected to his prejudice."

I am glad to find that in this case a long and elaborate affidavit has been filed on behalf of the State by the Director of Controlled Commodities setting out in detail the provisions of the All India Yarn Distribution scheme. The material features of this scheme are as follows:

(3) Under the scheme, the Government of India takes over the entire yarn produced in the Indian Union. After permitting various composite mills to retain for the produce and consumption of their weaving sections the yarn produced by their spinning sections, out of the balance of yarn the Central Government retains a portion for Government purposes & a portion for export to foreign countries and leaves the balance for internal distribution in the country. Such balance of yarn called "free yarn" is pooled together and distributed to the various States for supplying the consumers in their respective areas. The quotas of yarn for the respective States are fixed by the Textile Commissioner at Bombay. Thereafter, the Director of Controlled Commodities at Madras is in charge of the distribution within the State. This distribution is in accordance with the principles laid down in Government Orders issued from time to time.

The handloom factories, power-loom factories and hosiery-factories which were getting supplies of yarn direct from the mills during the previous control period were treated preferentially and they were allowed to continue to get their supplies direct from the mills. The quantity to be supplied to each consumer is fixed by the Provincial Textile Commissioner. Accordingly consumers of yarn within the State are divided into two main categories for the purpose of distribution, namely, (1) those who were purchasing yarn direct from the mills at ex-mill rates during the last control period and (2) other consumers purchasing yarn from wholesale or retail dealers. The persons in the first category are called "consumer quota holders". These are given the same quantity of yarn as they were purchasing on an average during the basic period of 1940-42 at ex-mill rates for their own consumption and use. There are about 91 such "consumer quota holders" in the State, including power looms, hosiery factories, handloom factories and master weavers.

Old and established dyers in Madras, Madura and Ramnad districts are given certain bales, but these

bales come back to the weavers in the shape of yarn through normal channels of distribution. Miscellaneous consumers requiring small counts like 1 to 2 are given about 120 bales of yarn and the Fisheries Department is allotted about 100 bales. Out of the balance, 36 per cent. is allotted to the Madras Handloom Weavers' Provincial Co-operative Society for distribution to handloom weavers who have joined co-operative societies for the reason that a little more than one-third of the handlooms as originally estimated in 1945 are held by the members of that Society. The balance of 64 per cent. is allotted to the Collectors of the various districts for distribution to the weavers other than those who are members of the Society and other consumers in the districts. During the second half of the year 1950, supplies of yarn became very scarce and it was found that blackmarketing was going on as some of the consumers were bogus. In order to ensure a fair distribution of the available yarn to genuine weavers and other consumers at controlled rates, it was found necessary to revise the distribution scheme. Identity cards were issued to genuine consumers. But the consumer quota holders were permitted to obtain their usual supplies direct from the mills at ex-mill rates.

(4) It is frankly admitted in the affidavit filed by the Director of Controlled Commodities that the consumer quota holders are no doubt in a better position, but they were placed in a special class as they were enjoying the privileges during the prior control period. It was submitted that the distribution of yarn was always undertaken on the most fair and equitable basis possible and the classification was a fair and reasonable classification necessitated by the circumstances. It was also explained why the period of 1940-42 was fixed as the basic period. This was because control was introduced in 1945 and the years 1943 and 1944 were years during which conditions were extremely unsettled and it was not possible to get accurate statistics for the period.

(5) The real complaint of the petitioners is against the preferential treatment of the "consumer quota holders" both as regards the quantities of yarn and the favourable price at which they will be able to purchase yarn direct from the mills.

(6) Mr. Narasaraju, learned advocate for the petitioners raised two main grounds of objection to the classification of the consumers into "consumer quota holders" and others. The first ground was that any classification for purposes of distribution can be made only by the legislature and not by the executive or administrative authorities entrusted with the task of distribution. The second ground was that the classification must rest on a distinction which had a logical connection with the object and purpose. The first ground does not need much consideration. There is nothing in the constitution which precludes a classification even by bodies other than the legislature. The real question is whether the classification amounts to an illegal discrimination. Having regard to the wide definition of "law" in Art. 13(3) as including any rule, regulation and notification having the force of law, it is obvious that any method of distribution which the State adopts in pursuance of a Control Order should not contravene the provisions of Art. 14 which guarantees equal protection of the laws to all persons. The reports of the United States Supreme Court decisions contain several examples of classification by executive and administrative bodies and authorities which are subject to judicial review equally with classification made by the Legislature.

(7) In support of the second ground of objection learned counsel relied on the observations in 'CHARANJIT LAL v. THE UNION OF INDIA', 1950 SCR 869. The principles laid down in that case have been summarised by His Lordship Fazl Ali J. in 'Prohibition Case', 'STATE OF BOMBAY v. BALSARA', 1951-2 Mad LJ 141 at p. 153. The propositions so laid down so far as they are material to this application are as follows:

"(5) Every classification is in some degree likely to produce some inequality and mere production of inequality is not enough.

(6) If a law deals equally with members of a well-defined class it is not obnoxious and it is not to the charge of denial of equal protection on the ground that it has no application to other persons.

(7) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis."

Bearing these principles in mind, we have to see if there is anything in the classification adopted in the All India Yarn Distribution Scheme which contravenes these principles. It is true that one way of distribution among several consumers is by adopting the 'pro rata' basis. But that basis need not always be the most equitable basis. This basis has been to a certain extent adopted so far as the new entrants are concerned. But consumers of long standing who had, during the normal years and during the first control period, managed to obtain standing contracts directly with the mills and who had been more or less continuously in the trade were apparently considered to deserve a preferential treatment. I do not think that such a view is unfair or discriminatory. Nor can I say that this basis has no reasonable and just relation to the object sought to be attained, namely, a proper distribution of yarn.

(8) I need only refer to one decision of the Supreme Court of United States which throws considerable light on the point under discussion, a decision to which we also referred in the prior applications, 'BALA KRISHNAN v. STATE OF MADRAS', CMP Nos. 6181 and 6182 of 1951: (AIR 1952 Mad 565), namely, 'SECRETARY OF AGRICULTURE v. CENTRAL ROIG REFINING CO.', (1950) 94 Law Ed. 381: 338 US 604. Under the Sugar Act of 1948 the Secretary of Agriculture was authorised to allot the refined sugar quota of a particular area among those marketing the sugar on the main land from an off-shore area. He was specifically directed to provide a fair distribution of the quota by taking into consideration three factors which included (1) past marketings and (2) ability to market the amount allotted. An order of the Secretary allotting certain sugar quota among the various refineries of the Island of Puerto Rico was based upon findings that the proper measure as to "past marketing" and "ability to market" was a period preceding the abnormal war years. The constitutionality of the Act was challenged.

The Supreme Court held that the Act did not offend the due process clause because of the alleged discriminatory character of the Secretary did not exceed the authority given him by the Act. The following observations made by Frankfurter J. who delivered the opinion of the Court are most instructive:

"It was evidently deemed fair that in a controlled market each producer should be permitted to retain more or less the share of the market which he had acquired in the past. Accordingly, past marketings were to be taken into consideration in the Secretary's allotments.....The problem which confronted Congress was not the setting of quotas abstractly considered but so to fix their

amount as to achieve approximate justice in the shares allotted to each area and the persons within it. To recognise the problem is to acknowledge its perplexities.....To fix quotas on a strict historical basis is hard on late-comers into the industry or on those in it who desire to expand. On the other hand, to the extent that new-comers are allowed to enter or old-timers to expand, there must either be an increase in supply or a reduction in the quotas of others....

Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this court to reweigh the relevant factors and, per chance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation."

(9) I am of opinion that in the circumstances set out in the counter affidavit filed on behalf of the State by the Director of Controlled Commodities, the preferential treatment accorded to "consumer quota holders" cannot be held to be discriminatory and in contravention of the principle underlying Art. 14 of the Constitution. I am inclined also to take into consideration the fact that the total number of bales allotted to these "consumer quota-holders" which includes consumers of different classes is only 1850 out of the aggregate allotment to the Madras State of about 16000 to 18000 bales.

(10) The application is therefore dismissed with costs. Advocate's fee Rs. 150/-.

(11) Leave to appeal to the Supreme Court granted under Art. 132(1) of the Constitution, as this involves a substantial question of law concerning the interpretation of the Constitution.

(12) 'Writ Petition No. 635 of 1951': This application is really covered by our decision in C. M. P. No. 5524 of 1951. The petitioners in this case are (1) The Coimbatore District Master Weaver Licensees' Association, Erode, by its President, O. A. Ramaswami, and (2) O. A. Ramaswami, as proprietor of Sri Murugan Textiles, Chennimalai. A master weaver is a person having a number of weavers possessing handlooms in his employment and working under his supervision. The master weavers were not originally included among the "consumer quota holders", but subsequently they were also so included. There is no necessity, therefore, to examine their case separately. Their position is now exactly similar to that of the other "consumer quota holders."

(13) Mr. Narasaraju, the petitioner's counsel, complained that some of the master-weavers, though they were getting supplies direct from the mills during the basic period of 1940-42, were excluded from the list of "consumer quota holders" because they had not been doing business in the first control period. I see nothing unreasonable in this policy of the Government. Persons who had discontinued their business for a time, and during the critical period, have been, I think, quite rightly, not given the same right and privilege as those who were carrying on business continuously. Such persons ought to be really included among the new-comers.

(14) For the reasons set out in our judgment in C. M. P. No. 5524 of 1951 this application must also be dismissed with costs. Advocate's fee Rs. 150/-.

A/C.R.K./D.H. Application dismissed.

A. I. R. 1952 MADRAS 718

(FULL BENCH)

RAJAMANNAR, C. J., RAGHAVA RAO, AND VENKATARAMA AYYAR, JJ.

Kandula Radhakrishna Rao and others, Appellants v. The Province of Madras represented by the Collector of West Godavari, Eluru and another, Respondents.

Appeals Nos. 365, 468, 551, 447 and 641 of 1947, D/- 16-11-1951.

(a) Sales Tax — Madras General Sales Tax Act (IX (9) of 1939), S. 8 — Commission agent — Rusum collected openly from buyers — Nature of.

Where certain amounts were collected by the Commission agents openly and not clandestinely and the evidence showed that the amounts were not considered by any party, either the seller or the buyer or the commission agent, as part of the price, that the commission agent obtained a remuneration both from the seller and the buyer which was in accordance with the mercantile usage and that it was as if the agreement between the parties was that the commission agent should get a particular amount from the seller and another amount from the buyer as his commission.

'Held' that the amounts of rusum should be treated as part of the agreed commission contemplated under S. 8. (Para 5)

(b) Sales Tax — Madras General Sales Tax Act (IX (9) of 1939), S. 3 — Commission agent — Liability to tax as dealers — Question is mixed question of fact and of law and not a mere question of law. (Para 7)

† (c) Sales Tax — Madras General Sales Tax Act (IX (9) of 1939), S. 2(b)) — Commission agent and broker — Difference between — Commission agent is a dealer.

A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract.

A commission agent on the other hand has, according to the accepted mercantile practice, control over or possession of the goods and has the authority from the owner of the goods to pass the property in and title to the goods. When a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business is therefore a dealer as defined in S. 2 (b) of the Sales Tax Act which does not contemplate as a necessary condition that the goods sold should belong to the person selling or buying: 'AIR 1949 Mad 843' Approved: 'AIR 1948 Mad 102(1)' Dist. Observations in 'AIR 1950 Mad 521' to the contrary held obiter and dissented from. Case law referred. (Paras 10, 13, 20)

(d) Sales Tax — Madras General Sales Tax Act (IX (9) of 1939), Ss. 8, 3 — Scope — Commission Agent — Liability to sales tax.

Though it is true that S. 8 is not a taxing section, yet occurring as it does in the same enactment, it must be read as throwing some light on the other related provisions and in view of the fact that there is nothing in the definition of dealer to indicate that the buying or selling must be on the person's own account, the obvious inference from S. 8 is that the definition would cover also the case of commission agents mentioned in S. 8 who would, but for the exemption given by S. 8, be liable to taxation under S. 3. (Para 16)

P. Somasundaram and N. C. V. Ramanujachari, for Appellant and the Govt. Pleader, for Respondent. (In App No. 365/47).

N. C. V. Ramanujachari, for Appellant and Govt. Pleader and C. Vasudeva Mannadiar, for Respondent. (In App. No. 447/47).

The Govt. Pleader, for Appellant and C. V. Dhikshitulu, for Respondent. (In App. No. 641/47).

P. Somasundaram and M. Nagaramayya, for Appellant and the Government Pleader and K. N. Karunakaran, for Respondent. (In App. No. 468/47).

P. Somasundaram and N. C. V. Ramanujachari, for Appellant and the Government Pleader and K. N. Karunakaran, for Respondent. (In App. No. 551/47.)

The Advocate General appeared with the Government Pleader in all cases.

REFERENCES: Courtwar/Chronological/ Paras
('47) 1947-2 Mad LJ 220: (AIR 1948 Mad 102(1): 49 Cri LJ 45) 7, 8
('50) ILR (1950) Mad 421: (AIR 1949 Mad 343) 1, 5, 13
('51) ILR (1951) Mad 257: (AIR 1950 Mad 521) 1, 5, 7, 8, 9, 14, 20
('38) AIR 1938 Nag 254: (176 Ind Cas 675) 11
(1871) 6 Ch 397: (40 LJ Bk 73) 11
(1872) LR 5 HL 395: (41 LJQB 201) 19
(1881) 43 LT 171 10
(1883) 11 QBD 797: (52 LJQB 538) 19

RAJAMANNAR C. J.: These appeals have been posted before a Full Bench because of a conflict of opinion between Division Benches of this Court ('PROVINCE OF MADRAS v. FIRM OF KANIGOLLA SIVALAKSHMINARAYANA', ILR (1950) Mad 421 and 'PROVINCIAL GOVERNMENT OF MADRAS v. VEERABHADRAPPA', ILR (1951) Mad 257) on the interpretation of some of the provisions of the Madras General Sales Tax Act, Madras Act IX of 1939. All these appeals arise out of suits filed for the recovery of amounts of sales tax alleged to have been illegally levied from the respective plaintiffs. Appeals Nos. 365, 468 and 551 of 1947 arise out of three original suits Nos. 12, 33 and 34 of 1946 which were disposed of by a common judgment by the learned District Judge of West Godavari at Ellore. All these suits were dismissed and the plaintiffs are the appellants before us. App. No. 447 of 1947 is from the decree dismissing O. S. No. 37 of 1945. This suit was disposed of by the same learned Judge who disposed of the three first mentioned suits. O. S. No. 93 of 1946 from which App. No. 641 of 1947 is the appeal was tried by another Judge, the learned Subordinate Judge of Ellore, who took a view different from that of the learned District Judge of West Godavari and decreed the suit. Hence the State of Madras is the appellant in this appeal. In all the appeals, common questions of law arise. Before these points are discussed, it is necessary to set out in brief the salient facts in these cases which have a material bearing on the questions which fall for decision. But even before this it will be helpful to refer to the main provisions of the Madras General Sales Tax Act.

(2) The object of the Act is to provide for the levy of a general tax on the sale of goods in the Province of Madras. The following definitions in Sec. 2 of the Act are important. Sec. 2(b) defines a dealer as meaning any person who carries on the business of buying or selling goods. Sale is defined in clause (H) thus:

"Sale with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge;

Explanation: A transfer of goods on the hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale."

Clause (1) defines "turnover" thus:

"Turnover means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, tenant or otherwise, shall be excluded from his turnover:

Explanation: Subject to such conditions and restrictions, if any, as may be prescribed in this behalf:

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and

(iii) where for accommodating a particular customer a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former."

Sec. 3 is the charging section. Sec. 3(1) says:

"Every dealer shall pay in each year a tax in accordance with the scale specified..... Provided that any dealer whose turnover in any year is less than ten thousand rupees shall not be liable to pay the tax under this sub-section for that year."

The second proviso avoids the possibility of double taxation. It runs thus:

"Provided further (1) that in respect of the same transaction of sale, the buyer and the seller shall not both be taxed, but only one of them, as shall be determined by the rules made in this behalf under sub-sec. (2), shall be taxed thereon, and (2) that when the amount for which any goods were bought by a dealer has been included in his turnover, the amount for which the same goods were sold by him shall not be included in his turnover, for the purposes of this Act."

Section 8 is the next important Section and as one part of the argument relates entirely to a construction of this Section, it is useful to set it out in extenso. It runs:

"The Provincial Government, may on the application and on payment of such fee as may be prescribed in that behalf, license any person under this section who for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax under S. 3 such of his transactions as are carried out in accordance with the terms and conditions of his licence;

Provided always, that, save where the transaction consists of a sale by a grower of produce grown by him or on his land, no such exemption shall be given unless the amounts for which the goods concerned in such transactions are sold, are included in the turnover of the principals or of the dealers from whom purchases were made, or, would have been so included but for an exemption provided under this Act."

Under Sec. 9 (1) every dealer whose turnover is ten thousand rupees or more in a year is bound to submit a return of his turnover. Sec. 9 (2) deals with the manner of assessment. Sec. 13 makes it incumbent on every dealer and every person licensed under Sec. 8 to keep and maintain a correct account showing the value of the goods sold and bought by them. Sec. 19 confers power on the Provincial Government to make rules. Rules have been framed by the Government in exercise of the powers conferred by this section.

(3) The plaintiffs in all the suits carry on independent business of their own and also commission business. Every one of them has obtained a licence under Sec. 8 of the Act. The licences granted to them are in the following form:

"Form No. 5

Licence under Section 8 under Madras General Sales Tax Act of 1939

(See Rule 6 (5))

Whereas.....having their place of business in..... have paid to him a licence fee of Rs. 10 in words (ten rupees only) a licence is hereby granted under Section 8 of the Madras General Sales Tax Act of 1939 subject to the provisions of the said Act, subject to the rules made thereunder and subject to the following conditions:

1. The licence holder shall submit to the undersigned as before the last day of every month, a return in form No. 6 for the previous month.

2. The licence-holder shall be exempt from the tax payable under section 3 (1) of the Madras General Sales Tax Act of 1939, only to the extent to which the goods bought or sold through him are included in the turnover of the principals or in the turnover of the dealers from whom purchases were made.

3. This licence shall not apply to the transactions of the license holder carried on otherwise than for an agreed commission or brokerage on behalf of known principals (including firms) in the province specified in his accounts, or to the transactions of the licence-holder on behalf of principals outside the province.

No correction in this licence shall be valid unless it is ordered and attested by the undersigned.

Licensing Authority."

The Sales Tax Officers held that these plaintiffs had violated the conditions of the licence and so forfeited the exemption from the payment of the sales tax provided by Sec. 8 because the plaintiffs had made extra collections from the buyers in addition to the cost of the goods and appropriated these amounts for themselves without passing them on to their seller principals or including them in the turnover of their principals. The extra collections which appear to have been made by the plaintiffs are not all of them of the same nature. The amounts collected as Kolagram, Dharmam, Digumati and Cooly do not purport to be appropriated by the plaintiffs for their own use. Kolagram represents the amount paid as weighment or measurement charges. The dharmam amounts are set apart (or intended to be set apart) for charity. Digumati is a charge for unloading. The gumastha rusum indicates by its name that it is a more or less a levy for clerical expenses. The general evidence is that these charges are made by all the commission agents in the locality and have received the sanction of mercantile usage. Indeed, the learned Advocate General did not address any argument in respect of these collections. The Government appear to have recognised this fact as is evident from condition 5 contained in the form which was substituted for the original form by a Government Order dated 7th February 1948. It runs thus:

"(5) The agreed commission or brokerage specified in the accounts shall be the entire remuneration of the agent and each legitimate incidental charge actually incurred by him in respect of insurance, transport, loading and unloading, godown rent, interest, correspondence, telegrams, the use of the telephone and the like shall be specified in the accounts separately."

In addition to the levy of these amounts the plaintiffs, at least in most of the cases, appear to have also collected amounts under the heading of rusum. Initially, the rate of the rusum synchronised with that of the sales tax though there is evidence that the rate was increased in some cases. These amounts which were collected by the plaintiffs from the buyers were admittedly not passed on to their sellers though the rusums did find a place in the accounts of the plaintiffs and it is said that the plaintiffs had included these amounts in their turnover. It is common ground that there is no secrecy about this charge and the argument proceeded before us on the footing that this custom of commission agents collecting rusums from the buyers at a particular rate and appropriating them was well established and the sellers either actually knew or must be deemed to have known of this usage.

(4) The case of the Government shortly is that the plaintiffs have been obtaining in these transactions a further benefit than the agreed commission or brokerage. From another point of view also there has been a violation of the conditions of the licence because the amounts collected by the plaintiffs as rusums really must be deemed to be part of the price of the goods and these amounts were not included in the turnover of the seller principals as part of the price. The plaintiffs met these charges by pleading firstly that these amounts ought not to be added to the price of the goods and secondly that they should be deemed to be part of the agreed commission. Though there was an attempt to contend that in effect the plaintiffs were acting as agents for both the sellers and the buyers and therefore were charging as they were entitled to charge commission from both the seller and the buyer, the attempt was not persisted in and the appeals were argued on the basis that the plaintiffs were only agents for the sellers. It was further contended on behalf of the plaintiffs that even assuming that they had committed a breach of any of the conditions of the licence granted to them under Sec. 8, they were not liable as commission agents to the sales tax because they could not in law be held to be dealers within the meaning of the definition of dealer in the Act.

(5) The first question which arises for decision is whether on the evidence it can be held that the

plaintiffs had violated any of the conditions of the licence granted to them under Sec. 8 of the Act by reason of the fact that they had collected the rusum from the buyers and had not passed it on to their seller principals and also because the rusum amounts were not included in the price of the goods and included as such in the turnover of the principals. The two trial judges came to conflicting decisions on this point on practically the same kind of evidence. I am inclined to agree with the learned Subordinate Judge at Ellore who decided O. S. No. 93 of 1946. He held that the rusums collected by the plaintiffs were in pursuance of a trade usage and that they form part of the agreed commission contemplated under Sec. 8 of the Act. In coming to this conclusion he was largely influenced by the evidence of merchants who came and deposed that this practice of collection of rusum by the commission agents was well known to the merchants of the locality and was acquiesced in. The other learned Judge considered that the question of the knowledge of the seller principals was wholly irrelevant from a purely legal point of view. Though he was prepared to concede that certain of the seller principals knew about the collections of rusum by the commission agents from the buyer, he agreed with the view taken by the Board of Revenue that the rusum collections were in the nature of prices and should have been included in the turnover of the seller principals. We were taken through the evidence which related to this part of the case by counsel at the bar. On the whole the impression left on me as a result of the evidence is that these amounts were not considered by any party, either the seller or the buyer or the commission agent, as part of the price. In effect the evidence is that the commission agent obtained a remuneration both from the seller and the buyer and this was in accordance with the mercantile usage. It is as if the agreement between the parties was that the commission agent should get a particular amount from the seller and another amount from the buyer as his commission. There is nothing either in the decision in the 'PROVINCE OF MADRAS v. FIRM OF KANIGODA SIVALAKSHMINARAYANA', ILR (1950) Mad 421 or in the decision in the 'GOVERNMENT OF MADRAS v. VEERABADRAPPA', I. L. R. (1951) Mad 257 to preclude us from holding that the rusums must be treated as part of the agreed commission. Govinda Menon J. was of the opinion that if the commission agent collected rusums openly and not clandestinely, then the rusums should be deemed to be part of the agreed commission. The learned Judge observed:

"It is therefore clear that in collecting an amount designated "rusums" the commission agents were really collecting a commission .. .. .."

Mack J. accepted the finding of the lower Court that they charged rusum as a little additional commission and said:

"There can be no doubt, nor is it disputed, that this charge of rusum was a new practice which arose out of the Sales Tax Act, 1939. It appears to have originated from prudent sellers making this charge and ensuring against a sales tax levy being made on their total turnover .. .. We are therefore unable to accept the learned Advocate General's contention that rusum is in the circumstances something charged by the commission agent in addition to the agreed or customary commission of one per cent".

The learned Judge was apparently of the view that if there is no evidence or material to show that the sellers principals agreed to the rusum being collected from the buyers by the commission agents and being appropriated by them, the charge of rusum could not be held to be either an addition to the agreed commission or an item of expenditure legitimately incurred by the commission agent on behalf of the principal. In the cases before us, I think on the evidence it should be held that the seller principals must be deemed to have agreed to the collection of the rusums by the plaintiffs. In the latter case I. L. R. (1951) Mad 257 Viswanatha Sastri J. observed as follows:

"It is true that the respondents have taken out licences under Sec. 8 in respect of their commission agency business. In accordance with the customs of the groundnut trade at Adoni they charged a small brokerage from buyers as well as sellers of groundnuts for whom they acted as commission agents. It is also true that they charged a small sum as rusum or mahimai for charity and establishment expenses in addition to the commission proper of a quarter anna in the rupee. Those amounts are also shown in their accounts and in my opinion, they really form part of the commission they collected though distributed under separate heads. There is no provision in the Act or the rules fixing the maximum brokerage permissible and it is left to be settled by contract between the broker or commission agent and his principals or by the usage of the trade. It may be that it is a vicious practice for brokers to charge brokerage both from the buyer and the seller of goods in respect of one and the same transaction. But it is a matter of notoriety that practice is deeply rooted in many places and several trades. The licence issued to the plaintiffs in these cases, which we have perused, does not prevent such a mode of earning brokerage or commission".

(6) It must therefore be held that the plaintiffs in these cases have not violated the conditions of the licences granted to them under Sec. 8 of the Act.

(7) The next question and by far the more important one is assuming that the plaintiffs have violated the conditions of the licences and therefore were not entitled to exemption under Section 8 of the Act whether they would be liable to the tax as dealers. This question appears to us to be a mixed question of fact and of law and not a mere question of law. It is therefore necessary to ascertain the nature of the business transacted by the plaintiffs as commission agents. It was indeed common ground and amply supported by the evidence that the plaintiffs were acting as agents for several seller principals who entrusted them with goods for sale at specified prices. Though these principals were known to the plaintiffs, they rarely if ever disclosed their names to the several buyers. So far as the buyers were concerned, the transactions were between them and the plaintiffs. The seller and the buyer as a rule were not brought into contact with each other. The plaintiffs, as commission agents, are given full authority to pass the property and the title in the goods to the buyers. P. W. 1 in O. S. No. 93 of 1946, a partner of the firm of the plaintiffs in that case, deposed that the firm had 100 to 200 principals. 90 per cent of whom resided outside the place of business. The principals send the goods to the firms for sale. On these facts must be determined the question whether the plaintiffs can fall within the definition of "dealer" in the Act. I have referred to these facts because during the course of the argument, it became evident to me that the actual decision in 'GOVERNMENT OF MADRAS v. VEERABADRAPPA', I. L. R. (1951) Mad 257 on the facts found in that case was unassailable. I shall briefly show what divergence there is between the facts in the present cases and the facts in the case before the learned Judges in 'GOV-

ERNMENT OF MADRAS v. VEERABHADRAPPA', I. L. R. (1951) Mad 257. Satyanarayana Rao J. extracted in his judgment the summary of the evidence made by the learned District Munsif as regards the nature of the business carried on by the plaintiffs in that case. That summary clearly demonstrates the fact that the plaintiffs were acting merely as brokers and were bringing the sellers and the buyers together. The sellers brought their goods to the plaintiffs' shop and the plaintiffs sent for prospective purchasers who came in person or sent their representatives. The purchasers themselves inspected the goods and the prices were fixed after discussion between the sellers and the buyers and the commission agents. Thereafter, there was delivery made to the buyers. The plaintiffs were paid commission and the other amounts which were called gumastha, dharma, rusum etc. The payment of these sums was consented to by the sellers. Viswanatha Sastri J. alludes to the nature of the business in the following passage in his judgment:

"Here the plaintiffs are mere commercial agents who brought buyers and sellers of groundnuts together, arranged the sale or purchase and earned a small commission or brokerage from both of them. The learned District Judge described the situation thus:

"An agent who merely brings a buyer and seller together cannot be said to buy or sell his goods in his own behalf, any more than a marriage broker who brings the parties together can be said to be a party to the marriage."

The facts in the 'PUBLIC PROSECUTOR v. NARASIMHA REDDY', (1947) 2 Mad L. J. 220 were also similar to the facts in 'GOVERNMENT OF MADRAS v. VEERABADRAPPA', I. L. R. (1951) Mad 257. Chandrasekhara Aiyar J. referred to the accused in the case as having acted as a broker or commission agent who brought the seller and the buyer together. He pointed out that the word 'turnover" as defined was not appropriate to what is done by an agent

"in the way of bringing together a buyer and a seller for brokerage or a commission."

(8) On the facts found in the 'PUBLIC PROSECUTOR v. NARASIMHA REDDY', 1947-2 Mad LJ 220 and the 'GOVERNMENT OF MADRAS v. VEERABHADRAPPA', I. L. R. (1951) Mad 257, there can be no doubt whatever that the merchants in those cases do not fall within the definition of "dealer". They themselves neither sold nor bought the goods. They simply brought the seller and the buyer together and received a brokerage or commission by way of remuneration for their trouble. It does not appear that the plaintiffs in those cases were entrusted with the possession or control of the goods or that they had authority to transfer the property or the title in the goods. They could not therefore have effected a sale as defined in Sec. 2 (h) of the Act.

(9) It appears to me that the learned Judges in the 'GOVERNMENT OF MADRAS v. VEERABHADRAPPA', I. L. R. (1951) Mad 257 were not really concerned with ascertaining the nature of the business transacted by the commission agents who were not mere brokers bringing together the sellers and the buyers but who were entrusted with the goods by their seller principals with authority to transfer the property and title in the goods to the buyers who obtained delivery from the commission agents themselves without even being aware of the identity of the seller principals. The position in law of a commission agent to which category the plaintiffs in the cases now before us belong, must, I think, be properly appreciated before we can decide the question whether they would be dealers within the meaning of Sec. 2 (b) of the Act.

(10) A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent, on the other hand, of the class to which the plaintiffs belong, is not like a broker. He has almost invariably, custody or possession of the goods, actually or constructively. He often sells in his own name and in certain circumstances can sue the buyer himself. As pointed out by Jessel M. R. in 'KIRKHAM v. PEEL', (1881) 43 L. T. 171 commission agents receive goods from anybody who sends goods to them and no person in their position ever dreams of keeping separate accounts at their bankers, in respect of each of the transaction of each of their members. He observed:

"The course of trade always was, and it is shown in this case by the accounts current, that a commission agent is liable to the consignor of the goods for the amounts received, and is in the habit of making advances to the consignor. He charges interest, and debits himself with the amounts received when they are received, and credits himself with interest on the other side of the account so that the real transaction between the parties is for the consignor to treat such a consignee as creditor for his advances and interest and to regard him as a debtor for the amounts received and interest".

(11) In Blackwood Wright's Law of Principal and Agent, this case is cited as authority for the position that a commission agent is not bound to keep separate accounts at his bankers, for he is not a fiduciary agent and the monies he receives are his own; and by the customs of trade he is only liable as debtor to his employer for the amounts received (See 2nd Edn. p. 189). That in spite of the parties supposing their relationship to be that of principal and agent, in point of law it may be different as well illustrated by the case of 'EX PARTE WHITE, IN RE NEVILL', (1871) 6 Ch 397. In 'KALYANJI v. TIKARAM', AIR 1938 Nag. 254 the legal position of a commission agent is very fully discussed by Vivian Bose J. (as he then was). The course of business found in that case was as follows. The plaintiff was a merchant who dealt in the purchase and sale of grain and cotton seed. The defendants were also merchants who acted as commission agents in respect of those commodities. The arrangement between them was this: The plaintiff was to send the defendants consignments of these goods from time to time; the defendants were to keep these goods with them and await instructions from the plaintiff about the sale; then as soon as the plaintiff gave them the word they were to sell and in due course hand over the sale proceeds to the plaintiff less their commission charges. At first sight it would appear that the defendants would come within the definition of agent given in Sec. 182 of the Contract Act. But the learned Judge held that the Contract Act does not draw a fine distinction between different classes of agents nor is the Act exhaustive so far as this part of the law was concerned. The learned Judge held that so far as the sales in the cases were concerned, the defendants were not acting on behalf of the plaintiff as his agent but on behalf of themselves. The intention was that the plaintiff would sell to the commission agents and the commission agents to the persons to whom they sold. No privity of contract was intended to be established

between the plaintiff and the purchasers as would have been the case in a case of agency pure and simple. The learned Judge then made the following observation with which I respectfully agree:

"Commission agents are of course agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the terms and the relationship between the parties from then on is one of debtor and creditor". (255)

.. .. .. "The test to my mind is this; does the commission agent when he sells have authority to sell in his own name? Has he authority in his own right to pass a valid title? If he has then he is acting as a principal vis a vis the purchasers and not merely as an agent and therefore from that point on he is a debtor of his erstwhile principal and not merely an agent". (256)

The following description in the learned Judge's judgment of the course of business of a commission agent in general is very illuminating and appears to me to be apposite to the present cases:

"We also know that commission agents in general deal with a large number of what I may call principals scattered throughout India and sometimes abroad. It can hardly be supposed that the customers who come to their shops for purchasing a given quantity of cotton seed or grain look beyond them to these other persons resident elsewhere or deal with them otherwise than as principals in their own behalf. The customer in such circumstances can scarcely be expected to ask or know or even care who is the owner of each handful of grain he purchases; in fact, it may well be that the commission agents themselves do not know once they have bought the grain from their godowns and mixed it with other stock which is being retailed in their shops; nor would the principals care who these purchasers are. Their contracts are with the commission agents and ordinarily no privity is established between the principals and ultimate purchasers. In general there is nothing to prevent these commission agents from purchasing the commodities themselves and then selling thereafter at a profit to themselves. This profit they will be entitled to retain. A mere agent could not do that. Looking then to the general dealing between the parties in this case, looking to the fact that these conditions are the usual conditions upon which commission agents operate & to the fact that the defendants were themselves grain and seed merchants actually running a shop, I am clear that the understanding between the parties was that the defendants were to sell the grain and cotton seed in their own right and be responsible for the plaintiff as debtors for the sale proceeds less their agency charges."

(12) Bearing in mind the peculiar nature of a commission agent's business, let me examine the definitions in the Madras General Sales Tax Act. Dealer is defined as any person who carries on the business of buying or selling goods. "Sale" is defined as a transfer of the property in goods by one person to another in the course of trade or business for consideration. The general law relating to sale of goods is contained in the Indian Sale of Goods Act. Under Sec. 4(1) of that Act, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Ss. 18 to 26 of the Act embody the general and special rules relating to the transfer of property as between seller and buyer. Secs. 27 to 30 embody the rules relating to the transfer of title and this distinction made between property in the goods and title to the goods is not without significance. In law there can be a transfer of property in goods without a transfer of title to them. A sale of goods refers to the transfer of property irrespective of the fact whether the title also is transferred or not. The language of S. 27 clearly contemplates a sale by a person who is not the owner of the goods; for it says:

"Subject to the provisions of this Act and of any other law for the time being in force where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his consent precluded from denying the seller's authority to sell."

As no written conveyance, still less a registered deed, is necessary for the sale of goods, unlike in the case of sale of immovable property, the contract of sale is performed when the goods are actually delivered. It is because that there can be a sale by a person who has no title to the goods that Sec. 27 enunciates the rule that the buyer acquires no better title to the goods than the seller had. In the case of a commission agent, the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, undoubtedly when a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would, in my opinion, fall within the definition of dealer in the Sales Tax Act. Neither the definition of dealer nor of sale contemplates as a necessary condition, that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another.

(13) Now I shall briefly deal with the two decisions which are alleged to contain conflicting opinions. In 'PROVINCE OF MADRAS v. FIRM OF KANIGOLLA SIVALAKSHMINARAYANA', I. L. R. (1950) Mad 421 the point did not arise directly. One of the learned Judges, Mack J. does not consider how far a commission agent would be a dealer. Govinda Menon J. however, in passing observed that a commission agent should be deemed to be a person who carries on the business of buying or selling goods and said:

"Had it not been for the incorporation of S. 8, even a person who, for an agreed commission or brokerage, buys or sells goods on behalf of known principals, specified in his accounts in respect of each transaction, will be a 'dealer' within the meaning of the Act and hence liable to be taxed."

(14) In 'GOVERNMENT OF MADRAS v. VEERABADRAPPA', ILR (1951) Mad 257 on the facts found by the District Munsif from whose judgment an extract is to be found in the judgment of Satyanarayana Rao J. it is clear that the question which has come up before us for decision could not have arisen. In that case there was obviously no sale by the plaintiffs because all that the plaintiffs did was to bring the seller and the purchaser together and to earn a commission for themselves. They would not obviously be dealers within the meaning of the definition because they never transferred

the property in the goods to the buyer. But the learned Judges did go into the question in a general way whether a commission agent would be a dealer within the meaning of the definition in the Act. In so far as the learned Judges held that the pltffs. in the case before them were not dealers within the meaning of the Act, no possible exception could be taken. But if they meant to lay down that a commission agent would never fall within the definition of a dealer, with due deference to them, I cannot agree. In view of the great regard I have for the two learned Judges, I shall deal with the judgments separately in some detail.

(15) Satyanarayana Rao J. prefaces the discussion of the point with the assumption that when a "dealer" is defined as a person who carries on the business of buying or selling goods, that means that he buys or sells the goods on his own account. That, in his opinion, is the primary meaning of the definition. While I agree that ordinarily buying and selling by a person may be on his own account, there is nothing in the language of the definition to exclude from its ambit persons buying and selling goods on account of others. When a person buys or sells goods on behalf of some one else, even then it will not be inaccurate to say that he buys and sells goods. The learned Judge seeks to receive support for his view from explanation 2 which includes within the definition the agent of a person resident outside the Province who carries on the business of buying and selling goods in the Province. I do not think that the explanation throws any light on the point in issue. The reference in the explanation is presumably to an agent of a person who carries on business 'qua' agent of that person who however is residing outside the Province. Now it is well known and it was admitted by counsel before us that the plaintiffs in the cases before us though they describe themselves as commission agents, do not purport to be agents of any particular person or persons. Some of them admittedly get goods from as many as 100 principals. It will be opposed to facts to say that they are carrying on business as the agent of these persons. In the case of an agent who carries on business professedly as an agent of another then it is really the principal who can be deemed to be carrying on the business and the explanation (2) refers to such a case. The learned Judge then refers to the definition of turnover and again makes the assumption that to constitute the turnover of the agent he must buy or sell the goods for himself. Dealing with the definition of "sale" as a transfer of property in goods the learned Judge draws the implication that the property in the goods at the time of the sale vested in the person who sells and by reason of the sale, the purchaser obtains a transfer of the property in the goods from the seller. If the learned Judge meant "title" by the term "property" then undoubtedly property does not vest in the commission agent; but I think it would be correct to say that a commission agent who has custody and possession of the goods is vested with the property in the goods and he does have the authority to transfer the property in the goods to the buyer. Personally I am inclined to think that S. 27 of the Sale of Goods Act to which I have already adverted earlier supports my view. The learned Judge says:

> .....except in the limited classes of cases contemplated by S. 27 of the Sale of Goods Act, it is impossible for an agent to convey or transfer property in the goods except under the authority of the principal."

But a commission agent does sell goods with the authority and consent of the owner of the goods. After a brief reference to the definition of agent in Sec. 182 of the Indian Contract Act, the learned Judge concludes that a commission agent who sells or buys on behalf of the principal is not a dealer.

(16) The learned Judge was apparently confronted with S. 8 which to my mind in the clearest possible way assumes that but for the exemption the persons described therein would be liable to the tax under Sec. 3 of the Act as dealers. These are the persons who for an agreed commission or brokerage buy or sell on behalf of known principals specified in their accounts in respect of each transaction, persons like the plaintiffs in the cases before us. The only way in which the learned Judge gets over the implication of S. 8 is by holding that the section was enacted "by way of abundant caution in order to make the machinery of taxation move smoothly and with speed." He says:

> "Section 8, it must be remembered, is not a taxing section but a section which creates exemption on the assumption that otherwise the person is liable to taxation. If that assumption falls to the ground as shown already, there is no need really for the exemption."

In another place, he opines that S. 8 was intended to cover transactions of accommodation contemplated by explanation (4) to the definition of turnover in the Act. In my opinion, though it is true that Sec. 8 is not a taxing section, yet occurring as it does in the same enactment, it must be read as throwing some light on the other related provisions and in view of the fact that there is nothing in the definition of dealer to indicate that the buying or selling must be on the person's own account, the obvious inference from S. 8 is that the definition would cover also the case of persons mentioned in Sec. 8 who would, but for that section, be liable to taxation under Sec. 3.

(17) The other learned Judge also came to the conclusion that an agent can in no event be included in the definition of a dealer. But there are observations in his judgment which appear to me to be not inconsistent with the view I am taking. I do not for a moment differ from him when he says

> "a broker or commission agent who merely brings together the buyer and seller does not transfer the property in the goods."

But with respect I am unable to follow how an agent who might effect transfer of the property in the goods to the buyer if he had been authorised to sell by the owner of the goods cannot be said to have sold the goods in view of the definition of sale in the Act. Again I do not disagree with him in the following statement of the law:

> "A broker is an agent who, in the ordinary course of his business, is employed to make contracts for the purchase of sale of goods of which he is not entrusted with the possession or control. Usually he contracts in the name of the principal & arranges contracts of sale or purchase in such a way as to bind both the buyer and the seller. There may be other kinds of agents for the sale or purchase of goods on behalf of and employed, by a principal. It is elementary that goods can be sold so as to transfer title to the buyer only by the owner of the goods or by a person acting under his authority or with his consent."

(18) It is true that ordinarily no agent can maintain an action in his own name to enforce a contract made by him merely in his capacity as agent. But a commission agent selling the goods of an undisclosed principal can certainly maintain an action in his own name. Once more I find myself in agreement with the learned Judge when he says:

"The mere fact that an agent, who is entrusted with goods for sale, sells them without disclosing who the principal is, does not make the transaction a sale of the agent's goods nor does it convert the relationship between him and his principal into one of vendor and purchaser."

That may be so, but when the commission agent entrusted with the possession of the goods and authorised to sell them on behalf of his principal enters into a contract of sale with a third party i.e., the buyer and transfers the property in the goods to the buyer, I fail to see why the transaction between the commission agent and the buyer would not be a sale within the meaning of the definition of that term in the Act. The learned Judge is unable to get over Sec. 8 though he sets out what according to him that section was intended to cover.

(19) Both the learned Judges discuss the well-known decision in 'IRELAND v. LIVINGSTON', (1872) LR 5 HL 395. We are not concerned as to how far Lord Blackburn's dictum about the relationship between a commission agent and a foreign consignee as being that of vendor and purchaser is correct law. All that we are concerned with in this case is to determine whether the plaintiffs in these cases would be dealers i.e. persons engaged in the business of buying or selling goods. I do not therefore propose to deal at any length with either the decision in 'IRELAND v. LIVINGSTON', (1872) L. R. 5 H. L. 395 or 'CASSABGOLOU v. GIBB', (1883) 11 Q. B. D. 797.

(20) In my opinion, the learned Judges in 'GOVERNMENT OF MADRAS v. VEERABADRAPPA', I. L. R. (1951) Mad 257 went too far in holding that in no event and under no circumstances can a commission agent be deemed to be a person carrying on the business of buying or selling goods and I must express my respectful dissent from them. In my opinion, the plaintiffs in these cases would be dealers within the meaning of that expression in the Act and liable to tax under Sec. 3 but for the exemption given by Sec. 8. As I have held that the conditions of the licence granted under Sec. 8 have not been infringed, the plaintiffs will be entitled to the exemption. All the suits will therefore be decreed.

(21) In the result, App. Nos. 365, 468, 551 and 447 of 1947 will be allowed and App No. 641 of 1947 will be dismissed. There will be decrees as prayed for. The plaintiffs will have their costs here and in the Court below.

A/C.R.K./D.R.R. Order accordingly.

AIR 1952 MADRAS 725

RAMASWAMI J.

In re, C. Devanugraham, Petitioner.

Criminal Revn. No. 525 of 1951 and Criminal Revn. Petn. No. 520 of 1951, D/- 25-1-1952.

† (a) Criminal P. C. (1898), S. 403 — Prosecution without valid sanction — Acquittal — Effect.

For the bar of a fresh trial under S. 403 the Court by which the accused was first tried should be competent to try the offence. Where there was no valid sanction for the prosecution of the accused the prosecution was a nullity and the order acquitting the accused was without jurisdiction and could only operate as an order of discharge; the accused had not been tried by a Court of competent jurisdiction and accordingly S. 403 (1) was no bar to the institution of a fresh prosecution against the accused for the same offence on the same facts as in the former prosecution: AIR 1949 PC 264, Foll. (Para 7)

Anno: Cr. P. C., S. 403 N. 11.

† (b) Constitution of India, Art. 20 (2) — Prosecution without valid sanction — Discharge — Effect.

The principle underlying Art. 20 (2) is the same as underlies S. 403, Criminal P. C., namely, double jeopardy. The word "prosecuted" is said to have been introduced in order to make it clear that the power relates to punishment by a court of law and not to other kinds of punishment besides a judicial penalty for example departmental action in the case of public servants or proceedings under the Legal Practitioners' Act in the case of lawyers. Clause (2) uses the conjunction "and" and not the disjunction "or" between the words "prosecuted" and "punished" and this makes it clear that to bar a fresh prosecution for the same offence, the accused should have been both prosecuted and punished. So when an accused is discharged for want of sanction there is no punishment and when a man is punished departmentally, there is no prosecution. Therefore Art. 20 (2) does not take away the right to institute a second prosecution when the first is bound to be a nullity by reason of want of sanction a prerequisite for the maintaining of the prosecution. (Para 8)

(c) Criminal P. C. (1898), S. 403 — Prosecution without valid sanction — Retrial — Argument drawn from misery.

The argument that the offence under S. 161, Penal Code alleged was as early as 1949 and that the accused has also been removed from service and that it will not be expedient that the case should now be prosecuted after obtaining the necessary sanction, drawn from misery is a good argument for being considered at the end of the case and in the event of the accused being convicted and it will then be open to the trial Magistrate to adopt one of many liberal courses open to him under the Code of Criminal Procedure and under the Madras Probation of Offenders Act. This is certainly no ground for not getting along with the trial. (Para 9)

Anno: Cr. P. C., S. 403 N. 1.

V. Rajagopalachari for R. V. Raghavan, for Petitioner; State Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('48) 1948-1 Mad LJ 243: (AIR 1948 PC 82: 49 Cri LJ 261) 3
('50) 1950 Mad WN Cri 1: (AIR 1949 PC 264: 50 Cri LJ 889) 7
('45) 1945 FCR 93: (AIR 1945 FC 16: 46 Cri LJ 510) 7
(1834) 6 Car & P 337: (172 ER 1266) 7
(1911) 1 KB 964: (80 LJKB 507) 7
(1912) 2 KB 362: (81 LJKB 957) 7
(1914) 1 KB 66: (83 LJKB 233) 7

ORDER: This is a criminal revision petition filed against the order made by the learned Sixth Presidency Magistrate, Egmore, Madras in C. C. No. 8583 of 1950.

(2) The facts are: The petitioner was employed as a Food Inspector in the service of the Corporation of Madras. He was charged by the Special Branch Police for an offence under S. 161, I. P. C. in that he received a sum of Rs. 50 from K. Sarangapani Naicker, a milk-

man as illegal gratification. The case was tried before the Fifth Presidency Magistrate in C. C. No. 1137 of 1949. The petitioner was convicted and sentenced to six months rigorous imprisonment and to pay a fine of Rs. 300 or in default to suffer rigorous imprisonment for three months. The petitioner preferred an appeal to the High Court in Crl. Ap. No. 728 of 1949 and this was disposed of by Panchapagesa Sastry J.

(3) The relevant portion of the judgment of Panchapagesa Sastry J. is as follows:

"It is conceded by the State Prosecutor that if the sanction granted is illegal then, the conviction cannot stand. The ground of objection urged against the validity of the sanction is that the facts relating to the alleged offence were not placed before the sanctioning authority or rather that there is no evidence on behalf of the prosecution that the facts were so placed. Reliance was placed on the decision of the Judicial Committee reported in 'GOKULCHAND DWARKADAS v. EMPEROR', 1948-1-Mad L J 243 (PC)."

The learned Judge accepted this contention and concluded:

"It follows that it is not proved that the sanction accorded is legal. If so, the conviction cannot stand. In this view it is unnecessary to deal with the question as to whether the offence is brought home to the appellant; nor is it necessary to refer to the other contentions raised by the learned advocate for the appellant. In the result the conviction and sentence are set aside and the appellant is acquitted. Fine, if paid, will be refunded."

Subsequently, the Special Branch Police after rectifying the defect mentioned above has charge-sheeted the petitioner and it has been taken on file and numbered as C. C. No. 8583 of 1950 on the file of the Sixth Presidency Magistrate, Egmore.

(4) The preliminary objection taken by the petitioner was that he having been acquitted by the High Court a second trial was barred under S. 403, Cr. P. C. and that in any case Art. 20(2) of the Constitution of India prohibited a second trial.

(5) The learned Sixth Presidency Magistrate went into the question thoroughly and overruled this objection and hence this criminal revision petition.

(6) In my opinion, the two points taken relating to S. 403, Cr. P. C. & Art. 20(2) of the Constitution of India are without any substance.

(7) POINT 1: It is an elementary proposition that for the bar of a fresh trial under S. 403, Cr. P. C. the court by which the accused was first tried should be competent to try the offence. Therefore where the sanction or complaint by a particular person or authority is necessary under the law for the trial of a person, the question arises whether in the absence of such sanction or complaint a court which tries him is a court of competent jurisdiction. On this question, there was conflict of decisions. The majority of the High Courts have held that the Court could not be deemed to be a Court of competent jurisdiction in such cases because the trial without a proper complaint was void under S. 530 and therefore a judgment of acquittal which ensued was also void and so there was nothing which the accused could compel a Court to recognise in support of a plea of previous acquittal.

These conflicts have been happily set at rest by a decision of the Privy Council in 'YUSAF-ALLI MULLA v. THE KING', 1950 Mad W N Cr. 1. (PC). Their Lordships of the Privy Council have held that where there was no valid sanction for the prosecution of the accused the prosecution was a nullity and the order of the Magistrate acquitting the accused (or convicting as the case may be) was without jurisdiction and could only operate as an order of discharge; the accused had not been tried by a Court of competent jurisdiction and accordingly S. 403(1) of the Criminal Procedure Code was no bar to the institution of a fresh prosecution against the accused for the same offence on the same facts as in the former prosecution.

The view of the Federal Court in 'BASDEO AGARWALLA v. EMPEROR', 1945 F C R 93 that a prosecution launched without a valid sanction is a nullity was approved. It was finally held that under the common law, a plea of previous acquittal or previous conviction could only be raised where the first trial was before a court competent to pass a valid order of acquittal or conviction and that unless the earlier trial was a lawful one which might have resulted in a conviction the accused was never in jeopardy. Leading English cases in 'REX v. BOWMAN', (1834) 6 Car & P 337; REX v. BATES', (1911)-1-K. B. 964 and 'REX v. MARSHAM: PATHICK LAWRENCE EXPARTE' (1912) 2 K B 362 were referred to and 'REX v. SIMPSON', (1914) 1 K B 66 was distinguished. The judgment of the Bombay High Court was affirmed. The present case is on all fours with the Privy Council decision which is now cited and there can be no doubt that beyond taking advantage of the term "acquittal" instead of "discharge" in the judgment of my learned brother Panchapagesa Sastri J.. there are no merits in this contention. Therefore the plea of previous acquittal based upon S. 403, Cr. P. C. has no substance.

(8) POINT 2: Turning to the Art. 20(2), Constitution of India, the principle underlying this clause is the same as underlies S. 403, Cr. P. C. namely double jeopardy. It runs as follows:

"No person shall be prosecuted and punished for the same offence more than once."

The word "prosecuted" is said to have been introduced in the present case in order to make it clear that the power relates to punishment by a court of law and not to other kinds of punishment besides a judicial penalty for example, departmental action, in the case of public servants or proceedings under the Legal Practitioners' Act in the case of lawyers. The word "and" has certainly been used in a conjunctive and not a disjunctive sense because to interpret the word "and" as "or" would be reading into the Article something which is not there. The principle that no citizen should be put in jeopardy of his life or liberty more than once is so well known that in almost every Constitution one finds a provision against a person being put to trial in respect of the same offence more than once. Section 403, Cr. P. C. is nothing more than an elaboration of this principle in all its niceties and distinctions.

In this background when we consider Art. 20(2) it is seen that it is nothing more than a clause only against a fresh prosecution and punishment for the same offence and which was

also the law previously. There is absolutely no scope on the wording of the article to suspect that the framers of the Constitution wanted to unsettle the settled law of the land. What they merely wanted to provide for was a specific thing, namely, the non-prosecution of a person who had already been prosecuted and convicted. One should hesitate long before presuming that the law established for decades was sought to be disturbed by the makers of the Constitution, especially when there was nothing in the working of that law, which required or justified such disturbance. Above all, whatever the intention of the framers may be, we are guided only by the intention as expressed in the Article, and that intention, as pointed out by N. R. Raghavachari in his Constitution of India is perfectly clear. (See page 94). The only consequence of clause (2) not providing for other cases known to the existing law, either with reference to the permissibility of fresh prosecutions or with reference to the non-maintainability thereof is probably this, that the criminal law of the land can hereafter be amended in the ordinary way for the purpose of altering the existing law subject to the provision in clause (2) of Art. 20 which being one of the fundamental rights cannot be taken away or abridged or contravened.

This shows as already premised that clause (2) uses the conjunction "and" and not the disjunction "or" between the words "prosecuted" and "punished" and this makes it clear that to bar a fresh prosecution for the same offence, the accused should have been both prosecuted and punished. So when an accused is discharged for want of sanction there is no punishment and when a man is punished departmentally, there is no prosecution. Therefore Art. 20(2) of the Constitution of India does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction a prerequisite for the maintaining of the prosecution.

(9) Both the grounds taken by the learned advocate fail and the final point mentioned by him is that the offence alleged was as early as 1949 and that the petitioner has also been removed from service and that it will not be expedient that the case should now be prosecuted after obtaining the necessary sanction. This argument drawn from misery is a good argument for being considered at the end of the case and in the event of this petitioner being convicted, and it will then be open to the trial Magistrate to adopt one of many liberal courses open to him under the Code of Criminal Procedure and under the Madras Probation of Offenders Act. This is certainly no ground for not getting along with the trial.

(10) The criminal revision petition is dismissed and the learned Sixth Presidency Magistrate is directed to dispose of the case without further delay.

A/C.R.K./D.H. Revision dismissed.

AIR 1952 MADRAS 727

MACK AND SOMASUNDARAM JJ.

In re N. Swaminatha Iyer and others, Petitioners.

Criminal Misc. Petns. Nos. 1293, 1289, 1291, 1294, 1313 and 1329 to 1345 of 1951, D/- 14-8-1951.

(a) Criminal P. C. (1898), S. 239 — Charge under S. 120-A and S. 120-B, Penal Code — Joinder of charges — Effect of S. 239 — Duty of prosecution — Charge of abetment, joining of — Propriety of.

The effect of Ss. 120-A and 120-B, I. P. C. and S. 239 Cr. P. C. is to open out an unlimited avenue for masses of charges being framed against persons in a joint trial on a mere accusation of conspiracy. S. 239 Cr. P. C. is an express exception to S. 233, Cr. P. C. and does not import either expressly or by implication the limitations set out in S. 234 or those in S. 235(1). In fact there is no limit to the number of offences specified in S. 239, the only limitation being that the accusation should be of offences committed "in the course of the same transaction".

For the old restrictions as to misjoinder in Ss. 233, 234 and 235 which the association of Ss. 120-A and 120-B and 239 Cr. P. C. have completely removed, the restrictions of reasons, commonsense, practicability and a sense of responsibility which all prosecutors are presumed to have, have to be substituted. No practical purpose is served by formulating in a conspiracy case a multitude of offences of the same kind against one person which would be grossly vitiated by mis-joinder if he was on trial by himself. Nor can such a course be in any way justified merely because S. 239 Cr. P. C. makes it "legally permissible." Normally it would not require more than three charges of an offence of the same kind to be framed against one conspirator in any conspiracy case, however complicated, certainly not in any case of misappropriation or breach of trust. There are special cases in which this number can be reasonably and properly exceeded. The criterion should always be the avoidance of multiplicity of criminal trials which an efficiently and intelligently conducted conspiracy case should always succeed in achieving by bringing to justice several persons at one trial.

In any true conspiracy case, there should be no need to frame any charge of abetment at all. Each conspirator abets every offence committed by a fellow conspirator. The formulation of abetment charges within the ambit of conspiracy, while it may not be bad on the technical point of misjoinder is wholly redundant and superfluous and is made a further backdoor for the compilation of innumerable charges which complicate these cases. Several abetment charges also within the ambit of the main conspiracy accusation suggest minor exclusive conspiratorial groups which have no relation to each other and help to weaken the main conspiracy charge exposing it to criticism that it is thin and not bona fide. It must always be remembered that abetment is also conspiracy and that S. 109, I. P. C. was prior to the creation of S. 120-B the only means of punishing conspiracy which culminated in an offence. Ss. 107 to 109, I. P. C. still remain law. But those sections are hardly ever invoked in cases of conspiracy which are now built round S. 120-B, I. P. C. with many charges both of direct offences and of abetment brought within its scope. (Paras 16, 18, 19)

(b) Banking Companies (Amendment) Act (1950), S. 11 — Scope — Prosecution on direction of winding up Judge, in addition to orders

of local Government in respect of offence under S. 477-A, Penal Code — S. 11 does not apply.

S. 11, Banking Companies (Amendment) Act, 1950 does not require all offences under the Indian Penal Code which are not punishable also under the Companies Act, to be tried by a Judge of the High Court as against a managing director, directors, officers, & so on. Offences such as forgery & cri. breach of trust, even if they are disclosed in the course of the winding up have to be tried by the ordinary courts not inferior to that of a Presidency or First Class Magistrate under S. 278(1) of the Companies Act, and the procedure under S. 237(1) for prosecution of such cases on a direction of the winding up court, by the liquidator is left undisturbed. Whatever "criminal proceedings" may mean, it cannot apply to the case prosecuted on the direction of the winding up Judge in addition to the orders of the local Government and sanction afforded under S. 196-A of the Cr. P. C. in respect of a non-cognizable offence under S. 477-A, I. P. C. (Para 21)

(c) Criminal P. C. (1898), S. 439 — Retrial — Several persons connected with Bank charged under S. 120-B read with Ss. 409 and 477-A, I. P. C. — Protracted trial for 2 1/2 years — — Joinder of charges in way impossible to try — Retrial ordered after splitting up charges.

Though a case of S. 120-B read with Ss. 409 and 477-A I. P. C. in which several persons connected with the conduct of the bank business have stood a protracted trial for 2½ years which has produced charges impossible to try at a single trial, a court would be justified in not directing a retrial of the accused when quashing the charges, considering the gravity of the charges made against the officers of the bank, they were ordered to be retried in a de novo trial on the charge of conspiracy between a certain period to falsify bank accounts and to bring into existence a false balance sheet. (Para 23)

Anno: Criminal P. C., S. 439, N. 25a.

M. K. Nambiar, M. Srinivasagopalan, N. Panchapakesa Aiyar, S. Gopala Aiyar, for M. Ranganatha Sastry, K. V. Ramachandra Aiyar, P. C. Sarangapani, G. Ramanatha Aiyar, K. Desikachari, and N. Kasturi Ranga Aiyangar, for Petitioners; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('02) 25 Mad 61: (28 Ind App 257 PC) 14
('27) 8 Lah 230: (AIR 1927 PC 215: 29 Cri LJ 673 PC) 16
('38) ILR (1938) 2 Cal 295: (AIR 1938 PC 130: 39 Cri LJ 452 PC) 16
('29) 53 Bom 344: (AIR 1929 Bom 128: 30 Cri LJ 588) 16
('22) 49 Cal 573: (AIR 1922 Cal 107: 23 Cri LJ 657) 16
('26) 49 Mad 74: (AIR 1925 Mad 690: 26 Cri LJ 1513) 16
('33) 1933 Mad WN Cr 77: (1933 Mad WN 528) 16
('33) 1933 Mad WN Cr 213: (AIR 1934 Mad 88: 35 Cri LJ 631) 16
('37) 1937 Mad WN Cr 212: (AIR 1938 Mad 130: 39 Cri LJ 266) 20

ORDER: These are petitions by the accused in what is known as the Hanuman Bank Conspiracy case to quash no less than 67 charges framed against them by the Special Magistrate, Tanjore, on grounds of misjoinder, some of the accused also contending that there were no prima facie grounds to justify any charge against them.

(2) The actual trial of this case commenced in November 1948, two years and nine months ago, in the course of which over 6000 exhibits were filed and 203 witnesses examined.

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(3) A few facts about the Bank and the personnel of the accused may be set out before we come to the most regrettable history of the trial of this case. The Hanuman Bank was incorporated in Tanjore in 1933 in a small way with an authorised capital of only Rs. 20,000 which was increased to Rs. 5 lakhs in 1943 and to Rs. 7 lakhs in 1946 as shown in the balance sheets. At the time the Bank crashed in 1947 it had 20 branches, 16 in Tanjore district and one each at Madras, Chidambaram, Tiruchirapalli and Madurai.

(4) Accused 1, Diwan Bahadur N. Swaminatha Aiyar, retired Chief Engineer of the Public Works Department, now an old man of 73, was President of the Board of Directors from 1938. He was also Chairman of a managing committee of three, the other members of which were accused 2 and accused 3.

Accused 2, K. V. Krishnamurthi Aiyar, now aged 63, was an ex-clerk of the Registration Department on a pension of Rs. 25-4-0, when he became a director of this Bank and also acted as Managing Director from 1937 under powers of delegation from the then Managing Director. He was then elected Managing Director in 1944 by the general body of share-holders for five years.

Accused 3, Viswanatha Aiyar, was an ex-clerk of some coffee plantations. He became Director in 1937 and was subsequently manager. He was a promoter from the beginning.

Accused 4, Dr. T. S. Varadachari, is a doctor practising at Negapattinam and was a Director continuously from 1940.

Accused 5, N. Rajamani Aiyar, is a registered accountant, with the qualifications of G. D. A., R. A. He was the auditor of the Bank from its inception in 1933.

Accused 6, A. S. Venkatarama Aiyar was an assistant in the employ of accused 5.

Accused 7, V. Ganesa Aiyar, was the Secretary of the Bank from October 1943 on a salary of Rs. 100 a month including allowances.

Accused 8, R. Appasami Aiyar, now aged over 60, was Accountant at the head office from 1937 onwards.

Accused 9, S. Vancheesan, was Assistant Secretary of the Bank from 1945.

Accused 10, S. Viswanathan, was in 1946 Inspector of Branches on a pay of Rs. 100 and had previously worked as Branch Agent.

Accused 11, N. Venkataraman was from 1945, Agent of the Nagapattinam branch.

Accused 12, S. Ramanathan, was an ordinary clerk from 1940 and acted as agent for one month in the Manambuchavadi branch in Tanjore district.

Accused 13, N. S. Krishnamachari was agent at Madras from 1945 after being in Bank employ since 1937.

Accused 14, K. P. Nagarajan is the son of the Managing Director, accused 2, and after enrolment as an advocate is said to have been appointed Agent on probation and from September 1946 was agent in the Madurai Branch.

Accused 15, Mahadeva Aiyar joined the bank in 1943 as a clerk and from 1946 was a Branch Agent.

Accused 16, Venkatarama Aiyar, the elder brother of accused 2, signed the memorandum of association. He was a director from 1937 to 1940 and had no official connection with the bank since. He is described as a cinema proprietor at Pondicherry.

Accused 17, Rajagopala Aiyar, is the brother of accused 2 with no official connection with the bank.

Accused 18, Sattanathan, is a nephew of accused 2. He was director till 1940 and in 1946 became a Superintendent of Coffee plantations, a concern promoted by this bank.

Accused 22 to 28 are all bank constituents of long standing who were granted substantial overdraft facilities.

(5) The circumstances which led up to the bank crash and its winding up under court orders and to this prosecution are briefly these. On 9th December 1946, the Reserve Bank wrote a confidential letter stated to be Ex. P. 2515 to the Secretary of the Hanuman Bank inviting attention to S. 42 (6) (a) of the Reserve Bank Act which required an application for registration as a scheduled bank to be made as the previous balance sheet disclosed an authorised capital which exceeded Rs. 5 lakhs. This of course involved an account scrutiny by the Reserve bank of this bank's affairs. It is the prosecution case that in December 1946 and January 1947 the officials of the Bank desparately resorted to wholesale and fictitious manipulation of accounts to cover up a shortage in assets amounting to Rs. 5,31,704-12-0 and that in fact a false balance sheet, Ex. P. 2217 was prepared and passed and signed by accused 1 to 4, 5, 7 and 8 and also by other directors in their official capacities. The Bank made no application to the Reserve Bank, & it would appear after correspondence with the Government of India accused 2 wrote to the Reserve Bank that the balance sheet was likely to be ready by June 1947 after which the application would be filed.

On 15th July 1947, the Bank suspended payment. On 26th July 1947 a creditor filed O. P. No. 192 of 1947 in this court to wind up the bank. There was also a moratorium application filed, which was dismissed on 19th August 1947. In pursuance of a resolution passed at a directors' meeting on 10th August 1947 at which accused 1, 4 and one K. Narayanaswami Aiyar P. W. 181, a retired Income-tax Officer, were present, accused 1 himself made a complaint to the District Superintendent of Police with serious allegations of a criminal nature against accused 2, 7, 8, 9, 10 and 14. According to the learned Public Prosecutor, P. W. 181 had made a previous complaint on 22nd July 1947 to the Police, but received a reply from the D. S. P. that a complaint should be made by the Board of directors, and this it was which led to this complaint filed by accused 1 whose hand was thereby forced.

(6) On 1st August 1947 Messrs. Brahmayya and Co. are appointed auditors by the Registrar of Joint Stock Companies under S. 277 N(3) of the Indian Companies Act in connection with a moratorium application under this section. They completed the audit in November 1947. The winding up court appointed the Official Receiver as provisional liquidator and on court orders Messrs. Brahmayya and Co. continued investigation as investigating auditors. The winding up order was passed on 5th November 1947 and Brahmayya and Co. were appointed Official Liquidators. In the meantime, it would appear, at the instance of the Premier, (?) directed the C. I. D. to investigate the criminal complaint laid by accused 1. On the 20th April 1948 Bell J. passed an order on Appln. No. 1420 of 1948 that a police investigation be made into the offences committed by the Directors and officers of the Bank, and that in view of the nature of the investigation the Inspector of C. I. D. who was in charge of the investigation at the instance of the Government should conduct the same.

(7) The C. I. D. investigation appears to have been based largely on the report of the auditors who are also now the Official Liquidators. A preliminary charge sheet was laid on 4th August 1948 and the final charge sheet on 29th September 1948 alleging a conspiracy commencing from 1938 to commit criminal breach of trust under S. 409 of the Indian Penal Code and falsification of the accounts of the Bank under S. 477-A of the Indian Penal Code.

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(8) We do not propose to waste too much time or paper traversing these 67 charges which cover 43 pages of closely typed matter. Charge 1 is a general charge of conspiracy against all these accused under S. 120-B read with S. 409, I. P. C. and S. 477-A I. P. C. The criminal conspiracy alleged is said to have the object of defrauding the Hanuman Bank

> "by committing the offences of criminal breach of trust.....by dishonest misappropriation, unlawful disposal or diversion or suffering the misappropriation or diversion of monies, assets and securities of the said Hanuman Bank Ltd. lawfully entrusted to him under the domination of the managing director, accused 2, and other agents and officers on his behalf by diverse means, namely, dishonestly granting or suffering the grant of advances on overdrafts, accounts, loans, bills, advance accounts, etc. to one or other of you or your relations or friends without any control by or sanction of the Board of directors or Committee of Management without security or sufficient security.....and to do or cause to be done all acts which may facilitate or serve to conceal the commission of offences of criminal breach of trust by wilful and fraudulent falsification of the books of account of the bank."

Charge 2 is a direct charge against accused 2 under S. 409, I. P. C. that between the years 1939 and 1947 in Tanjore and diverse other places he committed criminal breach of trust or suffered the criminal misappropriation of moneys and assets of the Bank aggregating to Rs. 6,76,216-6-1. Then follows a multitude of offences on alleged manipulations, fraudulent closures of accounts, fictitious entries and fraudulent credits with reference to a mass of exhibits.

Charge 3 is one against accused 1 and 3 under S. 409 read with S. 109, I. P. C. of abetment of the charges specified in charge 2 in pursuance of the alleged conspiracy.

The next charge No. 4 is against the auditor, accused 5, and his assistant, accused 6, under S. 409 read with S. 109, I. P. C. for abetment of all the offences conglomerated in charge 2.

(9) We may now pass on to the alleged conspiracy to falsify accounts. The main charge out of several framed dealing with this is charge 7 which charges directly accused 1 to 3, 7 to 10 and 12 to 15, namely, the Bank employees and officials for making fraudulent and fictitious entries in chittas, cash books and C.D. accounts, loan ledgers, and so on between November 1946 and February 1947. This charge is one directly under S. 477-A of the I. P. C. and contains a catalogue of more than 100 exhibits including for instance Ex. P. 2152 (aa to oo) without any indication whatsoever as to who committed any particular falsification. It is in fact an omnibus charge against all these officials and employees collectively.

Charge 8 is one under S. 477-A read with Section 109 I. P. C. against accused 18 and 22 to 28 for abetment of falsification of accounts between November 1946 and February 1947 as per particulars contained in charge 7.

Charge 58 is one of falsification under Section 477-A between 1st January 1945 and 31st December 1945 against accused 2, 7, 9, 12 and 14.

Charge 59 is another charge of falsification against accused 2, 7 and 15 also relating to 1945.

Charge 60 is another charge of falsification of several items against accused 2, 7, 9, 12 and 15 relating to 1946.

Charge 67 is a direct charge against accused 2, 7, and 14 of falsification of several ledgers and so on relating to the year 1944.

(10) In none of these falsification charges does the auditor, accused 5, appear as accused even of abetment at all. Under charge 4 we find him charged to our great surprise only with abetment of criminal breach of trust and a number of such offences committed by accused 2 under charge 2. The learned Public Prosecutor can only explain this by saying it was a regrettable omission and cannot explain at all the charge of abetment against the auditor under S. 409 read with S. 109.

(11) The other charges are mainly under Section 409 of abetment, most charges containing several counts. These charges have been formulated on no intelligible plan, system or sequence. For instance, charge 37 is one under Section 409 against accused 2 for allowing accused 4 to overdraw his account by Rs. 6683-1-3. Accused 2 is also charged in a comprehensive charge, No. 17, directly under S. 409 with more offences including this item. We then find accused 4 charged in charge 23 under Section 409 read with S. 109 for abetting this offence catalogued in charge 17 item (o).

(12) When some petitions to quash charges were filed before me during the vacation in June this year, after hearing the Asst. Public Prosecutor I directed them to be placed before the Chief Justice for orders for posting before a Bench with an observation that they required the careful scrutiny of the Public Prosecutor who should only be heard on them. The result is that we are hearing this as a Bench with the very able assistance of the learned Public Prosecutor, Sri V. T. Rangaswami Aiyangar, who assumed office only last year. He has readily conceded the utter impossibility of trying any accused on these unintelligible and impossible charges at one trial. He has presented to us with ability and clarity the conspiracy to falsify the Bank accounts wholesale in December 1946 which was the pivot of further audit enquiry.

His case, as we understand it, is that Brahmayya and Co. found in their audit (report) that the Bank books would not tally with the balance sheet to the tune of over Rs. 5 lakhs, that at the end of 1946, it became necessary to make them tally in view of the call from the Reserve Bank, and that the Bank officials conspired together to effect fictitious entries which would have the effect of swelling the credits and making up the shortage in the bank books, and for this as he put it, more than Rs. 5 lakhs had to be brought into the "till" of the bank books. He has referred us to the evidence of a bank employee, examined as P. W. 165 who was a Branch Agent in November 1946 to the effect that there was a conference of Bank employees including himself and accused 2, 7, 8, 9, 10 and 14 who met together and agreed (on request) to obtain cheques, hundies, loan applications and so on from the bank's longstanding customers including accused 22 to 28 so that, as we understand the prosecution case, the bank might show large sums paid in on the credit side of their accounts without actually paying out money to their constituents by juggling accounts in some way or other.

P. W. 165 deposed that he was asked to approach accused 23, a contractor and rice merchant and a constituent of the bank from 1940 with an existing overdraft of over Rs. 1 lakh, but that he did not do so. His evidence is of course exposed to some criticism as he is in the position of an accomplice. The learned Public Prosecutor has shown us an example of the clumsy technique which according to the prosecution was resorted to in the shape of an overdraft account. Ex. P. 1449 (a) of one Subramanya Aiyar who has since died which stood only at Rs. 58-11-11 and which was inflated to Rs. 30058-11-11 with credits to the tune of Rs. 30000 placed to his account between the 23rd and 30th December 1946 in order, it is alleged, to create a volume of fictitious bank "receipts". The Public Prosecutor suggested as a way out of the impasse that this conspiracy to falsify accounts be split up or taken out of the case and tried separately.

(13) There are a number of charges framed arising out of alleged criminal breach of trust, diversion of funds and so on in pursuance of the conspiracy, framed in connection with a company known as Coorg Coffee Plantations promoted by the bank. Accused 1 was chairman of the Board of directors, accused 2, the Managing agent and accused 14, 18 and 24 are said to have been directors. One estate was purchased in 1945 for Rs. 1,80,700 in which accused, 2, 7, 8, 13 and 14 all took shares. Several charges relate to unauthorised loans given to these accused. Another estate was purchased in 1946 in the name of accused 2 for Rs. 1,75,000. On 1st October 1947, after the crash accused 2 conveyed this estate to Coorg Plantations Ltd., the explanation given by his advocate being that the purchase was taken in his name out of bank funds as share capital could not be recovered immediately, and that if he lost the opportunity of purchase, somebody else would have seized it. Our attention has been drawn to a legal opinion, Ex. P. 1840 by Sri D. Mahalingam Pillai, who is said to have been Public Prosecutor, Tanjore, dated 1-10-1947 while this case was under investigation that the purchase by accused 2 was in order & may be ratified by Coorg Plantations Ltd.

It is now conceded before us that the Official Liquidators have sold these estates for Rs. 3,20,000, that the debenture-holders and preference share-holders have been paid 16 annas in the rupee and the ordinary share-holders 12 annas in the rupee and all the scrips held by such of the accused as were share-holders have been made available to the Official Liquidators who have so far declared a dividend of 7 annas in the rupee to the bank creditors. This is, in view of the impartial suspension of the liquidation for over two years, by so many of the bank ledgers, accounts books and documents being bottled up in this protracted trial, a tribute to the efficiency and zeal of the Official Liquidators. Normally there would have been nothing criminal in the bank lending money to intending purchasers of shares in this company which they were promoting and holding the share scrip as security. It is amazing how a bank manned by personnel of the experience of accused 2 and others who do not appear to have known the elements of banking generated the confidence of the public to invest their moneys in this bank. In the affairs of the Coorg Plantations Ltd., there do appear to have been many irregularities, if not some offences, committed with which however several accused charged with this widespread conspiracy have no connection or concern at all.

(14) We come now to the alleged misjoinder in these 67 charges. They cannot be held to be vitiated legally or technically by misjoinder in the light of case law laid down up to the Privy Council. The evolution of conspiracy law is interesting. In 'SUBRAMANYA IYER v. EMPEROR', 25 Mad 61 (PC) two officers of the Military Accounts Department were charged under Ss. 109 and 161, I. P. C. and Ss. 109 and 384, I. P. C. with 41 acts of bribes and extortions extending over two years. One of them was tendered a pardon during the trial and gave evidence as an approver. A Full Bench of this court upheld the conviction of Subramania Aiyar on one count. In appeal the Privy Council set it aside holding that the trial was vitiated by non-compliance with S. 234, Cr. P. C., under which a single person may be tried only for three offences of the same kind if committed within a period of one year. Section 239, Cr. P. C. was not then in existence and was enacted by the Criminal Procedure Amendment Act (XVIII of 1923). Under this section persons may be charged and tried together (a) if accused of the same offence committed in the course of the same transaction. (b) if accused of an offence along with persons accused of abetment or of an attempt to commit such offence, (c) accused of more than one offence of the same kind, within the meaning of S. 234 committed by them jointly within the period of 12 months and (d) if accused of different offences committed in the course of the same transaction.

(15) In 1913 the new offence of criminal conspiracy, defined in S. 120-A, I. P. C. and punishable under S. 120-B, to commit an offence was created by the Legislature with the primary object, as would appear from the Statement of Objects and Reasons, of punishing even a conspiracy which does not culminate in any offence. In cases in which in pursuance of conspiracy an offence was in fact committed the only avenue for the prosecution was by charges of abetment under S. 109, S. 107 defining an abettor as one who engages with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy.

(16) The resultant effect of Ss. 120-A and B, I. P. C. and S. 239, Cr. P. C. has been to open out an unlimited avenue for masses of charges being framed against persons in a joint trial on a mere accusation of conspiracy. There are several reported cases in which such trials have been held and convictions upheld negativing pleas of embarrassment by misjoinder 'SATYANARAYANA v. EMPEROR', 1933 Mad W N Cri. 77; 'VENKATA HANUMANTHA RAO v. EMPEROR', 1933 Mad W N Cri. 213; 'IN RE MALLU DORA', 49 Mad 74; 'MUKUND SINGH v. EMPEROR', 8 Lah 230 (PC); 'GOPAL RAGHUNATH v. EMPEROR', 53 Bom 344; 'ABDUL SALIM v. EMPEROR', 49 Cal 573. In 'BABULAL CHOWKHANI v. EMPEROR', ILR (1938) 2 Cal 295 (PC) a case considered by the Privy Council in which several persons were tried and convicted under S. 120-B and on numerous charges under S. 379, I. P. C. and S. 39 of the Electricity Act, Lord Wright held that S. 239, Cr. P. C. was an express exception to S. 233, Cr. P. C. and did not import either expressly or by implication the limitations set out in S. 234 nor those in S. 235(1) and that in fact there was no limit to the number of offences specified in S. 239, the only limitation being that the accusation should be of offences committed "in the course of the same transaction." He upheld the view taken in our courts, including 'GOPAL RAGHUNATH v. EMPEROR', 53 Bom 344. In that judgment he made the following observations which are pertinent and most relevant to the present problem which now confronts us:

"It has been affirmed that improper advantage is taken of S. 239 (d) so as to bring into one proceeding a great number of accused and a great multiplicity of offences, with serious hardship and injustice to the accused. If that were indeed the result of the section, as the High Court seem to be apprehensive it might be, it would be much to be regretted and might well be a ground for an amendment of the section by the legislature, if such practice prevailed notwithstanding the warning of the High Court and their determination to see that the accused are not being unfairly dealt with and to prevent any procedure by which cases which should be comparatively short and simple become unwieldy, complicated and lengthy. But even so that can be no ground why the court should misconstrue the section. Indeed it is difficult to think that such apprehensions are justified. It must be hoped, and indeed assumed, that Magistrates will exercise their discretion fairly and honestly. Such is the implied condition of the exercise of every discretionary power. If they do not, or if they go wrong in fact or in law, then the accused has prima facie a right of recourse to the superior courts by way of appeal or revision. The passage already quoted from the judgment of the High Court shows how vigilant and resolute that court would be to see that the accused were not prejudiced or embarrassed by an improper misjoinder of charges or of persons accused. These safeguards may well have appeared to the legislature to be sufficient. It may seem paradoxical that the prosecution should have the advantage of joining different offences and different accused simply because the al-

legation of a conspiracy seemed to the Magistrate to be prima facie justified, whereas at the trial the allegation breaks down. But the charges have to be framed, for better or for worse, at an early stage of the proceedings. It would be paradoxical if one, no one could tell till the end of the trial whether the trial was legal or illegal."

We do not think Lord Wright could have visualised the possibility of a case such as this, where after a trial before a Magistrate lasting for 2½ years a confused conglomeration of charges has resulted, bewildering not merely to any defending counsel, but also to any trying court and on the basis of which no further trial can possibly proceed on a vast accumulation of matter indiscriminately flung into the case. As regards magisterial discretion it has unfortunately been quite impossible for the Magistrate who framed these charges to exercise any at all.

* * * *

(17) The present impasse is not the result of the law which presumes a certain amount of commonsense, practicability and responsibility not only in the accusation of a criminal conspiracy but also in its conduct of such a prosecution. We can find nothing whatsoever wrong or mala fide in the accusation of conspiracy to falsify accounts from December 1946 but everything wrong with the way in which books, documents and papers of this bank under liquidation have been flung into this case without any attempt at selection or crystallising specific charges on which the prosecution sought to bring home the guilt to offenders.

* * * *

We have no hesitation in quashing all the charges framed not on the legal ground of misjoinder, but for the other reasons we have given.

(18) It is incumbent on us at this stage and in view of the deadlock in the trial of this case to prescribe a remedy for a growing "conspiracy disease" which seems to afflict prosecutors in varying degrees in the conduct of these cases. We can only substitute for the old restrictions as to misjoinder in Ss. 233, 234 and 235 which the association of S. 120-A and B and S. 239, Cr. P. C. have completely removed, the restrictions of reason, commonsense, practicability and a sense of responsibility which all prosecutors are presumed to have. No practical purpose, so far as we can see is served by formulating in a conspiracy case a multitude of offences of the same kind against one person which would be grossly vitiated by misjoinder if he was on trial by himself. Nor can such a course be in any way justified merely because S. 239, Cr. P. C. makes it "legally permissible". It is also "legally permissible" for a single person to be charged at repeated trials for offences of the same kind restricted by S. 234 to three at a time and to be convicted say of 60 such offences on 20 separate charge-sheets at 20 separate trials and awarded concurrent sentences of imprisonment. But any prosecutor or magistrate insisting on pursuing such a course will undoubtedly find himself speedily relieved of all his responsibilities on grounds inter alia of suspected sanity. We can see no real reason for differential treatment as regards prosecutors who seek to do, as it appears to us substantially the same thing by the backdoor of conspiracy in these trials merely on the ground that some others help him to commit these offences. Normally it would not require more than three charges of an offence of the same kind to be framed against one conspirator in any conspiracy case, however, complicated, certainly not in any case of misappropriation or breach of trust. There are special cases in which this number can be reasonably & properly exceeded. The criterion should always be the avoidance of multiplicity of criminal trials which an efficiently and intelligently conducted conspiracy case should always succeed in achieving by bringing to justice several persons at one trial. The learned Public Prosecutor agrees with us that had this course been adopted, instead of evidence of hundreds of offences being flung into this case even the twin conspiracy case of criminal breach of trust and falsification could have been completed in the course of a few months.

(19) In this case there are also no less than 17 charges of abetment. As it appears to us in any true conspiracy case there should be no need to frame any charge of abetment at all. Each conspirator abets every offence committed by a fellow conspirator. The formulation of abetment charges within the ambit of conspiracy, while it may not be bad on the technical point of misjoinder as it appears to us is wholly redundant and superfluous and is made a further backdoor for the compilation of innumerable charges which complicate these cases. Several abetment charges also within the ambit of the main conspiracy accusation suggest minor exclusive conspiratorial groups which have no relation to each other and help to weaken the main conspiracy charge exposing it to criticism that it is thin and not bona fide. It must always be remembered that abetment is also conspiracy and that S. 109, I. P. C. was prior to the creation of S. 120-B the only means of punishing conspiracy which culminated in an offence. Ss. 107 to 109, I. P. C. still remain law. But those sections are hardly ever invoked in cases of conspiracy which are now built round S. 120 B, I. P. C. with many charges both of direct offences and of abetment brought within its scope.

(20) In 'VENKATARAMIAH v. EMPEROR', 1937 Mad W N Cr. 212 Newsam J. sitting by himself in 1937 in this court in revision quashed charges under S. 120-B and substituted charges under S. 109, I. P. C. observing that where the matter had gone beyond the stage of conspiracy and an offence is alleged to have been committed, S. 120-B was wholly irrelevant. In that case the question of failure to obtain sanction under S. 196-A, Cr. P. C. the offences involved being non-cognizable, arose. Such sanction was necessitated also by S. 5 of the Criminal Law Amendment Act, 1913, making sanction necessary for conspiracy to commit a non-cognizable offence. No such sanction is required, of course, for a court to take cognizance in the case of an abetment by conspiracy of any kind of offence if committed. The practice of using S. 120-B in cases of conspiracy even when offences have been committed has been approved up to the Privy Council in cases to which we have referred. The charges under S. 120-B are far more easy and convenient to frame than those under the abetment sections when more than two or three persons are involved, and we consider that the prerequisite sanction under S. 196-A, Cr. P. C. for the user of this section in non-cognisable cases in this manner a salutary safeguard.

There is no necessity for any fresh legislation to stop abuses in the conduct of conspiracy cases in the state of the law as it stands now, pro-

vided S. 120-B in conjunction with S. 239, Cr. P. C. is not misused. Its user in cases of this type has, we consider, great potentialities for good and evil. If the potentialities for abuse continue to be exploited, the legislature may have to come to our rescue by imposing the restrictions of misjoinder contained in S. 234, Cr. P. C. to each person charged within the ambit of a conspiracy. We are of the opinion that when the Legislature created the offence of mere conspiracy under S. 120-B in 1913 and enacted S. 239, Cr. P. C. in 1923, they did not anticipate the possibility of a weapon being gradually forged out of this legislation by prosecuting authorities for harassment of numbers of accused in long and protracted trials of this nature on a veritable multitude of offences and for the tribulation of trying magistrates and courts. Finally, as the learned Public Prosecutor has conceded, no accused in this case could possibly have been convicted on the conglomeration of charges framed in this case. The prosecution in a case of conspiracy should be most careful to avoid any exposure to the slightest criticism that it is in conspiracy with the accused to conduct these cases in such a manner as will ensure their ultimate acquittal.

(21) We are also called upon to deal on these petitions with an interesting legal position created by the Banking Companies Amendment Act XX of 1950. Mr. Rangaswami Aiyangar on the first day of his arguments was inclined to take the position that this case stood automatically transferred to the High Court under S. 11 of the Act which makes special provisions for speedy disposal of winding up proceedings. Section 45-A gives the High Court exclusive jurisdiction to entertain any matter relating to or arising out of a bank in liquidation. Section 45-C empowers a winding up court to take cognizance of and try summarily offences by any promoter, director, manager or officer of a banking company, provided the offence is punishable under the Indian Companies Act with imprisonment which does not exceed two years. S. 45 C (3) requires offences by such persons punishable under the Companies Act which are not tried summarily to be tried by a Judge of the High Court other than the Judge for the time being dealing with winding up without any commitment for trial and without the aid of a jury. S. 11 then creates a difficulty. Under it,

> "Where any proceedings for the winding-up of a banking company or any other proceeding, whether civil or criminal, which has arisen out of or in the course of the proceeding is pending in any court immediately before the commencement of this Act, it shall stand transferred on such commencement"

to the High Court. This criminal case arose in a sense in the course of winding-up proceedings, after the winding up O. P. had been filed and later a direction was given by the winding-up Judge to C. I. D. to investigate the case, which they did mainly on the basis of the audit report from the auditors appointed in the course of the winding up proceedings. S. 11 does not of course require all offences under the Indian Penal Code which are not punishable also under the Companies Act, to be tried by a Judge of the High Court as against a managing director, directors, officers, and so on. Offences such as forgery and criminal breach of trust, even if they are disclosed in the course of the winding up, have to be tried by the ordinary courts not inferior to that of a Presidency or First Class Magistrate under S. 278 (1) of the Companies Act, and the procedure under S. 237 (1) for prosecution of such cases on a direction of the winding up court by the liquidator is left undisturbed. Whatever "criminal proceedings" may mean, it cannot apply to this case prosecuted also on the direction of the winding up Judge in addition to the orders of the local Government and sanction afforded under S. 196-A of the Cr. P. C. in respect of a non-cognizable offence under S. 477-A, I. P. C.

(22) In addition to this comprehensive twin conspiracy charge-sheet the C. I. D. laid no less than 25 charge-sheets alleging criminal breach of trust in other courts in the jurisdiction of which this bank had branches. The Public Prosecutor has supplied us with a list of these cases. No less than eight of them were laid against accused 13, the Agent of the Madras Branch, in which other Bank constituents not implicated in this main conspiracy case were involved. Eight similar cases were laid before the Additional First Class Magistrate, Negapattinam, in some of which we find accused 2, 7, 8, 9, 10, 11 and 13 involved along with others who are not accused in the present case. In this list we also find two cases pending in the Sub-Divisional Magistrate's court, Tanjore, in which accused 2 and 7 are involved. S. 120-B, I. P. C. has been invoked also in no less than 22 of these cases which were all stayed by the Admission Court on the unopposed ground that the books and records required for their prosecution were all filed in this main conspiracy case. Altogether therefore the C. I. D. investigation produced 23 conspiracy cases.

(23) In a case of this kind in which several persons have stood a protracted trial for 2½ years which has produced such charges as these impossible to try at a single trial, a court would be justified in not directing a retrial of the accused when quashing the charges. In view of the gravity of the charges made against the officers of the bank, namely, accused 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 14 and 15 we think they should be retried in a 'de novo' trial on the charge of conspiracy between October 1946 and April 1947 to falsify bank accounts and to bring into existence a false balance sheet. We accept the Public Prosecutor's suggestion that this conspiracy charge should be split out of this case which has degenerated into a chaotic muddle. We are unable to accept his suggestion that accused 22 to 28 should also be included in this conspiracy charge. They were constituents of the bank whose accounts were juggled with in a manner of which they may not have been aware. The auditor's assistant, accused 6, accused 11 the Agent of the Nagappattinam branch against whom several charge sheets are pending, accused 17 and 18, we do not consider need be tried any further on any count in this unwieldy conspiracy case. Accused 4, though a Director who signed the balance sheet, is a doctor practising in Negapattinam. The prosecution has not made all directors who signed it vicariously liable and in fact has examined two of them, K. Narayanaswami Aiyar, P. W. 181, and Swaminatha Sastri, P. W. 189, as prosecution witnesses. In quashing these charges we do not think there should be any further trial of accused 4, 6, 11, 16, 17, 18 and 22 to 28 on any counts in this charge sheet, though we do not exonerate them from culpability, in view of

the protracted trial to which they have been subjected.

(24) Mr. Nambiar began to address some lengthy arguments to us on the absence of any evidence to show that accused 1, President of the Board of Directors and Chairman of the Managing Committee, was at all aware of the wholesale manipulations alleged. It is true that in accused 2 as managing director under Art. 64 of the Articles of Association was vested the actual management of the bank. We do not desire to go into the merits of the evidence as regards accused 1, nor can we express any opinion at this stage. It is sufficient to say that we think that there is a prima facie case which he has to meet and direct him to take his trial on this limited charge.

(25) We have decided after mature consideration to withdraw this entire case and all the documents piled up there to the High Court under S. 526 (1) (e) Cr. P. C. as we consider this course expedient in the interests of justice and also under S. 526 (b) on the ground that in its trial some questions of unusual difficulty may be created or are likely to arise which the Magistrate may not be capable of dealing with. We have considered and rejected the possibility even of a commitment to the Sessions Court of Tanjore on these split up charges. No commitment on the basis of the vast accumulation of matter in this case is, in our opinion, at all practicable. It is also imperative that all the Bank records should be brought to this court as expeditiously as possible for liquidation proceedings which have been unnecessarily held up for nearly three years. The course we have decided to adopt will also accord with the policy of the Banking Companies Act which requires a Judge of the High Court to try all offences committed by officers of a bank punishable under the Indian Companies Act. Falsification of accounts is also punishable under Sections 282 and 237 of the Indian Companies Act. The learned Public Prosecutor pointed out a technical difficulty in any prosecution for conspiracy under these sections for want of specific sanction as regards them. He has placed before us a draft of clear and lucid counts on which he suggests these accused may be tried in this court. It contains quite rightly, in our opinion, not more than three specific counts of falsification under S. 477-A I. P. C. against any of the accused. The Public Prosecutor's estimate of duration of such a trial is ten days and he says that about 25 witnesses may have to be examined, the prosecution founding its case mainly on the bank accounts. Under S. 526 (2), Cr. P. C. the trying Judge will have to try the case by warrant procedure, and we certainly think that under S. 267, Cr. P. C. they should be tried without a jury. Under S. 31 (1), Cr. P. C., he is competent to pass any sentence authorised by law. The prosecution will be conducted by the Public Prosecutor.

(26) The stay in the 24 cases pending in Magistrate's courts according to the list furnished by the Public Prosecutor will be immediately vacated. The Public Prosecutor is directed to control and give directions regarding their prosecution with due regard to S. 240, Cr. P. C. The records will be called for from the Special Magistrate's court as expeditiously as possible. The other counts on the C. I. D. charge-sheet will remain for the present to be dealt with in due course according to law in accordance with S. 240 Cr. P. C.

(27) In view of this abortive and most protracted trial at heavy and wasteful expenditure of public money as a result of misdirected prosecution we would strongly recommend to Government the appointment of a Director of Prosecutions on a fixed salary, not much below that of a High Court Judge, who should be charged with the responsibilities of directing the conduct of prosecutions in important cases throughout the State, with the assistance in Madras also of prosecutors remunerated on a fixed adequate salary. In the observations we have made in this case we are far from underrating the difficulties in the proper prosecution of a case of deep-seated conspiracy involving several persons. It involves a great deal of preparation and the presentation before the trying court of a clear-cut case with counts capable of being formulated into charges on each of which the trying court is bound specifically to find. The remuneration for the work involved on the basis of a daily fee is in our opinion quite incommensurate with the labour involved, if the desired result of these cases being disposed of in the minimum period of time is to be achieved.

C.R.K./B/R.G.D. Order accordingly.

AIR 1952 MADRAS 734

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

Luis Caetano Menzes, Petitioner v. State of Madras, Respondent.

Civil Misc. Petn. No. 9092 of 1950, D/- 4-3-1952.

(a) International Law — Nationality — Fundamental basis — Petitioner held a Portuguese national — Constitution of India, Art. 5.

The fundamental basis of a man's nationality is his membership of an independent political community and it is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other.

Held on facts that the petitioner was a Portuguese national. (Para 6)

(b) Constitution of India, Art. 14 — Arbitrary classification — Exclusion of citizens of French and Portuguese settlements in India from foreign nationals in Notification No. G. O. 517, Dev., 2-2-1951 for purposes of issue of liquor permits held arbitrary and void under Art. 14 — (Madras Prohibition Act (10 of 1937), S. 54 (a)).

The only classification which will not offend Art. 14 of the Constitution would be the classification between Indian citizens on the one hand and foreign nationals on the other. Portuguese settlement in India though geographically situated in India must be treated as part of the territory of Portugal and a citizen of that settlement must be treated as a Portuguese national. As such he is a foreign national. His exclusion from the general category of foreign nationals as is done by the Government Order No. 517, Development, dated 2nd February 1951 for the purposes of issuing of liquor permits, is arbitrary and discriminatory and offends Art. 14 of the Constitution. (Para 6)

F. S. Vaz, for Petitioner; Advocate General, for Government Pleader and Narayana Nair for the State Prosecutor, for Respondent.

RAJAMANNAR C. J.: This is an application by one Luis Caetanao Menezes for the issue of a writ of prohibition, prohibiting the State of Madras from exercising any of the powers derived from Madras Act X of 1937 (the Madras Prohibition Act), or to issue a writ of mandamus directing the Board of Revenue to issue a permit to the petitioner. In the affidavit in support of the application, the petitioner states that he is a Portuguese subject born at Sholapur of parents both of whom were born in Goa, that his birth certificate proves his Portuguese nationality and his name is inscribed in the register of Portuguese subjects maintained at the Consulate at Madras; that according to the laws of his country he is entitled to all the rights and privileges to which any citizen born in any Portuguese province in Europe is entitled to without any restrictions or limitations whatsoever. It is further stated that after the Madras Prohibition Act was extended to the City of Madras, the petitioner who was residing at Royapuram, Madras, applied to the Board of Revenue through the Collector of Madras for a permit for the possession and consumption of liquor stating that he was a Portuguese subject and he was accustomed to partake of foreign liquor for over thirty years; that under the rules framed under the said Act the Board of Revenue is empowered to grant permits and in so granting or refusing the permits the Board of Revenue from time to time follows the directions given to the Board by the Government, that the application of the petitioner was eventually refused on the 18th November 1948 for the reason that there was no good ground for exempting him from the provisions of the Act. The petitioner alleges that European nationals of foreign states are given permits without any restriction but persons in the position of the petitioner who are subjects of a foreign European power like Portugal but who are not Europeans are denied the same treatment. This he charges is discriminatory on the part of the State and it is contrary to Art. 14 of the Constitution.

(2) The Assistant Secretary, Board of Revenue and Excise, has sworn to an affidavit on behalf of the State, that the State is not concerned with the laws of Portugal and the right of the petitioner under those laws; and justifying the refusal on the ground that the applicant was treated as an Indian as there was no clear proof that he was a non-Indian.

(3) At the time of the hearing of the application, the learned Advocate brought to our notice the latest Government Order on the subject of issue of liquor permits (G. O. No. 517 Development dated 2nd February 1951). The following is the material portion of this order:

"The Government have examined the various classifications now in force for grant of liquor permits and direct that in future applicants for liquor permits should be divided into the following two classes:

1. Indians and the citizens of the French and Portuguese settlement in India;
2. Foreign national excluding citizens of the French and Portuguese settlements in India;

Indians and citizens of the French and Portuguese settlements in India should be granted permits only in exceptional cases on the production of medical certificates and subject to the other restrictions now in force for the grant of permits to Indians, permits may be granted to other nationals coming under category (2) and who are 21 years or above as in the case of non-domiciled Europeans without drawing any distinction between non-domiciled Europeans and non-domiciled Asians as regards the quantity to be allowed."

(4) The petitioner's counsel challenges the validity of the classification adopted in this Government Order. He contends that there could be no warrant for this arbitrary classification according to which the citizens of the French and Portuguese settlements in India, that is settlements of independent foreign countries are classed along with Indian citizens. Foreign national would include nationals of every foreign country and it is for the Government of the country concerned to decide who belonged to a particular nationality.

(5) The learned Advocate General did not contest the position that it is for the concerned Government to claim any person among its nationals. He brought to our notice the statement of the law on the subject in some of the recent text books on International Law. In the thesis on British Nationality by Clive Parry we have the following:

"The term 'nationality' is one belonging, in strictness, rather to public international law than to the law of England or the United Kingdom. In the broad sense it connotes the quality of being permanently within the personal jurisdiction of a State, whether within or without the territory of that State. Thus the 'nationals' of a State are all those persons, natural or artificial, which it has the right to protect abroad, with respect to whose conduct abroad it has the right to legislate, and whom it is under a duty to receive back into its territory if a foreign State desires to deport them. Who are its nationals, however, is entirely a matter for the law of a State to decide."

(6) Schwarzenberger in his book on International Law says substantially the same:

"In principle, every sovereign State is free to determine for itself to whom it wishes to grant nationality."

The learned author points out that the fundamental basis of a man's nationality is his membership of an independent political community and it is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. It is therefore clear that on the allegations made by the petitioner in his affidavit which have not been denied on behalf of the State, the petitioner is a Portuguese national. He would therefore fall prima facie within the category of foreign nationals in the second of the two classes referred to in the Government Order of 2nd February 1951. If so, what then is the justification for excluding him from this category because he happens to be a citizen of a Portuguese settlement in India? Portuguese settlements in India though geographically situated in India must be treated as part of the territory of Portugal. The learned Advocate General was not able to convince us as to how this exclusion can be justified as not being discriminatory. The learned Advocate General gave us an opportunity of looking into the Government file connected with this question. We find therefrom that the view that we are inclined to take, namely, that the only classification which will not offend Art. 14 of the Constitution would be the classification between Indian citizens on the one hand and foreign nationals on the other was also taken by the departments concerned; but evidently

the Government came to a different conclusion and decided to exclude the citizens of the French and Portuguese settlements in India on the ground that the grant of permits to them might lead to abuse. It is not clear how it would, but even assuming it would, we do not think that that would be sufficient in law to warrant an arbitrary classification excluding particular foreign nationals from the general category of foreign nationals.

(7) We, therefore, must hold that the State was wrong in refusing to grant a permit to the petitioner. We, therefore, direct the State to dispose of his application in the light of this judgment. There will be no order as to costs.

A/C.R.K./D.R.R. Order accordingly.

***AIR 1952 MADRAS 736**

SATYANARAYANA RAO
AND RAGHAVA RAO JJ.

Seethalakshmi Achi and others, Appellants v. V. T. Veerappa Chettiar, Respondent.

Appeal No. 344 of 1947 and C. M. P. No. 7477 of 1948, D/- 3-4-1951.

(a) (Burma) Japanese Currency (Evaluation) Act (36 (XXXVI) of 1947), S. 4 — Payment in Japanese currency — Validity.

It is clear from S. 4 that if otherwise the payment is to a person having authority to receive it, on behalf of another person, it cannot be treated as invalid on the ground that it was paid in Japanese currency. (Para 4)

† (b) International Law (Private) — War — Enemy character — Test to determine.

The enemy character of a person under English common law (which applies to India) attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy-occupied territory and the test is an objective test depending upon facts. The domicile of a person may be in the civil law sense or a commercial domicile, but is used in both cases in technical or territorial sense and not necessarily in the sense in which it is understood under Civil law. (Para 15)

(c) Interpretation of Statutes — English Common law — Applicability to India.

The English Common law does not apply to India when there is statutory law covering the point, and even when there is no rule of statute, the common law of England is applied 'sub modo' having regard to the conditions of the society and the customs and manners of the people of India. Where, however, the principles of common law in England are themselves in a state of uncertainty there is nothing to preclude a Judge in adopting that rule of English common law which is in accordance with justice and equity: AIR 1923 Mad 523 and AIR 1938 Mad 164, Ref. to. (Para 29)

† * (d) International law (Private) — War — Change of nationality of territory — Test to determine.

It is necessary that for the territory, either by conquest, cession or annexation of a permanent or temporary nature, to become part of the territory of the enemy there should be a formal declaration changing the national character of the territory; and effective control with a view to hold the territory in question by an establishment of civil and military administration would not be sufficient to bring about a change of nationality of the territory: (1857) 11 Moore PC 88, Foll; 1943 AC 203, Not foll. Case law discussed. (Para 30)

† * (e) International law (Private) — War — Creditor's agent and debtor on same side of line of war — Payment by latter to former — Validity — (Defence of India Rules (1939), Rr. 97 (b) and (f) and 98 (2)).

When a creditor and his agent and the debtor are not across of the line of war but in the same belligerent state and on the same side of the line of war there is no reason prohibiting the payment of the debt by the debtor and a receipt by the creditor: Case law discussed. (Para 30)

The plaintiff and the defendant carried on money-lending business in Burma. In 1939, the defendant executed a promissory note to the plaintiff in India. The plaintiff filed a suit in India to recover the amount due under the promissory note ignoring the payment made in Burma by the defendant's agent to the plaintiff's agent in 1944. The questions were whether Burma was an enemy territory at the time of the payment and if Burma was an enemy territory, whether the plaintiff's agent had authority to give a valid discharge:

Held that in the absence of any evidence to show that the Government of Japan had established anything like a civil administration under its control and authority besides the military occupation which could effectively exercise dominion and control over the territory, it could not be held that Burma was an occupied enemy-territory. (Para 31)

Held further that even otherwise the payment was good and valid as the defendant's agent and the plaintiff's agent were living in the same enemy-occupied territory and both being enemies there was no ground for treating the payment as invalid. (Para 32)

Held also that none of the disabilities contemplated by R. 98 of D. I. Rules would apply as the transaction was between enemies inter se and not between a British Indian subject on the one hand and an enemy on the other and therefore even if Burma was treated as an enemy territory within the meaning of the Defence of India Rules the payment in Burma by the debtor to the creditor was not hit at by any of the rules made under the Defence of India Act. (Para 39)

(f) Defence of India Rules (1939), R. 2 (2) "Not being an area.....His Majesty" — Meaning.

Words "not being an area in the occupation of His Majesty or of a State allied with His Majesty" can only be read as meaning 'not being an area which was in the occupation of His Majesty or of a State allied with His Majesty". The words "not being an area" must have reference to the words "any area" with which the rule opens: AIR 1946 Mad 328, Foll. (Paras 35 and 37)

(Applying this interpretation Burma was held not to be enemy territory as during

the Japanese occupation in the Second World War it was in the previous occupation of His Majesty.) (Para 38)

(g) Defence of India Rules (1939), R. 2 (2) — Object of definition.

The object of the definition is to exclude from the definition by adopting the comprehensive test of previous occupation by His Majesty as the sole and guiding factor even in respect of territories held by His Majesty as sovereign even though they happen to be in the occupation of the enemy for the time being. (Para 36)

(h) Interpretation of statutes — Construction giving effect to all parts of clause must be adopted.

The accepted canon of interpretation of all statutes is, as far as possible the construction which gives effect to all the parts of a clause must be adopted and a restricted construction which makes a part of it otiose shall not be adopted unless it becomes impossible to reconcile all the parts of a clause. (Para 37)

D. Ramaswami Iyengar and P. S. Srinivasa Desikan, for Appellants; R. Rangaswami Iyengar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

(1857) 11 Moore PC 88: (14 ER 628 PC) 16, 17, 18, 30, 31
(1861-63) 9 Moo Ind App 387: (1 WRPC 14) 29
('47) AIR 1947 PC 85: (49 Bom LR 564) 31
('16) 18 Bom LR 190: (AIR 1916 Bom 193) 29
('20) 44 Bom 1: (AIR 1920 Bom 294) 29
('16) 33 Ind Cas 540: (AIR 1917 Cal 411) 29
('85) 8 Mad 175 29
('16) 31 Mad LJ 860: (AIR 1918 Mad 1294) 29, 30
('16) 32 Mad LJ 146: (AIR 1918 Mad 1124) 29
('23) 46 Mad 605: (AIR 1923 Mad 523 (2): 24 Cri LJ 599 (FB)) 29
('32) 55 Mad 727: (AIR 1932 Mad 445) 29
('38) 1938-2 Mad LJ 340: (AIR 1938 Mad 164) 29
('43) 1943-2 Mad LJ 201: (AIR 1943 Mad 743) 27, 34
('44) ILR (1944) Mad 124: (AIR 1944 Mad 239) 27, 34
('44) 1944-2 Mad LJ 293 35
('46) ILR (1946) Mad 768: (AIR 1946 Mad 328) 27, 33, 34, 35, 37
('48) S. A. No. 37 of 1948 (Mad) 34
(1902) AC 484: (71 LJKB 857) 14, 29
(1916) 2 AC 307: (85 LJKB 1333) 14
(1916) 2 AC 112: (85 LJPC 146) 20
(1918) AC 239 24
(1918) AC 260: (87 LJKB 531) 22, 23
(1919) AC 59: (88 LJ KB 147) 24
(1919) AC 974: (88 LJP 180) 20
(1928) AC 269: (97 LJKB 502) 25, 30
(1943) AC 203: (112 LJKB 32) 9, 11, 14, 17, 18, 20, 24, 26, 29, 30, 31, 33
(1943) 1 All ER 418 25
(1802) 3 B & P 113: 6 RR 724 14, 23
(1802) 3 B & P 191 23
(1808) 1 Camp 429: (170 ER 1010) 18
(1915) 2 Ch 124: (31 TLR 420) 22, 23
(1915) 2 Ch 409: (84 LJCh 849) 20
(1917) 2 Ch 144: (86 LJCh 625) 24
(1940) 1 Ch 785: (109 LJCh 468) 26
(1943) Ch 233: (112 LJCh 305) 20, 31
(1799) 1 Ch Rob 196 18, 19, 22, 23
(1800) 3 Ch Rob 41 14
4 Ch Rob 8 22
(1804) 5 Ch Rob 302-3 14
8 Cranch 155 21
8 Cranch 181 29
9 Cranch 191 18
(1814) 1 Dod 450 18
(1808) Edw 1: (165 ER 1011) 18
(1809) 1 Edw 171: (165 ER 1071) 18
(1857) 7 El & Bl 763: (27 LJQB 17) 23
(1813) 1 Gall 563 21
4 Harr & Mc H 161 25
(1915) 1 KB 857: (84 LJKB 1001) 23
(1915) 2 KB 379: (84 LJKB 1673) 25
(1915) 84 LJP 140: (112 LT 777) 22
100 Mass 561 21, 22, 25, 29
(1900) 2 QB 339: ((1902) AC 484) 13
1 Pet (CC) 496 25
5 Rob 115 18, 19, 30
(1815) 6 Taunt 237: 16 RR 610 25
9 W 3: 1 Id Rayms 282 14
(1870) 9 Wall 72: 19 US SC Law Ed 627 25, 29
(1869) 19 US SC Law Ed 207: (7 Wall 447) 25, 29
(1819) 4 Wheat 246 18

JUDGMENT: This appeal by the defendants raises an interesting and difficult question of law, and we have taken time to consider our judgment. The case was ably and elaborately argued by both sides and we are indebted to counsel for the assistance rendered by them.

(2) The plaintiff instituted the suit to recover Rs. 4900 the balance of principal and Rs. 990-7-6 interest calculated according to the vaddi chittai making a total of Rs. 5890-7-6 as balance due under a promissory note, Ex. P. 1 dated 19th October 1939 executed by one Meyyappa Chettiar in favour of V. T. Veerappa Chettiar for Rs. 17,696-8-6. This Meyyappa Chettiar, the executant of the note, is the husband of the first defendant, undivided father of defendants 2 and 3. He carried on money-lending business at Dedaya in Burma under the style of S. M. A. M. S. The plaintiff, the payee under the note, carried on also money-lending business at Rangoon under the style of V. T. Firm. In respect of transactions between the two firms in Burma, Meyyappa Chettiar became indebted to the plaintiff in a sum of Rs. 34,500 as per settlement of account dated 30th July 1934.

On 7-4-1935 the defendants' agent at Dedaya executed a promissory note to the plaintiff, and under this promissory note there were payments made in 1935 and 1936. The promissory note was lost and on 17th March 1937 for the balance due under the lost promissory note Meyyappa Chettiar executed a promissory note in favour of the plaintiff and also gave a varthamanam, letter of even date. The promissory note was for a sum of Rs. 26,579-8-1 which was executed in British India at Pallathur. Under this note also, payments were made in 1939, and for the balance due under that promissory note, on 19-10-1939 the suit promissory note Ex. P. 1 was executed by Meyyappa Chettiar in favour of the plaintiff at Pallathur. There were subsequent payments admittedly made towards this promissory note.

The plaintiff filed the suit in 1945 ignoring a further payment of Rs. 5786-5-6 made in Burma by the agent of the defendants to plaintiff's agent Viswanathan Chettiar (P. W. 2) for which a voucher, Ex. D. 1 dated 5-10-1944 was given by the plaintiff's agent to the defendants' agent. A payment of Rs. 100 was made at Pallathur to save the promissory note from limitation and according to the defendants the understanding was that if the note was already discharged by payment in Burma this amount should be refunded.

(3) The dispute between the parties is with reference to the payment by the defendants'

agent to the plaintiff's agent at Burma. In the suit the plaintiff denied the receipt of this amount & also disputed the validity of the payment made to the pltf's agent on the ground that after the invasion of Burma by Japan on 7-3-1942 the agency of Viswanathan Chettiar, the plaintiff's agent, came to an end, and that he had no right to give a valid discharge. It was also pleaded that as the payment was in Japanese currency there was no valid payment. It has now been found by the trial court that the plaintiff's case that no payment was made in Burma is false and that, in fact, the plaintiff's agent received the amount and credited the same in the account of the plaintiff, Ex.D. 2, maintained by Viswanathan Chettiar, P. W. 2 at Burma.

It is also further found that this amount was utilised by the agent to discharge the V. T. firm's liability due to Moulmein C. T. M. N. R. M. N. N. This finding is not now seriously challenged by the respondent plaintiff, and indeed could not be in view of the unimpeachable evidence on which the case of the defendants rests. The plaintiff therefore undoubtedly received the amount and had the full benefit of it, but for reasons best known to himself he has chosen to take up the attitude of calling upon the defendants to pay the amount twice over. The learned Subordinate Judge who tried the suit came to the conclusion that at the material time Burma was not an enemy territory, but as the payment was made in Japanese currency it was not a valid payment. In the result he decreed the plaintiff's suit as prayed for and disallowed the claim of the defendants for a refund of the sum of Rs. 100 based on an agreement to refund the same. This question however is not now in appeal and need not be considered.

(4) The questions raised in the appeal are:

"1. Whether Burma was an enemy territory at the time of the payment?

2. If Burma was an enemy territory whether the plaintiff's agent who admittedly resided in Burma during the occupation of that territory by Japanese had authority to give a valid discharge?

3. Whether the payment in Japanese currency is valid?

The last question does not present any difficulty, as it has now been brought to our notice by the learned advocate for the appellants that after Burma was restored to British Government an Act entitled the Japanese Currency (Evaluation) Act, 1947, (Burma Act No. XXXVI (36) of 1947) was passed which validated payments made in Japanese currency during the occupation of Burma by the Japanese. Copies of this and other Acts were filed in this court as additional evidence with a petition to admit them in appeal. As these Acts have a material bearing, we think that this petition to admit these Acts as additional evidence should be granted. Section 4 of this Act says:

"Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted such payment shall be deemed to be payment in legal currency notes of the same face value, as if the Japanese currency notes were legal currency notes at the time the payment was made."

It therefore follows that if otherwise the payment is to a person having authority to receive payment on behalf of the plaintiff, it cannot be treated as invalid on the ground that it was paid in Japanese currency. The real question therefore is whether P. W. 2 had authority to receive payment on behalf of the plaintiff and to give a valid discharge. The contention urged on behalf of the respondent-plaintiff is that by reason of the Japanese occupation of Burma at that time it became an "enemy territory", that P.W. 2, the plaintiff's agent who lived in Burma at that time became an "enemy" and therefore under law the agency of P. W. 2 terminated.

(5) The following dates are material in considering the question whether Burma became an enemy territory, and these dates were agreed to by both parties as correct. On 8-12-1941 war was declared against Japan by Britain and America. On 7th March 1942, Japan occupied Rangoon. On 4-5-1945, the British Army retook Rangoon. On 6th August 1945 and 8th August 1945, Hiroshima and Nagasaki were destroyed by atom bombs by the Americans. On 14-8-1945, the war in the East terminated.

(6) The most important question is whether the agent of the plaintiff, P. W. 2, at the time he received payments from the agent of the defendant on 5-10-1944 had authority to give a valid discharge on behalf of the plaintiff. That P. W. 2 was the duly constituted agent of the plaintiff to carry on money-lending business at Rangoon on behalf of the plaintiff at the time War broke out and that he had continued to act on behalf of the plaintiff by collecting debts and doing other acts on behalf of the plaintiff as his agent during the period Burma was in the occupation of Japanese cannot now be seriously doubted.

The evidence of P. W. 2, the agent, is clear and unambiguous to establish that he was collecting rents and paying taxes in respect of the property of the plaintiff during the period of War. He was also liquidating the debts of the business. Notwithstanding this evidence, however, an attempt was made by the learned advocate for the respondent to reopen the question and repudiate the agency in fact, but that attempt has failed in view of the evidence of P. W. 2. It is significant that the plaintiff himself did not go into the witness box to repudiate the agency and even the power of attorney, if any, under which P. W. 2 acted was not produced.

The evidence of D. Ws. 1 and 2 to a large extent supports the case of the defence and the account maintained by P. W. 2 during the period, produced by the plaintiff but exhibited on the side of the defendants as Ex. D. 2, puts the matter beyond any doubt. The plaintiff made no serious attempt in the trial court to deny the agency and the case, therefore, must proceed on the basis that P. W. 2 was an agent in fact. Whether that agency continued in law notwithstanding the fact that War broke out between England and Japan and Burma was occupied by Japan is the only question that remains to be determined.

(7) The argument that the agency of the agent terminated by reason of the occupation of the territory by Japan is founded on the common law doctrine of England which, it was contended applies to British India at least by way of justice, equity and good conscience. Reliance was also placed upon the Defence of India Rules made by the Government of India prohibiting trading with the enemy by virtue of the power vested in the Government under the Defence of India Act, 1939.

(8) For a proper appreciation of the contentions urged on either side it is necessary to have a correct perspective of the English common law doctrine relevant for the purpose of the case.

(9) The English common law was recently subjected to a critical and, if one may say so with respect, to a careful examination by the House of Lords in 'SOVFRACHT (V/O) CASE', (1943) A. C. 203, and the masterly exposition of the subject, particularly in the classic speeches of Lord Wright and Lord Porter, has lightened, to a large extent, our task. It is unnecessary therefore to traverse the same field once again by subjecting the authorities on the subject to a detailed examination.

(10) Total War with its incidence of massacre of innocent men, women and children and large-scale destruction of property by perverting the knowledge of science for devising ways and means of destruction in a brutal manner is the product of modern civilisation, if civilisation it can be called. The principles regulating intercourse between residents of belligerent states are not part of international law but are part of the municipal law of every country. They are to a large extent supplemented and modified very often by Trading with the Enemy Acts and the rules, regulations and proclamations promulgated under the power conferred under such Acts.

(11) There are two fundamental principles of English common law which are made applicable to enemy subjects in time of war. These principles though separate are closely connected as the basis on which they are founded is common. As stated by Lord Wright in 'SOVFRACHT (V/O) CASE', (1943) A. C. 203 at p. 217, these principles are:

> "One is that he (enemy subject) is denied access to the English courts, the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. Both principles depend on rules of English municipal law, and both have their foundation in the ancient common law."

In their origin these principles seem to have been founded on public policy and they have now obtained such an absolute character that it is not now open to reject their application by a scrutiny of public policy. The rule against trading with an enemy is considered as a belligerent weapon of self-protection and is aimed at crippling the resources of the enemy. In Openheim's International Law, Vol. II, at pages 258 and 262 these rules are summarised as follows:

> "Formerly the rule prevailed everywhere that an enemy subject had no 'persona standi in judicio' and was, therefore, 'ipso facto' by the outbreak of war, prevented from taking or defending proceedings in the courts. This rule dated from the time when war was considered such a condition between belligerents as justified hostilities by all the subjects of one belligerent against all the subjects of the other, the killing of all enemy subjects irrespective of sex and age, and, at any rate, the confiscation of all private enemy property. War in those times used to put enemy subjects entirely 'ex lege', and it was only a logical consequence from this principle that enemy subjects could not sustain 'persona standi in judicio'. Since the rule that enemy subjects are entirely 'ex lege' has everywhere vanished, the rule that they might not take or defend proceedings in the courts had in many countries, such as Austria-Hungary, Germany, Holland and Italy, likewise vanished before the World War. But in Great Britain and the United States of America the general rule that enemy subjects are prevented from taking legal proceedings still survives, though qualified, as we shall see, by many exceptions." (The exceptions are omitted as not being relevant) * * *
>
> "Before the World War, following Bynkershock, most British and American writers and cases, and also some French and German writers, asserted the existence of a rule of International law that all intercourse, and especially trading, was 'ipso facto' by the outbreak of war prohibited between the subjects of the belligerents, unless it was permitted under the custom of war (as, for instance, ransom bills) or was allowed under special licences, and that all contracts concluded between the subjects of the belligerents before the outbreak of War became extinct or suspended. On the other hand, most German, French, and Italian writers denied the existence of such a rule, but asserted the existence of another, according to which belligerents were empowered to prohibit by special orders all trade between their own and enemy subjects.
>
> These assertions were remnants of the time when the distinction between International and Municipal law was not, or was not clearly, drawn. International law, being a law for the conduct of states only and exclusively, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, now-a-days untenable. Their place must be taken by the statement that, States being sovereign, and the outbreak of war bringing the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects."

(12) It would be seen on an analysis of these principles that the very foundation or the basis for them is that, if there is war between belligerents, a person is an "enemy subject" which implies that he is in some way connected with the enemy territory or enemy occupied territory.

(13) What is War? Hall in his International Law defines "War" at page 60 as follows:

> "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of War is set up, in which the combatants may use regulated violence

against each other until one of the two has been brought to accept such terms as his enemy is willing to grant."

This definition has judicial approval in 'DRIEFONTEIN CONSOLIDATED GOLD MINES LTD. v. JONSON', (1900) 2 Q. B. 339 at p. 343. War, therefore, is a

"contest between two or more states through their armed forces with the ultimate object of each contestant or each contestant group vanquishing the other or others and imposing his own conditions of peace."

(14) Who is an Enemy? It is important to consider the test which determines the enemy character of a person. Under the law in England the test of enemy character is not nationality but residence or even living in enemy territory for whatever purpose it may be. It is not necessary that the person, even if he is a British subject, should have a domicile in the sense of the civil law, viz., the place of a man's permanent house, or even of an indefinite residence. If a person, whether a neutral or a British subject, lives in enemy territory even for purposes of business, he is treated in law as an "enemy subject." Of course what applies to enemy territory applies equally to enemy occupied territory. The test of enemy character has nowhere been so clearly laid down as by Lord Lindley in 'JONSON v. DRIEFONTEIN CONSOLIDATED MINES LTD.', (1902) A. C. 484 at page 505 where the learned Lord summarised the tests in these words:

"When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as alien enemy in considering the validity or invalidity of his commercial contracts: 'Mc CONNELL v. HECTOR', (1802) 3 B & P 133: 6 R. R. 724. Again, the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses; 'WELLS v. WILLIAMS', 9 W. 3: 1 Id. Raym. 282. As observed by Sir William Scott in 'THE YONGE KLASSINA', (1804) 5 Ch. Rob. 302-3 a man may have mercantile concerns in two countries, and if he acts as merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed counting house in the enemy's country will not be decisive. See also 'The Portland' (1800) 3 Ch. Rob. 41."

From this passage it is evident that the term "domicile" is used in a twofold sense; one is in relation to the person without reference to his commercial intercourse and the second is in regard to the place of business which is styled by Dicey as a "commercial domicile" of a person. In particular cases the two domiciles of persons may be the same, or may be different, but it is impossible to ignore the distinction. The subject is more elaborately discussed by Professor Mcnair on Legal Effects of War in Chapter II. In Halsbury's Laws of England, 2nd Edn. (Lord Hailsham), at page 447 it is stated that

"An alien enemy is one whose Sovereign or State is at war with the Sovereign of England, or one who is voluntarily resident or who carries on business in an enemy's country even though a natural-born British subject or a naturalised British subject."

In the case of a company incorporated in the United Kingdom as stated in Volume I of Halsbury's Laws of England, at page 447:

"It does not become an alien enemy merely because its shares are held by alien enemies, but becomes an alien enemy if its agents or the persons in 'de facto' control are alien enemies or if it carries on business in an enemy country. 'DAIMLER CO. LTD. v. CONTINENTAL TYRE AND RUBBER CO. LTD.', (1916) 2-A.C. 307. The same applies to a company incorporated in an allied state. A company incorporated in an enemy country is an alien enemy regardless of how its shares are held."

In 'SOVFRACHT (V/O) CASE', (1943) AC 203 Viscount Simon L. C. defined a subject of a state at War with England as "a person of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country" and he pointed out at page 211:

"1. The test of 'enemy character' is fundamentally the same whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law.
2. The test is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment."

(15) In the same case Lord Wright at p. 219 stated:

"Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicile in the sense of settled residence or in the case of traders commercial domicile. Domicile in the strict legal sense is not necessarily relevant. Some of these cases were decided in the Prize Court, others in courts of common law. However the right to sue or prosecute an action in Court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense. The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can."

It follows from these authorities that the enemy character of a person under English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy occupied territory and the test is an objective test depending upon facts. The domicile of a person may be in the civil law sense or a commercial domicile, but is used in both cases in technical or territorial sense and not necessarily in the sense in which it is understood under Civil law.

Webber in his book on the Effect of War on Contracts, 1946, Edn. discusses this topic in Chapter III at page 89.

(16) It becomes now necessary to consider the more difficult question of the nature of occupation required for purposes of these rules to change the national character of a State to constitute an enemy-occupied territory. There is no difficulty in determining an "enemy territory". It is the area under the sovereignty of a power at war and of which it is the owner of the soil. What is the quality of occupation required to make a territory occupied by an enemy "an enemy-occupied territory" for the purpose of the common law?

The Trading with the Enemy Act, 1939 and its counterpart in India, sub-rule (2) of Rule 2 of the Defence of India Rules, substantially agree and include within the definition the area "in the occupation of a power with whom His Majesty is at War". The occupation required to constitute a territory an enemy-occupied territory has been the subject-matter of judicial decisions, English and American, and the opinions of Sir William Scott, who was later Lord Stowell, and of Marshall C. J. of the United States, as well as of Lord Kingsdown in the well-known 'GERASIMOS CASE (CREMIDI v. POWELL'), (1857) 11 Moore P.C. 88 (PC) have been subjected to a critical examination by Lord Wright and Lord Porter in the 'SOVFRACHT (V/O) CASE', 1943 A.C. 203 and the House of Lords in a way differed from the view of Lord Kingsdown in 'GERASIMO'S CASE', (1857) 11 Moore. P. C. 88.

(17) An occupation of a territory by the enemy may be an occupation for military or strategic purpose and the territory may be subjugated by the hostile force which occupies it so as to subject it to such control as it may think fit to exercise, or it may, having occupied it by cession or conquest or some other means permanently or temporarily have incorporated it with the territory over which the enemy has undisputed sovereignty. There may yet be an intermediate position where the enemy without actual and formal annexation of the territory may hold the dominion and control over the territory for a sufficiently long period and the occupation may be of such relatively permanent character as to indicate an intention to hold it. The belligerent State may in such a case assume some kind of administration over it.

An occupation of this character is something more than mere occupation for military purposes and falls short of complete annexation or incorporation with its own territory. Of these three possibilities Mr. Lushington, a Judge of the Admiralty Court, who decided the case in 'GERASIMO', (1857) 11 Moore. P. C. 88 in the the first instance accepted the first position. He said,

> "So long as any territory is in possession of the enemy, I apprehend that the law declares that all the inhabitants thereof, and all the persons resident therein and carrying on trade are to be considered as enemies in respect of that trade."

This view has been regarded by all the authorities as erroneous and an occupation of such a nature has not the effect of altering the national character of the territory. The second view was held by the Right Hon. T. Pemberton Leigh, afterwards Lord Kingsdown, in the 'GERASIMO'S CASE', (1857) 11 Moore P.C. 88. The intermediate view has been established by the decision of the House of Lords in 'SOVFRACHT (V/O) CASE' (1943) A.C. 203. Wheaton on International Law, Vol. II, 6th Edn. at page 780 points out the distinction between "occupation" and "conquest" in these words:

> "Further, just as invasion must be accompanied by certain essential conditions in order that it may be transformed into occupation, so must military occupation be accompanied by certain necessary conditions in order that it may ripen into conquest. Formerly, as we have pointed out above, the invader assumed the larger rights of an occupant, and the occupant assumed the still larger rights of a conqueror. But now there is a line of demarcation between these stages. Conquest or complete subjugation implies the permanent subjection of the occupied country to the sovereign of the occupying forces, with the intention that this territory shall be annexed to the dominions of the new sovereign and shall henceforth be considered as a constituent portion thereof; that is, conquest depends on "firm possession" together with the intention and the capacity to hold the territory so acquired.
>
> The rights under occupation, then, cannot be co-extensive with those of sovereignty. The rights acquired are due to the military exigencies of the invader, and consequently are only provisional. The local inhabitants do not owe the occupant even temporary allegiance; and the national character of the locality is not legally changed.
>
> This view has long been adopted by British Courts. Thus in the 'GERASIMO'S CASE', 11 Moore P. C. 88 the Privy Council pointed out that in order to convert a friendly or neutral territory into an enemy territory, it was not sufficient that the territory in question should be under hostile occupation and subjected to the control of a hostile power; some additional element was necessary, e. g. cession or conquest, whereby the territory was incorporated with and made part of the dominions of the invader. This principle was adopted not only by the British Prize Courts, but also in the Courts of common law. Lord Stowell emphasised the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time."

In the 7th Edn. of Wheaton's International law, Vol. II, pages 233 and 234, the same definition of conquest is retained. The point for consideration, therefore is, is there a substantial difference between the view of Lord Kingsdown in 'GERASIMO'S CASE', (1857) 11 Moore PC 88 as to what is required to be established to change the national character of the territory and the view expressed by the House of Lords in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203.

(18) In the 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88 a cargo of corn owned by certain residents of Galatz in Moldavia was shipped by a ship carrying Wallachian colours and when the ship was coming out of the mouth of the Danube was seized by the British for a breach of the Black Sea blockade and one of the questions was whether the seizure was justified. In the Court of Admiralty, Right

Hon. Dr. Lushington held that Moldavia was in the possession of the Russians who were then enemies and as trade by the enemies was prohibited the seizure was justified. On appeal to the Privy Council this decision was reversed by Lord Kingsdown.

The Russian Minister made a declaration that the occupation of Moldavia and Wallachia by Russia was only for a military purpose connected with strategical considerations and disclaimed an intention on the part of Russia either to prolong indefinitely the occupation or to establish herself there in a permanent manner or to incorporate the principalities with her own dominions or throwing the sovereignty of the Ottoman Government. On these facts the Privy Council had to consider whether by reason of such occupation the national character of the territory was altered so as to constitute it an "enemy-occupied" territory. In arriving at a contrary conclusion, differing from that of Dr. Lushington, Lord Kingsdown relied upon the law as stated by Lord Stowell in some of the decisions. In 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88 at page 96 it is observed:

"Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on and, of course, as an enemy of those with whom that power is at War. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country."

"Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such Power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any Judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the Judge of the Court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred."

In order to establish the meaning of the term "dominions of the enemy" the Privy Council relied upon the opinion of Lord Stowell in the case of The "Fama" 5 Rob. 115 thus:

"In order to complete the right of property there must be both right to the thing and possession of it; both 'jus ad rem' and 'jus in re'. "This", he observes "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, when a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements may be informed under whose dominion and under what laws they are to live."

It was pointed out later in the course of the judgment that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force and that this principle was acted upon by the Lords of Appeal in the 'ST. DOMINGO CASES', of the "Dart" and "Happy Couple" where the rule operated with extreme hardship. The same is the opinion of Lord Stowell in the "Manilla", (1808) Edw. 1, where it was held on the facts of that particular case that there was no declaration of any sort by the British to constitute the Island of St. Domingo an enemy territory.

In order to further reinforce this conclusion the Judicial Committee relied on 'DONALDSON v. THOMPSON', (1808) 1 Camp 429, and the opinion of Lord Stowell in the case of The "Bolletta", (1809) 1 Edw. 171. At page 100 it is pointed out that Lord Stowell recognised in The "Bolletta" (1809) 1 Edw. 171 the distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time. As the occupation by the Russians in the case before the Privy Council was only a military occupation for strategical considerations, it was held that Moldavia was not an enemy territory. No doubt the Judicial Committee in that case did not refer to the other cases decided by Lord Stowell, particularly The 'HOOP', (1799) 1 C. Rob. 196 and the other decisions adverted to in the judgment of Lord Wright in the 'SOVFRACHT (V/O) CASE', (1943) A.C. 203. In the 'SOVFRACHT (V/O) CASE', (1943) A. C. 203 Lord Wright summarised the opinion of Lord Stowell after an examination of the decisions in these words:

"It is, I think, clear that in these and other like cases Lord Stowell's opinion was that a territory changed its national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation. A mere occupation in the course of and for purposes of military operations did not change the national character. These were cases in prize in which the issue was enemy or not enemy, but the same test

was applied in a different connexion in The 'Foltina', (1814) 1 Dod. 450."

Marshall C. J. in 'BENTZON v. BOYLE', 9 Cranch 191 known as 'Thirty Hogsheads of Sugar Case' stated the principle thus:

"Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British Island until it was restored to Denmark".

To the same effect was the opinion of Story J. also of the Supreme Court of the United States, in the case of 'UNITED STATES v. RICE', (1819) 4 Wheat 246. Lord Wright and the other law-Lords, particularly Lord Porter, disagreed with the view of Lord Kingsdown. The extreme view of Lord Lushington was rejected as stating the law too widely without any qualification. Lord Wright pointed out that Lord Kingsdown did not consider the view of Lord Stowell in The 'Hoop' (1799) 1 C. Rob. 196 and Marshall C. J. in 'THIRTY HOGSHEADS OF SUGAR', 9 Cranch 191. He however did not dissent from the ultimate conclusion of Lord Kingsdown on the facts of the case as the occupation in question by the Russians of Moldavia was purely of a temporary nature and for strategical purpose. After quoting the statement of law by Lord Kingsdown in 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88 which is already extracted in this judgment, the learned Lord in his speech observed:

"The former sentence may be taken to describe what has been called belligerent occupation, which would not generally be regarded as changing the national character of the territory, but one reading of the alternative contained in the second sentence would seem to exclude cases like the occupation by the British of Heligoland and the captures in the West Indian Islands in the French War or the subjugation of European countries by the Germans in the present War. A conquest during war may in a sense be temporary, as was that of Demerar by the French, and may be reversed either by reconquest or by surrender, but if while it lasts there is what is called firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered the national character of the place will generally, at least for the time, be changed.

Perhaps Lord Kingsdown's language means no more than that when he speaks of a territory being temporarily incorporated with & forming part of the dominions of the invader at the material time. If it is so construed it is in harmony with the earlier decisions and is unexceptionable. It is clear on the facts that the Russian occupation of Moldavia was no more than a temporary military and strategical occupation. But if Lord Kingsdown makes the change in national character depend on formal acts or declarations it would not, in my opinion, be consistent with recognised authorities. The issue depends on fact, not on form."

The test laid down by Lord Wright in this speech practically amounts to what is described by Wheaton as the essence of "conquest". Lord Kingsdown by himself did not insist upon any particular form or a formal act of declaration in order to bring about a change in the character of the territory. It was Lord Stowell in The "Fama" 5 Rob. 115 case who stated that there should be some public act in order to bring about the transfer the object being to give due publicity to the inhabitants of such settlements who are certainly interested in knowing under whose dominion and under which laws they were to live. What is insisted on by Lord Wright is not mere occupation, but subjugation:

"This would show" to quote Lord Wright again, "that a mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it.

I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared, or surrendered or retaken under the pressure of superior force, but there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a settled acquisition."

On the facts of the case before the House of Lords there was no difficulty in coming to the conclusion that Holland was an enemy-occupied territory as no evidence was given as to the actual status of Holland at that time, and the case proceeded up to the stage of the House of Lords on the footing that Holland was occupied and was under the dominion of the Germans. No doubt, as in the case of Burma whose Governor shifted to Simla, the Dutch Government was established in and recognised by Great Britain, and, in fact continued its 'de jure' existence in Great Britain. It was also found that the Germans did not intend to relinquish their possession of Holland unless forced to do so. The subjects of Holland, therefore, were forced to submit to the German yoke much against their will and had to wait for their day of deliverance. Lord Porter in dealing with the question opined that it was difficult to give a definite answer to the question so as to cover all cases:

"The solution" according to him "depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former Government is superseded. These considerations are 'in his opinion' the solution of the apparent conflict between the cases in which the inhabitants of occupied territory have been held to be alien enemies and those in which the opposite view has been taken."

After quoting the passage from the judgment of Lord Kingsdown in the 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88 Lord Porter expressed his disagreement with the statement of the

law contained in that judgment in the following words:

"In terms this statement would seem to require a formal cession or conquest followed by a permanent or temporary incorporation of the occupied territory with the enemy state to make the inhabitants of the occupied territory enemy aliens as regards a country at war with the occupying power, and would seem to assert that to bring about this result it is not enough that the territory is occupied and controlled by the enemy, however complete the occupation and unlimited the control. If this be the meaning of Lord Kingsdown's words, I should not agree with them, but he was speaking with reference to the facts of the case under consideration in which it could not be said that there was even an attempt at civil control of the occupied provinces.

It is enough, in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers. Indeed, I can imagine a case where, though lip service was paid to the legal government of a country, yet in practice control was so exercised by an occupying power that in substance the territory formed part of the dominion of the enemy. At the present time when in international affairs formal acts have been largely dispensed with either as a preliminary to or during the course of a war, when declarations of war have ceased to be made and invasion follows immediately on declarations of friendship or neutrality, it is, in my view, essential to regard substance & not form."

Viscount Simon L. C. expressed his view on this question in proposition 4 in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 at p. 211 thus:

"But this is not always or absolutely so. It depends on the nature of the occupation, and on the facts of each case. If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time and is exercising some kind of Government or administration over it, the area acquires "enemy character". Local residents cannot sue in our courts and goods shipped from such an area have enemy origin; see Marshall C. J. in the 'THIRTY HOGSHEADS OF SUGAR', BENTLON v. BOYLE', 9 Cranch 191, at page 195.

If, on the other hand, the occupation is of a slighter character—for instance, if it is incidental to military operations and does not result in effective control the case is different, as in 'CREMIDI v. POWELL', (1857) 11 Moore P. C. 88. I would adopt the observations of my noble and learned friend Lord Wright on this decision, for I agree that, while, Dr. Lushington's statement of the law went too far in one direction, Lord Kingsdown (then the Right Hon. Thomas Pemberton Leigh) in delivering the judgment of the Privy Council reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind."

(19) From the foregoing discussion, it would follow that the only difference between the House of Lords and Lord Kingsdown is this, that a formal declaration of a conquest, cession or annexation is not needed to change the national character of the territory according to the House of Lords. Lord Kingsdown in terms does not himself express and insist on such formality though Lord Stowell laid down that requirement in the case of The "Fama" 5 Rob. 115.

The essence, however, of the two views is that the occupation must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation. The civil and military administration over the country must be exercised by the enemy to the exclusion of the former government. The occupation should not be of the slightest character for military or strategical reasons, but of the more comprehensive nature. The enemy must have effective control though provisional and must treat it as a settled acquisition. If the occupation is in a fluid state, swinging backwards and forwards, as in the case of Korea at present, the national character of the territory would not be altered. This approximates to the test laid down by Wheaton in defining what constitutes conquest.

(20) The question of change of the character of the territory, therefore, must be determined on the facts of each case and inferred from the evidence available in the case. The decision in 'SOVFRACHT (V/O) CASE,' (1943) A.C. 203 proceeded practically on the assumption that the control by Germany of Holland was effective. The intention to keep the territory as an acquisition and the character of occupation must be inferred from the facts as satisfied by evidence as pointed out by Lord Greene M. R. in the later decision in 'ANGLO INTERNATIONAL BANK LTD., IN RE', (1943) Ch. 233. He states at page 241:

"Such an intention was, Lord Wright says (in 'SOVFRACHT (V/O) CASE', (1943) AC 203) one of the matters which before the House were treated as of "common notoriety". On what facts or information this treatment was based does not appear, but, if an intention of this character is a necessary element we are not sure to what extent the court is entitled in a case like the present where there is no opposition to treat as notorious matters on which it has no information except what may be gathered from official publications and the public press. Thus, we do not see how we can assume that the enemy intends to "keep" France, or Belgium, or Greece, or the channel Isles, in the sense of incorporating them permanently in his possession.

We cannot, however, think that the expression "keep" was intended by Lord Wright to be used in this sense. One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation

does not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word "keep" as used by Lord Wright in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the house."

Then he quotes the opinions of Lord Atkin, Lord Thankerton, and Lord Porter and then concludes:

"In view of these expressions of opinion we hope that we are justified in reading the language of Lord Wright in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language. But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation."

In view of the fuller exposition of the law on the subject by the House of Lords in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 it is unnecessary to refer to the decisions in The 'GUTENFELS' (1916) 2 A.C. 112, 'SOCIETE ANONYME BELGE DES MINES D' ALJUSTREL v. ANGLO BELGIAN AGENCY LTD.', (1915) 2 Ch. 409 and 'THE LEONORA', (1919) A.C. 974. McNair discusses the topic of what amounts to belligerent occupation of a territory by the enemy at pages 322 to 329.

(21) The common law of England has established the doctrine of non-intercourse between residents in belligerent states during a state of war. In America, however, the prohibition against intercourse is confined to commercial intercourse, though the decisions cannot be said to be altogether uniform. In The 'RAPID' 8 Cranch 155, and The 'EMULES', (1813) 1-Gall 563 there are dicta to the effect that all intercourse is prohibited between citizens of belligerent States. Gray J. however in 'KERSHAW v. KELSEY', 100 Mass 561 the leading case on the subject, which has been since followed, restricted the intercourse of their citizens with their enemy to commercial intercourse. After reviewing the principal English and American authorities, the learned Judge stated the law in these terms:

"The law of nations as judicially declared, prohibits all intercourse between subjects of the two belligerents which is inconsistent with the state of war, between their countries. This includes any act of voluntary submission to the enemy, or receiving his protection as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either between the two countries, directly or indirectly, or through the intervention of third persons or partnerships or by contracts in any form looking to, or involving such transmission, or by insurances upon trade by or with the enemy."

"Beyond the principle of these cases the prohibition has not been carried by judicial decisions. At this stage of the world when all the tendencies of the law of nations are to screen individuals and private contracts from injury or restraint in consequence of war between their governments we are not disposed to declare such contracts unlawful as not having been heretofore judged to be inconsistent with a state of war."

(22) It has been authoritatively decided, however, by the Court of Appeal in England in 'ROBSON v. PREMIER OIL AND PIPE LINE CO. LTD.', (1915) 2-Ch. 124 that the prohibition of common law of intercourse with an alien enemy is not limited to commercial intercourse and the view of Gray J. in 'KERSHAW v. KELSY', 100 Mass 561 was dissented from. The opinion of Lord Stowell in The 'HOOP', (1799)-1-Ch. Rob. 196 and 'THE COSMOPOLITE', 4 Ch. Rob. 8 and that of the President of the Probate Division in The 'PANARIELLOS', (1915) 84 L. J. P. 140 have been taken in England as establishing the wider prohibition of intercourse and the basis of the prohibition is stated by Pickford L. J. in unambiguous terms thus:

"The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

All kind of intercourse, therefore, according to the English common law, whether commercial or otherwise is inconsistent with a state of war between two belligerent countries and is therefore absolutely forbidden. It need not be established, that in fact there was intercourse with the enemy. It is enough if there is a possibility of intercourse. This decision was approved by the House of Lords in 'ERTEL BIEBER AND CO. v. RIO TINTO CO.', (1918) A.C. 260.

(23) It follows as a corollary of the principle of prohibition of intercourse that an executory contract which either involves intercourse or whose continued existence must in some way operate against public policy is abrogated as a result of war. Of course, it is not permissible during a state of war to residents of belligerent states to enter into contracts. Such contracts are prohibited by law. The law interferes with executory contracts by dissolving them. Lord Dunedin in 'ERTEL BIEBAR AND CO. v. RIO TINTO CO.', (1918) AC 260 at p. 267 enunciated the principles relating to this matter thus:

"The proposition of law" says the learned Lord "on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial"."

The learned Lord agreed with the judgment of the Court of Appeal in 'ROBSON v. PREMIER OIL AND PIPE LINE CO.', (1915) 2-Ch. 124 at page 136 and quoted the passage already cited from that judgment, and, examined and considered in detail the case in The 'HOOP' (1799) 1-Ch. Rob. 196, 'FURTADO v. ROGERS', (1802) 3 B & P 191, the judgment of the Queen's Bench in 1857 in 'ESPOSITO v. BOWDEN', (1857) 7

El and Bl 763 and the opinion of Lord Reading C. J. in the case of 'PORTER v. FREUDENBERG', (1915) 1-K.B. 857 at page 866. At p. 269. dealing with the effect on contracts he says that war does not avoid all contracts between subjects and enemies and that accrued rights are not affected though the right to sue in respect thereof is suspended.

Another exception recognised is in the case of contracts which are really concomitants of rights of property, which even if executory are not abrogated. The executory contract which is abrogated must involve intercourse or its continued existence must in some way be against public policy. To the same effect are the observations in the speeches of the other Lords. A learned discussion of this subject is to be found in Chapter IV of Professor McNair's Book and in Chapter V of Webber on Effect of War on Contracts.

(24) We are only concerned in this case with the restricted narrow question of the effect of War on a contract of agency. It is therefore necessary to consider its effect on other contracts and the rights and the liabilities of the contracting parties thereunder. As pointed out by Lord Wright in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 persons residing in enemy territory, so long as the enemy occupation lasts, are on the wrong side of the line of war and therefore they are shut off from communication & intercourse and from commercial dealing in the same manner and to the same extent as if they were original enemies such as the nationals or residents in the enemy territory. The learned Lord says at page 230 in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 that:

> "This rule is only concerned with relations across the line of war; so far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which the Master of the Rolls enumerates, the rule has no application, even though these activities go to promote the advantage of the German state and strengthen its war effort."

Both Lord Wright and Lord Porter agree that the agency of the solicitor in that case to act on behalf of his client who is an enemy subject terminated with the enemy occupation of the territory. Lord Porter at page 254 states the rule to be

> "Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse."

and relies for this view upon the decision of the House of Lords in 'HUGH STEVENSON AND SONS v. ATTIENGESELLSCHAFT FUR CARTONNAGEN INDUSTRIE', (1918) A. C. 239 which related to a case of partnership. But the learned Lords differ from the view taken in 'TINGLEY v. MULLER', (1917) 2-Ch. 144 and express their concurrence with the dissenting speech in that case and the view of Lord Sumner in 'RODRIGUEZ v. SPEYER BROTHER', (1919) AC 59 at p. 130. Viscount Simon L. C. agrees with the view expressed by Lord Porter. It may, therefore, be taken that so far as the English common law is concerned the principle of abrogation of agency when either the principal or the agent becomes an alien is firmly established notwithstanding the view expressed in the earlier decision.

The decision in 'TINGLEY v. MULLER', (1917) 2-Ch. 144 might perhaps be justified on the peculiar facts of that case as the power of attorney empowered the agent in England to sell the property of the principal who left for Germany and that practically amounted to a sale or a conveyance of the equitable interest and no further intercourse was contemplated or was necessary.

'HUGH STEVENSON AND SONS v. AKTIENGESELLSCHAFT FUR CARTON-NAGEN INDUSTRIE', (1918) A.C. 239 related to a case of partnership between two companies one a German and the other an English trading in England and carrying on business there. By reason of the declaration of war in 1914 the partnership was dissolved and the English partner continued the business and made use of the property of the partnership, including the interests of the German partner in the business. The question that had to be considered was whether after the termination of war the German company was entitled to a share of the profits made by the English company with the help of the German company's assets.

The answer given by the House of Lords was naturally in favour of the German company. Though the declaration of war had the effect of abrogating or dissolving an executory contract it did not forfeit private property of the enemy partner in England. The law of England does not recognise the principle that as a result of the war the property of an enemy subject in England is confiscated. The property has to be restored to the person entitled to it after restoration of peace.

The question, therefore, in that case did not relate to a contractual right but related entirely to right to property. The preservation for the benefit of an alien enemy of property situated in England together with its profits until the war terminated for the purpose of being restored to him, it was held, did not constitute trading with the enemy. Nor is it within the purview of the prohibition against doing anything for the benefit of the enemy during the continuance of war. What is prohibited under this last principle is doing something for the benefit of the enemy at a time when he continued to be an enemy and not an advantage to be restored to him after the establishment of peace.

(25) The intercourse prohibited is across the line of war, and, as pointed out by Lord Wright in the passage already cited, the common law of England, which of course cannot apply to the enemy country, does not and cannot prohibit intercourse or internal commerce and ordinary activities of these in the enemy occupied territory inter se so long as they are on the same side of the line of war, even if such activities and such trade have the effect of conferring an advantage upon the enemy and strengthening his war effort.

To this class of cases I should think, belongs the decision in 'OTTAMAN BANK v. JEBARA (1928) A.C. 269. The facts of that case were somewhat peculiar. A British subject residing in Manchester, was in the habit of consigning goods to customers in Beyrout in Syria. The course of trade followed by him was that he

drew the bills on correspondents and handed them to the Ottoman Bank in Manchester together with the bills of lading of the goods which were shipped. On presenting the bills, the bank made an advance to the Manchester Merchant about 80 per cent. on the amount of the bill.

The bills and the bills of lading were thereafter transmitted to Beyrout. On arrival at Beyrout of the goods, the person on whom the bill was drawn paid the bill and received the bill of lading if the goods had not already been cleared from the ship. If the goods were removed from the ship, however, he used to receive the goods on the advice of the Beyrout branch of the Ottoman Bank after paying the price. The amount so realised was credited by the bank at Beyrout to the Manchester merchant who was the respondent before the House of Lords.

War was declared between England and Turkey on 5-11-1914 by which date several consignments of goods arrived at Beyrout, but the documents of title and the bills were still in the hands of the branch of the Ottoman Bank of Beyrout. The customers to whom the goods were destined, paid the bills and obtained the goods. Though the bills were in sterling the customers paid actually in Turkish currency at the rate of exchange obtaining on that date at London. It was at that time impossible for the Beyrout Branch to remit the amount to the Ottoman Bank at London.

The respondent brought the action for the realisation of the amount due as per the bills. The appellant, the Ottoman Bank, refused to pay the amount but was willing to pay the number of Turkish piastres actually received calculated at the exchange rate on that date. There was also an alternative claim in the action for damages for wrongful conversion. Rowlatt J. who tried the action gave judgment for the respondent as the Bank was bound to pay in sterling as they had been paid in sterling.

This judgment was reversed in appeal on the ground that at the moment the Beyrout Bank dealt with the goods they had no authority, the agency having terminated, and, in handing the goods to the Syrian merchant they acted without authority and therefore they were liable for conversion. The respondent was willing to accept payment as directed by the judgment of Rowlatt J. and was not anxious to press for damages for wrongful conversion though it would have been to his advantage. On appeal Viscount Dunedin held that the Bank in Beyrout accepted the payment in lawful money from the Syrian merchant when he handed over the goods and therefore was a debtor for this sterling amount as indicated in the bill. He also pointed out that war did not abrogate every contract.

> "It is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy. Now this contract had been partially carried out, the bills had been indorsed, and the bank had been handed them and the indorsed bills of lading. From that a subsidiary contract arose, i.e., the contract that on payment of the bills the shipping documents should be handed over. Now to execute that no intercourse between an English subject and the enemy was necessary. The bank was a Turkish subject and the Syrian merchant was a Turkish subject. The Bank therefore was in my view perfectly entitled to do what it did; nay more it might have been forced to do it by the Syrian merchant on producing proof that he was the real consignee of the goods and profiteering payment of the bill. That, in my view, shuts out any idea of conversion."

To the same effect are the observations of Lord Shaw of Dunfermline at page 280:

> "It is to be observed that there was no bar whatsoever to the acceptance in sterling or in the full market equivalent of the day of a cheque upon London from another Turkish subject.....namely, the customer in Beyrout. Both bank and customer were Turkish subjects there; and the legitimacy of the payment to the bank in Beyrout is, therefore, beyond question, there being no international equality about that part of the transaction."

Again lower down:

> "Prohibitions against doing business with English or other enemy nationals cannot apply to a case of a payment made between two Turkish nationals and goods delivered on the head of a payment, documents and goods passing from one Turkish national in Beyrout to another."

There were similar observations in the speeches of the other Lords. The decision in 'ANTOINE v. MORSHEAD', (1815) 6 Taunt 237: 16 RR 610 is not of much assistance as the remarks of the learned Judge were expressly restricted to the facts of that case and the learned Judge did not intend to lay down a general rule of law. That an executory contract for the sale of goods becomes void after the outbreak of war was also held in 'ARNHOLD KARBERG & CO. v. BLYTHE, GREEN, JOURDAIN AND CO.', (1915) 2 KB 379. That a contract involving intercourse with and conferring benefit on the enemy would be dissolved after the outbreak of war is illustrated by a decision in 'SCHERING LTD. v. STOCKHOLMS ENSKILDE BANK', (1943) 1 All ER 418 on somewhat peculiar facts. The American law takes a more liberal view regarding the effect of war on the relationship between a principal and agent, particularly with reference to the collection of debts. In 'KERSHAW v. KELSEY', 100 Mass 561 Gray J. of the Supreme Judicial Court of Massachusetts said:

> "When a creditor, although a subject of the enemy remains in the country of the debtor or has a known agent there authorised to receive the amount of debt throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to the principal in the enemy's country; if he should do so the offence would be attributable to him and not to the person paying him money."

In 'WARD v. SMITH', (1869) 19 USSC Law Ed 207 it is stated:

> "When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will

violate the law by remitting it to his alien principal. The rule, says Mr. Justice Washington in 'CONN v. PENN', 1 Pet (CC) 496 can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor or has a known agent there authorised to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in 'PAUL v. CHRISTIE', 4 Harr and Mc H 161."

In 'UNITED STATES v. HENRY GROSSMAYER', (1870) 9 Wall 72: 19 US SC Law Ed 627, Davis J. who delivered the opinion of the Court observed:

"A prohibition of intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted."

These authorities of the American courts establish undoubtedly that if the creditor has an agent in the enemy territory payment to such an agent by the debtor also living in the same enemy territory is good. The views of the American courts are criticised by Professor McNair on page 208 of his book on the ground that many of the decisions arose from the Civil War and that they are not reliable guides when international war is in question. Trotter in the Law of Contract during and after War, 3rd Edn. p. 96 cites 'WARD v. SMITH', (1869) 19 U.S.S.C. Law Ed. 207 and 'UNITED STATES v. GROSSMAYER', (1870) 9 Wall 72: 19 U.S.S.C. Law Ed. 627 with approval and does not question the correctness of the views expressed in those decisions.

(26) Bowstead on Agency, at page 275, 10th Edn. states on the basis of the view of Lord Porter in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 that,

"Where the continuance of the agency may require intercourse with the enemy during a war, the agency is determined by the outbreak of war; so that the retainer of a solicitor ceases when his client becomes an enemy alien."

In 'EICHENGRUEN v. MOND', (1940) 1-Ch. 785 it has been held that so long as the solicitor remains on record service upon him is sufficient although his client had become an enemy agent. We do not think that the decision in 'EICHENGRUEN v. MOND', (1940) 1-Ch. 785 is good law after 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 because the solicitor could no longer have any authority to represent the principal resident in enemy territory.

(27) Of the two fundamental principles of the common law of England which have been under consideration till now in India the procedural incapacity of an alien enemy to sue, i.e., to sustain a 'persona standi in Judicio' is enacted in S. 83 of the Civil Procedure Code and had received statutory recognition. For the limitations therefore for the application of that principle, one has to look to the provisions of S. 83 of the Civil Procedure Code. It seems to have been adopted and applied to India even under the Code earlier to the Code of 1882. This section itself has been judicially interpreted after the second World War in this court in three decisions, to two of which Chandrasekhara Aiyar J. was party i.e., 'THENNAPPA CHETTIAR v. INDIAN OVERSEAS BANK LTD.', (1943) 2-Mad. L. J. 201 and 'MANASSEH FILM CO. v. GEMINI PICTURE CIRCUIT', I.L.R. (1944) Mad. 124.

The view of Chandrasekhara Aiyar J. has been accepted and followed by Leach C. J. and Lakshmana Rao J. in 'CHEM ABBHEONG v. PACKIRI MAHOMED ROWTHER', ILR (1946) Mad. 768. We are not concerned in this case with the right of the plaintiff to institute the present suit as he is not an alien enemy but a person residing in British India and the suit itself was instituted after the termination of the war. It is therefore unnecessary to examine the decisions in detail and consider some of the criticisms levelled against them. In the course of this judgment, we shall have occasion to consider some aspects of the questions dealt with in these cases.

(28) The other branch of the English common law regarding prohibition against intercourse between residents in belligerent States and its effect on contracts has not been applied to India by any Statute. It can only apply to India by way of justice, equity and good conscience in the absence of any rule applicable to the situation and enacted by any Statute.

(29) How far and to what extent the English common law generally applies to India, both in the Presidency towns of Madras, Bombay, or Calcutta, and in the moffussil, has been subject-matter of judicial decisions. The net result of these decisions is that the English common law does not apply when there is statutory law covering the point, and even when there is no rule of statute, the common law of England is applied 'sub modo' having regard to the conditions of the society and the customs and manners of the people of India. Where however, the principles of common law in England are themselves in a state of uncertainty there is nothing to preclude a Judge in adopting that rule of English common law which is in accordance with justice and equity.

It is unnecessary, in our opinion, to consider in detail all the decisions as the ground is covered by GOPAL NAIDU v. KING EMPEROR', 46 Mad 605, 'BALAMMAL v. PALANDI NAIDU', (1938) 2-Mad LJ 340. The principle of adopting other rules when there is no law covering the point was made possible by giving liberty to a Judge to act according to justice, equity and good conscience. That was for the first time recognised in this Presidency by Re-

gulation II (2) of 1802, Sec. 17. Section 16 of the Regulating Act, 1873 also directs that in cases enumerated in the section where there is no specific rule the court is at liberty to act according to justice, equity and good conscience. It is on this basis that the common law of England relating to torts has been applied to this country even though there is no statutory law of torts in British India. The other authorities relied on in the course of the arguments before us are: 'THE ADVOCATE GENERAL OF BENGAL v. RANEE SURNOMOYE DOSSEE', 9 Moo Ind App 387 (P.C.), 'PARVATHI v. MANNAR', 8 Mad. 175, 'NARAYANA SAH v. KANNAMMA BAI', 55 Mad. 727 and the opinion of Ilbert in 'Government of India', 1916 Edn., at page 360, where it is stated:

> "In matters for which neither the authority of Hindu or Mohamedan text books or advisers nor the regulations and other enactments of the Government supplied sufficient guidance, the Judges of the civil courts were usually directed to act in accordance with 'justice, equity and good conscience'. An Englishman would naturally interpret these words as meaning such rules and principles of English law as he happened to know and considered applicable to the case; and thus, under the influence of English Judges, native law and usage were, without express legislation, largely supplemented, modified and superseded by English law."

In two decisions of this Court the English common law, which prohibits intercourse between hostile subjects, has been considered. Of these, the most important decision which considered the authorities as they then existed, is the decision of Srinivasa Aiyangar J. in 'VUTHRIK v. DAVID', 31 Mad. L. J. 860. In that case an agent of the Basel Mission who was a German leased certain lands in British India to the plaintiff. After the outbreak of war between Great Britain and Germany, that is the first World War, a suit by the succeeding secular agent of the Mission was instituted for the recovery of the rent under the lease. The lease in question was granted after the outbreak of War and the contention was that the lease was void.

Following the opinion of Gray J. in 'KERSHAW v. KELSY', 100 Mass 561 Srinivasa Aiyangar J. sitting as a single Judge held that the prohibition as regards intercourse was confined only to commercial intercourse and did not render illegal all contracts whatever be their nature. He also referred to the opinion of Lord Davey in 'JONSON v. DRIEFONTEIN CONSOLIDATED MINES LTD.', (1902) A. C. 484 and of Lord Stowell in The 'HOOP', (1799) 1 C Rob 196. The opinion of Story J. in 'THE JULIA', 8 Cranch 181 at 193 in which a wider prohibition was accepted was considered as purely obiter by the learned Judge. As the lease could not be considered a commercial transaction it was held that the suit for recovery of rent on the basis of the lease was sustainable and was decreed. No dispute was raised in that case that the common law of England should not be applied in India.

The other decision is the judgment of Abdur Rahim O. C. J. and Burn J. in 'SOORTHINGJE SAKALCHAND v. MAHOMED NASURUDDIN', 32 Mad. L.J. 146 which related to a contract of sale of goods. The action was for the recovery of certain quantity of glass bangles from the defendants. The first defendant was the agent of an Austrian firm and in that capacity entered into a contract in April-May 1914 to supply glass bangles of a particular quantity. The plaintiff accepted two drafts representing the price of the goods on 22-7-1914. War was declared with Austria on 12-8-1914. The goods were shipped by the steamer "Steinturm" which arrived in Ceylon on 15-8-1914, that is three days after the war was declared. The bills of lading were kept in the possession of the National Bank of India in Madras who were agents for the collection of the drafts and for handing over the documents of title relating to the Austrian firm. The bills were payable on the 22nd August, but the goods were not delivered to the plaintiff and the drafts were not paid.

Bakewell J. who tried the action in the first instance on the Original Side held that the contract became wholly void on account of the outbreak of War and by virtue of Royal Proclamation of 5-8-1914, and 12-9-1914 it became unlawful to trade with the enemy and that therefore the plaintiff's action for recovery of the value of the goods was not sustainable. Apart from the question of common law, a proclamation made it unlawful for the plaintiff to pay money and obtain the delivery of the goods. The property in the goods did not pass to the plaintiff as the 'jus disponendi' i.e., power of dealing with the goods was retained by the defendant. It was held that the contract could not be enforced.

The Calcutta High Court also considered the principles after the First World War in 'G. C. SETT v. MADHORAM HURDEODASS', 33 Ind. Cas. 540 (Cal). At that time, it must be observed, there was some doubt whether such contracts for the sale of goods, which were executory in nature were merely suspended during the war or became abrogated and dissolved altogether. Chaudhury J. of the Calcutta High Court was of opinion that the rights under the contract were only suspended during the war but that the contract was not avoided or dissolved. This view may not be correct under the present law.

There are two decisions of the Bombay High Court reported in 'WILFRED R. PADGETT v. JAMSHETJI', 18 Bom. L. R. 190 and 'VALLI MAHOMED v. BERTHOLD REIF', 44 Bom. 1 in both of which the question raised was whether the interest on a debt was not suspended during the war. In 'VALLI MAHOMED v. BERTHOLD REIF', 44 Bom 1 the view of the Supreme Court of the United States that where the debtor resides in the same country as the creditor or his duly authorised agent provided such agent was appointed before the War, interest on a debt was not suspended by the War as laid down in 'UNITED STATES v. HENRY GROSSMAYER', (1870) 9 Wall 72: 19 U.S.S.C. Law Ed. 627, 'WARD v. SMITH', (1869) 19 U.S. S.C. Law Ed. 207 was followed. In that case the branch firm of the plaintiffs to whose representative the defendant paid interest was established long before the war. In 'WILFRED R. PADGETT v. JAMSHETJI', 18 Bom. L. R. 190 Macleod J. held that:

> "The accrual of interest is suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities."

(30) There is no ground therefore to uphold the contention that the English common law should not be applied to this country to any extent. The House of Lords in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203, differed from the opinion of Lord Kingsdown in 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88, a Privy Council case, on the question of the test to be applied to determine the change of the nationality of territory. While Lord Kingsdown took the view that it was necessary that for the territory, either by conquest, cession or annexation of a permanent or temporary nature to become part of the territory of the enemy there should be a formal declaration changing the national character of the territory, the House of Lords thought that effective control with a view to hold the territory in question by an establishment of civil and military administration would be sufficient to bring about a change of nationality of the territory.

There is also a difference between the English common law and the law of the United States on the nature of the intercourse prohibited during the war. The English view is that all intercourse is prohibited while in America the prohibition is restricted to commercial intercourse. Further, the House of Lords expressed a different opinion that the relationship of principal and agent is terminated by war for all purposes. While in America if the creditor or his agent and the debtor reside on the same side of the line of War, that is in the enemy territory, there is no objection to payments of the debts to the creditor or his agent and the interest on the debt is not also suspended.

The American view has been accepted in this court in 'VUTHRIK v. DAVID', 31 Mad. L. J. 860 and regarding the debts by the Bombay High Court in the two Bombay decisions already referred to. As it is open to this court to accept the English common law only to the extent to which it accords with justice, equity and good conscience, and, as the decisions of the Judicial Committee were considered till the Constitution came into force as binding on this court in preference to the House of Lords, if we have to choose between the tests laid down by Lord Kingsdown and the House of Lords, we would prefer the former to the latter.

The test laid down by Lord Kingsdown is definite and precise and as Lord Stowell pointed out in The "FAMA" 5 Rob. 115 the subject residing in enemy occupied territory is entitled to know to which state he should look to for protection, and, it is therefore incumbent upon the enemy State occupying the territory to hold it and treat it as part of the territory of which he is the sovereign.

The test laid down by the House of Lords requires an investigation into the facts of each case in order to determine the nature and extent of occupation, and, it is not always easy to decide whether the occupation was effective or not. It may be in a fluid condition and the occupation might change hands from time to time. To embark into an enquiry in each case, whether the occupation in a given period was effective or not, would be difficult and leave the person residing in such territory in an uncertain state regarding his business and his occupation and his dealings with the residents in friendly territory. The law should not be left in our opinion, in such an uncertain and nebulous state, and, should be, as far as possible, definite and precise.

For these reasons we would prefer with great respect the test laid down by Lord Kingsdown, though, we must say that the opinion of the House of Lords is entitled to the highest respect. In our view, the rigorous test of absolute prohibition of intercourse adopted in England is too severe a punishment for the person who has the misfortune of residing in an enemy-occupied territory. As pointed out by Wheaton, this principle itself is not followed in other countries than the Anglo-American countries. The object of prohibition being to prevent trade between residents of two belligerent States, it is unnecessary in our opinion, to extend the prohibition beyond the necessary requirement. This court has already adopted the opinion of Gray J. in the decision in 'VUTHRIK v. DAVID', 31 Mad. L. J. 860.

The view of the Supreme Court of the United States, in our opinion, is more in accordance with justice, equity and good conscience. Both on principle and on authority, it seems to us that when a creditor and his agent and the debtor are not across the line of war but in the same belligerent State and on the same side of the line of war there is no reason prohibiting the payment of the debt by the debtor and a receipt by the creditor. In fact, as has been referred to already, the decision of the House of Lords in 'OTTOMAN BANK v. JEBARA', (1928) A.C. 269 seems to be consistent with the principle recognised by the American Courts and adopted by the Bombay High Court in this country.

(31) It remains now to consider in the first place whether Burma was an enemy-occupied territory. So far as this case, it is of no consequence whether we adopt the test in the 'GERASIMO'S CASE', (1857) 11 Moore P. C. 88 or the test in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 as in our opinion the evidence adduced in the case does not necessarily support the inference that Japan acquired effective control over the territory and established civil administration with a view to hold possession of the territory in de facto sovereignty. Proclamation or even a declaration to hold the territory in its own right was never made. The British Government the 'de jure' sovereign of the State, did not abandon their sovereignty and cede the territory to Japan.

It can be seen by a reference to the decision of the Privy Council in 'CHITTAMBARAM v. EMPEROR' A.I.R. 1947 P.C. 85 that the Governor of Burma shifted to Simla and was carrying on the 'de jure' Government of Burma from that place. He declared a state of emergency under the Government of Burma Act, 1935, assumed to himself legislative and executive functions and promulgated certain Ordinances constituting special courts for the trial of criminal offences.

The evidence in this case is very meagre regarding the nature of the occupation by Japan. P. W. 2 the agent of the plaintiff, says that there was Japanese Government and also Burma Government and that there were British and Japanese currencies then prevalent in the country. The Japanese currency that was introduced was not backed up either by silver or gold. The currency notes, actually issued, were not signed by any authority on behalf of the Japanese Government and a Rs. 10 note issued

by the Japanese Government was produced before us; and all that appears on the face of the note is "Japanese Government. Ten Rupees". There is no promise to pay; there is no signature of any person authorised to issue the currency, and, what is more significant, it is not the Japanese Yen that was mentioned in the Note; but the British rupee. It is a misnomer to call such notes currency notes, though there is evidence that people were forced to accept these notes on pain of punishment by the military authorities.

D. W. 1, an agent of another Nattukottai Chettiar, who then resided in Burma stated that from 1942 after the Japanese occupation and till the re-occupation by the British regular administration of the Government was going on. Courts were functioning, the magisterial officers were functioning and the revenue officers were functioning. The head of the Government was Ba Ma, a Burman. Administration was being carried on by Burmans under Japanese control. We do not know from this evidence what the nature of this control was, and what the relationship between Ba Ma and the Japanese Government was.

It must be remembered that it was the policy of Japan when it entered war to establish what was then styled a co-prosperity Sphere of Asians and it promised independence to Burma. The Ba Ma Government, as it is called, may have been an independent Government by Burmans; we do not know the details. This witness D. W. 1 describes the nature of the paper notes that were issued by Japan and he adds that no coins were issued in the territory though a branch of their Yokohama Bank was established. The Ba Ma Government was running all the departments of the administration. D. W. 2 also gives evidence on the same lines and he deposes that if any one refused Japanese currency he would be arrested by the Burma Government under the Japanese control.

It is therefore difficult to conclude on this meagre evidence that the Government of Japan had established anything like a civil administration under its control and authority besides the military occupation which could effectively exercise dominion and control over the territory. As pointed out by Lord Greene M. R. in 'ANGLO INTERNATIONAL BANK LTD. IN RE', (1943) Ch. 233 without evidence and proof of facts establishing the change of national character of the territory it cannot be assumed. Of this proof there is none in this case. Applying therefore either of the tests the plaintiff, in our opinion, has failed to establish that at the time the payment was made by the defendants' agent to the plaintiff's agent, Burma was an "occupied enemy-territory". This conclusion is sufficient to dispose of the case.

(32) But even otherwise the payments in our opinion, will be good and valid as the defendants' agent and the plaintiffs' agent were both living in the same enemy-occupied territory and as the creditor had an admitted agent in Burma and the debtor had also an agent in Burma who made the payment and both being enemies, there is no ground for treating the payment as invalid. Applying the principle of the American decisions, there is nothing to indicate that there was any possibility of intercourse or any intercourse between the plaintiff and his agent. The plaintiff himself did not venture to go into the witness-box and speak to the facts. P. W. 2 does not say that at that time there was any possibility of any intercourse between him and his principal.

There is no question therefore of his remitting the money to the plaintiff but there is no objection to his remitting the funds to India as it is not an enemy territory. The reverse of course is not permissible. If there is an attempt to remit funds from British India to Burma it would be prohibited both under the Common law, and, as it would be seen later, under the Defence of India Rules. The question, therefore, viewed from the point of the common law must be answered in favour of the defendants and against the plaintiff and the payment must be upheld.

(33) It remains to consider the position under the Defence of India Rules. The Defence of India Rules were made by virtue of the power conferred upon the Central Government under Section 2 of the Defence of India Act, 1939. Part XV of the Rules relating to control of trading with the enemy and the definition of "enemy" and "enemy territory" are framed on the same lines as the corresponding provisions in the English Trading with the Enemy Act, 1939 (2 and 3 Geo. VI Chap. 89). As pointed out by Lord Wright in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 at page 219, these statutory definitions dealing with trading with the enemy and the custody of enemy property are limited to the purposes of the Act and regulations and do not impinge on the common law in regard to the separate question of an enemy's competence to sue.

On the whole, however, we think that these definitions at least in the latest form, do substantially agree with the definitions of "enemy" and "enemy-occupied territory" reached by the common law in the authorities. The purpose of these rules, therefore, is to provide the limitations under which trading with the enemy is permitted and the object is to control such a trade. Section 15 (1) of the English Act contains the definition of "enemy territory."

> "'Enemy territory' means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at War, not being an area in the occupation of His Majesty or of a Power allied with His Majesty."

Sub-sec. (2) of Sec. 2 of the Defence of India Rules defines "enemy territory" in the same terms. According to this rule:

> "'Enemy territory" means:
> "(a) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of, a State at war with His Majesty, not being an area in the occupation of His Majesty, or of a State allied with His Majesty."

The only variation in this definition is the inclusion of "Area administered by a State at war with His Majesty" and also the addition of the words "for the time being" before the words "in the occupation of". The expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" is common to both the definitions and this was not modified or omitted in England by any subsequent amendment. This is made clear by a perusal of the Defence (Trading with the Enemy) Regulations, 1940, issued by the Order in Council dated 26-1-1940 made under the Emergency Powers (Defence) Act 1939 and

1940 (S. R. and O. 1940 No. 1092) by which certain amendments in the main Act of 1939 were introduced.

This definition as contained in the English Act is also to be found printed at page 329 of McNair's book published in 1944, and, therein also the latest clause of the definition "not being an area in the occupation of His Majesty or of a power allied with His Majesty" is not omitted. This definition is also found printed in 'SOVFRACHT (V/O) CASE', (1943) A. C. 203, at page 205 of the report as a footnote but there the last clause is omitted. Lord Wright refers to this definition at page 218 but there also the last clause is omitted, and, in both places after the words "a Power with whom His Majesty is at War" a full stop is to be found.

This, I think has misled Leach C. J. who delivered the judgment of the Court in 'CHEM ABBHEONG v. PACKIRI MAHOMED ROWTHER', I.L.R. (1946) Mad. 768 to infer that the rule under the Defence of India Rules is different in material respects from the corresponding provisions in the English law as the latter does not include in the definition of "Enemy territory" the words "not being an area in the occupation of His Majesty or of a State allied with His Majesty." He therefore thought this omission justified his conclusion that the English law in 'SOVFRACHT (V/O) CASE', (1943) A.C. 203 should not be followed as the English law was different. But of course the learned Judge does not rest his decision solely on that ground, for he pointed out at page 775 that the facts of that case were different from the facts of the case which he was called upon to decide. It is unfortunate that this mistake should have crept into the judgment of the learned Judge.

(34) The meaning of the expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" is by no means clear and is difficult to construe. In a recent judgment of Viswanatha Sastri J. in S. A. No. 37 of 1948 of the Pudukottah State, in construing the definition of "enemy territory" in the Defence of India Rules he differed from the interpretation placed upon it by this Court by the learned Chief Justice in 'CHEM ABBHEONG v. PACKIRI MAHOMED ROWTHER', I.L.R. (1946) Mad. 768 and by Chandrasekhara Aivar J. in 'TENAPPA CHETTIAR v. INDIAN OVERSEAS BANK LTD.', (1943) 2 Mad. L. J. 201 and 'MANASSEH FILM CO. v. GEMINI PICTURE CIRCUIT', I.L.R. (1944) Mad. 124.

All the three decisions of course related to the interpretation of S. 83 of the Code of Civil Procedure and the interpretation of the Defence of India Rules did not directly arise for decision. Viswanatha Sastri J. sitting as a Special Judge of the Pudukottah Court, of course, was not bound by the decisions of this Court and was at liberty to place an interpretation of his own unfettered by any precedent.

(35) The definition of "enemy territory" in the Rules relates to three different areas, (1) an area which is under the sovereignty of a State at war with His Majesty, (2) an area which is administered by a State at war with His Majesty (such as the mandated territories) and (3) any area for the time being in the occupation of a State at war with His Majesty. The words "for the time being" are significant and are important in deciding the nature of occupation at the material point of time. The last expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" takes out of the definition an area in the occupation of His Majesty or even an area in the occupation of a State allied with His Majesty.

The application of this part of the definition in the first two cases above instanced presents no difficulty. In the first case even if the State at war with His Majesty is the undisputed sovereign of an area at the time if such an area at the material time is however occupied by His Majesty or by a State allied with His Majesty it is no longer an enemy territory though the Sovereign of that State is at war with His Majesty. The reason is undoubtedly that His Majesty is in effective occupation of a territory belonging to a sovereign who is at war with himself. The same remarks would apply also to an area in respect of which the State at war is not the sovereign, but was under its administration and control.

The difficulty is to apply this part of the definition to the third case where the area is "for the time being in the occupation of the State at war with His Majesty." It is pertinent to ask how can an area be in the occupation of a State at war and at the same time be in the occupation of His Majesty or of a State allied with His Majesty. The expression "for the time being" undoubtedly indicates that the occupation concerned is the present occupation though it may in the context include also territory previously in the occupation of His Majesty or of a State allied with His Majesty.

In other words, it would have been better if the definition contained in the last part (?) of the words which was after the expression "not being an area". With that amendment the last part would read as follows: "not being an area which was in the occupation of His Majesty or of a State allied with His Majesty." This part undoubtedly qualifies the words "any area" in the beginning of the definition and it is intended to apply to the three classes of cases contemplated by the definition and not merely to the first two classes.

In 'CHEM ABBHEONG v. PACKIRI MAHOMED ROWTHER', I.L.R. (1946) Mad. 768 Leach C. J. put upon the clause a similar interpretation and the mistake into which the learned Chief Justice fell about the supposed difference in language between the English and Indian definitions of enemy territory does not vitiate or in any way affect the construction put by him on the definition. At page 773, the learned Chief Justice says:

> "The question then is, what is the meaning to be attached to the words "not being an area in the occupation of His Majesty or of a State allied with His Majesty" to be found in the Indian Rule? In our judgment they can only be read as meaning 'not being an area which was in the occupation of His Majesty or of a State allied with His Majesty'. The words "not being an area" must have reference to the words "any area" with which the rule opens. Under the rule there are three categories of enemy territory, namely, (i) territory which is under the sovereignty of a State at war with His Majesty, (ii) territory which is being administered by a State at war with His Majesty and (iii) territory which for the time being is in the occupation of a State at war with His Majesty. If

> the words 'not being an area in the occupation of His Majesty' are not to be read in the way we read them, the provision with regard to the territory occupied by the enemy would be meaningless because an area cannot be in the occupation of both at the same time."

He, therefore, held that Penang in the Federated Malay States was not an enemy territory reversing the decision of Byers J. to the contrary reported in 'PACKIRI MAHOMED ROWTHER v. CHOW AN CHOONG', (1944) 2 Mad. L. J. 293.

(36) We are not in this case concerned with the criticisms of Viswanatha Sastri J. levelled by him against the decisions of this Court in interpreting S. 83 of the Code of Civil Procedure and we think it is unnecessary therefore to deal with that aspect of the judgment of the learned Judge. The learned Judge however in the judgment in the second appeal of Pudukottah points out the anomaly of describing territories like Burma and Federated Malay States under the sovereignty of His Majesty as territories in the occupation of His Majesty so as to exclude them from the definition of "enemy territory."

No doubt, these territories were undoubtedly under the sovereignty of His Majesty and were not merely territories occupied by His Majesty. But the object of the definition is to exclude from the definition by adopting the comprehensive test of previous occupation by His Majesty as the sole and guiding factor even in respect of territories held by His Majesty as sovereign even though they happen to be in the occupation of the enemy for the time being.

(37) During war under the English common law the essential assumption and basic test to determine the national character of the territory and to decide whether it is enemy territory or not, is occupation, and effective occupation, as laid down in the decisions already referred to. It does not matter even if the sovereignty is held by one state if that state at the material time was not in effective occupation of the territory. Even territories in respect of which His Majesty is undoubtedly the sovereign may pass into the occupation of the enemy State, but the object of the definition is to exclude from it States over which His Majesty has undoubted sovereignty or were under His Majesty's administration though they are occupied by the enemy. If previously they were in the occupation of His Majesty (whether held as Sovereign or administered by His Majesty) they should not be treated as enemy territory. The object seems to be not to cut off trade relations in such a case as His Majesty may have possibly intended to recover back in a short time possession of those territories from the enemy who occupied it or, perhaps it was thought it was inequitable for the residents in that territory to be under disability to have commercial intercourse with residents in a territory which was all along a friendly or neutral state. It was perhaps thought that trading in such circumstances need not be prohibited.

The learned Judge in our view did not attach sufficient importance to the expression "for the time being" in the definition which can only be contrasted with a previous occupation of His Majesty. There is no necessity to have deliberately introduced the expression "for the time being" in the Indian definition which was not present in the English Act.

The interpretation adopted by the learned Judge would apply only to the first two classes of cases and would not apply to the third thereby omitting to give full significance to the intention of the Legislature in introducing the clause qualifying expression "any area" occurring in the opening part of the definition. The accepted canon of interpretation of all Statutes is, as far as possible the construction which gives effect to all the parts of a clause must be adopted and a restricted construction which makes a part of it otiose shall not be adopted unless it becomes impossible to reconcile all the parts of a clause. In our view, therefore, it is difficult to accept the narrow interpretation placed by the learned Judge upon the clause, and, with great respect we differ from his view. In our opinion the interpretation placed by Leach C. J. and Lakshmana Rao J. in 'CHEM ABBHEONG v. PACKIRI MAHOMED ROWTHER', I.L.R. (1946) Mad. 768 is correct.

(38) Applying this interpretation of the definition to the present case Burma is not an enemy territory as it was in the previous occupation of His Majesty.

(39) We now turn to the definition of "enemy" in Rule 97 of the Defence of India Rules. Under clause (b) "any individual resident in enemy territory" and under clause (f) "as respects any business carried on in enemy territory, any individual or body of persons (whether incorporated or not) carrying on that business" are enemies. By reason of residence in Burma the plaintiff's agent P. W. 2 and the defendants' agent would be enemies. As the plaintiff and the defendant are carrying on business in Burma in respect of that business the plaintiff and the defendants are also enemies. They may not have been within the purview of the prohibition in Rule 98 as there is no proof that they carried on any commercial, financial or other intercourse or dealings with or for the benefit of an enemy. Under sub-clause (2) of Rule 98

> "any reference in this rule to an enemy shall be construed as including a reference to a person acting on behalf of an enemy."

Therefore, the agent of the plaintiff is an enemy for the purpose of this Rule 98. The receipt of payment of the money by an enemy, that is the plaintiffs' agent, residing in Burma was not by a subject who is not an enemy but by an enemy either resident or carrying on business in an enemy territory. None of the disabilities therefore contemplated by Rule 98 would apply as the transaction was between enemies inter se and not between a British Indian subject on the one hand and an enemy on the other. It follows therefore that even if Burma is treated as an enemy territory within the meaning of the Defence of India Rules the payment in Burma by the debtor to the creditor is not hit at by any of the rules made under the Defence of India Act.

(40) We have already found that in view of the subsequent legislation the payment in Japanese currency is valid.

(41) It follows that the decision of the learned Judge in the Court below decreeing the plaintiff's suit is erroneous and must be reversed. The appeal is accordingly allowed and the decree of the lower court is set aside and the plaintiff's suit is dismissed with costs throughout.

C.R.K./A/V.R.B. Appeal allowed.

A. I. R. 1952 MADRAS 754

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

Abdul Azeez, Petitioner v. Pathumma Bi, Respondent.

Civil Revn. Petn. No. 300 of 1951, D/- 15-11-51.

† **Majority Act (1875), S. 2 (a) — Muhammadan woman, minor according to Majority Act but major according to personal law cannot file suit for dissolution of her marriage without next friend — (Civil P. C. (1908), O. 32, R. 1).**

A Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Majority Act is not entitled to bring a suit for dissolution of her marriage without being represented by a next friend: 3 Mad 248, Followed; AIR 1931 Bom 76; AIR 1948 Cal 66, Not approved; AIR 1942 Oudh 243, Rel. on. (Para 7)

(Plaint was ordered to be returned not having been properly presented).

Anno: Majority Act, S. 2 N. 1; Civil P. C., O. 32 R. 1 N. 2.

C. S. Swaminatha, Ayyar, for Petitioner; B. Porker and S. M. Mohideen, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('33) 54 All 806: (AIR 1932 All 649) 3, 5
('98) 22 Bom 430 3, 4
('31) AIR 1931 Bom 76: 55 Bom 160 1, 4, 10, 11
('25) AIR 1925 Cal 322: (80 Ind Cas 914) 3
('28) 47 Cal LJ 372: AIR 1928 Cal 303 3; 4, 5
('48) AIR 1948 Cal 66: (ILR (1946) 2 Cal 349) 1, 4, 10, 11
('81) 3 Mad 248 2, 3, 4, 5, 10, 11
('18) 41 Mad 1026: (AIR 1918 Mad 319) 3, 6
('42) 17 Luck 572: (AIR 1942 Oudh 243) 3, 10
('38) 17 Pat 303: (AIR 1939 Pat 133) 3
('36) 14 Rang 215: (AIR 1936 Rang 212 FB) 3

ORDER OF REFERENCE

BASHEER AHMED SAYEED J: The point that arises for consideration in this civil revision petition is whether the plaintiff, who is a minor under the Indian Majority Act but who is a major according to her personal law, is entitled to bring a suit for dissolution of her marriage without a next friend. The learned District Munsif of Ottapalam, who heard the petition of the defendant filed under Order 32 Rule 1 of the Civil Procedure Code praying that the suit O. S. No. 496 of 1950 on the file of the said Court should be dismissed on the ground that the plaintiff therein being a minor was not entitled to bring the suit without the next friend, dismissed the same following the decisions in 'AHMED SULAIMAN v. MT. BAI FATMA', AIR 1931 Bom 76, 'NAKASETAN BIBI v. HABIBAR RAHIMAN', AIR 1948 Cal 66 and KHATOM BI v. ABDULLATIN', 4 Cal 78 (sic) and holding that the plaintiff was competent to sue for dissolution of her marriage without a next friend and that the suit as framed was maintainable. The defendant has preferred this civil revision petition against the said decision of the learned District Munsif of Ottapalam.

(2) Mr. C. S. Swaminatha Aiyar appearing for the petitioner has invited my attention to the decision in 'ITHAYI UMAH v. KAIRHIRAPOKOIL, 3 Mad 248, a Bench decision wherein it has been held that:

"Sec. 2 of Act IX of 1875 (Indian Majority Act) refers only to the capacity to contract which is limited by S. 11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code, Chapter XXXI".

(3) This decision has been folowed in 'ABI DHUNNISSA BIBI v. MUHAMMAD FATHI UDDIN', 41 Mad 1026. This again is a Bench decision and in that decision it has been held that:

"A relinquishment of her right to dower by a Muhammadan woman who is a minor, under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). To relinquish dower is not to act in the matter of dower within the Sec. 2 of the Indian Majority Act".

Apart from these two decisions, no other decision of this court on the point in question has been brought to my notice. In 'USMAN ALI KHAN v. MT. KHATOON BANU', 17 Luck 572 relied upon by the learned counsel for the petitioner it has been held that:

"Sec. 2(a) of the Indian Majority Act does not prevent a Muhammadan girl of 15 years of age from bringing a suit for dower through a next friend and the decree obtained in such a suit is not a nullity".

Though in this case objection was taken that the suit brought on behalf of the minor through the next friend was incompetent, still the decision has turned upon the interpretation of the words occurring in S. 2(a) of the Indian Majority Act viz., " to act in the matter of dower". It has been held in that decision, after a review of all the cases including 'ITHAHI UMAH v. KAIRHIRAPOKOIL', 3 Mad 248, 'ABI DHUNNISSA BIBI v. MUHAMMAD FATHIUDDIN', 41 Mad 1026 and cases of other High Courts as well, that the words "to act in the matter of dower" in S. 2 (a) are to be given only a restricted meaning and do not include the bringing of a suit for dower and that that section merely relieves the plaintiff of some of the consequences of her minority, but she remains a minor nonetheless. That being so it was held, the provisions of Or. XXXII Rule 1, C. P. C. still apply and so in respect of the institution of suits she will have to act through her next friend. In 'NAJMUNNISSA BEGUM v. SIRAJUDDIN AHMED KHAN', 17 Pat 303 which has also been referred to in the Lucknow Full Bench decision the decision in 'ABI DHUNNISSA BIBI v. MAHOMED FATHIUDDIN', 41 Mad 1026 was followed and it was held that:

"Once a marriage has been performed and the dower is settled, a wife who (although a major according to the personal law of the lady) is still a minor under the Majority Act, 1875 is not competent to relinquish the whole or part of her dower to change its character".

The Bench which decided the case distinguished it from the decisions in 'QUASIM HUSSAIN BEG v. KANIZ SAKINA', 54 All 806 and 'MOZHARUL ISLAM v. ABDUL GANI ALA', AIR 1925 Cal 322. In 'MAUNG TUN AUNG v. MA E. KYI', 14 Rang 215 the terms "capacity to act in the matter of marriage" came up for consideration and it was held that:

"The expression "capacity to act in the matter of marriage" in S. 2 of the Majority Act means the capacity to be a party to a valid marriage and relates to the acts of the parties by which their status is changed; the expression does not refer and is not applicable to a pre-nuptial agreement to contract a marriage in the future."

Though in this case the parties were Burmese, nevertheless the discussion on the terms of S. 2-a of the Indian Majority Act was relevant as the decision turned only upon that issue. This Full Bench also reviewed several of the decisions that had been placed before it such as 'BAI SHIRINBAI v. KHARSHEDJI', 22 Bom 430; 'ABIDHUNNISSA BIBI v. MUHAMMAD FATHIUDDIN', 41 Mad 1026; 'FATIMA KHATUN v. FAZLUL KARIM', 47 Cal LJ 372 and so forth.

(4) It will thus be seen that all the four High Courts, viz; Madras, Lucknow, Patna and Rangoon are of one opinion, viz., that a suit by a minor under the Indian Majority Act, but who is a major under the personal law governing the party, cannot be filed for any purpose connected with her marriage without a next friend acting on her behalf. As against this, the High Courts of Bombay, Calcutta and Allahabad take quite a different view and they hold that it is permissible for a minor under the Indian Majority Act but who is a major under her personal law to bring a suit for dissolution of her marriage without the aid of a next friend, and the interpretation put upon the words "to act in the matter of marriage" was that it should not be restricted to the mere right to contract but should extend also to the right to file a suit or otherwise enforce her rights through a court of law. In 'AHMED SULEMAN v. BAI FATMA', 55 Bom 160 a Bench of two Judges of the Bombay High Court held that:

> "Under the Mahomedan law a wife of 16 years of age is entitled to sue for divorce, without a next friend by virtue of S. 2(a) of the Indian Majority Act. The case of Parsis is different."

They followed the decision in 'BAI SHIRINBAI v. KHARSHEDJI', 22 Bom 430 wherein it was said that the Majority Act did not use the expression "capacity to contract" but used only the words "capacity to act" which were said to be of much wider import. In 'MT. FATIMAKHATUN v. FAZLUL KARIM', 47 Cal LJ 372 and 'NAKSETAN BIBI v. HABIBAR RAHMAN', AIR 1948 Cal 66 it was held by the Calcutta High Court that:

> "Sec. 2, Majority Act, does not merely create certain exceptions to S. 11, Contract Act, but the words " to act" are wide enough to include in it the institution of a suit. A suit instituted by a Muslim minor girl, who has attained her puberty, for dissolution of marriage is covered by expression 'the capacity of any person to act in the matter of marriage, divorce etc. and is maintainable without a next friend."

(5) The cases in 'MT. FATIMA KHATUN v. FAZLUL KARIM', AIR 1928 Cal 303 and 'ITHAHI UMAH v. KAIRHIRAPOKOIL', 3 Mad 248 was referred to and distinguished. In 'QASIM HUSSAIN BEG v. KANIZ SAKINA', 54 All 306 Sulaiman C. J. and Iqbal Ahmed J. considered the question of relinquishment of dower by a minor muslim wife 'vis-a-vis' Sec. 2 of the Indian Majority Act and held that:

> "The settlement of dower or its relinquishment comes within the exception contained in S. 2 of the Indian Majority Act. The agreement about the payment of a certain amount of dower is a part of the contract of marriage and a person who is a minor under the Indian Majority Act, but a major under the Muhammadan law, is capable of relinquishing the dower as consideration for obtaining 'Khula', which is a form of divorce recognised by the Muhammadan law and comes within the exception mentioned above."

This decision agreed with the opinion expressed by the Calcutta High Court that the settlement of dower or its relinquishment would come within the exception contained in S. 2 of the Indian Majority Act.

(6) There is thus a conflict of opinion between the High Courts of Madras, Lucknow, Patna and Rangoon on the one hand and those of Bombay, Calcutta & Allahabad on the other. No cases of any other High Court have been placed before me and no decision of this court later than 'ABI DHUNNISSA BIBI v. MUHAMMAD FATHI UDDIN', 41 Mad 1026 has been made available on this question. In these circumstances, and in view of the conflict between several High Courts on this question, and this High Court having had no occasion to review the decisions of the other High Courts which have come in the wake of 'ABIDHUNNISSA v. MOHAMED FATHI UDDIN', 41 Mad 1026 and considering for the importance of the question, I think it is desirable that the matter should be decided by a Bench of this High Court. I therefore refer this petition for decision to a Bench to be constituted for the purpose by my Lord the learned Chief Justice.

JUDGMENT OF DIVISION BENCH

(7) RAJAMANNAR C. J.: The question of law which falls for decision in this case is whether a Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act is entitled to bring a suit for dissolution of her marriage without being represented by a next friend. This case originally came up before Basheer Ahmed Sayeed J. who found a divergence of opinion on the point between several High Courts and having regard to the importance of the question thought it desirable to be decided by a Division Bench.

(8) Order 32, Rule 1, C. P. C. lays down that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. There are no exceptions to this general rule of procedure contained in the Code itself. There is no definition of a minor in the Code nor in the General Clauses Act. The Indian Majority Act, IX of 1875 provides that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. This rule is, however, subject to certain exceptions contained in that Act. We are concerned with the exception embodied in S. 2 (a) of that Act which runs as follows:

> "Nothing herein contained shall affect.....
> (a) the capacity of any person to act in the following matters (namely) marriage, dower, divorce and adoption."

Prima facie, this provision means not that a person ceases to be considered a minor under the Indian Majority Act but that the fact that the person is a minor does not affect the capacity of that person to act in certain matters. The question is whether by reason of this provision an exception can be grafted to Or. XXXII Rule 1 of the Code and it can be held that a minor within the meaning of the Indian Majority Act and therefore within the meaning of the Civil Procedure Code can institute a suit in respect of the matters specified therein in a Civil Court governed by the Code without being represented by a next friend. Apart from authority, we think he cannot. Sec. 2 (a) saves only the capacity of a person to act in certain matters and not to act in suits or legal proceedings relating to such matters or of which the subject-matter is one or other of the matters therein mentioned. It means for instance that a person can marry or adopt though he or she is a minor within the meaning of the Indian Majority Act. It is one thing to say that a person can act in the matter of adoption and another to say that he can institute a suit to declare the validity of his adoption or to obtain reliefs on the basis of his adoption.

(9) Order XXXII, Rule 1 enacts a rule of procedure. It does not nor does it purport to affect the substantive rights of parties. Even though represented by a next friend, the suit instituted in accordance with Or. XXXII Rule 1 is nevertheless a suit by the minor. The rule only insists on a particular procedural condition being fulfilled. But for Or. XXXII, Rule 1 there is nothing in

the general law of the land which would prevent a minor from instituting legal proceedings without a next friend. A minor can, without being represented by a next friend, institute criminal proceedings. He can even file a suit for the recovery of a sum not exceeding Rs. 500 which is due to him for, wages or for piece of work or for work done as a servant in the Presidency Small Cause Court, without a next friend. It is therefore clear that there is nothing in S. 2 (a) of the Indian Majority Act which overrides the provision in Or. XXXII, Rule 1.

(10) The point is directly covered by the decision of a Division Bench of this court in 'ITHAYI UMAH v. KAIRHIRAPOKOIL', 3 Mad 248 . The question referred for decision in that case was whether a minor Muhammedan female can in her own name sue her husband in respect of maintenance, dower etc. It was urged in the court below that the Indian Majority Act had no application because of the provisions of S. 2 (a) of that Act. The lower court was of opinion that that provision referred only to the capacity to contract and not to the capacity to sue which was purely a question of procedure and was regulated by Chapter XXXI C. P. C. The learned Judges, Sir Charles Turner C. J. and Tarrant J. were of the opinion that the lower court had correctly apprehended and expressed the law. A similar view was taken in 'USMAN ALI KHAN v. MIR KHATOON BANU', 17 Luck 572 which dealt with a suit for dower. The learned Judges held that the words "to act in the matter of dower" in S. 2(a) of the Indian Majority Act should be given a restricted meaning and do not include the bringing of a suit for dower. The learned Judges observed that S. 2(a) merely relieves a minor of some of the consequences of minority but she remains a minor nonetheless.

> "That being so, the provisions of Order XXXII, Rule 1, C. P. C. still apply. So in respect of the institution of suits he will act through her next friend".

Authority, however, is not wanting for the contrary view. In 'AHMED SULEMAN v. BAI FATMA', 55 Bom 160 one of the points which arose for decision was whether a suit for divorce by a Muhammadan woman of 16 could be instituted without a next friend or guardian. The case was decided by a Division Bench consisting of Madgavkar and Barlee JJ. Madgavkar J. answered the question in the affirmative by a reference to the provisions of S. 2(a) of the Indian Majority Act and by holding that the wife suing for her divorce acts in the matter of divorce. The other learned Judge, Barlee J. though he delivered a separate judgment, did not deal with this point. There is no reference in this case to the earlier decision of our court in 'ITHAYI v. KAIHIRAPOKOIL', 3 Mad 248. Akram J. sitting alone took the same view in NAKSETAN BIBI v. HABIBAR RAHIMAN', AIR 1948 Cal 66. In his opinion the words "to act" in S. 2(a) of the Indian Majority Act are wide enough to include the institution of a suit by a minor, who under his or her personal law may have attained majority. The learned Judge followed the decision in 'AHMED SULEMAN v. BAI FATMA', 55 Bom 160. The attention of the learned Judge was invited to the decision in 'ITHAYI UMHA v. KAIHIRAPOKOIL', 3 Mad 248 but he purported to distinguish that decision by observing that that was a case for recovery of stridhan also and clearly would not be covered by S. 2 of the Indian Majority Act. With great respect to the learned Judge we do not think that this is a fair way of distinguishing that decision. Though no doubt it appears from the narration of the facts that the suit was 'inter alia' also for recovery of stridhana the reasoning of the learned Judges does not advert to this fact nor is it based on that circumstance.

(11) We have no hesitation in expressing our respectful agreement with the decision of our court in ITHAYI UMHA v. KAIHIRAPOKOIL', 3 Mad 248. There is nothing in the reasoning of Madgavkar J. in 'AHMED SULEMAN v. BAI FATMA', 55 Bom 160 nor of Akaram J. in 'NAKSETAN BIBI v. HABIBAR RAHMAN', AIR 1948 Cal 66 which commends itself to us. On the plain reading of S. 2 (a) and (3) of the Indian Majority Act and Or. XXXII, Rule 1, C. P. C. only one conclusion appears to us to be possible, viz., that a suit by a person who is a minor within the definition contained in Sec. 3 of the Indian Majority Act, cannot be instituted except by a next friend of the person.

(12) The learned District Munsif was therefore wrong in holding that the suit was properly instituted. The petitioner before us, the defendant in the court below took out an application praying that the suit may be dismissed on account of this defect in the presentation. We do not think that it is proper to follow this course. We think that the proper course is to return the plaint as not having been properly presented. We direct the learned District Munsif to do so. The civil revision petition is to this extent allowed. There will be no order as to costs here and in the court below.

C. R. K./A./ R. G. D. Order accordingly.

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* A. I. R. 1952 MADRAS 756

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

P. Thambiran Padayachi and others, Petitioners v. The State of Madras represented by the Secretary to Government, Revenue Department, Government of Madras and others, Respondents.

Writ Petns. Nos. 215, 76, 74, 72 and 78 of 1951 and C. M. P. Nos. 2778 of 1951 and 457, 10637 of 1950 and Petn. No. 50 of 1951, D/- 3-11-1951.

†* **(a) Constitution of India, Art. 31 (2) — Public purpose — Meaning explained — (Land Acquisition Act (1894), S. 6) — (Words and Phrases — 'Public purpose').**

Acquisition of property for public purpose under Art. 31 (2) includes whatever results in advantage to the public. It is not necessary that it should be available to the public as such. It might be in favour of individuals provided they are benefited not as individuals but in furtherance of a scheme of public utility. Schemes for construction of houses for clearing slum areas, relieving congestion and housing poor people are for a public purpose as they tend to promote social welfare and prosperity: (1896) 164 US 112; 270 NYP 333; AIR 1914 PC 20; AIR 1925 Mad 837 and AIR 1930 Mad 798, Rel. on. (Para 16)

A society was formed and registered under the Madras Co-operative Societies Act, 1932 with the object of enabling its members to construct houses. This society considered that certain block of lands within the municipal limits of the city of T would serve as suitable building sites and moved the Government for its acquisition. The Government gave its consent to the scheme and issued a notification declaring that the lands were needed for public purpose, to wit, construction of houses and

in pursuance of this notification proceeded to acquire lands. The petitioner filed an application attacking the validity of the acquisition proceedings, contending that the public as such had no interest in the land or buildings, that neither the public nor even a considerable portion thereof would be benefited by the scheme and in effect the acquisition would amount to taking property of one individual and transferring it to another:

Held (1) that the society could be regarded as constituted for the benefit of the public; (Para 6)

(2) that in general building schemes were to be considered as advantageous to the public; (Para 12)

(3) that even though the direct and immediate beneficiaries under the scheme might be individuals it was a public purpose as it benefited the public generally; (Para 14)

(4) that therefore the acquisition was valid. (Para 19)

(b) Constitution of India, Arts. 19 (1) (f), 31 (2) — Valid acquisition under Art. 31 (2) — Effect on Art. 19 (1) (f).

Article 19 (1) (f) must be read subject to Art. 31 (2) and where there is a valid acquisition under that Article there is no property in respect of which the rights conferred under Art. 19 (1) (f) could be claimed: AIR 1950 SC 27; AIR 1951 SC 41; AIR 1951 All 674 (FB); AIR 1951 Bom 86, Rel. on. (Para 4)

(c) Land Acquisition Act (1894), S. 17 (as amended by Mad. Act XXI of 1948) — Scope.

The scope of S. 17, as amended by Madras Act XXI of 1948, is limited in its operation to cases of emergency. The purposes mentioned in that section cannot be turned into a general definition of what are public purposes under the Act. (Para 8)

R. Kesava Aiyangar, L. V. Krishnaswami Aiyar, K. Rajah Aiyar, for V. Ramaswami Aiyar, T. A. Ramaswami Reddi, K. Bhashyam, S. Ramayya Nayak, M. Natesan and M. K. Nambiar, for Petitioners; Advocate General instructed by the State Counsel and the Govt. Pleader, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('15) 39 Bom 279: (AIR 1914 PC 20) 13, 14, 19
('50) 1950 SCJ 174: (AIR 1950 SC 27: 51 Cri LJ 1383 SC) 4
('51) 1951 SCJ 29: (AIR 1951 SC 41) 4
('51) AIR 1951 All 674: (1951 All LJ 365 FB) 4
('46) AIR 1946 Bom 216: (47 Cri LJ 594) 21
('51) AIR 1951 Bom 86: (ILR (1951) Bom 473) 4
('51) AIR 1951 Bom 121: (ILR (1951) Bom 656) 20, 21
('51) AIR 1951 Cal 97: (55 Cal WN 463) 16
('26) 49 Mad 237: (AIR 1925 Mad 837) 14
('30) 59 Mad LJ 274: (AIR 1930 Mad 798) 14
('31) AIR 1931 Mad 361: (131 Ind Cas 647) 14
('46) ILR (1946) Mad 153: (AIR 1945 Mad 394 FB) 3
('50) 29 Pat 790: (AIR 1950 Pat 392 SB) 15
('51) AIR 1951 Pat 91: (30 Pat 454 SB) 15
(1896) 164 US 112: 41 Law Ed 369 9
(1905) 198 US 361: 49 Law Ed 1085 9
(1906) 200 US 527: 50 Law Ed 581 9
(1916) 240 US 30: 60 Law Ed 507 9
(1923) 262 US 700: 67 Law Ed 1186 9
(1946) 327 US 546: 90 Law Ed 843 18
130 ALR 1053 12
291 NY 320 10
270 NYP 333: 105 ALR 905 10, 12

VENKATARAMA AIYAR J.: These are petitions filed under Art. 226 of the Constitution of India challenging the validity of various notifications issued by the State of Madras under S. 6 of the Land Acquisition Act, I of 1894, declaring that certain lands were to be acquired for construction of houses. The petitioners are the owners of the lands proposed to be acquired under the notification and their contention is that the purpose mentioned in the declaration is not a public one and that, in consequence, the acquisition is in contravention of Art. 31(2) of the Constitution and, therefore, void. In some of the petitions, certain other points have also been raised but we have reserved consideration of these points to a later stage and heard arguments on the constitutional issue as to the validity of the acquisition.

(2) It will be convenient to take writ petition No. 76 of 1951 for a statement of the material facts, that being the main petition argued and typical of the rest. Within the municipal limits of the City of Tiruchirapalli at a place called Chintamani there is a block of lands of the extent of 45 acres consisting of several fields owned by a number of persons. The petitioner owns some of them. A society called the Tiruchirapalli Co-operative House Construction Society Ltd. was formed and registered under the Madras Co-operative Societies Act (VI of 1932) with the object of enabling its members to construct houses. This society considered that the aforesaid block of lands would serve as suitable building sites and moved the Government for its acquisition. The Government gave its consent to the scheme and on 15th June 1950 issued a notification declaring that the lands were "needed for a public purpose, to wit, construction of houses" and in pursuance of this notification proceeded to acquire the lands. Awards were passed on 29th May 1951 and 31st May 1951. The petitioner has filed the present application attacking the validity of the acquisition proceedings.

(3) Though it was alleged in the affidavit of the petitioner that no part of the compensation came from public funds and that, therefore, the requirements of S. 6(1) had not been complied with, the objection was not pressed, the Advocate General having made a statement that one anna in the rupee was paid by the Government.

This ground of attack must, therefore, be rejected. Vide SURYANARAYANA v. THE PROVINCE OF MADRAS', ILR (1946) Mad 153 (FB).

(4) It was also argued that the acquisition proceedings were an infringement of the fundamental right of the petitioner to hold property recognised in Art. 19(1)(f) and that, therefore, they are void. But Art. 19(1)(f) must be read subject to Art. 31(2) and where there is a valid acquisition under that Article there is no property in respect of which the rights conferred under Art. 19(1)(f) could be claimed. In 'A. K. GOPALAN v. STATE OF MADRAS', 1950 S.C.J. 174 at p. 294 the following observations occur in the judgment of Das J.:

"But suppose a person loses his property by reason of its having been compulsorily acquired under Art. 31 he loses his right to hold the property and cannot complain that his fundamental right under sub-clause (f) of clause (l) of Art. 19 has been infringed."

Referring to this observation the same learned Judge observed in 'CHIRANJIT LAL v. UNION OF INDIA', 1951 SCJ 29 at p. 57:

"In 'GOPALAN'S CASE', I pointed out that the rights conferred by Art. 19 (1) (a) to (e) and (g) would be available to the citizen until he was under Art. 21 deprived of his life or personal liberty according to procedure established by law and that the right to property guaranteed by Art. 19 (1) (f) would likewise continue until the owner was under Art. 31 deprived of such property by authority of law. Therefore it will be necessary to consider first whether the shareholder of the company has been deprived of his or its property by authority of law under Art. 31 for if he or it has been so deprived then the question of his or its fundamental right under Art. 19 (1) (f) will not arise.

In 'RAJA SURYAPAL SINGH v. THE U. P. GOVERNMENT', AIR 1951 All 674 a Full Bench of the Allahabad High Court following the observations of the Supreme Court in 'A. K. GOPALAN v. THE STATE OF MADRAS', 1950 SCJ 174 held that the right to property guaranteed in Art. 19 (1) (f) would cease when it is compulsorily acquired under Art. 31. In 'DWARKADAS v. SHOLAPUR S. and W. CO.', AIR 1951 Bom 86 in negativing the contention that acquisition of property under Art. 31 was a violation of the fundamental right guaranteed under Article 19 (1) (f), the learned Judges observe:

"It would seem, therefore, on the same analogy that the right to acquire, hold and dispose of property guaranteed to the citizen under Art. 19 (1) (f) would only be operative in the case of those whose property has not been taken away under Art. 31. That must be so logically because if a man has been deprived of property under Art. 31(1) or 31(2) no question of his acquiring, holding and disposing of that property could possibly arise under Art. 19. This right can only be made justiciable provided the Legislature has not validly taken action under Art. 31 and it is only then that the question might arise whether any restrictions placed upon that right under sub-clause (5) of Art. 19 are reasonable restrictions or not."

This contention must, therefore, be overruled.

(5) The substantial contention urged by Mr. L. V. Krishnaswami Iyer, the learned advocate for the petitioner, is that the acquisition is not for a public purpose within the meaning of Art. 31 (2) and that therefore it is void. It is argued that the lands now sought to be acquired will when assigned by the building society come to be held by individual members as their own private property, that the building of houses by them would result only in benefit to them, that the public as such will have no interest in the land or buildings, that neither the public nor even a considerable portion thereof will be benefited by the scheme and in effect the acquisition would amount to taking property of one individual and transferring it to another and that, therefore, there was no public purpose.

(6) It was further contended that the persons who would really be benefited would be the shareholders of the society, that the profits of the scheme will go into their pockets, that under the rules of the society the public had not even a right to participate in the scheme because the management had the power to refuse to admit any person as a member without assigning any reasons, that the society could lease the properties and sell them to any person even a non-member and that, therefore, it could not be regarded as a truly public company. On this aspect of the matter, the learned Advocate General invited our attention to the various provisions of the Madras Co-operative Societies Act VI of 1932, under which the building society has been registered. The preamble to the Act states that it is expedient to facilitate the formation and working of co-operative societies for various purposes one of which is bringing about better living. Under S. 4 it is only societies which have for their object the promotion of the economic interest of its members in accordance with the co-operative principles, that could be registered under the Act. The rules of the society have to be approved by the Registrar who has under the Act large powers of control over the societies. Section 35 provides that no part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members, and rules are laid down as to how the profits are to be dealt with. In this particular society there is a rule that only five per cent of the profits shall be available for distribution among its members. It also appears from the counter affidavit that there are 332 members on the rolls of the society and that 278 of them have applied for houses and paid the full share capital. The provision that the management shall have power to refuse admission to any person without assigning any reason is the usual one adopted by co-operative societies for ensuring the smooth working of the institution and for preventing undesirable persons from getting in and creating factions. We are, accordingly, of opinion that there is no substance in the objection that the society could not be regarded as constituted for the benefit of the public.

(7) The question that has to be decided is whether the acquisition of lands for enabling members of the society to construct houses for themselves can be said to be a public purpose. "Public purpose" is not defined in the Constitution nor is much light thrown on it by the definition in the Land Acquisition Act, Sec. 3 (f), which is in these terms:

"The expression 'public purpose' includes the provision of village sites in districts in which the (Provincial Government) shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision."

Mr. K. Rajah Aiyar who appeared for one of the petitioners relied on the amendment to S. 17 of the Land Acquisition Act introduced by the Madras Act, XXI of 1948. Under this section the Collector is authorised to take possession of any land urgently if in his opinion it becomes necessary to do so

"(i) for the purpose of any library or educational institution, or

(ii) for the construction, extension or improvement of—

(A) any building or other structure in any village for the common use of the inhabitants of such village, or

(B) any godown for any society registered or deemed to be registered under the Madras Co-operative Societies Act, 1932, or

(C) any dwelling house for the poor, or

(D) any irrigation tank, irrigation or drainage channel or any well, or

(E) any road."

(8) The contention that is urged is that the section is exhaustive of all purposes which the Legislature considered to be public; that the construction of building would be a public purpose only if it was of the character mentioned in sub-clauses A, B and C, and as the buildings to be constructed by the members of the society do not fall within the categories of A, and B and as there is no limitation in the rules of the society that the houses are to be constructed only as dwelling houses for the poor, the acquisition was not for a public purpose. But this argument ignores the true scope of S. 17 which is limited in its operation to cases of emergency and the purposes mentioned in that section cannot therefore be turned into a general definition of what are public purposes under the Act. Mr. K. Bhashyam Iyengar who appeared for one of the petitioners relied on Section 40 (1) (a) of the Land Acquisition Act wherein it is provided that the Provincial Government should not consent to any acquisition of land for a company—co-operative society is a company as defined in S. 3 (e) of the Act—unless it is for construction of dwelling houses for workmen employed by the company. It is argued that this is an indication that construction of dwelling houses for other persons is not a public purpose and that, therefore, the present acquisition is illegal. But this section again does not purport to give a definition of what a public purpose under the Act is; Sec. 40 (1) (a) does not even refer to a public purpose; much less does it indicate that construction of dwelling houses for persons who are not workmen would not be a public purpose. It is intended merely to guide Provincial Government in giving consent to acquisition of lands for a company and indeed once such consent is given by the Government it does not appear that the acquisition proceedings started thereunder could be challenged on the ground that consent should not have been granted under S. 40 of the Act. Moreover, the section obviously has reference only to companies which carry on commercial undertakings involving employment of workmen on a large scale and any inference which may be drawn from the language of the section would be inapplicable to a co-operative society which does not employ any workmen but consists only of members constructing houses for themselves. Thus, neither Sec. 17 nor Sec. 40 of the Land Acquisition Act is of much help in deciding the genera' question as to whether the construction of houses is a "public purpose".

(9) There is considerable authority in America as to what constitutes a public purpose and the question has been considered with reference to schemes for construction of houses. The power to acquire private property compulsorily is called "Eminent Domain", under the American law and it is a condition of the exercise of that power that it should be for "public use". Two views have been held on the connotation of the words "public use". The older and stricter view is that unless the property is dedicated for user by the public at large or a considerable section thereof it would not be a public use. Vide Nichols on "Eminent Domain", Vol. II, p. 430 (1950 Edn.). But the modern and more liberal view is that it is not an essential condition of public use that the property should be transferred to public ownership or for public user and that it is sufficient that the public derives advantage from the scheme. According to this view, it is no objection to the validity of an acquisition that it is in favour of a private corporation or of individuals provided it results in public advantage. Vide Nichols page 435. In 'FALLBROOK IRRIGATION DISTRICT v. BRADLEY', (1896) 164 U.S. 112 (161, 162): 41 Law Ed. 369, (389) the facts were that an Act of California provided for the acquisition of lands whenever 50 land-owners or a majority of them in a particular locality required it for construction of a watercourse, the object of the legislation being to enable dry lands to be brought under wet cultivation. The validity of the Act was challenged on the ground that the acquisition would only benefit particular land owners who could take water from the channel, that the public as such had no direct interest in the matter and that consequently there was no public user. This contention would be right if the stricter view were to be adopted but it was rejected and the acquisition was upheld, the court observing:

"To irrigate and thus bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the land-owners, or even to any-one section of the State. The fact that the use of the water is limited to the land-owner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use.....It is not necessary, in order that the use should be public that every resident in the district should have the right to the use of the water."

This statement of the law was approved and followed in 'CLARK v. NASH', (1905) 198 U. S. 361: 49 Law Ed. 1085, 'STRICKLY v. HIGHLAND BOY MINING CO.', (1906) 200 U. S. 527: 50 Law Ed. 581 and 'MT. VERNON-WOODBERRY COTTON DUCK CO. v. ALABAMA I. P. CO.', (1916) 240 U. S. 30: 60 Law Ed. 507. In 'RINDGE CO. v. LOS ANGLES COUNTY', (1923) 262 U. S. 700: 67 Law Ed. 1186, it is observed again:

"It is not essential that the entire community or even a considerable portion should directly enjoy or participate in an improvement in order to constitute a public use."

Willis in his work on "Constitutional law" states the law thus:

"What is a public use? On this question there have been two viewpoints. One may be called the older viewpoint and the other the newer viewpoint. According to the older viewpoint, in order to have a public use, there must be a use by the public.....According to the newer viewpoint there is a public use if the thing taken is useful to the public.....In these cases there is not necessarily a general use by the public, but there is a general benefit to the public. Private enterprises are thus allowed to exercise sovereign power of eminent domain, not because they are taking the property for their own use, but because in taking the property for their use they are benefiting the public." (1936 Edn., pp. 817-820).

Referring to this newer viewpoint Nichols writes:

"Judicial opinion which follows the broad or liberal concept considers that the narrow doctrine has been repudiated and is no longer the prevailing view. 'Public use' is considered 'public benefit' and it is not considered essential that the entire community or even any considerable portion thereof should directly enjoy or participate in any improvement in order that it constitutes a public use" (Nichols, "Eminent Domain", pp. 434, 445).

The same writer also observes that where the acquisition is for the public benefit it is immaterial that there is incidental benefit to private individuals and the following observations with reference to an acquisition on behalf of private corporation are particularly relevant with reference to the contention on behalf of the petitioners that it is the shareholders of the co-operative society that are benefited by the acquisition:

"While the primary object in taking and holding such land is the public benefit which alone justifies a taking without the consent of the owner and incidental object is the hope of profit to be derived by the corporation from the use of the land, it is well settled that the incidental benefit to the stock-holders in the profits arising from tolls, fares and other charges does not render the taking for a private use, if the tolls, fares and charges are to be derived from serving the public." (Nichols on "Eminent Domain", Vol. 2, page 448.)

(10) The question whether schemes for building of houses could be held to be for a public purpose has come up frequently for decision before American State Courts.

In 'NEW YORK CITY HOUSING AUTHORITY v. MULLER', 270 N.Y.P. 333: 105 A.L.R. 905 certain lands were taken in pursuance of a governmental project for clearing slums and for providing housing accommodation at low rents to persons with low income. The validity of this acquisition was questioned on the ground that the uses were private and not public. The court overruling this contention observed:

"Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use; and to formulate a universal test even though it were possible, would in an inevitably changing world be unwise if not futile"..... and holding that those purposes were for the benefit of the public the court went on to observe "It is also said that since the taking is to provide apartments to be rented to a class designated as persons of low income or to be leased or sold to limited dividend corporations the use is private and not public. This objection disregards the primary purpose of the legislation. Use of a proposed structure, facility or service by everybody and anybody is one of the abandoned universal tests of a public use."

In 'MURAY v. LA GUARDIA', 291 N. Y. 320 the facts were somewhat similar to the present case. A corporation called Stuyvesant Town Corporation was formed for acquiring 18 city blocks and constructing buildings thereon. It was financed by the Metropolitan Insurance Company which held all the stocks of the corporation. The owners of the lands which had been taken contended that the scheme would benefit only some individuals and the insurance company which was a private corporation and that there was no public use in the project. The court held that to provide low rent houses to families with low income and to clear slum areas would both be public uses. Then dealing with the contention that there was no public use in the project because the insurance company was benefited the court observed:

"Nor do we find merit in the related argument that unconstitutionality results from the fact that in the present case the statute permits the city to exercise the power of "Eminent domain" to accomplish a project from which 'Metropolitan' a private corporation may ultimately reap a profit. If upon completion of the project the public good is enhanced it does not matter that private interests may be benefited."

This decision was taken on a writ before the Supreme Court and was affirmed without a judgment. Vide 'MURAY v. LA GUARDIA', 291 N. Y. 320.

(11) Dealing with this topic Nichols writes as follows:

"It had been contended by those who sought to impede and defeat the object of the proponents of low cost housing and slum clearance that legislation in support of such object was for the benefit of particular individuals and classes and that, therefore, there was no public use involved. In overruling such contention the courts have held that determination of the question of public use depends not at all upon the factor of the right to use the housing facilities and who shall be permitted to exercise such right but rather upon the factor of the general public benefit which must of necessity ensure upon the removal of disease infested and crime breeding communities.....The primary purpose of housing legislation is to safeguard the general public by eliminating the evil aspects of slum areas rather than to benefit a special or limited group. There is no constitutional mandate that each and every member of the public must derive a direct benefit from the public monies which are expended for such purpose" (Nichols, Vol. 2, pp. 517-518).

(12) This passage deals with clearance of slum areas but as already mentioned the same principle has been applied to acquisitions made for constructing houses with low rent to families with low income. Vide Nichols, page 520. 'WILLIAM v. POWEL', referred to in the annotation to 'NEW YORK CITY HOUSING AUTHORITY v. MULLER', 270 N. Y. 333: 105 A. L. R. 905 is an instance of a legislation which permitted acquisition for relieving congestion in a municipal area and its legality was upheld. Generally it has now been held that acquisition of land for a public use is not limited to the taking of lands in slum area. It can be in lands deemed necessary for a housing project: 'HOUSING AUTHORITY OF DALLAS v. HIGGINBOTHAM', 130 A.L.R. 1053 at pp. 1067-1068 (Nichols Vol. II, p. 521). Those authorities show that, in general, building schemes are to be considered as advantageous to the public whether it is to clear slum area or to provide dwelling houses for the poor or to relieve congestion.

(13) We shall now examine the authorities cited by the learned advocate for the petitioner. In 'HEMABAI v. SECY. OF STATE', 39 Bom. 279 the facts were that the East India Company

had assigned certain lands under a sanad of the year 1839 and it had also leased certain other lands under a grant of the year 1854 subject to a condition that they could be resumed for a "public purpose." The Government required those lands for providing accommodation for its officers and gave notice of resumption. The holders of the lands contested the validity of the resumption on the ground that building dwelling houses for officers was not a public purpose as it would benefit only individuals. This contention was negatived in both the courts in India and this decision was affirmed by the Judicial Committee. The judgment of Lord Dunedin lays down the following propositions: (1) To constitute a public purpose it is not necessary that the land when taken should "in some way or other be made available to the public at large" and (2) It is sufficient if the purpose is one "in which the general interest of the community is concerned." The contrast between the general interest of the community and the particular interests of individuals made by Bachelor J. in his judgment and approved by the Privy Council only means that the purpose for which the acquisition is made should be of advantage to the community and not merely to particular individuals. The principles laid down in this decision are in accord with the modern view held in American courts and they do not help the petitioners.

(14) In 'VEERARAGHAVACHARIAR v. SECY. OF STATE', 49 Mad. 237 certain vacant sites were acquired for enabling Panchamas to build houses. It was argued that this was not a public purpose as the benefits of the acquisition would go only to individuals. In rejecting this contention Devadoss J. observed:

> "It is not possible to define what a public purpose is. There can be no doubt that provision of house sites for poor people is a public purpose for it benefits a large class of people and not one or two individuals."

'SECY. OF STATE v. GOPALA IYER', 59 Mad. L. J. 274 is another case of acquisition of sites for building houses for Panchamas and other servants. In upholding the acquisition Venkatasubba Rao J. observed as follows:

> "The measures adopted, while directly benefiting the Panchamas, indirectly benefit the public at large. Even if only a section of the public is benefited still the purpose is a public one. The expression includes a purpose in which the general interests of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned. See 'HEMABAI v. SECY. OF STATE', 39 Bom. 279...On behalf of the plaintiff, it is contended that the effect of the Government order is to enable it to acquire a particular house site for a particular individual. As the learned District Munsif has very clearly pointed out, this is a matter of detail which does not affect the general question of the purpose being a public one."

'RAMASWAMI IYER v. SECY. OF STATE', AIR 1931 Mad. 361, again raised the same question about the validity of the acquisition of sites for building houses for Panchamas. Sundaram Chetty J. in following the above authorities observed "That even if only a section of the public is benefited by this acquisition the purpose would still be a public purpose as held by Venkatasubba Rao J. in 'SECY. OF STATE v. GOPALA IYER', 59 Mad. L. J. 274." These decisions recognise the principle that even though the direct and immediate beneficiaries under the scheme may be individuals it is a public purpose if it benefits the public generally.

(15) Two decisions of the Patna High Court were cited on behalf of the petitioners. In 'KAMESHWAR v. STATE OF BIHAR', 29 Pat. 790 (S.B.), the question was about the validity of the Bihar State Management of Estates and Tenures Act, 1949, the decision of the court being that it was invalid. There was a discussion in the judgment on the meaning of the words "public purpose" occurring in Art. 31 (2) —vide pages 849, 850 and 894 to 896—but there is nothing in those observations which throws any light on the question now before us. Nor is the decision in 'KAMESHWAR SINGH v. STATE OF BIHAR', AIR 1951 Pat 91 (SB), in point the question there being whether the Bihar Land Reforms Act, 30 of 1950 was valid. It was held to be void under Art. 14 of the Constitution. In the course of the judgment, two of the learned Judges discussed the meaning of the words "public purpose" in Art. 31 (2) and came to the conclusion that they should be liberally interpreted. The following observations of Reuben J. (para. 38, page 107) are relevant for the present discussion:

> "The expression 'public use' in the 5th Amendment to the American Constitution has given rise to divergent views in that country. According to the earlier view there must be use by the public. The later and more liberal view takes it as sufficient if there is general benefit to the public. The adoption by our Constituent Assembly of the expression "public purpose" points to preference for the latter view. The word "purpose" is wider in its connotation than the word "use". Vide also the observations of Das J. in paragraph 89 at page 121."

(16) In 'MD. SAFI v. STATE OF WEST BENGAL', AIR 1951 Cal 97, it was held that the acquisition of land for settlement of refugees was for a public purpose. The result of the authorities may be thus summed up: Acquisition of proprty for public purpose under Art. 31 (2) includes whatever results in advantage to the public. It is not necessary that it should be available to the public as such. It might be in favour of individuals provided they are benefited not as individuals but in furtherance of a scheme of public utility. Schemes for construction of houses for clearing slum areas, relieving congestion and housing poor people are for a public purpose as they tend to promote social welfare and prosperity.

(17) Now what are the facts of this case? During the time of World War No. 2 owing to transport difficulties there was considerable shortage of timber, iron, cement and other building materials and building operations had consequently come to a standstill. On the other hand, the strength of the population in cities and towns went on mounting by leaps and bounds owing to large and continuous influx of persons from rural areas. There was an acute shortage of accommodation resulting in overcrowding, rackrenting and growth of slum areas and the evils became so serious that the Government appointed a Provincial Housing Committee for reporting on the ways and means of solving the problems by G. O. Ms. No. 1397 Public (P and D) dated 10th May 1947, G. O. Ms. No. 2469 Development dated 24th June 1947, and G. O. Ms. No. 2788 Development dated 27th

June 1947. The Committee submitted its report on 20-12-1947 and one of the suggestions made therein was the organization of co-operative housing societies in town areas. Vide Chapter 11, paragraphs 182, 200 and 201. Pursuant to this, the State has been sponsoring the formation of house building societies and acquiring lands for them to construct buildings and a Special Land Acquisition Officer, Co-operative Housing Schemes, has been entrusted with the due execution of this policy. The magnitude of the work will be evident from the fact that acquisitions have been made on behalf of at least a dozen of such societies functioning in all parts of the presidency, as is evident from these applications. The problems arising out of overcrowding have necessitated legislation for protection of tenants against arbitrary eviction and unreasonable enhancement of rent. The public utility involved in these acquisitions must be judged in the light of these facts. Mr. K. Rajah Iyer conceded and rightly that under the circumstances the acquisition would not have been open to question if the Government itself acquired lands and allotted them to individuals for constructing houses. We are unable to see how if that is a public purpose it ceases to be one when it is carried through the machinery of a co-operative society. We, therefore, hold that public purpose has been amply established in these acquisitions.

(18) We have reached this conclusion even without the aid of the presumption which the law raises in favour of the existence of public purpose in such acquisitions. Though the question is a justiciable one and the ultimate decision must rest with the courts, the action of the Legislature in deciding upon the acquisition is itself considered good proof that the purpose is a public one. It was observed in 'UNITED STATES v. WELCH', (1946) 327 U.S. 546: 90 Law Ed. 843 at p. 848, that "When Congress has spoken on the subject its decision is entitled to deference until it is shown to involve an impossibility." The same considerations must apply to notifications issued by the Government under the powers vested in them under the Land Acquisition Act for acquisition of lands.

(19) In 'HEMABAI v. SECY. OF STATE', 39 Bom. 279, this is what the Privy Council observed on this aspect of the case:

> "Prima facie the Government are good Judges of that. They are not absolute judges. They cannot say 'sic volo sic jubeo'. But at least the court would not easily hold them to be wrong."

The acquisition must, therefore, be held to be valid.

(20) In the view we have taken it is unnecessary to deal at any length with the contention advanced by the learned Advocate General that the petitioners are not entitled to raise any objection based on Art. 31 (2) as it applies only to future legislation and not to any existing legislation which does not fall under Art. 31(6). Reference was made to the decision in 'HEMAN SANTLAL v. STATE OF BOMBAY', A.I.R. 1951 Bom. 121 in support of this contention. That was a case of requisition under the Bombay Land Requisition Act, 33 of 1948. The order passed under that Act on 29-5-1950 was attacked as unconstitutional. The contention was that under the provisions of that Act properties could be requisitioned even when there is no public purpose and that they were consequently opposed to Art. 31 (2) and became void; and the order which was passed under those provisions must be declared illegal. The learned Judges held that the provisions in Act 33 of 1948 were opposed to Art. 31 (2) but that Article 31 (5) saved "the provisions in an existing law" not falling within Art. 31 (6) and that consequently Act 33 of 1948 was excepted from the operation of Art. 31 (2) and that the validity of the order could not be challenged. But the reasoning in this decision will not apply to the present case because under "the existing law" that is the law in force before the commencement of the Constitution (vide definition Art. 366 (10)) a distinction was made between acquisition and requisition of property.

(21) In 'TAN BUG TAIM v. COLLECTOR OF BOMBAY', A.I.R. 1946 Bom. 216 the Bombay High Court held that requisition was not covered by S. 299 (2) of the Government of India Act which was limited to acquisition of property. In this view, the two conditions of a valid acquisition laid down in Sec. 299 (2) and re-enacted in Article 31 (2) that it should be for a public purpose and compensation should be made would apply only to acquisitions of property and not to requisition. Therefore, even on the reasoning in the decision in 'HEMAN SANTLAL v. STATE OF BOMBAY', A.I.R. 1951 Bom. 121 the present case would be hit by the provisions of Section 299 (2) of the Government of India Act.

(22) Moreover these conditions are prescribed also by the Land Acquisition Act and it has not been contended before us that the question whether the purpose of the acquisition is a public one or not is not open to consideration by courts by virtue of S. 6(3) of that Act. These are questions which do not call for any decision in this case and we express no opinion on them.

(23) RAJAMANNAR, C. J.: We have already held that the purpose of the concerned acquisition is a public purpose within the meaning of Art. 31 of the Constitution.

(24) The only other point pressed by the petitioner is that on the site belonging to him which is proposed to be acquired he has put up certain buildings and therefore it should be exempted from the scheme of the acquisition. On behalf of the State, the Superintendent, Development Department, has sworn to an affidavit in which it is alleged that the field of the petitioner forms the frontage of the block acquired and that the petitioner having got scent of the proposed acquisition constructed houses and laid foundations on it in hot haste to avoid, if possible, the acquisition. He also stated that the petitioner and others have got houses in the town and their action in hastily putting up the house and the foundations on the land sought to be acquired was with a view to defeat the object of the Co-operative Building Society. As the field is adjoining the road, its exclusion would mar the beauty of the colony and affect the lay-out. The petitioner filed a reply affidavit which did not specifically deny the allegations made in the counter affidavit filed on behalf of the State. Besides a vague statement that the houses were put up before the notification as to dates when they were put up were not mentioned. The impression left upon us is that the houses were built by the petitioner in view of the proposed acquisition and with a view if possible to prevent the acquisition. The petitioner

therefore cannot be entitled to any relief on this ground. The petition is dismissed with costs—Rs. 50.

C.R.K./A/V.S.B. Petition dismissed.

A. I. R. 1952 MADRAS 763

SUBBA RAO J.

Nodiyodath Kunhi Krishnan's Son, Chozhi, Appellant v. Melepurakkal deceased Raman's widow, Lakshmi, Respondent.

A. A. A. O. No. 105 of 1950, D/- 23-11-1951.

Debt Laws — Madras Agriculturist's Relief Act (4 (IV) of 1938), Ss. 9A and 10 (a) (as amended by Madras Act (23 (XXIII) of 1948) — Relief obtained on ground that mortgage was not usufructuary — Subsequent addition of S. 9-A — Relief sought under S. 9A on ground that mortgage was usufructuary — (Approbate and reprobate).

In a suit for redemption, the mortgagor contended that the document he had executed was not usufructuary mortgage as defined in S. 10 (2) and on that basis obtained reliefs under Ss. 8 and 9 of the Act. Subsequently, when S. 9-A was introduced in the Act, the mortgagor in the same proceedings sought to amend the decree on the ground that it was an usufructuary mortgage within the meaning of the Explanation added to S. 9A.

Held that as usufructuary mortgage in Explanation to S. 9A is defined in similar terms as in S. 10 and as no party to a suit can be allowed to get relief on inconsistent positions on the principle of approbate and reprobate, the mortgagor was not entitled to the relief sought by him though such relief was conferred by a new provision: AIR 1937 Mad 254 FB, Disting. (Paras 6 and 7)

K. B. Balakrishna Iyer, for Appellant; N. Sundara Iyer, for Respondent.

REFERENCE..... Para.

('37) 1937-1 Mad LJ 233: (AIR 1937 Mad 254 FB) 8

JUDGMENT: This is a civil miscellaneous second appeal against the order of the Court of the Subordinate Judge of Ottapalam in A. S. No. 144 of 1949, setting aside that of the District Munsif of Chowghat in E. A. No. 233 of 1949.

(2) The appellant executed a possessory mortgage deed dated 29th July 1913 in favour of the respondent. Under that document the mortgagor was liable to pay Rs. 2 to the mortgagee in addition to the income for the purpose of paying the Government assessment as the income was not sufficient to pay the interest. The appellant filed O. S. No. 145 of 1948 for redemption of the mortgage. In that suit he claimed relief under Ss. 8 and 9 of the Madras Agriculturists' Relief Act, (IV (4) of 1938). He contended that the Rs. 2 payable by him represented a payment towards interest on the mortgage amount and that the amount was liable to be scaled down under S. 8 of Act IV (4) of 1938. The District Munsif accepted his contention and scaled down the debt on 20th October 1948.

(3) Subsequently, under the Amending Act, (XXIII (23) of 1948), the Legislature introduced S. 9-A whereby under certain circumstances an usufructuary mortgage debt would be deemed to be completely discharged, or substantially reduced. Taking advantage of that section, the appellant again filed E. A. No. 233 of 1949 for reopening the decree and scaling down under the new Act. The learned District Munsif amended the decree showing that the amount payable by the appellant was Rs. 22 for interest, Rs. 31-8-0 as costs of suit and Rs. 173-0-3 for value of the improvements.

(4) The relevant provisions of Act IV (4) of 1938 may now be read:

"S. 10(2): Nothing contained in Ss. 8 and 9 shall affect any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee except to the extent provided for in S. 9 A."

S. 9-A: Where a usufructuary mortgage was executed at any time before 30th September 1947 and the mortgagee is in possession of the property mortgaged to him, the mortgagor shall be entitled to redeem the property notwithstanding that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived."

(5) Under the other provisions of S. 9-A the mortgage amount would be scaled down having regard to the circumstances mentioned therein. The explanation to S. 9-A runs thus:

"An 'usufructuary mortgage' in this section means any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee."

Under S. 10 of the Act a mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated, cannot be scaled down under Ss. 8 and 9 of Act IV (4) of 1938, but by reason of S. 9-A even such a usufructuary mortgage can be scaled down in the manner provided by that section.

(6) In the suit the appellant contended that the document was not an usufructuary mortgage as defined under S. 10(2) and on that basis obtained reliefs under Ss. 8 and 9 of the Act. At the time when he sought for and obtained the relief S. 9-A was not in the statute book. Section 9-A was introduced in the Act by Act XXIII (23) of 1948. Now in the same proceedings he is seeking to amend the decree on the ground that it is an usufructuary mortgage within the meaning of the explanation added to S. 9-A. An usufructuary mortgage in the explanation to S. 9-A is defined in similar terms to an usufructuary mortgage defined under S. 10 of the Act.

(7) The position therefore is this: the appellant who obtained relief at one stage of the suit on the basis of a document which was not an usufructuary mortgage, now seeks to get a relief on an inconsistent basis namely that the suit document is an usufructuary mortgage. No party to a suit can be allowed to get relief on inconsistent positions on the principle of "approbate and reprobate". But Mr. Ramakrishna Aiyar contended that in accordance with law then existed, he was able to get relief under Ss. 8 and 9 of the Act but the present relief is only based on the right conferred upon him under the amended section. It is true that a party to a suit or a proceeding can acquire a new right by reason of an amending Act. But in this case the new right conferred upon the petitioner depends upon a fact namely whether the document is a usufructuary mortgage or not. As the appellant got relief from the court on the basis that it was not an usufructuary

mortgage, he cannot now rely upon a new provision on an inconsistent foundation.

(8) The learned counsel then relied upon a Full Bench decision of this Court reported in 'NARAYANA AYYANGAR v. SUBRAMANIAN CHETTIAR', 1937-1-Mad L J 233. In that case no principle of "approbate and reprobate" was raised or considered. Ramesam J. who delivered the leading judgment, only laid down the well-recognised principle that there can be no res judicata by laying down a wrong rule of law between the parties for future guidance also and that that decision must be confined to matter to which it has been applied at the time of the former decision.

(9) In the view I have taken it is unnecessary to consider the other question namely whether the document provided for a rate of interest within the meaning of S. 10(2) (i) of the Act.

(10) The appeal fails and is dismissed with costs.

(11) No leave.

B/C.R.K./V.R.B. Appeal dismissed.

A. I. R. 1952 MADRAS 764

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

K. C. Varadachari, Partner, Madras Oil Mills and Products, Petitioner v. The State of Madras, by the Secretary to the Government of Madras, Food and Agriculture Department, Respondent.

Civil Misc. Petn. No. 5590 of 1951, D/- 22-2-52.

Constitution of India, Arts. 19 (1) (g), 304(b) and 14 — Right to carry on business — Business to be carried on under licence — Imposition of licence-fees — Reasonableness — Tests for determination — Enhancement of licence-fees leviable under Madras Manure Dealers' Licensing Order, 1949 — Discrimination between Oil-millers and other manure dealers — Validity of enhancement — (Madras Manure Dealers' Licensing Order (1949)).

There is a fundamental difference between a tax and a licence-fee. For the grant of a licence a fee may be charged to cover probable expenses which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenues for the general purpose of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable, whereas a tax need not be. (Para 3)

Though, ultimately the decision in each case must depend upon the particular facts of that case, certain general tests have been formulated by the Courts in various decisions to decide whether a particular fee is reasonable in the circumstances. They are: (1) the licence fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the authority in respect of the supervision and regulation of the particular trade or calling in respect of which the license is issued: AIR 1931 PC 217, Foll. (Para 4)

(2) there must be some relation between the expenses incurred in the issue of licences and in regulating the licensed trade and other occupation and the amount of fees leviable. When the licensing authority issues a number of licences to persons engaged in different trades and occupations it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on the particular trade or a few particular trades: AIR 1930 Mad 55, Foll. (Para 5)

Tested on the above principles the enhancement of the license-fee in so far as it related to the Oil Mills in the State brought about by G. O. No. Ms. 2435 (Food and Agriculture) dated 29th December 1950 which amended the Madras Manure Dealer's Licensing Order, 1949 is unreasonable as the total fees that would be collected from all the mills in the state would be disproportionately high in comparison with the expenditure which according to Government's own statement it would incur. (Para 12)

Further the G. O. in fixing a higher rate of fee for the oil-millers while making all other manure dealers pay at flat rate of Rs. 20 irrespective of the fact that they might stock and sell more than the oil millers could even produce is discriminatory and offends Art. 14 of the Constitution. (Para 13)

Therefore, the enhanced fee imposed by the G. O. is unconstitutional and invalid both as imposing an unreasonable restriction upon the right to carry on business guaranteed by the Constitution as well as being discriminatory and as contravening Art. 14 of the Constitution. (Para 14)

K. V. Venkatasubramaniam, for Petitioner; Advocate General, for the Govt. Pleader, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('31) 9 Rang 440: (AIR 1931 PC 217)	4
('29) 52 Mad 764: (AIR 1930 Mad 55)	5
('31) 61 Mad LJ 748: (AIR 1931 Mad 497)	6
('32) 1932 Mad WN 873	7
('43) ILR (1943) Mad 521: (AIR 1943 Mad 191)	8
('30) 8 Rang 143: (AIR 1930 Rang 282)	4
(1937) 300 US 290: 81 Law Ed 653	8

ORDER: The petitioner is a partner of a firm carrying on the business and trade of an oil miller under the name and style of Madras Oil Mills and Products. The Oil mill owned by the firm has got five expellers which are used for crushing groundnut and producing groundnut oil and groundnut cake. The firm had been granted a licence under the Madras Manure Dealers' Licensing Order. The fee for the said licence was Rs. 10 from the year 1947. By G.O. No. Ms. 2435 (Food and Agriculture) dated the 29th December 1950 an amendment was made to the Madras Manure Dealers Licensing Order, 1949, providing for the enhancement of the licence fee. The rate so far as oil mills were concerned was fixed at Rs. 100 for each expeller and Rs. 20 for each rotary or screw press. For mere dealers in manure the licence fee was fixed at Rs. 20 and for firms engaged in manure mixing trade the licence fee was fixed at Rs. 100 with a non-recurring fee of Rs. 50 for each manure mixture marketed. In accordance with this amendment the petitioner's firm became liable to pay a sum of Rs. 500 as licence fee as there were five expellers in the Mill. The petitioner seeks to have the aforesaid G. O. dated the 29th December 1950 enhancing the licence fee quashed by a Writ of Certiorari.

(2) The main ground on which the enhancement is impugned is that the new rate of fee is disproportionately high and virtually amounts to levy of a tax. The material allegations are contained in paragraph 9 of the affidavit which runs as follows:

"I submit that the Government by levying such disproportionately high rate of licence fee are in fact levying a tax which can only be done by the Legislature and not by the Executive. Further the licence fee should be only to cover the cost of issuing licences and for general supervision and in this case I submit that except that the Madras Manure Dealers Order makes it obligatory for me to make returns of production and sale of oil, there is absolutely no control over the dealers in manure by the respondent and even the sum of Rs. 10 previously collected per year is in effect a tax and not a licence fee."

He also attacks the new amendment on the ground that the classification adopted by it is discriminatory and is inconsistent with the provisions of Art. 14 of the Constitution.

(3) On behalf of the State the Joint Director of Agriculture filed a counter affidavit supporting the amendment. He stated that there had been frequent complaints from the public of adulteration of oil cakes used as cattle food and manure as well as other kinds of manure and the Govt. have approved of certain amendments to the Madras Manure Dealers' Control Order the enforcement of which would ensure good quality in manure. To enforce these amendments it is said that the staff of inspectors and analysts for analysing manure samples had to be strengthened. A statement was given of the strength of the staff employed and the expenditure by the Govt. on this account during 1950 and 1951 which showed a total of Rs. 43,389. It was further stated that the question of employing additional staff for the purpose at an estimated cost of Rs. 56,720 was under the consideration of the Government. The justification for the imposition of the enhanced licence fee may be stated in the language employed in the counter affidavit which is as follows:

"In fixing the different scales for different classes of licences what was prominently kept in view was that the scale of taxation or licence fee should be based on the work involved and cost of the control and inspection necessary. It is the millers who supply the dealers with oil cakes, and frequent checks to ensure quality are therefore necessary at the very source. It cannot therefore be contended that the imposing of licence fee is not justified by consideration relating to the interests of the general public."

and further on,

"When compared to the cost of installing and working an oil mill, the enhanced licence fee of Rs. 100 per expeller per annum is an insignificant amount. The capacity to pay and the fact that oil mills are the source of supply of oil cakes to dealers and hence frequent checks have to be made at the source were prominently kept in view in proposing the enhancement of licence fees."

It is now well established that there is a fundamental difference between a tax and a licence fee. The issue of licences to regulate particular branches of business or specified trades or occupations and other matters is part of what in American constitutional law is called "the police power" of the State. For the grant of a licence a fee may be charged to cover probable expenses which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenues for the general purpose of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable, whereas a tax need not be.

(4) Courts have often dealt with the question whether a particular licence fee is reasonable or not. Though, ultimately the decision in each case must depend upon the particular facts of that case, certain general tests have been formulated to decide whether a particular fee is reasonable in the circumstances. In laying down these general principles, courts have always kept in view the essential difference between a licence fee and a tax, namely, that in the case of a licence fee imposition is intended to reimburse the authority in any amount expended by it in respect of the particular business or matter which is intended to be regulated, whereas a tax is the recognised method of raising revenues for general purposes. It is useful to refer to some of the decided cases on the point, and we shall begin with the ruling of the Privy Council in 'PAZUNDAUNG BAZAR CO. LTD. v. MUNICIPAL CORPORATION OF THE CITY OF RANGOON', 9 Rang. 440 (P.C.). That was given on an appeal from the judgment of the Rangoon High Court reported in 'MUNICIPAL CORPORATION OF RANGOON v. PAZUNDAUNG BAZAR CO. LTD.', 8 Rang. 143. Under the City of Rangoon Municipal Act the Corporation had power to charge licence fees for private markets. The question was whether the licence fee imposed was unreasonable. Heald, Offg. C. J. rejected the contention of the owners of the private markets who were protesting against the levy that the only charges recoverable by way of licence fees were the cost of the papers on which the licences and receipts were printed together with the costs of printing and writing thereon and the cost of such inspection as was directly connected with the licences themselves. He held (and Mya Bu J. concurred with him) that the licence fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the corporation in respect of the supervision and regulation of private markets. The Privy Council agreed with this statement of the law.

(5) In 'CORPORATION OF MADRAS v. SPENCER & CO.', 52 Mad. 764 this court held that a licence fee imposed by the Corporation of Madras for storing spirits was unreasonable because the imposition was not with a view to pay for the expenses in connection with the licences but was obviously done to increase the revenue of the Corporation from liquor. The learned Judges accepted the view of the trial Judge, Beasley J. (as he then was) that licence fees were leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which were licenced and that there must be some relation between these expenses and the amount of fees leviable. In the case before them, they found on the evidence which had been adduced that the expenses of supervising the places where foreign liquor was stored were practically nil.

Reilly J. enunciated two general principles which may be useful to determine whether licence fees can be held to be reasonable or not, namely,

"If we accept the proposition that the power of charging licence fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed; and there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But, roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the corporation, then I think we can rightly say that they are unreasonable. There is another principle. Although it is almost impossible for the Corporation itself to ascertain, when the licencing authority issues they are issuing a number of licences to persons engaged in different trades and occupations, exactly what is the cost of any particular licence or of licences for persons engaged in particular trades or occupations — and certainly we could not attempt anything of that sort — yet, surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not."

Of course it is not for a court to minutely assess and fix what in its opinion is the proper fee. All that the court can do is to hold whether a particular fee is reasonable or not.

(6) Practically the same principles were reiterated in a subsequent decision of this court in the 'MUNICIPAL COUNCIL, KUMBAKONAM v. RALLI BROS.', 61 Mad. L. J. 748. It was held that the licence fee should be commensurate with the extra cost entailed by granting the licences and exercising such supervision as was necessary to see that its terms were complied with. But the fees should not be so assessed as substantially to contribute to the general revenues of the local body.

(7) The decisions above cited were all discussed in 'KUNHAMBU v. LOCAL FUND OVERSEER CHIRAKKAL', 1932 Mad W. N. 873 in which it was again laid down that the licence fee should not be converted into a tax for the purpose of raising revenue and the licence fee should bear a definite and well-recognised relation to the expenses incurred by the licensing authority.

(8) The decision in 'INDIA SUGAR AND REFINERIES LTD. v. MUNICIPAL COUNCIL, HOSPET', I.L.R. (1943) Mad. 521 relied upon by the learned Advocate General does not lay down any different principle. The following observations of Wadsworth J. are apposite:

"It is, we think, well settled that a licence fee for carrying on a particular trade or industry should not be regarded as a form of taxation the extent of which is to be governed purely by revenue considerations. The licence fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. We doubt whether the Municipality would be justified in increasing the licence fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax payer in the municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, it is we think, reasonable to take this expenditure into account in fixing the amount of the fee. When a supervision agency is necessary for a number of industries, it will always be difficult to say how the cost is to be apportioned and, so long as the apportionment is to be made on a reasonable basis, it is not for the courts to interfere with the way in which it has been achieved."

Substantially, similar principles have been laid down by the Supreme Court of the United States. It is sufficient to cite one instance, namely, the decision in 'INGLES v. MORF', (1937) 300 U. S. 290: 81 Law Ed. 653, in which a permit fee was held to be invalid because it bore no reasonable relation to the total cost of regulation to defray which it was collected.

(9) Bearing these principles in mind, let us examine the facts of the present case. The licence fee in question is imposed under the Madras Manure Dealers' Licensing Order, 1949. That order was made by the Government of Madras in exercise of the powers conferred by Sec. 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Ordinance 1949 and, in supersession of the Madras Manure Dealers' Licensing Order, 1947. It may be mentioned that the said Ordinance has now been replaced by Madras Act XXIX of 1949. Clause 2 of this order defines a dealer as

"Oil miller or a person who sells manure in quantities of not less than one maund at a time."

'Oil miller' means any person owning or having in his possession or under his control, an oil mill run by power or hand presses but does not include a person owning or having in his possession or under his control a wooden or stone chekku."

Clause 3 enacts that no person shall on and after 6th December 1949 carry on business as a dealer in manure in the Province of Madras except under and in accordance with a licence issued in that behalf by a licensing authority. A fee of Rs. 10 per annum is payable in advance with every application for a licence (Clause 4 (ii)). Clauses 6, 7, 8 and 9 deal with issue of and refusal to issue licences to applicants. Clause 10 runs thus:

"Any officer authorised by the Director may enter upon and inspect any premises in which he has reason to believe that the sale or storage for sale or distribution of manure is taking place contrary to the provisions of this order or any order made thereunder."

Form II set out in the schedule contains the terms and conditions of the licence, the following of which are important:

"3. The licensee shall not store manure in any place other than that specified in paragraph 2,

except with the approval of the licensing authority.

4. The licensee shall maintain a register of daily accounts showing correctly all transactions in manure in his possession or control. It shall show:

(a) the opening stock on each day,

(b) the quantities sold, delivered or received each day, showing the place of origin, that is, the name of oil miller or factory or other consignor from whom received;

(c) the quantities sold, delivered or otherwise disposed of on each day showing the places of destination and the names of the consignees; and

(d) the closing stock on each day.

5. The licensee shall submit to the licensing authority so as to reach him not later than the 10th of each month, a true return in form III set out in the schedule to the Madras Manure Dealers' Licensing Order, 1949, of the stocks, receipts deliveries and balance during the preceding month.....

8. The licensee shall give all facilities at all reasonable times to any officer authorised by the Director of Agriculture, Madras for the inspection of his accounts and stocks wheresoever they may be kept and for taking samples of such manures for examination.

9. The licensee shall comply with any directions that may be given to him by the Director of Agriculture, Madras, or any officer authorised by him in regard to the sale or storage for sale or distribution of manure."

There is provision for a contravention of any of the conditions of the licence.

(10) It will be noticed from the provisions of the Order as well as the licence that the licence in question is what may be called a "dealers' licence". No doubt a "dealer" is defined as including an oil miller, but even in respect of him the order relates only to transactions of sale and distribution. There is nothing in the order which directly or indirectly provides for anything other than the regulation of the sale of manure. In Form II, i.e. the licence form, there is one term which makes it incumbent on the licensee to give all facilities to an officer authorised by the Director of Agriculture to take samples of manures for examination. But there is nothing in the order or in the licence which imposes any punishment on a person selling adulterated or bad type of manure. Nor is there anything to indicate as to what is to happen after the officer of the Agriculture Department takes samples of manures for examination. The supervision and regulation contemplated by the Order are confined to the stocking and sale of manure and do not relate to the maintenance of any quality. It is apparently because of this fact that in the Order itself a flat rate of Rs. 10 per annum is prescribed for every licence.

(11) If Rs. 10 was considered to be proper and adequate fee from 1947 onwards, what then is the justification for a sudden enhancement in 1951 from Rs. 10 to Rs. 100 per expeller? The statement set out in paragraph 6 of the counter affidavit filed on behalf of the State relates to the staff of the Inspectors of Fertilisers and Chemical Analysts' section of Agriculture department of the Government. Presumably the staff is engaged in checking and analysing samples of fertilisers and other things. But there is nothing in the Order to indicate that the licence required from the dealers is for the purpose of ensuring the proper quality of manure being sold. There is not even a provision which makes a sale of adulterated or unwholesome manure punishable.

(12) We are not impressed with the figures set out in the counter affidavit. Many material particulars are found wanting as regards this aspect of the matter. The costs of the establishment has been given but we have no information as to the total amount being collected as licence fees from the various classes of dealers dealt with by the Order. There is no averment that the total of fee collected is much less than the costs of establishment. On the other hand, on the information supplied to us in the counter affidavit it is clear that the total fees at the enhanced rate which can be collected from the oil millers alone, completely leaving out of account the other classes of dealers, would far exceed the cost of establishment. There are 478 oil mills which have expellers and the average number of expellers per mill is 2.5, that is to say, on an average each oil mill would be liable to pay a licence fee of Rs. 250. The total fee for 478 oil mills having expellers would be Rs. 1,19,500. Besides there are mills having rotaries or screw presses. These number 687. The average number of rotaries per mill is 3.6, and the enhanced rate is at Rs. 20 per each rotary. If the amount calculated at this rate is added to the amount of fee which can be collected from the expeller mills, the figure reached is disproportionately high in comparison with the expenditure incurred by the Government even according to their statement in the counter-affidavit.

(13) It is impossible to discover any rational basis for adopting the expeller as a unit for charging licence fee. If it is said that the more the number of expellers it would mean more manure produced and sold, then it can be very properly asked, what about the other dealers who may actually stock and sell much more than what any oil miller may be able to produce and sell? Such dealers have to pay only at a flat rate of Rs. 20. The enhancement in the case of oil millers only would in that event be clearly discriminatory and would offend the provisions of Art. 14 of the Constitution.

(14) We must therefore hold that the enhanced fee imposed by the amendment in 1950 is unconstitutional and therefore invalid because the fee would amount to an unreasonable restriction on the exercise of the right to carry on business guaranteed by the Constitution and also because the fee is discriminatory and in contravention of Art. 14 of the Constitution. The application is allowed and the rule nisi is made absolute. The State will pay the petitioner the costs of this application Rs. 150.

C.R.K./A/M.K.S. Application allowed.

A. I. R. 1952 MADRAS 767

SATYANARAYANA RAO
AND RAJAGOPALAN JJ.

Rao Saheb Dr. Ananda Baliga, Appellant v. Srimat Ananteswar Temple, Manjeswar by its executive Officer, Sri K. P. Kaurath and others, Respondents.

Appeal No. 434 of 1948, D/- 22-1-1952.

Madras Hindu Religious Endowments Act (II (2) of 1927), Ss. 84 (1) and 73 and 79 and 79A — Suit for declaration that temple belonged to certain community and for injunction — Jurisdiction of Civil Court — Civil P. C. (1908), S. 9.

The suit was instituted under O. 1. R. 8 of the Civil Procedure Code, with the leave of the Court on behalf of the Gowd Saraswat Brahmin Community in South Kanara; and two reliefs which were claimed in the plaint with reference to the suit temple which was at present being managed by an executive officer appointed by the Madras Hindu Religious Endowments Board in 1939 were (1) a declaration that the temple belonged to and was of the exclusive right of the members of the Gowd Saraswat Brahmin Community of South Kanara who alone had the exclusive right of management and performing the puja therein; (2) a permanent injunction restraining the defendant from introducing any form of 'agama' ritual or mode of worship in the said temple other than the existing form, contrary to the well-established custom and usage:

Held that (1) S. 84 (1) was intended to give jurisdiction to the Board to decide a dispute, when a dispute was raised, whether a particular institution was a math or temple as defined by the Act; and not a dispute which admitted the institution to be a temple but that the temple was exclusively owned by a particular religious denomination such as the Gowd Saraswat Brahmin Community and not by the Hindu Community as a whole. S. 84 (1) (a) of the Act, therefore, did not cover the dispute raised in the suit, and, therefore, the prohibition against the exercise of the jurisdiction by the Civil Court under S. 84 (1) did not come into operation.

(2) Neither in S. 73 nor in any of the other provisions of the Act was there any provision to obtain a declaration in a case of this description. The bar therefore contemplated by S. 73 (4) did not apply in the present case in so far as it was confined to the relief of the declaration.

(3) Sections 79 and 79A, were not intended to provide a forum for the determination of the denominational rights of a community over the temple but were intended to apply to matters like the usage regarding the rituals, honours, perquisites, emoluments and so on. Therefore, there was no bar laid down by S. 79A either, so far as the relief for declaration was concerned. As regards the second relief, however, it no doubt fell within the purview of S. 79A and it was not open to the plaintiff to at once resort to a suit without going to the anterior process of getting an adjudication from the Board as provided by S. 79A.

(4) The plaintiff was thus entitled to maintain the suit for the first of the reliefs set out above and the total dismissal of the suit was not justified. (Paras 1, 4, 6, 7, 8, 9)

Anno: C. P. C., S. 9 N. 53.

A. Narayana Pai, for Appellant; M. K. Nambiar, M. Sekhara Menon, C. F. Louis, M. Seshachalapathi, T. K. Raman Nambisan, K. N. Karunakaran and V. V. Raghavan, for the Govt. Pleader, for Respondents.

SATYANARAYANA RAO J.: The plaintiff whose suit has been dismissed on a preliminary point by the lower court is the appellant in this appeal. The suit was instituted under O. 1, R. 8 of the Civil Procedure Code, with the leave of the court on behalf of the Gowd Saraswat Brahmin Community in South Kanara; and two reliefs were claimed in the plaint with reference to the suit temple which is at present being managed by an executive officer appointed by the Madras Hindu Religious Endowments Board in 1939 as the temple was notified under the Act (Vide Ex. B. 1). The reliefs which the plaintiff claimed in the plaint were two: (1) a declaration that the first defendant temple belongs to and is of the exclusive right of the members of the Gowd Saraswat Brahmin Community of South Kanara who alone have the exclusive right of management and performing the puja therein; (2) a permanent injunction restraining the second defendant from introducing any form of 'agama' ritual or mode of worship in the said temple other than the existing form, contrary to the well-established custom and usage. The suit was instituted on the 16th of April 1947 and the objection taken was that the suit was barred by the provisions of the Madras Hindu Religious Endowments Act (II of 1927). The contention was upheld by the lower court. Hence this appeal.

(2) Since the decision in the case, the Madras Hindu Religious Endowments Act, II of 1927, was repealed by the Madras Hindu Religious Charitable Endowments Act, 1951 (XIX of 1951) but the rules and the notifications issued under the repealed Act have been continued by S. 103 of the new Act.

(3) The suit being of a civil nature it remains to consider whether the jurisdiction of the Civil Court is taken away either expressly or impliedly by any of the provisions of Act II of 1927. Our observations regarding the provisions of Act II of 1927 which have been relied on as barring the jurisdiction of the Civil Court would equally apply to the corresponding provisions of the new Act. It is, therefore, unnecessary to refer in the course of the judgment to the provisions of the new Act.

(4) The main provisions that have been relied on as barring the jurisdiction of the Civil Court are Sections 84 (1), S. 73 (4) and 79 and 79A. Section 84 (1) provides:

"If any dispute arises as to:

(a) Whether an institution is a math or temple as defined in this Act,

(b) Whether a trustee is a hereditary trustee as defined in this Act, or not, or

(c) Whether any property or money endowed is a specific endowment as defined in this Act or not,

such dispute shall be decided by the Board and no court in the exercise of its original jurisdiction shall take cognizance of any such dispute."

It is not claimed on behalf of the respondent that clauses (b) and (c) would apply in the present case. But he relies upon clause (a) and the contention is that the dispute raised in the plaint in respect of which the declaration is sought is a dispute which raises the question whether the institution is a temple as defined in the Act, or not; and therefore the relief sought for in the plaint is within S. 84 (1) (a) of the Act and the cognizance of the suit by the Civil Court is barred. He refers in this connection to the definition of "Temple" in S. 9, clause (12) of the Act. It states:

"'Temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship."

The argument is, if a question arises whether a temple is owned by the Hindu community as

a whole or whether it is owned only by a section of that community, the dispute would then be one which can aptly be described as raising the question whether the institution is a temple or not within the meaning of S. 84 (1) of the Act. In our opinion, if the section is so construed, it would be placing a strained construction upon it and we think that the language of the section does not warrant such an interpretation. The section is intended to give jurisdiction to the Board to decide a dispute, when a dispute is raised, whether a particular institution is a math or temple as defined by the Act; and not a dispute which admits the institution to be a temple but that the temple is exclusively owned by a particular religious denomination such as the Gowd Saraswat Brahmin Community and not by the Hindu Community as a whole. S. 84 (1) (a) of the Act, therefore, in our opinion, does not cover the dispute raised in the present suit, and, therefore, the prohibition against the exercise of the jurisdiction by the Civil Court under S. 84 (1) does not come into operation.

(5) It was then argued that the suit is barred by S. 73 (4) of the Act which provides:

"No suit or other legal proceeding claiming any relief provided in this Act, in respect of such administration or management shall be instituted except under and in conformity with the provisions of this Act."

Section 73 was the subject of amendment several times and no useful purpose would be served by referring to decisions pronounced at a time when the language of this clause was not identical. Under this clause what is required is that if the Act itself provides for a relief which is claimed in the suit, the jurisdiction to entertain a suit for such a relief which has relation to the administration or management is taken away. The only method by which the aggrieved person could get redress in respect of such an infringement is to adopt the procedure laid down in the Act and achieve his object. In such a case, where the relief itself is provided by the Act in respect of the administration or management, it is not open to a party to ignore the provisions of the Act and approach the civil court by a suit for obtaining an identical relief. In such a case the jurisdiction is obviously barred.

(6) This takes us to the question whether any provision has been made for adjudication or for granting a declaration of the nature now sought for in the suit under the provisions of the Act. Neither in S. 73 nor in any of the other provisions of the Act is there any provision to obtain a declaration in a case of this description. The bar therefore contemplated by sub-clause (4) of S. 73 does not apply in the present case in so far as it is confined to the relief of declaration.

(7) The learned counsel for the respondent then relied on Ss. 79 and 79(A) of the Act. His argument was that the declaration of the exclusive rights of the denomination was founded on usage and therefore it is a matter which falls within the purview of S. 79, as a consequence of which the machinery provided for in S. 79A for an adjudication of that dispute is the only remedy provided for in such a case and no other. Sections 79 and 79A of the Act, in our opinion, are not intended to provide a forum for the determination of the denominational rights of a community over the temple but are intended to apply to matters like the usage regarding the rituals, honours, perquisites, emoluments and so on. It is inconceivable that the legislature could have intended to give jurisdiction to the Board to consider and adjudicate upon rights of such a magnitude as rights of a particular denomination over a temple whether founded on usage or on other grounds by the simple and summary machinery provided under S. 79A of the Act. We are, therefore, of the opinion that there is no bar laid down by S. 79A of the Act either, so far as the relief for declaration is concerned.

(8) As regards the second relief, however, it no doubt falls within the purview of S. 79A and it is not open to the plaintiff to at once resort to a suit without going to the anterior process of getting an adjudication from the Board as provided by S. 79A of the Act. The learned advocate for the appellant (plaintiff) saw the force of this objections and was willing to give up this relief on behalf of his client. The relief must, therefore, be deleted from the plaint.

(9) From the foregoing it follows that the plaintiff is entitled to maintain the suit for the first of the reliefs set out above and the total dismissal of the suit by the learned Judge is not justified. The appeal therefore must be allowed and the decree of the lower court set aside, and the suit is remanded for disposal in the light of the observations contained in this judgment. The costs of this appeal will abide and follow the result of the suit in the trial Court. The appellant is entitled to a refund of the court fee paid by him on the memorandum of appeal.

C.R.K./B/D.H. Appeal allowed.

A. I. R. 1952 MADRAS 769

SUBBA RAO J.

Swaminatha Chettiar and another, Appellants v. Nagalingam Chettiar and another, Respondents.

Second Appeal No. 1058 of 1948, D/- 29-11-1951.

(a) Civil P. C. (1908), S. 34 — Award of interest in suit for dissolution of partnership — Defendant partner in possession of property after dissolution — No steps taken to collect outstandings — Interest to be awarded from date of plaint.

Though the ordinary rule in a suit for dissolution of partnership is to award interest only from the date when the amount due from the one to the other is ascertained, in a case where the suit is for an account in respect of a dissolved partnership, interest may be given even from the date of the filing of the plaint, if the circumstances in that case establish that the other partner was in possession of the assets or utilised them for the purpose of his business, or was otherwise guilty of latches. Where though the partnership was dissolved long ago the defendant partner did not take any steps to collect the outstandings or to enable the plaintiff partner to collect the outstandings or to pay off whatever was due to the plaintiff but instead he continued carrying on the business ignoring the severance of the plaintiff and took up an attitude even when the suit was filed which was absolutely unhelpful to the plaintiff, interest should be awarded from the date of the plaint. (Para 4)

Anno: Civil P. C., S. 34 N. 4.

(b) Civil P. C. (1908), S. 35 — Suit for accounts of a dissolved partnership — Defendant taking unhelpful attitude — Defendant directed to pay costs — Discretion held rightly exercised — Appellate Court held could not interfere. (Para 6)

Anno: Civil P. C., S. 35 N. 22.

R. Gopalaswami Iyengar, for Appellants; T. K. Subramania Pillai, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('31) 58 Cal 208: (AIR 1930 PC 185) 4
('43) 1943-1 Mad LJ 16: (AIR 1942 PC 61) 4
('47) 1947-2 Mad LJ 450: (AIR 1948 Mad 231) 4

JUDGMENT: This is a second appeal against the decree and judgment of the learned Subordinate Judge of Kumbakonam modifying those of the learned District Munsif of Velangiman at Kumbakonam in O. S. No. 139 of 1945.

(2) The first respondent filed the suit for accounts of a dissolved partnership. A preliminary decree was made on the 10th July 1946 upholding that the partnership was dissolved on 15th September 1944 and that the accounts of the partnership should be taken from 3rd February 1943 to 15th September 1944. Subsequent to the decree, a Commissioner had been appointed and he submitted a report. Various objections were taken to the Commissioner's report by both the parties. It is not necessary to consider all the objections raised, as we are concerned in the second appeal only with four of such objections.

(3) The first objection is that the learned Subordinate Judge was wrong in disallowing compensation for collections made by the defendants. The Commissioner in his report stated that the defendants should be given 1½ per cent of the collections as charges. The learned District Munsif held that the defendants did not incur any expenses in regard to the collections and, therefore, they are not entitled to any collection charges. With this view, the learned Subordinate Judge agreed. Mr. Gopalaswami Aiyangar contended that the defendants had taken a grave risk in supplying the goods to old constituents who owed sums to the partnership business, and that they did so only because they felt that that was the only method by which they could collect the amounts. He further stated that by so doing, in effect, the defendants credited the amounts subsequently paid by the constituents against earlier debts, with the result that the debtors of the partnership business became their own debtors.

But there is the other side of the picture. It is not suggested, nor there is any evidence in the case, that the constituents were in involved circumstances and that the debts and outstandings would have to be written off. Indeed, there is no evidence in this case to establish that the defendants, because of the course adopted by them, lost any money on that account. The defendants, who continued the business, necessarily would not give up the earlier constituents. The continuance of the business and its prosperity would depend upon their keeping earlier constituents and carrying on the business with them. In the circumstances of the case, what the defendants did was really to their advantage. The business they were carrying on in partnership with the plaintiff, they continued. There is also no evidence in the case to prove that the defendants had spent any additional amounts for the purpose of collecting the amounts due to the partnership before the plaintiff left it. In the circumstances, I agree with the court below that there is no justification for giving compensation towards the alleged charges incurred by the defendants.

(4) The second objection relates to interest. The District Munsif as well as the Subordinate Judge awarded interest from the date of the plaint. Learned counsel contended that the ordinary principle is that in a case of dissolution of partnership, the partners will be entitled to interest only from the date when the amounts due from the one to the other is ascertained. In support of his contention, he relied upon a decision of the Judicial Committee in 'SULEMAN v. ABDUL LATIF', 58 Cal 208 (PC). There, their Lordships ruled that the decree in a suit for dissolution of partnership and accounts should provide for payment of the interest on the amount due only from the date of the final decree by which the amount (if any) is found due and not from the date of the plaint. Satyanarayana Rao J. applied that principle in 'VEERASWAMI v. CHITTI NAIDU', 1947-2 Mad LJ 450. There, the plaintiff filed the suit for dissolution of an existing partnership and for accounts. The learned Judge held that he was entitled to interest on the amount decreed only from the date of the final decree and not from the date of the plaint.

The Privy Council distinguished their own decision 'SULEMAN v. ABDUL LATIF', 58 Cal 208 (PC) in 'HAKIM RAI v. GANGARAM', 1943-1 Mad LJ 16 (PC). In that case, the suit was brought nearly two years after the dissolution of the partnership against a former managing partner, who has been retaining in his hands and for his own purpose, the assets of the firm, without accounting for them or their proceeds to his partner. The Privy Council held that, in the circumstances, interest is properly chargeable against the accounting defendant, even though he has not acted fraudulently. They awarded interest to the plaintiff from the date of plaint until realisation. When 'SULEMAN v. ABDUL LATIF', 58 Cal. 208 (PC) was cited, the Privy Council distinguished that case on the following ground:

> "But that case was concerned with an ordinary suit for the dissolution and the winding up of the affairs of a going partnership. The present case is widely different. It is a suit brought nearly two years after the dissolution of the partnership against the former managing partner, who has been retaining in his hands and for his own purposes assets of the firm without accounting for them or their proceeds to his co-partner. In such a case interest is properly chargeable against the accounting defendant even though he has not acted fraudulently."

It is, therefore, clear that though the ordinary rule in a suit for dissolution of partnership is to award interest only from the date when the amount due from the one to the other is ascertained, in a case where the suit is for an account in respect of a dissolved partnership, interest may be given even from the date of the filing of the plaint, if the circumstances in that case establish that the other partner was in possession of the assets or utilised them for the purpose of his business, or was otherwise guilty of latches. In the present case the learned Subordinate Judge found on the evidence that "though the partnership was dissolved on 15th September 1944, the appellants did not take any steps to collect the outstandings or to enable the plaintiff to collect

the outstandings or to pay off whatever was due to the plaintiff. Instead, they continued carrying on the business ignoring the severance of the plaintiff and took up an attitude even when the suit was filed which was absolutely unhelpful to the plaintiff." On the aforesaid ground, the learned Subordinate Judge agreed with the learned District Munsif that interest should be awarded from the date of the plaint. I cannot say that the direction of the learned Judge is inconsistent or otherwise contrary to the principle recognised in 'HAKIM RAI v. GANGARAM', 1943-1 Mad. L.J. 16 (PC). In my view, interest has rightly been awarded to the plaintiff.

(5) The next objection relates to a sum of Rs. 332-4-6. It appears that this amount was due to the first defendant from the plaintiff in respect of their dealings prior to the starting of the suit business. Learned counsel for the appellants contended that this item is an item in the partnership accounts and, therefore, the court should have allowed this item in his favour. But a scrutiny of the accounts discloses that this item was not brought into the partnership accounts at all. Ex. D. 1 dated 12-4-1943 is an account of the plaintiff in the personal account of the first defendant. This amount finds a place in that account. That item was brought into the partnership account only under Ex. P. 6 dated 21st May 1945. It was held that the partnership was dissolved on 15th September 1944. This item therefore obviously cannot form an item in the accounting between the partners.

(6) The last objection relates to costs. Learned counsel contended that costs of the parties should have been directed to come out of the partnership assets and that the lower court was wrong in directing the appellants to pay the costs of the plaintiff. The learned Judge gave sufficient and valid reasons for awarding costs in the manner he did. He followed the correct principle and directed the appellants to pay the costs because, in his view, the appellants took up a hostile and unhelpful attitude, and even stated that the plaintiff could not maintain the suit. It is well settled that the appellate court will not interfere with an order for costs, unless the order of the Subordinate Court is contrary to any well recognised principle of law.

(7) In the circumstances, I do not see any reasons for interference in second appeal. The second appeal is dismissed with costs. (No leave).

C.R.K./B/R.G.D. Appeal dismissed.

***A. I. R. 1952 MADRAS 771**

FULL BENCH

RAJAMANNAR C. J.; CHANDRA REDDI AND VENKATARAMA AIYAR JJ.

Chittam Subba Rao, Petitioner v. Vela Mankanni Chelamayya, Respondent.

Civil Misc. Petn. No. 7265 of 1951, D/- 7-3-1952.

†* (a) Constitution of India, Art. 133 — Affirmance — Meaning of — (Civil P. C. (1908), S. 110).

If the requirements of pecuniary valuation are satisfied, an appellant is entitled, as of right, to leave to appeal to the Supreme Court if the decree of the Court of first instance is modified substantially by the decree of the High Court, where the matter in respect of which it has been modified is a matter in dispute before the Supreme Court irrespective of the fact whether the modification is in favour of the applicant or not and although no substantial question of law is involved. But if the modification is in respect of a matter not comprised in the subject matter still in dispute on appeal to the Supreme Court the applicant is not entitled to leave as of right. Case law discussed; observations of Raghava Rao J. in AIR 1950 Mad 124, Not approved. (Paras 14, 22)

Anno: C. P. C., S. 110 N. 13.

(b) Interpretation of Statutes — Reasonable construction — Civil P. C. (1908), Pre.

In construing a statutory provision speculations ought not to enter about what the legislature may or may not have intended apart from what it has expressed by the language that it has employed. Court cannot add to the language actually employed and thus give an unwarranted extension to the scope of a statutory provision. At the same time the letter and the statutory provisions should not compel a court to an unreasonable construction if it is possible to take a reasonable view by taking the letter of the provision along with its substance. (Para 16)

Anno: C. P. C., Pre. N. 7.

Ch. Sankara Sastri, for Ch. Suryanarayana Rao and Ch. Ramakrishna Rao, for Petitioner; P. Satyanarayana Raju, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('24) 51 Cal 969: (AIR 1925 PC 60) 12, 16, 19
('27) 6 Pat 24: (AIR 1926 PC 93) 20
('04) 8 Cal WN 294 13
('27) AIR 1927 Cal 543: (103 Ind Cas 65) 16
('32) 35 Mad LW 206: (AIR 1932 Mad 46) 6, 15, 16, 17
('37) ILR (1937) Mad 121: (AIR 1936 Mad 881) 7, 15, 17
('38) 1938-1 Mad LJ 487: (AIR 1938 Mad 631) 8, 15
('40) 1940-1 Mad LJ 857: (AIR 1940 Mad 483 FB) 21
('47) ILR (1947) Mad 6: (AIR 1946 Mad 539 FB) 9, 15, 17, 19
('47) ILR (1947) Mad 744: (AIR 1947 Mad 227) 10, 15, 16
('50) ILR (1950) Mad 381: (AIR 1950 Mad 124) 11, 15, 16

RAJAMANNAR C. J.: This application for leave to appeal to the Supreme Court of India against the judgment and decree in Appeal No. 253 of 1947 on the file of this court originally came on before Subba Rao and Panchapakesa Aiyar JJ. who had disposed of the appeal. The learned Judges found there was a conflict of decisions of Division Benches and have referred the following question to a Full Bench:

"Whether an appeal will lie as of right to the Supreme Court from any judgment, decree or final order of the High Court if the decree of the first court is modified in favour of the applicant but in other respects confirmed and if the requirements of the pecuniary valuation are satisfied, but no substantial question of law is involved."

(2) To understand the scope of the question referred, it is necessary to mention the relevant facts. App. No. 253 of 1947 arose out of a suit O.S. No. 43 of 1946 instituted in the court of the Subordinate Judge of Ellore by the respondent to this application, Chalamayya against the applicant Subba Rao and five others for a declaration that a Will dated 23rd December 1944, Ex. D. 7,

alleged to have been executed by Kalla Samoamurthi in favour of the first defendant, Subba Rao, was false and forged and that the first defendant obtained no rights thereunder and for possession of the properties set out in schedules B and C to the plaint, for recovery of mesne profits and for directing the first defendant to render an account of the monies of the deceased Sambamurthi in his hands. The respondent relied upon another Will, Ex. P. 1, alleged to have been executed by the said Sambamurthi in his favour on 28th November 1944. The learned Subordinate Judge decreed the suit holding that Ex. D. 7 was not a true Will and that Ex. P. 1 was the last Will and testament of the said Sambamurthi. That decree in so far as it is material runs as follows:

"1. The plaintiff do recover possession of the plaint B schedule properties from the defendants,
2. The plaintiff be not entitled to recover possession of the C schedule properties,
3. The first defendant do render an account of the monies of Sambamurthi in his hands."

In the appeal to the High Court from this decree by the first defendant (Appeal No. 253 of 1947) this court set aside the decree of the trial court in so far as it granted the relief of accounting against the first defendant but upheld the finding of the trial court as regards the Wills. The result was that the decree of the lower court was modified by deletion of the clause relating to accounting. The first defendant, the appellant in Appeal No. 253 of 1947, seeks to appeal to the Supreme Court against this decree. It is common ground that the value of the subject-matter of the suit in the court of first instance as well as the value of the subject-matter in dispute on appeal to the Supreme Court is upwards of Rs. 20,000. It is also clear, and the learned Judges who made the reference proceeded on the footing, that no substantial questions of law were involved in the appeal.

(3) The provision which now embodies the right of appeal to the Supreme Court is Article 133 of the Constitution. Clause 1 of that Article runs thus:

"An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies — (a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law, or (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or (c) that the case is a fit one for appeal to the Supreme Court; and when the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

Substantially this reproduces the provisions of Ss. 109 and 110, C. P. C. as they stood on the date of the commencement of the Constitution. The only alteration which needs notice is that instead of the words "the amount or value of the subject matter of the suit in the court of first instance" which occurs in S. 110, C.P.C. we have the words "the amount or value of the subject matter of the dispute in the court of first instance" and in lieu of the words "and the amount or value of the subject matter in dispute on appeal" the following words were substituted, namely, "and still in dispute on appeal."

(4) The decision of the question now referred to us depends upon the construction of the following words in Art. 133 namely:

"Where the judgment, decree or final order appealed from affirms the decision of the court immediately below."

Though the words apparently look clear and simple, there has been not a little divergence of judicial opinion as to their construction. Difficulties have always arisen on account of the peculiar facts of each case and not often the decision in each case has not been completely unaffected by a consideration of the reasonableness of the conclusion which would follow on the adoption of one or other of the possible constructions.

(5) I think it is useful to refer to the leading decisions of this court on this question. I shall first set out the actual decision in each of the cases without commenting on the observations in the several judgments and then try to ascertain if there is a real conflict in principle and if there is, on what point or points.

(6) The earliest case to which I need refer is that in — 'Perichiappa Chettiar v. Nachiappan', 35 Mad. L. W. 206. In a suit for account against an agent the plaintiff valued his claim at Rs. 40,000. The trial court passed a decree in favour of the plaintiff for Rs. 5682. Against this decree the defendant appealed to the High Court and the plaintiff preferred a memorandum of cross objections claiming a decree for a further amount. He valued his memorandum at Rs. 20,000. The High Court allowed the defendant's appeal in part and reduced the amount decreed by the trial court by about Rs. 4,000, allowed the cross objections preferred by the plaintiff only to a small extent of Rs. 150 and dismissed it in respect of the remaining sum of Rs. 19850. The plaintiff applied for leave to appeal to the Privy Council. It was held by Reilly and Ananthakrishna Aiyar JJ. that the plaintiff was entitled to leave as of right under S. 110 C.P.C. It may be observed here that the decree of the trial court as for a certain amount of money ascertained as a result of taking an account. The High Court's decree was for a different amount.

(7) The next case is — 'Venkitaswami v. Sakkutti', I.L.R. (1937) Mad. 121. There was a suit on a mortgage bond executed by the first and fourth defendants, one of the sons and the widow of a deceased Hindu. The suit was brought not only against them but also against the second defendant who was another son of the deceased and the third defendant, the son of the first defendant. The trial court passed a decree for the full amount claimed against the first and fourth defendants. The second and third defendants were held liable only for a small portion of the debt. The plaintiff filed an appeal to the High Court against all the defendants. The High Court confirmed the decree of the trial court as against defendants 1, 2 and 4, but reversed the decision of the lower court as regards the third defendant and held that his share in the joint family properties was liable almost for the full amount claimed. The plaintiff applied for leave to appeal to His

Majesty in Council against the judgment of the High Court in so far as his claim against the second defendant was disallowed. He had already obtained practically all he claimed against defendants 1, 3 and 4. It was held by Venkatasubba Rao and Cornish JJ. that the application was unsustainable inasmuch as the decree against the second defendant was one of affirmance and there was no substantial question of law involved.

(8) In — 'Chavali Velayya v. Board of Commissioners, H. R. E., Madras', 1938-1 Mad L J 487 the petitioners in the application for leave to appeal had claimed title to five plots bearing distinct survey numbers. The court of first instance held that these five items belonged to the deity and not to the petitioners who were the 'archakas.' On appeal the High Court upheld the petitioners' claim as regards two of the items but confirmed the decision of the court below as regards the remaining three items. The appeal to His Majesty in Council therefore related only to the three items as to which the High Court's decree had affirmed the lower court's decision. It was held by Venkatasubba Rao and Abdur Rahman JJ. that leave could not be granted as the decree of the High Court must be deemed to have affirmed the decision of the trial court and there was no substantial question of law involved.

(9) The decision in — 'Gangadhara v. Subramania', I.L.R. (1947) Mad. 6 (F.B.), is that of a Full Bench. One S filed a suit for a declaration that eleven items of property described in the plaint schedule belonged to the estate of one Sundaram Aiyar and that a deed of settlement executed by Sundaram Aiyar's mother in respect of these properties was void. The plaintiff claimed the properties as the reversioner of Sundaram Aiyar. The trial Court decreed the suit in respect of six of the eleven items but dismissed the rest of the claim. Defendants 2, 3 and 4 appealed to the High Court in respect of the six items decreed to the plaintiff. The plaintiff in his turn filed a memorandum of cross objections claiming four of the five items disallowed by the trial court. The appeal was dismissed but the memorandum of cross objections was allowed and the suit was decreed in respect of ten of the eleven items claimed.

The second, third and fourth defendants sought a certificate permitting an appeal to His Majesty in Council. It was contended by the plaintiff that the petitioners had a right of appeal only with regard to the four items in respect of which this court had reversed the decision of the court below, but they were not entitled to a certificate so far as six of the items in respect of which the High Court had affirmed the decision of the lower court were concerned. It was held by a Full Bench to which I was a party that the petitioners were entitled to a certificate as the decree of the High Court was not one of affirmance.

(10) 'Lakshmanan v. Thangam', I.L.R. (1947) Mad. 744 was a case in which the decree of the trial court was affirmed 'in toto' except for a slight variation made in the matter of certain debts alleged to be due by the family. The application for leave to appeal to His Majesty in Council was by defendants 1 and 3 to 9 and the variance made by this court was entirely in their favour. In fact, this question did not form part of the subject matter in dispute in the proposed appeal, which was confined to certain properties in schedule C with regard to which the High Court completely affirmed the decree of the trial court. The learned Judges, Wadsworth O. C. J. and Yahya Ali J. considered that the decree of the High Court with regard to the matters on appeal to the Privy Council was one of affirmance within the meaning of Section 110, C. P. C.

(11) The last of the reported cases on the point is — 'Viraraghava Rao v. Narasimha Rao', I.L.R. (1950) Mad. 381. In this case the suit was for eviction of the defendants from a picture house and for damages. The defendants resisted the suit mainly on the ground that they were entitled to the protection given to tenants under the Madras Rent Control Act. The trial court negatived the defence and decreed the suit in favour of the plaintiff with damages at the rate of Rs. 200 per day. There was an appeal by the defendants in which the High Court agreed with the lower court that the defendants were not tenants, but on the quantum of damages the lower court's decree was modified in favour of the defendants by a reduction of the rate from Rs. 200 to Rs. 50 per day. The defendants applied for leave to appeal to the Federal Court. It was held by Horwill and Raghava Rao JJ. that they were entitled to get leave as of right even though no substantial question of law was involved in the appeal, as the decree of the High Court was not one of affirmance. The proposed appeal was in respect of both damages and eviction.

(12) All the above decisions as well as other decisions dealing with this question almost invariably refer to the ruling of the Privy Council in — 'Annapurnabai v. Ruprao', 51 Cal 969 (P.C.). In that case the suit was for recovery of possession of certain properties on the ground that the plaintiff was the validly adopted son of one Shankar Rao. The first defendant was the junior widow of Shankar Rao and the second defendant was alleged to have been adopted to Shankar Rao by the first defendant. They denied the adoption alleged by the plaintiff and set up the adoption of the second defendant. Further the first defendant, the widow claimed to be entitled to Rs. 3000 per annum for maintenance out of the estate. The trial court held that the plaintiff's adoption was true and the alleged adoption of the second defendant was not proved. It however held that the first defendant was entitled to maintenance at the rate of Rs. 800 per annum. There was an appeal to the court of the Judicial Commissioner. The appellate court modified the decree as regards maintenance by increasing the rate from Rs. 800 to Rs. 1200 per annum and in other respects the decree was confirmed.

The defendants applied for leave to appeal to the Privy Council, but their application was dismissed on the ground that the decree of the first court had been affirmed except in respect of a small change in favour of one of the applicants and that no question of law was involved. Thereupon the defendants applied to the Privy Council for special leave. The argument of Sir George Lowndes for the petitioners was that the appellate court did not affirm the decree of the first court but varied it and consequently it was not material under S. 110, C. P. C. whether any substantial question of law was involved. But having regard to the concurrent findings the petitioners desired to appeal only with regard to the amount of the maintenance. The respondent did not appear. Special leave to appeal was granted but was limited to the

question of maintenance. In delivering the judgment of their Lordships, Lord Dunedin observed:

"In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of S. 110, C. P. C. is correct. They had therefore a right of appeal."

(13) From this cryptic judgment much has been sought to be inferred by the courts in India. To my mind the only principle which that ruling established is that if in respect of a matter in controversy between the parties there has been a variation by the High Court in favour of either party then it is not permissible to dissect the matter into two artificial parts, namely, the part in respect of which there has been an affirmance & the part as regards which there has not been. This artificial dissection was the basis adopted in the earlier case of — 'Raja Sree Nath Roy v. Secy. of State', 8 Cal. W. N. 294 and it must be deemed to have been overruled by the Privy Council. If there is one single claim, say, for maintenance or damages or for the recovery of property based on a particular title and the trial court passes a decree granting the plaintiff a partial relief and on appeal the High Court modifies the decree by altering the relief, then there is a right of appeal without any substantial question of law being involved in the case. This variation need not be against the party applying for leave. It may be in his favour, though not entirely in his favour. This was all that was decided in that case. One important fact must not be overlooked in applying the principle laid down by the Privy Council in that case and that is that the matter in respect of which there had been a variation was a matter still in dispute and formed part of the subject matter of the appeal to the Privy Council.

(14) Now, in my opinion, there is no real conflict between any of the decisions, as such of this court mentioned by me above apart from observations made in them. Every one of these decisions can be supported by the application of certain common principles. These principles may be briefly stated thus:

1. If the judgment or decree of the High Court varies the decision of the lower court in respect of a matter in controversy in the proposed appeal to the Privy Council, then there is a right of appeal not only to the person against whom the variation has been made, but even to the party in whose favour the variation has been made. But it is necessary that the matter in respect of which there has been a variation should be the subject matter of the proposed appeal to the Privy Council.

2. A matter in controversy cannot be split up or analysed or dissected into component parts or arbitrary divisions. The true test will be to determine the nature of the dispute or controversy.

3. If the matter in respect of which there has been a variation is not the subject matter of the proposed appeal, then such variation would not confer a right of appeal. As regards matters unconnected with the matter in respect of which there has been a variation 'Ex hypothesi' this will be the case when the variation has been completely in favour of the applicant.

(15) Every one of the decisions can be justified by an application of the principles I have set out. In — 'Perichiappa Chettiar v. Nachiappan', 35 Mad. L. W. 206 there was only one matter in controversy, namely, what was the amount due to the plaintiff from the defendant, his agent. The trial court found that Rs. 5682 was the amount due, whereas the High Court decreed a different sum. There was therefore a clear variation in respect of the matter on appeal to the Privy Council. In — 'Venkitaswami v. Sakkutti', I.L.R. (1937) Mad. 121 the suit was against four defendants. The trial court had passed a decree against the 1st and 4th defendants but had practically dismissed the suit as against the 2nd and third defendants. On appeal the High Court confirmed the decree in so far as defendants 1, 2 and 4 were concerned, but reversed the decision of the lower court as regards the third defendant. This reversal was in favour of the plaintiff. The subject matter of the proposed appeal to His Majesty in Council was the plaintiff's claim against the second defendant only. The question therefore was the liability of the 2nd defendant. So far as that was concerned the decree of the High Court had affirmed the decision of the trial court. There was no doubt a variation made by the High Court, but that was in respect of the third defendant against whom the plaintiff obtained all the relief that he could and was satisfied with such relief. Therefore the plaintiff's claim as against the third defendant could not be and was not a part of the proposed appeal to the Privy Council.

The learned Judges held that so far as the second defendant was concerned, the decree of the High Court was one of affirmance. — 'Chavali Velayya v. Board of Commrs. H. R. E., Madras', 1938-1 Mad. L. J. 487 may at first sight appear to strike a different note. But on a closer analysis it will be evident that that decision also can be explained in the light of the principles set out above. In that case no doubt the petitioners had claimed title to five plots of land, but they based their title on the same grant. The plea of the contesting defendants was that the grant was in favour of the deity and not the petitioners who were the Archakas. The question therefore related to the construction of the grant, namely, whether the grant was to the deity or to the archakas. The High Court agreeing with the court below held that the grant was to the deity. But they excluded two of the five items on the ground that they had been inadvertently included owing to a mistake and that the grant did not comprise them. So, on the question in controversy, namely, whether the grant was to the archakas or to the deity there was an affirmance of the decision of the court below. The application for leave was therefore rightly dismissed.

It may also be observed that the two items in respect of which the High Court had allowed the appeal did not form part of the subject matter of the appeal to the Privy Council. In the Full Bench case in — 'Gangadhara v. Subramania', I.L.R. (1947) Mad. 6 (F.B.) the matter in controversy was as regards the properties which belonged to the estate of the last male holder. Eleven items were claimed to belong to his estate. The trial court held that six of the said items belonged to the estate. But on appeal ten of the items were held to belong to the estate. The defendant's application for leave was granted because there had been a variation by the High Court of the decree of the trial court. Though there were several items the matter in controversy must be deemed to be only one, viz., what were the properties belonging

to the deceased holder. It may be remarked in passing that there was a prayer in the plaint that a deed of settlement executed in respect of these properties was void. The settlement covered all these items, but the only controversy was whether the settlement was void in part or entirely. There was a variation on this question and therefore it was held that the petitioners were entitled to leave to appeal.

Here again, the matter in controversy was also the subject matter of the appeal to the Privy Council. In — 'Lakshmanan v. Thangam', I.L.R. (1947) Mad. 744, though there was a variance made by the High Court the matter in respect of which there was variance did not form part of the subject matter in dispute in the proposed appeal. The learned Judges therefore refused to grant leave. In — 'Viraraghava Rao v. Narasimha Rao', I.L.R. (1950) Mad. 381 one of the matters in controversy, which however was also included in the subject matter of the proposed appeal, was the quantum of damages, and there had been a variation as to this. The petitioners were therefore entitled to leave as of right.

(16) It will thus be seen that none of the decisions as such in the cases above cited is in conflict with the others. I am in entire agreement with the following statement of the law on the point by Yahya Ali J. who delivered the judgment on behalf of the Division Bench in — 'Lakshmanan v. Thangam', I.L.R. (1947) Mad. 744:

> ".....When the appellate decree modifies the original decree upon a single point and that completely in the appellant's favour so that he has no further grievance in that matter, he cannot have, because of that modification, a right of appeal on other points on which the courts have concurred, without showing that there is a substantial question of law involved."

The decision in — 'Viraraghava Rao v. Narasimha Rao', I.L.R. (1950) Mad 381 can be supported on the basis of this legal position. In fact, of the two learned Judges one of them, Horwill J. expressly accepted and followed the ruling in — 'Lakshmanan v. Thangam', I. L. R. (1947) Mad. 744. The other learned Judge, Raghava Rao J. said,

> ".....it goes without saying that even on the narrower view adopted by this court in — 'Lakshmanan v. Thangam', I. L. R. (1947) Mad. 744 which is what my learned brother is prepared to accept, the applicant is entitled to the certificate asked for, because this is not a case of complete variance of the lower court's decree on the question of damages, which leaves no further grievance to be agitated in this regard before a higher tribunal."

It only remains to consider the observations of Raghava Rao J. in — 'Viraraghava Rao v. Narasimha Rao', I.L.R. (1950) Mad. 381 on the construction of the provision under discussion. At the outset I may say that I entirely agree with him that in construing a statutory provision speculations ought not to enter about what the legislature may or may not have intended apart from what it has expressed by the language that it has employed. I am also of opinion that courts cannot add to the language actually employed & thus give an unwarranted extension to the scope of a statutory provision. At the same time I do not think that the letter of the statutory provisions should compel a court to an unreasonable construction if it is possible to take a reasonable view by taking the letter of the provision along with its substance. For instance, take a case where the High Court confirms substantially the decision of the court below but makes a formal modification or corrects an inadvertent error, practically on the consent of both the parties, even then, applying the letter of the law should we hold that the judgment of this court is not a decree of affirmance? I am not clear if the view of the learned Judge is that we should hold so because of the decision of the Privy Council in — 'Annapurna Bai v. Ruprao', 51 Cal 969 (P.C.).

I think one should not construe the short pronouncement of Lord Dunedin in that case as if it were in itself a statutory provision. That pronouncement must be understood having regard to the facts of that case, and so understood I am of opinion that Rankin C. J.s view in — 'Narendralal v. Gopendra', A.I.R. 1927 Cal. 543 is "logical, simple and reasonable and not illogical, laboured and not particularly well reasoned" as Raghava Rao J. thinks (see page 395). With all respect to that learned Judge I do not agree with him that Rankin C. J. was in any way delimiting the effect of the Privy Council decision in a manner not warranted by the plain language of their Lordships. I do not also agree with him that the reasoning in — 'Perichiappa Chettiar v. Nachiappan', 35 Mad. L. W. 206 is in any way inconsistent with the view of Rankin C. J. in — 'Narendralal v. Gopendra', A.I.R. 1927 Cal. 543. That reasoning must again be taken with the facts of the case before the learned Judges. The learned Judges repelled the attempt to construe the last clause of S. 110, C. P. C. as if it ran,

> "Provided that so far as the decree or final order appealed from in respect of any separable part of the case affirms, etc., and that if that part involved no substantial question of law it should be excluded in calculating the necessary Rs. 10,000."

So far I am in entire agreement. But I do not see how it follows from the reasoning in — 'Perichiappa v. Nachiappan', 35 Mad. L. W. 206 that a party who feels aggrieved by the decision of the High Court on a particular matter is entitled as of right to appeal to the Privy Council (or Supreme Court) in respect of that matter on the ground that in respect of some other matter there has been a variation made by the High Court, though no substantial question is involved as regards the matter in dispute on appeal to the Privy Council (or Supreme Court).

(17) With all respect to the learned Judge and after re-reading carefully the judgment of the Full Bench in — 'Gangadhara v. Subramania', ILR (1947) Mad 6 (FB) (and I was one of the Bench), I am unable to follow Raghava Rao J. when he says that the effect of that decision is that it has accepted — 'Perichiappa Chettiar v. Nachiappan', 35 Mad L W 206 in preference to — 'Venkitasami v. Sekutti', ILR (1937) Mad 121. Besides I am wholly intrigued by the way in which that learned Judge disposes of the decision in — 'Venkitaswami v. Sakkutti', ILR (1937) Mad 121. Apparently, he is not prepared to hold that the decision in that case was wrong. In the face of the express statement of the Full Bench that there was no reason to question the correctness of that decision it would not have been open to the learned Judge to say that the decision was not correct. Then, how does he support that decision even on the basis of what he

calls "the peculiar facts of that case?" The learned Judge says:

"The decision in — 'Venkataswami v. Sakkutti', ILR (1937) Mad 121 was, in other words, held correct, because the party seeking leave i.e., the plaintiff, sought to take advantage of the High Court's reversal of the decree of the trial court against the third defendant for making out a right of appeal against the second defendant, against whom he had concurrently lost in both the courts."

I take it that this is the learned Judge's justification of that decision. Alongside the above remarks I shall place the following observations of the learned Judge in the next page,

"The true view to take of the matter in the existing state of the case law of this court and with due regard, in particular, to the Full Bench ruling in — 'Gangadhara v. Subramania', ILR (1947) Mad 6 F. B. is that if 'quoad' the party seeking leave to appeal, the decree sought to be appealed against is not one of wholesale affirmance, it does not matter in what particular or to what extent the variation has taken place or whether the variation wholly or to the extent to which it has gone is in favour of the party seeking to appeal or against him."

(18) With due deference to the learned Judge I have tried to reconcile but have not been able to succeed in reconciling these two statements.

(19) I am of opinion that there is nothing in the language of the statute or in the ruling of the Judicial Committee in — 'Annapurna Bai v. Ruprao', 51 Cal 969 (PC) or in the judgment of the Full Bench in — 'Gangadhara v. Subramania', ILR (1947) Mad 6 (FB) which is inconsistent with the principles which I have set out earlier in this judgment. I think it a very reasonable view to take that in coming to a decision on the question of affirmance, the subject matter of the appeal to the Privy Council (or the Supreme Court) is a relevant factor, though it is not permissible to dissect a matter in controversy into its component parts or make an artificial division of the matter into parts and to hold that as regards one part there has been affirmance and as regards the other part there has not been. The matter in controversy should be taken in its entirety.

(20) It may happen sometimes that the subject matter of the appeal to the Privy Council (or the Supreme Court) comprises more than one matter in dispute. Suppose there has been a variation in respect of one of these matters only, then is the party entitled to leave as of right even though no substantial question of law is involved? My answer is yes, because it is not open to this Court to direct that the appeal should be confined only to a part of the subject matter of the proposed appeal. If as regards one matter in dispute the judgment of this court is not one of affirmance, then the aggrieved party is entitled to leave. Now, it is well established that an appeal to the Privy Council (Supreme Court) can only be filed against a judgment and decree of this court. Even though only a portion of the judgment or decree is challenged, nevertheless, the appeal is against the judgment and decree. The following observations of Viscount Dunedin make this clear:

"The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree and the decree alone." — 'Jowad Hussain v. Gendan Singh', 6 Pat 24 (PC) at pages 27-28.

(21) I may give as an analogous instance the case of an admission of a second appeal. If there is a substantial question of law as regards one of the matters in dispute, this court is bound to admit the second appeal. But it cannot purport to admit it only on that point, because the second appeal is preferred against the judgment and decree of the lower appellate court, vide — 'Eswariah v. Rameswarayya', 1940-1 Mad L J 857 (FB).

(22) My answer to the question referred to the Full Bench is as follows:

If the requirements of pecuniary valuation are satisfied, an appellant is entitled as of right to leave to appeal to the Supreme Court if the decree of the court of first instance is modified substantially by the decree of the High Court, where the matter in respect of which it has been modified is a matter in dispute before the Supreme Court irrespective of the fact whether the modification is in favour of the applicant or not and although no substantial question of law is involved. But if the modification is in respect of a matter not comprised in the subject matter still in dispute on appeal to the Supreme Court, the applicant is not entitled to leave as of right.

C.R.K./A/D.H. Answer accordingly.

A. I. R. 1952 MADRAS 776

SATYANARAYANA RAO J.

M. Thirumaleshwara Bhatta, Appellant v. Balike Govinda Bhatta and others, Respondents.

Appeal No. 426 of 1948, D/- 4-2-1952.

Provincial Insolvency Act (1920), S. 28 — Insolvency of Hindu father — Power of Official receiver to sell son's interest.

On adjudication of the father as an insolvent not only the share of the father but also the power of the father to dispose of the share of the son would vest in the Official Receiver under S. 28. But the mere fact that the order of the adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father for the son's share would not by itself convey to the auction-purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. Where in the sale list it is said in the preamble that what is purported to be sold is the entire right possessed by the insolvent in the immoveable properties described in the schedule, so also if in the sale deed, it is definitely stated that what is being conveyed is the property belonging to the insolvent under 'Muli mula geni and janmi' right of which the creditor became the auction purchaser. The sale will be confined to the right of the insolvent in the property and will not extend to the share of the son. Further the power of sale of the father is dependent upon the existence of coparcenary and if

that coparcenary is terminated by division in status, the power ceases to exist. When prior to the date of sale the son issued a notice to the father demanding partition of the property, this would bring about division in status and prevent the Official Receiver from exercising the power of sale. (Paras 3 & 4)

Anno: Pro. Insolvency Act S. 28 N. 5.

T. Krishna Rao, for Appellant; K. Y. Adiga and K. P. Adiga, for Respondents.

REFERENCE: Para

('43) ILR (1943) Mad 83: (AIR 1942 Mad 682 FB). 3

JUDGMENT: The second defendant is the appellant in this appeal. The first plaintiff is the son of the first defendant. They were members of a joint undivided Hindu family. On the 27th of April 1938 (Ex. B. 25) the father and the son executed a trust deed in respect of their family properties in favour of their family deity, Shri Sankaranarayana Devaru constituting themselves trustees on behalf of the God. Thereupon the second defendant who was a creditor of the first defendant filed I. P. No. 11 of 1938, Sub-Court, South Kanara on the 26th of July 1938, Ex. B. 26 to adjudicate the first defendant an insolvent. The deed of trust was relied on as constituting an act of insolvency.

On the 15th of November 1939, the first defendant was adjudicated an insolvent, (Ex. B. 27). The Official Receiver in whom the property became vested then filed R.I.A. No. 95 of 1940 to set aside the deed of trust under Ss. 4, 5, 53 and 54 of the Provincial Insolvency Act on the 10th January 1940, Ex. B. 28. The God was impleaded as a respondent represented by the first plaintiff as its trustee. The respondent was ex parte in that application and after examining one witness the trust deed was set aside as having been brought into existence to defraud the creditors of the first defendant. The order of the Court is dated 28th January 1941. In April 1941 the Official Receiver took steps to bring the properties to sale. The sale was fixed on 28th May 1941 and was actually held on 31st of May 1951 in which the second defendant became the purchaser for a sum of Rs. 2850 subject to a prior mortgage. On the 2nd of July 1941 the Official Receiver executed the sale deed, Ex. B. 39 in favour of the second defendant. On 13th August 1941 the first plaintiff surrendered the entire property to the second defendant and the second defendant came into possession of the property.

(2) On the 14th of October 1943 the present suit was filed by the first plaintiff claiming a half share in the suit properties as the trust deed was set aside by the Insolvency Court. The second defendant resisted the suit. The Official Receiver was impleaded as the third defendant. The second defendant claimed that by reason of his purchase he was entitled not only to the share of the insolvent but also to the share of the son and that in any event the trust deed was valid at least between the first plaintiff and the second plaintiff to the extent of half share and that the first plaintiff was not entitled to any relief. On this objection the second plaintiff was impleaded as a party. The learned Subordinate Judge held that the purchase by the second defendant was effective only to vest the father's 'share' in him and that he was not entitled to the son's share. A decree for partition was granted in favour of the first plaintiff. The second defendant now appeals to this court.

(3) There are two points which arise for consideration in this appeal. The first point is whether the sale by the Official Receiver conveyed to the second defendant not only the share of the father but also the share of the son. At the time the suit was instituted in the lower court the law was as laid down by the Full Bench of this Court in 'Rama Sastrulu v. Balakrishnarao', ILR (1943) Mad. 83 (FB) that the insolvency of the father would not vest in the Official Receiver the power of the father to sell the son's share for the discharge of the debts binding on the son either on the ground of necessity or on the ground of pious obligation. The law has since been altered by the Amending Act which has restored the position to what it was before the decision of the Full Bench. It must, therefore, be taken that the law is that on adjudication of the father as an insolvent not only the share of the father but also the power of the father to dispose of the share of the son would vest in the Official Receiver under S. 28 of the Provincial Insolvency Act. The question that has to be decided in this case is not whether the power had vested in the Official Receiver but whether the Official Receiver in fact purported to exercise that power and intended to convey the share of the son as well to the purchaser. This has to be gathered from the proclamation of sale and from the sale deed actually executed by the Official Receiver.

In Ex. B. 5 the sale list dated 28th May 1941 it is said in the preamble that what was purported to be sold was the entire right possessed by the said insolvent in the immoveable properties described in the schedule. The sale was, therefore, confined to the right of the insolvent in the property and did not extend to the share of the son. No doubt in the schedule the entire property was described. In the sale deed, Ex. B. 39 it is definitely stated that what was being conveyed was the property belonging to the insolvent under 'muli mula geni and janmi' right of which the second defendant became the auction purchaser. Reference, no doubt, was made to the cancellation of the trust deed in the insolvency proceedings but that would not affect the question if in fact what the Official Receiver intended to sell and did sell was only the insolvent's right in the property. If he had conveyed not merely the insolvent's right but also the right of the son it could very well be presumed that he purported to exercise the right to sell the right of the father to sell the son's share as well. But in the absence of any specific language in the deed conveying the interest of the son in the property or in the absence of any other indication in the deed from which the intention to convey the larger estate could be gathered it is impossible to uphold the contention urged on behalf of the second defendant by Mr. Krishna Rao that this deed vested in the second defendant not merely the share of the father but also the share of the son as well.

In my opinion the mere fact that the order of the adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father for the son's share would not by itself convey to the auction purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that

power of sale and did in fact sell the son's share as well. In these circumstances in my opinion the view taken by the lower court that the son's share did not vest in the second defendant by virtue of the sale is correct.

(4) There is also another objection which in my opinion, is also well founded though it was not definitely taken on behalf of the plaintiff in the plaint. On the 19th of May 1941, that is, prior to the date of sale the first plaintiff issued a notice to the first defendant demanding partition of the property. This would bring about division in status and prevent the Official Receiver from exercising the power of sale. The power of sale of the father is dependent upon the existence of coparcenary and if that coparcenary is terminated by division in status, the power ceases to exist. This notice no doubt, was produced by the first defendant when he was in the witness box but I find absolutely no cross-examination on the point suggesting that it was ante-dated and brought into existence collusively which is the contention now urged on behalf of the appellant. It is a registered notice issued on behalf of the first plaintiff on the 19th of May 1941 and received by the father. The learned Subordinate Judge notwithstanding the fact that this question was not specifically raised in the pleadings accepted the notice as genuine and I see no reason to differ from his conclusion. This is an additional reason for holding that the share of the son did not vest and could not vest by reason of the sale by the Official Receiver in the second defendant. The view taken by the lower Court on both the points is correct and the appeal fails and is dismissed with the costs of the first defendant.

C.R.K./B/D.H. Appeal dismissed.

A. I. R. 1952 MADRAS 778

SUBBA RAO J.

N. Balaraman, Petitioner v. Corporation of Madras, Respondents.

Writ Petn. No. 581 of 1951, D/- 30-11-1951.

Constitution of India, Art. 226 — Order passed with giving opportunity to petitioner to put forward his case — Municipalities — Madras City Municipal Act (IV(4) of 1919), Ss. 287, 365 and 366.

Issuing an order or refusing to issue a license is of quasi-judicial nature and the Commissioner will have to comply with the provisions of the Act and also shall give reasons for his refusal. Against the order of refusal, a statutory right of appeal is given to the Standing Committee. If the order of the Standing Committee is against the view expressed by the Commissioner he can refer the matter to the Council whose order will be final. When a tribunal is entrusted with quasi-judicial functions affecting the rights of parties, it is the elementary principle that the said tribunal should give an opportunity to the person affected to put forward his case. Any decision made by such a tribunal without giving that opportunity is contrary to the principles of natural justice and is liable to be set aside. But the procedure which a tribunal is to follow depends upon the functions, the character and the administrative convenience of the tribunal. It is not possible to equate the council to a Court of law, and insist upon that tribunal to follow and adopt the rules of judicial procedure adopted and followed by Courts. Where the Council set aside the order of the Standing Committee without giving an opportunity to the petitioner to put forward his case, the order of the Council is liable to be quashed. (Para 2)

Raman of Raman and Raghavan, for Petitioner; T. Ramaprasad Rao for John and Row, for Respondents.

ORDER: This application is for issuing a writ of certiorari to quash the order of the Corporation of Madras. The petitioner is the proprietor of the firewood depot situated at No. 69 Guruvappa Chetty Street, Chintadripet, Madras. On 2-2-1951, the Commissioner of the Corporation refused to issue a license on the following grounds: (1) there is no space for loading and unloading inside the firewood depot; (2) the splitting is done on the road margin; and (3) there is no open space 20 feet all round in order to reduce fire risk. The petitioner appealed against that order to the Standing Committee (Health). The Standing Committee set aside the order of the Commissioner and directed the issue of the license. The Commissioner referred the matter to the council and the council passed a resolution on 11-9-1951 setting aside the sale (said?) order of the Standing Committee and restoring that of the Commissioner.

The petitioner filed this application for setting aside that order on the ground that the order was arbitrary and also contrary to the principles of natural justice. The relevant sections of the Madras City Municipal Act are as follows:

"S. 287(1): No place within the limits of the City shall be used for any of the purposes mentioned in schedule VI without a license obtained from the Commissioner and except in accordance with the conditions specified therein."

One of the items of schedule VI is firewood selling or storing.

"S. 365(3): Every order of the Commissioner or other municipal authority refusing, suspending, cancelling or modifying a license or permission shall be in writing and shall state the grounds on which it proceeds.

S. 366(1) An appeal shall lie to the Standing Committee from... (d) any refusal by the Commissioner to grant a licence under Ss. 282, 287, 295, 299 and 304(2).

S. 366(2): If on any such appeal, the Standing Committee reverses or substantially modifies any action taken or proposed to be taken by the Commissioner or any order passed by him, he may, within one month of the date of such decision, refer the matter to the council, and pending the decision of the council on such reference, the Commissioner shall not be bound to give effect to the decision of the Standing Committee."

(2) It is clear from the aforesaid provisions that issuing an order or refusing to issue a license is of quasi-judicial nature and the Commissioner will have to comply with the provisions of the Act and also shall give reasons for his refusal. Against the order of refusal, a statutory right of appeal is given to the Standing Committee. If the order of the Standing Committee is against the view expressed by the Commissioner he can refer the matter to the Council whose order will be final.

In this case, it is not disputed that the Council set aside the order of the Standing Committee without giving an opportunity to the petitioner to put forward his case.

When a tribunal is entrusted with quasi-judicial functions affecting the rights of parties, it is the elementary principle that the said tribunal should give an opportunity to the person affected to put forward his case. Any decision made by such a tribunal without giving that opportunity is contrary to the principles of natural justice and is liable to be set aside. But the procedure which a tribunal is to follow depends upon the functions, the character and the administrative convenience of the tribunal. It is not possible to equate the council to a court of law, and insist upon that tribunal to follow and adopt the rules of judicial procedure adopted and followed by courts. It is hoped that the Corporation will evolve a procedure which will give a reasonable opportunity to a party affected to put forward his case. The order of the Corporation of Madras is hereby quashed and they are directed to dispose of the reference in accordance with law. In this view, the other question does not arise for consideration. In the circumstances, the parties will bear their own costs.

C.R.K./B/D.H. Petition allowed.

A. I. R. 1952 MADRAS 779

BASHEER AHMED SAYEED J.

Lakshmana Prasada and Sons, Appellants v. A. Achuthan Nair, Respondent.

City Civil Court Appeal No. 10 of 1950, D/- 4-12-1951.

Contract Act (1872), Ss. 19 and 65 and 72 — Sale and purchase of motor car for price in excess of controlled price under mistake of fact — Return of excess amount — (Madras Civil Motor Cars Control Order (1947), Ss. 4 and 5).

The appellants were dealers of "Hindustan-10" motor vehicles and on the 22nd January 1948, sold one "Hindustan-10" car to the respondent for the sum of Rs. 9350 which they believed and represented to be the controlled price for the said vehicle. The respondent also paid the price in the belief that the price represented by the appellants was the controlled price, but subsequently the respondent learnt that the price fixed by the Government was only Rs. 8195 for the said "Hindustan-10" motor vehicle and that the appellants had collected in excess a sum of Rs. 1155:

Held (1) that the price fixed by the Provincial Government for a vehicle of the kind in question was only Rs. 8195 and not Rs. 9350 paid for by the respondent. From a reading of clauses 4 and 5 of the Madras Civil Motor Cars Control Order, 1947 it was also evident that the power to fix the price for motor vehicles vested only with the Provincial Government and not with the Provincial Motor Transport Controller. Therefore, circular No. 61 which was approved by the Provincial Motor Transport Controller, relied upon by the appellants, was of no avail as it could not be considered to be an authorised fixation of the price for the vehicle in question. Nothing had been produced to show that the Provincial Government had delegated the power to the Provincial Motor Transport Controller to fix the price at the figure given in the circular and approved of by him. (Para 3)

(2) It could not be said that there was any consent obtained from the respondent by the appellants for the sale and purchase of the vehicle by means of any fraud or misrepresentation so as to make the contract voidable and so as to make it necessary for the respondent to return the car. It was not necessary for the respondent to return the car and claim back the entire price paid by him to the appellants. (Para 4)

(3) S. 65 of the Contract Act would not attract itself to the contract in question. For the price the respondent paid he got the car and it could not be said that he got any extra advantage by the transaction. On the other hand, the extra advantage gained by the appellants would seem to be the excess over the controlled price which he was bound to refund. (Para 5)

(4) This case was one which came directly under S. 72 of the Contract Act. The simple fact in this case was that money had been paid in excess of the controlled price under a mistake of fact. Therefore, in such circumstances, money that had been paid under a mistake of fact must be recoverable by the party who parted with it. The mistake was about actual price fixed by the Provincial Government for the car. This could not be said to be money that had been paid under a mistake of law. The excess received over and above the controlled price could not be retained by the vendor and the vendee was entitled to claim it back, because the money was paid under a mistake as to the fact of the price: Case law discussed. (Para 5)

Anno: Contract Act, S. 19 N. 2; S. 65 N. 1; S. 72 N. 2, 3.

K. Bhashyam Iyengar and P. V. Subramaniam, for Appellants; K. P. Raman Menon, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('49) 1949-2 Mad LJ 657: (AIR 1949 PC 297) 5
('46) AIR 1946 Cal 245: (80 Cal LJ 170) 5
('02) 25 Mad 183: (11 Mad LJ 379) 5
('40) AIR 1940 Mad 660: (1940-1 Mad LJ 582) 5
('42) ILR (1942) Mad 669: (AIR 1942 Mad 590) 5
(1905) 1 Ch 326: (74 LJCh 199) 5

JUDGMENT: The defendants are the appellants in this appeal. They have preferred this appeal against the judgment and decree of the learned Additional City Civil Judge decreeing the suit brought by the respondent for recovery of a sum of Rs. 1555 alleged to have been collected illegally from the respondent.

(2) The defendants are dealers of "Hindustan-10" motor vehicles and on the 22nd January 1948, the appellants sold one "Hindustan-10" car to the respondent for the sum of Rs. 9350 which they believed and represented to be the controlled price for the said vehicle exclusive of taxes and other charges. The respondent also paid the price in the belief that the price represented by the appellants was the controlled price, but subsequently the respondent learnt that the price fixed by the Government was only Rs. 8195 for the said "Hindustan-10" motor vehicle and that the appellants had collected in excess a sum of Rs. 1155.

After this knowledge, the respondent called upon the appellants by notices to refund the excess collected by the appellants over and above the controlled price fixed by the Government. The appellants declined to refund the said excess denying that they collected any excess over the controlled price and stating that they collected only the price approved by the Provincial Motor Transport Controller, that there was no misrepresentation by the appellants in the matter of the price and that even if there was any such misrepresentation, the respondent not having rescinded the contract, he was not entitled to recover the excess now claimed, either by way of damages or otherwise and that interest was also not payable. The learned Additional City Civil Judge after framing the issues referred to in his judgment, accepted the case of the respondent and decreed the suit.

(3) The learned counsel appearing for the appellants now contends that there was no evidence adduced to show that the price of the vehicle in question was only Rs. 8195 on the date when the vehicle was sold and that in so far as the appellants acted in pursuance of circular No. 61 contained in Ex. A. 4 (a), which was approved by the Provincial Motor Transport Controller, they were justified in retaining the entire sum paid by the respondent towards the price of the vehicle. On this point, two Gazette Notifications have been produced by the respondent's counsel. They are dated 6th June 1947 published on the 17th June 1947 and 17th April 1948 published on the 27th April 1948. A reading of these two notifications makes it clear that the price fixed by the Provincial Government for a vehicle of the kind in question was only Rs. 8195 & not Rs. 9350 paid for by the respondent. From a reading of clauses 4 and 5 of the Madras Civil Motor Cars Control Order, 1947, it is also evident that the power to fix the price for motor vehicles vests only with the Provincial Government and not with the Provincial Motor Transport Controller.

Such a price having been fixed by the notifications referred to above, the first notification fixing the price at Rs. 8195 and the second notification fixing the price at Rs. 7700 and the second notification superseding the previous notification and there being no other notifications in between the two notifications referred to above, it is fairly clear that the price for which the motor vehicle in question should have been sold in December 1947 was only Rs. 8195 and not anything in excess thereof. Therefore circular No. 61 referred to in Ex. A. 4 (a) relied upon by the appellants was of no avail as it could not be considered to be an authorised fixation of the price for the vehicle in question. Nothing has been produced to show that the Provincial Government had delegated the power to the Provincial Motor Transport Controller to fix the price at the figure given in the circular and approved of by him. In these circumstances, it has to be held that the authorised price for which the vehicle could have been sold was only Rs. 8195 so that when the respondent paid a sum of Rs. 9350 the difference collected by the appellants is in excess of the controlled price. There is therefore no substance in the contention on behalf of the appellants that they had sold the vehicle for the proper price.

(4) The next contention raised by the learned counsel for the appellants is that the respondent having alleged misrepresentation on the part of the appellants in inducing the respondent to pay more than the controlled price, S. 19 of the Indian Contract Act came into operation and under that section, agreement between the parties was voidable, and the respondent not having avoided the contract by returning the vehicle which he had purchased from the appellants which it was open to him to do, he cannot now claim the excess amount paid by him over and above the controlled price. I cannot agree that there is any force in this contention, for though there are certain allegations in the plaint which might lead to an inference that the respondent has relied upon the ground of misrepresentation, still, in my opinion, the general tenor of the plaint, as I read it, is not that the respondent relies solely upon any misrepresentation on the part of the appellants in inducing him to part with the excess sum but that he has simply made use of this argument as an additional ground to strengthen his claim for the excess, the actual basis of the claim being that while the price actually fixed by the Provincial Government was only Rs. 8195, the appellants had collected a sum which was over and above the price actually fixed and that such collection was not justifiable and that the appellants cannot retain the said excess for themselves.

That accounts for the reason why the plaintiff-respondent did not think of avoiding the contract by returning the car to the appellants. If he had really conceived that the vehicle had been sold to him under a misrepresentation, he would have certainly returned the car and claimed the entire amount paid by him. The fact however is that at the time when the car was purchased by the respondent and sold by the appellants, both the parties were under the bona fide belief that the price of the car was as collected by the appellants and as exhibited by the appellants on their notice board in their show room. It was only after the purchase had been made and the respondent had taken delivery of the vehicle, that the respondent came to know that the price was much lower than what was actually paid by him.

The evidence on the record in this case does not support the view that the respondent was led into any belief that the price was Rs. 9350 by means of any misrepresentation made by the appellants. The appellants had in their possession the circular No. 61 contained in Ex. A. 4 (a) and they were under the impression that that was the price at which they were entitled to sell their vehicle; and the respondent also at that time was under the impression that the correct price was the one demanded by the appellants. Therefore, it cannot be said that there was any consent obtained from the respondent by the appellants for the sale and purchase of the vehicle by means of any fraud or misrepresentation so as to make the contract voidable and so as to make it necessary for the respondent to return the car. I therefore think that it was not necessary for the respondent to return the car and claim back the entire price paid by him to the appellants.

(5) The next contention raised by the learned counsel for the appellants is that in so far as the appellants sold the car in contravention of the price fixed by the Provincial Government under their notifications, the contract itself was an illegal one being against the Control Order, and therefore S. 65 of the Contract Act would attract itself to the contract in question. S. 65 of the Contract Act reads thus:

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The contention of the learned counsel for the appellants is that inasmuch as during the period when the contract came into existence there was great scarcity of cars in the market and the respondent having taken delivery of the car from the appellants which he would not have ordinarily got in those circumstances, and there being no compulsion on the part of dealers in motor vehicles to sell their vehicles to any particular individuals, though the Government had reserved to itself only the right to fix the price at which the car could be sold, it was therefore incumbent upon the respondent to have returned the car to the appellants if he had discovered that the contract was void in that it was against the Control Order, and the respondent not having restored the advantage he got to the appellants he is not now entitled to claim the excess which he had paid to the appellants.

His contention is that the respondent having received an advantage in that he was the person who purchased the car in difficult circumstances he should have restored that advantage to the appellants if he were to claim back the price which he paid and he not having done so in spite of the fact that he discovered the contract to be void as being against the Control Order, the appellants are not called upon to pay back any excess over and above the controlled price. The learned counsel for the appellants has invited my attention in this connection to the decision in 'Jagadish Prosad v. Produce Exchange Corporation, Ltd.,' AIR 1946 Cal. 245 and contends that inasmuch as the respondent has not rescinded the contract and has retained the car to himself and he not having been in a position to return the car either as he had used it for his benefit, he cannot be allowed to claim the refund. The point urged by the learned counsel is that when there is an illegal or a void contract both the parties to the contract must be put back to the original position in which they were before the contract and since that has become impossible in the circumstances of the present case, the respondent alone could not be permitted to claim the excess that he is said to have paid towards the price of the car without restoring the car itself to the vendor.

I do not think that it is possible for me to accept this contention of the learned counsel for the appellants, nor could I agree that the facts in the present case lend themselves to the application of the reasoning contained in the decision referred to by the learned counsel for the appellants. For the price the respondent paid he got the car and it cannot be said that he got any extra advantage by the transaction. On the other hand the extra advantage gained by the appellants would seem to be the excess over the controlled price which he is bound to refund. The learned counsel for the appellants has also invited my attention to certain decisions such as 'Seddon v. North Eastern Salt Co. Ltd.,' (1905) 1 Ch. 326 and 'Oriental Govt. Security Life Assurance Co. Ltd. v. Narasimhachari', 25 Mad. 183 in this connection. I do not think these decisions apply to the facts of the present case, for, I think, this case is one which comes directly under S. 72 of the Contract Act. The simple fact in this case is that money has been paid in excess of the controlled price under a mistake of fact.

Both the parties, as I have already observed, have bona fide been under the impression and belief that the price at which the vendor could sell and the vendee could purchase was Rs. 9350, but it later transpired that the sum of Rs. 9350 had been received by the vendor and paid by the vendee under a mistake, while the controlled price was only Rs. 8195 on the date of the transaction as fixed by the Provincial Government in their notifications referred to above, about both of which the parties were not aware. Money having been paid under a mistake of fact that the price was what was quoted by the appellants and not otherwise, and when it became known to both the parties that the price that should have been collected was only a lesser sum than what was actually paid, it was open to the respondent to claim the excess and it was reasonable and proper that the excess paid should be refunded by the appellants. The sum of Rs. 9350 was paid as the amount legally due to the appellants and it was received by the appellants under such belief, though the belief was a mistaken one.

There is no evidence or proof that the money paid in excess of the controlled price was intended to be given away as a gift or a present to the appellants by any means, and such being the case, I am of opinion that S. 72 of the Indian Contract Act comes into operation and applies to the facts of this case. It must be stated that when the motor vehicle was delivered by the appellants to the respondent, it was delivered only on the basis that the price which was paid and received was only the controlled price. If that were so, it cannot be said that there was any illegal contract entered into between the parties. The contract itself must be deemed to be to sell the vehicle at the controlled price, because the vendors were not expected to commit an offence by selling it at a price other than the controlled price. When it was later on discovered that the transaction had taken place actually not on the basis of the controlled price but on something different therefrom, certainly the appellants would be bound to return the difference in the price which they had received in excess of the controlled price.

The evidence of D. W. 1 also is to the effect that it was intended and the vehicle was actually sold for the controlled price which he believed was Rs. 9350 on the basis of the circular contained in Ex. A. 4(a). Therefore in such circumstances, money that has been paid under a mistake of fact must be recoverable by the party who parted with it. The mistake is only about actual price fixed by the Provincial Government for the car. This cannot be said to be money that has been paid under a mistake of law. The reasoning therefore in 'Shiba Prasad Singh v. Srish Chandra Nandi', (1949) 2 Mad. L.J. 657 (P.C.) would seem to apply to the facts of this case. Even so, the decision in 'Sowdra Bai v. Saraswathi Ammal', ILR (1942) Mad. 669 would apply to the facts of this case in full force. In 'Audinarayana v. Panchayat Board of Mangapaka,' AIR 1940 Mad. 660 it has been held that a payment under a mistake of fact cannot be considered to be voluntary payment so as to enable the receiving party to retain the benefit thereof. S. 72 is clear and it is in the following terms :

"A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

Mr. Bhashyam, learned counsel for the appellants has invited my attention to certain passages in 'Jagadish Prasad v. Produce Exchange Corporation', AIR 1946 Cal. 245. It was held in that decision on the facts of that case that no mistake arose and I do not think the argument advanced in that case would apply to the facts of the present case. I am unable to agree that the exception mentioned in these decisions would cover the present case; nor does any question of splitting up the contract would arise in the present case. True, there cannot be any new contract substituted in place of the old contract under which the vehicle was sold; but what actually took place was that both the vendor and the vendee were transacting the business on the basis of the controlled price and when it turned out that the controlled price was less than the price actually paid and received, the simple thing that followed was that the excess received over and above the controlled price could not be retained by the vendor and the vendee was entitled to claim it back, because the money was paid under a mistake as to the fact of the price.

The argument of the learned counsel for the appellants that the appellants not being under any compulsion that the respondent should be sold a car and the respondent having received the benefit under the sale in that he got the car and therefore must restore back the car to be entitled to claim the balance overpaid, does not appeal to me; nor does the argument that the respondent should either return the car and get back the entire amount or get nothing at all appear to be valid, in my opinion. I am therefore inclined to hold that what the learned City Civil Judge has done in the circumstances is but the correct thing, and his decision has therefore to be upheld.

(6) In the result, this appeal fails and the decree and judgment of the lower court are confirmed. The appellants will pay the costs of this appeal to the respondent.

C.R.K./B/D.H. Appeal dismissed.

A. I. R. 1952 MADRAS 782

RAMASWAMI J.

Moyankutty and others, Petitioners v. Narayanan Nair and others, Respondents.

Civil Revn. Petn. No. 1039 of 1951, D/- 29-2-1952.

Civil P.C. (1908) O. 6, R. 17 — Suit for redemption and possession — Suit stayed on ground that tenant's possession might be disturbed — Plaintiff seeking amendment by restricting his relief to redemption only should be allowed.

Court cannot refuse the prayer for amendment of the plaint on the ground of motive of the plaintiff.

The amendment has to be allowed so long as it is within the rights of the plaintiff and does not take away any valuable rights which had accrued to the opposite party.

Where upon a stay of a suit for redemption and possession on the ground that the tenants let in by the mortgagee could not be disturbed by virtue of statutes relating to the protection of tenants, the plaintiff seeks to amend his plaint by forgoing the relief for possession and by restricting his prayer to only extinguishment of the mortgage, the amendment cannot be denied on the ground that the plaintiff seeks to circumvent the stay order. It is open to the plaintiff to give up a portion of his claim. After amendment the suit will cease to be one for the recovery of possession and will not prejudice rights conferred by Madras Act XVII of 1946 or the later Acts enacted for the protection of tenants. (Para 6)

Anno: Civil P.C. O. 6 R. 17 N. 2, 7.

C. S. Swaminathan, for Petitioners.

ORDER: This civil revision petition is filed against the order made by the learned District Munsif of Manjeri refusing to allow an amendment in O.S. No. 155 of 1949.

(2) The short facts are: the plaintiff filed this suit for recovery of possession of the properties held under a mortgage sued on. The mortgage sued on here is for Rs. 400. There was also a claim for arrears of purappad. Defendants 3 to 7 are said to be tenants in possession under the mortgagees. Defendants 1 and 2 deposited the arrears of rent claimed in the suit and the suit was stayed under Act 17 of 1946.

(3) This plaintiff thereupon filed an amendment petition (I.A. No. 668 of 1950) giving up the claim for recovery of possession of the plaint property and adding a prayer for the extinguishment of the mortgage, i.e. he gave up a portion of his claim.

(4) The respondents objected to the amendment being allowed on the ground that it was a ruse to deny them the rights conferred under Act 17 of 1946.

(5) The learned District Munsif agreed with this contention and held that this application was not bona fide and that it was filed to get over the order of stay of the suit. He finally refused to allow the amendment.

(6) I am unable to see either the logic or the force of the learned District Munsif's reasoning for denying the relief for amendment because the motive with which the plaintiff filed the amendment is neither here nor there. The amendment has to be allowed so long as he is within his rights and does not take away any valuable rights which had accrued to the opposite party. This is not the case here. It is open to a plaintiff to give up a portion of his claim and after amendment the suit will cease to be one for the recovery of possession and will not prejudice rights conferred by Act XVII of 1946 or the later Acts enacted for the prediction (protection?) of tenants. Secondly, we are not concerned here with the stay of this suit. The only point to be considered is whether the plaintiff can restrict his claim by stating that they only seek now to redeem that mortgage and seek its extinguishment and that they do not want to disturb the people who are in possession. This the plaintiffs are certainly entitled to do. The fact that the restriction may lead to some other result in regard to stay is not a matter which ought to weigh in considering the question of allowing or disallowing the amendment; nor can the court consider the bona fides or mala fides of a petition for amendment so long as the amendment claimed is within the right of a plaintiff.

(7) In these circumstances, I have no hesitation in setting aside the order of the lower

court and directing that the amendment be allowed and the suit be disposed of according to law. The costs of this application will be costs in the cause.

C.R.K./B/R.G.D. Revision allowed.

A. I. R. 1952 MADRAS 783

RAJAMANNAR C. J.

AND VENKATARAMA AIYAR J.

S. S. Velayudham Pillai, Appellant v. The Governor-General in Council, South Indian Railway, represented by the General Manager having his office at Trichinopoly, Respondent.

Second Appeal No. 1255 of 1947, D/- 17-10-1951.

Civil P. C. (1908), S. 80 and O. 22, R. 10 — Government made party pending suit — Necessity of giving notice.

S. 80 can obviously have no application to the continuation of a suit properly instituted when at the time of the institution the Government was not a necessary party. If the Government was a necessary party against whom the plaintiff sought relief or must be deemed to have sought relief, then, the fact that the Government was not made at the inception a party, but was subsequently added as a party would not make any difference in principle. In such cases the suit must be deemed to have been instituted against the Government only when the Government is made a party, and obviously S. 80 would apply to such a case and the Government would be entitled to the two months' notice. But in a case where on the date of the institution of the suit, the plaintiff could not have claimed, and did not claim, any relief against the Government and therefore no notice under S. 80 was necessary, but if it transpires during the pendency of the suit that the interest of the defendant has devolved on the Government, either by voluntary act of the Government or by operation of law, there is no fresh institution of the suit as against the Government. The Government only steps into the shoes of the party whose interest has devolved on it. Because in such a case, there is no institution of a suit as against the Government at the time when it is brought on record in the pending suit, S. 80 cannot have any application: AIR 1926 All 585, Approved. (Para 4)

Anno: C. P. C., S. 80 N. 16 Pt. 7.

C. R. Pattabhiraman and R. Ramasubbu Aiyar, for Appellant; S. S. Ramachandra Aiyar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('26) AIR 1926 All 585: (96 Ind Cas 351) 4

('41) A. S. No. 126 of 1941 (Mad) 5

('44) C. S. No. 39 of 44 (Mad) 4

('45) 1945-1 Mad LJ 22: (AIR 1945 Mad 224) 5

RAJAMANNAR C. J.: This second appeal came up in the first instance before Viswanatha Sastri J. who considered it desirable that it should be heard by a Bench as the decision in the case was likely to affect a number of suits and appeals of the same type.

(2) The suit out of which this second appeal arises was instituted by the appellant originally against the South Indian Railway represented by the General Manager having his office at Trichinopoly for damages for short delivery of goods consigned to him through the railway company on 18th September 1943. The suit was instituted on 23rd March 1944 after the issue of the notice required under S. 77 of the Indian Railways Act. On 1st April 1944, the South Indian Railway was taken over by the Govt. of India and by a notification dated 14th October 1944, the General Manager was authorised to act for and on behalf of the Central Government as from 1st April 1944 in all judicial proceedings in which the South Indian Railway Administration might be concerned.

On 19th June 1944, on an application by the plaintiff-appellant, the plaint was amended by removing the name of the South Indian Railway Co., Ltd., through its Agent and General Manager and by substituting instead, the Governor-General-in-Council represented by the General Manager, South Indian Railway. On the same day, the General Manager of the South Indian Railway filed a written statement. It is not clear whether this written statement was filed as the General Manager representing the South Indian Railway before it was taken over or it was filed by the General Manager as representing the Governor-General-in-Council, because the first paragraph of the written statement is as follows:

"The suit is unsustainable in law, the South Indian Railway Co., Ltd., having ceased to exist on and from 1st April 1944. The Governor-General-in-Council should be brought on record."

Evidently this written statement was filed, at any rate prepared to be filed, before the plaint was actually ordered to be amended. On 24th November 1944 the District Munsif, Tenkasi, who tried the suit dismissed it. There was an appeal by the plaintiff (A. S. No. 66 of 1945) in the Court of the Subordinate Judge of Tinnevelly. The appeal was allowed and the suit was remanded for fresh disposal on 27th September 1945, and eventually a decree was passed in favour of the plaintiff on 15th April 1946. Against this decree the Governor-General-in-Council represented by its General Manager, South Indian Railway filed an appeal A. S. No. 93 of 1946.

(3) In the memorandum of appeal for the first time the point was taken that the suit was liable to be dismissed because of the failure on the part of the plaintiff to give the notice under S. 80, C. P. C. to the Government. The learned Subordinate Judge took up this point as a preliminary point and held that a notice under S. 80, C. P. C. was necessary in the case and as no such notice had been given, the suit should be dismissed in limine. In the result, the appeal was allowed and the suit dismissed. The plaintiff has filed the present second appeal against the decree and judgment of the Subordinate Judge.

(4) Several points appear to have been argued by learned counsel before Viswanatha Sastri J. but, in our opinion, the appeal can be disposed of on our decision on one of these points. This point may be stated in the language of Viswanatha Sastri J., thus:

"Is a notice to the Government under S. 80, C. P. C. essential, when it is made a party to a pending suit by reason of a devolution of interest under Order 22, Rule 10, C.P.C."

There appears to be very little of case law on this question, but we have felt no difficulty whatever in coming to a conclusion on this

point. Apart from the decided cases to which we shall presently refer, the language of Section 80, C. P. C. does not appear to us to give much room for doubt. It says that no suit shall be instituted against the Government until the expiration of the two months next after notice in writing has been delivered to or left at the office of the official specified.

The section can obviously have no application to the continuation of a suit properly instituted when at the time of the institution the Government was not a necessary party. If the Government was a necessary party against whom the plaintiff sought relief or must be deemed to have sought relief, then, the fact that the Government was not made at the inception a party, but was subsequently added as a party would not make any difference in principle. In such cases the suit must be deemed to have been instituted against the Government only when the Government is made a party, and obviously S. 80 would apply to such a case and the Government would be entitled to the two months' notice. But in a case where on the date of the institution of the suit, the plaintiff could not have claimed, and did not claim, any relief against the Government and therefore no notice under S. 80 C. P. C. was necessary, but if it transpires during the pendency of the suit that the interest of the defendant has devolved on the Government, either by voluntary act of the Government or by operation of law, there is no fresh institution of the suit as against the Government. The Government only steps into the shoes of the party whose interest has devolved on it. Because in such a case there is no institution of a suit as against the Government at the time when it is brought on record in the pending suit, S. 80 cannot have any application.

In — 'G. I. P. Rly. Co. v. Mahadeo Ram', AIR 1926 All 585 an identical question arose for decision. The suit was instituted against the G. I. P. Railway while it was a private company. During the pendency of the suit the line was taken up by the Government and the Secretary of State for India in Council was substituted as defendant. An objection was taken that notice should have been given to the Secretary of State under S. 80 and the objection was overruled by Daniels J. The learned Judge observed:

"Here there was no question of instituting the suit. The suit was already instituted".

The learned Judge pointed out that in the case of a devolution governed by Order 22, Rule 10 of the Code, the suit is by the leave of the court continued by or against the person to or upon whom such interest has come or devolved. Clarke J. followed this decision in C. S. No. 39 of 1944 the judgment in which is unreported. With great respect we are in entire agreement with the reasoning in — 'G.I.P. Rly. Co. v. Mahadeo', A.I.R. 1926 All 585. In fact we think no other view can reasonably be taken.

(5) The learned counsel for the respondent sought to rely on certain decisions of this court in which the Government happened to be impleaded as a party during the course of the suit and it was held that S. 80 of the Code applied to such cases. As we pointed out already, that would be so in cases where the Government was a necessary party even at the time of the institution of the suit. but for some reason or other the plaintiff had not joined the Government as a party at the time of the institution. In such cases, there is no devolution of interest and the suit as against the Government must be deemed to have been instituted only at the time when they happened to be impleaded as party. We do not doubt the correctness of these decisions, — 'Appallanarasamma v. Municipal Council, Vizagapatam', 1945-1 Mad. L. J. 22 and 'Chidambaram Chettiar v. Municipal Council, Karaikudi', A. S. No. 126 of 1941 (Mad.) but the principle underlying these decisions has no application whatever to the case before us.

(6) In the view we have taken, the appeal must be allowed and the appeal (A. S. No. 93 of 1946) must be remanded to the court of the Subordinate Judge of Tinnevelly, to be decided on the merits. The appellant will be entitled to the costs of this appeal. The appellant will also be entitled to a refund of the stamp duty paid on the Memorandum of second appeal.

C.R.K./B/V.R.B. Appeal allowed.

A. I. R. 1952 MADRAS 784

SUBBA RAO J.

Vutukuri Bala Nagamma, Appellant v. Vutukuri Hanumanthu and others, Respondents.

Second Appeal No. 861 of 1948, D/- 2-11-1951.

Will — Construction — General rule — Exception.

The general and accepted rule of construction, namely, that the express intention of a testator should be gathered from a reading of the entire will is paramount. But if the testator appointed a person as sole trustee without words of limitation and there is no indication in the document to the contrary, the said grant conveys an estate of inheritance. But the rule is not inflexible and in a case where the will contains other directions which are inconsistent with such intention, the Court should give effect to his real intention: 40 Cal. 274 (PC), AIR 1938 Mad. 661 and AIR 1922 PC 253 Rel. on. (Para 4)

B. V. Ramanarasu, for Appellant; K. Bhimasankaram, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('13) 40 Cal 274: (40 Ind App 37 PC) 3
('22) 49 Cal 459: (AIR 1922 PC 253) 3
('38) 1938-2 Mad LJ 623: (AIR 1938 Mad 661) 3

JUDGMENT: This second appeal is against the decree and judgment of the Court of the Subordinate Judge of Guntur confirming that of the District Munsif of Gurzala in O. S. No. 262 of 1945, a suit filed by the managing trustee of Sree Sitaramaswamivaru for delivery of possession of the plaint schedule property to the plaintiff or to the plaintiff and defendants 2 to 6 and subsequent mesne profits.

(2) Hanumanthu, the plaintiff, Balayya, the husband of the first defendant, Chinna Palayya and Kanaka Palayya, defendants 2 and 3 are the divided sons of one Veerayya. Defendants 4 and 5 are the sons-in-law of Veerayya. Defendant 6 is the grandson of Veerayya by his daughter. Veerayya constructed a temple for God Sitaramaswamivaru and executed a will, Ex. P. 1, dated 22-8-1934 endowing certain properties to the temple and also prescribing the machinery for its management. Under that will, his four sons were constituted trustees and his two sons-in-law and the grandson were appointed trustee members. Palayya, his eldest

son, was appointed managing trustee. After the death of Veerayya, the properties endowed were managed in accordance with the directions given in his will. Palayya executed another will Ex. P. 3 dated 20-8-1941 endowing other properties and also directing the person appointed as managing trustee for God Sree Sitaramaswamivaru after his lifetime to manage the properties. The plaintiff, the present managing trustee, filed the aforesaid suit for delivery of possession of the plaint schedule property and for mesne profits. The suit was decreed by the courts below.

(3) It is not necessary to particularise all the contentions raised by the defendants and the findings of the courts as Mr. Ramanarasu confined his argument only to one question. He argued that as Veerayya appointed the first defendant's husband as one of the trustees without words of express limitation, her husband acquired an estate of inheritance. I shall now proceed to consider the cases cited by him in support of his argument.

In 'Tripurari Pal v. Jagat Tarini Dasi', 40 Cal. 274 (PC), the facts were: A testator after declaring the properties to be debutter for the maintenance of the family idol stated in his will that his son, on attaining majority, would personally conduct the work of the sheba, and if he died his (the testator's) widow would be the shebait and that after her, his daughters by her would be shebaits. The Judicial Committee in a short judgment held that under the will there was an absolute gift of the shebaitship to the son and it was not cut down by anything that followed in the will. On the construction of that will, their Lordships held that the son got an estate of inheritance in the shebaitship. This judgment was construed and relied upon by a Bench of this Court consisting of Madhavan Nair and Stodart JJ. in the case of succession to the trusteeship — 'Ramachar v. Venkata Rao', 1938-2 Mad L.J. 623. The right to succeed depended upon the construction of the will which was in the following terms:

> "I have set apart the undermentioned lands for charity, for the cost of building Hanumantharayan's temple, for the worship and the daily upkeep of the same. For the purpose of conducting this charity my second son V has been appointed to the management ..... Whereas I have appointed V my second son as manager to administer the charities out of the dedicated properties, if the said charities be not conducted properly the leading persons in the village shall intervene and conduct the said charity properly. My sons K, V and R shall have no right whatever in the properties dedicated to the said charities."

The learned Judges held that the will conferred heritable trusteeship on V though in appointing him to the office, the testator did not make any express provision for the succession after the son's death. It is true that the learned Judges accepted the respondents' case that where the deed conferred trusteeship on the founder's son without further words it does by implication make provision for the appointment of trustees to succeed him. But the judgment cannot be understood to mean that the learned Judges overruled the general and well-accepted rule of construction that the intention of the testator should be gathered from a reading of the entire document. Indeed, when 'Gopal Lal v. Purnachandra', 49 Cal. 459 (P.C.) was cited, they distinguished that case on the ground that they did not know more of the details of the will by which the trust was founded.

I would have followed that judgment, as I should do, if in this case the testator conferred the right of trusteeship on his son alone without any words of limitation. The decision of the Judicial Committee in 'Gopal Lal v. Purnachandra', 49 Cal. 459 (P.C.) is clear authority for the position that it is not an inflexible rule of law or construction that whenever a trusteeship is conferred upon a person without words of limitation, the said person will get an estate of inheritance. For, in that case, the Hindu testatrix appointed her grandson to perform the worship of certain family idols and directed that he should be the person in charge of the worship. Their Lordships held that no heritable shebaitship was created. Mayne on Hindu Law 10th edition summarises the law on the subject at page 940 as follows:

> "The devolution of the office of shebait of an idol or of Dharmakartha of a temple or manager of a charitable endowment, upon the death of termination of office of the incumbent depends upon the terms upon which it was created, or usage of each particular institution, where no express deed of trust or foundation exists. Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heirs of the donee, according to the rule, that a grant without words of limitation conveys an estate of inheritance, unless such devolution is inconsistent with, or opposed to the purpose the founder had in view in creating the trust or where the office is descendible to a single heir."

(4) The following principles may be gathered from the aforesaid discussion of the case law: The general and accepted rule of construction, namely, that the express intention of a testator should be gathered from a reading of the entire will is paramount. But if the testator appointed a person as sole trustee without words of limitation and there is no indication in the document to the contrary, the said grant conveys an estate of inheritance. But the rule is not inflexible and in a case where the will contains other directions which are inconsistent with such intention, the court should give effect to his real intention.

(5) Applying these principles, I find it very difficult to hold on a fair reading of the entire will, Ex. P. 1, that the testator intended to confer on his eldest son an estate of inheritance. Under the will the testator made a scheme providing for checks and counter-checks. He created three classes of trustees — managing trustee, trustees and trustee members. The mode of devolution in the case of managing trustee was also provided by him. If the eldest son Palayya should be removed from the managing trusteeship, one of his other three sons should be appointed managing trustee.

The provisions of the will also indicate that the testator had no confidence in women for he preferred his sons-in-law and his grandson to his daughters. It could not have been his intention that the wife of any of his sons should take part in the management of the endowments to the temple. This is not a simple case of a testator making an absolute gift of shebaitship or trusteeship to one of his sons without any words of limitation. I would therefore hold on a construction of the provisions of the will that Palayya did not get an estate of inheritance under the will. The judg-

ment of the lower court is therefore correct. No other point was raised. This second appeal fails and is dismissed with costs.

(6) No leave.

C.R.K./B/V.R.B. Appeal dismissed.

A. I. R. 1952 MADRAS 786

SUBBA RAO J.

Vadlamani Kalidas, Appellant v. Fakir Mohammad Saheb and others, Respondents.

Second Appeal No. 712 of 1948, D/- 1-11-1951.

Civil P.C. (1908), O. 34, R. 4 — Suit on mortgage — Puisne mortgagee made party — Application by him for decree on foot of his mortgage — Preliminary decree — Puisne mortgagee paying off amount due to plaintiff and applying for passing of final decree — Application dismissed on ground that there was no provision in preliminary decree for passing final decree — Application for amendment of preliminary decree — Mortgagor in meanwhile paying amount of plaintiff's mortgage to puisne mortgagee — Full satisfaction of plaintiff's mortgage entered — Preliminary decree amended — Final decree held could be passed.

In a suit by a mortgagee to enforce his mortgage, subsequent mortgagees were made parties. Defendant 9, one of the puisne mortgagees impleaded in the suit prayed for a decree on the foot of his mortgage. A preliminary decree was passed. Defendant 9 paid the amount due to the plaintiff and applied for passing a final decree not only for the amount of the suit mortgage but also for the amount due under the subsequent mortgage held by him. The application was dismissed on the ground that there was no provision in the preliminary decree directing the passing of a final decree for the consolidated sum of the two mortgages. On the same day, he applied for the amendment of the preliminary decree. The decree was amended and in the amended decree, defendants 1 to 6 (Mortgagors) were directed to pay into Court the amount due to the puisne mortgagee (Defendant 9). Meanwhile, on behalf of the mortgagors, the amount due to the first mortgagee (Plaintiff) which the puisne mortgagee paid off, was paid to him by the Receiver on behalf of the mortgagors. The puisne mortgagee received that amount and passed a receipt without prejudice to his rights, which he was agitating in the application for amendment. Full satisfaction of the plaintiff's mortgage was recorded. After the preliminary decree was amended the puisne mortgagee applied for the passing of the final decree:

Held that recording of full satisfaction in the circumstances of the case was only a tentative one subject to the result of the said application for amendment of preliminary decree. As the preliminary decree was amended and as a decree in the favour of the puisne mortgagee was given, he would be entitled to apply for the passing of a final decree for sale. (Para 4)

P. Somasundaram and P. Suryanarayana, for Appellant.

REFERENCES: Courtwar/Chronological/ Paras
('19) 42 Mad 90: (AIR 1919 Mad 100 (2)) 4
('48) AIR 1948 Mad 336: (1948-1 Mad LJ 4) 4

JUDGMENT: This second appeal arises out of I. A. No.169 of 1946, an application filed by the appellant for passing a final decree in his favour. One V. Kama Sastri filed O. S. No. 28 of 1940 on the file of the Court of the District Munsif of Amalapuram to enforce the mortgage dated 18-3-1918. Defendants 1 to 6 were either the mortgagors or their legal representatives. Defendant 7 was the subsequent purchaser of portion of the hypotheca. Defendants 8 and 9 were the subsequent mortgagees. Defendant 9, one of the puisne mortgagees impleaded in the suit prayed in his written statement for a decree on the foot of his mortgage. A preliminary decree was passed on 11-3-1943. Defendant 9 paid the amount due to the plaintiff. Having paid the amount, he filed I. A. No. 179 of 1944 for passing a final decree in his favour not only for the amount due under the suit mortgage but also for the amount due under the subsequent mortgage held by him.

On 30th March 1944, the learned District Munsif dismissed that application on the ground that there was no provision in the preliminary decree directing the passing of final decree for the consolidated sum of the two mortgages, one in favour of the plaintiff and the other in favour of defendant 9. But he held that defendant 9 was entitled to a final decree in his favour for the sum which he paid over to the prior mortgagee. On the same day, defendant 9 filed I. A. No. 363 of 1944 for amending the preliminary decree so as to bring it in conformity with form No. 9 of Appendix D of Sch. 1, C. P. C. Pending that application, the receiver appointed for the administration of the mortgagor's estate paid the amount due on the first mortgage with subsequent interest to defendant 9. Defendant 9 received that amount without prejudice to his rights, which can only mean without prejudice to his rights which he was agitating in the aforesaid application. Full satisfaction of the plaintiff's mortgage claim was recorded on 1-8-1944.

The application for amendment was disposed of by the learned District Munsif on 3rd September 1945. He allowed the amendment and directed the decree to be brought in conformity with Form No. 9 of Appendix D of Schedule 1, C. P. C. He also rejected the plea that the application should not be allowed as full satisfaction of the decree was recorded. After the decree was amended, he filed the present application for the passing of the final decree. But that was dismissed by another District Munsif on the ground that the application for final decree at the instance of defendant 9 was not maintainable as full satisfaction of the preliminary decree was recorded. When an appeal was filed to the Subordinate Judge, he confirmed the same. Defendant 9 preferred the above second appeal. The respondents are not represented by counsel.

(2) The rights of a puisne mortgagee who is impleaded as defendant to a suit on the prior mortgage are governed by Or. 34, Rule 4(4), C. P. C. It reads:

"Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 Form No. 10 or From No. 11, as the case may be, of Appendix D with such varia-

tions as the circumstances of the case may require."

Under Form No. 9, the amounts due to the first mortgagee and the second mortgagee are declared. The defendants or any of them are directed to pay the amount due to the first mortgagee in court within the prescribed time. It also directs the mortgagor to pay into court on or before the prescribed date the amount due to the second mortgagee. If the amount due to the plaintiff is not paid, the property of the mortgagor is directed to be sold. The procedure to be followed if the hypotheca is directed to be sold is found in clause 4(iii) of Form No. 9. It says:

"In the case where a sale is ordered under clause 4(ii).....the money realised by such sale shall be paid into court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Or. 34 of the First Schedule to the Civil Procedure Code, 1908 and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other person entitled to receive the same;"

Under sub-clause (iv) of clause 4:

"if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively."

Clause 5(a) says:

"If defendant No. 2 (2nd mortgagee) pays into court to the credit of this suit the amount adjudged due to the plaintiff but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree."

Clause 6 provides the manner in which the second mortgagee, who paid the first mortgage amount will be paid and also recognises his right to obtain a personal decree for the balance, if the amount realised is not sufficient to discharge both the mortgages. Form No. 10 relates to a suit by the second mortgagee impleading the first mortgagee as party. Form No. 11 refers to a suit by a sub-mortgagee.

(3) The aforesaid provisions show that the mortgagee, who is the plaintiff, is ordinarily in charge of the suit. In case the mortgagor makes default in paying the amount declared due to him, he will have to apply for the passing of a final decree and for the sale of the property. In a particular contingency, the second mortgagee is entitled to apply for a final decree that is, when he pays off the first mortgagee and thereby subrogated to his right. In that contingency, he is entitled to treat the suit brought by the first mortgagee as one for his benefit. He can apply to the court under clause 5 of Form No. 9 to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree in the same manner as the plaintiff might have done under clause 4. But can a puisne mortgagee, who obtained a preliminary decree in his favour also apply for the passing of a final decree if the first mortgage of the plaintiff is paid off by the mortgagors? If he cannot, it may cause unexpected and undeserved hardship to the puisne mortgagee. A puisne mortgagee, who is made a party to a suit by a prior mortgagee, may agitate his rights in that suit and get a preliminary decree for payment. The suit may drag on for a number of years and if the mortgagors pay off the first mortgagee, the rights of the puisne mortgagee to institute another suit therefor may get barred.

(4) Order 34, C. P. C. provides a machinery for ascertaining the rights of the puisne mortgagee and for declaring the amount due to him. Form No. 9 also provides for a decree directing the mortgagor to deposit the amount due to him in court within the time specified. But it does not expressly provide for a case where after such a preliminary decree was made, the mortgagor pays off the first mortgagee. Or. 34, rule 4(4) is not exhaustive of the terms to be embodied in a preliminary decree for sub-rule (4) of Or. 34(4) provides for such variations as the circumstances of the case may require. Further, when there is a preliminary decree in favour of the puisne mortgagee, unless that decree is discharged by any of the ways known to law, the party in whose favour such a decree is made will be entitled to pursue the other and necessary steps to realise the amount decreed to be paid to him. In 'Vedavyasa Aiyar v. Madura Hindu Sabha Nidhi Co. Ltd.', 42 Mad 90 the facts were:

"In a suit for sale by a prior mortgagee against the mortgagor and a puisne mortgagee, the decree not only directed the sale of the mortgaged properties for the amount found due to the prior mortgagee but also ascertained the amount due to the puisne mortgagee and ordered the payment to him of this amount out of the surplus sale proceeds."

When the puisne mortgagee filed another suit, it was argued that S. 47, C. P. C., was a bar to that suit and that the remedy of the puisne mortgagee was to execute the decree made in his favour in the suit by the prior mortgagee. At page 94, the learned Judges say:

"The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid the other mortgagees can apply for sale in order to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them. If the mortgagor pays off the amount for which alone a sale in default of payment was directed, it is difficult to see how under the express terms of the decree, each puisne encumbrancer can come forward and ask for sale. No time is fixed in the decree for redeeming them. There is no direction in the decree directing the mortgagee to pay them any amount and the right to share which is dependent on there being a sale and a surplus after paying off the plaintiff mortgagee cannot be enforced if for any reason the sale

cannot take place at the instance of the plaintiff."

This judgment is therefore based upon the terms of the preliminary decree, which did not provide for redemption of the second mortgage. The second mortgagee also did not discharge the first mortgage.

In 'Jagannath Rao v. K. V. Sastry', AIR 1948 Mad 336 another Bench of this court had to consider the scope of Or. 34(4). In that case, a mortgagee brought a suit for sale against the mortgagor, his sons and the puisne mortgagee. In that suit, the amount due to the puisne mortgagee and the question whether the subsequent mortgage was binding upon the sons were decided. The question arose whether the decision was binding on the principle of res judicata in a subsequent suit filed by the subsequent mortgagee. In the prior suit, a decree was drawn up in the manner required by Or. 34, Rule 4, and in the words found in Form 9, Appendix D. At page 337, the learned Judges considered the scope of Or. 34, Rule 4 and observed,

"That sub-rule says that where in a suit for sale subsequent mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in form No. 9 of Appendix D. It is clearly the object of the legislature in this sub-rule that not only the rights of the prior mortgagee but also those of the subsequent mortgagees should be worked out in order to finally determine the claims on the property, which is the subject of the suit. As already pointed out, it provides an additional right on the part of the subsequent mortgagee to execute the decree as the plaintiff himself could provided that he pays off and redeems the mortgage of the plaintiff. No decree can therefore be passed in favour of the plaintiff alone without also determining the amount due to the subsequent mortgagees."

In this case it is not necessary to express my final opinion on the larger question raised as the puisne mortgagee paid off the first mortgagee. When he applied for final decree, it was dismissed on the ground that there was no provision in the preliminary decree directing the passing of a final decree for the consolidated sum of the two mortgages. On the same day, he applied for the amendment of the decree. The decree was amended on 3-9-1945 and in the amended decree, defendants 1 to 6 were directed to pay into court the amount due to the puisne mortgagee. Meanwhile, on behalf of the mortgagors, the amount due to the first mortgagee which the puisne mortgagee paid off, was paid to him by the Receiver on behalf of the mortgagors. The puisne mortgagee received that amount and passed a receipt without prejudice to his rights, which he was agitating in the application for amendment. The recording of full satisfaction in the circumstances of the case was only a tentative one subject to the result of the said application. As the preliminary decree was now amended & as a decree in the appellant's favour was given, he would be entitled to apply for the passing of a final decree for sale. The order of the lower court is therefore set aside and the appeal is allowed with costs throughout.

(5) Leave refused.

C.R.K./B/R.G.D. Appeal allowed.

A. I. R. 1952 MADRAS 788

SUBBA RAO J.

Chemmanghat Kunnath Melethil Ramankutty Vaidyar's wife Kunhumalu, Appellant v. M. K. Gopalakrishna Iyer, the present executive trustee of Chokkanathapuram Sri Meenakshisundareswaraswami Devasthanam and others, Respondents.

Second Appeal No. 2565 of 1947, D/- 11-7-1951.

Malabar Compensation for Tenants' Improvements Act (1(I) of 1900) Ss. 3(1) and 5(1) and (2) — "Tenant" — Mortgagee in possession — Mortgage invalid — Liability to pay mesne profits.

A person in possession in good faith believing to be a mortgagee will be a statutory tenant under the provisions of the Act and his rights and liabilities will have to be worked out as per the terms of the said provisions. Such a person cannot therefore be held to be in wrongful possession of the mortgaged properties notwithstanding the fact that the mortgage deed was invalid. The word "mortgage" in S. 5(2) can be understood to comprehend an invalid mortgage under which such a person continues to be in possession. (Para 5)

A mortgagee in possession under an invalid possessory mortgage is not therefore liable to pay mesne profits in a suit for possession of the mortgaged property filed against him: AIR 1918 Mad. 381 and AIR 1919 Mad. 272, Foll. (Para 5)

K. Kuttikrishna Menon and K. N. Karunakaran, for Appellant; C. S. Swaminathan; M. K. Nambiar and M. Sekhara Menon, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('18) AIR 1918 Mad. 381: (43 Ind Cas 173) 5
('19) 10 Mad LW 300: (AIR 1919 Mad 272) 5

JUDGMENT: The only question that arises in this second appeal is whether the first defendant-appellant is liable to pay mesne profits. The relevant facts may be briefly stated. The properties described in the schedule annexed to the plaint belong in 'jenm' to Sree Meenakshisundareswara Swami Devaswom in Puttur Amsom, Palghat taluk. The temple was an ancient one and from its origin it was under the management of Naduvil Edam. The Edam had on various occasions in the past demised the properties on kanoms and also mortgaged them. On 25-3-1929 one Pangi Achan of the Edam executed a possessory mortgage to the first defendant in regard to the suit properties for Rs. 3000 under Ex P. 4. As the Devaswom was mismanaged, on 30-11-1935 the Madras Hindu Religious Endowments Board framed a scheme and the 1st plaintiff was appointed as executive officer. The second plaintiff is his successor. Defendants 2 to 4 are the members of Naduvil Edam.

The temple by its executive officer filed O. S. No. 231 of 1943 on the file of the District Munsif's court, Palghat, for possession of the suit properties and for mesne profits. The learned District Munsif of Palghat held that the mortgage deed was supported by consideration and that the mortgagee was a bona fide creditor but that the mortgage was invalid as it was executed in contravention of the provisions of S. 76 of the Madras Hindu Religious Endowments Act. He further held that the defendant would be entitled to the cost of improvements under the

Malabar Compensation for Tenants' Improvements Act (I (1) of 1900) (hereinafter referred to as "the Act") but was liable to pay mesne profits. In appeal the learned Subordinate Judge also accepted the said findings, though he made some slight modifications in regard to the amount of mesne profits payable by the first defendant to the plaintiff. The first defendant preferred the above second appeal.

(2) The learned counsel for the appellant confined his arguments to the sole question of mesne profits. He contended that his client would not be liable to mesne profits as he was a statutory tenant under the Act and therefore was not in wrongful possession of the suit lands. The answer to the question turns upon the consideration of the relevant provisions of the Act. S. 3(1) of the Act defines a "tenant". It reads:

> "'tenant', with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who, with the bona fide intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator."

(3) S. 5(1) says:

> "Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of court."

(4) S. 5(2) runs:

> "A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be."

Section 6 provides for delivery of possession to the plaintiff after the amount of compensation payable by the tenant is ascertained and after giving credit to amounts payable by the defendant to the plaintiff in respect of the tenancy.

(5) From the aforesaid provisions, it is clear that for the purpose of the Act the word "tenant" is given a very wide connotation so as to take in even a trespasser who cultivates a land intending to pay the customary rent. It includes also a person in possession of land in good faith believing himself to be a mortgagee. Under S. 5 such a tenant is entitled to be in possession until he is evicted in execution of the decree. Under S. 5(2) till he is evicted he will be subject to the terms of the lease or mortgage as the case may be. It will follow that a person in possession in good faith believing to be a mortgagee will be a statutory tenant under the provisions of the Act and his rights and liabilities will have to be worked out as per the terms of the said provisions. So understood, I find it very difficult to hold that such a person is in wrongful possession of the mortgage properties notwithstanding the fact that the mortgage deed was invalid. The Legislature designedly conferred certain rights on such a person and legalised his possession till he is duly evicted under S. 6(1) of the Act.

Sadasiva Aiyar J. had occasion to consider the scope of S. 5 and S. 6 of the Malabar Tenancy Act in 'Parameswara v. Valia Mannadiar', AIR 1918 Mad 381. There a suit was filed for ejectment and the question was whether the mortgagee was bound to pay mesne profits from the date of the tender of the amount due under the mortgage into court when it was found that the money tendered sufficiently covered the compensation for improvements also. The learned Judge held that till compensation was actually paid the mortgagee remained in possession as mortgagee despite the valid tender. The same learned Judge sitting with Napier J. said in 'Manager Sankunni Variar v. Kunji Nangayaramma', 10 Mad L W 301 that

> "the mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by a decree of court and hence he is not accountable for mesne profits till either of these events happens."

Mr. Swaminathan appearing for the respondents did not question the correctness of the decisions, but contended that those cases related to valid mortgages and therefore the principle accepted therein could not be applied to a mortgage which was held to be invalid. In support of his argument he relied on the provisions of S. 5(2) of the Act and argued that that subsection applied only to valid mortgages and as in the present case the mortgage was invalid the liability of the tenant would be governed by general law.

I do not see any difficulty in reconciling the provisions of S. 5(2) with the other sections of the Act. If the definition of a tenant is wide enough to take in a person holding under an invalid mortgage in the circumstances mentioned in the definition and if such a person is entitled to be in possession till he is evicted in execution of a decree, there is no reason why the word "mortgage" in S. 5(2) cannot be understood to comprehend an invalid mortgage under which such a person continued to be in possession. For the purpose of applying the provisions of the Act without giving undue advantage to the mortgagee at the expense of the mortgagor, such a person's tenure is made subject to the terms of the mortgage deed during the period of his statutory tenancy.

I cannot also distinguish the aforesaid Bench decisions in the manner suggested by the learned counsel for the respondents, as, even in these cases the mortgagee would not under general law be entitled to be in possession if the entire amount due to him was legally tendered. I therefore hold that the first defendant is not liable to pay mesne profits. In the result the decree of the lower court is modified and the parties are directed to pay and receive proportionate costs in the courts below. Here the parties will bear their own costs.

(6) Leave granted.

C.R.K./B/V.R.B. Decree modified.

A. I. R. 1952 MADRAS 789

SUBBA RAO J.

T. M. Munusamappa and sons, Appellant v. The Assistant Custodian of Evacuee Property, Madras, Respondent.

Writ Petn. No. 178 of 1951, D/- 16-10-1951.

Administration of Evacuee Property Act (1950), S. 56 — Rules under, R. 14 (2) — Petitioners, admittedly tenants of evacuee, allowed to continue in possession on payment of monthly rent after property had vested in Custodian — No power in custodian to evict petitioners forcibly.

Where the petitioners, who were admittedly the tenants of the evacuee, were allowed to continue to be in possession after the property had vested in the Custodian on payment of a monthly rent, and the petitioners had paid rent for five months under that arrangement.

Held that it was impossible to say that the relationship between the parties was not that of landlord and tenant on a monthly basis and the Custodian had no power to evict them forcibly. (Para 2)

K. S. Varadachari, for Appellant; Vepa P. Sarathy, for the Advocate General for the State Counsel, for Respondent.

ORDER: This is an application for issuing a writ of prohibition restraining the respondent from taking forcible possession pursuant to the notice dated 21st June 1951. The petitioners are occupying two out of the three godowns bearing present Municipal door No. 7 in Stringer Street, G. T. Madras. The property was declared to be evacuee property. The petitioners were paying rent to the evacuee Haji Mohammad Abbas from 9th December 1943 till about 25th January 1951. After the property vested in the respondent under S. 8(4) of the Evacuee Properties Administration Act, 1950, the Deputy Tahsildar took formal possession of the same on 1st February 1951. He took a cheque for a sum of Rs. 150 from the petitioners and allowed them to continue in possession on payment of a monthly rent of Rs. 150. It is not disputed that the petitioners were paying a rent of Rs. 150 per month from 1st February 1951 to the end of June 1951. After some correspondence between the parties, on 21st June 1951 the Assistant Custodian issued a notice to the petitioners directing them to vacate one of the two godowns by 23rd July 1951 and hand over its possession to his representative. They were also informed that in case they did not deliver possession peacefully, they would be evicted from one of the godowns with such police force as might be necessary. The said notice was issued on the basis that the petitioners were not tenants but were in permissive possession.

(2) The learned counsel for the petitioners contended that the relationship between the parties was that of landlord and tenant, and that the custodian had no power to evict them forcibly. On the facts admitted, it is impossible to say that the relationship between the parties is not that of landlord and tenant. The petitioners were admittedly the tenants of the evacuee. On 1st February 1951, the Deputy Tahsildar took only formal possession as the petitioners were in actual occupation. The petitioners also were paying rent from 1st February 1951 till the end of June. In the absence of any other evidence to establish that the petitioners were allowed to continue to be in possession under some arrangement other than that of a tenancy, I must hold that the petitioners are tenants on a monthly basis. If so, the only provision that enables the Custodian to evict the tenants is rule 14(2) framed under the Act (Act XXXI of 1950). It reads:

"In case of a lease or allotment granted by the Custodian himself, the Custodian may evict a person on any ground justifying eviction of a tenant under any law relating to a control of rents for the time being in force in the State concerned, or for any violation of the conditions of the lease or the allotment."

The notice issued in this case does not comply with the provisions of the said rule. It was obviously based on the assumption that the petitioners were not tenants.

(3) In the circumstances I direct a writ of prohibition to be issued restraining the respondent from evicting the petitioners otherwise than in strict compliance with the provisions of rule 14(2) framed under the Act. The parties will bear their respective costs.

C.R.K./B/V.B.B. Writ of prohibition issued.

A. I. R. 1952 MADRAS 790

SOMASUNDARAM J.

In re Gadiraju Narayanaraju and others, Petitioners.

Criminal Revn. Case No. 850 and Cri. Revn. Petn. No. 802 of 1948, D/- 15-9-1949.

(a) Criminal P. C. (1898), S. 350 — Judgment written and signed by magistrate who heard the evidence, but delivered by his successor is not illegal.

A judgment written and signed by the predecessor while he was in office and who had heard the evidence can be delivered by the successor. In such a case there is no irregulartiy, much less an illegality. 7 Cri LJ 459 (Mad); AIR 1917 Mad 340; AIR 1933 Mad 251 (1), Relied on; AIR 1947 Mad 248, Distinguished. (Para 4)

Anno: Cr. P. C., S. 350 N. 6.

(b) Criminal P. C. (1898), S. 526 (8) — Application under, made after examination of defence witnesses — Mandatory provisions of S. 526 (8) do not apply.

The word "trial" in S. 526 (8) means all proceedings up to judgment and does not include judgment. It however, includes arguments of the pleaders on either side. The expression "before the defence closes its case" means before the conclusion of the examination of the witnesses for the defence.

Where the application under S. 526 (8) was made not before the defence closed its case but afterwards, and before the commencement of the argument the mandatory provisions of S. 526 (8) do not apply to the application. (Paras 9, 10)

Anno: Cr. P. C., S. 526 N. 2a.

(c) Criminal P. C. (1898), S. 350 (1) — Case posted for arguments — Petition by accused under S. 526 (8) on date fixed for argument — Petition dismissed and case posted for judgment — Magistrate transferred — Application for de novo trial before successor — Application rejected and judgment written and signed by predecessor delivered — Held that the case having reached past the stage of trial, it was within discretion of magistrate either to act or not upon evidence recorded by predecessor — Refusal for de novo trial was not illegal. (Para 12)

Anno: Cr. P. C., S. 350 N. 5.

V. T. Rangaswami Aiyangar, for P. S. Rama Rao. for Petitioners; Public Prosecutor, for the Crown.

REFERENCES: Courtwar/Chronological/ Paras
('33) AIR 1933 PC 218: (34 Cri LJ 886) 8
('08) 18 Mad LJ 197: (7 Cri LJ 459) 4
('17) 40 Mad 108: (AIR 1917 Mad 340: 17 Cri LJ 166) 4
('33) AIR 1933 Mad 251 (1): (34 Cri LJ 117) 4
('47) ILR (1947) Mad 365: (AIR 1947 Mad 248: 48 Cri LJ 81) 4
('37) AIR 1937 Pat 131: (38 Cri LJ 484) 8
('49) AIR 1949 Pat 105: (50 Cri LJ 176) 8

ORDER: In this case the four petitioners have been convicted for offences under Ss. 325 and 323 and 323 read with S. 34 I.P.C. The first accused is sentenced to four months' R.I. and a fine of Rs. 100 for an offence under S. 325 I.P.C. and the others are sentenced to pay a fine of Rs. 100 each for offences under S. 323 and 323 read with S. 34 I.P.C.

(2) The evidence on which these petitioners have been convicted has been accepted by both the courts below and after going through it, I see no reason to reject it. But the learned advocate has raised questions of law which arise on the following facts:

(3) The defence closed its case on 2nd December 1947 and C. W. 1 was examined on 16th December 1947 and the Magistrate had posted it for arguments (at the instance of the defence counsel) to 21st December 1947. On 21st December 1947 the pleader instead of advancing arguments, presented a petition under S. 526(8) Cri. P.C. praying for an adjournment as he intended to move the High Court for transfer. The petition was dismissed. The Magistrate was then under orders of transfer. He therefore posted the case for judgment to 22nd December 1947 and as the accused were absent on that day, he handed over charge to his successor with the judgment he had already written and signed. The successor adjourned the case and on the adjourned date the accused presented a petition under S. 350 Cri. P.C. for a de novo trial and the same was rejected on 14th December 1948 and the successor delivered the judgment on the same day.

(4) The first contention of the learned advocate is that the conviction is illegal, because the judgment that was delivered was written by the predecessor in office. He contends that it is a fundamental rule of Criminal jurisprudence that the Judge who hears the evidence must pronounce the judgment and he relies on 'Alli Khan In re', ILR (1947) Mad. 365 in support of his contention.

'Alli Khan in re', ILR (1947) Mad. 365 is a case where the Sessions Judge after his transfer and after the successor had taken charge remained in the station, dictated the judgment and gave it to the successor to be delivered and the successor delivered the same on behalf of his predecessor. Horwill J. who delivered the leading judgment held that the moment the predecessor handed over charge to the successor, the predecessor had become functus officio and he had no jurisdiction to pronounce it and the defect cannot be cured by S. 537 Crl. P.C. After dealing with the history of the law on the subject he stated

> "It will be seen from the above analysis that the original law was that the Judge who writes and pronounces a judgment must be the Judge who hears all the evidence. This must still be deemed to be the law, except in so far as it has been modified by the Legislature from time to time."

He refers to Or. XVIII rule 15 and Or. XX rule 2 C.P.C. as instances of modification introduced in the Civil Procedure Code, and similarly he refers to S. 350 Crl. P.C. as a modification introduced in the Criminal Procedure Code. Under S. 350, a successor is permitted to act on the evidence recorded by the predecessor or partly recorded by him. But there is no corresponding provision relating to sessions trials. In 'Sankara Pillai in re', 18 Mad. L.J. 197 it has been held that a successor can pronounce the judgment written and signed by his predecessor. It is a decision of a Bench of this court and it is on all fours with this case.

'In re Sankara Pillai', 18 Mad. L.J. 197 is referred to 'in re Savarimuthu Pillai', 40 Mad. 108 another decision of a Bench of this court. The learned Judge who delivered the judgment 'in re Savarimuthu Pillai', 40 Mad. 108 said

> "A Magistrate who pronounces the judgment of his predecessor in office must in my opinion be taken to adopt it as his own."

Both the above decisions are referred to in 'Alli Khan in re', ILR (1947) Mad. 365 where it is stated

> "If the decision in 'Sankara Pillai in re', 18 Mad. L.J. 197 purports to be an interpretation of S. 367 Crl. P.C. without reference to the provisions of S. 350 Crl. P.C. which deals with cases before a Magistrate, then we would find it difficult, with respect, to accept that interpretation as correct. But it is unnecessary for the purpose of disposing of this appeal to expressly dissent from it, because it can be distinguished on two grounds: the first is that already indicated, i.e., it dealt with a case where there was a change of magistrates, in which different considerations arose because of the provisions of S. 350 Crl. P.C. and the second is that in that case the earlier magistrate continued in office when he wrote the judgment."

Thus the decision in 'Sankara Pillai in re', 18 Mad. L.J. 197 and 'Re Savarimuthu Pillai', 40 Mad. 108 were not dissented from in 'Alli Khan in re', ILR (1947) Mad. 365. The present case is one which is governed by the provisions of S. 350 Crl. P.C. and it is not disputed that the judgment was written by the predecessor while he was in office. Such a judgment can therefore be delivered by the successor. In 'Chinna Somayya in re', AIR 1933 Mad. 251(1) Burn J. held that where a magistrate who signs the judgment but does not pronounce it, is transferred and the judgment is pronounced by his successor there is no irregularity much less an illegality. There is therefore nothing illegal or irregular in the judgment delivered in this case.

(5) The second contention is that the first Magistrate should have adjourned the case when the pleader presented an application under S. 526(8) Crl. P.C. and the dismissal of the petition and the subsequent proceedings are illegal and therefore the judgment written by the predecessor is illegal and hence the conviction and sentence are illegal.

(6) As already stated the defence case was closed on 2nd December 1947 and after examination of C. W. 1 on 16th December 1947 the case was posted for arguments on 21st December 1947 when the application under S. 526(8) was presented. The question for consideration is whether the mandatory provisions of S. 526(8) apply to applications at that stage of the case.

(7) S. 526(8) is as follows:

> "If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party

interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon."

(8) Before this clause was amended in 1932 the clause 8 was as follows:

"If, in the course of any inquiry or trial or before the commencement of the hearing of any appeal, the Public Prosecutor the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon."

Under the clause as it stood before the amendment of 1932 the application may be made at any stage of the trial; the only limitation being that it must be made before the commencement of the hearing. But under the present clause after the amendment in 1932, it must be made in any trial but before the defence closes its case. The word "trial" is not defined in the present Code though it was defined in the Code of 1872. According to the definition contained in the Code of 1872 "trial" means the proceedings taken in court after a charge has been drawn up and includes the punishment of the offender. This is in accordance with the definition given by Privy Council in 'Basil Ranger Lawrence v. Emperor', AIR 1933 P.C. 218 where it has been held that trial means the whole proceedings including the sentence. That is a case from Nigeria and it is not known how the word is used in the Code. But the definition of this word has not only been dropped in the subsequent enactments; but the context in which the word is used in Ss. 366 and 497 Clause (4) of the present Code shows that judgment does not form part of trial. S. 366 says that judgment in every trial shall be pronounced either immediately after termination of the trial or at some subsequent time etc. S. 497(4) says:

"That if at any time after the conclusion of the trial and before judgment is delivered..."

It is therefore clear that at any rate so far as these two sections are concerned, the word "trial" is used only in a restricted sense, as not including the judgment or sentence. In 'Ishar Singh v. Shama Dusadh', AIR 1937 Pat. 131 certain observations were made as to what the expression "before the defence closes its case" means. It is clear from the judgment that these observations are in the nature of obiter dicta and 'Raghu Singh v. Bhairo Prasad', AIR 1949 Pat. 105 also refers to these observations only as obiter dicta.

(8A) It is an elementary rule of construction that a word must be given the same meaning wherever it occurs in the same enactment, unless it is expressly given a different meaning in any particular section.

(9) If therefore the word "trial" in Ss. 366 and 497 clause (4) means all proceedings upto judgment and does not include judgment it must be given the same meaning in S. 526(8) Crl. P.C. But it has been held that "trial" includes arguments of the pleaders on either side. As already stated the application was made on 21st December 1947 when it was posted for arguments. In fact instead of advancing arguments on that day, the application under S. 526(8) was made. The application was therefore made in the course of trial. But under the clause, the application should be made not only in any trial but before the defence closes its case. When does the defence close its case is the question to be considered. The word "case" is not defined in the Code. But it is used in relation to prosecution and defence in Ss. 289 and 290 Crl. P.C.

(10) S. 289(2) says: "..... the prosecutor may sum up his case." S. 290 refers to the summing up of the case by the defence. It is clear that in the two sections, 289 and 290, the word "case" is used as meaning the stage when the examination of the witnesses is concluded on either side. The expression "before the defence closes its case" means therefore before the conclusion of the examination of the witnesses for the defence. In the particular context in which the expression is used, I think that this is the meaning that has to be given to it. Giving this meaning then, in this case the defence closed its case on 2nd December 1947 and the application that was made on 21st December 1947 was made not before the defence closed its case but after it closed its case and the mandatory provisions of S. 526(8) do not apply to the application. The application was therefore rightly rejected.

(11) The next question is whether the successor should have granted a de novo trial which was demanded by the petitioners after the successor took charge. The predecessor as stated before wrote out his judgment and was ready for delivery on 22nd December 1947 and as the accused did not appear on that day, he adjourned the case to 2nd January 1948 when the petition for de novo trial was presented. The successor was not then invested with powers to try the case and he therefore adjourned it to 17th January 1948. Before that date obviously he was conferred with the necessary powers and after hearing arguments on 11th February 1948 on the petition for de novo trial, he dismissed the same on 14th February 1948. A further adjournment was applied for for moving the High Court to revise the order and that also was dismissed and the judgment written by the predecessor and signed by him was pronounced by the successor and signed by him.

(12) Under proviso to S. 350 Crl. P.C. in any trial the accused may when the second magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard. The accused is entitled of right to this de novo trial, as it is often called, only in a trial and when the successor commences the proceedings. In this case on 21st December 1947 when the case was posted for arguments, no arguments were advanced but an application under S. 526(8) was made. I have already held supra that at that stage the Magistrate is not bound under the clause to adjourn the case and the application was rightly refused. The very fact that when the case is posted for arguments on a particular day and that on that particular day, instead of advancing arguments, the accused intimated to the court that he intends to move the High Court for a transfer shows that the accused did not intend to argue the case before the Magistrate and if the adjournment applied for

was rightly refused, there was no other alternative left to the Magistrate but to deliver the judgment. He had therefore written the judgment which he was entitled to do in the circumstances, and once the judgment had been written and signed by him, the case has reached beyond the stage of trial. Even so the succeeding magistrate had a discretion under clause (1) to S. 350 to act or not, on the evidence recorded by his predecessor. The procedure is left purely to the discretion of the Magistrate which is different from the right which the accused has under proviso (a) to the section. If the Magistrate does not choose to exercise his discretion under clause (1) of S. 350, the accused has no right to demand it, the exercise of the right being limited to the stage of the conclusion of the trial. In this case the successor would have done well in the circumstances if he had exercised his discretion under S. 350(1). But he did not do so. Instead he adopted the judgment of his predecessor. The case as already stated had reached past the stage of trial and the refusal of the application for de novo trial was therefore in the circumstances not illegal. In 'Bhogole Chinna Somayya in re', AIR 1933 Mad. 251 Burn J. has held that in such circumstances the accused is not entitled to a de novo trial.

(13) The result is the petition fails and is dismissed.

C.R.K./B/R.G.D. Petition dismissed.

A. I. R. 1952 MADRAS 793

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

RM. G. Sundararamier Radhakrishnier & Co., Applicant v. The Commissioner of Income Tax, Madras, Respondent.

Case Referred No. 31 of 1949, D/- 15-10-1951.

Income Tax Act (1922) S. 10(2)(XV) — Capital or business expenditure — Assessee carrying on business of exporting piecegoods — Share of profits paid to one of importers by way of commission for securing import permits — Not a permissible deduction.

The assessee who was trading in piecegoods and exporting them to Ceylon entered into an oral agreement with K, one of his importers in Ceylon, to give him as his commission half of the profits accruing on the exports to Ceylon in consideration of his services for obtaining the import licenses in Ceylon. During the assessment years the assessee credited to K two sums of money in his account books representing the half share of profits accruing on the exports to Ceylon as the Commission of K and these sums were again shown as an item of expenditure in the final profit and loss account of the assessee. The question was whether the assessee was entitled to claim deduction in respect of these two sums under S. 10(2) (XV).

Held that the assessee was not entitled to claim any deduction under S. 10(2) (XV) in respect of these two sums. The transaction was really and in substance a division of ascertained profits. It was for the assessee to show that the expenditure he incurred by payment to K in the two years of assessment was expenditure which was not only not in the nature of capital expenditure but was expenditure "laid out or expended wholly or exclusively for the purposes of such business." (Paras 3 & 4)

Anno: Income Tax Act S. 10 N. 13.

K. Srinivasan, for Applicant; C. S. Rama Rao Sahib, for Respondent.

RAJAGOPALAN J.: The question for decision is

"Whether on the facts and in the circumstances of the case, the applicant was entitled to the deduction of Rs. 5127 in the assessment year 1945-46 and Rs. 4742 in the assessment year 1946-47 under S. 10(2) (XV) of the Indian Income tax Act."

(2) The facts were not really in dispute even before the Appellate Incometax Tribunal. The Tribunal reported:

"It was admitted that the agreement on the basis of which the payments had been made was only oral, and that Karuppan Chettiar did not do anything for the business, apart from helping in securing the licence which enabled the assessee to export cloth to Ceylon. That there was such an agreement to pay Karuppan Chettiar that Karuppan Chettiar helped him in obtaining a licence and that Karuppan Chettiar was paid the sums referred to above were not in dispute before the Tribunal."

Learned counsel for the applicant pointed out that the assessee, who was trading in piecegoods was exporting goods to Ceylon in the past, one of the importers in Ceylon being Karuppan Chettiar himself. During the assessment years, however, it was necessary to obtain a import licence in Ceylon. The further case of the assessee was that without the help of Karuppan Chettiar, i.e., without the accounts he produced to prove that, in the past, the assessee had been exporting piecegoods to Ceylon to persons including Karuppan Chettiar, it would not have been possible for the assessee to obtain that import licence. The assessee applied for the licence, Karuppan Chettiar produced the evidence, and the assessee obtained the licence. It was for these services that the assessee entered into the agreement with Karuppan Chettiar, to give him as his commission half of the profits on the transactions, i.e., exports to Ceylon. The exports in the assessment years were partly to Karuppan Chettiar himself and partly to others.

(3) Under S. 10(2)(XV) of the Incometax Act, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purposes of such business, profession or vocation can be excluded. It is for the assessee applicant to show that the expenditure he incurred by payment to Karuppan Chettiar in the two years of assessment was expenditure which was not only not in the nature of capital expenditure but was expenditure "laid out or expended wholly or exclusively for the purposes of such business."

(4) The agreement between Karuppan Chettiar and the assessees was oral. The terms thereof were not clear; but it was conceded before the. Incometax authorities including the Incometax Appellate Tribunal that it was out of the profits arising from the export business to Ceylon that Karuppan Chettiar was to be paid, the payment being half of those profits. No doubt learned counsel for the assessee drew our attention to the entries in the account books, which showed the payment to Karuppan Chettiar as commission. It was again shown

as commission and was an expenditure incurred in the final profit and loss account which the assessee cast. But on the statement of the assessee himself, in form and in substance, apart from the description as commission, it was really a case of division of profits. It was not a question of capital expenditure. It was not a question of money expended wholly and exclusively for the purpose of the business which the assessee carried on. The pattials which the assessee as an exporter sent to the importers in Ceylon gave the price, which included the assessee's margin of profits. There were three pattials in one year and four pattials in another which exhausted the quota available to the assessee for export to Ceylon. On that business for the assessment year having been concluded, the amount realised as profits on each of the transactions during the year was ascertained, and half of it was credited to Karuppan Chettiar in the assessee's books, and that was again shown as an item of expenditure in the final profit and loss account of the assessee. That did not however, prevent its being a case of division of profits, profits already ascertained with reference to the export business, i.e. an item of the assessee's business involved in the export of goods to Ceylon. As we said before, it was really in form and in substance a division of ascertained profits; and as such the assessee was rightly held not to be entitled to any deduction of incometax. Sec. 10(2)(XV) does not apply to those two items of expenditure, and it is our answer to the question. As the assessee has failed he must pay the costs of the Commissioner of Incometax which we fix at Rs. 250/-.

C.R.K./B/K.S. Answer in the negative.

A. I. R. 1952 MADRAS 794

SUBBA RAO J.

Arunadevi Jajodia and others, Petitioners v. The Collector of Madras and others, Respondents.

Writ Petn. No. 753 of 1951, D/- 4-2-1952.

(a) Income-tax Act (1922) S. 24-B(3) — Notice — Requirements.

The notice served upon the eldest member of the family, who was doing the business, and addressed to all the legal representatives at the business premises must be taken to be a sufficient notice on the legal representatives of the deceased. (Para 4)

Anno: Income Tax Act S. 24B N. 1.

(b) Income Tax Act (1922) S. 46(7) — "Proceedings for the recovery" — Meaning of.

The procedure prescribed for the recovery of the arrears is embodied in S. 46. The proceedings for the recovery, therefore, start when the Income-tax Officer forwards the certificate to the Collector. The fact that the Collector proceeds to recover the amount from the assessee is not inconsistent with the circumstance that the proceedings for recovery start earlier. The issue by the Incometax Officer of a certificate is the first step of the proceedings for the recovery of the arrears. (Para 5)

Anno: Income Tax Act S. 46 N. 1.

D. Narasaraju and T. T. Shrinivasan, for Petitioners; V. V. Raghavan, for Govt. Pleader and C. S. Rama Rao Sahib, for Respondents.

ORDER: This is an application for issuing a writ of mandamus directing the first respondent to forbear from proceeding with the sale or doing anything pursuant to the notice dated 4-10-1951.

(2) The first petitioner is the widow, and the other petitioners, are the sons of late Rangilal Jajodia, who died on 11th January 1946. Shankarlal Jajodia is the eldest brother of petitioners 2, 3 and 4. Prior to his death Rangilal Jajodia submitted returns for the assessment years 1941-42, 1942-43 and 1943-44 under the Incometax Act in respect of the business carried on by him at Madras. He also submitted returns under the Excess Profits Tax Act. He employed an auditor to discuss the matter with the Incometax Officer, and the enquiry was practically concluded, though the formal assessments were not made. After the death of Rangilal Jajodia the Incometax Officer altered the title for the assessment as "Estate of the late Sri Rangilal Jajodia, represented by Sri Shankarlal Jajodia, son of Rangilal Jajodia and Srimathi Aruna Devi, widow of Rangilal Jajodia and her children", and caused notice to that effect to be served at the business place, and Shankarlal Jajodia received the same.

The assessments were made on 30-3-1946, 20-3-1947 and 20-3-1947 in regard to the assessment years 1941-42, 1942-43 and 1943-44 respectively. The Incometax Officer forwarded certificates to the Collector specifying the amount of arrears due from the assessee on 25-3-1947, 20-3-1948 and 24-3-1948. In regard to the excess profits tax, assessment for the period ending 31-3-1942 was made on 28-2-1947, and a certificate was issued on 23-3-1948. The Collector is now bringing to sale the petitioners' property under the Revenue Recovery Act for realising the arrears of tax. This application is filed for the aforesaid relief.

(3) Learned Counsel for the petitioners raised before me three points: (1) The Incometax Officer did not comply with the provisions of S. 24-B(3) of the Incometax Act in making the aforesaid assessments, and therefore they were invalid. (2) The proceedings for the recovery of the arrears under the Act were commenced after the expiry of one year from the last day of the financial year in which the demand was made, and therefore the arrears could not be collected under the Madras Revenue Recovery Act; and (3) The Collector was bringing to sale 11 grounds out of 22 grounds cutting off a portion of the building in the middle, and he had no power under the Revenue Recovery Act to sell the property in that manner.

(4) For appreciating the first point the relevant provisions of S. 24B may be read. Sec. 24-B(3) says:

"Where a person dies, without having furnished a return which he has been required to furnish under the provisions of S. 22, or having furnished a return which the Incometax Officer has reason to believe to be incorrect or incomplete, the Incometax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment, and for this purpose may, by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator, or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of Ss. 22 and 23 have required from the deceased person."

Under this section if a person dies after having furnished a return, the Incometax Officer may make the assessment after requiring the legal representative of the deceased person to furnish the necessary accounts, documents or other evidence. It is said that the Incometax Officer did not accept the return, but made the assessment without issuing notice to the legal representative of the deceased Rangilal Jajodia, and that therefore the assessment was invalid. What actually happened in this case is mentioned in the counter affidavit filed by the second respondent. It is stated therein that the assessment was practically completed, and that there was nothing further to be done by the assessee, but the Incometax Officer altered the title for the assessment as "estate of the late Shri Rangilal Jajodia, represented by Shri Shankarlal Jajodia, son of Rangilal Jajodia and Srimathi Arunadevi, widow of Rangilal Jajodia and her children" and caused notice to be served at the business place, and the eldest son who was in charge of the business received the same.

But it was argued that the late Rangilal Jajodia executed a Will whereunder all his properties were bequeathed to his widow and sons other than Shankarlal Jajodia, and that therefore the notice served upon Shankarlal Jajodia was not a valid notice. Except making that allegation, no effort has been made before me to establish that Rangilal Jajodia executed such a Will. In the absence of any proof that such a Will was executed by Rangilal Jajodia, I must assume for the purpose of this application that Shankarlal Jajodia is also one of the heirs along with his mother and brothers. The notice therefore served upon the eldest member of the family who was doing the business, and addressed to all the legal representatives at the business premises must be taken to be a sufficient notice on the legal representatives of the deceased. Anyhow, the legal representatives preferred an appeal against the order of the Incometax Officer, and this question would be considered in that appeal. Any observations I have made are not intended to be a final determination of the question of the validity of the assessments made. That question will necessarily be determined in the appeal by the appropriate tribunal.

(5) The second point is based upon the provisions of S. 46 (7). The material provisions of S. 46 are as follows:

"S. 46 (1) When an assessee is in default in making a payment of incometax, the Incometax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(2) The Incometax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.

(7) Save in accordance with the provisions of sub-sec. (1) of S. 42, or of the proviso to S. 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act."

Learned counsel contends that the words "no proceedings for the recovery" in Sec. 46 (7) refer only to the proceedings taken by the Collector for the recovery of arrears under the Revenue Recovery Act, and therefore the proceedings having been commenced by him one year after the prescribed time are barred under that sub-section, whereas learned counsel for the Incometax Officer argues that the proceedings for the recovery of the sum commence from an earlier point of time when the Incometax Officer forwards a certificate under S. 46 (2), and he has forwarded certificates in the present case on 25-3-1947, 23-3-1948 and 24-3-1948, which dates are within the prescribed time. The question therefore is, what do "proceedings for the recovery" mean in S. 46 (7). The process of assessment involves three stages: (1) the factum of assessment, (2) demand of the amount assessed, and (3) proceedings to recover the amount if a default is made by the assessee. The Incometax Officer starts the proceedings to recover the arrears in the prescribed manner after the default is made.

The procedure prescribed for the recovery of the arrears is embodied in S. 46 of the Act. The proceedings for the recovery therefore start when the Incometax Officer forwards the certificate to the Collector. But the learned counsel for the petitioner argued with some force that the words used in S. 46 (2) brought about a distinction between the issuing of a certificate by the Incometax Officer and the starting of proceedings to recover from the assessee. He relied upon the words in S. 46 (2) "on receipt of such certificate, shall proceed to recover from such assessee the amount", and compared those words with the words in S. 46(7) "proceedings for the recovery of any sum payable under this Act", and contended that the said proceedings for recovery related to the stage when the Collector proceeded to recover the amount from the assessee. The word 'proceeding" relates to the "modes in which judicial transactions are conducted". In its general acceptance it connotes "a prescribed mode of action for carrying into effect a legal right" (See P. Ramanatha Aiyar's Law Lexicon).

The meaning of the word is wide enough to include the entire procedure prescribed by the Act for realising the amount. The fact that the Collector proceeds to recover the amount from the assessee is not inconsistent with the circumstance that the proceedings for recovery start earlier. I therefore hold that the issue by the Incometax Officer of a certificate is the first step of the proceedings for the recovery of the arrears. So construed, it follows that the proceedings were started within the time prescribed by S. 46 (7) of the Act.

(6) There are no merits in the third point. The Collector is empowered to recover the arrears under the provisions of the Revenue Recovery Act. It has not been established that he has contravened any provisions of the Act in bringing the property to sale. If he is selling the property in inconvenient plots, it is for the petitioners to raise the necessary objections before him.

(7) In the result the application fails and is dismissed with costs. Advocate's fee Rs. 100.

C.R.K./B/D.H. Application dismissed.

A. I. R. 1952 MADRAS 795

BASHEER AHMED SAYEED J.

Governor-General in Council owning the B.B. & C.I. Rly. represented by the General Manager, Petitioner v. Ajithbhai Jayanthilal and Co., by partners, S. M. Patel and others, Respondents.

Civil Revn. Petn. No. 1411 of 1949, D/- 4-9-1951.

Railways Act (1890), S. 77 — Question whether company had notice of loss — Intention of Legislature in inserting section is relevant consideration.

The intention of the Legislature in having inserted S. 77 in the Railways Act should be a very relevant consideration in deciding as to whether the company had or had not notice of the loss suffered by the plaintiff: AIR 1919 Mad. 140, AIR 1922 Mad. 362 (FB) & AIR 1930 Cal. 332 Foll. 26 Bom. 669, Not foll. (Para 5)

Where the plaintiff gave notice under S. 77 to A railway within time, but it being turned out that the proper quarter where the plaintiff could lay claim for compensation was B railway, the A railway entered into correspondence with the B railway long before the expiry of six months required for the notice:

Held that considering that the object of the section was not to deprive customers of their legitimate right but only to enable the railway administration to have sufficient time to investigate the claim set up without allowing the parties to resort to litigation, B railway had notice and S. 77 had been sufficiently complied with. (Para 5)

Anno: Railways Act, S. 77, N. 1.

King and Partridge, for Petitioner; D. Ramaswami Iyengar and L. Krishna Das, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('02) 26 Bom 669: (4 Bom LR 495) 3
('30) 57 Cal 1286: (AIR (17) 1930 Cal 332) 3, 5
('99) 22 Mad 137 5
('09) 4 Mad LT 427: (3 Ind Cas 479) 5
('12) 23 Mad LJ 511: (17 Ind Cas 419) 5
('13) 36 Mad 65: (12 Ind Cas 76) 5
('18) 41 Mad 871: (AIR (6) 1919 Mad 140) 3
('22) 45 Mad 135: (AIR (9) 1922 Mad 362 FB) 5
('47) ILR (1947) Nag 369: (AIR (35) 1948 Nag 17) 3, 5

ORDER: This civil revision petition is by the Governor-General in Council owning the B. B. & C. I. Railway represented by the General Manager seeking to set aside the decree passed by two Judges of the Presidency Small Causes Court, Madras, in a New trial Application preferred by the respondent against the judgment of the Chief Judge of the Court of Small Causes, Madras, dismissing the claim for loss sustained by the respondent by the failure of the company to deliver one bale of textiles.

(2) Both the trial Judge as well as the two Judges who heard the New Trial Application came to the conclusion that the loss of one bale of textiles consigned by the respondent was due to the misconduct of the Railway Administration itself and not by any other agency outside the Railway Administration. Both are of the definite opinion that some of the railway employees were responsible for the loss of this one bale in question. The misconduct of the employees of the Administration is certainly the misconduct of the Administration itself. On this point, there is no question raised by the petitioner. Besides, it being a finding of fact, no question can be raised either.

(3) The main question that has been argued before me by the learned counsel for the petitioner is that S. 77 of the Indian Railways Act has not been complied with. S. 77 lays down thus:

"A person shall not be entitled to a refund of an over-charge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."

The learned trial Judge relying upon the language of the section has brushed aside the authorities quoted before him by the respondent and came to the conclusion that he failed to see how a statutory requirement can be got over by an appeal to its objects & reasons, however, good it may be. He further stated that no decision of this court had been cited to that effect before him. On the other hand, the two Judges who heard the New Trial Application have placed reliance upon the decision in 'Shamsul Huq v. Secy. of State', 57 Cal 1286 and 'Govindlal v. Governor General in Council', ILR (1947) Nag 369 and came to the decision that the object of the section and the intention of the Legislature underlying this section should be looked into and that it should not be interpreted in too strict a manner to deprive the plaintiff of his legitimate right to claim the loss from the Railway Administration for non-delivery of goods consigned.

The learned counsel for the petitioner has invited my attention to the decision in 'East Indian Rly. Co. v. Jethmul', 26 Bom 669 which reversed the judgment of Tyabji J. and held that the strict compliance of S. 77 was required before any person could be entitled to claim a refund or compensation for the loss of property entrusted to the Railway Administration. If this decision had stood by itself, probably I would have been inclined to agree with the learned counsel for the petitioner. But the learned counsel for the respondent invited my attention to a decision in 'M. & S. M. Rly. Co. Ltd. v. Haridoss Banmalidas', 41 Mad 871 which has also been cited by the learned counsel for the petitioner. In that decision at page 884 Spencer J. has observed as follows:

"If 'destruction' is to include deliberate acts of the company, or its servants, I cannot see why the word 'loss' should only apply to cases where the goods have been mislaid. If the company is liable for negligence it must 'a fortiori' be liable for wilful acts. I think the intention of the Legislature in inserting S. 77 into the Act must have been that by requiring notice to be given before claims are put in, the company might have time to investigate such cases and meet the claims of persons who have suffered loss, if possible out of court. The word 'loss' in the English language, is, in my opinion, sufficiently wide to cover cases where the goods are not forthcoming either from deliberate acts or from acts of negligence and I see no reason to confine it only to cases of the latter kind."

(4) In this case the finding, as already observed, has been that the loss has accrued due

to the misconduct of the employees of the company to whom the goods were originally consigned. In the above decision, Spencer J. made it clear that the intention of the section is merely to put the company on notice so that time may be made available to the company to investigate such claims and meet such claims out of court wherever possible. While this decision does not help to any extent the learned counsel for the petitioner, in my opinion, it does lay down the rule that should be observed in considering whether the requirements of S. 77 have been complied with or not.

(5) In 'Mahadeva Aiyar v. S. I. Rly Co.', 45 Mad 135 (FB) Kumaraswami Sastry J. has observed while considering S. 140 of the same Railways Act to the following effect:

"The object of the section is to see that the company gets notice and there is no magic in the methods provided for by the section to see that it reaches him if as a matter of fact the notice comes into his hands. Supposing the plaintiff adopts the method of sending the notice by post without registration and the agent admits receipt of the notice which is otherwise valid, there is no reason for holding that non-registration is such a vital defect that it invalidates the notice....."

So far as notices of action are concerned, the substantial point is whether they reached the person to whom the law requires notice to be given and the method by which he received it is a matter which is of comparative unimportance and a deviation from the methods prescribed in the section will, in my opinion, be only an irregularity....."

He further goes on to observe:

"I am of opinion that 'Woods v. Mehar Ali', 4 Mad L T 427; 'Perianan Chetty v. South Indian Rly. Co.', 22 Mad 137; 'M & S M Rly. Co. v. Bhimappa', 23 Mad L J 511 and 'Seshachalam Chetty v. Traffic Manager, the Nizam's Guaranteed State Rly. Co.', 36 Mad 65 were rightly decided, and would follow them in preference to the decisions that put a strict and legal literal interpretation on clauses (a), (b) and (c) of S. 140."

No doubt, in that case, the question arose as to whether leaving a notice in the hands of the Traffic Manager of the company was sufficient compliance of S. 140 of the Railways Act. Nevertheless, the principle as to the method or the form in which notice should be considered sufficient to the railway administration has been laid down. What has been made applicable to S. 140, I fail to see why should not be made applicable by analogy to S. 77 of the Act also. In this case, though direct notice was given to B. B. & C. I. railway only in November 1946, still notice sent to the M. & S. M. Railway Co., had been given sufficiently in time and the M. & S. M. Railway had already entered into correspondence with the B. B. & C. I. Railway long before the expiry of the period of six months required for the notice. Ex. P. 6 is material in this connection. Under that document, the M. & S. M. Railway admitted that they were in correspondence with the foreign railways. The question is whether notice of the loss of the goods belonging to the plaintiff had not been brought home to the B. B. and C. I. Railway by the correspondence which had taken place between the M. & S. M. Railway and the B. B. & C. I. Railway and whether in those circumstances, the B. B. & C. I. Railway could not be taken to have had notice of the loss in respect of which compensation was claimed. Following the principle laid down in the two decisions cited above and also in 'Shamsul Huq v. The Secy. of State', 57 Cal 1286 I am inclined to think that in such cases, the intention of the Legislature in having inserted S. 77 in the Railways Act should be a very relevant consideration in deciding as to whether the company had or had not notice of the loss suffered by the plaintiff. In 'Shamsul Huq v. The Secy. of State', 57 Cal 1286 Lort-Williams J. stated very definitely that

"the object of the section is to prevent dishonest claim for loss when, owing to delay, it might be impossible to trace the transaction and that it was intended as a weapon of defence against fraud, not as a means to enable the railway authorities to deprive their customers of their just dues."

I entirely agree with this observation and I think that in the circumstances of the present case, these observations would apply. In addition to this, there is further the decision in 'Govindlal v. Governor General in Council', ILR (1947) Nag 369, cited by the learned counsel for the respondent. Niyogi J. observed as follows in that decision:

"Both the railway companies have admitted that the loss of one bale had occurred in transit. That admission itself dispenses with the enquiry into the validity or invalidity of the notice of the claim made by the plaintiff since as pointed out in 'Shamsul Huq v. Secy. of State', 57 Cal 1286 Sec. 77 of the Railways Act is only intended to give an opportunity to the railway company to make satisfactory investigation."

No doubt, in that case, a notice was given to the Superintendent-General within six months and not to the railway administration as such, but it was considered sufficient to bind the railway company in terms of Sec. 77 of the Railways Act, even though the Superintendent General had not been technically authorised to receive notice under that section. But, in this case, both the Railway Administrations are part and parcel of the same system of railways administered who the plaintiff thought, was directly responsible to deliver the goods, should be considered sufficient when that notice had been somehow brought to the notice of the other administration from whom the plaintiff seeks to claim relief. The M. & S. M. Railway was until a certain stage thought to be the appropriate quarter where the plaintiff could lay claim for compensation. But, as it turned out that the proper quarter was B. B. & C. I. and as gathered from the evidence on record, the M. & S. M. Railway duly entered into correspondence with the B. B. & C. I. Railway and the B. B. & C. I. railway had notice of the loss of the property which should have been delivered to the plaintiff even long prior to the expiry of the six months period. It must be stated that the B. B. & C. I. railway had notice and that S. 77 of the Act had been sufficiently complied with considering that the object of the section was not to deprive customers of their legitimate right but only to enable the railway administration to have sufficient time to investigate the claim set up without allowing the parties to resort to litigation.

(6) In this view, I think that the decision of the two Judges of the Small Cause Court has

to be upheld and this petition has to be dismissed, and is accordingly dismissed. The petitioner will pay the respondent's costs.

C.R.K./B/V.R.B. Petition dismissed.

A. I. R. 1952 MADRAS 798

GOVINDA MENON J.

S. M. Raja Goundar and others, Appellants v. Choolai Sabapathi Mudaliar, Respondent.

Civil Revn. Petn. No. 792 of 1949, D/- 8-9-1950.

(a) Civil Procedure Code (1908), O. 17 R. 1 — Judge absent on date of hearing — Chief ministerial officer adjourning case — Adjournment if ultra vires — Practice to be followed indicated — Madras Civil Courts Act (III (3) of 1873), S. 24.

Under S. 24 of the Madras Civil Courts Act, ministerial officers of a Court shall perform such duties as may from time to time be imposed upon them by the presiding officer of the court. When a presiding officer is absent on account of illness or other reason from court, it is to be presumed that for performing the routine duties which are not judicial on that day the presiding officer the power to delegate it to the chief ministerial officer. No introductions have been issued by the High Court to the subordinate courts as to what should be done with regard to cases which stand posted to a particular date when the presiding officer is unavoidably absent on that day. In such state of circumstances the proper procedure which ought to be followed by the subordinate courts is that such cases should be deemed to automatically stand adjourned to the next working day and on such next working day when the presiding officer attends court he should either take up those cases on that day or adjourn them to suitable dates. But there is nothing illegal or improper in the Chief ministerial officer adjourning a case which stands posted to a particular date on which the judge does not attend court to a later date, if he is authorised to do so by the presiding officer. Mere adjournment of a case which has not been part-heard cannot be said to be a judicial order, and, therefore, even if the adjournment is done by the Chief ministerial officer, still it cannot be held that the action is ultra vires and that the case cannot be deemed to have been adjourned. AIR 1934 Lah 984, considered. (Para 4)

Anno: Civil P. C., O. 17 R. 1 N. 4.

(b) Civil P. C. (1908), O. 17 R. 1 — Court is not bound to inform party of adjourned date.

There is no duty cast upon the Court to inform the party of the adjourned date when he has not conformed to the imperative duty of being present in Court. (Para 4)

Anno: Civil P. C., O. 17 R. 1 N. 1.

N. R. Raghavachariar, and V. C. Sri Kumar, for Appellants; M. Natesan, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('99) 22 All 66: (1899 All WN 176 FB) 3
('32) 33 Pun LR 804 3
('34) AIR 1934 Lah 984: (155 Ind Cas 514) 3, 4
('36) AIR 1936 Lah 1000: (167 Ind Cas 520) 3
('30) 58 Mad LJ 10: (AIR 1930 Mad 113 SB) 4

ORDER: O. S. No. 100 of 1947 on the file of the Court of the District Munsif of Vellore, stood posted for hearing to the 18th February 1948 and on that day the presiding officer was on casual leave. The case was, therefore, adjourned to 4-3-1948 on which date the defendant did not appear. An 'ex parte' decree was passed against him as prayed for by the plaintiff. I. A. No. 356 of 1948 was filed by the defendant to set aside the 'ex parte' decree on the ground that he was not aware of the date to which the case had been adjourned, that he had been under the impression that the adjourned date was the 5th March 1948 and on the 'bona fide' belief that the case would be heard only on 5-3-1948 he did not attend court on 4-3-1948 or engage his counsel to conduct the same.

(2) Both the lower courts have disbelieved the plea of the defendant chiefly on the ground that the defendant did not offer himself for examination to prove the allegations contained in his affidavit. The learned District Judge says that the vakil for the defendant in the Court of first instance refused to put the defendant into the witness box although requested to do so by the opposite side; and, therefore, what was peculiarly within the knowledge of the defendant was withheld from the knowledge of the Court. For these and other reasons, the application under Order 9 Rule 13, C. P. C. which was rejected by the trial Court shared the same fate at the hands of the court of appeal.

(3) In revision it is contended before me by the learned counsel for the petitioner that whatever might be the merits of the case, the lower courts acted without jurisdiction in not setting aside the 'ex parte' decree for the reason that the adjournment of the case from 18th February 1948 to the 4th March 1948 was illegal and 'ultra vires' the powers of the officer who ordered it. It is urged that, on the absence of a Judge or presiding officer on a particular day, the chief ministerial officer has no jurisdiction to adjourn the cases posted for that date, and such being the case the adjournment to 4-3-1948 was entirely outside the powers of the ministerial officer and if that is so, a case wrongly posted to a date by an unauthorised person need not be attended to by the parties to that litigation.

For this contention reliance was placed on two decisions of the Lahore High Court, each by a Single Judge. In the first of them — 'Hukam Chand v. Mani Shibrat Dass', AIR 1934 Lah 984, Hilton J. expressed the opinion that when a Judge is absent the clerk has no power to fix the adjournment date and failure to appear on a date so fixed does not justify the dismissal for default. The learned Judge relied upon an earlier decision of the same Court reported in — 'Jowala Sahi Dhera Shah v. Maya Das', 33 Punj LR 804. The learned Judge was further of opinion that the absence of the party on such an unauthorised adjourned date would not amount to any negligence on his part. The second of the Lahore cases is by Agha Haidar J. in — 'Gulam Haidar v. Diwan Iqbal Nath', AIR 1936 Lah 1000, where the learned Judge relying upon the earlier decisions in — 'Jowala Sahai Dhera v. Maya Das', 33 Pun LR 804 and in — 'Lalta Prasad v. Nand Kishore', 22 All 66 FB, held that where the adjourned dates have been fixed by the reader of the Court who has altered the dates signed by the Subordinate Judge, such practice is wholly irregular and should be put an end to. In this case it does not appear from the facts stated that the adjournment was on account of the absence of

the presiding officer for illness or for other reasons. 'Ex concessis' it has to be admitted that when there is a presiding officer in a court and when he adjourns the case to a particular date the clerk or the reader has no right to alter the date at all; and therefore this latter case of Lahore has no bearing so far as the facts of our case are concerned.

(4) No doubt the observations of Hilton J. in — 'Hukam Chand v. Mani Shibrat Dass', AIR 1934 Lah 984 are of some help to the contention urged by the learned counsel for the petitioner. What we have to see is whether the practice and procedure obtaining in this State would justify the adoption of the very wide observations made by the learned Judge in that case. Under S. 24 of the Madras Civil Courts Act, ministerial officers of a Court shall perform such duties as may from time to time be imposed upon them by the presiding officer of the court. When a presiding officer is absent on account of illness or other reason from court, it is to be presumed that for performing the routine duties which are not judicial on that day the presiding officer has the power to delegate it to the chief ministerial officer. No instructions have been issued by this court to the subordinate courts as to what should be done with regard to cases which stand posted to a particular date when the presiding officer is unavoidably absent on that day. In such state of circumstances it seems to me that the proper procedure which ought to be followed by the subordinate courts is that such cases should be deemed to automatically stand adjourned to the next working day and on such next working day when the presiding officer attends court he should either take up those cases on that day or adjourn them to suitable dates. But the practice now obtaining, as I understand is, that the chief ministerial officer adjourns such cases to certain future dates. It is this practice that has given room for the contention raised by the learned counsel for the petitioner. In my view there is nothing illegal or improper in the Chief ministerial officer adjourning a case which stands posted to a particular date on which the judge does not attend court to a later date, if he is authorised to do so by the presiding officer. Mere adjournment of a case which has not been part-heard cannot be said to be a judicial order; and, therefore, even if the adjournment from the 18th February to the 4th March was done by the chief ministerial officer, still it cannot be held that the action was 'ultra vires' and that the case cannot be deemed to have been adjourned to 4th March 1948.

Moreover, in this case there is nothing to show — because the petitioner has not offered to give evidence — that on the 18th February he was present in court. He should have been present in court or should have taken necessary steps for the conduct of the case on the 18th and since there is no evidence that he was present, it cannot be held that there is any duty cast upon the court to inform him of the adjourned date when he has not conformed to the imperative duty of being present in court. In — 'Commissioner of Income-tax v. Perianna Pillai', 58 Mad LJ 10 at p. 15 Curgenven J. in delivering the judgment of the Full Bench observed as follows:

"It is not the practice, much less a rule of procedure, even in the Court of Justice that an adjournment date is so intimated to an absent party. No doubt if a party chooses to apply, in person or by representative, at the Court or Office, he can learn what orders have been passed. But he cannot insist upon a telegram or a letter by post, any more than he can insist upon a letter by a special messenger."

If therefore, the petitioner by his own negligence in being absent on 18-2-1948 did not know the adjourned date, he has to thank himself. He cannot turn round and say that the chief ministerial officer had no jurisdiction to adjourn the case to a free day on a subsequent occasion. He should have presented himself on 18-2-1948 and objected to it or he could have stated that that date would not be suitable to him or matters like that. But in the absence of such protest it cannot be held that the action of the ministerial officer in fixing a date for the hearing is illegal or irregular. The petitioner has to prove that he was not aware of the adjourned date and he has signally failed to do so.

(5) As I have already remarked, the proper procedure that should have been followed by the presiding officer was to have taken up the cases which had stood posted for 18-2-48 on the next day when he attended court and himself either heard them that day or adjourned them to a future date. But the failure to do so is a mere irregularity which would not amount to a failure of justice.

(6) This Revision Petition is therefore dismissed but in the circumstances without costs.

C.R.K./B/R.G.D. Revision dismissed.

A. I. R. 1952 MADRAS 799

KRISHNASWAMI NAYUDU J.

In re L. Palaniappa Chettiar, Petitioner.

Civil Revn. Petns. Nos. 17 and 18 of 1952. D/- 10-1-1952.

Court-fees Act (1870), S. 7 (IV-A) (added by Madras Court-fee (Amendment) Act 5 (V) of 1922) — Setting aside of portion of document.

Where the plaintiff seeks to reopen accounts, it is not open to him to apply for setting aside a portion of the document settling the account so long as the document evidencing the settlement is outstanding and he will not be entitled to have the accounts reopened. It is not open to the plaintiff to ask the Court to look into the accounts unless he gets out of the agreement to which he was a party. It is therefore incumbent on him to have the entire document set aside and he is liable to pay Court fee under S. 7-IV-A for setting aside the document. AIR 1939 Mad 894, Foll. (Para 1)

Anno: C. F. Act, S. 7 (IV-A) (Madras), Note 1.

S. Jagadisa Iyer, for Petitioner.

REFERENCE..... Para.

('40) ILR (1940) Mad 73: (AIR 1939 Mad 894) 1

ORDER: These are revision petitions against the order of the Subordinate Judge of Devakottai directing the petitioner to pay Court fee under S. 7-IV-A in respect of relief in the amended prayer. The amendment is in respect of cancellation of a portion of Ex. A 1 and it was contended before the learned Judge that it is not capable of valuation and S. 7-IV-A is not applicable and no court-fee is payable. In A. S. No. 858 of 1948 at his instance the suit was remanded to enable the petitioner to apply for amendment of the plaint for setting aside the settlement evidenced by Ex. A. 1 and it was

observed by the learned Judges in A. S. No. 858 of 1948 that what the plaintiff wanted was

"a sifting and fresh enquiry into the accounts reopening the entire settlement of accounts on the ground that the agreement Ex. A 1 was initiated by duress, fraud, misrepresentation etc."

and the plaintiff was therefore given leave to apply for amendment paying of course the additional court fee due for setting aside the settlement evidenced by Ex. A 1. It is obvious that he has not now asked for setting aside the entire document but has chosen to apply for cancellation only of a portion of the document, that is in respect of clauses 3 and 4 alone. The learned Judge has rightly held that the plaintiff must pay Court fee under S. 7-IV-A in respect of the relief claimed. It is not open to the plaintiff to apply for setting aside a portion of the document so long as the document evidencing the settlement is outstanding and he will not be entitled to have the accounts reopened. As observed by Wadsworth J. in — 'Vellayya v. Ramaswami', ILR (1940) Mad 73:

"when the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party then quite clearly he must get that decree or deed cancelled or declared void 'in toto' and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for declaration."

It is not therefore open to the plaintiff to ask the Court to look into the accounts unless he gets out of the agreement to which he was a party. It is therefore incumbent on him to have the entire document set aside. He is liable to pay Court fee under S. 7-IV-A for setting aside the document. I see no error in the exercise of the jurisdiction by the learned Subordinate Judge.

(2) The petitions are dismissed.

C.R.K./B/V.R.B. Petitions dismissed.

A. I. R. 1952 MADRAS 800

RAMASWAMI J.

In re Gangipati Appayya and others.

Criminal Revn. Cases Nos. 1019 to 1021 of 1950 and 283 and 284 of 1951 and Criminal Revn. Petns. Nos. 952 to 954 of 1950, 282 and 283 of 1951 D/- 17-1-1952.

Companies Act (1913), Ss. 13(1) and 133(3) — Failure to place balance sheet before general body meeting within time — Managing director pleading his own default — Plea of innocence by directors.

Where a complaint under S. 13(1) read with S. 133(3) was filed against the managing director and the directors of a company for their failure to place the balance sheet before the general body meeting of the company as required by the Act and it was contended on behalf of the managing director that no offence was made out against him because, inasmuch as no general body meeting was held within the period prescribed, no question of placing the balance sheet arose and the plea of the directors was that it was impossible for them to hold a general body meeting and place the balance sheet and especially so when it was the managing director who was entitled to call this meeting and get the balance sheet placed before it;

Held that this was a clear case where the managing director was relying on his own default in order to establish his innocence and this he could not be permitted to do. AIR 1917 Cal. 1; Rel. on; AIR 1948 Bom. 357, Dissent from; AIR 1941 Mad. 504, Ref. to. (Para 7)

Held further that the pleas put forward by the directors also could not be accepted as they had ample opportunities and time to apply to the Registrar for extension and they did not do so; and secondly they had got their own responsibility and could not plead innocence on the ground of helplessness and throw the entire blame on the managing director. AIR 1948 Cal. 42, Rel. on. (Para 9)

Anno: Companies Act S. 133 N. 1.

D. P. Narayana Rao, C. V. Dhikshitulu and N. Rajeswara Rao, for Petitioners; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('48) AIR 1948 Bom 357: (49 Cri LJ 515) 6
('18) 45 Cal 486: (AIR 1917 Cal 1: 18 Cri LJ 787) 6
('48) AIR 1948 Cal 42: (48 Cri LJ 236) 8
('41) 1941-1 Mad LJ 419: (AIR 1941 Mad 504: 42 Cri LJ 683) 7
(1911) 1 KB 588: (80 LJ KB 396) 6

ORDER: These are five connected cases filed against appeals filed against the convictions and sentences of the Additional First Class Magistrate, Vijayawada in C.C. Nos. 178 and 179 of 1949.

(2) The facts are brief: The petitioners before us are the directors of Sri Gopalakrishna Motor Transport Company Ltd. and whose affair were the subject matter of investigation till recently on the original side of the High Court. How this company came into existence was as follows: These directors were originally competing bus-owners running a few buses each. The Government of Madras then insisted that groups of 20 buses should be formed into fleets and then only they would be allowed to operate as public transport vehicles. Therefore by reason of this requirement the erstwhile warring competitors were thrown together. It is not too much to say that it was more like a case of a number of wild cats being thrown into a cage and asked to live amicably thereafter. It needed therefore no astrologer to forecast the future of such a company.

The company was incorporated under the Indian Companies Act of 1913 as Joint Stock company limited by shares on 20-12-1944 having its registered office at Vijayawada. Sri Veeramachaneni Seethayya became the Managing director and the other petitioners became the directors. According to S. 131(1) of the Indian Companies Act the first balance sheet must be placed before the General Body meeting not later than 18 months after the date of the incorporation and subsequently the balance sheet should be placed before the General Body once in every calendar year. No balance sheet was placed before the General Body meeting and not even the first balance sheet in the General Body meeting which was managed to be held in 1947. The balance sheets upto and including 14-11-1945 and from 15-11-1945 to 31-12-1945 were prepared in 1948.

I may point out for completeness of information that the petitioners became Managing

Director and directors from 1-7-1946 and the first General Body meeting was held on 19-6-1946 and as I just pointed out before, no balance sheet was placed before it. The balance sheet was only adopted by the General Body only in 1948. Therefore the Assistant Registrar of Joint Stock Companies, Kistna Masulipatnam filed a complaint under S. 131(1) of the Indian Companies Act read with S. 133(3) against Seethayya and five others for their failure, being the directors of Sri Gopala Krishna Motor Transport Company Ltd., Vijayawada to place the balance sheet before the General Body meeting of the company as required by the Act.

(3) The case for Seethayya is that no offence has been made out against him because, inasmuch as no General Body meeting was held within the period prescribed, no question of placing the balance sheet arose and that the charge against him, as it stands, is misconceived and that no offence has been committed by him on that footing. The case for the ordinary directors is that there has been no wilful default on their part and that owing to circumstances beyond their control the placing of the balance sheet could not be done and hence they are not guilty.

(4) The learned First Class Magistrate found all these persons guilty as charged and fined the Managing Director Rs. 500 and fined the other directors Rs. 250 each. On appeal the fines and default sentences were halved by the learned Sessions Judge, Krishna at Masulipatnam.

(5) The two points taken in the lower court have been taken by the petitioners before me also. They are found to be without any substance. I shall deal with them one by one.

(6) As regards the case of the Managing Director, it is quite true that a decision of the Bombay High Court relied on by learned counsel for Seethayya (Managing Director) reported in — 'Emperor v. Pioneer Clay & Industrial Works Ltd.', AIR 1948 Bom. 357 lends support to the contentions of Seethayya. In that case it is laid down that what is made penal by S. 134(4) is default in complying with the requirements of the section and under S. 134(1) there is no obligation cast upon the company to file three copies of the balance sheet and the profit and loss account if no general meeting has been called. Where, therefore, no general meeting of the company was called and no balance sheet and profit and loss account laid before it, the company and its directors have made no default in complying with S. 134 by their failure to file the copies of the balance sheet and the profit and loss account with the Registrar of the companies and they are not guilty under S. 134(4) although they might have committed an offence either under S. 76(2) or under S. 133(3), that is to say, not calling for a general body meeting within the time prescribed.

This decision itself was a clear dissent from a Bench decision of the Calcutta High Court reported in — 'Debendranath Das v. Registrar of Joint Stock Companies', 45 Cal. 486. In that decision on facts practically the same as before the Bombay High Court, the Calcutta High Court took the view that it was not open to an accused to plead in answer to a charge under S. 134 his prior default in respect of the calling of the prescribed general meeting and placing before the company at such meeting a duly prepared and audited balance sheet and they relied on a decision of the English Court in — 'Park v. Lawton', (1911) 1 K.B. 588. Out of the two decisions I am inclined to follow the latter.

(7) Whatever might have been the facts in the Bombay case of which we have no full account, it is clear here that this accused person Seethayya is relying on his own default and pleads his innocence. There were sufficient opportunities before him for applying to the Registrar of the Joint Stock Companies to condone the delay. In fact in a Madras case reported in — 'Ramanujam Appalasami In re', (1941) 1 Mad. L.J. 419 the accused were convicted under S. 76(2) of the Companies Act for not holding a general meeting of the company of which they were the directors within 18 months of the date of the incorporation. They were also convicted under S. 131 of the Companies Act for not having laid before the general body within 18 months from the incorporation of the company a balance sheet.

It was shown that in reply to a letter from the company the Registrar of Joint Stock Companies had condoned the delay in the following terms: "The delay in holding the general meeting is condoned and the list of members and summary is filed this time." Held: Inasmuch as the letter of the Registrar condoned the failure of the accused to hold a general meeting they were not liable to be convicted under S. 76(2) of the Companies Act. Held further: As the Registrar had condoned the delay in holding the general meeting he should be deemed to have condoned the delay in filing the balance sheet before the general body at its meeting and the accused were not liable to be convicted under S. 131 of the Companies Act.

In this case it is not the contention of Seethayya that the balance sheet had been prepared at any time or that he had applied for extension of time for holding the general meeting. Therefore this is a clear case where the Managing Director is relying on his own default in order to establish his innocence and this he cannot be permitted to do. The conviction of Seethayya, the Managing director is correct. But in view of the extenuating circumstances in this case the fine is reduced to Rs. 50.

(8) Turning to the case of the directors their plea is nothing more than an argument drawn from misery that it was impossible for them to hold a general body meeting and place the balance sheet and especially so when it was the Managing Director who was entitled to call this meeting and get the balance sheet placed before the meeting and not they the directors. This kind of plea cannot be entertained in this case for several reasons. These directors had ample opportunities and time to apply to the Registrar for extension and they did not do so; secondly the explanations put forward by them and referred to in paragraph 5 of the judgment of the lower appellate court are unfounded and which need not be repeated as they were not pressed here; and thirdly the directors have got their own responsibility and cannot plead innocence on the ground of helplessness and throw the entire blame on the Managing director. In — 'Bhagirath v. Emperor', AIR 1948 Cal. 42 the following observations at pages 43 and 44 are instructive:

"If directors, who are responsible for the management of a company and who presumably know the duties imposed upon them by law, make no attempt to see that those

duties are carried out there is justification for holding, in my opinion, that they wilfully and knowingly permitted the company to fail to carry out those duties. The suggestion that these various directors were mere figure heads not taking any active part in the control of the company is in my opinion not worthy of serious consideration. They were directors, they attended meetings throughout the period with which we are concerned and they were responsible for the management of the company. But these provisions of the Companies Act have been deliberately enacted to protect shareholders and in some cases to protect the general public and they impose a definite duty upon directors. It is necessary that these duties should be properly carried out and it is necessary, in my opinion, that when directors fail to do so, the penalties provided for in the Act should be imposed and the directors should be substantially penalised."

(9) Therefore the plea put forward by these directors cannot be accepted. The convictions are correct but the sentences can be legitimately reduced in this case in view of the observations of Clark J. who dealt with this very company on the original side in O. P. No. 261 of 1947 and the judgment of Govinda Menon J. in O. S. A. No. 12 of 1948. The fines are reduced to Rs. 25 each.

(10) The balance of fine amount if paid will be refunded to the petitioners and their L.C. if any.

C.R.K./B/V.R.B. Order accordingly.

A. I. R. 1952 MADRAS 802

GOVINDA MENON AND MACK JJ.

R. M. S. Deivanai Achi, Appellant v. P. L. L. N. Kannappa Chettiar (died) and others, Respondents.

A. A. O. No. 426 of 1947, D/- 22-7-1952.

(a) Registration Act (1908), S. 17(1)(b) and (2) (vi) — Compromise instalment decree in money suit creating charge over immovable property of the value of more than 100 Rs. — It is compulsorily registrable — 'Subject-matter of suit' — Meaning of.

A compromise instalment decree passed in a money suit and creating a charge over certain items of immovable property of the value of Rs. 100 or upwards, over which the plaintiffs had specifically asked for a charge in their plaint falls within the exception mentioned in S. 17(2)(vi) and, therefore, is compulsorily registrable under S. 17(1)(b). (Paras 1, 6 & 7)

The expression "subject-matter of the suit" is not defined in the Registration Act. A claim to have a liability satisfied out of the general estate of a person by a charge on several items alleged to constitute that estate, is not enough to bring these items into the category of subject-matter of what is substantially a money suit. These items would become the subject-matter of litigation only in the event of claims made in enforcing a charge: AIR 1937 Mad. 504 Rel. on. AIR 1935 Mad. 232 Ref. (Para 7)

Anno: Regs. Act S. 17 N. 59.

† (b) **Registration Act (1908), Ss. 29(2), 28, 30 and 31 — Scope —Compromise decree affecting immovable property — Venue of registration — Registration can be validly made by a Sub-Registrar within whose jurisdiction property is situate.**

Under S. 29(2), it is optional and not obligatory for the party to have a compromise decree affecting immovable property registered by the Sub-Registrar in whose jurisdiction the Court is situate. If it is not obligatory and some kind of discretion is allowed to the party, then it necessarily follows that since the document is one compulsorily registrable under S. 17, sub-S. (1) clause (b) it has to be presented for registration in the office of the Sub-Registrar where the documents referred to in that sub-section should be presented; that is the Sub-Registrar within whose jurisdiction the property is situate by the application of S. 28. There is nothing whatsoever in the Registration Act which renders registration effected in the office of the Sub-Registrar in whose jurisdiction the property is situated, invalid in law. (Paras 2 & 9)

S. 29(2) gives the parties an enlarged right with regard to the presentation of a copy of a decree or order, which they would not have if the instrument affecting immovable property is not a copy of a decree or order. The scheme of Part V of the Registration Act comprising Ss. 29 to 31 shows that Ss. 29, 30 and 31 are enabling and enlarging provisions to the imperative restriction contained in S. 28: AIR 1938 Bom 212 discussed. (Para 2)

Anno: Reg. Act S. 29 N. 2; S. 28 N. 1; S. 30 N. 3 S. 31 N. 2.

(c) Limitation Act (1908), Art. 182(7) and S. 20 — Registered instalment compromise decree — Decree-holder entitled to realise whole amount on default in payment of any one instalment — Second and third instalments not paid on due dates viz., 13-5-1939 and 13-5-1940 respectively — Application for execution filed on 4-4-1946 — No evidence to show that decree-holder had exercised his option to enforce default clause — Subsequent payments made by judgment-debtor appropriated by decree-holder towards second instalment which had fallen due on 13-5-1939 — No acknowledgment or agreement in writing signed by any of the judgment-debtors as required by S. 20, Limitation Act — Execution is barred with regard to second instalment but not so with regard to third instalment: AIR 1946 Cal. 500 F.B. Rel. on. (Para 10)

Anno: Lim. Act, Art. 182 N. 24 and 136.

R. Sethurama Sastri, for Appellant; R. Gopalaswami Aiyangar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('38) 40 Bom LR 160: (AIR 1938 Bom 212) 2, 8

('46) ILR (1946) 2 Cal 552: (AIR 1946 Cal 500 FB) 10

('35) 58 Mad 781: (AIR 1935 Mad 232) 1

('38) 1938-1 Mad LJ 325: (AIR 1937 Mad 504) 1, 7

GOVINDA MENON J. : I have had the advantage of perusing the judgment which my learned brother is about to deliver and while I agree with his conclusion I would venture to add a few words of my own, especially since the question argued is bereft of authority in this court and is important from the point of view of the construction of the Registration Act. Is the compromise decree charging properties specifically mentioned in the schedule thereto but

which were not in terms the subject-matter of the litigation, compulsorily registrable under S. 17 (1) of the Registration Act? That it is a document which purports to create right, title and interest in immoveable property of the value of more than Rs. 100 has not been questioned; and but for the fact that S. 17 (2) clause (vi) as it originally stood exempted a decree or order of court from being compulsorily registered, the decree in question would, of necessity, be registrable. By the amendment made by S. 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, the words "except a decree or order expressed to be made on a compromise & comprising immovable property other than that which is the subject-matter of the suit or proceeding" have been added to clause (vi) of S. 17 (2). The result of this amendment is to make a decree passed on a compromise comprising immoveable property other than that which is the subject-matter of the suit compulsorily registrable. Do the immoveable properties over which a charge has been created, when the provisions regarding instalment payment are not fulfilled, form the subject matter of the suit?

Apparently, opposing views on a topic similar to the one in question have been expressed by Venkatasubba Rao J. and Venkataramana Rao J. in Govindaswami v. Rasu, 58 Mad. 781 and 'Ramayya v. Rangaraju', (1938)-1 Mad LJ 325 respectively. In the earlier case the question arose in the following way. Pending a suit for the recovery of a sum of money, the plaintiff got attached before judgment certain properties belonging to the defendant and later on the parties entered into a compromise and a decree was made embodying the terms. The compromise decree provided for the payment of the amount claimed in three months and created a charge for the sum decreed over the properties that had already been attached. In subsequent proceedings the question raised was whether the properties which were attached before judgement and became incorporated in the compromise decree with a charge being impressed upon the same, are the subject-matter of the suit or not. The learned Judge was of opinion that an application for attachment was a "proceeding" within the meaning of S. 17 (2) (vi) of the Registration Act and therefore the attached properties must be deemed to have been the "subject-matter" of a suit or "proceeding." This decision does not in so many terms say that even though the properties were not originally included in the plaint or any relief claimed against them at the time the suit was filed, by subsequent action, if the parties wished to impress upon such properties a relief which was not originally asked for, such properties could be said to be the subject-matter of the suit. Reliance was placed on this decision by Mr. R. Gopalaswami Aiyangar for the respondent that in order to understand the implication of the term "subject-matter of the suit" what is finally imparted by the decree should be the guiding factor and not on what the plaintiff intended originally to fasten his claim. It seems to me that the construction that is sought to be put on this decision is a somewhat far-fetched one.

On the other hand, Venkataramana Rao J. decided a case somewhat on the same lines as the present one. See Ramayya v. Rangaraju, (1938) 1-Mad. L. J. 325. Where a plaintiff filed a suit on a promissory note executed by a Hindu father against the executant and his undivided sons claiming a decree against the father personally & against the sons by a decree against the assets of the family, there was a compromise by which the defendants were directed to pay the amount decreed in two instalments and as security for the due payment of the said sum a charge was made on certain properties of the family. The question arose whether such a compromise decree was compulsorily registrable under S. 17 (2) clause (vi) of the Registration Act, because it comprised immovable property other than that which was the subject-matter of the suit or proceeding. The learned Judge held that the "subject-matter" of the suit in the clause contemplates specific immovable property which should have been the subject-matter of the litigation and that there must be a claim or right in, or to, the specific immovable property asserted in the litigation and the relief sought in respect thereof. The prayer for a decree against the assets of the joint family did not make any item of the joint family property the subject-matter of the suit. I am in respectful agreement with this view. The contention of Mr. R. Gopalaswami Aiyangar that the compromise decree in question is not compulsorily registrable cannot therefore be accepted.

(2) If the compromise decree is compulsorily registrable what then is the venue of registration? The scheme of the Registration Act as embodied in Part III comprising Ss. 17 to 22 deals with what are registrable documents and what are not. Part V relating to Ss. 28 to 31 deals with the place or venue of registration. S. 28 is a general section which lays down the place for registering documents relating to land and what is stated therein is that save as otherwise provided in that Part, every document mentioned in S. 17, sub-sec. (1), clauses (a), (b), (c), (d) and (e) and S. 17, sub-sec. (2), in so far as such document affects immoveable property, shall be presented for registration in the office of the Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. By the amendment of clause (vi) of sub-sec. (2) of S. 17 which is in the nature of an exception, (the exception has already been noted) a compromise decree comprising immoveable property other than that which is the subject-matter of the suit or proceeding would come within the compulsorily registrable documents mentioned in S. 17, sub-sec. (1), clause (b). Therefore at first sight, but for the saving clause in the first portion of the section a compromise decree like the one we have to deal with ought to be registered under S. 28. S. 29 is in the nature of an amplification of S. 28 and is covered by the saving clause of S. 28. Sub-sec. (1) of S. 29 exempts a copy of a decree or order from its operation and the registration of the copy of decree or order is dealt with in sub-sec. (2).

Prior to the Repealing and Amending Act 32 of 1940, in the place of the existing words "not being a document referred to in S. 28, or a copy of a decree or order" what originally stood there were the words "other than a document referred to in S. 28 and a copy of a decree or order". It is conceded by both parties that the amendment does not materially affect or alter the scope of the section. Sub-sec. (2) lays down the venue of registration of a copy of the decree and it is to the effect that a copy of the decree or order may be presented for registration in the office of the Sub-Registrar in whose sub-district the original decree or order

was made, or, where the decree or order does not affect immoveable property in the office of any other Sub-Registrar under the State Government at which all the persons claiming under the decree or order desire the copy to be registered. It is therefore clear that if the decree or order affects immoveable property it need not be registered in the office of the Sub-Registrar within whose jurisdiction the property is situate but can be registered in the office of the Sub-Registrar in whose sub-district the Court which made the decree is situate. By the enactment of sub-sec. (2) is it open to the parties to have the option of getting a copy of decree of court affecting immoveable property registered in the office of the Sub-Registrar within whose jurisdiction the court is not situate but within whose jurisdiction the property lies? That this is the way in which this section has been understood is clear from the Madras Registration Manual, Part II, page 91, Order 292 (b) which says:

"A copy of a decree or of an order of court relating to immoveable property may be presented for registration either in the office of the Sub-registrar in whose sub-district the property or any portion of it is situate or in the office of the Sub-Registrar in whose sub-district the original decree or order was made."

The respondent contends that this interpretation of S. 29, sub-sec. (2) is opposed to the general canon of construction contained in the maxim expressio unius est exclusio alterius (express mention of one thing implies the exclusion of another). But the difficulty in accepting this contention is that whereas in S. 28 with regard to the documents mentioned therein it is obligatory that they should be presented for registration in the office of the Sub-registrar within whose sub-district the whole or some portion of the property is situate, and the words used are "shall be presented", in sub-sec. (2) of S. 29 it is optional to the party to produce the document for registration before the Sub-Registrar within whose jurisdiction the court is situate. The section begins with the words "a copy of a decree or order may be presented..." It is therefore not obligatory for the party to have a compromise decree affecting immovable property registered by the Sub-Registrar in whose jurisdiction the court is situate. If it is not obligatory and some kind of discretion is allowed to the party, then it necessarily follows that since the document is one compulsorily registrable under S. 17, sub-sec. (1) clause (b) it has to be presented for registration in the office of the Sub-Registrar where the documents referred to in that sub-section should be presented; that is the Sub-Registrar within whose jurisdiction the property is situate by the application of S. 28.

In my view, sub-sec. (2) of S. 29 gives the parties an enlarged right with regard to the presentation of a copy of a decree or order, which they would not have if the instrument affecting immovable property is not a copy of a decree or order. Once again, looking at the scheme of Part V of the Registration Act comprising Ss. 29 to 31, it is possible to see that Ss. 29, 30 and 31 are enabling and enlarging provisions to the imperative restriction contained in S. 28, for S. 30 gives the District Registrar as well as the Registrar of a Presidency Town a discretion to register instruments even though the properties are situate within the jurisdiction of a Sub-Registrar subordinate to him. S. 31 provides for the registration or acceptance for deposit at private residence. As stated already these are enabling provisions which take away from the rigour of S. 28.

It is not disputed that a document compulsorily registrable under S. 28, can be registered under Ss. 30 and 31, that is, it need not be produced before the Sub-Registrar but may be taken to the District Registrar or a Registrar in the Presidency Town. It might as well be registered by the officer coming to the private residence of the party. If therefore one can avail of the provisions of Ss. 30 and 31 and have a document properly registered, I do not see any reason why a compromise decree or order relating to immovable property should not be registered at the place where the properties are situated. Mulla in his Indian Registration Act, at page 140, has given the following note:

"COPY OF DECREE. A consent decree comprising immovable property which is not the subject-matter of the suit must be registered. As decrees should always remain on the records of the court registration must be effected by a person claiming under the decree presenting a copy of the decree for registration to the Sub-Registrar in whose district the immovable property is situate."

From this note it appears as if the learned author was of opinion that a compromise decree affecting immovable property which is not the subject-matter of the suit cannot be registered by a Sub-Registrar in whose jurisdiction the court is situate but of necessity must be presented for registration to the Sub-Registrar in whose jurisdiction the immovable property is situate. This interpretation completely loses sight of the enabling provision contained in S. 29, sub-sec. (2) where the words used are "a copy of a decree or order may be presented for registration....." which are general in terms and are not restricted to a copy of decree or order affecting immovable property which is the subject-matter of the suit or proceeding. Though Mullah cites — 'Vinayak v. Parsappa', (40 Bom. L.R. 160), as an authority for the proposition that the copy of the decree should be presented for registration to the Sub-Registrar in whose sub-district the immovable property is situate, on a careful perusal of the judgment in that case we do not think that the learned Judges have decided the case in that manner. In the earlier part of the judgment, Rangnekar J. discusses the question regarding the compulsorily registrable nature of a decree or order of a court made on a compromise and relating to immovable property which is not the subject-matter of the suit, and he holds that such decrees or orders are compulsorily registrable. Then he refers to Ss. 28 and 29 and the provisions of Ss. 17 and 18. The learned counsel for the respondent relies on the following sentences in that judgment:

"A decree or order which is compulsorily registrable will obviously fall under S. 28 and if nothing more had been said, S. 29 would not apply to such a decree or order. But the legislature has deliberately put a copy of a decree or order in S. 29 as being a document which is not to fall within S. 28. S. 29 makes a clear distinction between documents other than the documents mentioned in S. 28 and a document of the nature of a copy of a decree or order. Unless, therefore, the words 'copy of a decree or order' are treated as a surplusage — which is clearly not allowable — the intention seems to be to put a copy of a decree or order on a special footing, and

although if S. 29 had not been enacted, a copy of a decree or order which is compulsorily registrable would have come under S. 28, it seems to me that by enacting S. 29 in this particular way, the legislature has indicated that a copy of a decree or order compulsorily registrable can be registered. If there was no such distinction it would have been sufficient to enact S. 29 without the words 'copy of a decree or order' and the scheme would have been complete."

In my opinion, this discussion has failed to attach sufficient importance to the enabling provisions which follow S. 28. The learned Judge there has not adverted to Ss. 30 and 31 which themselves allow documents to be presented for registration either at the office of the District Registrar or at private residence. I am of opinion that the decree in this case has been properly registered and that the last instalment alone is not barred.

(3) MACK J.: This appeal has been placed before a Bench at the instance of Chandra Reddi J. as it raised a question of importance under the Registration Act, bare of authority, for which it was desirable that an authoritative ruling should be obtained.

(4) The short point of law under the Registration Act is whether a compromise instalment decree passed in a money suit in which a charge was created over items of immovable property was validly registered under the Registration Act. The decree-holder registered this decree under S. 28 in the Sub-Registrar's Office at Karaikudi where the charged property was situated. The learned Subordinate Judge took the view that such a decree should have been registered under S. 29 of the Registration Act in the office of the Sub-Registrar in whose sub-district the document was executed. Holding that the decree had not been validly registered, he dismissed an execution petition filed on 4-4-1946 to execute the compromise instalment decree, which was dated 30-6-1938.

(5) The other relevant facts for determination of the application on merits also are these. The compromise decree was for Rs. 6841-13-9 payable in three instalments, (1) Rs. 1000 by 16-9-1938, (2) Half the balance by 13-5-1939 and (3) The remaining balance by 13-5-1940 with the usual provision that if default was committed in paying any instalment, the decree-holder would be entitled to realise the entire balance due immediately. The first instalment was paid by the due date 16-9-1938. The second instalment was not paid by 13-5-1939 but four payments made subsequent to that date by the petitioner have been appropriated towards the second instalment due, i.e., Rs. 300 paid on 3-6-1939, Rs. 900 paid on 17-6-1939, Rs. 500 paid on 1-8-1940 and Rs. 100 paid on 16-12-1948.

The learned Subordinate Judge found that in view of adjustments made between the parties, execution for the balance due on the second instalment was not barred by limitation. There is no doubt that the third instalment due on 13-5-1940 is not barred on this execution petition filed on 4-4-1946 if the decree is held to be validly registered, Art. 182 of the Limitation Act extending the limitation period for execution in cases where court decrees have been registered to six years.

(6) We think the view taken by the learned Subordinate Judge that this compromise charge decree could only be registered under S. 29 of the Registration Act is erroneous. Registration of such a charge decree is clearly compulsory under S. 17 of the Registration Act which provides for documents for which registration is compulsory. Any decree or order of a court, which creates, declares, assigns, limits or extinguishes any right, title or interest in immovable property would come within the scope of S. 17(1)(b) but for S. 17(2)(vi) which excludes decrees or orders of a court from this category

"except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding."

This exception to S. 17 (2)(vi) was the result of the Transfer of Property (Amendment) Supplementary Act, 1929. So we have S. 17(2)(vi) really creating an exception to an exception which can only bring such a decree or order back into the category of documents compulsorily registrable.

(7) It is urged by Mr. Gopalaswami Aiyangar that the present compromise decree does not fall into the excepted category under S. 17(2)(vi) because the property charged was the subject-matter of the suit or proceeding in that a charge was asked in the plaint on the items charged. There is indeed a note on the decree under execution by the court that the compromise does not contain anything extraneous. Venkataramana Rao J. considered this very point in — 'Ramayya v. Rangaraju', (1938) 1 Mad. L.J. 325 and held that a precisely similar decree should have been registered under S. 17 clause 2(vi) and not having been so registered, the charge could not prevail. As observed by Venkataramana Rao J. the expression "subject matter of the suit" is not defined in the Registration Act. A claim to have a liability satisfied out of the general estate of a person by a charge on several items alleged to constitute that estate, is not enough to bring these items into the category of subject-matter of what is substantially a money suit. These items would become the subject-matter of litigation only in the event of claims made in enforcing a charge. The primary method of registration which is intended to give notice and publicity of conveyances of immovable property and charges and burdens on them is in the office of the Sub-Registrar within whose jurisdiction the property is situate. It would be extremely difficult to hold that a document so registered, as required in the case of a document compulsorily registrable, has been invalidly registered.

(8) S. 29 of the Registration Act makes provisions for registering other documents. Under S. 29(1) every document (not being a document referred to in S. 28 or a copy of a decree or order) may be presented for registration in the office of the Sub-Registrar in whose sub-district the document was executed or in the office of any other Sub-Registrar at which all persons concerned desire it to be registered. Under S. 29(2) a copy of a decree or order may be presented for registration in the office of the Sub-Registrar in whose sub-district the original decree or order was made. There is no obligation on parties to register documents contemplated by S. 29(1) and (2) though it is open to parties to register in order inter alia to obtain the benefit of Art. 182 of the Limitation Act. In — 'Vinayak v. Parsappa', 40 Bom. L.R. 160, S. 29 of the Registration Act was considered by a Bench of the Bombay High Court who held that it was sufficient if a copy of a court decree was sent for

registration without the original. It is interesting here to note that Mulla in his Registration Act commentary under S. 29, at page 140 of the 4th edition after stating that a consent decree comprising immovable property, which is not the subject-matter of the suit must be registered, cites — 'Vinayak v. Parasappa', 40 Bom. L.R. 160 as authority for the position that a copy of such a decree should be presented for registration to the Sub-Registrar in whose district the immovable property is situate. — 'Vinayak v. Parasappa', 40 Bom. L.R. 160 does not however decide the venue of registration which Mulla has in our opinion rightly assumed to be that contemplated by S. 28, viz., the district in which the immovable property was situated.

(9) Our attention has been drawn to Rule 292(b) of the Registration Manual, Part II, page 91. According to this rule as interpreted in practice by the Registration department, a person registering such a decree as that before us has the option of registration either under S. 28 or under S. 29(2). On a careful consideration of these two sections, we are of opinion that this is the correct legal position. Such a decree as that we are considering is clearly compulsorily registrable but S. 29(2) allows registration to be done at the option of the party in the office of the Sub-Registrar in whose sub-district the original decree or order was made. There is nothing whatsoever in the Registration Act which renders registration effected in the office of the Sub-Registrar in whose jurisdiction the property is situated invalid in law. We have no hesitation in finding that this compromise decree has been validly registered and that execution is governed by Art. 182 of the Limitation Act.

(10) The recovery of the second instalment, which fell due on 13-5-1939, was however prima facie time barred on this execution petition filed on 4-4-1946. In — 'Ranglal Agarwalla v. Shyamlal Tamuli', ILR (1946) 2 Cal. 552 (F.B.) a Full Bench of the Calcutta High Court held that a decree such as this gave an option to the decree-holder on the occurrence of a default, either to demand immediate payment of the whole amount or still to abide by the instalments at his choice. Accordingly after a default has occurred in the payment of instalments, an application for execution for the recovery of the subsequent instalments as such is maintainable, where there is nothing to show that the decree-holder had previously sought to enforce the default clause; the application being governed by Art. 182(7) of the Limitation Act. There is nothing to show that the default clause was ever sought to be enforced by the decree-holder. To save execution being barred, the decree-holder relied on alleged adjustments. The mere payment of sums of money after the second instalment fell due would not be sufficient to save limitation. On default of any one instalment, the whole decree amount becomes due and limitation begins to run from the date of default in cases where the decree-holder seeks to enforce the default clause. The execution petition details two separate adjustments. The second one is said to have been made on 1-8-1940 when Rs. 500 was paid to the decree-holder under an agreement that half the balance would be paid by 12-5-1941 and the remaining half by 12-5-1942 and that, in default of such payment, the plaintiff would be entitled to execute the original decree. This agreement is said to have been recorded in E. A. No. 653 of 1940 on 1-8-1940 but these execution records are said to have been destroyed when the records of the Devakottai courts were burnt in the 1942 disturbances.

We are far from satisfied that there is any acknowledgment or agreement in writing signed by any of the defendants as required by S. 20 of the Limitation Act which would save limitation so far as the second instalment under the original decree is concerned. When there was default in payment of that instalment, the decree-holder had the option of executing the decree for the entire balance and failed to do so within six years of that default. We think that execution for the second instalment is barred though the decree-holder is entitled to appropriate any payments made towards the second instalment. The decree-holder is only entitled in execution to the unpaid third instalment to recover which he has six years time from 13-5-1940. Subject to verification, execution will proceed for recovery of the third instalment only under the original compromise decree.

(11) The appeal succeeds in part. In the circumstances, we direct the parties to bear their own costs throughout.

C.R.K./A/K.S. Appeal partly allowed.

A. I. R. 1952 MADRAS 806

MACK J.

Jayalakshmi Ammal and another, Petitioners v. Subbraya Reddiar (deceased) and others, Respondents.

Civil Revn. Petn. No. 1086 of 1951, D/-1-8-1952.

† **Civil P. C. (1908), O. 21, R. 89 (1) — Charge-holder — Decree-holder — Right to apply under Rule.**

A decree-holder, who has a charge on property can apply under O. 21, R. 89 to set aside the Court sale held in execution at his own instance. (Paras 1 and 7)

Anno: C.P.C., O. 21, R. 89 N. 12.

T. Munuswami Reddi, for Petitioners; Lakshminarayana Reddi, K. Pandurangam and T. Lakshmiah, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('02) 29 Cal 1: (5 Cal WN 821 FB) 3
('28) 51 Mad 770: (AIR 1928 Mad 1191) 4

ORDER: A simple but interesting point arises on this revision petition, namely, whether a decree-holder, who has a charge on property, can apply under Order 21, Rule 89 C. P. C. to set aside the court sale held in execution at his or her own instance. The District Munsif answered the question in the affirmative but the learned District Judge took a different view and held that Order 21, Rule 89, C. P. C., did not apply to decree-holders. The charge-holder is the petitioner and is strenuously opposed by the auction-purchaser, who it may be mentioned, bought two acres and 97 cents of lands of which 77 cents were wet in the auction for only Rs. 192.

(2) The charge-holders were a widow Jayalakshmi Ammal and her minor daughter, who in O. S. No. 417 of 1944, was granted maintenance with a charge on certain items of property. In execution, they brought this land to sale with this result. They filed two applications, under Order 21, Rule 89 and also under Order 21, Rule 90. They obviously could not

prosecute both simultaneously in view of R. 89 (2) and withdrew the application under R. 90.

(3) Order 21, Rule 89 (1) has undergone more than one change. The old original Section in the Code was S. 310 (a) which read as follows:

"Any person whose immovable property has been sold under this chapter may apply to have the sale set aside....."

In — 'Paresh Nath v. Nabogopal', 29 Cal. 1 a Full Bench of the Calcutta High Court, by a majority of four Judges to one held that a mortgagee came within the definition of a person whose immovable property has been sold. But in that case the mortgagee was not the decree-holder, who brought the property to sale.

(4) Order 21, Rule 89 as it was enacted in the Code of 1908 read as follows:

"Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside."

A decision in point under this rule is — 'Adenna v. Chinna Ramayya', 51 Mad. 770, a Bench decision of this court in which Madhavan Nair and Curgenven JJ. held that a lessee, subject to whose lease immovable property was sold in court auction, can apply under O. 21, Rule 89 to have the sale set aside. There is an interesting observation in the judgment, which considered the scope of Order 21, Rule 89 to the following effect:

"Any more restricted meaning would apparently limit resort to the rule to the judgment debtor or to one of several joint judgment debtors, or in the very unusual case of the mortgagee decree-holder applying to have the sale under his own decree set aside."

It is not clear from that decision what led the learned Judges to refer to the last alternative category of case. Nor can the learned advocate, who relies on this decision, refer me to any case in which the mortgagee decree-holder was held to be entitled to apply under O. 21, Rule 89 to set aside a sale in execution under his own decree.

(5) Order 21, Rule 89, as it now stands reads as follows:

"Where immovable property has been sold in execution of a decree, the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property may apply to have the sale set aside....."

As the Rule stands, the first point for determination is whether the charge-holders fall into one of the alternative categories of persons entitled to file such an application, that is, of persons holding an interest in property. Mr. Lakshminarayana Reddy, who has argued for the auction-purchaser with persistence and at some length referred me to some decisions, which differentiate between a mortgage, a charge and a lease.

I am in complete agreement with the differentiation made in those decisions. There can, however, be no doubt that as regards a mortgage, charge, and a lease, the mortgagee, charge-holder and the lessee all have an interest in the property mortgaged, charged or leased. Nor can there be any doubt of the eligibility of the charge-holder to file an application under Order 21, Rule 89 in cases where property is brought to sale on which he has a charge by another decree-holder and not by himself.

(6) The interesting point then arises whether the charge-holder is precluded from applying under Order 21, Rule 89 because he is bringing the application in execution of a decree at his own instance. The learned District Judge has carefully considered the peculiarity in the result, namely that if a decree-holder himself is allowed to make the deposit and set aside the execution sale for which he has applied under Order 21, Rule 89 (1) he merely deposits the money, withdraws it and pays it himself. No doubt, under Order 21, Rule 89 (1)(b) the deposit is for payment to the decree-holder.

I am unable, however, to see anything in this result, which precludes a decree-holder from applying under O. 21, Rule 89 (1), if he is a person who has an interest in the property he has brought to sale, apart from his attachment of the property in execution of his own decree. It cannot, in my view, be possibly said that a charge-holder has no interest in the charged property, in particular, a widow, who is vitally interested in it for the payment of her future maintenance. This is obviously a case in which the widow was greatly dissatisfied with the low price this land fetched in court sale and wanted to have the court sale set aside whether under Order 21, Rule 89 or under Order 21, Rule 90. She filed applications under both sections and appears to have been legally advised that she was entitled to press her application under the former section as a person holding an interest in the property.

(7) I am unable to agree with the learned District Judge in his view that Order XXI, Rule 89 is confined only to judgment-debtors or persons deriving interest from them. This would nullify or render nugatory the last alternative category of persons entitled to apply under Order 21, Rule 89 (1). This is a peculiar type of case in which a section, which primarily contemplated applications by judgment-debtors or persons holding from them, has been so worded — in my view, intentionally so worded — as to confer a right of filing applications under this section to all persons holding an interest in the property, although they may be mortgagee decree-holders, or charge-holders, and even in execution of the decree which they have obtained.

(8) This petition is allowed with costs throughout. The order of the learned District Judge is set aside and that of the learned District Munsif restored.

C.R.K./A/V.R.B. Petition allowed.

A. I. R. 1952 MADRAS 807

RAJAGOPALAN J.

Balusu Prabhakara Pattabhi Ramarao, Appellant v. Chintapalli Venkata Subbama, Respondent.

A. A. A. O. No. 88 of 1950, D/- 23-11-1951.

Civil P.C. (1908) S. 60(1)(c) — Agriculturist — Cultivation of land through agency.

Where the judgment-debtor is dependent for her living upon the cultivation of the lands and is unable to maintain herself otherwise, the fact that the whole of this cultivation is carried on through paid servants does not make her any the less an agriculturist within the meaning of S.

60(1)(c). AIR 1937 Mad. 551 FB Ref. (Para 3)

Anno: C.P.C. S. 60 N. 10.

M. P. Somasundaram, for Appellant; D. Narasaraju, for Respondent.

REFERENCE ..... /Para 3

('37) ILR (1937) Mad. 777: (AIR 1937 Mad 551 FB)

JUDGMENT: The appellant was the decreeholder in O.S. No. 130 of 1947 and the respondent in appeal was one of the judgment debtors. When four items of property belonging to the judgment debtor, respondent in this appeal, were attached in execution of the decree, she applied for exemption of those items from attachment under S. 60(1)(c) of the Civil Procedure Code. There was little dispute about item 4 even in the trial court. The learned District Munsif held that the judgment debtor was entitled to the benefit of clause (c) but only with respect to item 1, the house and item 2, the vacant site attached to the house, but not with reference to item 3, a detached vacant site. Against that order of the learned District Judge, the decreeholder has preferred this appeal.

(2) The learned District Judge has found that the judgment debtor, Venkatasubbamma, had a small piece of agricultural property of her own. Besides, she cultivated 13 acres of land on lease. In fact she was a joint lessee in the Kadappas executed in favour of the decreeholder himself. These findings of fact are binding upon me in second appeal.

(3) Learned counsel for the appellant contends that in view of the admission of the judgment debtor's husband examined as P. W. 1, that the judgment debtor herself never came out of the house and never herself actually cultivated any portion of the lands in her possession, she could not be an agriculturist within the meaning of S. 60(1)(c) of the Civil Procedure Code. Learned counsel relied upon 'Lakshmayya v. Official Receiver, Kistna', ILR (1937) Mad. 777. The Full Bench no doubt said,

> "An agriculturist within the meaning of Sec. 60(1)(c) C.P.C. must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise."

The learned Judges did not lay down as one of the conditions that the person claiming the benefit of S. 60(1)(c) Civil Procedure Code must himself or herself actually cultivate the land, and the cultivation of the land through any agency in part or in whole would be sufficient to take him or her outside the scope of S. 60(1)(c) Civil Procedure Code. Applying the test formulated by the Full Bench in the case cited above it has to be found that the judgment debtor Venkatasubbamma in this case "is dependent upon the cultivation of the lands and is unable to maintain herself otherwise." That the whole of this cultivation is carried on through paid servants does not make her any the less an agriculturist within the meaning of Sec. 60(1)(c) Civil Procedure Code. She is still dependent upon the lands, and but for the lands and the income therefrom she will be unable to maintain herself is the finding of fact recorded by the learned District Judge.

(4) The second appeal fails and is dismissed with costs. (Leave to appeal is refused).

C.R.K./B/V.B.B. Appeal dismissed.

A. I. R. 1952 MADRAS 808

SUBBA RAO J.

Union of India, owning the South Indian Railway by the General Manager, Petitioner v. S. P. Nataraja Sastrigal and others, Respondents.

Writ Petn. No. 731 of 1951, D/- 13-2-1952.

† **Constitution of India, Art. 226 — Other effective remedy open — Payment of Wages Act (1936), Ss. 16 and 17.**

A combined reading of the provisions of Sec. 16 and Sec. 17 of the Payment of Wages Act indicates that for the purpose of the pecuniary limit the total amount awarded by the Commissioner in a single application is the guiding factor. In a single application, whether filed by one employee or by employees belonging to the same unpaid group, the Commissioner can direct payment of wages or award compensation. When a single application can be filed by an unpaid group, it is reasonable to hold that for the purpose of appeal, the total amount awarded in that application should be taken into consideration. Clause (a) of S. 17 (1) confers a right of appeal on an employer if the total amount directed to be paid by him in a single application should exceed Rs. 300. The absence of the words "unpaid group" in Clause (a) will not establish that in the case of an employer the total amount paid by him to each of the employees alone should exceed Rs. 300. As the employer has a right of appeal to the Court of Small Causes against the order of the Commissioner, the writ of certiorari asked for will not issue when the petitioner employer who has got an adequate remedy has not availed himself of it. (Para 5)

Anno: Payment of Wages Act, S. 17 N. 1.

S. S. Ramachandra Aiyar, for Petitioner; R. Desikan, for (Nos. 1 and 2) and Govt. Pleader (for No. 3), for Respondents.

ORDER: This is an application for issuing a Writ of Certiorari to quash the order of the Additional Commissioner for Workmen's Compensation, Madras.

(2) The respondents, S. P. Nataraja Sastrigal and S. Padmanabha Rao, were assistant Masters in the South Indian Railway each in charge of Northern area School and Eastern area school respectively, of the Golden Rock colony. They were allowed to draw a duty allowance of Rs. 2 each per mensem. The appointments were made on 5-7-1941. Subsequently their designation was changed to that of head masters. In the year 1950, the Central Pay Commission sanctioned a revised scale of pay and allowance to the head masters which was to be given retrospective effect from January 1947. In implementation of the above, the duty allowance of the head masters was raised to Rs. 15 per month. After the revision of the scales of pay, C. S. Krishnamurthy Aiyar and M. G. Venkatarama Aiyar in whose places the respondents were appointed, were posted as head masters of the said two elementary schools. The respondents were reverted to their posts as assistant masters and posted to work in the High Schools and Elementary Schools respectively.

As they were reverted to their original posts they were ordered not to draw the special pay of Rs. 15 per mensem. Pursuant to that order, their wages were reduced by Rs. 15 per mensem. There was also a proportionate reduction in their dearness allowance by another sum

of Rs. 5. They applied by a group application under Sec. 15(2) and Sec. 16 of the Payment of Wages Act, 1936, for payment of their delayed wages and also for compensation. They estimated their relief in a sum of Rs. 310-10-8. The Additional Commissioner for Workmen's Compensation allowed their claims. The Union of India has filed the present application for issuing a writ of certiorari to quash that order of the Commissioner.

(3) Learned counsel for the petitioner contended that the Additional Commissioner for Workmen's Compensation, Madras, had no jurisdiction to question the validity of any reversion or transfer made by the administration of any of their employees but that his jurisdiction was confined to direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit, within the prescribed limit only on the basis of his existing appointment. But learned counsel for the respondents raises a preliminary objection and contends that the writ would not issue as the petitioners have an effective remedy by way of an appeal to the Court of Small Causes against the order of the Commissioner and that they had not preferred the same.

(4) To appreciate the preliminary objection, the following two relevant provisions of the Act may be read:

"Sec. 16 (1) Employed persons are said to belong to the same unpaid group if they are borne on the same establishment and if their wages for the same wage-period or periods have remained unpaid after the day fixed by Sec. 5.

(2) A single application may be presented under Sec. 15 on behalf of or in respect of any number of employed persons belonging to the same unpaid group, and in such case the maximum compensation that may be awarded under sub-sec. (3) of Sec. 15 shall be ten rupees per head.

(3) The authority may deal with any number of separate pending applications, presented under Sec. 15 in respect of persons belonging to the same unpaid group, as a single application presented under sub-sec. (2) of this section, and the provisions of that sub-section shall apply accordingly.

"Sec. 17. (1) An appeal against a direction made under sub-sec. (3) or sub-sec. (4) of Sec. 15 may be preferred, within thirty days of the date on which the direction was made, in a Presidency-town, before the Court of Small Causes and elsewhere before the District Court:

(a) by the employer or other person responsible for the payment of wages under Sec. 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(b) by an employed person, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged exceeds fifty rupees, or

(c) by any person directed to pay a penalty under sub-sec. (4) of Sec. 15.

(2) Save as provided in sub-sec. (1), any direction made under sub-sec. (3) or sub-sec. (4) of Sec. 15 shall be final."

(5) Under Section 16 of the Act a single application may be filed on behalf of any number of employed persons belonging to the same unpaid group, and even if a number of applications are filed by members belonging to the same unpaid group, the Commissioner is authorised to consolidate them and treat them as one application. Under Sec. 17, an employer as well as an employee can file an appeal against the order of the Commissioner to the Court of Small Causes. Section 17 (1) (a) restricts the right of appeal at the instance of the employer only to cases where the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees. A combined reading of the provisions of Sec. 16 and Sec. 17 of the Act indicates that for the purpose of the pecuniary limit the total amount awarded by the Commissioner in a single application is the guiding factor. In a single application, whether filed by one employee or by employees belonging to the same unpaid group, the Commissioner can direct payment of wages or award compensation.

When a single application can be filed by an unpaid group, it is reasonable to hold that for the purpose of appeal, the total amount awarded in that application should be taken into consideration. That this is so is clear from the provisions of Sec. 17 (1) (b), for under that provision, in the case of an employee, the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged would govern the right of appeal by him. If in the case of an employee the total amount of wages withheld from him, as well as from the other members of the unpaid group, governs the right of appeal, there is no reason why in the case of an employer, in the same application, different considerations should prevail. But it was said that clause (b) of Sec. 17 (1) itself makes the distinction. The presence of the words "unpaid group" in clause (b) and their absence in clause (a) was strongly relied upon in support of the contention that in the case of an employer the total sum paid only to one employee should exceed Rs. 300. In my view no such inference flows from the absence of the said words in clause (a). Cl. (a) of S. 17(1) confers a right of appeal on an employer if the total amount directed to be paid by him in a single application should exceed Rs. 300.

As he is directed to pay a sum exceeding Rs. 300 awarded in a single application and as that fact confers on him a right of appeal, the legislature perhaps thought that it would be unnecessary to state further that that amount should be the total amount payable to the entire unpaid group. The employer satisfies the pecuniary limit conferring a right of appeal on him and it is irrelevant to consider for that purpose how and in what proportion that amount was shared by the recipients. But in the case of an employee, it is necessary to state in the provision that the amount paid on behalf of the entire group would govern his right of appeal; for, otherwise it may lend scope for the argument that the employee preferring the appeal must satisfy the condition.

Therefore the absence of the words "unpaid group" in clause (a) will not establish that in the case of an employer the total amount paid by him to each of the employees alone should exceed Rs. 300. I therefore accept the preliminary objection and hold that the petitioners had a right of appeal to the Court of Small Causes against the order of the Commissioner. The writ asked for will not issue as the petitioners who have got an adequate remedy have not availed themselves of it. In this view it is

not necessary to express my opinion on the question raised by the learned counsel for the petitioners. This application is therefore dismissed with costs — Advocate's fee, Rs. 100/-.

C.R.K./B/D.H. Application dismissed.

A. I. R. 1952 MADRAS 810

GOVINDA MENON J.

Akhandala Kurup, Petitioner v. Damodara Kurup and others, Respondents.

Civil Revn. Petn. No. 1492 of 1951, D/- 14-3-1952.

Court fees Act (1870) S. 7 (iv-A); Sch. II, Art. 17-B (Mad.) — Suit for partition of family property — Existence of earlier partition — Plaintiff 'eo nomine' party to it, though as minor represented by mother — Plaintiff can ignore the previous partition deed and is not bound to set it aside — Suit need not be valued as one for cancellation of previous partition — Suit can be valued as one for partition as if there was no previous partition — Section 7 (iv-A) (Mad) is not an impediment to the valuing of the plaint — Such items as are assessed to land revenue as ryotwari land need be valued at ten times the revenue payable — Improvements on such property, whether buildings or trees need not be separately valued. AIR 1943 Mad 427; AIR 1950 Mad 832 Relied on; AIR 1941 Lah 152 FB; AIR 1940 Mad 113 FB; AIR 1936 Mad 411; AIR 1926 Mad 122 Considered. (Paras 1, 3)

Anno: Court fees Act, S. 7(iv)(b) N. 1, 3, 4, 8; S. 7 (iv-A) (Mad) N. 1; Sch. II Art. 17-A (Mad) N. 1; Art. 17(vi) N. 10.

K. N. Karunakaran, for petitioner; A. K. Balakrishnan, S. M. Mohiuddin and K. P. Ramakrishna Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('41) ILR (1941) Lah 308: (AIR 1941 Lah 152 FB) 2
('26) AIR 1926 Mad 122: (90 Ind Cas 843) 3
('36) 70 Mad LJ 398: (AIR 1936 Mad 411) 3
('40) ILR (1940) Mad 259: (AIR 1940 Mad 113 FB) 3
('43) 1943-1 Mad LJ 249: (AIR 1943 Mad 427) 1
('50) 1950-1 Mad LJ 408: (AIR 1950 Mad 832) 1
('50) C. R. P. No. 1950 of 1950 (Mad) 4

ORDER: The only question that has to be decided is as regards the court fee payable on the plaint. The learned Subordinate Judge, relying upon earlier decisions of this court, such as — 'Kuppuswami Goundan v. Mari Goundan', 1943 -1 Mad. L. J. 249 and — 'Ramaswami v. Kunjammal', 1950-1 Mad LJ 408 came to the conclusion that the plaintiff is not bound to set aside the partition deed and that he can simply ignore the existence of an earlier partition. In these circumstances, S. 7 (iv-A) of the Court-fees Act is not an impediment to the valuing of the suit. Nothing has been urged before me by the respondents to show that this conclusion arrived at by the learned Judge is not sustainable either on the principle decided in the cases mentioned, or under any other statutory provision.

(2) The petitioner's Counsel urges that when once he is able to ignore the existence of the previous partition of 1938, it is as if there has been no partition at all which would result in the properties being relegated to the position which they occupied prior to the alleged void partition. Antecedent to 1938, according to the plaintiff himself, and the other members of the joint family were in joint possession of the family properties and the suit for partition could be filed on the footing that antecedent jointness of possession should be converted into separate possession. On that basis Art. 17-B of the second schedule of the Court-fees Act which provides for a fixed court-fee in such suits is the provision of law applicable. Even if that position is untenable, according to the petitioner's counsel, the plaintiff should be deemed to be a tenant in common with other members of the erstwhile family after a division in status has taken place. To a partition suit filed by such a tenant in common, a Full Bench of the Lahore High Court in — 'Mohammad Sohail v. Gulam Rasul', I.L.R. (1941) Lah 308 (FB) has applied the same principle as would pertain to a suit for partition where there has been no such conversion of coparcenary into a tenancy in common. Tekchand J. in delivering the judgment of the Full Bench observed that the reasons as to why a suit by a coparcener for partition should fall within clause (vi) of Art. 17 of the Second Schedule to the Court-fees Act (Art. 17-B of the Madras amendment) should apply equally to a suit by a co-owner who is only a tenant in common. The learned Judge observed:

> "In either case, the relief sought is the change in the mode of enjoyment of joint property of which the plaintiff 'ex hypothesi' is in joint possession and it is not possible to estimate at money value the subject matter in dispute. It makes no difference for this purpose that in one case the joint property is held by the parties "as joint tenants", while in the other they own it as "tenants in common." And in the latter class of cases, it is again, immaterial that the parties are governed by the Mohammadan law, or that they do or do not belong to the same family."

Mr. Karunakaran for the petitioner urges that this dicta contained in the Full Bench case must be applied to a case where the plaintiff is entitled to ignore the partition thereby placing himself in the position as if there had been no partition at all. But the real difficulty in this case arises from the fact that the plaintiff in paragraphs 6 and 7 of the plaint admits the existence of an earlier deed to which he was 'eo nomine' a party though as a minor represented by his mother as guardian.

(3) On the other hand Mr. K. P. Ramakrishna Aiyar for the contesting respondents relies upon the Full Bench decision in — 'Ramaswami v. Rangachariar', I.L.R. (1940) Mad 259 (FB) as well as the observations contained in — 'Sellammal v. Jothimani Nadar', 70 Mad. LJ 398. In the Full Bench case the majority Judges constituting the Full Bench held that where in a partition of joint Hindu family property the plaintiff has impleaded alienees from the joint family and contested the validity of their alienations, the proper way of valuing the suit is that in respect of the general relief for partition and delivery of the plaintiff's share, the provision in the Court-fees Act which was applicable was Art. 17-B of the second schedule to the Act and that in respect of alienations made and property having passed over to the possession of third parties, the suit should be valued under S. 7 (v) of the Court-fees Act. In the latter case Varadachariar J. considered a case where two sons of a Hindu

father filed a suit for partition and claimed that the properties which had been assigned by their father in favour of their step mother were in fact joint family properties and should be brought into the hotchpot for partition even though there had been an earlier partition of the remaining properties and held that court-fee on the plaint was leviable under Sec. 7, clause (v) of the Court fees Act. Though the facts in that case have some resemblance to those we have to consider now, it seems to me that they are not 'ad idem'.

Somewhat allied to the present case is the decision in — 'Suryanarayana v. Seshayya', AIR 1926 Mad. 122 where Odgers J. discussed the question of courtfee payable in a suit where the plaintiff admitted partial partition of joint family properties but at the same time contended that since the rest of the properties remained joint he was in constructive possession of the same along with the other members of the family. To such a case the learned Judge applied Art. 17-B of the Second schedule. What was decided was that the correct mode of regarding the relief claimed in suits for partition of properties of a joint Hindu family which had already divided some of its properties is that it is merely a prayer to change the form of enjoyment and can only be valued by deducting, from the value of the plaintiff's share as ascertained in the partition, the value of his beneficial enjoyment as coparcener before partition. In such a case therefore it is impossible to estimate the money value of the suit. Article 17-B alone should therefore be held to be applicable. If the plaintiff had, in the plaint, alleged that he was in joint possession of any item of the joint family property along with the other members, then this decision of Odgers J. would be applicable. But I am not able to find any allegation in the plaint where it is stated that he is in joint possession with the other members of the family of at least one item of the family property. On the plaint as it stands, I cannot say that the learned Judge was wrong in directing court-fee to be paid on the basis he did with regard to the relief for partition. But it seems to me that such of the items as are assessed to land revenue as ryotwari land need be valued only at ten times the revenue payable. The improvements on such property, whether they are buildings or trees, need not be separately valued.

(4) My attention was drawn to the judgment in — 'C. R. P. No. 1950 of 1950', in which my learned brother Basheer Ahmed Sayeed J. has held that in somewhat similar circumstances in relation to a Marumakattayam tarwad, court-fee was payable under Art. 17-B of the second schedule of the Court fees Act. But it is seen from that judgment that the plaintiffs who claimed partition were not 'eo nomine' parties to the previous partition deed at all. Further they were claiming maintenance on the basis that they were in joint possession with the defendants. If the plaintiff here had asserted in the plaint that there was joint possession, constructive or otherwise, of at least some portion of the property, Art. 17-B would be the proper provision of law. But in the absence of any such allegation, I find it difficult to hold that on the averments in the plaint joint possession can be maintained. It is open to the plaintiff to suitably amend the plaint, if so advised, and then claim that the court-fee paid is correct. But if no such amendment is made, the order of the lower court cannot be disturbed. In any event the plaintiff is not bound to pay court-fee on the buildings on lands which are assessed to land revenue.

(5) With these observations this revision petition is dismissed but in the circumstances without costs.

C.R.K./B/R.G.D. Revision dismissed.

A. I. R. 1952 MADRAS 811

SUBBA RAO J.

Poosarla China Appalanarasimhalu, Petitioner v. Board of Revenue, Chepauk, Madras, Respondent.

Writ Petn. No. 734 of 1951, D/- 11-2-1952.

Stamp Act (1899), S. 57 — Scope of power and duty of Revenue Board under Section.

The power contained in S. 57 is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the Stamp duty. The power to make a reference under S. 57 of the Act is not for the benefit of the Revenue Authority. It is coupled with a duty cast upon him, as a public officer, to do the right thing, and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so, it is within the power of the Court to direct him to discharge that duty and make a reference. AIR 1950 SC 218, Foll. (Para 3)

Anno: Stamp Act S. 57 N. 1 Pts. 2c. and 2b.

E. Venkatesam and E. L. Bhagiratha Rao, for Petitioner; Vepa P. Sarathy, for Govt. Pleader, for Respondent.

REFERENCE..... /Para.

('50) 1950-2 Mad LJ 564: (AIR 1950 SC 218) 3

ORDER: This is an application for the issue of a writ of mandamus or other appropriate writ for directing the Revenue Board of Madras to refer the case to the High Court under S. 57 of Act II (2) of 1899.

(2) One Chinna Brahmajee and another Pedda Brahmajee were brothers. The petitioner is the son of Chinna Brahmajee. Parvateesam and Sriramamurthi are the sons of Peda Brahmajee. There was a partition between the two branches. Lists were prepared and they were reduced to writing on 1-7-1946. Sriramamurthi produced the lists before the Commercial Tax Officer, Vizagapatam, in connection with some enquiry there. The Commercial Tax Officer impounded the instrument under S. 33 of the Indian Stamp Act and forwarded it to the Deputy Collector, Narasapatam, for collection of deficit stamp duty and penalty. The Revenue Divisional Officer held that the document was a partition deed and, therefore, required to be stamped as a partition deed. He directed Sriramamurthi to pay a sum of Rs. 4590 made up of deficit stamp duty payable on the document and the penalty imposed thereon. Sriramamurthi filed a petition before the Revenue Divisional Officer on 23-12-1947 questioning the correctness of the decision and also contending that the stamp duty and the penalty should be collected not only from him, but from the other sharers.

The Revenue Divisional Officer, after giving notice to the parties concerned, reviewed his order and fixed the deficit stamp duty at a sum of Rs. 1252-8-0 and the penalty at a sum of Rs. 6262-8-0, and directed the Tahsildar, Chodavaram, to collect the said amounts from all the sharers. The petitioners preferred an appeal to the District Collector of Vizagapatam and against the said order of the Revenue Divisional Officer. The District Collector agreed with the Revenue Divisional Officer and dismissed the appeal. When a revision was filed to the Revenue Board of Madras, that was dismissed on the ground that they saw no reasons to interfere. The petitioner then filed an application before the Revenue Board under S. 57 of the Indian Stamp Act requesting them to refer the case to the High Court for decision. The Revenue Board again held that it saw no reason to comply with the request of the petitioner. The present petition is filed for purposes of directing the Revenue Board to refer the case to the High Court.

(3) The scope of the powers and the duty of the Revenue Board under S. 57 of the Act has been clearly stated recently by the Supreme Court in — 'Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd', 1950-2 Mad. L. J. 564 (S.C.). The headnote in that case clearly brings out the salient features of the judgment. It reads:

"The power contained in S. 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the Stamp duty. The power to make a reference under S. 57 of the Act is not for the benefit of the Revenue Authority. It is coupled with a duty cast upon him, as a public officer to do the right thing, and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so, it is within the power of the Court to direct him to discharge that duty and make a reference."

The question, therefore, is whether, in the present case, important questions of law arise and whether the Revenue Board did not discharge their duty under the provisions of S. 57 of the Act.

(4) The learned Government Pleader contended that the point that arose in the case was the construction of a document and when once the construction put upon the document by the Revenue Board was correct, the Revenue Authorities had a clear right under the Act to recover the deficit stamp duty and the penalty imposed from all the parties to the document whereas the learned counsel for the petitioner argued that three substantial questions of law arose in the case and that this was a fit case for the Revenue Board to refer the case to the High Court for decision.

(5) The three questions that arose for decision were stated by the Collector as follows:

"1. Whether the document in question is not an instrument of partition within the meaning of S. 2 (15) of the Indian Stamp Act and is not, therefore, liable to stamp duty or penalty;

2. Whether P. Sriramamurthi, one of the co-sharers, being the person that produced the document before the Commercial Tax Officer, he alone was the person who could be proceeded against for the realisation of the duty and penalty and that it was not right to order collection from all the three brothers in equal shares; and

3. Whether the Revenue Divisional Officer, having called upon Sriramamurthi to pay the stamp duty and penalty by his order dated 6-1-1947, was not justified in subsequently reviewing the same by means of his order dated 13-7-1948, in which the appellant and the other two brothers were asked to pay the stamp duty and penalty in equal shares."

(6) The Collector held against the petitioner on all the points.

(7) After hearing the learned counsel appearing for the petitioner and for the Revenue Board, I am of the view that the questions raised are substantial questions of law and the Revenue Board should have referred the matter to the High Court under S. 57 of the Act. As the case will be referred to the High Court for decision, I think it is not advisable or even necessary to express my opinion on the three questions raised. I, therefore, direct the Revenue Board to refer the aforesaid three questions to the High Court under S. 57 of Act II (2) of 1899 within a month after the service of the writ. The petitioner will have his costs. Advocate's fee Rs. 100.

C.R.K./B/V.R.B. Order accordingly.

A. I. R. 1952 MADRAS 812

MACK AND SOMASUNDARAM JJ.

In re Mathali Goundar.

Ref. Trial No. 48 of 1951 and Criminal Appeal No. 386 of 1951, D/- 14-11-1951.

Criminal P. C. (1898), S. 342 (1) — Failure of Sessions Judge to ask questions to accused.

Where all the circumstances have been put in the Committing Magistrate's Court and no circumstances on which the Sessions Judge relies appear in the evidence in the Sessions Court, which have not already appeared in the committing Court and which have not been put to the accused, it cannot be said that S. 342 has not been complied with because the Sessions Judge himself has not put separate simple questions to the accused which he should do in order to observe the demeanour of the accused explaining the incriminating circumstances alleged against him. AIR 1951 SC 441. Disting, AIR 1952 Mad. 177 Ref. to. (Para 10)

Anno: Cr. P.C. S. 342 N. 20 Pts. 1 to 3.

K. S. Sundaram, for Accused; Asst. Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('51) 1951 SCJ 518: (AIR 1951 SC 441): 52 Cri LJ 1491 4-9

('51) 1951-2 Mad LJ 423: (AIR 1952 Mad 177): 1952 Cri LJ 385 4-9

SOMASUNDARAM J.: The Additional Sessions Judge of Salem has found the accused guilty of murder of one Sellappa Goundan, uncle of the accused and sentenced him to death.

(2) The occurrence is said to have taken place adjoining the road which leads to Sankari railway station near a betel 'mundy'. On the night of 19th October 1950 at about 10 p. m. P. Ws. 7 and 12 who were living near the 'mundy' heard cries "Aiyo, water water".

They came out each with a lantern and found the deceased Sellappa Goundan sitting on a cot in front of the 'mundy' under a 'pandal' with a spear in his hand which is M. O. 1 in the case. His 'dhoti' was bloodstained. They gave him water and as the deceased wanted that word should be sent to his wife, P. W. 7 sent P. W. 8, one of the boys working in the mundy, to go and fetch his wife. He went and told the wife of the deceased (P. W. 1) that her husband was lying on a cot in front of the mundy with a wound on his abdomen and that he was sent by P. W. 7 to inform her.

P. W. 1 then, with the assistance of her brother (P. W. 3) who is also her son-in-law engaged a cart and came to the scene with her daughter, P. W. 2, aged about 9 years and her son, P. W. 5, aged about 6 years. They saw Sellappa Goundan lying on a cot with a bleeding injury in the abdomen. They also saw a spear underneath the cot. They found P. Ws. 7 and 12 present there and also a woman called Pavayee (the wife of the accused). P. W. 1 questioned her husband as to how he came by the injuries and the deceased stated that the accused had stabbed him with the spear, M. O. L, which was lying nearby. P. W. 12 suggested that the deceased may be taken to the hospital. The cot was, therefore, carried up to the road and kept there waiting for a jutka or other transport to be brought.

(3) In the meantime, P. W. 1's brother, (P. W. 3 who, as already stated, is also her son-in-law), was sent to fetch P. W. 1's mother's sister. The wife of the accused, Pavayee who was staying there till then left the place. After P. W. 3 left the scene, P. W. 1, her daughter P. W. 2, and her son P. W. 5, and one Pachayee who has not been called as a witness stayed there by the side of the cot. While they were so staying by the side of the deceased, the accused is said to have come again with a covering on his head and given four or five stabs in quick succession on the chest and other places with a weapon like M. O. 2. The deceased immediately collapsed on the spot. The accused then ran away in the southern direction. While the accused was stabbing, P. W. 1 who recognised him, shouted for help. No one came, but as the accused was going away from the scene he was met by P. W. 3 coming in the opposite direction and the accused is said to have chased P. W. 3 also and then left and run away.

P. W. 3 came back to the scene to see his father-in-law dead. Later, after 11 p. m., P. W. 9 also, on receiving information about the death of Sellappa Goundan, came to the scene. Though a number of these persons were present near the dead body none of them appears to have gone to the village munsif till next morning at about 7 a. m. The village munsif recorded a statement from P. W. 9 who went to give the information. The village munsif came to the scene of occurrence and was present till the Sub Inspector came and held the inquest. The accused was arrested on the 20th of October 1950, at about 2 p. m. at the Sankari shandy on the Edapadi road. The weapon, M.O. 2, was found in the hollow of a tamarind tree on which the thatched shed of the father of the accused was built. On examination by the Chemical Examiner no blood was found on this weapon, though the spear was stained with human blood.

(4-9) (His Lordship after discussing the evidence, held that the accused was guilty of murder). The learned advocate raised a point that the Sessions Judge in this case has not complied with the provisions of S. 342, Criminal Procedure Code and therefore the trial is vitiated. In the Sessions Court the statement made by the accused before the committal court was read out to him and, after marking it as Ex. P. 5 and recording his answer that it is correct the Sessions Judge simply asked the accused whether he wished to say anything more. The accused said he had nothing to add; and then the learned Judge proceeded to ask if the accused had any defence witnesses, to which the accused said that he had none. In the committal court all the circumstances that appeared against the accused in the evidence given before the committing Magistrate were put to the accused and his answers were obtained from him. There is not a single circumstance on which that court could rely on against the accused that was not put to the accused. In the Sessions Court no circumstance different from what appeared in the evidence in the committing court is found in the evidence given before the learned Sessions Judge. There has been no variation and the little variation, if any, was only in favour of the accused; so that all the circumstances that appeared in the evidence in the Sessions Court had been put to the accused by the committing Magistrate as the same appeared in the evidence in the other court and the answers of the accused obtained thereon.

The question for consideration is whether a Sessions Judge should again put all the questions to the accused and record the answers from him. The learned advocate relied on two decisions in support of his contention, one of which is the decision of a Bench of this Court in — 'Sagili Solomon, in re', (1951)-2-Mad L J 423 and the other a decision of the Supreme Court in — 'Tara Singh v. The State', 1951 S C J 518. In view of the decision of the Supreme Court, it is unnecessary to refer to the decision of this court reported in — 'Sagili Solomon, in re', (1951)-2-Mad L J 423. In the case before the Supreme Court the scope of S. 342, Criminal Procedure Code was considered; and the learned Judges pointed out how the circumstances which the Sessions Judge relied on did not appear in the evidence before the committal court, but appeared only in the evidence before the Sessions Judge. This is what their Lordships say at page 523 of the Journal; (only the relevant portion is extracted here).

"Now, this was evidence which was recorded exclusively in the Sessions Court. The eyewitnesses before the Sessions Judge had resiled from the previous statements which they made in the committal proceedings. Accordingly, a questioning by the committing Magistrate would not and could not cover the point made here, and naturally, the Magistrate has not questioned the appellant about that circumstance. He next relied on the evidence of these witnesses as recorded in the court of the committing Magistrate. One point he used against them was the evidence of motive which these witnesses supplied in the committal proceedings. The appellant was not told what that evidence was nor was he asked to explain it. He was questioned about this motive in the committal proceed-

ings by the committing Magistrate, but even there he was not told who had given the evidence and the material on which the committing Magistrate relied to establish the presence of motive was not disclosed.

The Sessions Judge also relied on the fact that the appellant had confessed to the three eye-witnesses that he had killed his uncle and injured his father. There is not a single question regarding that either in the committing Magistrate's Court or in the Sessions Court.

Another ground on which the Sessions Judge proceeded was the extra-judicial confessions made by the appellant to Ujagar Singh, Fauja Singh and Garbaksh Singh. The appellant was questioned about an extra-judicial confession by the committing Magistrate but not about one made to these three persons.

* * *

Next, the Sessions Judge considered that as the most important piece of evidence damaging to the accused was the dying declaration of Hakam Singh recorded by the Magistrate, P. W. 5. Neither the Sessions Judge nor the committing Magistrate questioned the appellant about that. The Sessions Judge also relied on the two statements of Jakam Singh made before the Police, one of which the police recorded as his dying declaration. Again not one word was put to the appellant about this."

(10) The circumstances therefore on which the learned Sessions Judge in that case relied were not put to the accused either by the committing Magistrate or by the Sessions Judge. Their Lordships therefore held that under S. 342, Criminal Procedure Code, for the learned Sessions Judge to rely on the circumstances he should have questioned the accused. Here such a complaint cannot be made. All the circumstances have been put in the committing Magistrate's Court and no circumstances on which the learned Sessions Judge relied appeared in the evidence in the Sessions Court, which had not already appeared in the committing court & which had not been put to the accused. We think, therefore, that there is no substance in the contention of the learned advocate that S. 342, Crl. P. C. has not been complied with. We must say however that the Sessions Judge should himself put separate simple questions to the accused so that the trial court itself may observe the demeanour of the accused explaining the incriminating circumstances alleged against him. However desirable it may be and however much we may say that the Sessions Judge should follow such a procedure, we do not think that in this case the failure to do so either vitiates the trial or has resulted in any prejudice to the accused.

(11) On the evidence, as already stated, we accept the finding of the Sessions Judge that it was the accused who dealt the stabs which resulted in the death of the deceased and that he is therefore guilty of murder.

(12) But the question of sentence has given us some anxiety. We find in this case, as already stated, that the accused must have seen the deceased sleeping with his wife on the cot and he must have, therefore, acted under grave and sudden provocation when he first speared him. If he had given the other injuries as well at the same time his act would certainly fall under Exception (1) to Sec. 300, I. P. C. and the offence would only be one under S. 304, I. P. C. But we think that when he came a second time and stabbed the deceased with a knife he did so under sustained provocation which was still grave but not sudden. The gravity of the provocation, we think, is a circumstance which can be taken into consideration on the question of sentence. We therefore reduce the sentence to transportation for life. With this modification of sentence we dismiss the appeal.

C.R.K./B/V.R.B. Sentence reduced.

A. I. R. 1952 MADRAS 814

MACK, J.

The Cosmopolitan Club, Madras Represented by the Honorary Secy. P. M. Balasubramania Mudaliar, Petitioner (in both) v. The Deputy Commercial Tax Officer, Triplicane Division, Mt. Road, Madras and another, Respondents (in both).

Civil Misc. Petns. Nos. 3414 and 3415 of 1951, D/- 27-11-1951.

(a) Constitution of India, Art. 226 — Petitioner Club paying sales tax on refreshment served by it to members, since 1939 — No objection to tax taken — Petitioner challenging legality of the very levy of tax — Long and tedious avenue of appeal and revision not followed — Remedy by way of writ under Art. 226 held was appropriate and correct one — Revisional machinery provided by Sales Tax Act is primarily intended for individual assessees dissatisfied by assessment made — Though there is no provision in the Constitution it is desirable that before Government is put on its defence, in such a case, there should be notice to it, like one required under S. 80, Civil P. C. — In the particular case however, no notice held was necessary — (Sales Tax — Madras Sales Tax Act (IX (9) of 1939), S. 3(a)). (Paras 6, 10)

(b) Constitution of India, Art. 226 — English precedents, value of.

In evolving their own case law under Art. 226 of the Constitution, which confers on High Courts far wider powers than those exercised by the King's Bench Division in England, it is neither necessary nor is it possible for the Indian High Courts to follow the precedents in English prerogative writ and other writ case law, in particular the distinction between writs of course or ex debito justitiae and what are known as discretionary writs. The only broad criterion that the Courts in India can apply is whether in view of the nature of the case and the illegality alleged and the wrong complained of, a relief by way of writ is the correct and appropriate remedy. There is no such thing in Art. 226 as a writ of course or a writ by right. The writs which lie under S. 226 (1) are all discretionary writs which are dependent on the facts of each case, and the nature of the illegality and wrong alleged. (Para 7)

(c) Companies Act (1913), S. 26 — Effect of registration.

It is only a members' club which is eligible for registration under S. 26. Registration of a club under S. 26 is prima facie proof that the club is not an association for profit. (1927) 43 TLR 400, Ref. (Para 12)

Anno: Companies Act, S. 26 N. 1.

(d) Sales Tax — Madras Sales Tax Act (IX (9) of 1939), Ss. 2 (b) and (h), 3 (a) — Club registered under S. 26, Companies Act — Club, a members' club not running for profit — Every member having equal interest and share in Club property and servants — Club purchasing articles of games and refreshment and paying sales tax — Every member sharing in purchase equally — Refreshment served to members at cost price inclusive of sale tax on articles already paid — Supply of refreshment is not transfer of property in the course of trade or business, within meaning of the definition "sale" given in S. 2 (h) — Levy of sales tax on supply of refreshment is therefore illegal — (Obiter — Claim for refund of tax paid by the club since 1939, without challenging the legality of the levy would not be equitable — It should be considered as ex gratia payment to State Treasury). (Paras 15, 17, 18)

K. S. Jayarama Ayyar, for C. K. Venkatanarasimham and Srimathi Padmini Raghavan, for Petitioner; Govt. Pleader and V. P. Sarathi, for the State Counsel on behalf of Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('50) 1950 SCR 566: (AIR 1950 SC 163) 4
('51) 1951-2 Mad LJ 340: (AIR 1952 Mad 273) 4
('51) C. M. P. No. 1767 of 1951: (AIR 1952 Mad 117) 5
(1846) 3 Dow & L 542 4
(1882) 8 QBD 373: (51 LJMC 25) 16
(1915) 1 KB 172: (87 LJKB 161) 16
(1924) 1 KB 390: (93 LJKB 289) 13
(1927) 43 TLR 400 12
(1928) 1 KB 291: (96 LJKB 347) 4, 7
(1940) 1 KB 576: (109 LJKB 288) 16

ORDER: In these two petitions, the Cosmopolitan Club, Madras, represented by its Honorary Secretary seeks to challenge the legality of the levy of sales tax on the supply of refreshments to the Club members. The 1st respondent impleaded is the Deputy Commercial Tax Officer of the Triplicane Division and the second respondent the State of Madras.

(2) The prayer in C. M. P. No. 3414 of 1951 is for the issue of a Writ of Certiorari or other appropriate writ or order to quash G. O. Ms. No. 2472 dated 21-9-49 of the Revenue Department, Government of Madras, which declined to grant exemption from such sales tax on a letter dated the 22nd of August 1949 addressed to the Honourable Minister for Finance of the Government of Madras. In that letter it was represented that there were about 1200 members on the rolls of the Club, which afforded amenities in sports, indoor games and in various directions to its members, and that refreshments were supplied to members as an amenity and not on any commercial basis. The letter was an appeal for exemption in the circumstances from the payment of sales tax. On this, the Government passed the G. O., sought to be quashed on the ground that they did not see sufficient justification for exempting the sale of refreshments by the Cosmopolitan Club, Madras from liability to pay sales tax. In the original letter of the Cosmopolitan Club Ex. R-2 produced by Government, there was no specific objection to the levy of this tax as illegal under the Sales Tax Act. This allegation however appears in the common affidavit filed in support of these two petitions. C. M. P. No. 3415 of 1951 seeks for a writ by way of mandamus to direct the respondents to forbear from levying the collecting such sales tax in future.

These two petitions were admitted by Raghava Rao and Viswanatha Sastry JJ. sitting as a Bench on the 9th of March this year. Mr. Jayarama Ayyar, who appears for the Cosmopolitan Club, says that he had to argue at some length before he persuaded them to admit them. There is no order of course giving any reasons for admission. The Government Pleader has, as may be expected, raised strenuous objections to maintainability, which I shall first consider.

(3) The levy of Sales tax was first made in 1939. The fiscally operative section is S. 3(a) of the Madras Sales Tax Act under which subject to the provisions of the Act, every dealer shall pay for each year a tax on his total turnover for such year. Section 2 (b) defines a 'dealer' as "any person who carries on the business of buying or selling goods", with the following very important explanation "A co-operative Society, a Club, a firm or any association, which sells goods to its members is a dealer within the meaning of this clause".

(4) The Cosmopolitan Club has been paying sales tax since 1939, which grew from a comparatively insignificant levy of a few rupees a year to a considerable sum. The first objection by the Government Pleader is that the Club has raised no objection to the legality of the tax before the Deputy Commercial Tax Officer and has not explored the machinery of relief by way of appeal and revision provided by the Act itself. Under S. 11, an assessee objecting to an assessment has a right of appeal within 30 days to the appellate authority, which is admittedly the Commercial Tax Officer. Section 12 specifically provides for a revision by the Board of Revenue. He also urges that the right of suit is also not barred as under S. 18 no suit shall be instituted against the State in respect of any act done unless it is initiated within 6 months from the date of the act complained of. This section also clearly leaves open the ordinary right of suit subject to a restricted time limitation as has been held in — Province of Madras v. Satyanarayanamurthi, 1951-2 Mad. L. J. 340 by Govinda Menon and Basheer Ahmed Sayeed JJ. It is also pointed out that under the Madras Amending Act VI of 1951 an appeal also lies to the newly constituted Sales Tax Appellate Tribunal with a right of revision to the High Court. There can be no doubt that there exists very elaborate machinery under the Sales Tax Act, which an aggrieved assessee can explore. It is true that ordinarily the existence of alternative remedies exclude the remedy by way of writ, nor will a Court interfere to enforce the law of the land by this extraordinary remedy in cases where an action at law will lie for complete satisfaction.

It is not necessary to refer to the wealth of English case law quoted to support this position in Halsbury's laws of England Vol. IX p. 774. There have been however cases where writs by way of Certiorari or mandamus have been granted to aggrieved persons despite their failure to explore other avenues open to them. In — 'King v. Postmaster-General Exparte Carmichael', (1928) 1 K. B. 291 the applicant Mrs. Carmichael had what Avory J. held, a right of appeal under the Workmen's Compensation Act, which gave all the relief which she can require. I would be most reluctant to import into Indian Law the view of Avory J. which is rather an

extreme one, expressed in the following sentence:

"But even if that remedy is open to her, it is undoubtedly goods law that if the application for a certiorari is made by a party aggrieved then it ought to be granted 'ex debito justitiae' and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned".

Halsbury's Law of England page 873 refers to a decision — 'R. v. Blathwayt', (1846) 3 Dow & L 542 in which a dissatisfied party was permitted to apply for a writ of certiorari instead of appealing, though it was held that he could not do so till the time for appealing had expired. It is not necessary to pursue further investigation into English Writ case law on this point in view of the decision of our own Supreme Court — 'Rashid Ahmed v. The Municipal Board, Kairana', 1950 S.C.R. 566. That was an application under Article 32 of the Constitution to enforce the fundamental right to carry on a business. It was held that although the petitioner had a right of an appeal under the U. P. Municipalities Act, it was not in the circumstances an adequate legal remedy, the existence of which would disentitle the petitioner from maintaining his application.

(5) The maintainability of writ petitions under Article 226 of the Constitution is extremely difficult, if not impossible to circumscribe, define and restrict. I had occasion in a recent petition — 'In re Anandan Nambiar' C. M. P. No. 1767 of 1951 (Mad) as a member of the Bench, which decided that matter, to make the following observation to which I adhere.

"Art. 226 confers on us extremely wide powers of interference and a corresponding extremely heavy burden of responsibility.....It is only in exceptional cases that writs under these wide powers "for any other purpose" can in our opinion be issued, such as for instance when there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been mala fide discrimination against an individual to the detriment of his rights. It is impossible to define with exactitude the cases in which Art. 226 of the Constitution can be rightly invoked. They should be comparatively exceptional and very few. But we view with growing apprehension and alarm the very large number of petitions under this Article seeking our intervention and to make it an avenue for redress. This may be partly due to a tendency to exploit it with legal ingenuity seeking fresh avenues for the invocation of this Article."

I propose to consider the question of maintainability and also the propriety of issuing a writ in the light of those observations I made then.

(6) These are in many respects peculiar petitions, challenging as they do the validity of a sales tax which not only this club but other clubs also have been paying without demur or objection since 1939. Mr. Jayarama Ayyar has referred me to Art. 265 of the Constitution according to which no tax shall be levied or collected except by the authority of law. I do not think that the failure of the Cosmopolitan Club to object to this tax since 1939 and to explore the long and tedious avenue of appeal and revision provided by the Act is an impediment in the way of issuing a Writ, if it be found that the sales tax levy is really illegal. There are some other cogent reasons, which appeal to me for a finding that the remedy by way of a writ under Art. 226 is not only open to the petitioning Club but is also the appropriate and correct one. In the first place, the appellate and revisional machinery provided by the Sales Tax Act is primarily intended for individual assessees, dissatisfied with the assessment made. This however is a case of the very legality of a sales tax levy itself on the petitioning Club and similar social Clubs being challenged. Before a suit can be filed for a declaration that the tax is illegal and claiming also consequential relief by way of refund of tax illegally collected, the whole gamut of appellate and revisional machinery must take its course, and then a suit with the possibility of an appeal and a Second Appeal, which may take years finally to conclude and in the meantime this tax, if ultimately held to be illegal, will continue to be collected. Social organisations like Clubs, which do not exist for profit or gain cannot afford the luxury of prolonged litigation, nor do they ordinarily seek litigation against Government presuming as they probably do that the taxes that they are called upon to pay are in accordance with law. This appears to be the reason why the legality of this Act has never been challenged before.

(7) In evolving our own case law under Art. 226 of the Constitution, which confers on High Courts far wider powers than those exercised by the King's Bench Division in England, it is in my view neither necessary nor is it possible to follow the precedents in English prerogative writ and other writ case law, in particular the distinction between writs of course or ex debito justitiae and what are known as discretionary writs. If we follow for instance as a precedent the view of Avory J., in — 'King v. Postmaster-General Ex parte Carmichael', (1928) 1 K. B. 291 which I have referred to, our High Courts may be inundated with writ petitions to such a degree as to bring other work to a comparative stand-still with the spate of legislation which has flooded this state and discretionary rules framed under statutes having the force of law, all providing avenues for appeal and revision. The only broad criterion that we can apply is whether in view of the nature of the case and the illegality alleged and the wrong complained of, a relief by way of writ is the correct and appropriate remedy. Art. 226 confers on High Courts power to issue to any person or authority including in appropriate cases any Government, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them not only for the enforcement of fundamental rights in Part III of the Constitution but "for any other purpose." It does not appear to be even necessary to confine and restrict a petitioner to a particular writ on English precedents nor would it be proper to dismiss a petition invoking relief by way of a writ of certiorari on the ground that the correct remedy would be a writ by way of mandamus or prohibition. I would prefer to take the view that there is no such thing in Art. 226 as a writ of course or a writ by right and that the writs which lie under S. 226 (1) are all discretionary writs which are dependent

on the facts of each case, and the nature of the illegality and wrong alleged.

(8) A further preliminary point arises in view of an objection by the Government Pleader that the petitioning Club at no time specifically challenged the legality of this tax before filing this petition. In their letter to the Finance Minister marked for ready reference as Ex. R-2 dated 22-8-1949, the Club asked for exemption from this tax on grounds that the refreshments were supplied to members as in their homes without any profit motive and so on. The only section dealing with exemption is S. 6 which empowers the Provincial Government by notification to exempt or reduce sales tax on specified classes of goods at all or specified points in a series of sales by successive dealers or by any class of persons. The G. O. passed by Government declining to grant exemption in favour of the petitioning Club technically, legally or strictly correct as nowhere was the legality of this tax challenged as such in Ex. R-2.

(9) Mr. Jayarama Ayyar for the Club filed an uninitialled office copy Ex. P. 2 of Ex. R-2 sent to him by the Club Secretary containing a paragraph to the effect that two legal opinions Exs. P-2(a) and P-2(b) had been taken to the effect that this tax was illegal. The club Secretary has also filed an explanatory affidavit Ex. P-3 to the effect that the paragraph referring to the two legal opinions was deleted from the original letter contemplated (Ex. P-2) and that the legal opinions Exs. P-2(a) and P-2(b), were sent as enclosures to Ex. R-2. This fact is however nowhere mentioned in Ex. R-2, and an affidavit has been filed Ex. R-4 by the Commercial tax officer that these two legal opinions were not received by Government at all. There appears to have been some confusion in this matter arising from the unbusinesslike manner in which social clubs, which are not commercial concerns working for profit are managed by elected committees and honorary presidents and secretaries who draw no remuneration.

(10) The lack of notice or representation to Government prior to the filing of a writ petition under Art. 226 may assume considerable importance in some cases to the extent of justifying a dismissal in limine. It is ordinarily just, convenient and also necessary that Government should have an opportunity of examining the illegality complained of before being summarily dragged to court on a writ petition. Even S. 80 of the Civil Procedure Code requires a statutory notice by a plaintiff to be served on Government two months before the filing of any suit. Such previous notice is not necessary in writ petitions where aggrieved persons challenge the validity of any legislation under which Government have acted, where Government has exercised quasi-judicial functions and the representations of the aggrieved petitioner have been heard. I would express the view that the general principle should be that Government should have notice of the alleged illegality or wrong on which the writ petition is founded before it is filed, and given a reasonable opportunity of investigating the grievance and remedying it before such a step is taken. In this particular case, the letter of the Club to Government though it asks for exemption, which may be construed as a discretionary favour, really gives reasons now advanced seriously for challenging the very legality of the tax. The legality has of course been challenged in the affidavit supporting these writ petitions, and in para 3 of the counter-affidavit opposing it, there is the specific contention that "the supply of refreshments by the petitioner in law constitutes a sale or transfer of property in the refreshments by the Club to its members". The Government Pleader concedes that the legal position has been examined, nor is there any likelihood in a case of this kind that Government would have conceded on a mere challenge of the legality of this tax paid without demur for over 10 years that they collected it illegally during this long period. There is of course no provision in the Constitution requiring notice to Government before putting it on its defence as under S. 80 C. P. C. There is no inflexible rule. I am of the opinion that in the particular circumstances of these petitions, they should not be rejected on this ground, and that the legality of this tax can only be properly investigated by this Court on a petition under Art. 226.

(11) The simple point for determination is whether the supply of refreshments by the petitioning Club to its members charging a fixed rate constitutes in law a sale. The Articles and Memorandum of Association of the Cosmopolitan Club Ex. P-1 said to be based on those of the Eccentric Club London is that of a social or members' Club, not conducted for gain or profit, but with the objective of providing amenities to its members for meeting in the Club premises, for recreative and social activities varying from strenuous games to pastimes of less vigorous character, for social intercourse for interchange of ideas on a variety of topics serious and light, ranging from Ethics and Philosophy to the prattle of idle gossip. I can take judicial notice of the necessity to sustain and refresh members of a Club indulging in these generally wholesome social and recreative activities by a supply of refreshments, both liquid and solid.

(12) The Petitioning Club has admittedly been registered under S. 26 of the Companies Act, though it does not require registration. Sec. 26 makes special provision for an association such as the petitioning Club, formed for promoting commerce, art, science, religion, charity or any other useful object and applies or intends to apply its profits, if any, or other income in promoting its objects being registered under the Companies Act. Such registration can only be ordered if the Central Government is satisfied with the bonafides of such a club and that it is an association formed not for profit. The Club, if registered, has the privilege of limited liability without the addition of the word 'limited' to its name. Registration under S. 26 of the Act is prima facie proof, if it were needed, that the petitioning Club is not an association for profit. Lord Halsbury in his Laws of England Vol. IV at page 484 paragraph 883 differentiates between two kinds of incorporated Clubs under the English Companies Act of 1929, i.e., between what is in substance a members' Club, with the advantages incident to incorporation as a company, especially that of suing and being sued as a legal entity, and a proprietary club with an incorporated company as proprietor instead of an individual. A proprietary Club is something quite different in which non-proprietary members may be excluded from any share in the management which is run for profit. (See —

Cole v. Merton Park-Wimbledon Golf Club Ltd.', (1927) 43 TLR 400). It is only a members' Club which is eligible for registration under S. 26 of the Indian Companies Act.

(13) There can in the first place be no doubt that the petitioning Club is a members' club which is not conducted for profit or gain. In — 'Inland Revenue Commissioners v. Westleigh Estates Co. Ltd.', (1924) 1 K. B. 390 it was held by the Court of appeal reversing the decision of Rowlatt J. that the Club being a members' and not a proprietary club, the club was not carrying on any "undertaking of a similar character to that of a trade or business and was therefore not liable to corporation profit tax because its accounts showed a surplus of income over expenditure".

(14) Now from its constitution, the petitioning Club is a society of persons, each of whom contributes funds, out of which the Club expenses are met. Such contribution is made by means of entrance fees, or monthly or annual subscriptions and other charges paid by members. It is not recognised as having any legal existence apart from the members of which it is composed. All the members of the petitioning Club are on an equal footing with an equal interest in the Club and its property. The President, Honarary Secretary, Treasurer and so on are all unpaid officers, nor would in effect a paid full-time secretary divest such a club of the distinctive features of a non-proprietary members' Club. Each member has an equal legal interest not only in the Club property but also in the service of Club servants. The Club of course through its Secretary employs servants including its cooks. It purchases on behalf of the Club and for the consumption of its members commodities on which sales tax is paid and some of these commodities are converted and cooked into edible food, and supplied to members when required. If a club has say 500 members, each member would have a 1/500 share in the service of the club cook, waiters and other servants. When he is supplied through his club with refreshments and drinks, cigarettes, tennisballs and so on, as he needs them for use, he is charged on his bill a fixed rate determined by the cost thereof including sales tax already paid, cost of establishment and so on. The question of profit does not enter into the question of supply.

(15) Can such a supply by a Club to a member be in law regarded as a sale. At first blush the explanation to S. 2(b) of the Madras General Sales Tax Act appears to have been expressly designed to bring within the scope of sales tax levy "a Co-operative Society, a Club or firm or any association, which sells goods to its members" as a dealer. S. 2 (b) however defined dealer as any person, who carries on the business of buying or selling goods. The emphasis in both the sections and the explanation is on the word "sale" and indeed this cannot be otherwise, the tax leviable being one on sales. Nor has the legislature sought to give any unusual meaning to the word 'sale'. It is defined in S. 2(h) as follows:

> "Sale with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration."

A sale therefore must in the first place be a transfer of property in goods. I hold that the supply of refreshments in a members' club such as this registered under S. 26 of the Companies Act, purchased out of Club funds, composed of members subscriptions is not a transfer of property from the club as such to a member.

The second and more important and also as it appears to me, a mandatory requirement of the definition is that the transfer of property must be in the course of trade or business. A members' Club, such as the petitioning Club, does not do any trade or business in purchasing from outside the requirements of members and supplying it to them at a fixed charge. On these two grounds, the levy of sales tax on such supplies of refreshments by clubs to members must be held to be illegal.

(16) Mr. Jayarama Ayyar has referred me to some English case law, all drawn from the domain of public house licensing. Though the analogy is not perhaps very happy in this State which is now committed to prohibition they strongly reinforce the view I have taken. The oldest decision is — 'Graff v. Evans', (1882) 8 Q.B.D. 373 one of the year 1882, in which the manager of a bonafide members' club was prosecuted for selling by retail intoxicating liquors without a licence under the Licensing Act of 1872. Holding that the transaction was not a sale, some interesting reasons were given both by Field J. and Huddleston B. Field J. was of the opinion that Foster, to whom the manager Graff supplied the liquor, was an owner of the property together with all the other members of the Club and was entitled to obtain the goods on payment of the fixed price. He also held that a sale involved an element of bargain and that Graff could not have in any event sued Foster for the price as the price of goods sold and delivered. Huddleston B. took the view that there was no transfer of the general or absolute property in the goods to Foster but a transfer of a special interest. This decision was followed in — 'Metford v. Edwards', (1915) 1 K. B. 172 and applied to a working Men's Club which was not a bonafide Club and liable to be struck off the register. The criterion applied by Lush J. was summed up in the following sentence:

> "If there was a club whose members owned the liquors consumed there was distribution as opposed to sale of those liquors no matter how the club was conducted."

The decision in — 'Graff v. Evans', (1882) 8 Q.B.D. 373 was also followed in a more recent case — 'Trebanog Working Men's Club and Institute Ltd. v. Macdonald', (1940) 1 K. B. 576. That was an interesting case in which two member Clubs were incorporated under the Industrial and Provident Societies Act respectively, the share-holders and the members being in each case identical.

They purchased intoxicating liquor and supplied it from time to time to individual members for payment as in an ordinary club. It was held that the two clubs were a legal entity as distinct from the members and could therefore act as their agents or trustees, the real interest being in the members so that the societies did not require to be licenced. All these cases arose out of convictions for violation of the Licensing Act or for sale of liquor without a licence. Underlying them all, there is the basic legal principle that a purely members Club which makes purchases through a Secretary or manager & supplies requirements

to members at a fixed rate does not in law sell these goods to members but merely distributes them, all the essential elements of a sale in the transaction being wanting.

(17) It is not necessary for me to go outside the scope of the present petition and speculate as to the intention of the Legislature in enacting the explanation to S. 2 of the Sales Tax Act. All that I can say is that it can only apply to a Co-operative Society, Club, Firm or any Association, which sells goods to its members. This will depend upon the constitution of the society or club as the case may be and other incidents of the alleged transactions. I have no hesitation in holding that in the case of a members' club, it does not sell goods to its members when it supplies them with refreshments and other requirements purchased out of club funds to which the members have contributed and in which they have a joint legal interest and that a sales tax levy on such turnover is illegal. C. M. P. No. 3414 of 1951 for the issue of a writ of certiorari or other appropriate writ to quash G. O. Ms. No. 2472 dated 21-9-1949 is dismissed as not pressed, and C. M. P. No. 3415 of 1951 which seeks by way of a writ of mandamus to direct the respondents to forbear from levying and collecting sales tax on the value of the refreshments supplied to the members by the Club is allowed and a writ in these terms will issue. The parties will bear their own costs.

This is in some respects an unusual petition, the unusual feature attaching to the case being that Government have perfectly bonafide collected this tax on this and similar Clubs for more than 10 years without any demur, protest or challenge as to legality. The finding that this tax is illegal, which I have had under law to give, may raise some hopes in the petitioning Club and also other clubs of claiming a refund of some of the tax paid in the past from Government. I would like to express the view that no such claim would, in the circumstances, be really equitable, the collection of this tax having been acquiesced in all these years. Nor can I of course grant any such relief on this petition. The petitioning Club which is given on this petition the relief it seeks, can well rest content with it and the freedom this decision gives them from any future levy of the tax, regarding the past tax they have paid as an 'ex gratia' contribution to the State treasury.

C.R.K./B/R.G.D. Appropriate writ issued.

AIR 1952 MADRAS 819

KRISHNASWAMI NAYUDU J.

Singana Sathiraju, Appellant v. Merla Sathamma, Respondent.

A. A. A. O. No. 136 of 1950, D/- 7-3-1952.

Limitation Act (1908), Art. 182 — Counsel orally stating no instructions — Endorsement on execution petition, "No instructions, no bids, sale stopped. E. P. closed" — Order held not final order — Subsequent execution petition held one in continuation — Presentation by same counsel without fresh vakalatnama held proper presentation — Power held not terminated by stating orally that he had no instructions — Civil P. C. (1908), O. 3, R. 4 (2) — (Madras Civil Rules of Practice, R. 187).

The execution petition was posted for sale to 6-2-1948 and for final hearing to 13-2-1948. On 6-2-1948 the following endorsement was made on the execution petition: "No instructions, no bids, sale stopped. E. P. closed" On the 11th of February 1948 the decree-holder filed through the same counsel an execution petition No. 73 of 1948 with a prayer that it may be treated as a continuation of the prior E. P. No. 104 of 1947 and for fixing a date of sale and for proceeding with the sale:

Held that Rule 187 of the Civil Rules of Practice (Mad) had no application. The rule had application only in cases of default of compliance of any order of court as to payment of 'batta' and other steps to be taken as provided therein. (Para 3)

Held also that the petition, having been closed only for want of bids, the order closing the petition did not amount to a final order and E. P. No. 73 of 1948 was a continuation of the previous execution proceedings. (Para 3)

Held further that the mere fact that a vakil after having appeared for the party at the previous presentation said that he had no instructions, did not amount to his withdrawal from the undertaking in his vakalatnama unless it was so stated and that the presentation by the counsel on the 11th of February 1948 was a proper presentation even apart from the signature of the party in the execution petition, since there was admittedly nothing in writing to cancel the vakalatnama. For a proper termination of the vakalat provisions of O. 3, Rule 4 (2), Civil P. C. must have been strictly observed in the sense that there must be something in writing, the form of the document being immaterial provided the intention to terminate the authority was clearly expressed: AIR 1925 Mad 316, Rel. on; AIR 1951 Mad 686 (2), Not followed; AIR 1925 Mad 21 (FB), Expl. and Distinguished. (Paras 5 and 7)

Anno: Civil P. C., O. 3, R. 4, N. 16; Limitation Act, Art. 182, N. 129.

B. V. Subrahmanyam, for Appellant; D. Narasaraju, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('01) 23 All 220: (28 Ind App 28 PC) 6, 7
('24) 47 Mad 819: (AIR 1925 Mad 21 FB) 5, 6, 7
('25) AIR 1925 Mad 316: (82 Ind Cas 1028 FB) 5, 7
('47) 1947-2 Mad LJ 423: (60 Mad LW 729 (1)) 3
('50) 1950-2 Mad LJ 759: (AIR 1951 Mad 686 (2)) 5, 6

JUDGMENT: The judgment-debtor is the appellant in this civil miscellaneous second appeal. In execution of a decree passed against him on 3-4-1935, his properties were attached and brought to sale in E. P. No. 104 of 1947. The execution petition was posted for sale to 6-2-1948 and for final hearing to 13-2-1948. On 6-2-1948, the following endorsement is found on the E. P. "No instructions, no bids, sale stopped. E. P. closed." On the 11th February 1948 the decree-holder filed an execution petition No. 73 of 1948 with a prayer that it may be treated as a continuation of the prior E. P. No. 104 of 1947 and for fixing a date of sale and for proceeding with the sale.

(2) Two objections were raised on behalf of the appellant (i) that the order dated 6th February 1948 was a final order and E. P. No. 73 of 1948 having been presented 12 years after the

date of the decree, is barred by limitation & (ii) that the counsel having reported no instructions on the 6th of February 1948, he is not entitled to present E. P. No. 73 of 1948 and the presentation is not a proper presentation.

(3) As regards the first of these objections, the learned Counsel relies on Rule 187 of the Civil Rules of Practice and argued that there was a default on the part of the decree-holder and that the order closing the petition amounted to a dismissal of the petition and therefore it was a final order. But it must be noted that Rule 187 will have application only in cases of default in compliance of any order of court as to payment of batta and other steps to be taken as provided therein. Rule 187 has therefore no application to this case. Further the learned counsel relied upon Order 21, Rule 69 and contended that inasmuch as the sale was posted for the 6th of February 1948 and neither the decree-holder nor his counsel appeared and requested for an adjournment, the order disposing of the petition amounted to a dismissal and, therefore, it was a final order. Or. 21, Rule 69 only empowers the court to exercise its discretion to adjourn any sale under certain terms and conditions provided therein but it does not say anything as to what the court ought to do in case the sale is not adjourned. The court has rightly in such cases closed the petition for statistical purposes and it cannot amount to a final order dismissing the petition. This position is covered by the authority of the judgment of Happell J. in 'Gangaraju v. Bhimalingam', 1947-2-Mad. L. J. 423, where it has been held that where in an execution application the property is put up for sale but is not sold because there were no bidders and thereafter the District Munsif makes an order that the petition was "closed", there is no final disposal of the petition and a subsequent execution application filed would be in continuation of the prior one. I, therefore, consider that the petition, having been closed only for want of bids the order closing the petition does not amount to a final order and E. P. No. 73 of 1948 is a continuation of the previous execution proceedings.

(4) The only other question that has to be considered is whether the petition has been properly and validly presented. From the original of the execution petition, it is found that the decree-holder himself has signed it and that will be a valid petition but the question has been whether the presentation by the Counsel, who is stated to have reported no instructions on the previous occasion, would amount to proper representation. As matters stand, there appears to be some doubts expressed to as to the power of the counsel, who reports no instructions orally to represent his client in subsequent proceedings. The learned counsel argued this question and I consider it necessary to deal with it.

(5) The learned counsel for the appellant relied upon a judgment of Horwill J. in 'Krishna Pillai v. Ranganathan Pillai', 1950-2-Mad. L. J. 759. In that case, as the defendants were not ready their advocate through another advocate reported no instructions. The suit was then decreed ex parte. In an application to set aside the ex parte decree by the advocate under the same vakalatnama, it was held that it was not a proper vakalatnama as the advocate has withdrawn it when he reported no instructions in the suit. The application to set aside the ex parte decree was dismissed. The learned Judge agreed that the dismissal was proper and observed that when the Vakil reports no instructions, it means that he withdraws his vakalatnama, and if authority was necessary for that position, the learned Judge referred to the decision in 'Manickam Pillai v. Mahudam Bathummal', 47 Mad 819 and observed that that decision supported the view taken by the learned Judge.

It does not appear however that the provision of law relating to the withdrawal of vakalats and the termination of the vakil's authority was placed before the learned Judge. Order 3, Rule 4 (2) provides that every appointment of a pleader shall be filed in court and shall be deemed to be in force until determined with the leave of the court, by a writing signed by the client or the pleader as the case may be and filed in court or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client. The language of Order 3, Rule 4 (2) is clear that the power given under the vakalat is in force until determined as provided by the rule, i.e., by means of a document signed by the client or pleader as the case may be. Thus when the pleader wants to terminate his authority, he can file in court a document withdrawing his vakalat from the client and when the client wants to terminate the authority of his vakil he can file a document in writing signed by him. There is no such writing in the present case and admittedly the counsel orally reported no instructions. I consider it is necessary that to determine the authority of a counsel some document in writing is necessary whatever may be the form of the document showing an intention on the part of the counsel to determine the vakalat. In the absence of such a document, it cannot be said that the vakalat has been duly and properly determined.

The decision in 'Balakrishna Aiyar v. Muthamal', A.I.R. 1925 Mad. 316 supports this view. In that case, it was held that the mere fact that a vakil after having appeared for the party at many hearings says he has no instructions does not amount to his withdrawal from the undertaking in his vakalatnama unless it is so stated. There is no difficulty in view of the specific provisions in the Code of Civil Procedure to say that in the present case the presentation by the counsel on the 11th of February 1948 was a proper presentation even apart from the signature of the party in the execution petition, since there is admittedly nothing in writing to cancel the vakalatnama.

(6) The learned counsel for the appellant however relied upon the observations of the learned Chief Justice in the Full Bench case reported in 'Manickam Pillai v. Mahudam Bathumal', 47 Mad 819 also referred by Horwill J. in 'Krishnapillai v. Rajamanickam Pillai', 1950-2 Mad. L. J. 759 as supporting the contention that even an oral representation by the counsel that he has no instructions to appear would amount to cancellation of the vakalat notwithstanding the specific rule in the Civil Procedure Code. It was held that when a pleader engaged in a case reports that he has no instructions, whether after he has asked for an adjournment and been refused or not, he must be deemed not to have appeared in the case thereafter even if there be no formal withdrawal in writing of the vakalat. It was held further that the court must be deemed to

have given its leave within the meaning of Order 3, Rule 4(2), C. P. C. to the pleader to withdraw his vakalat when it does not object to such withdrawal. In that case, on the day when the case came up for hearing, the pleader asked for an adjournment and stated that if adjournment were not granted, he had no further instructions to go on with the case. He had previously filed a vakalat in the ordinary form. He did something more than the mere asking for an adjournment. He took the plaint which he had drawn and signed and endorsed it as follows:

"I have no instructions except to apply for an adjournment."

The provision in the Civil Procedure Code was slightly different in language. Sub-rule 2 was in the following terms:

"Every such appointment, when accepted by a pleader shall be filed in court and shall be considered to be in force until determined with the leave of the court by a writing signed by the client or the pleader as the case may be and filed in court....."

The learned Chief Justice observed that the statute does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form and that that which he endorsed on the back of the plaint was a perfectly good written withdrawal from his duties and obligations under the vakalat. I entirely agree that there is nothing even in the present rule prescribing the form of withdrawal excepting that there must be a withdrawal in writing signed by the pleader. Since there was an endorsement on the plaint that he had no instructions except to apply for an adjournment, it was held that it amounted to a proper withdrawal of his vakalat. The following observations of the Chief Justice in that case were relied upon to show that even a representation would be sufficient to terminate the vakalat:

"But, while basing our decision on that short ground, we think, in view of some decisions of that court, one recently reported decision and another which is unreported that we ought to point out that when this matter was discussed in those cases, attention does not seem to have been drawn to the decision of the Privy Council in 'Radhakrishnan v. The Collector of Jaunpuri', 23 All 220 P. C. The facts of that case are set out in a quotation from the judgment of the Subordinate Judge, which runs as follows:

"That day (i.e., the day fixed for hearing) the pleader for the applicant stated that he could not conduct the case, and he had received no instructions from his client. Thereupon the court proceeded to try the case and tried and decided the issues on the evidence adduced on the plaintiff's behalf and decreed the suit against the applicant."

"Their Lordships held in that case that the applicant could not be held in the circumstances to have appeared. We trust that if this matter comes before the courts again, notice will be taken of that decision, because, so far as appears, a wider question is determined there, as there is no statement — a feature that exists in this case — to the effect that the pleader has filed an instrument in writing taking himself out of his vakalat, a withdrawal on his part which Order 3, Rule 4 contemplates.

"The exact question put to us is, if when a pleader reports no instructions, whether after he had asked for an adjournment and been refused, or not, the court is correct in holding that the party for whom the pleader was appearing has not appeared. We think that the only answer can be that, at any rate, in the circumstances of this case, the pleader cannot be deemed to have appeared."

(7) The learned counsel contends that it may be but he is not definite that the unreported decision may be referred to in the judgment of the Full Bench decision in 'Balakrishna Aiyar v. Muthammal', A.I.R. 1925 Mad. 316. The question that arose for determination in that case was whether simple reporting of no instructions orally would amount to a proper withdrawal of the vakalat. The Privy Council decision referred to by the learned Chief Justice was 'Radhakishan v. Collector of Jaunpur', 23 All 220. The only question that arose for decision there was whether after reporting no instructions, the physical presence of the advocate in court would amount to appearance even though the party was absent since there was no written representation withdrawing his vakalat. The learned Chief Justice's opinion in — 'Manickam Pillai v. Mahudam Bathummal', 47 Mad. 819 was that it does not matter whether the reporting of no instructions was in writing or oral. Once the counsel states that he is unable to proceed with the case and had no instructions to do so, it amounted to non-appearance of the party and that was probably the subject-matter of the unreported decision mentioned in the judgment. The observations of the learned Chief Justice could not have been intended to apply to a case like the present one where the counsel reports no instructions without anything in writing.

For a proper termination of the vakalat, Order 3, Rule 4 (2) must be strictly observed in the sense that there must be something in writing; the form of the document is immaterial provided the intention to terminate the authority is clearly expressed. The decision of Horwill J. reported in 'Krishna Pillai v. Ranganatha Pillai', 1950-2 Mad. L. J. 759 was based on the observations of the learned Chief Justice in 'Manickam Pillai v. Mahudam Bathummal', 47 Mad 819 quoted above, which have relation to the question of termination of counsel's authority under a vakalat and the attention of the learned Judge has also not been brought to the express provision in the Civil Procedure Code, viz., Order 3, Rule 4(2). I have already found that in this case the execution petition No. 73 of 1948 even otherwise has been duly and properly presented. The appellant fails in both the objections.

(8) The appeal is dismissed with costs. Leave refused.

C.R.K./B/R.G.D. Appeal dismissed.

A. I. R. 1952 MADRAS 821

RAMASWAMI J.

Narapureddigari Narayanareddi and others, Accused-Petitioners v. State and another, Respondents.

Criminal Misc. Petn. No. 2255 of 1951, D/- 5-12-1951.

(a) Criminal P. C. (1898), S. 215 — "On a point of law" — Meaning of.

The District Magistrate having committed the accused to the Sessions under S. 437, the High Court can interfere and quash the commitment only on a point of law. The term of law includes an order of commitment rested upon no acceptable and valid evidence.

(Held that the order of Commitment by the District Magistrate was based upon no acceptable and legally valid evidence). (Paras 10, 11, 12)

Anno: Cr. P. C., S. 215 N. 8.

(b) Criminal P. C. (1898), S. 154 — First information report — Information after starting investigation.

A Statement recorded after investigation had started and coming within the mischief of S. 162, is not a valid first information report at all. When on receiving information of a cognizable offence the Sub-Inspector has started for a village in order to investigate the cognizable case, it is not open to him after starting investigation to collect information and then select and collate and bring into existence a document on the morning of next day in order to suit the theory which he has formed in the case. This disguising of a statement under S. 162, as a first information report is to be condemned: AIR 1951 Mad 812, Rel. on. (Para 13)

Anno: Cr. P. C., S. 154 N. 3.

(c) Criminal P. C. (1898), S. 154 — Variance between first information report and the case.

Complete variance between the first information report and the case for which the accused have been committed not in regard to minor details or unimportant matters or side issues but in regard to main charges is enough to throw out the case as an unreliable one which will not commend itself to any tribunal. (Para 14)

Anno: Cr. P. C., S. 154 N. 9, 10.

(d) Criminal P. C. (1898), Ss. 172 and 367 — Failure to record statements of important witnesses.

The failure to record separately the statements of prosecution witnesses in the case diary who are the most important eye-witnesses in the case is a serious irregularity considerably prejudicing the accused and is by itself enough to make the evidence tainted. (Para 17)

Anno: Cr. P. C., S. 172 N. 2; S. 367 N. 6.

(e) Penal Code (1860), S. 391 — Dacoity — Sufficiency of evidence.

Where the evidence was that some persons on the top of the house of another person got into the house through the skylight and carried away some bags:

Held that that could not obviously be construed as evidence sufficient for sustaining a specific charge of dacoity. (Para 19)

Anno: Penal Code, S. 391 N. 1.

V. C. Gopalaratnam and L. V. Krishnaswamy, for Petitioners; Public Prosecutor, for the State; R. V. Raghavan, for Respondent .

REFERENCE..... Para.

('51) 1951 Mad WN Cr 83: (AIR 1951 Mad 812: 52 Cri LJ 857) 13

ORDER: This is a petition filed against the order of committal made by the learned District Magistrate, Nandyal, as against the order of discharge made by the Sub Magistrate of Cuddapah in P. R. C. No. 2 of 1951.

(2) The short facts are: There is a bitter faction in the village of Bidinemacherla in Pulivendla Taluk between two parties headed by P. W. 1 and accused 1. There have been several criminal cases between them and security proceedings were launched against both the parties. On 17-3-1950 the security case stood posted before the Sub Divisional Magistrate of Jammalamadugu at Pulivendla Camp.

(3) The case for the prosecution is that accused 1 and his partisans deliberately absented themselves from this hearing and that while the opposite party was at the camp, formed themselves into an unlawful assembly numbering about 100 and armed at about 8 A.M. and that they trespassed into the house of prosecution witnesses 1 to 4 and caused damage to the property and caused hurt to prosecution witnesses by stone pelting.

(4) The chequered career of the first information in this case can now briefly be alluded to. P. W. 13 the Sub Divisional Magistrate, is said to have passed on Ex. P. 8a with a covering note Ex. P-8 to the Sub Inspector of Police, Simhadripuram (P. W. 11). P. W. 11 received Exs. P-8 and P-8a according to himself at Ankalamagudur village and proceeded to Bideenam via Simhadripuram at 8 P.M. on 17-3-1950. There P. W. 11 is said to have recorded a complaint petition Ex. P-1 on the morning of 18-3-1950 though dated as 17-3-1950, which has been registered as the first information report in this case.

(5) P. W. 11 inspected the damaged houses in the night of 17-3-1950 itself though the Panchayatdars assembled in the next morning and Mahazarnama had been drawn up. P. W. 11 proceeded to the house of accused 1 and arrested six accused therein and recovered spears and other weapons of offence. He saw some injuries in the persons of accused 6 and 18 as also on the persons of P. Ws. 1, 2, 3 and 4. P. W. 12, the Circle Inspector of Police arrived at 9 a.m. on 18-3-1950 and took up further investigation in the case. The investigation in this case has been completed on 18-3-1950 itself. But the charge-sheet in this case was laid on 30-3-1950 in the Court of the Sub-Magistrate of Pulivendla against 19 persons for offences under Ss. 147, 448, 427 and 323 read with S. 149, Indian Penal Code.

(6) This case was taken on file as a calendar case on 31-3-1950 under Ss. 147, 448, 426 and 323, Indian Penal Code, by Mr. Yusuf Naick who was then the Sub Magistrate of Pulivendla. This Magistrate examined 12 prosecution witnesses in the case and the prosecution evidence was practically completed but for the examination of the formal witness P. W. 13, the Revenue Divisional Officer of Jammalmadugu, for the purpose of filing Exhibits P-8 and P-8a. Then Mr. J. Chandrasekharam took charge as Stationary Sub Magistrate, Pulivendla, on 15-8-1950 and examined P. W. 13 on 4-9-1950 and had Exhibits P-8 and P-8a filed. On 5-9-50 Mr. Chandrasekharam felt that the evidence of two court witnesses 1 and 2 was vital and therefore summoned them and examined them on 10-9-50. C. W. 1 is the person who stated that he was present at the scene of offence and conveyed the information to C. W. 2 who presented Exhibit P-3a to P. W. 13 Major Ratnam.

The case was adjourned to 22-9-50 for the further examination of P. W. 11 under S. 540, Criminal Procedure Code. On 22-9-50 on his

own motion and without any request from the prosecution side conducted by the Assistant Public Prosecutor the Sub Magistrate, Pulivendla, converted the case into a preliminary Register case as he seems to have come to the conclusion that there is evidence for an offence of dacoity under S. 395, Indian Penal Code. The reasons for adopting such a course are not patent. On 6-10-50 after the examination of the accused the Sub Magistrate, Pulivendla, on the application of the accused inspected the scene of offence, drew up plans regarding the location of the houses and made his own notes of inspection and which later he has stated must form part of his committal order.

On 12-10-50 the Sub Magistrate on his own motion after the accused had stated that they had no defence witnesses recalled P. Ws. 3, 4, 5 and 6 under S. 540, Criminal Procedure Code, and the purpose of which and the direction in which it went will be indicated later. It is sufficient for our purpose to state here that the Sub Magistrate fished out some evidence to support the theory of dacoity and got it on record. Then finally on 25-10-50 charges were framed against accused 1, 3, 6, 8, 10, 11, 13, 15, 17 and 19 under Ss. 147, 427, 451 and 395, I. P. C., and against accused 4 under Ss. 147 and 427 read with S. 149, I. P. C. and against the rest of the accused under Ss. 147 and 427, I. P. C. and all the accused were committed to the sessions.

(7) There was a revision petition to the High Court & it was held here that the accused should have been given an opportunity to cross-examine the P. Ws. after the Magistrate decided to treat it as a Preliminary Register case and the committal order was set aside and it was directed that the accused should be given an opportunity to cross-examine the witnesses and if they desired to examine defence witnesses they should be allowed to do so and that the Magistrate should then dispose of the case according to law.

(8) Thereafter the accused persons applied for a transfer of the case from the Sub Magistrate, Pulivendla to some other Court and the District Magistrate of Cuddapah transferred the case to the Sub Magistrate, Cuddapah. The Sub Magistrate, Cuddapah came to the conclusion that the evidence was such that no impartial tribunal could ever accept it and cancelled the charges framed by his predecessor under S. 213 (2), Criminal Procedure Code, and discharged the accused. There was a revision therefrom and the learned District Magistrate, Cuddapah, set aside this order of the Sub Magistrate, Cuddapah and directed the committal and committed the accused to take their trial in the Sessions Court of Cuddapah for the offences charged against them as set out in the order of the Sub Magistrate, Pulivendla, dated 31-10-50. The present petition is filed against it.

(9) The orders of both the lower Courts constitute in parts unpleasant reading because the learned Sub Magistrate, Cuddapah, who felt a righteous indignation against the Sub Magistrate, Pulivendla, Mr. Chandrasekharam for several gross irregularities has written his order as if he was sitting in appeal over Mr. Chandrasekharam's order. The learned District Magistrate, Cuddapah, who has felt a righteous indignation against the Sub Magistrate, Cuddapah for criticising in strong terms a co-officer has written his order as if he was an administrator reviewing and non-judicially revising the discharge order of a subordinate Magistrate.

(10) Before entering into a discussion of the grounds put forward by the learned advocate Mr. V. C. Gopalratnam I must indicate the scope of the enquiry before me. The learned District Magistrate of Cuddapah having committed the accused to the Sessions under S. 437, Criminal Procedure Code, the High Court can interfere and quash the commitment only on a point of law.

(11) The term point of law has been construed by High Courts in various decisions and includes an order of commitment rested upon no acceptable and valid evidence.

(12) There can be no doubt in this case that the order of commitment by the learned District Magistrate is based upon no acceptable and legally valid evidence and here are my reasons.

(13) This case may legitimately be described as a symposium of all the irregularities and illegalities that can be thought of in connection with a criminal case both under the Criminal Procedure Code and under the Indian Evidence Act. To begin with the first document treated in this case as the first information report, namely, Exhibit P-1 is not a valid first information report at all. On the other hand, it is a statement recorded after investigation had started and coming within the mischief of section 162, Criminal Procedure Code. The learned Sub Magistrate, Cuddapah, has pertinently pointed out that information of a cognizable case setting the Police in motion was received by the Sub Inspector under the shape of Exts. P-8 and P-8a in Ankalamagudur village on 17-3-1950. Exhibits P-8 and P-8a contained definite information about the rioting, unlawful assembly, mischief and looting. On receiving information of a cognizable offence the Sub Inspector has started for Bideenamcherla in order to investigate the cognizable case.

It was not therefore open to him after starting investigation to collect information and then select and collate and bring into existence Ex. P-1 on the morning of next day in order to suit the theory which he has formed in the case. This disguising of a statement under S. 162, Criminal Procedure Code, as a first information report is condemned both under the Madras Police standing orders as well as by repeated decisions of this court of which the latest is — 'Gurusami Naidu v. Guruswami Naidu', 1951 Mad W N Cr. 83.

(14) The information in Exhibit P-8 is not mere gossip or hearsay. It is conveyed by C. W. 1 who came to Pulivendla from the scene of offence and was of a person whose house was also damaged and of P. W. 2 who is the son of P. W. 6 whose house also was damaged. P. W. 6 herself is stated to have come from the scene of offence, to Pulivendla and conveyed the information to C. W. 1. Then Exhibit P-8a was passed on by P. W. 14 to P. W. 11 with the note Exhibit P-8 for moving the police in the matter. This first information has naturally got much importance because it represents the earliest version in the case before there was time to concoct and shape the evidence in a particular fashion. There is no dispute that the information in Exhibits P-8 and P-8a has no resemblance whatsover to the case which

has been developed and for which these accused persons have been committed to the Sessions. In my opinion, this complete variance between the first information report and the present case for which the accused have been committed not in regard to minor details or unimportant matters or side issues but in regard to main charges is enough to throw out this case as an unreliable one which will not commend itself to any tribunal.

(15) The investigation at the earliest stage, namely, on the morning of 18-3-50 shows that faction leaders had been at work to give the present shape to this case, whereas what really seems to have happened was entirely different, namely, that there was a trouble in the village involving about 100 persons and in which both factions took part and some pelting of stones and minor injuries have been caused. P. W. 1's evidence is that as soon as the Galatta started, he closed his doors and remained indoors till P. W. 11 arrived and which is in the natural and probable course of events. But when he is said to have given the statement Exhibit P-1 to the Sub Inspector, treated as the first information report in this case, there is a meticulous description of several damages to the houses of the partisans of P. W. 1 and other details.

On being pressed as to how while he was immured in the house till P. W. 11 arrived he came to know of this unless he had x-ray eyes, P. W. 1 unabashingly mentioned that some boys told him all these and that he could not mention the names of these boys. In other words, the first information is not the product of the truthful information given by any one but the composite picture resulting from the imagination of factionists busy at work on that morning of 18-3-1950 under the aegis of the Sub Inspector of Simhadripuram. The learned Sub Magistrate of Cuddapah was fully justified in holding

> "It looks quite probable that Exhibit P-1 was got up at the instance of P. W. 11 on the morning of 18-3-1950 after he had surveyed the damages on the night of 17-3-1950 and had consultations with P. Ws. 1 and 2."

(16) It is singular that the Sub Inspector has not chosen to examine according to himself P. Ws. 3 and 4 because he says he sent them to the Hospital along with P. Ws. 1 and 2. There was no reason to do so and the only inference is that at an earlier stage P. Ws. 3 and 4 could not give any information and have toed the line only later.

(17) Though P. Ws. 4 and 5 are important witnesses it is found that the case diary merely mentions that P. W. 4 corroborated P. W. 3 in all respects. It is singular that it should be so because P. Ws. 3 and 4 are stated to have been examined on the way-side and P. W. 5 is stated to have been examined in the village Bideenamcherla. It is quite clear as pointed out by the learned Sub Magistrate that the entries in the case diary were not made contemporaneously with the examination and have been fudged. The failure to record separately the statements of P. Ws. 4 and 5 who are the most important eye-witnesses in the case is a serious irregularity considerably prejudicing the accused and is by itself enough to make the evidence tainted.

(18) Though the investigation has been completed on 18-3-50 and after which not a tittle of evidence has been recorded, the charge-sheet has been filed on 30-3-50 at the conclusion of the remand period of 14 days showing a vindictiveness inconsistent with impartial enquiry and a desire to gratify the ill-feelings of P. W. 1 and his partisans.

(19) To these irregularities of investigation the learned Sub Magistrate, Mr. Chandrasekharam, has added his own quota in full measure. The said Sub Magistrate without rhyme or reason converted a calendar case into a Preliminary Register Case. The present learned Sub Magistrate, Cuddapah, rightly points out:

> "I have read the evidence on record by 22-9-50 and am unable to understand how and why this peculiar course was adopted. The evidence of P. Ws. 3, 4 and 5 in their Chief examination is to the effect that some persons on the top of the house of P. W. 9 got into the house through the skylight and carried away some bags."

That could not obviously be construed as evidence sufficient for sustaining a specific charge of dacoity of which the police had not even thought of.

(20) The learned Sub Magistrate, Pulivendla, after the accused had stated that they had no defence witnesses recalled P. Ws. 3, 4, 5 and 6 under S. 540, Criminal Procedure Code, and has adopted a procedure clearly showing that he did so in order to build up a case of dacoity. This aspect of the case has been dealt with fully on pages 11 and 12 of the typed order of the Sub Magistrate, Cuddapah, which need not be repeated. But in spite of this prompting, prodding and probing the net result of the analysis of the evidence to show the offence of dacoity is that the dacoity is false.

(21) The learned Sub Magistrate, Pulivendla, has carried out his local inspection, plan-drawing and making of notes to lengths which are not permissible at all and beyond the limits laid down by the various High Courts' decisions. They were not for the purpose of understanding the evidence but to collect fresh evidence and build up a new case. The learned Sub Magistrate, Cuddapah, bluntly remarks and rightly that the elaborate plans and notes made by the Sub Magistrate on 8-10-50 and the manner in which the prosecution witnesses 3, 4, 5 and 6 were recalled on 12-10-50 and the way in which they were examined were all plainly designed to prop up the prosecution case of dacoity. Therefore, there has been gross misuse of the beneficial provisions of S. 539-A as well as S. 540, Criminal Procedure Code, vitiating the entire enquiry and making the evidence worthless.

(22) The Herculean labours of this Sub Magistrate of Pulivendla proved in vain however because as pointed out by the learned Sub Magistrate, Cuddapah, the evidence given by these P. Ws. was incredible as pointed out by him at page 13 of his typed order and which need not be repeated.

(23) Then finally on unimpeachable evidence it is found that accused 1, the leader of the faction was not present at all at the time of the Galatta and he has been falsely implicated because he is the leader. On the other hand, apparently anticipating this Galatta this leader has created an excellent alibi for himself and which is in the natural and probable course of conduct of these faction leaders in the Ceded Districts.

(24) I have therefore no hesitation in holding that the commitment not being based on any acceptable or valid evidence, ought not to have been made at all, and it is quashed.

C.R.K./B/D.H. Commitment quashed.

A. I. R. 1952 MADRAS 825

GOVINDA MENON

AND PANCHAPAKESA AYYAR JJ.

Gurusanthayya, son of Kariveerappa, Appellant v. Setra Veerayya and others, Respondents.

A. A. O. No. 16 of 1951, D/- 3-1-1952.

(a) Civil P. C. (1908), O. 17 Rr. 2 and 3 — Distinction — Party failing to appear at adjourned hearing — R. 2 and not R. 3 applies.

The distinction between O. 17, Rr. 2 and 3 is that in order that O. 17, R. 2 should apply, a party or his pleader should not be present in Court, whereas in the case of O. 17 rule 3, even if the party or his pleader is present in Court, if there is a failure to produce evidence, to cause the attendance of witnesses or to perform any other act necessary to the further progress of the suit O. 17 R. 3 applies. AIR 1936 Mad 625, Rel. on; AIR 1935 Mad 210, Disting. (Para 3)

In this view, where the plaintiff does not appear on the adjourned date and the suit is dismissed, the dismissal of the suit is under O. 17 R. 2 and not under O. 17 R. 3. Hence, in such a case O. 9 R. 9 would apply. (Paras 1, 4)

Anno: C. P. C., O. 17 R. 3 N. 3.

(b) Civil P. C. (1908), O. 8 R. 9 and O. 6 R. 17 — Party has no right to file rejoinder after written statement is filed and findings given on certain issues — Procedure to be followed stated.

There is no provision of law in the Civil Procedure Code, by which it is open to a party to file a rejoinder after the written statements have been filed, and findings given on certain issues. If any further fact has to be brought to the notice of the Court, the proper procedure is to apply for amendment of the plaint and not to file a rejoinder, which would necessitate the filing of fresh written statement and the framing of fresh issues. (Para 5)

Anno: C. P. C., O. 8 R. 9 N. 1.

C. A. Vaidhyalingam and C. Kondiah, for Appellant; S. Srinivasa Iyer and K. Sivaprasada Rao, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('18) 41 Mad 286: (AIR 1918 Mad 143(2) FB) 3
('35) 58 Mad 817: (AIR 1935 Mad 210) 4
('36) 70 Mad LJ 688: (AIR 1936 Mad 625) 3, 4

GOVINDA MENON J.: This is an appeal against the order of the District Judge of Bellary refusing to set aside an order dismissing a suit for default. What happened was that on 8-9-1950 when the suit came on for hearing the predecessor of the learned Judge, from whose order this appeal is filed, passed an order stating that certain issues had been decided against the contentions raised by the defendants, and that the suit would stand posted to 18-9-1950 for the plaintiff's rejoinder. On 18-9-1950 there was no appearance, and the learned District Judge thereupon passed an order in the following terms:

"Issues 2 and 7: Finding negativing the contentions of the defendants was given by this court on 8-9-1950.

Issue 3: The plaintiff and his pleader are absent. I decide the third issue in the affirmative."

In the result the suit was dismissed with costs. An affidavit in support of the application to set aside the order of dismissal for default was sworn to by Mr. D. Venugopalachariar, pleader for the plaintiff-appellant, and therein he states that on 18-9-1950 the rejoinder was ready, typed and signed by the plaintiff and was in the bundle of records relating to O. S. No. 2 of 1947. This along with another bundle was sent by the advocate through his clerk in order that it might be filed in court at the proper time through any of the juniors of Mr. Venugopalachariar, who would be present in that court. The learned pleader further states that at 11-30 a.m. the District Court passed an order stating that the rejoinder had not been filed, and that, as the plaintiff and his pleader were absent, the third issue was decided in the affirmative, and the suit was accordingly dismissed with costs. The reason why Mr. Venugopalachariar could not be present was that he had been engaged in some land acquisition proceedings before the Subordinate Judge's Court, and that his juniors were engaged in the Munsif's Court at Bellary. According to the learned pleader, whenever he had work in the District Court, either he or one of his juniors would be usually present in Court to attend to that kind of work. But on that particular day it unfortunately happened that the junior, Mr. Chenna Basappa could not be present in the District Court, as he had to appear in the Munsif's Court. These facts have not been seriously disputed by the advocate who appeared for the defendants in the court below. The only contention put forward there was that the dismissal of the suit was under O. 17, R. 3 and not under O. 17, R. 2, and that therefore the provisions of O.9, R. 9 would not apply to the facts of the present case.

(2) In our opinion, the learned District Judge erred in not accepting the statements contained in the affidavit of Mr. Venugopalachariar. We are of opinion that there was sufficient reason for the non-appearance of the plaintiff or his pleader when the case was called in court. It might be remarked that the usual procedure in such circumstances would be not to file the rejoinder earlier in the office, so that the same might be sent over to the court when the case is taken up, but to present the rejoinder in court through the Bench clerk. Mr. Venugopalachariar thought that he could resort to that step instead of filing it earlier. Even if that is not the proper procedure, still there is an error of judgment and inadvertent mistake and we cannot ascribe any wanton culpability to the pleader in this matter. We are satisfied that the plaintiff had sufficient reasons for not appearing in court when the case was called on 18-9-1950.

(3) But the really important question is whether O. 17, R. 2 or O. 17, R. 3 applies. The distinction between the two rules is that in order that O. 17, R. 2 should apply, a party or his pleader should not be present in court, whereas in the case of O. 17, R. 3, even if the party or his pleader is present in court if there is a failure to produce evidence, to cause the attendance of witnesses or to perform any

other act necessary to the further progress of the suit O. 17, R. 3 applies. That this is the correct distinction is exemplified by a decision of this court in — 'Ellammal v. Karuppan Chetti', 70 Mad L J 688. In that case after a suit had been proceeded with for a certain time and after some witnesses were examined, the suit was adjourned to a further date. On that date neither the defendants nor their vakil appeared, and therefore an 'ex parte' decree was passed. On an application to set aside the 'ex parte' decree, the court of first instance held that O. 17, R. 3 applied, and on appeal to the High Court, Venkatasubba Rao and Cornish JJ. had to decide the question, and they observed as follows:

"To define the line of division between R. 2 and R. 3 of Order 17, may in some cases be difficult, but in this case, the facts do not seem to present much difficulty. The learned Judge's order is not particularly lucid, but the ground of his decision apparently is, that as the adjournment of the 30th July, was granted for the specific purpose of enabling the defendants to examine a certain witness, the provision that applies is R. 3. No doubt that rule provides that where time has been granted for the performance of an act, such as causing the attendance of a witness and the party fails to perform that act, in such a case the court may, notwithstanding such default proceed to decide the suit on the merits; but that does not mean that where the parties themselves fail to appear, the operation of the more specific provision contained in R. 2 is excluded. In other words, the proper way of construing R. 3 would be that where no default occurring under R. 2, default occurs under R. 3, the court should proceed under the latter provision & dispose of the case on the merits; but if the default consists in non-appearance, it is R. 2 which deals with such a case specifically, that in terms applies. It is unnecessary to cite authority beyond referring to — 'Pichamma v. Sreeramulu', 41 Mad 286 (FB)."

(4) Mr. Kasturi Sivaprasada Rao, on the other hand, invites our attention to — 'Govindarajulu v. Imperial Bank of India', 58 Mad 817. In that case the learned Judges were alive to the distinction between the two rules, and observed, at page 819 of the report, that in that case the first defendant should be regarded as having appeared. In another place also there is a statement that the first defendant did appear by his pleader on that date; but the failure in that case was to produce certain evidence. We do not think that the decision in — 'Govindarajulu v. Imperial Bank of India', 58 Mad 817 goes to the extent of holding that even where the party did not appear on the adjourned date, still the provisions of O. 17 R. 3 had to be applied. In our opinion, the law has been very correctly stated, if we may say so with respect, in — 'Ellammal v. Karuppan Chetti', 70 Mad L J 688. Therefore the objection that the remedy that is open to the appellant is only to file an appeal against the dismissal of the suit cannot be upheld.

(5) Mr. Kasturi Sivaprasada Rao raises the question that it was not open to the learned District Judge to direct the filing of a rejoinder on 18-9-1950. We are not aware of any provision of law in the Civil Procedure Code, by which it is open to a party to file a rejoinder after the written statements have been filed, and findings given on certain issues. If any further fact has to be brought to the notice of the court, the proper procedure is to apply for amendment of the plaint and not to file a rejoinder, which would necessitate the filing of fresh written statement and the framing of fresh issues. We therefore think that in this case no rejoinder should have been ordered to be filed. Instead of the rejoinder, if the facts justify it, the plaintiff is at liberty to apply for amendment of the plaint.

(6) Since we have already found that there were sufficient reasons for the plaintiff for not appearing when the case was called, we think that the order of the learned District Judge has to be set aside, and it is accordingly set aside, and the suit will be returned to file. In the circumstances of the case the appellant will pay the respondents' costs in the C. M. A. in this court. No costs in the Memo of Objections.

C.R.K./B/V.B.B. Appeal allowed.

A. I. R. 1952 MADRAS 826

GOVINDA MENON

AND KRISHNASWAMI NAYUDU JJ.

Rampalli Ramachandrudu, Appellant v. Sait Bakraj Gulabchand Firm and others, Respondents.

A. A. O. Nos. 212 and 337 of 1951, D/- 14-2-1952.

Civil P. C. (1908), Ss. 46 and 47 — Order of precept — Applicability.

An order of precept under S. 46 is one which tends to facilitate the execution of the decree and not a step in execution proceedings and is, therefore, not appealable: AIR 1940 Cal 26 and AIR 1926 Cal 249, Foll. (Para 2)

Anno: C. P. C., S. 46 N. 3; S. 47 N. 84.

G. Balaparameswari Rao, for Appellant; P. V. Vallabhacharyulu, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('88) 12 Bom 400 2
('25) 90 Ind Cas 527: (AIR 1926 Cal 249) 1, 2
('39) ILR (1939) 2 Cal 370: (AIR 1940 Cal 26) 1

GOVINDA MENON J.: These appeals arise out of the orders passed by the District Judge of East Godavari extending the time for a precept issued to the Court of the District Judge of West Godavari to keep in attachment properties belonging to the appellant who is a judgment-debtor in the suit out of which the application for precept and its extension was made. Mr. P. V. Vallabhacharyulu for the respondent raises a preliminary objection that an order directing a precept is not appealable, as it is not one relating to execution, discharge or satisfaction of the decree. For this argument he relies upon the observations of Sen J. in — 'Rai Kissenji v. Sri Kissen', ILR (1939) 2 Cal 370. The learned Judge observes as follows:

"After there is an attachment pursuant to a precept under S. 46, C. P. C., further steps have to be taken before the decree can be executed. First, there must be an application under S. 39 of the Code to the Court, which passed the decree, for transmission of the decree to the Court which is to execute the decree. Then there must be an application for execution of the decree to the Court to which the decree has been transferred and the application must be in tabular form as

provided in O. 21, R. 11, C. P. C., when the executing court is not the High Court. If the Court, to which the decree has been transferred is the High Court, then the application for execution must be in form I of the rules of this court and must contain, in addition to the particulars mentioned in O. 21, R. 11 certain other particulars (vide Chapter 17, R. 10 of the Original Side rules). It is thus clear that after an attachment under a precept there must be an application for execution in the proper form and it is only upon such application that execution can issue. The order issuing a precept is, therefore, not an order directing execution and the attachment under a precept is not an attachment in execution proceedings. In the case of — 'Kasiswar De v. Aswini Kumar', 90 Ind Cas 527: AIR 1926 Cal 249 it was held that an application for an attachment under S. 46, C. P. C. cannot be regarded as an application for execution. This was a case regarding rateable distribution, but the principle underlying this view applies."

(2) What happened there was when a precept was directed to be issued to the Sheriff of Calcutta by the Civil Court of Benares and the properties in Calcutta were kept in attachment, the Sheriff claimed poundage for having the attachment made and the question was whether he was entitled to poundage at all. The learned Judge in considering that question found that a precept under S. 46 is not a step in the execution proceedings but is merely a step taken to facilitate execution. Even if a precept has been ordered, still the decree-holder has to apply to the court which passed the decree under S. 39, C. P. C. for transmitting the decree and thereafter an application under O. 21, R. 11, C. P. C. has to be filed to the court to which the precept has been directed. We agree with the learned Judge that an order of precept under S. 46 is one which tends to facilitate the execution of the decree and not a step in execution proceedings. The same view has been taken by the Calcutta High Court in an earlier case in — 'Kasiwar De v. Aswini Kumar', 90 Ind Cas 527 (Cal) where Greaves and Cuming JJ. held that an application for attachment under S. 46, C. P. C. cannot be regarded as an application for execution. The learned Judges referred to earlier decisions in — 'Pallonji Shapurji v. Edward Vaughan Jordan', 12 Bom 400 and other cases. We agree with the principles set forth in the Calcutta cases referred to above.

(3) We are, therefore, of opinion that the appeals are not maintainable and they are dismissed with costs, one set.

C.R.K./B/G.M.J. Appeals dismissed.

A. I. R. 1952 MADRAS 827

SUBBA RAO J.

Nune Panduranga Rao, minor by next friend Nune Sivaiah, Petitioner v. Divvala Gopala Rao and another, Respondents.

Civil Misc. Petn. No. 14009 of 1950, D/- 13-8-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XXV (25) of 1949), S. 7 (2) — Payment of rent — Excess amount with landlord.

Section 7 (2) does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent, if the said amounts were not paid by the tenant towards the rent of any particular month. It is true that on the date when a tenant authorises the landlord to adjust the amounts with him towards the rent of any particular month, or months the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller's order fixing the fair rent does not really affect the question. The amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of S. 7 (2) (1). AIR 1951 Mad 343, Rel. on. (Para 2)

N. Subramaniam and J. V. Krishna Sarma, for Petitioner; B. S. Ramamohana Rao, for Respondents.

REFERENCE..... Para.

('50) 63 Mad LW 1176: (AIR 1951 Mad 343) 2

ORDER: The petitioner is the landlord, and the first respondent is the tenant. The petitioner filed R. C. P. No. 56 of 1949 for evicting his tenant under S. 7(4) of Madras Act XXV of 1949. The application for eviction was based upon two grounds: (1) that the tenant was committing nuisance, and (2) that he made a default in payment of rent from February 1948. The tenant filed an application a few days prior to the application filed by the petitioner, for fixing the fair rent. The Rent Controller fixed the fair rent and also held that the said rate should come into force from 11-3-1947. As the excess rent paid by the tenant on the basis of the pre-existing rate of rent fixed by the Rent Controller would be much more than the rent actually due to him, the Rent Controller dismissed the application for eviction. In appeal the Subordinate Judge also took the same view and dismissed the appeal.

(2) Mr. Subramanyam, the learned counsel for the petitioner, contended that the Rent Controller could not take into consideration the unadjusted amounts in the possession of the landlord, and that as a default to pay rent was committed within the meaning of S. 7(2) of the Act, he had no jurisdiction to refuse eviction. Section 7(2) (i) reads:

"A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied—

(2) that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord, or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

Under the express provisions of this section, if the tenant has not paid or tendered the rent

due by him within the time prescribed therein, he is liable to be evicted. The section does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent, if the said amounts were not paid by the tenant towards the rent of any particular month. It is true that on the date when a tenant authorises the landlord to adjust the amounts with him towards the rent of any particular month, or months the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller's order fixing the fair rent does not really affect the question. I am therefore of opinion that the amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of S. 7(2)(1) of the Act.

A Bench of this Court consisting of Rajamannar C. J. & Balakrishna Aiyar J. held in — 'Navaneethammal in re', 63 Mad L W 1176 that in the case of amounts paid in advance, in the hands of a landlord, such amounts could not be treated as payments made towards rent due for any particular month. The learned Judges observe at page 1176:

"The learned advocate for the petitioner also urged upon us another point not dealt with by the learned Judge, namely, that the landlord had with him two months' rent in advance and he could adjust it towards arrears of rent under S. 6(c). But to invoke the provisions of that sub-section of S. 6 the tenant should exercise the option and call upon the landlord 'in time' to make the adjustment. There is no evidence in this case of the exercise of such choice."

In the present case also the amount paid in excess was not authorised by the tenant in time to be adjusted towards the rent due for any particular month; but this will not dispose of the application before me. Learned counsel for the respondent contended that his case was that he tendered the rent due to the landlord every month and he refused to accept the same. He further argued that the learned Judge accepted his case and found on the evidence that he made the tender every month and that therefore he was not liable to be evicted. It is true that a perusal of the judgment discloses that such an argument was advanced; but I cannot say that the learned Judge has given any definite finding on the said contention. The learned Subordinate Judge will have to decide on the evidence on record whether the respondent tendered the rent due till the application for eviction was taken out against him.

(3) The order of the lower court is quashed, and it is directed to dispose of the appeal in accordance with law. The petitioner will have his costs, advocate's fee Rs. 50.

C.R.K./B/D.H. Petition allowed.

A. I. R. 1952 MADRAS 828

SATYANARAYANA RAO
AND VISWANATHA SASTRI JJ.

M. N. Murugappa Chetti and Sons, Tiruppur, Appellant v. The Commissioner of Income-tax, Madras, Respondent.

Case Referred No. 10 of 1947, D/- 6-1-1950.

Hindu Law — Joint family — Acquisition — Presumption — Managing agency agreement by coparcener — Commission earned would be prima facie his individual (and not joint family) income — Income-tax Act (1922), S. 12A — Companies Act (1913), S. 2 (9-A).

A Hindu undivided family is not a "person" as defined in the Companies Act, 1913 as amended in 1936, and therefore it is incapable of entering into a managing agency contract as a legal entity. (Para 4)

The commission earned under a managing agency agreement by a member of a coparcenary would 'prima facie' be his individual property or separate property unless it be shown that the rights were acquired by utilising any portion of the joint family property. The 'prima facie' view that the rights under the managing agency agreement acquired by a coparcener would be his individual property may be rebutted by showing that the family estate had suffered a detriment as part and parcel of the arrangement under which the managing agency rights were acquired. AIR 1947 Bom 299 and AIR 1944 Bom 76, Ref. (Para 7)

A and his brother B, who were partners in a firm, entered into a managing agency agreement with certain Mills. The two brothers were then members of a Hindu joint family. Later they became divided, and the partition was between A on the one hand and B on the other and there was also a division inter se between B and his sons. A had also sons but there was no division 'inter se' between A and his sons. The partition deed made no reference to the rights under managing agency agreement. Nor was there any fresh agreement after partition between the Mills and the firm. The firm continued to manage the company. The question was whether the share of the managing agency Commission obtained by A after the partition, was the income of his joint family or was his individual income. It was not proved that the joint family property suffered any detriment by the conduct of A and B obtaining the managing agency agreement.

Held that the managing agency Commission should be treated as the individual income of A. (Para 7)

The fact that in the previous years the brothers did not object to the assessment of the income as joint family income does not at all support the inference that the income should for the assessment year also be treated as joint family income. (Para 6)

Advocate General for S. Swaminathan, for Appellant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('44) AIR 1944 Bom 76: (214 Ind Cas 42) 7
('47) 1947-15 ITR 124: (AIR 1947 Bom 299) 7

SATYANARAYANA RAO J.: The short question that arises for consideration in this reference is whether the managing agency com-

mission earned by one Murugappa Chettiar is assessable to income-tax as the joint family income of Murugappa and his sons. The question formulated in this reference is as follows:

> "Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the proportionate income of the managing agents Messrs. M. Nanjappa Chettiar and Sons was the income of the Hindu undivided family of Murugappa Chettiar and not the individual income of the karta?"

The facts relevant for the disposal of this reference may be shortly stated: on the 12th of May 1932, Murugappa Chettiar and his brother Chikkanna Chettiar entered into a managing agency agreement with the Dhanalakshmi Mills Ltd., whereunder Messrs. Nanjappa Chettiar and Sons, the name of the firm of which the two brothers are partners were appointed managing agents of the company subject to certain conditions and rights enumerated in the agreement. The two brothers, at the time when the agreement was entered into, were admittedly members of a Hindu joint undivided family. On the 7th February 1941, the two brothers, Murugappa and Chikkanna, became divided and the partition is evidenced by a partition deed of that date. The partition was between Murugappa on the one hand and Chikkanna on the other and there was also a division 'inter se' between Chikkanna and his sons. Murugappa also had sons but there was no division 'inter se' between Murugappa and his sons. Murugappa seems to have obtained a deed of release on the 2nd April 1941 from his sons, but that release may be left out of consideration as no argument is now based on the strength of that release. The partition deed made no reference to the rights under managing agency agreement; nor was there any fresh agreement after partition between Dhanalakshmi Mills and the firm. The firm continues to manage the company and in the year of account 1942-43, Murugappa, for his share of the managing agency commission, obtained a sum of Rs. 26607. This sum was treated by the Income-tax Officer as income of the joint family and was assessed as such overruling the objection of Murugappa that it was really his individual income and should not have been included in the income of the joint family. This decision was upheld by the Appellate Assistant Commissioner and also by the Appellate Tribunal. Hence this reference.

(2) Undoubtedly on the date of the assessment, Murugappa and his sons were members of a Hindu joint family and Murugappa, the father, is no doubt also the karta of that family. The commission earned by Murugappa as managing agent under the managing agency agreement above referred to can be established to be joint family property in one of two ways: (1) either by establishing that the managing agency agreement was in fact obtained on behalf of the joint family and that therefore the commission earned under that agreement must be deemed to be property of the family; or (2) by establishing that the income was earned by utilising joint family property or joint family money or at any rate by utilising the property of the joint family to its detriment. If none of these is established it must be presumed that the managing agency commission earned by Murugappa is his separate and individual property and not property of the joint family.

(3) Mr. Rama Rao Sahib, learned counsel for the Income-tax Commissioner tried to sustain the decision of the Appellate Tribunal on those two grounds. We may here dispose of the basis of the decision of the Appellate Tribunal as it is now conceded—and indeed it cannot be sustained—that merely because in the previous years Murugappa did not object to the assessment of this commission as income of the joint family, the income during the assessment year also must be treated as the income of the joint family. It is rather difficult to see on what principle the Appellate Tribunal presumed that the income during the accounting year was also income of the joint family merely because on prior occasions Murugappa or Chikkanna did not object to the income being treated as the income of the joint family.

(4) The contention that the managing agency agreement must be deemed to have been obtained on behalf of the joint family may now be considered. The agreement was entered into in 1932 when Murugappa and Chikkanna were undivided and there is nothing to indicate in the document that it was entered into on behalf of, and for the benefit of, the family. The indication, if any, points to an opposite conclusion for the reason that when the karta of the family at that moment was Murugappa, who was the senior of the two brothers, the agreement was entered into in the name of the two brothers, which negatives any presumption that the agreement was entered into on behalf of the family. Even a contract entered into by a person who happens to be the manager of the family is prima facie a contract entered into in his individual capacity, unless there is a clear indication in the document itself that he entered into it on behalf of, and for the benefit of, the family. In this document, which was entered into by the two brothers in their individual capacity, there is nothing to support the contention that it was entered into on behalf of the family. Further, liberty was given under the agreement to the two partners of the firm of Messrs. Nanjappa Chettiar and Sons to take any others also into the partnership and the change in the constitution of the firm, or the name and style, would not have the effect of affecting in any manner the rights under the managing agency agreement. The mere accident that these two persons were members of an undivided family affords no justification for inferring that the agreement was entered into on behalf of the family. Further under the Indian Companies Act as it stands after the amendment of 1936, a joint family as such cannot enter into a managing agency agreement for in the definition under S. 2, clause (9-A) a "managing agent" is defined as meaning "a person, firm or company". A Hindu undivided family is not a "person" and therefore it is incapable of entering into a managing agency contract as a legal entity.

(5) The next contention is that a large amount was invested by the two brothers in purchasing shares in Messrs. Dhanalakshmi Mills Ltd. and from this it is argued that there is utilisation of the joint family funds and hence the managing agency commission earned by the brothers must be deemed to be income of the family. That there is really no connection between the purchase of the shares from and out of the joint family funds and the managing agency agreement is made clear by the agreement itself as it specifically states that

the agreement was entered into between the two brothers and the company in consideration of the firm of Messrs. Nanjappa Chettiar and Sons having promoted the company and not for the reason that they purchased the shares in the Dhanalakshmi Mills. There is no qualification prescribed in the agreement that the managing agents should hold any shares in the company & that they should so hold & continue to hold the shares during the continuancy of the managing agency agreement. The purchase of the shares, the acquisition of the rights under the managing agency agreement, and the agreement itself are not in any manner connected and therefore it cannot be stated that the joint family property suffered any detriment to any extent by the conduct of these two persons in obtaining the managing agency agreement. The shares have been earning large dividends, in some years, as large as the face value of the shares, and really no detriment was suffered by the family by the purchase of these shares.

(6) The fact that in the previous years the brothers did not object to the assessment of the income as joint family income does not at all support the inference that the income should be treated as joint family income. It may be in the prior years that the two brothers, and later after partition Murugappa had no objection to treat the income of that particular year or years as joint family income. But that does not have the effect of converting the income to be accrued in future into joint family income on any conceivable principle of Hindu law. If it is a case of blending, it requires that the property must be in existence before it is actually blended. It cannot be said that at the time the income of the previous years was agreed to be treated as joint family income, the income of the assessment year was in existence, and it is therefore impossible to invoke the doctrine of blending to a case of this description and to hold that the managing agency commission earned during the accounting year must be treated as joint family income.

(7) The commission earned under a managing agency agreement by a member of a coparcenery would 'prima facie' be his individual property or separate property unless it be shown that the rights were acquired by utilising any portion of the joint family property as in the case of — 'Haridas Purushotham In re', 1947-15 I. T. R. 124 (Bom) at p. 132. In that case emphasis was laid upon the fact that an asset was sold to the new company, i.e., the Mills, which formed part of the joint family property of the person or persons who entered into the managing agency agreement and as stated at page 132 of the report, the new company, i.e., Messrs. Purushotham Govindji & Co. was appointed managing agents and as part and parcel of that arrangement, the Hubli Mills in which the assessee admittedly held a share as Karta was sold by the partnership to the new company. The managing agency therefore was held in that case to have been derived from, or acquired with, the assistance of the joint family. The prima facie view that the rights under the managing agency agreement acquired by a coparcener would be his individual property may be rebutted by showing, as in that case, that the family estate had suffered a detriment as part and parcel of the arrangement under which the managing agency rights were acquired. This position is not inconsistent with the view of Chagla J. in — 'Ramchandra v. Chinubai', AIR 1944 Bom 76 at p. 79 where the learned Judge observed:

> "To my mind it is impossible to contend that the mere office of managing agents without any benefits attaching to it can never be deemed to be joint family property."

The learned Judge in that sentence must have been thinking of a case where no detriment to the family estate was involved in the acquisition of the office of managing agents and not a case like the one which was considered in — 'Haridas Purushotham in re', 1947-15 I. T. R. 124 (Bom) at p. 132. For these reasons we are of opinion that the decision of the Appellate Tribunal is wrong & that the first part of the question referred to us must be answered in the negative. On the second part of the reference we hold that the managing agency commission should have been treated as the individual income of Murugappa Chettiar. The assessee who succeeds in this reference is entitled to his costs which we fix at Rs. 250.

C.R.K./B/V.B.B. Reference answered in the negative.

A. I. R. 1952 MADRAS 830

SUBBA RAO J.

Messrs. Katta Adinarayana and Brothers, Petitioners v. The State of Madras represented by the Commercial Tax Officer, Bellary and another, Respondents.

Writ Petn. No. 245 of 1951, D/- 9-11-1951.

Constitution of India, Art. 226 — Other remedy open.

The Madras General Sales Tax Act with its subsequent amendments has not custed the jurisdiction of the ordinary Civil Courts when a party is alleged to have been aggrieved by the administration of the Act. An application under Art. 226 for issuing a writ of 'certiorari' to quash the orders of the taxing Authorities assessing the petitioner for sales tax cannot be granted as the petitioner has an effective remedy by way of a suit in the Civil Court for the relief claimed. (Para 2)

T. S. Narasinga Rao and M. Balachandrudu, for Petitioners; Govt. Pleader for Respondents.

REFERENCE..... Para

Province of Madras v. Satyanarayanamurthi, (AIR 1952 Mad 273) 2

ORDER: This is an application for issuing a writ of certiorari to quash the orders of the Board of Revenue dated 14th May 1951 of the Commercial Tax Officer, Bellary, dated 9th April 1951 & of the Deputy Commercial Tax Officer, dated, 2nd March 1951. The Deputy Commercial Tax Officer assessed the petitioner for sales-tax for the year 1948-49 in a sum of Rs. 2,22,490-2-9. He filed an appeal against that order to the Commercial Tax Officer, Bellary, but that appeal was dismissed, on 9th April 1951. When he filed a petition to the Board of Revenue that was rejected on 14th May 1951. The petitioner seeks to set aside those orders on the ground that they are illegal and contravene the provisions of the Act.

(2) The learned Government Pleader raised the preliminary objection that the petitioner has other adequate and effective remedy by way of filing a suit in a civil court and therefore this application should be dismissed. In

— 'the Province of Madras v. Satyanarayanamurthi', AIR 1952 Mad 273. Govinda Menon and Basheer Ahmed Sayeed JJ. held that the Madras General Sales-tax Act of 1939 with its subsequent amendments has not ousted the jurisdiction of the ordinary civil courts when a party is alleged to have been aggrieved by the administration of the Act, and that

> "suits alleging that sales-tax was illegally levied against the plaintiffs and that excessive amounts were collected from them as sales-tax are maintainable."

This judgment was delivered on 26th April 1951. The petitioner could have filed a suit in a civil court for the relief which he now seeks to obtain in this writ. As he has other effective remedy, this application is dismissed with costs. Advocate's fee Rs. 100.

C.R.K./B/D.H. Application dismissed.

A. I. R. 1952 MADRAS 831

SUBBA RAO J.

Kalluri Krishnayya, Appellant v. Potti Venkata Subbarayudu, Respondent.

Second Appeal No. 1008 of 1948, D/- 21-11-1951.

Debt Laws — Madras Agriculturists' Relief Act (4 (IV) of 1938) Ss. 8, 9 and 13 — As amended by Madras Act (23 (XXIII) of 1948) — Effect of amendment — Original pro-note executed after 1-10-1932 — Renewal of pro-note after Act came into force — S. 9 applies and debt cannot be traced back to original note.

The law at the time when the Amending Act 13 of 1948 came into force was that neither S. 8 nor S. 9, Madras Agriculturists' Relief Act, 1938 would apply to a debt incurred after 22-3-1938. The debt under S. 9 could not be traced back to the earlier debt but should be scaled down with reference to the actual contract with the reduction of interest indicated in that section. S. 13 governed all debts whether incurred for the first time or renewed in respect of earlier debts, if they were incurred or renewed after the Act came into force. At that stage, the Legislature intervened and substituted Explanation III to the pre-existing Explanation to S. 8 of the Act. Under the substituted Explanation, a debt, which has been renewed or included in a fresh document executed after the commencement of the Act, is also liable to be scaled down under S. 8 of the Act. But, designedly, no similar explanation was added to S. 9. (Para 9)

Consequently, even after the amendment where the original debt is incurred on or after 1-10-1932 and is renewed after 22-3-1938, the debt cannot be traced back to the original debt: AIR 1941 Mad. 799(2) and AIR 1943 Mad. 344 Ref. (Para 9)

M. S. Ramachandra Rao and M. Krishna Rao, for Appellant; U. Sethumadhava Rao, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('41) 1941-2 Mad LJ 307: (AIR 1941 Mad 799(2)) 8

('43) 1943-1 Mad LJ 231: (AIR 1943 Mad 344) 9

('45) 1945-2 Mad LJ 565: (AIR 1946 Mad 111) 7

JUDGMENT: This second appeal raises a question in regard to the applicability of S. 9 of the Madras Agriculturists' Relief Act (hereinafter referred to as the Act) to debts incurred after the Act came into force.

(2) The facts are simple and are not in dispute. The defendant executed a promissory note Ex. P. 1 dated 5-1-1943 in favour of the plaintiff for a sum of Rs. 1024-6-0. The prior promissory notes, which culminated in Ex. P. 1, are as follows:

Ex. P. 2, dated 7-1-1940.
Ex. P. 3, dated 9-1-1937.
Ex. P. 4, dated 11-1-1934.

(3) The consideration for the earliest promissory note was Rs. 500. It will be seen from the aforesaid dates that the original debt was contracted after 1st October 1932 and that Exs. P. 1 and P. 2 were executed subsequent to the Act, i.e., 22-3-1938. The plaintiff filed O. S. No. 22 of 1946 on the file of the Court of the District Munsif, Ongole, for recovery of a sum of Rs. 1024-6-0 due under the promissory note Ex. P. 1 with subsequent interest at 9 per cent per annum. The defendant pleaded that he is an agriculturist and that the debt should be scaled down under the Act. He also contended that though Exs. P. 1 and P. 2 were executed subsequent to the Act, they were so executed under an arrangement between the parties that at the time of the settlement of the suit, the debt should be ascertained according to the Act and that the renewals were made only for the purpose of acknowledgment of the debt. The learned District Munsif held that the agreement pleaded was not true but that the promissory notes executed subsequent to the Act were not supported by consideration. He found, after giving credit to the amounts paid, that the plaintiff would be entitled to a decree for a sum of Rs. 333 and subsequent interest from 9-9-1944 at 6¼ per cent per annum. In appeal, the learned Subordinate Judge held that the plaintiff would be entitled to a decree on the basis of Ex. P. 1 and, after giving credit to the amounts paid, he gave a decree for a sum of Rs. 656-13-8 with subsequent interest at the rate of 6¼ per cent per annum. The defendant preferred the above second appeal.

(4) The learned counsel for the appellant contended that, in view of the provisions introduced by Amending Act, 23 of 1948, the debt is liable to be scaled down under the provisions of the Act. To appreciate the contention of the learned counsel, the relevant provisions of the Act, as amended by Act 23 of 1948, may be read:

"8. Debts incurred before 1st October 1932, shall be scaled down in the manner mentioned hereunder, namely:

(1) All interest outstanding on the 1st October 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

Explanation III: Where a debt has been renewed or included in a fresh document executed before or after the commencement of this Act, whether by the same or a different debtor and whether in favour of the

same or a different creditor, the principal originally advanced together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable under this section."

(5) This Explanation has been substituted by Amending Act 23 of 1948 for the explanation, which reads as follows:

"Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under this section."

9(1) Debts incurred on or after the 1st October 1932, shall be scaled down in the manner mentioned hereunder, namely:

Interest shall be calculated up to the commencement of this Act at the rate applicable to the debt under the law, custom, contract or decree of court under which it arises or at five per cent per annum simple interest, whichever is less, and credit shall be given for all sums paid towards interest and only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due:

Provided that any part of the debt which is found to be a renewal of a prior debt (whether by the same or a different debtor, and whether in favour of the same or different creditor) shall be deemed to be a debt contracted on the date on which such prior debt was incurred and if such debt had been contracted prior to the 1st October 1932, shall be dealt with under the provisions of S. 8."

(6) The words "whether by the same or a different debtor, and whether in favour of the same or different creditor" were inserted in the proviso by the Amending Act XXIII of 1948.

"13. In any proceeding for recovery of a debt, the court shall scale down all interest, due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6¼ per cent per annum, simple interest, that is to say, one pie per rupee per mensem simple interest, or one anna per rupee per annum simple interest."

(7) The law in regard to the interpretation of the aforesaid provisions in their unamended form was well settled and the decisions cited before me afford illustrations to the principles accepted by the Court. The applicability of S. 8 of the Act to a promissory note executed after the commencement of the Act was considered in — 'Suryanarayana v. Alavandararao', 1945-2 Mad LJ 565.

(8) The learned Judges observed at page 566 that:

"It is well settled that a debt incurred after the commencement of Madras Act IV of 1938 cannot be scaled down except in accordance with S. 13 of that Act."

The same rule was applied in — 'Thiruvengadatha Aiyangar v. Sannappan Servai', 1941-2 Mad. L.J. 307 to a debt incurred after 1st October 1932 and renewed after the Act came into force. The learned Judges observed at page 309:

"S. 13 seems to provide a complete machinery for dealing with debts incurred after the commencement of the Act, and it appears to have been designed as part of a regular scheme whereby debts of agriculturists are divided into three categories: first, those incurred before 1st October 1932, which fall under S. 8; secondly, those incurred from 1st October 1932 to 22nd March 1938, which fall under S. 9 and thirdly, those incurred after 22nd March 1938. The only point in seeking to apply S. 9 to the last class of debts is to get the advantage of the proviso to S. 9(1). It seems to us that having regard to the scheme of the Act, if it had been the intention of the legislature to include the theory of renewals into the scaling down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf. We are of opinion that all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under S. 13."

(9) In — 'Sarveswararao v. Venkatasubbayya & Sons', 1943-1 Mad. L.J. 231 the learned Judges further pointed out the scope of the proviso to S. 9. They stated

"the obvious intention of the Legislature in enacting this proviso was merely to give a rule for the classification of debts into those to which S. 8 will apply and those to which S. 9 will apply. The latter class of debts has to be scaled down with reference to the actual contract modified to the extent indicated by the reduction of the rate of interest."

In an unreported judgment by another Bench of this court of which I was also a member, this view was not accepted. There the suit promissory note was executed on 10-10-1936. The prior promissory note was dated 10-11-1933. We held that even in the case of a debt covered by S. 9, the debt can be traced back to the earlier debt. That judgment was delivered on 10-3-1949, i.e., subsequent to the enactment of the Amending Act XXIII of 1948. The law therefore at the time when the Amending Act came into force was that neither S. 8 nor S. 9 would apply to a debt incurred after 22-3-1938. The debt under S. 9 could not be traced back to the earlier debt but should be scaled down with reference to the actual contract with the reduction of interest indicated in that section. S. 13 governed all debts whether incurred for the first time or renewed in respect of earlier debts, if they were incurred or renewed after the Act came into force. At that stage, the Legislature intervened and substituted Explanation III to the pre-existing Explanation. Under the substituted Explanation, a debt, which has been renewed or included in a fresh document executed after the commencement of the Act, is also liable to be scaled down under S. 8 of the Act. But, designedly, no similar explanation was added to S. 9. I state "designedly" because the proviso to S. 9 was also amended. Though the words found in the substituted explanation III to Sec. 8 viz., "whether by the same or a different debtor and whether in favour of the same or a different creditor" were inserted in the proviso, the other part of that explanation in regard to debts renewed after the Act came into force was not added to S. 9 by an explanation or otherwise. The Legislature presumably had knowledge of the decision in — 'Sarveswararao v. Venkata Subbayya', 1943-1 Mad. L.J. 231 wherein it was held that where

no portion of the debt has been incurred before 1-10-1932, the debt cannot be traced back and the debtor is only entitled to get under S. 9 in respect of that debt the relief of reducing the rate of interest as provided therein. In view of that decision, as no question of tracing back the debt under S. 9 arises, the Legislature did not think fit to add a similar Explanation to S. 9 also. It follows that the suit promissory note, which was executed after the Act came into force and to which the provisions of S. 9 apply, cannot be traced back to the earliest debt Ex. P. 4.

(10) The principal of Ex. P. 1 must be taken to be the principal for applying the provisions of S. 9. The learned Subordinate Judge's calculation is correct and is consistent with the provisions of S. 9.

(11) It is then contended by the learned counsel that the learned Subordinate Judge should have held that Exs. P. 1 and P. 2 were only taken as vouchers acknowledging the debt incurred prior to the commencement of the Act. The defendant pleaded in the written statement that there was an arrangement between the parties that at the time of the settlement of the suit debt, the amounts shall be ascertained according to the Act and, that the renewals were made for the purpose of acknowledging the debt. The learned District Munsif held against the said agreement, though, curiously notwithstanding that finding, he held that the suit promissory note was not supported by consideration. In appeal, the learned Subordinate Judge accepted that finding. The argument of Mr. Ramachandra Rao that the learned District Munsif's finding that the promissory notes were taken as vouchers was not disturbed by the appellate court is without any basis whatsoever as a perusal of the District Munsif's judgment shows that the Munsif did not accept the defendant's case that they were given as vouchers.

(12) In the result, the appeal fails and is dismissed with costs. No leave.

B/K.S. Appeal dismissed.

A. I. R. 1952 MADRAS 833

PANCHAPAKESA AYYAR J.

Karuppa Servai, Petitioner v. Kundaru alias Muniandi Thevan, Respondent.

Criminal Misc. Petn. No. 2437 of 1951, D/- 10-12-1951.

(a) Criminal P.C. (1898), S. 337(3) — Approver deposing in committing Magistrate's Court — Release on bail.

Neither the inquiring Magistrate nor the Sessions Judge has got the right to set at naught the mandatory provisions of S. 337(3) based on very salutary principles of public policy and public interest, and release an approver who is not on bail at the time of his acceptance of the tender of pardon, after the approver has deposed only in the committing Magistrate's Court, that is, in the course of the preliminary enquiry, and before the inquiry has ended, and, if committal ensues, before he has deposed at the trial in the Sessions Court truly and fully to matters within his knowledge. (Para 2)

Anno: Cr. P.C. S. 337 N. 19.

(b) Criminal P.C. (1898), Ss. 337(3), 497 and 498 — Applicability of Ss. 497 and 498 to approver.

An approver cannot be put in the same position as an accused, and the provisions of Ss. 497 and 498, cannot apply to him. Even if they apply, it would not be a fit case for releasing an approver on bail in a murder case. AIR 1951 Orissa 78 Ref. (Para 2)

Anno: Cr. P.C. S. 337 N. 19.

V. Rajagopalachari and K. Vaitheeswaran, for Petitioner; C. K. Venkatanarasimhan, for Approver; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras
('08) 31 Mad 272: (8 Cri LJ 153) 2
('09) 32 Mad 173: (9 Cri LJ 571) 2
('50) 16 Cut LT 186: (AIR 1951 Orissa 78) 2

ORDER: This is a petition filed by one of the accused in a murder case (R. C. No. 17 of 1951) for setting aside the order of the Sessions Judge of Madurai directing the release of an approver (P. W. 1), and for his re-arrest and detention in custody pending disposal of R.C. No. 17 of 1951, and the sessions trial therein, if committal ensues.

(2) I have perused the records and heard Mr. V. Rajagopalachariar for the petitioner, the learned Public Prosecutor for the State, and the learned counsel for the approver. The learned Public Prosecutor does not oppose the petition and, indeed, supports it. He relies upon the mandatory provisions of S. 337(3) Criminal Procedure Code, that an approver, unless he is already on bail at the time he accepts the tender of the pardon, (this approver was not on bail then), shall be detained in custody until the termination of the trial. In this case, even the preliminary enquiry is not concluded, let alone any trial begun in the sessions court. There is absolutely no doubt in my mind that neither the inquiring Magistrate nor the Sessions Judge has got the right to set at naught the mandatory provisions of Sec. 337(3) Criminal Procedure Code, based on very salutary principles of public policy and public interest, and release an approver who is not on bail at the time of his acceptance of the tender of pardon, after the approver has deposed only in the committing Magistrate's court, that is, in the course of the preliminary enquiry, and before the inquiry has ended, and, if committal ensues, before he has deposed at the trial in the sessions court truly and fully to matters within his knowledge.

An approver is not an accused, and cannot be made an accused till he has failed to disclose the entire facts within his knowledge truly and fully, and without concealing anything or giving false evidence. Only when he has concealed anything he knows, or given false evidence, can he be treated as an accused: see the ruling of a Bench of this Court, consisting of Wallis and Munro JJ., in — 'Arunachellam v. Emperor', 31 Mad. 272, and the ruling of another Bench of this Court, consisting of Wallis and Pinhey JJ., in — 'Kullan v. Emperor', 32 Mad. 173. In the latter ruling, it is specifically mentioned that the condition on which the approver is tendered a pardon is broken if he withdraws before the sessions court statements made before the committing Magistrate's court or even statements in his examination-in-chief in the sessions court itself in cross-examination. So, if committal ensues, the stage at which it is to be seen whether the approver has kept his condition or not is the

stage of the trial in the sessions court, and in the light of his evidence in chief-examination, cross-examination and re-examination in the sessions court compared with his statement in the Committal court. That is also obvious from Sec. 337(3), Criminal Procedure Code, itself where the word used is "trial", and not "enquiry." In — Khalli Behera v. State', 16 Cut. L.T. 186, Das and Panigrahi JJ. have observed as follows:

> "A person who accepts a pardon also accepts the grave risk of departing from the truth and being charged with the offence if he abuses the privilege granted to him. The statement of an approver is not a confession, and can be given in evidence against him under S. 339(2) Criminal Procedure Code",

as a kind of exception to the law of confessions. So, it is clear to me that an approver cannot be put in the same position as an accused, and the provisions of Ss. 497 and 498, Criminal Procedure Code, cannot apply to him. Like a lunatic who does an act constituting the crime but is not convicted and punished for it because he was of unsound mind at the time he committed the act, an approver is also a person who is "directly or indirectly concerned in or privy to the offence" under S. 337(1) Criminal Procedure Code, and is let off without conviction or punishment because he accepts the tender of a pardon and makes a true and full disclosure of all the facts relating to the crime within his knowledge. So, even if Ss. 497 and 498, Criminal Procedure Code apply, it would not be a fit case for releasing an approver on bail in a murder case like this.

(3) Besides, an approver has to be kept in safe custody till the conclusion of the trial (or inquiry if no committal ensues) like a sealed will in a will forgery case and then disposed of according to merits. He is not to be allowed to be let off on bail, when he is not on bail at the time he is tendered a pardon, but is to be kept in safe custody, free from police control or influence, or the influence of the accused. If he is released on bail, after he has given a statement in the enquiry court in full conformity with the statement given by him before the District Magistrate, it is obvious that the Police and the accused can both get at him freely thereafter, and there will be no guarantee that he will give out the whole truth at the trial if committal ensues. Truth, at the trial, in the case of an approver, does not mean sticking to the very statement given by him before the District Magistrate or in the committal court, but speaking to the true facts as they occurred, for Truth is one, and not two. The Public Prosecutor, before he can make an approver an accused, has to certify, under S. 339 (1), Criminal Procedure Code, that, in his opinion, the approver has wilfully concealed anything essential or given false evidence or not complied with the conditions on which the tender of pardon was made. It is of vital importance both to the accused and to the public that an approver should not be treated like an ordinary accused or witness, but strictly according to the provisions of the Criminal Procedure Code, S. 337 (3) being the prime provision regarding him. There may be a little doubt whether an approver can be released after he has given his full evidence in the sessions court, and where the Public Prosecutor does not certify that there is anything concealed or false, even before the trial is over; but there is no doubt at all that he cannot be released on bail at an earlier stage (if committal ensues) when he was not on bail at the time he was tendered the pardon and accepted it. Usually, a Sessions Court releases an approver in a murder case after the whole trial is over, and the verdict is given and judgment delivered, because only at that stage can it be seen whether the approver's evidence has been a full and true disclosure, of all the facts he knows, or not.

(4) I have no doubt whatever, therefore, in agreeing with Mr. Rajagopalachari, the learned counsel for the petitioner, and with the learned Public Prosecutor, and in disagreeing with the contentions of the learned counsel for the approver, and cancelling the order of the Sessions Judge, Madurai, releasing this approver on bail. I accordingly cancel that order and direct his re-arrest and detention in safe custody in a separate cell in Madurai Jail pending disposal of R. C. No. 17 of 1951 on the file of the Stationary Sub Magistrate, Nilakottai, and the conclusion of the trial (if committal ensues).

(5) The enquiry and trial (if committal ensues) of the case may be expedited as far as practicable, as the learned counsel for the approver says that there are nearly 60 witnesses, and many exhibits, and this approver has the prospect of being kept in custody for several months unless an order for expedition is given by me.

B/V.R.B. Order cancelled.

A. I. R. 1952 MADRAS 834

RAJAMANNAR C. J.

AND VENKATARAMA AIYAR J.

In re V. Nagalingam Servai and others, Petitioners.

Writ Petn. No. 648 of 1951, D/- 8-11-1951.

Constitution of India, Art. 226 — Fundamental rights — Infringement — Cancellation of license.

Where the railway authorities cancel the license issued to the petitioner for vending articles in the platform of a railway station, there is nothing illegal in such a course. No fundamental right of the petitioner has been in any manner infringed by the action of the railway authorities and no relief under Art. 226 can be given. (Para 2)

Arunachalam and Jagannadhan and Co., for Petitioners.

RAJAMANNAR C. J.: The petitioners have been for a long number of years vending various articles on the platforms of the Madhurai junction under permission granted to them originally by the South Indian Railway Company Ltd. They were granted licences and a monthly fee was being collected from them. From the 1st April 1951 the Government have taken over the railway. On the 28th September 1951, a notice was served on the petitioners cancelling the licences issued to them with effect from 1st November 1951. This application is for the issue of directions or orders appropriate to the case regarding the cancellation of these licences.

(2) It may be that this action on the part of the railway authorities is likely to cause great hardship to the petitioners as they would be thrown out of employment and deprived of the means of earning their livelihood by carrying on this business. But the learned counsel

for the petitioners has not been able to establish any right in the petitioners which we could enforce as against the State. Admittedly, the railway platform must be deemed to be the private property of the Railway Department of the Government and the position of the petitioners was that of bare licencees. Undoubtedly, the licence is not coupled with any interest and can be revoked at any time and without any reason. It may be that the Railway Authorities intend to grant the right of vending to a single individual. But it is not for us to criticise the policy of the railway administration. All that we can say is that there is nothing illegal in such a course. We are not convinced that any fundamental right of the petitioners has been in any manner infringed by the action of the Railway Authorities. The application is dismissed.

B/D.H. Application dismissed.

A. I. R. 1952 MADRAS 835

RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

A. L. V. R. St. Veerappa Chettiar, Petitioner v. State of Madras and another, Respondents.

Civil Misc. Petns. Nos. 6914, 13528 of 1950 and 490 of 1951, D/- 13-12-1951.

(a) Constitution of India, Art. 31 (6) — "Any law of the State" — Meaning.

The words "any law of the State" mean any Act, Ordinance or Order enacted by the State without any reference to its validity. Opinion of Das J. in AIR 1950 Pat 392 (SB), Approved and observations of Sinha J., Dissent, from. (Para 2)

(b) Constitution of India, Arts. 31 (6) and 226 (1) — Writ of certiorari — Issue of, to declare Act invalid.

When Art. 31 (6) declares that an Act shall not be called in question on the particular ground mentioned, it is not open to the Court to issue a writ of certiorari or other appropriate writ practically achieving the same result: (1874) LR 5 PC 417, Ref. to. (Para 5)

Anno: C.P.C., Appendix III; Constitution of India, Art. 226 N. 13.

(c) Government of India Act (1935), Sch. VII, List 2, Entry 9 — Madras Estates (Abolition and Conversion into Ryotwari) Act — Act relates to compulsory acquisition of interest in land — Act falls within Entry 9 of list 2 — Tenancy Laws — (Madras Estates Abolition and Conversion into Ryotwari) Act (26 (XXVI) of 1948), S. 1). **(Para 6)**

(d) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 (XXVI) of 1948), Ss. 1 and 3 (b) — Property acquired — Vesting of — Validity of Act — (Government of India Act (1935), S. 175 (2)).

Section 175 (2) of Government of India Act only concerns property acquired for the purposes of the Federation or of the Province. It cannot be said that the property of the zamindar or inamdar is being acquired under the Madras Estates Act for the purposes of either the Federation or of the Province. Assuming it can be deemed so, the result would be that whatever the provincial statute might say, the property would vest in His Majesty under S. 175 (2). But it would vest for the purposes of the Province. The declaration in S. 3 of the Madras Estates Act only means that the vesting is for the purposes of the Province. The Act is, therefore, not invalid. (Paras 7, 8)

R. Kesava Iyengar, for Petitioner; Advocate General and V. P. Sarathy, for Govt. Pleader instructed by State Counsel, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('51) 1951 SCJ 775: (AIR 1951 SC 458)	1
('50) 29 Pat 790: (AIR 1950 Pat 392 SB)	2, 6
(1874) LR 5 CP 417: (43 LJCP 39)	5
(1885) 118 US 425: (30 Law Ed 178)	2

RAJAMANNAR C. J.: In these applications the validity of Madras Act XXVI (26) of 1948 (The Madras Estates (Abolition and Conversion into Ryotwari) Act) is challenged. Of the many grounds on which it was challenged, several have become unavailable to the petitioners on account of the Constitution (First Amendment) Act, 1951. and the recent decision of the Supreme Court which held that Act to be valid (vide — 'Shankari Prasad Singh v. Union of India', 1951 SCJ 775. For instance, it is no longer open to the petitioners to contend that the Act has become void as being inconsistent with, or taking away, or abridging, any of the rights conferred by any of the provisions of Part III of the Constitution.

(2) But learned counsel for the petitioners contended that the Act is still liable to be challenged on other grounds. The first of such grounds pressed before us was that it contravenes the provisions of sub-sec. (2) of S. 299 of the Government of India Act, 1935. To this ground the answer of the State is that this ground is not open to the petitioners in view of Art. 31 (6) of the Constitution which runs as follows:

"Any law of the State enacted not more than 18 months before the commencement of this Constitution may within 3 months from such commencement be submitted to the President for his certification; & thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of S. 299 of the Government of India Act, 1935."

It is common ground that there has been a certification by the President in accordance with this clause. But the petitioners' counsel attempted to get out of this difficulty by putting forward two arguments. The first argument was that the President's certification could cure only irregularities and like defects which do not substantially affect the validity of the Act, but where the impugned Act is void 'ab initio' the President's certificate would not save it. This argument was built upon a construction of the words "any law of the State" as meaning any valid enactment. In support of this argument, learned counsel relied upon certain observations of Sinha J. in — 'Kameshwar Singh v. State of Bihar', 29 Pat 790 (SB). At p. 860 that learned Judge said:

"The opening words of the clause are — 'Any law of the State'. They are not 'Any Act passed by the State'. Hence in order to attract the operation of the clause, the first essential condition is that it must be a valid law of the State. In other words, the certification by the President may cure an irregularity or an illegality in some details of the law in

valid piece of legislation but it cannot cure a nullity. If the impugned Act was a nullity, the certification by the President could not give life to something which was void 'ab initio' and a law which is void 'ab initio' is something which was never in existence — see in this connection the following observations of the Supreme Court of America in the case of 'Norton v. Shelby County', (1885) 118 US 178 at p. 186, 'An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In the same case Das J. was apparently of a different view. In his opinion, Art. 31 (6) as worded would prevent the Court from calling into question a law coming within the purview of that clause which is liable to be challenged only on the ground covered by that clause and which must be held to be valid law because it cannot be called into question on that ground which renders it invalid.

"Thus there will be no question of reviving something which is dead or validating a nullity. A law passed by a competent Legislature is valid unless it is declared invalid by a competent court of law. If the court cannot call it into question on a particular ground, that ground cannot be urged for its invalidity either at the inception or at a subsequent stage; for to do so would nullify the provisions of Art. 31 (6) of the Constitution."

With great respect, I am in entire agreement with the opinion expressed by Das J. and I must express my respectful dissent from the observations of Sinha J. on this point. I am clearly of opinion that the words "any law of the State" mean any Act, ordinance or order enacted by the State without any reference to its validity.

(3) Of course, this does not mean that it is not open to the petitioners to challenge the validity of the Act on other grounds. Art. 31(6) does not say that the Act shall not be called in question on any ground whatever. On the other hand, that clause expressly limits the effect of the certificate to the only ground that it contravenes the provisions of clause 2 of Art. 31 or has contravened the provisions of sub-sec. 2 of S. 299 of the Government of India Act, 1935.

(4) There was no attempt to argue, still less to convince us, that the Act is void because the acquisition was not for a public purpose, assuming that that ground is still open to the petitioners.

(5) But for the strenuous way in which the point was pressed on us, I would not have considered it necessary to deal except in a cursory way with the contention of the petitioners' counsel that in spite of Art. 31 (6) declaring that the Act shall not be called in question on the particular ground mentioned, it is still open to the court to issue a writ of Certiorari or other appropriate writ practically achieving the same result. Reliance was placed on the rule well established in England that though a statute might purport to take away the right of certiorari in particular matters, nevertheless the Supreme Court would have power to quash the proceedings of an inferior court on the ground of excess of jurisdiction and similar grounds.

In the well known case of the — 'Colonial Bank of Australia v. Willan', (1874) LR 5 PC 417, Sir James Colvile pointed out that a statutory enactment purporting to take away the right of certiorari would not have the effect of absolutely depriving the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior court on the ground either of a manifest defect of jurisdiction in the tribunal that made the order in question or of manifest fraud in the party procuring it. The proposition is thus stated in Halsbury's Laws of England, 2nd Edn., Vol. IX, at page 862:

"Although certiorari is taken away, it may be granted, even on the application of the defendant, where the inferior court has acted without or in excess of jurisdiction; for in such a case the court has not brought itself within the terms of the Statute taking away certiorari. Thus, certiorari will lie although taken away where the subject matter of the inquiry was beyond the scope of the authority of the inferior court, either by reason of its nature or by reason of the absence of some essential preliminary; and it will also lie where by reason of interest or prejudice the inferior court was improperly constituted and was therefore without jurisdiction to entertain the cause."

I fail to see, however, how this rule of law can possibly apply to the present case. Firstly, the power and jurisdiction which this court is invested with to issue writs in the nature of certiorari and prohibition can now be traced to Arts. 225 and 226 of the Constitution. When the same Constitution also provides that a particular enactment shall not be called into question on the ground that it contravenes a particular provision, that is to say, on the ground that it is for a particular reason illegal, it follows that to that extent there is no power or jurisdiction in this court to declare that the enactment is void on that ground by the issue of a writ of certiorari or like writ. Secondly, the power of the superior court to quash proceedings by certiorari can only be exercised against inferior courts or tribunals but cannot be exercised against the Legislature. The petitioner's counsel is seeking for a wholly unwarranted application of the doctrine which reserves the power of a superior court to quash orders of inferior courts or tribunals.

(6) The next ground on which the impugned Act was attacked was that the Provincial Legislature which passed the enactment was not competent to pass it. Entry 9 of List 2 of schedule VII to the Government of India Act, 1935 is "compulsory acquisition of land" and prima facie the Act in question is an Act relating to compulsory acquisition of land. But petitioners' counsel argued that there could not be real acquisition unless there was adequate compensation, and as for several estates the compensation is nil or practically nil, the Act which leads to that result cannot be deemed to be an Act relating to acquisition of land.

Some support was sought to be found in the observations of Das J. at page 885 of the decision in — 'Kameshwar Singh v. State of Bihar', 29 Pat 790 (SB) that it is only if the requirement of payment of compensation (either by fixing the amount or specifying the principles and the manner in which the compensation is to be determined) is satisfied that a law authorising compulsory acquisition could be made. But surely Das J. was here referring to the provisions of sub-section (2) of S. 299 of the Government of India Act, 1935. The learned Judge was not dealing with the competency of the Legislature to pass the enactment in question in exercise of the power conferred by Entry 9 in List 2 of Schedule VII.

In my opinion, there is no question of competency at all in this case. The law does relate to compulsory acquisition of interest in land, and therefore, clearly falls within Entry 9 of List 2.

(7) The last argument of Mr. Kesava Aiyangar, petitioners' learned counsel, was that the Act was void because the vesting of the property acquired is declared by S. 3 (b) of the Act to be in the Provincial Government, whereas according to S. 175 (2) of the Government of India Act, 1935, the vesting should have been in His Majesty. No doubt, S. 3 does say that the entire estate acquired shall stand transferred to the Government and vest in them free of all encumbrances, and "Government" is defined in Sec. 2 (5) as "the Provincial Government". But, is this inconsistent with S. 175 (2) of the Government of India Act? That sub-section is in the following terms:

> "All property acquired for the purposes of the Federation or of a Province or for the exercise of the functions of the Crown in its relations with Indian States as the case may be, shall vest in His Majesty for those purposes."

Prima facie it looks to me as if this sub-section only concerns property acquired for the purposes of the Federation or of the Province. It cannot be said that the property of the zamindar or inamdar is being acquired under the Act for the purposes of either the Federation or of the Province. Assuming it can be deemed so, the result would be that whatever the provincial statute might say, the property would vest in His Majesty under S. 175 (2). But it would vest for the purposes of the Province. The declaration in Sec. 3 of the impugned Act only means that the vesting is for the purposes of the Province. There is no substance in this highly technical contention.

(8) I hold that Madras Act (XXVI (26) of 1948) cannot be held to be invalid on any of the grounds taken by the petitioners. The petitions are therefore dismissed.

(9) VENKATARAMA AIYAR J.: I agree.

B/V.R.B. Petitions dismissed.

A. I. R. 1952 MADRAS 837

CHANDRA REDDI AND RAMASWAMI JJ.

Bandi Peda Ramireddi, Appellant v. Tagaram Bichalu, Respondent.

Second Appeal No. 2510 of 1947, D/- 13-12-51.

Civil P. C. (1908), S. 11 and O. 21, R. 63 — Res judicata as between co-defendants — Tests — Decision under O. 21, R. 63.

In order that a decision may operate as res judicata as between co-defendants the requisite conditions are, (1) there must be a conflict of interest between the defendants concerned, (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (3) the question between the defendants must have been finally decided: AIR 1931 TC 114, Foll. (Para 5)

One Y sold property to P. A creditor of Y filed a suit and obtained a decree. Prior to judgment the property was attached when P intervened with a claim based on the sale deed in his favour. The claim having been allowed, the creditor filed a suit for vacating the claim order impleading P and Y. The suit was decreed it being held that the sale deed in P's favour was a sham and nominal transaction. Consequent upon this decision, Y sold the property to D. P thereupon instituted a suit for a declaration of his title and for an injunction restraining D from interfering with his possession.

Held that the suit was affected by the doctrine of res judicata in view of the finding in the earlier suit that the transaction evidenced by the sale deed in favour of P was not a genuine one: AIR 1945 Mad 333 (FB), Expln.; AIR 1948 Mad 118(2), Dissent. from. (Paras 4 and 8)

Anno: C. P. C., S. 11 N. 46 Pts. 2 and 3 N. 56, O. 21 R. 63 N. 11.

P. Satyanarayana Raju and M. B. Rama Sarma, for Appellant; Ch. Suryanarayana Rao, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('31) 53 All 103: (AIR 1931 PC 114) 5, 8
('21) 44 Mad 268: (AIR 1921 Mad 105) 6
('25) 48 Mad LJ 616: (AIR 1925 Mad 1113) 6
('45) AIR 1945 Mad 333: ILR (1946) Mad 79 (FB) 3, 6, 7, 8
('47) 1947-2 Mad LJ 189: (AIR 1948 Mad 118 (2)) 4, 7
(1843) 67 ER 530: (3 Hare 627) 5

CHANDRA REDDI J.: The question referred to the Bench is whether a judgment rendered in an earlier suit filed under O. 21, Rule 63 to which the claimant, the decree-holder, and judgment-debtors were impleaded as parties could operate as res judicata in a subsequent suit between the claimant and a representative-in-interest of the judgment-debtor. The facts of the case are fully set out in the order of reference; but for an appreciation of the question involved in this case we may briefly state a few facts.

The suit property originally belonged to one Khasim. Subsequent to his death, his widow Yelli sold the same for a stated consideration of Rs. 100 to the plaintiff under Ex. P. 1 dated 28th May 1936. A creditor of Yelli filed O. S. No. 589 of 1936 and obtained a decree. Prior to judgment, the suit property was attached when the plaintiff intervened with a claim based on Ex. P. 1. This claim was allowed which led to the filing of a suit by the creditor, O. S. No. 480 of 1941 for vacating the claim order. To that suit were impleaded not only the claimant, i.e., the present plaintiff, but the judgment-debtor as well. In the suit, it was decided that the property continued to be that of Yelli despite Ex. P. 1 for the reason that Ex. P. 1 was a sham and nominal transaction and was liable to be attached.

Consequent upon this decision, Yelli sold the property to the defendant for a stated consideration of Rs. 300, a portion of which was for discharging the decree debt in O. S. No. 589 of 1936. Subsequently, i.e., on 22nd June 1945, the present plaintiff deposited the decree amount into court. But as already the decree was discharged, the amount deposited by the present plaintiff was not utilised and he was informed of the same. Consequently the plaintiff has filed this suit for a declaration of his title and for an injunction restraining the defendant from interfering with his possession.

(2) The defendant filed a written statement contending inter alia that the finding that the property continued to be that of Yelli was res judicata, that Ex. P. 1 was a sham and nominal transaction and would not therefore bind him

and hence his sale had a priority over that of the plaintiff.

(3) The trial Court dismissed the suit accepting the defence. On appeal the Subordinate Judge of Guntur reversed the finding of the trial court and decreed the suit holding that the sale in favour of the plaintiff was a bona fide transaction. The Subordinate Judge negatived the contention urged on behalf of the defendant in support of the judgment that the decision in O. S. No. 480 of 1941 operated as res judicata. In support of its view that it did not operate as res judicata the lower appellate court relied on a ruling of a Full Bench of this court in — 'Narasimhachariar v. Raghava Padayachi', AIR 1945 Mad 333: ILR (1946) Mad 79 (FB). The defendant who is aggrieved by the judgment and decree of the lower appellate court has preferred this second appeal.

(4) When the matter came on for hearing before Subba Rao J. after deciding that the finding of the lower appellate court that Ex. P. 1 was not a sham and nominal transaction but was a bona fide one was binding upon the second appellate court, he referred the matter to a Bench as he was of opinion that the question stated above was of considerable importance and in view of a ruling of Horwill J. in — 'Angathevan v. Natarajan Chettiar', 1947-2 Mad LJ 189. The learned Judge was inclined to disagree with Horwill J. and take the view that the decision in the earlier suit would operate as res judicata in the present suit. However he referred the matter to a Bench as he thought that an authoritative ruling should be given on this question. Therefore the point for consideration in this second appeal is whether the present suit is affected by the doctrine of res judicata in view of the finding in O. S. No. 480 of 1941 that the transaction evidenced by Ex. P. 1 was not a genuine one.

(5) The principle of res judicata as applicable to co-defendants is laid down by the Judicial Committee of the Privy Council tersely in — 'Munni Bibi v. Trilokinath', 53 All. 103 (PC). In that case the property, a house in Agra which formed the subject-matter of decision by the Judicial Committee, originally belonged to one Joti Prasad, his wife being one Mukhandi. They had two sons by name Bishamber Nath and Amar Nath and two daughters, Ratan Dei and Kashi. Prior to his death Joti gifted this property to his wife; but this was not accompanied by possession. In the partition between the two sons of Joti after his death, they treated the property in dispute as a partible asset ignoring the gift deed in favour of their mother and the property was allotted to the share of Amar Nath. The latter who was very much involved in debts subjected all his properties including the house in question to a mortgage and on the foot of that mortgage a decree was obtained.

There were various proceedings in respect of this property and it is not necessary to allude to all of them. Suffice it to say that by 1908, the property happened to be in the possession of a donee from one of the daughters of Mukhandi, the root of title being the gift deed in favour of Mukhandi. In or about the year 1908, an assignee of a decree against Amar Nath proceeded to attach the property as belonging to Amar Nath. The person in possession of the property objected to the attachment and the objection was allowed. Thereupon, the assignee decree-holder instituted a suit for setting aside the summary order and for a declaration of his right to proceed against the property in question in execution of his decree. To this suit were added as parties not only the heirs of Mukhandi but also the daughter of Amar Nath, Munni Bibi, both Amar Nath and his widow having been dead by that time. The claim of the decree-holder to proceed against the properties was upheld and the suit was decreed. But the property was not allowed to be sold in execution as one of the maternal grandsons of Mukhandi discharged the decree.

Subsequently, Munni Bibi, the daughter of Amar Nath, instituted a suit for a declaration that that was the property of Amar Nath and for recovery thereof. One of the questions that arose for consideration was whether the decision in the earlier suit that the property was that of Amar Nath and that the heirs of Mukhandi had no title thereto operated as res judicata or not. Their Lordships decided that it operated as res judicata.

For judging, whether a decision was res judicata as between co-defendants or not their Lordships propounded three tests: (1) There must be a conflict of interest between the defendants concerned, (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (3) the question between the defendants must have been finally decided. As their Lordships thought that that case satisfied all the three tests requisite for the decision that it operated as res judicata, they held that the judgment in the earlier suit operated as res judicata. In coming to the conclusion that it operated as res judicata their Lordships relied upon the dictum laid down by Wigram V. C. in — 'Cottingham v. Earl of Shrewsburry', (1843) 67 E.R. 530 at p. 535 :

> "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

In our opinion the present matter comes within the scope of the ruling in — 'Munni Bibi v. Trilokinath', 53 All. 103 (P.C.).

(6) As in the lower appellate court, here Mr. Suryanarayana Rao, learned counsel for the respondent, relied on a decision of the Full Bench in — 'Narasimhachariar v. Raghava Padayachi', ILR (1946) Mad. 79 (F.B.). We shall now examine that ruling to see if it helps the respondents in any way. There, in a suit on a mortgage, a personal decree was given against the mortgagor and in execution of the personal decree some properties were attached as belonging to the mortgagor. The mortgagor's brothers filed a petition claiming the properties as their own. The claim was allowed; but as the decree was otherwise satisfied, the decree-holder did not take any steps to vacate the summary order. Subsequently in execution of another mortgage decree obtained against the same judgment-debtor, the same properties happened to be attached as properties belonging to him. His brothers again preferred a claim to these properties. The question arose whether the order in the claim proceedings that the property did not belong to the judgment-debtor operated as res judicata.

The Full Bench decided that the rule of res judicata had no application to that case for the

reason that an order under Or. 21, Rule 58 was conclusive only in respect of execution of a decree which has given rise to the proceedings. The learned Judges thought that the conclusiveness attached only to the rights worked out in pursuance of attachment in execution of the decree and did not extend beyond the execution of the decree giving rise to those proceedings. In that view, they overruled the decision of a Bench of this court in — 'Singariah Chetti v. Chinnabbi Reddy', 44 Mad. 268. Referring to — 'Kumara Goundan v. Thevaraya Reddi', 48 Mad. L.J. 616 which doubted the correctness of — 'Singariah Chetti v. Chinnabbi Reddy', 44 Mad. 268, the learned Chief Justice who delivered the judgment on behalf of the Full Bench observed as follows :

"The opinion expressed by Ramesam J. in — 'Kumara Goundan v. Thevaraya Reddi', 48 Mad. L.J. 616 that the filing of a suit under Or. 21, Rule 63 makes all the difference cannot be accepted without qualification. It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned; but, where the property is sold in execution proceedings arising out of an entirely different decree, the claimant will not be precluded from setting up his title as against a stranger purchaser."

(7) It is these observations that have given rise to the contention that a decision given in a suit under Or. 21, Rule 63 would not operate as res judicata in a subsequent suit based on an entirely different cause of action and which also formed the basis of the ruling in — 'Angathevan v. Natarajan Chettiar', 1947-2 Mad. L.J. 189. In that case, a decree-holder attached certain property as belonging to the judgment-debtor. The property attached was claimed by a third party as belonging to him exclusively which resulted in the claim being allowed. Thereupon, the decree-holder seems to have instituted a suit for setting aside the summary order. In the suit a decision was given that the judgment-debtor had a share in the property, it being the property of the joint family and so liable to be sold in execution of the decree.

In a subsequent suit, the same question arose in execution of another decree. When the matter came up in second appeal to this Court, Horwill J. relying on — 'Narasimhachariar v. Raghava Padayachi', ILR (1946) Mad. 79 (FB) held that it did not operate as res judicata. The learned Judge expressed the opinion that that case was governed by — 'Narasimhachariar v. Raghava Padayachi', though in — 'Narasimhachariar v. Raghava Padayachi', there was no suit under Or. 21, Rule 63 to vacate the summary order. He remarked :

"It is true that it was not necessary for the Full Bench in — 'Narasimhachariar v. Raghava Padayachi', to consider whether the decision in a claim suit operated as res judicata in proceedings in execution of another decree; but the learned Judges clearly felt it necessary to decide that question in order to set at rest the conflicts and uncertainties arising out of previous decisions. The point was carefully considered and the learned Judges were of opinion that a claim suit, arising as it does out of claim proceedings, has relationship only to the particular decree that was being executed."

We do not think that the observations in — 'Narasimhachariar v. Raghava Padayachi', lend themselves to the interpretation that in no case will the decision given in a suit under Or. 21, Rule 63 with reference to title to property would operate as res judicata in a subsequent suit. That this is so is clear from the observations of the learned Judges at page 88 of the same report :

"Subject to the operation of the doctrine of res judicata in any particular case, we hold that an order on a claim petition filed under Or. 21, Rule 38, or a decree in a suit filed under Rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings."

It is clear from this statement of law that the learned Judges did not intend to lay down that in no case would the doctrine of res judicata apply to a decision given under Or. 21, Rule 63. The earlier observations must be understood in the light of this later statement of law contained in the same judgment and we may take it that the former related to a case where the rule of res judicata would have no application, as for instance, in a suit instituted by the claimant or by the decree-holder, the judgment-debtor was not made a party and the fight was only between the claimant and the decree-holder. Viewed in that light, we think there is no conflict between the two statements of law contained in the same judgment. We should not assume that the learned Judges laid down a conflicting dicta.

(8) In these circumstances in our judgment the decision in — 'Narasimhachariar v. Raghava Padayachi', AIR 1945 Mad. 333: ILR (1946) Mad. 79 (FB) is not in any way conflicting with the ruling in — 'Munni Bibi v. Trilokinath', 53 All. 103 (PC) and does not carry the respondent very far. In our opinion, the judgment given in the earlier suit under Or. 21, Rule 63 would operate as res judicata as between co-defendants provided the three requisite conditions for the applicability of the rule of res judicata mentioned above are satisfied. In these circumstances, we answer the reference in the affirmative and direct the dismissal of the suit. This is a fit case in which we should direct each party to bear his own costs throughout.

B/V.R.B. Reference answered.

A. I. R. 1952 MADRAS 839

PANCHAPAKESA AYYAR J.

Pajerla Krishna Reddi, Petitioner.

Criminal Misc. Petn. No. 2481 of 1951, D/- 13-12-1951.

Criminal P.C. (1898), S. 337(3) — Approver turning hostile — Detention.

An approver who was in remand when he was tendered a pardon must be detained in custody under S. 337(3) till the termination of the trial if committal ensues or till the termination of the enquiry if committal does not ensue. The fact that he is said to have turned hostile is immaterial. (Paras 1 & 2)

Anno: Cr. P.C. S. 337 N. 19.

A. Ramachandran instructed by Row & Reddy, for Petitioner; Santhanam for Public Prosecutor, for the State.

ORDER : The petitioner is an approver, and neither an accused nor a mere witness. He was in remand when he was tendered a pardon as an approver and accepted it. So he must be detained in custody under Sec. 337(3), Crimi-

nal Procedure Code, till the termination of the trial if committal ensues, or till the termination of the enquiry if committal does not ensue.

(2) The fact that he is said to have turned hostile is immaterial. Approvers are "approvers" whether they are true to their word or turn hostile. Their character cannot be changed till the termination of the trial or enquiry in which they have been tendered and have accepted a pardon. They cannot throw away the pardon and get rid of their obligations like an advocate throwing away his brief. There are certain legal statuses like husband, wife, father, mother, son, approver etc., which cannot be thrown away at will. As even the enquiry is not yet over, the approver must remain in detention; if committal ensues, the detention will till the termination of the trial. That other accused have been let off on bail is immaterial as he is not an accused; that other witnesses are not detained in custody is immaterial as he is not a mere witness but an approver-witness subject to the mandatory provisions of Sec. 337(3), Criminal Procedure Code. This petition deserves to be and is hereby dismissed.

B/V.R.B. Petition dismissed.

A. I. R. 1952 MADRAS 840

SUBBA RAO J.

S. P. Shaik Abdul Khader and Co. by partner Abdul Khader, Petitioner v. A. R. Subramania Pillai and another, Respondents.

Writ Petn. No. 713 of 1951, D/- 14-12-1951.

Imports and Exports (Control) Act (1947), S. 3 — Restrictions on export trade issued — Validity — Restrictions are reasonable within the meaning of Art. 19(6) Constitution of India and are valid — Constitution of India, Art. 19(6).

Under the provisions of the Imports and Exports (Control) Act, 1947, the notification issued thereunder and the general instructions forwarded to the officers, restrictions were imposed in the interests of the general public, having regard to the imperative necessity to control export trade for the economic stability of the country. Specific and reasonable instructions were given to the officers and an appeal also was provided to rectify the orders of the subordinate officers. If cannot be said that the restrictions imposed are not reasonable within the meaning of Art. 19(6) of the Constitution of India, nor is the machinery provided for the implementation of the policy unsatisfactory.

(Para 8)

M. K. Nambiar for K. C. Jacob and S. K. L. Ratan, for Petitioner; N. Rajagopala Aiyangar and V. V. Raghavan for Govt. Pleader, for Respondents.

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Deputy Chief Controller of Exports, Custom House, Madras. The petitioner is a registered partnership firm carrying on business at Tirunelveli Pettai. The petitioner entered into a partnership with the first defendant on terms and conditions set out in the partnership deed dated 1-12-1950. The partnership deed was executed subsequent to the agreement dated 30-9-1950. The scope of the agreement, the partnership deed and the terms thereof are in dispute. During September 1950, two lots of hundred tons of chillies were exported under two contracts with the Co-operative Wholesale Establishment, Ceylon. Subramania Pillai, the respondent had shipped the goods in his own name and realised the sale proceeds through bank.

(2) The petitioner's case is that two consignments were made pursuant to the aforesaid partnership entered into between the parties.

(3) The 1st respondent does not deny the export but states that he paid a share in the proceeds to the petitioners firm as brokerage and that by reason of that payment it was never intended that the petitioner's firm should become partners with him. The first respondent applied for a quota that was to be allotted to him on the strength of the aforesaid exports. The petitioner wrote a letter dated 26-10-51 to the second respondent claiming that he was entitled to a moiety in the said quota. The second respondent replied that as the first respondent had shipped the goods in his own name, and duly realised the sale proceeds through bank, and as the petitioner retired from the partnership, the quota would be allotted to the parent firm or the individual, who retained the good will. This application is filed as aforesaid for quashing that order.

(4) Learned counsel for the petitioner raised before me the following two points: (1) The order of the second respondent violates the fundamental rights under Art. 19(1)(g) of the Constitution of India. (2) The order is, on the face of it, vitiated by an error.

(5) Art. 19(1) of the Constitution reads as follows:

"19(1). All citizens shall have the right—

(g) to practise any profession, or to carry on any occupation, trade or business.

6. Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

(6) Therefore, under sub-sec. (6) the fundamental right guaranteed does not prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right.

(7) The learned counsel's contention is that the petitioner is carrying on export business, and that by the order of the second respondent, he is precluded from carrying on the business. He also argued that the law imposing the restrictions on the export trade was unreasonable.

(8) The Imports and Exports (Control) Act, 1947 was enacted for the purpose of continuing for a limited period powers to prohibit or control imports and exports. Under S. 3, the Central Government was authorised to make an order prohibiting, restricting or otherwise controlling in all cases, or, in specified classes of cases, and subject to such exceptions, if any,

as may be made by or under the order, the import, export, carriage coastwise or shipment as ships, stores of goods of any specified description. On the 21st of February 1949, the Government of India issued a notification. It reads:

"In exercise of the powers conferred by sub-rule (3) of the rule 84 of the Defence of India Rules and in supersession of the Notification of the Government of India in the Department of Commerce, No. 91-C. W. (1) 44 dated the 29th January 1944, the Central Government is pleased to prohibit the export to any place outside India, of any goods of the description specified in the schedule annexed, except the following namely:

(e) any goods of the description specified in Part D of the said schedule and covered by an export licence issued by or under the order of the Central Government in the Ministry of Commerce or the Chief Controller of Exports or an Export Trade Controller or Deputy Chief Controller of Imports and Exports appointed in this behalf by the Central Government."

The Exports control policy was designed to conserve essential supplies for civilian consumption in this country. It also made possible the fair distribution of available exportable surplus among India's customers at controlled prices. A person or firm desirous of exporting any controlled commodity must comply with the Export Control Regulations and procedure. To that effect general instructions were given by the Ministry of Commerce prescribing the procedure and also the conditions for the issue of permits. Some of the said instructions are found in the Export Trade Control Circular No. 289 of 1951. It says that it has been decided to regulate the export of chillies to all permissible destinations on the principle of established shippers and under cover of licences issued by the office. One of the important rules prescribed for guidance is that those shippers, who have effected the export of chillies during any of the three financial years 1948-49, 1949-50 and 1950-51, may choose any one of the three years as their basic year and that allotments will be made to those shippers in proportion to their basic exports subject to the maximum limit of 15 tons per quarter per individual shipper. Under the general instructions given, it is also provided that exporters, who are not satisfied with the decision of the licensing authorities, or those, who have not received any reply from them within a reasonable time, may appeal, in the case of commodities included in Part D to the Chief Controller of Exports, New Delhi. Under the provisions of the Imports and Exports (Control) Act, 1947, the notification issued thereunder and the general instructions forwarded to the officers restrictions were imposed in the interests of the general public, having regard to the imperative necessity to control export trade for the economic stability of the country. Specific and reasonable instructions were given to the officers and an appeal also was provided to rectify the orders of the subordinate officers. I cannot say that the restrictions imposed are not reasonable within the meaning of Art. 19(6) of the Constitution of India, nor is the machinery provided for the implementation of the policy unsatisfactory.

(9) It was then contended that the order of the Controller of Exports was vitiated by an error on the face of the record. The Controller has construed the partnership deed and had come to the conclusion that, in the circumstances of the case, the proper course was to allot the quota to the parent firm, or the individual, who retained the goodwill. It was argued that, as the Controller found that 200 tons of chillies were exported by the partners on 30-9-1950, quota should have been allotted to each of them for exporting 100 tons of chillies as each of the persons must be deemed to have exported 100 tons in 1950-51. The Controller construed the terms of the partnership and held that the partnership was either continued by the 1st respondent or that he was carrying on the business with the goodwill of the partnership. He, therefore, took the view that the quota should be given to the 1st respondent, who was continuing the business. I cannot say that the order is vitiated by an error on the face of the record.

(10) Further, it was represented to me that a suit is now pending in respect of the partnership business and that the rights of the parties will be decided therein. Any observations that may have been made by the Controller of Exports or by me, in the course of this order, will not preclude the court from deciding the rights of the parties therein, or appointing a Receiver, if a case is made out for one.

(11) Further, the general instructions issued provide for an appeal against the order of the Exports Trade Controller to the Chief Controller of Exports, New Delhi. It is true that there is no statutory right of appeal as contended by the learned counsel for the petitioner. But the same instructions, which regulate the conditions under which the permits are issued, also provide for an appeal. If the Export Trade Controller is wrong because he has not followed the instructions strictly, his order certainly can be questioned by preferring an appeal provided for under the same instructions.

(12) For the aforesaid reason, the application fails and is dismissed with costs. Advocate's fee Rs. 100.

B/V.R.B. Application dismissed.

A. I. R. 1952 MADRAS 841

SUBBA RAO J.

Sri Raja Venkata Ramayya Appa Rao Bahdur Varu, Petitioner v. The Collector of Madras and another, Respondents.

Civil Misc. Petn. No. 6632 of 1951, D/- 19-2-1952.

Revenue Recovery Act (1890), Ss. 3 and 5 — "Recoverable" — Meaning of — Arrears of income tax — Income-tax Act (1922), S. 46.

Sec. 3 applies only to a case where the land revenue or a sum recoverable as arrear of land revenue is payable to the Collector. It cannot be applied to a case where the amounts are payable to an officer other than the Collector. As income-tax is payable to the Income-tax Officer, Sec. 3 can have no application.

The word "Recoverable" has obviously been used in S. 5 in the restricted sense of only connoting the process of actual collection. The amount of arrears of income tax is recoverable by the Income-tax Officer but the process of recovery is entrusted to the Collector. Therefore, as income-tax is recoverable by the Income-tax Officer as land revenue, under Sec. 5, the

Collector of the district in which the office of the Income-tax Officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district. (Paras 4 & 5)

Anno: Income-tax Act, S. 46 N. 1.

O. Chinnappa Reddi, for Petitioner; Vepa Sarathi, for Govt. Pleader and C. S. Rama Rao Sahib, for Respondents.

ORDER: This is an application for the issue of a writ of mandamus directing the respondents to forbear from restraining and selling the petitioner's property for recovery of arrears of income-tax.

(2) The petitioner was one of the partners of the United Construction Company, Rajahmundry who took a contract job No. 539 of the Aerodrome works of Madhurapudi for execution. The contract work commenced in October 1942 and was completed by December 1943. On 20-3-1950, the petitioner received a communication from the Income-tax Officer, Special North Circle, Madras, calling upon him to pay a sum of Rs. 16,445-3-0 being his share of income-tax, excess profits tax and compulsory deposit, and he duly paid the same. He received another notice from the Income-tax Officer, Rajahmundry, demanding him to pay a sum of Rs. 39,807-3-0 being the unpaid tax payable by the other partners. On 19-4-1951, he received a notice from the Tahsildar of Madras threatening to distrain and sell the properties of the petitioner if the said amount was not paid forthwith. The petitioner's case is that the Collector of East Godavari district in which the alleged arrears of income-tax accrued has no jurisdiction to send to the Collector of Madras a requisition for collecting tax from the properties situate in Madras. On that contention he seeks for the issue of the aforesaid writ of mandamus.

(3) The provisions of the Revenue Recovery Act, Act 1 of 1890 govern the situation. The relevant provisions are Ss. 3 and 5 of the Act:

"Where an arrear of land revenue or a sum recoverable as an arrear of land revenue is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum is payable the Collector may send to the Collector of that other district a certificate in the form as nearly as may be of the schedule, stating,

(a) the name of the defaulter and such other particulars as may be necessary for his identification and

(b) the amount payable by him and the account on which it is due.....

(3) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land revenue which had accrued in his own district."

Section 5: Where any sum is recoverable as an arrear of land revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land-revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act as if the sum were payable to himself."

(4) Learned counsel for the petitioner contended that arrears of income-tax is neither payable to the Collector nor recoverable by the Income-tax Officer and therefore neither Section 3 nor Section 5 of the Revenue Recovery Act, Act 1 of 1890 would apply to the case. Under S. 3 where an arrear of land-revenue or a sum recoverable as an arrear of land-revenue is payable to a Collector he may send to the Collector of that other district a certificate in the form prescribed where the defaulter's property is situate. Section 3 applies only to cases where the land-revenue or sum recoverable as land-revenue is payable to the Collector. To ascertain the meaning of the word "payable" the material provisions of the Madras Revenue Recovery Act may be noticed.

In S. 1 it is stated thus:

"Public revenue due on land shall, for the purposes of this Act be taken to include cesses or other dues payable to Government on account of water supplied to irrigation."

Section 3 reads as follows:

"Every land-holder shall pay to the Collector, or other officer empowered by him to receive the revenue due upon his land on or before the day on which it falls due, according to the Kisbundy or other engagement, and where no particular day is fixed then within the time when the payment falls due according to local usage."

Section 4: When the whole or a portion of a kist shall not be so paid, the amount of the kist or of its unpaid portion shall be deemed to be an arrear of revenue."

Under the aforesaid provisions "public revenue" also includes cesses or other dues payable to Government on account of water supplied for irrigation. Every land-holder shall pay the same to the Collector within the prescribed period. If it is not paid it will be recovered by the Collector in the manner prescribed by the Act. Under the said Act, therefore, the revenue is payable to the Collector. The cesses on account of water supplied for irrigation are also included in the term "Public Revenue" and made recoverable as arrears of land revenue. There may also be cases where under different Acts dues payable to the Collector though not be strictly public revenue may be recoverable as arrears of land-revenue. Section 3, therefore, in my view applies only to a case where the land-revenue or a sum recoverable as arrear of land revenue is payable to the Collector. It cannot be applied to a case where the amounts are payable to an officer other than the Collector.

In the present case as income-tax is payable to the Income-tax Officer, S. 3 can have no application. But under S. 5 of Act 1 of 1890 where any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority the Collector of the District in which the office of that officer or authority is situate may collect it and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act as if the sum were payable to himself. The contention of the learned counsel for the petitioner is that the sum is not recoverable by the Income-tax officer and therefore the section will not apply.

(5) Section 6 makes it clear that the officer who actually collects the amount is the Collec-

tor of the District in which the arrears accrued or the Collector of another district to whom the former Collector sends the certificate. Therefore, the word "recoverable" has obviously been used not in the restricted sense of only connoting the process of actual collection. A perusal of the relevant provisions of the Indian Income-tax Act (Act XI of 1922) also supports this interpretation. Chapter VI of the Act deals with recovery of taxes and penalties. That chapter makes a distinction between the recovery and the process of collection. Under S. 45 of the Act the tax shall be paid within the prescribed time after service of notice or order and the assessee failing to pay shall be deemed to be in default. Under S. 46, when an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that in addition to the amount of the arrears, a sum not exceeding that amount shall be 'recovered' from the assessee by way of penalty.

Under S. 46 (1-A) for the purposes of subsection 1, the Income-tax Officer may direct the 'recovery' of any sum less than the amount of the arrears & may enhance the sum so directed to be 'recovered' from time to time in the case of a continuing default, so however that the total sum so directed to be 'recovered' shall not exceed the amount of the arrears payable. Under S. 46(2) the Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. It will, therefore, be seen from the aforesaid provisions that the amount is recoverable by the Income-tax Officer but the 'process of recovery' is entrusted to the Collector. Therefore, as income-tax is recoverable by the Income-tax Officer as land-revenue, u/s. 5, Revenue Recovery Act, 1 of 1890 the Collector of the district in which the office of the Income-tax Officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district.

(6) In the result, this application fails and is dismissed with costs. Advocate's fee, Rs. 100.

B/D.H. Application dismissed.

A. I. R. 1952 MADRAS 843

SUBBA RAO J.

Birapalli Sreekanta Venkata Krishna Reddi Garu, Appellant v. Dandu Venkataraju and others, Respondents.

Second Appeal No. 1677 of 1948, D/- 17-1-1952.

Tenancy Laws — Madras Estates Land Act (I (1) of 1908), S. 145 — Decree for arrears of rent — Execution taken out — Occupancy rights transferred — Transferee sending notice under S. 145 (2) — Execution sale without notice to transferee is void.

Where the provisions of S. 145 (2) have been strictly complied with, the landholder is bound to recognise the transfer.

The Madras Estates Land Act does not say that a transfer of holding subsequent to the filing of an application for execution of a rent decree against the original pattadar can be ignored or cannot be recognised by the landholder. S. 145 (2) will equally apply to a transferee prior to the filing of the application and to a transferee subsequent to that date. Once the recognition of the transfer under S. 145 (2) is made the transferee will become the owner for all the purposes of the Act and thereafter the landholder can look to the purchaser only for effectuating his rights. A sale held without issuing a notice to the owner of the property (that is the transferee) is against the principles of natural justice and will be void: Case law Ref. (Para 5)

V. V. Raghavan, for Govt. Pleader, for Appellant; K. Bhimasankaran, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('36) 59 Mad 461: (AIR 1936 Mad 205 FB) 4
('36) 70 Mad LJ 576: (AIR 1936 Mad 465) 4
('46) ILR (1946) Mad 846: (AIR 1946 Mad 315) 4

JUDGMENT: The only question in this second appeal is whether the sale held in execution of a rent decree without issuing notice to the purchaser of the holding is valid.

(2) The facts are simple and may be briefly stated. One Chintalapati Bapiraju had occupancy rights in the plaint schedule items. The defendant, Zamindar of Nandigudem, is the land-holder. As Bapiraju was in arrears of rent, the defendant filed S..S. No. 422 of 1940 on the file of the Deputy Collector, Kovvur and obtained a decree. On 18-8-1942, he filed E. P. No. 175 of 1942 for executing the decree. On 25-12-1942, purporting to be under the terms of an agreement dated 25-12-1939, the sons of Bapiraju sold the holding to the plaintiffs under Ex. P-1. Subsequent to the purchase, in execution of a rent decree & without giving any notice to the purchasers the holding was sold on 21-10-1943 & purchased by the Zamindar. The plaintiffs, i.e., the vendees under Ex. P-1 filed O. S. No. 78 of 1945 on the file of the District Munsif Court, Kovvur for a declaration that the said court sale was not binding on them inasmuch as they were not impleaded in the execution application and no notice of the sale was served on them. Both the courts held that the sale was void and gave a decree as prayed for.

(3) Learned counsel for the appellant raised before me the following two points: (1) that the land-holder is not bound to give notice or to implead the plaintiffs as their purchase was not recognised by the land-holder under the provisions of the Madras Estates Land Act and (2) though the execution of the decree after the purchaser was recognised by the land-holder was bad, there was no duty cast on the land-holder to implead the purchaser as the sale was subsequent to the filing of the execution application. The first point turns upon the provisions of S. 145(2) of the Madras Estates Land Act which is as follows:

"Where a holding or any portion thereof is transferred by the act of a ryot, the land-holder on receiving notice thereof in writing from the transferor and the transferee shall recognise the transfer."

In this case, the evidence accepted by the court below establishes that a notice in writing signed by the transferor and the transferee was received by the land-holder. P. W. 1 speaks to that fact and his evidence has been accepted. There are no permissible grounds for taking a different view of the evidence adduced in the case. I therefore hold that the provisions of S. 145(2) have been strictly complied with and

therefore the land-holder is bound to recognise the transfer.

(4) I am also not satisfied that there are merits in the second point either. Section 147, the governing section says:

"(1) All acts and proceedings commenced or had under this Act against the transferor or the co-sharers prior to

"(a) the giving of the notice under sub-sec. (2) of S. 145 in so far as such acts and proceedings affect or purport to affect the land on which the arrear is due the crops growing thereon and the products gathered therefrom, shall as against the transferee or co-sharer be as valid & effectual as if such acts & proceedings had been commenced or had against the transferee or co-sharer himself, and he had been the defaulter."

Under this Section all acts and proceedings against the original pattadar prior to the requisite notice will be binding on the purchaser. It is argued that as a corollary to this section, the sale subsequent to the initiation of the proceedings will be binding on him and it is not necessary to implead him as a party even though he has complied with the provisions of S. 145(2). The section speaks of "all acts and proceedings". Though the execution application was filed prior to the sale, it cannot be said that the act of sale took place or proceedings in respect of that sale were initiated prior to the issue of the aforesaid notice. In — Veeramma v. Ramanna', ILR (1946) Mad 846 Leach C. J. and Lakshmana Rao J. had occasion to resolve the conflict between two judgments of Single Judges one that of Venkataramana Rao J. and the other of Wadsworth J. The learned Judges agreed with the view expressed by Venkataramana Rao J. in preference to that of Wadsworth J.

There the facts were the land-holder having had notice under S. 145(2) of the Act of the transfer of a portion of a holding belonging to a pattadar, brought the holding to sale in execution of a rent decree passed against the pattadar under S. 77 of the Act without giving notice of the execution proceedings to the transferee. The learned Judges held that the sale was void as under S. 147 (1) such notice was necessary. It is true, as pointed out by learned counsel for the appellant, that on the facts of that case, the transfer of the holding was effected prior to the filing of the execution application. But a perusal of the judgment discloses that nothing turned upon that circumstances. The ratio decidendi of the decision is found at page 852. The learned Judges observed:

"It is quite a different matter to say that no notice shall be given to a transferee when there has been a rent suit and the landholder is proceeding in execution of the decree obtained by him therein. S. 145 (2) read with Section 147 (1) makes it quite clear that notice is necessary. Where notice is required and is not given the transferee cannot be affected by anything done behind his back. If the property is sold in such circumstances, the sale is invalid."

In support of their conclusion the learned Judges relied on a decision of a Full Bench in — 'Kanchamalai Pathar v. Shahaji Rajasahib' 59 Mad. 461 (F.B.) where the learned Judges held that a sale without issuing notice under Order 21, Rule 22, C. P. C. to the legal representative of the judgment-debtor was void. Venkataramana Rao J. in — 'Subbarayulu v. Arunachala Nadar', 70 Mad L. J 576 expressed his view in the following terms:

"Thus it will be seen that once the transfer is notified to the landholder, the transferee is entitled to be impleaded in any fresh proceeding initiated after such notification though such proceeding be in connection with any decree or execution pending against the transferor before the date of notification or recognition."

It is again true, as pointed out by the learned counsel, that in that case the transfer was effected prior to the filing of the execution application. But the above remarks clearly indicate that that fact would not make any difference in the legal situation for though the execution was started earlier, the proceedings in respect of the sale would be void as no notice of that sale was given to the transferee who was legally recognised by the landholder.

(5) Even on principle the contention of the learned counsel does not appear to be sound. The Madras Estates Land Act does not say that a transfer of a holding subsequent to the filing of an execution application against the original pattadar can be ignored or cannot be recognised by the landholder. S. 145 (2) will equally apply to a transferee prior to the filing of the application and to a transferee subsequent to that date. Once the recognition is made, the transferee will become the owner for all the purposes of the Act and thereafter the landholder can look to the purchaser only for effectuating his rights. A sale held without issuing notice to the owner of the property is against the principles of natural justice.

(6) For all the aforesaid reasons, I agree with the courts below that the sale held without giving the requisite notice to the transferee is void. The second appeal fails and is dismissed with costs.

(7) No leave.

B/R.G.D. Appeal dismissed.

A. I. R. 1952 MADRAS 844

CHANDRA REDDI AND RAMASWAMI JJ.

Natesa Thevar, Appellant v. Narayanaswami Padayachi and others, Respondents.

Second Appeal No. 191 of 1948, D/- 28-2-1952.

(a) Limitation Act (1908), Art. 134 — "Transferred by the mortgagee."

Art. 134 applies to a conveyance by a mortgagee of an interest larger than he himself has in the property. (Para 8)

Anno: Lim. Act Art. 134 N. 11.

(b) Limitation Act (1908), Art. 134 — Execution sale.

A person who purchased the immovable property of the judgment-debtor in which the latter's interest was only that of a mortgagee, in Court auction, cannot get the benefit of Art. 134 as such an auction purchaser cannot be regarded as a purchaser from the mortgagee even if the whole interest in the property was sold at the auction: 25 Mad. 99 (F.B.), AIR 1950 P.C. 44 Foll. (Para 9)

Anno: Lim. Act Art. 134 N. 9.

(c) Limitation Act (1908) Art. 134 — Mortgagee.

There can be no transfer of property within the meaning of the Transfer of Property Act by involuntary sales such as sales in execution of a decree and a mortgage being a transfer of property it cannot be created by an executing Court bringing the properties to sale in execution against the mortgagee. Where the auction purchasers acquired full ownership in the suit properties and not a limited mortgage right they could not be called mortgagees within the meaning of Art. 134. They never occupied such a position with reference to the properties, they having purported to have purchased not the limited mortgage interest but the whole interest in the property. The expression mortgagee cannot include a person who has acquired full interest in the property and not the limited mortgage right: Case law discussed. (Paras 14 & 16)
Anno: Lim. Act, Art. 134 N. 13.

(d) Limitation Act (1908), Art. 144 — Adverse possession against mortgagee and mortgagor.

The sale of both the mortgagee's and mortgagor's interest in execution of the decree against the mortgagee and the dispossession of the mortgagee from the mortgaged properties will be adverse to the mortgagor also provided it is proved that the mortgagor had knowledge of the hostile acts or of the adverse possession. Art. 144 is applicable to cases where the mortgaged properties are sold as absolute properties of the mortgagee without any limitation on the interests thus sold and subsequently the vendee enjoys the properties in his own right and to the knowledge of the mortgagor: AIR 1921 All. 389 and AIR 1914 Mad. 334 (F.B.) Rel. on. (Para 19)
Anno: Lim. Act Art. 144 N. 85.

T. S. Kuppuswami Iyer, R. Swaminatha Iyer and R. Gopalaswami Iyengar, for Appellant; K. Bhashyam and T. R. Srinivasan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('50) 1950-1 Mad LJ 243: (AIR 1950 PC 44) 9
('87) 9 All 97 16
('15) 30 Ind Cas 564: (AIR 1915 All 422) 11, 12
('21) 43 All 164: (AIR 1921 All 389) 16, 19
('27) AIR 1927 All 177: (99 Ind Cas 280) 16
('30) AIR 1930 All 417: (124 Ind Cas 408) 12
('86) 10 Bom 49 20
('89) 12 Mad 316 13
('02) 25 Mad 99: (11 Mad LJ 323 FB) 9, 13, 16
('15) 38 Mad 903: (AIR 1914 Mad 334(2) FB) 20
('17) 5 Mad LW 250: (AIR 1918 Mad 1201) 11, 12, 13, 16
('18) 34 Mad LJ 431: (AIR 1919 Mad 1097) 11, 12
('21) 44 Mad 951: (AIR 1921 Mad 272 (2)) 11

CHANDRA REDDI J.: This second appeal which was referred to a Bench by Satyanarayana Rao J. raises a question under the Limitation Act. The facts of the case lie within a narrow compass and are not in dispute, the only controversy being whether it is article 134 or 144 or 148 of the Limitation Act that applies to this case. In order to appreciate the point involved in the second appeal, it is necessary to refer to the facts briefly giving rise to this litigation. The suit properties were mortgaged by one Sivanandi Thevar usufructuarily to one Kamakshia Pillai for Rs. 225 on 14-2-1891 the period fixed for redemption being 25 years. The mortgagee executed a simple mortgage of his othi right over the suit properties to Periasami Odayar on 5-4-1898 according to the plaintiff, while it is the defendants' case that it was a mortgage of the properties themselves. Kamakshia Pillai executed another simple mortgage over the same properties to one Chidambara Aiyar for Rs. 290.

Periasami Odayar filed a suit on his mortgage, obtained a decree and, in execution of the decree brought the properties to sale which were purchased by one Venkatarama Aiyar at the auction. Chidambara Aiyar also laid an action on his mortgage and in execution of the decree purchased the properties himself. The auction purchasers obtained the sale certificates under Exs. D-1 and D-2 and got into possession of the properties. They continued to be in possession and enjoyment thereof till they sold them to the predecessors-in-interest of defendants under Ex. P-4 dated 24-9-1913. The plaintiff who purchased the equity of redemption under two sale deeds Exs. P-5 and P-6 in 1936 and 1943 has filed the present suit for redemption of the mortgage of 1891 and for possession of the suit properties in the District Munsif's Court of Mayavaram.

(2) One of the defences to the suit was that as the entire interest in the suit properties was sold in court auctions of 1902 and 1904 and the mortgagee was dispossessed shortly thereafter by the auction purchasers who continued to be in possession as absolute owners ever since, till the latter sold them to the predecessors-in-interest of defendants with absolute rights, any right which the original mortgagee had in those properties was lost by limitation and adverse possession. Another plea was that even if the plaintiff was entitled to redeem the mortgage the defendants should be paid compensation for the buildings erected by them on the suit properties.

(3) The trial court dismissed the suit holding that the suit was barred by Art. 134 of the Limitation Act as it was filed beyond 12 years from the date of the sale to the predecessors-in-interest of defendants on 24-9-1913. Another finding given by it was that in case the plaintiff was entitled to redeem the mortgage, he was liable to pay a sum of Rs. 1000 by way of compensation.

(4) On appeal, the Subordinate Judge of Mayavaram confirmed that judgment agreeing with all the conclusions of the trial court. The plaintiff who was dissatisfied with the decisions of the courts below has preferred the second appeal.

(5) In this second appeal, the correctness of the findings of the courts below is assailed. It is urged by Mr. Gopalaswami Aiyangar in support of the appeal that Art. 134 is not applicable to this case but it is Art. 148 that governs it. According to him, the reasons for the non-applicability of Art. 134 are three fold. What was purchased at the court auction in 1902 and 1904 was only the mortgage rights and similarly what was sold by the auction purchasers in 1913 to the predecessors-in-interest of the defendants was only that right and therefore the provisions of Art. 134 are not attracted by this case. Secondly, the transfer under Ex. P-4 in 1913 was not made by the mortgagee within

the meaning of Art. 134; thirdly, a transfer by a sub-mortgagee does not come under Art. 134 and lastly on the date on which the transfer was effected in 1913 the right of action had not accrued to the mortgagor to sue for redemption in view of fixing a period of redemption.

(6) Before we examine the soundness of these contentions, it is necessary to set out the relevant provisions of the Limitation Act. Article 134 prescribes a period of 12 years for recovering possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration from the date when the transfer becomes known to the plaintiff. The third column "when the transfer is known to the plaintiff" was substituted by the Amending Act of 1929 for the words "the date of the transfer". As the transactions in question were effected prior to the amendment of this Article, we are concerned only with the Article as it stood prior to 1929. Article 148 is in the following words:

"Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	60 years.	When the right to redeem or to recover possession accrues."

It is not necessary for the purpose of this enquiry to refer to the proviso.

(7) In view of the contentions raised on behalf of the respondents we will set out the provisions of Art. 144 also. Article 144 is a residuary article laying down a period of 12 years for a suit for possession of immovable property or any interest therein not otherwise specially provided for in the Act, the period of limitation starting from the time when the possession of the defendant becomes adverse to the plaintiff.

(8) We will first deal with the applicability of Art. 134. From the provisions of that Article, it is clear that it applies to a conveyance by a mortgagee of an interest larger than he himself has in the property. This has not been disputed but how the learned counsel for the appellant sought to get over this was by arguing that what was purchased in the court auctions in 1902 and 1904 and what was sold by them in 1913 was only the right of the mortgagee and not the full ownership in the property. It looks to us that this is a futile attempt having regard to the terms of the various documents which fully support the concurrent finding of the courts below that under the Court sales absolute title to the properties passed to the auction purchasers and they in their turn transferred the full ownership in the properties to their vendees in 1913. It follows that Art. 134 will govern the case if the other requirements of that article are satisfied.

(9) The next point for consideration therefore is whether there was a transfer by the mortgagee within the meaning of Art. 134. We will have first to decide whether the sales of the properties in execution of the decrees on the mortgages obtained by Periaswami Odayar and Chidambara Aiyar in 1902 and 1904 amount to a transfer by a mortgagee so as to attract the provisions of Art. 134. An answer to this is to be found in — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB). It was laid down there that a person who purchased the immovable property of the judgment-debtor in which the latter's interest was only that of a mortgagee, in court auction could not get the benefit of Art. 134 of Schedule II of the Limitation Act as such an auction purchaser could not be regarded as a purchaser from the mortgagee even if the whole interest in the property was sold at the auction. The Full Bench observed:

"Article 134 is in our opinion intended solely to apply to cases in which the mortgagee disposes of the property voluntarily. But in the case of the involuntary sale in execution of a decree the purchaser cannot be regarded as a purchaser from the judgment-debtor."

This ruling of the Full Bench is still good law and its authority has been accepted by the Privy Council in — 'Sudarsan Das v. Rama Das', 1950-1-Mad L J 243 (PC). On these authorities, there can be no doubt that so far as court sales in this case are concerned, they are not transfers within the purview of Art. 134.

(10) We have next to consider whether the sale of the properties by the auction purchasers by private treaty in 1913 is a transfer within the meaning of Art. 134. If it is a transfer as contemplated by that Article, the period of limitation has to be reckoned from 24-9-1913 and the suit would be beyond time. The answer to this question depends upon whether the auction purchasers are mortgagees within the purview of Art. 134.

(11) For the proposition that the auction purchasers are mortgagees whose transfer to the predecessors-in-interest has the effect of attracting the provisions of Art. 134 reliance is placed by Mr. Bhashyam learned counsel for the respondents on — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250. There, one of the questions for consideration was whether Art. 134 applied to a transfer of absolute interest by a person who acquired only the mortgage rights in a court auction. Spencer and Phillips JJ. before whom the matter came up finally, answered it in the affirmative. The ratio decidendi is contained in the following passage:

"Against this it is argued that the purchaser of the mortgagee's interests is not himself a mortgagee within the meaning of the article.

In a similar case decided by Chamier J. in — Ghasi Ram v. Mt. Kishna', 30 Ind Cas 564 (All), it was held contra that the auction purchaser of the rights of the mortgagee steps into the shoes of the mortgagee and that the subsequent purchasers by private treaty from the auction purchaser can rely on Art. 134 to defeat a plaintiff seeking to redeem."

It should be observed that this is all the discussion on that question in that case. It was contended by Mr. Bhashyam that the correctness of this decision had not been doubted by our Court in any subsequent case; on the other hand, it had been followed in two cases in — 'Sesha Naidu v. Periasami Odayar', 44 Mad 951 and — 'Muthaya Shetti v. Kanthappa Shetti', 34 Mad L J 431. An examination of the decision in — 'Sesha Naidu v. Periasami Odayar', 44 Mad 951 shows that — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250 was not referred to with approval by Spencer J. for the position now contended for

by the learned counsel for the respondents. In this context the observations of Spencer J. at page 952 are apposite:

" — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250 was an instance of a conflict between Art. 134 and Art. 144. I then observed that it was clear that the plaintiff could not have resort to Art. 144 unless he first showed that Art. 134 was inapplicable, the reason being that Art. 144 is the residuary article for suits for the possession of immovable property as is indicated by the words 'not hereby otherwise specially provided for."

(12) — 'Muthaya Shetti v. Kanthappa Shetti', 34 Mad L J 431 has nothing to do with the question before us. Even in this case — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250 has been referred to only with reference to the question of good faith. Mr. Bhashyam also drew our attention to a ruling of a single Judge of the Allahabad High Court in — 'Abdul Aziz v. Munnilal', AIR 1930 All 417, which followed the ruling of Chamier J. in — 'Ghasi Ram v. Mt. Kishna', 30 Ind Cas 564 (All). It may be remarked that there also there is no discussion on the question beyond merely citing — 'Ghasiram v. Mt. Kishna', 30 Ind Cas 564 (All).

(13) Mr. Gopalaswami Aiyangar the appellant's counsel argued that — 'Kannuswami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250 was not correctly decided and is opposed to the principle enunciated in — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB) and some decisions of Allahabad High Court and requires reconsideration. He also urged that the interpretation placed by the learned Judges on the word "mortgagee' in Art. 134 of the Limitation Act is not borne out by the provisions of the Transfer of Property Act. It was maintained by him that if as decided in — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB) a sale of the mortgaged properties in execution of a decree against the mortgagee is not a transfer which means that a purchaser at a court auction is not a transferee from the mortgagee, such a purchaser cannot be described as a mortgagee within the meaning of that article. He referred us to the following statement of the Full Bench in the above mentioned case and contended that a court auction purchaser could not be termed a mortgagee for the purpose of Art. 134:

"The decision in — 'Muthu v. Kambalinga', 12 Mad 316 proceeds we think on the erroneous assumption that the court in selling the judgment-debtor's property in which his interest is that of a mortgagee for the discharge of the debt due by him under the decree is exercising the power of sale which the judgment-debtor 'qua' mortgagee possesses. Assuming he has power of sale, the court may be regarded as exercising that power in a suit which the mortgagee may bring against the mortgagor for the recovery of the mortgage debt. Such power of sale cannot be exercised for the benefit of the mortgagee to enable him to discharge a debt due by him to a third party."

(14) According to the learned counsel these observations lend support to his argument. It has to be noted that it is the creditor of the mortgagee who brings the properties to sale and gets the properties sold through the intervention of the court and this circumstance, so argues the learned counsel, shows that the buyer of the properties at the court auction is not a mortgagee. It is further maintained by him that a mortgage can be created only by contractual relations between the parties and not by operation of law and as substantiating this argument he invited our attention to S. 5 of the Transfer of Property Act which lays down as follows:

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future to one or more other living persons or to himself or to himself and one or more other living persons; and 'to transfer property' is to perform such act.

In this section "living person" includes a company or association or body of individuals whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

It is unnecessary to state that transfer of property includes a mortgage. It is urged on behalf of the appellant that it is manifest from the section that there can be no transfer of property within the meaning of the Transfer of Property Act by involuntary sales such as sales in execution of a decree and a mortgage being a transfer of property it cannot be created by an executing court bringing the properties to sale in execution against the mortgagee.

(15) There seems to be considerable force in the contention of Mr. Gopalaswami Aiyangar and this is supported by some of the decisions of the Allahabad High Court.

(16) In — Mt. Ram Piari v. Budh Sen', 43 All 164 it was laid down that Art. 134 was excluded by the fact that the vendors from the court auction purchasers had not purchased from the mortgagee but that they had acquired rights by virtue of an involuntary sale. In support of this conclusion the learned Judges relied on — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB) and — 'Bhagwan Sahai v. Bhagwan Din', 9 All 97 which took the same view as in — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB) and another case. This ruling was followed by a single Judge of that court in — 'Munawar Ali v. Jagmilan Ram', AIR 1927 All 177. However, it is not necessary for us to consider whether — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250 is correctly decided or not having regard to the fact that the present case is distinguishable from the facts of that case. It has to be observed that in — 'Kannusami Thanjirayan v. Muthuswami Pillai', 5 Mad L W 250, what was acquired by the auction purchasers was only the mortgage rights and not the absolute title to the properties mortgaged.

Whatever justification there might be for characterising the auction purchaser in such a case as one stepping into the shoes of the mortgagee, none exists in a case, as in the present one where the auction purchasers acquired full ownership in the suit properties and not a limited mortgage right and therefore could not be called mortgagees within the meaning of Art. 134. They never occupied such a position with reference to the suit properties, they having purported to have purchased not the limited mortgage interest but

the whole interest in the property. The expression mortgagee cannot include a person who has acquired full interest in the property and not the limited mortgage right. This, in our opinion, is sufficient to dispose of that question.

(17) In this view of the matter it is unnecessary to consider the soundness of the contention that Art. 134 is not applicable to the case as at the time of the sale in 1913, cause of action had not accrued to the mortgagor to institute a suit for redemption and for possession by reason of the fixation of a period of 25 years for redemption, or to refer to the decisions which take the view that a suit for redemption has to be filed within 12 years of the transfer by the mortgagee of the properties in excess of the interest he has therein even if the cause of action had not accrued to the mortgagor or to the cases which take a contrary view.

(18) But this does not dispose of the appeal. It is argued by the learned counsel for the respondents that even if Art. 134 is inapplicable, the suit should be held to be barred by limitation under Art. 144 of the Limitation Act and that in no event does Art. 148 apply to this case. His argument is that in view of the finding that it was not the mere mortgage right but full ownership in the property that was sold both at the court auctions in 1902 and 1904 and by the auction purchaser by private treaty in 1913 and there was dispossession of the mortgagee from the suit properties which were enjoyed ever since by the predecessors-in-interest and subsequently by the defendants as full owners the suit should be held to be barred under Art. 144 of the Limitation Act.

(19) We will have no hesitation in accepting the argument that the sale of both the mortgagee's and the mortgagor's interest in execution of the decree against the mortgagee and the dispossession of the mortgagee from the mortgaged properties will be adverse to the mortgagor also provided it is proved that the mortgagor had knowledge of the hostile acts or of the adverse possession. There is abundant authority for the proposition that Art. 144 is applicable to cases where the mortgaged properties are sold as absolute properties of the mortgagee without any limitation on the interests thus sold and subsequently the vendee enjoys the properties in his own right and to the knowledge of the mortgagor. It is not necessary to refer to the various cases cited in this regard. — 'Mt. Ram Piari v. Budh Sen', 43 All 164 which has already been referred to itself illustrates this principle.

But before Art. 144 is applied it should be established that to the knowledge of the mortgagor the possession of the purchasers was adverse to the former. It was laid down in — 'Peria Aiya Ambalam v. Shanmugasundaram', 38 Mad 903 (FB) that when a transferee dispossesses a mortgagee in possession and continues in possession of the property setting up a title adverse not only to the mortgagee but also to the mortgagor such a dispossession will become adverse to the mortgagor from the date of the latter's knowledge of such hostile acts.

At page 913 of the report it is remarked by Sankaran Nair J. who delivered the judgment of the Full Bench thus:

"If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right as in — 'Purmanandas Jiwandas v. Jamna Bai', 10 Bom 49 to possession in spite of a third party's lien on the property then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession and, therefore, he becomes entitled and it is necessary and his duty, if he does not want his right to be barred to claim possession immediately."

(21) On these authorities, it is clear that if the mortgagor had knowledge of the fact that the properties as such were sold in the court auctions and subsequently by the court auction purchasers to the predecessors-in-interest of the defendants the plaintiff's suit for redemption will be barred. If the suit is barred under Art. 144 of the Limitation Act, there will be no scope for the applicability of Art. 148 of the Limitation Act.

(22) In these circumstances, we have to consider whether either the plaintiff or his predecessors-in-interest the mortgagor had knowledge of these facts. Dealing with the question of adverse possession, the trial court stated as follows:

"It is conceded by Mr. Rajaram Aiyar for the defendants that he could not in any sense urge adverse possession in his clients with any effect. He conceded that he could succeed on this point only if he could show that the possession of Chidambara Aiyar and Venkatarama Aiyar was adverse both to the mortgagee and the mortgagors to the knowledge of the mortgagors. There was no attempt to show any such thing. My finding on this issue is in the negative."

Mr. Gopalaswami Aiyangar calls in aid this finding in support of his contention that the suit is not barred under Art. 144 and invites us to hold that he is still in time having regard to the provisions of Art. 148. He also relies on the following statement of the lower appellate court:

"There is no question of adverse possession here since even in the trial court the learned pleader for the defendants conceded that he could succeed on that point only if he could show that the possession of Chidambara Aiyar and Venkatarama Aiyar was adverse both to the mortgagee and to the mortgagors to the knowledge of the mortgagors and that there was no attempt to show any such thing."

But unfortunately further down the learned Subordinate Judge states something which is contradictory. In the same paragraph the Subordinate Judge remarks that he could not believe that the plaintiff who is no other than the brother's son of Sivanandi Thevar, the

mortgagor under Ex. P-2 did not know about the transfer or the persons who had been in possession of the properties ever since the year 1891 & that he would not believe that the plaintiff had been ignorant of what was being done in respect of the properties which his uncle Sivanandi had mortgaged to Kamakshia Pillai in the year 1891.

He further remarked:

"Surely in the circumstances of this case he must be deemed to have known not only the simple mortgages executed by Kamakshia Pillai, Exs. P-2 and P-3, but also the subsequent court auction sales Exs. D-1 and D-2 and the private sales under Exs. D-3, D-4, D-5 and D-6. Now he feigns ignorance of all these things and having obtained two sale deeds from the heirs of Sivanandi Thevar, tries a chance of obtaining the properties which are now said to be very valuable on the doubtful non-applicability of Art. 134 to the facts of this case."

(23) Having regard to the contradictory statements made by the learned Subordinate Judge, we are obliged to call for a clear finding from him as to whether the plaintiff was aware of the adverse possession of the defendants and their predecessors-in-interest. The Subordinate Judge is accordingly directed to submit a finding on that question within six weeks from the date of the receipt of the records in his court. Two weeks thereafter for objections if any.

B/D.H. Order accordingly.

A. I. R. 1952 MADRAS 849

CHANDRA REDDI J.

Puttamma Shedthi, Appellant v. Y. Sheena Shetty and others, Respondents.

Second Appeal No. 2090 of 1947, D/- 30-7-1951.

Civil P. C. (1908), O. 21, R. 96 — Affixture of copy of sale certificate in conspicuous place of one of plots — Presumption regarding other plots — (Evidence Act (1872), S. 114, Illustration (e)).

Affixture of a copy of sale certificate in a conspicuous place of one of the items in a case where several plots are involved and situated in different places is not an effective delivery of all the properties. Even though a copy of the sale certificate is affixed in a conspicuous place in one of the plots there is no presumption that the affixture as required by law was made with reference to all the plots if all of them are not in one place: AIR 1943 Mad 712 and AIR 1948 Mad 191, Rel. on. (Paras 4 and 5)

Anno: C.P.C., O. 21, R. 96 N. 5; Evidence Act, S. 114 N. 29.

K. Kuttikrishna Menon, for Appellant; T. Krishna Rao, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('44) ILR (1944) Mad 262: (AIR 1943 Mad 712) 4
('48) AIR 1948 Mad 191: (1947-2 Mad LJ 310) 4

JUDGMENT: The 9th defendant who is the legal representative of the 1st defendant is the appellant. The suit out of which this appeal arises was instituted by the two plaintiffs for a declaration that they are respectively entitled to A and B schedule properties and for a decree in their favour as against the 1st defendant the predecessor-in-interest of the present 9th defendant and for possession of these properties. In execution of the decree, the properties belonging to the 1st defendant were brought to sale on 22-6-1925 and were purchased by the 1st plaintiff who is no other than the nephew of the 1st defendant at Court auction for Rs. 1634-1-0. The sale was confirmed on 24-7-1925 and the sale certificate was granted to the auction purchaser on 12-9-1927. Subsequent to this purchase the 1st plaintiff sold a few items of the property purchased by him to the 2nd plaintiff described in schedule B on 16-1-1939. According to the plaintiffs the symbolic delivery of the property was taken by the first plaintiff as evidenced by Ex. P. 1 dated 7-7-1928.

(2) The defence to the suit was that though the properties were purchased in the name of the 1st plaintiff consideration for the sale proceeded from the 1st defendant and the plaintiff was only a benamidar for the first defendant and that in any event the suit was barred by limitation as the 1st defendant was in possession of this property adversely to the plaintiff. It was pleaded on behalf of the defendants that the symbolical delivery said to have been effected on 7-7-1928, did not really interrupt the adverse possession as the provisions of O. 21, Rule 96, C.P.C. were not complied with.

(3) The trial court decreed the suit holding that the sale price was paid by the 1st plaintiff and was not furnished by the 1st defendant and therefore the purchase was not benami for the 1st defendant. As regards the question of adverse possession, the trial court found that the symbolical delivery evidenced by Ex. P. 1 did interrupt the adverse possession and consequently the plea of the 1st defendant based upon adverse possession could not be accepted. In its opinion, the presumption under S. 114, Evidence Act that judicial official acts have been regularly performed would apply to this act, having regard to the return of the Amin regarding the affixture of a copy of the sale certificate and no further proof of the affixture is required. In appeal the appellate court agreed with the view of the trial court that the sale price was paid by the 1st plaintiff out of his own funds and did not proceed from the 1st defendant. On the question of adverse possession the District Judge contented himself by observing that he was unable to attach any importance to the suggestion put forward on behalf of the 1st defendant. In the result the appeal was dismissed.

(4) It is this decision that is under appeal now. On the findings of the Court below the only question that arises for consideration is whether symbolical delivery evidenced by Ex. P. 1 is effective so as to save the suit from the bar of limitation. Ex. P. 1 says that the delivery order was proclaimed by tom tom & that a copy of the sale proclamation (sic. certificate?) was affixed to the door of the house situated in the suit property and that the possession of the suit property was delivered to the auction purchaser, that is, the 1st plaintiff herein. What is contended by Mr. Kuttikrishna Menon the learned counsel for the appellants is that all that Ex. P. 1 shows is that a copy of the sale proclamation (sic. certificate?) was affixed to the door of the house situated in one of the

plots and that is not sufficient to make the symbolical delivery effective in respect of the other items of property. According to him the suit properties covered by different survey numbers, symbolical delivery of which is said to have been given under Ex. P. 1 are not so situated as to make the affixture in a conspicuous place of one plot sufficient to bring it within the purview of Order 21, Rule 96, C. P. C. His argument is that the survey numbers in which these properties are included as set out in Ex. P. 1 disclosed that the several items of property affected by Ex. P. 1 are not contiguous but lie in different parts of the village and therefore there was no proper affixture within the meaning of O. 21, Rule 96, C. P. C. in respect of such of the plots as are not adjoining the house on the outer door of which a copy of the sale proclamation was affixed.

(4a) In support of the proposition that affixture of a copy of sale certificate in a conspicuous place of one of the items in a case where several plots are involved and situated in different places is not an effective delivery of all the properties, reliance was placed on a Bench decision of this court in — 'Rukminamma v. Ramayya', I.L.R. (1944) Mad 262. It was laid down in that case that while several properties situated in different places were attached by one order of attachment and that order was affixed only in one of the places sought to be attached it could not be said that there was valid and effective attachment within the meaning of Order 21, Rule 54 (2) as affixture on one item of property was not sufficient to effect valid attachment of all the properties sought to be attached. This ruling of the Bench was followed in — 'Murugappa v. Tirumalai', A.I.R. 1948 Mad. 191. Dealing with the point whether the presumption arising under S. 144, Evidence Act, illustration (e), namely, that judicial and official acts have been regularly performed could be applied when once it is proved that there was affixture of a copy of the order of attachment to one of the items of the properties Rajamannar J. as he then was, observed:

> "It appears to be important to bear in mind the distinction between two things. It is true that that illustration (e) in S. 114, Evidence Act, declares that judicial and official acts may be presumed to have been regularly performed. But it does not say that it may be presumed that any particular official or judicial act has been performed. No doubt when the evidence is that a particular judicial or official act has been performed and there is no other evidence on record it may be presumed that that particular judicial or official act was regularly performed. But when the dispute is whether a particular official or judicial act was performed or not I think there is nothing in law which enables a court to presume that that act as a matter of fact was performed."

On the principle enunciated in this decision what Mr. Kuttikrishna Menon argues is that even though Ex. P. 1 furnishes some evidence of a copy of the sale proclamation (sic. certificate) being affixed in a conspicuous place in one of the plots there is no presumption that the affixture as required by law was made with reference to all the plots of land if all of them are not in one place and there should be evidence of affixture of copies of sale certificates in some conspicuous places in all the plots.

(5) Though the two rulings cited above were with reference to the provisions of O. 21, R. 54 I have no doubt that they apply with equal force to the interpretation of relevant provisions of Order 21, Rule 96 which require that

> "where the property sold is in the occupation of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under Rule 94 the court shall on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place of the property."

It is seen that the portion of the Order 21, Rule 96, C. P. C. material to this case, namely, the words "shall be affixed on a conspicuous part of the property a copy of the order" is the same as in Order 21, Rule 54 and therefore the rule of law stated in the above decisions will equally apply with equal force to this case. Hence, the only question to be considered is whether this affixture of a copy of the sale certificate in one place in this case is sufficient to bring the symbolical delivery within the purview of Order 21, Rule 96. This in turn depends upon whether all the plots are situated in one and the same place or whether they lie in different parts of the village. The lower appellate court has not applied its mind to this aspect of the question and has not given any definite finding. I, therefore, call upon the lower appellate Court to submit a finding as to whether these properties are so situated as to render the affixture in this case effective as regards all the items of property for purposes of symbolical delivery within the meaning of Order 21, Rule 96, C. P. C. Opportunities may be given to the parties to adduce evidence that may be necessary. Time for submission of the finding, two months. Objections if any two weeks thereafter.

B/V.R.B. Case remanded.

A. I. R. 1952 MADRAS 850

RAMASWAMI J.

Pallothu Seetharamayya, Petitioner v. Manda Anjayya, Respondent.

Civil Revn. Petn. No. 1451 of 1951, D/- 3-3-1952.

(a) Civil P. C. (1908), O. 37, R. 3 — Object and scope — Tests for applicability.

The Courts have to steer clear between two extremes, viz., readily giving leave as soon as there is a triable issue whether that issue is either bona fide or untenable, and secondly, practically withholding leave by imposing onerous conditions unless the defendant demonstrates at that stage that the plea raised by him was a cast-iron answer to the claim of plaintiff. The only test to be applied is whether the defence raised a real issue and not a sham issue in the sense that if the facts alleged by the defendant are established there would be plausible defence on those facts. It cannot be said that the moment the defendant had raised a triable issue unconditional leave should be granted to him.

Where the defence raised by the defendant raised no real issue in the case as to entitle him to unconditional leave to defend, the decision of the Judge to impose conditions held was correct: AIR 1950 Mad 226,

Followed: Case law reviewed.
(Paras 4, 5, 7, 8)

Anno: Civil P. C., O. 37, R. 3 N. 2, 3.

K. Umamaheswaram and U. Sethumadhava Rao, for Petitioner; P. R. Ramachandra Rao, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('24) 46 Mad LJ 255: (AIR 1924 Mad 612) 7
('35) 58 Mad 116: 68 Mad LJ 16:
(AIR 1935 Mad 43) 7
('38) 1938-2 Mad LJ 568: ILR 1939 Mad 36:
(AIR 1938 Mad 962) 7
('49) 1949-2 Mad LJ 70: (AIR 1950 Mad 226) 6, 7
(1902) 85 LT 262: (50 WR 49) 7

ORDER: This is a civil revision petition filed against the order made by the learned Additional Subordinate Judge of Vijayawada in C. M. P. No. 2071 of 1951 in O. S. No. 129 of 1951.

(2) C. M. P. No. 2071 of 1951 was an application made by the defendant under Order 37, Rule 3, Civil Procedure Code, for leave to defend the suit. The learned Subordinate Judge came to the conclusion that the defence was not a bona fide one and therefore gave leave to the defendant to defend on his depositing the suit amount into court and time was given for doing so till 25th September 1951.

(3) The contest before me in this civil revision petition is twofold, viz., that first of all, when the learned Subordinate Judge had come to the conclusion that on the defence put forward there was a triable issue he should not have imposed any condition and secondly, that on the facts the defence put forward could not be considered to be lacking in bona fides.

(4) POINT 1:—The object of this rule requiring that leave to defend should be obtained in suits under summary procedure is to ensure that in this class of suits the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree early by raising untenable and frivolous defence. But at the same time, it could never have been intended by the Legislature or by Courts that this rule should be so worked as to practically deprive a man of his right of defending a suit in court even when he has a good defence.

(5) Therefore we have to steer clear between two extremes, viz., readily giving leave as soon as there is a triable issue whether that issue is either bona fide or untenable, and secondly, practically withholding leave by imposing onerous conditions unless the defendant demonstrates at that stage that the plea raised by him was a cast-iron answer to the claim of plaintiff.

(6) On account of this necessity to steer clear between these two extremes the decisions of this court have been veering from one side to the other of course largely dictated by the facts of the cases which were under consideration and can be stated to have obtained a position of equilibrium in the latest Bench decision of this Court in — 'Kesavan v. South Indian Bank Ltd.', 1949-2 Mad. L. J. 70.

(7) The earliest Bench decision embodying the view that as soon as a triable issue has been raised by the defendant unconditional leave to defend should be granted is — 'Periayamiyana Marakayar and Sons v. Subramania Aiyar', 46 Mad. L. J. 255. This decision was followed in — 'Sundaram Chettiar v. Valli Ammal', 58 Mad. 116: 68 Mad. L. J. 16 heard by Sir Owen Beasley C. J. and Mr. Justice King. The Bench held that if a defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he succeeds in proving, entitles him to succeed in the suit, then the Master or the court before whom the application comes has no discretion whatever in the matter and that unconditional leave to defend should be granted, because a "triable issue" has been raised by the defendant and it is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether the defence set up is true or false. In this case, it may be noted that the Master thought that the defence was not bona fide and gave conditional leave to defend, the condition being that the defendant should within a certain time, pay the full amount claimed into court and this decision of the Master was confirmed by Stone J. sitting on the Original Side of the High Court.

The next Bench decision to be considered is — 'H. M. Ebrahim Sait v. South India Industrials Ltd.', 1938-2 Mad. L. J. 568: I.L.R. (1939) Mad. 36. In this decision the learned Judges Madhavan Nair O. C. J. (as he then was) and Krishnaswami Aiyangar J. doubted the correctness of the decision in — 'Sundaram Chettiar v. Valliammal', 58 Mad 116: 68 Mad L J 16 and at page 41 of the report there are certain observations of the Hon'ble the Officiating Chief Justice which go to indicate that in order to entitle a defendant to unconditional leave he should satisfy the court not only that there was a triable issue but also that his defence was bona fide. It is interesting to note that one of the parties to this judgment Krishnaswami Aiyangar J. appeared for the appellant in — 'Sundaram Chettiar v. Valliammal', 68 Mad L J 16: 58 Mad 116. Therefore it will be seen how prima facie these two decisions represent the two positions on either side. Therefore, when this matter came up for consideration in the latest Bench decision of Satyanarayana Rao and Viswanatha Sastri JJ. in 'Kesavan v. South Indian Bank Ltd.', 1949-2 Mad L J 70 the entire case law was gone into along with the English decisions arising from Order 14, Rule 6 of the Rules of the Supreme Court in England corresponding word for word to Order 7, Rule 6, Original Side Rules of the Madras High Court. The Bench laid down the following proposition:

"The learned Judges, when they referred to the triable issue and bona fide defence at p. 41 in — 'Ebrahim Sait's case', I.L.R. (1939) Mad. 36: 1938-2 Mad L J 568 must have meant by those observations to indicate, that it is not enough to have an issue whatever be its nature and substance but that it should be real and substantial. The defence must raise a plausible case for trial and if established a sufficient answer to the claim. We do not think that the decision in — 'Ebrahim Sait v. South India Industrials Ltd.', I. L. R. (1939) Mad 36 is intended to lay down a rule which is contrary to the decision of the House of Lords in — 'Jacobs v. Booth's Distillery Co.', (1902) 85 L. T. 262 and is in conflict with what was laid down in the earlier decisions of this court. On the facts of that case the defence was really not a bona fide one and there was no plausible issue for trial. We think that the only test to be applied is whether the defence raised a real issue and not a sham issue in the sense that if the

facts alleged by the defendant are established there would be plausible defence on those facts."

These observations, if I may say respectfully, harmonising the apparent conflicts and laying down the true ratio which ought to guide us in granting leave to defend in these classes of cases, are binding on me as the last word on the subject. Therefore, the contention put forward by the learned advocate that the moment he had raised a triable issue unconditional leave should have granted to the defendant is without substance.

(8) POINT 2:—The finding of the learned Subordinate Judge in the present case amounts in my opinion to no more than that the defence is a sham one and does not raise a triable issue on the foot of the following reasoning of the learned Subordinate Judge:

"It is alleged in the plaint that Koteswara Rao requested for a loan and the plaintiff refused to advance a loan to him. Then to accommodate Koteswara Rao, the defendant offered to execute the promissory note and took the amount from the plaintiff. As alleged in the plaint Koteswara Rao required the money for the purpose of carrying on business. It is recited in the promissory note that the amount was required for the purpose of tobacco business. From the contentions of both the parties, it is clear that the money was required by Koteswara Rao, that the plaintiff did not agree to take a promissory note from him and that therefore the defendant executed the promissory note to accommodate Koteswara Rao. According to the plaintiff the sum of Rs. 3600/- was advanced in cash and according to the defendant it represents the value of the tobacco crop purchased by Koteswara Rao from the plaintiff. Whatever might be the case, it is clear that the promissory note is supported by consideration. The burden lies very heavy on the defendant to show that the promissory note is not enforceable in law unless the condition disclosed in the written statement filed along with his application for leave is fulfilled. A doubt will arise in the mind of a prudent man why the condition attached to the enforcement of the promissory note has not been reduced to writing. On the same day, the plaintiff took one barn belonging to Koteswara Rao on a rental of Rs. 400/- per year. A document also has been executed in his favour. Koteswara Rao received a sum of Rs. 400/- towards the rent. When the promissory note and rent agreement were executed on the same day, it is significant to note why the condition precedent agreed upon to the enforcement of the promissory note was not reduced to writing. Further, the moment the promissory note was executed in favour of the plaintiff, it must be taken that the purchase money was paid off. It is the tobacco crop that is alleged to have been purchased by Koteswara Rao. It must be taken that he had taken possession of it then and there. It is really doubtful whether the plaintiff undertook to keep watch over the tobacco crop and deliver the same to Koteswara Rao in season."

I see no reason on the limited records before me and the submissions made at this stage to differ from the learned Subordinate Judge and prima facie I am satisfied that the defence raised by the defendant raises no real issue in the case as to entitle him to unconditional leave to defend. The decision of the learned Subordinate Judge to impose conditions is correct.

(9) The terms however in the circumstances of the case can be properly modified and the modification I make is that the defendant will be granted leave to defend on the defendant depositing in court half the suit amount within six weeks from the date of this order and furnishes security to the satisfaction of the trial court for the other half within the same period and failing which his petition will stand dismissed with costs.

(10) This civil revision petition is disposed of accordingly and in view of the partial relief to which the defendant has been found entitled on the facts here, each party will bear its own costs.

B/R.G.D. Order accordingly.

A. I. R. 1952 MADRAS 852

GOVINDA MENON

AND KRISHNASWAMI NAYUDU JJ.

Poomangalalorakath Mariyam Karamavathi and others, Appellants v. Palakkotanantakath Ummer Kutti and others, Respondents.

Second Appeal No. 240 of 1948, D/- 6-2-1952.

Madras Survey and Boundaries Act (VIII (8) of 1923), Ss. 13 and 14 — Decision under S. 13 — Finality.

The question as to whether the determination of the boundary of a village under S. 13 will affect title to a piece of land lying within the said boundary would depend very much upon the nature of the claim to that land and the questions that arose for decision before the survey officer. There may be a case in which the result of a boundary fixed by the survey officer becoming conclusive under S. 13 may have an indirect effect on the title to an area covered by the boundary; but strictly speaking this is not because the survey officer has any jurisdiction to determine the question of title and it is the indirect result of the fixing of the boundary.

Where the survey officer after demarcating the boundary of a survey number gave notice to the registered holders of the survey number intimating to them his decision and when the registered holders found that within their survey number has been included more land than what they were legitimately entitled to they naturally did not complain but the aggrieved party Puthukudi illom whose land had been included wrongly in the survey number had not been given any notice there has been no proper application of S. 13 and hence the Survey Officer's decision will not be binding upon the Puthukudi Illom under whom the plaintiffs claimed: AIR 1952 Mad 68, Rel. on. (Paras 2, 3)

K. Kuttikrishna Menon, for Appellants; A. Achuthan Nambiar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('43) 1943 Mad WN 106: (AIR 1943 Mad 420) 1, 2

('43) 1943-2 Mad LJ 311: (AIR 1943 Mad 727) 1, 2

('51) 1951-2 Mad LJ 325: (AIR 1952 Mad 68) 2, 3

('49) ILR (1949) 1 Cut 165: AIR 1951 Orissa 268 2

ORDER OF REFERENCE

RAMASWAMI J.: One of the points raised in this case is as regards the finality of the decision of a Survey Officer when that decision is not challenged within the prescribed time by means of a suit. There are two conflicting decisions on this point, namely, — 'Ponnusami Servai v. Mariappa Servai', 1943 Mad W N 106 and — 'Nagarathnam v. Guruswami', 1943-2 Mad L J 311. The learned District Munsif who decided this case in the first instance has pointed out in his judgment as follows:

"This conflict of decisions is a matter which could be set at rest only by the High Court and I have no option but to follow the latest decision on the point which according to the usual rule of following precedents should prevail."

The first judgment in point of time was pronounced on 24-11-1942 and the second judgment at point of time was dated 27-7-1942. Both sides request that this matter may be placed before a Bench so that an authoritative decision can be got and it seems to me right and proper that it should be so referred to. The papers will be placed before my Lord the Chief Justice for appropriate orders.

(Pursuant to the above order of reference this appeal coming on for hearing the Court delivered the following judgment:)

(2) GOVINDA MENON J.: This second appeal has been referred to a Bench by our learned brother Ramaswami J. on account of the apparent conflict between two single Judge's decisions of this court, viz., — 'Ponnuswami Servai v. Mariappa Servai', 1943 Mad W N 106 and — 'Nagaratnam v. Guruswami', 1943-2 Mad L J 311. At the time our learned brother referred the case to a Bench, i.e., on 7-9-1951 the decision of the Bench of this court in — 'Krishna Chandra v. Ramamurthi Pantulu', 1951-2 Mad L J 325 had not been reported though the Judges had pronounced their judgment nearly five months earlier.

The learned Chief Justice and Somasundaram J. after considering the conflict between the two cases have laid down following the decision in — 'Krishnachandra v. Venkatappa Rao', I.L.R. (1949) 1 Cut 165: A.I.R. 1951 Orissa 268 that the question as to whether the determination of the boundary of a village under S. 13 of the Madras Survey and Boundaries Act of 1923 will affect title to a piece of land lying within the said boundary would depend very much upon the nature of the claim to that land and the questions that arose for decision before the survey officer. The learned Judges further went on to hold that there may be a case in which the result of a boundary fixed by the survey officer becoming conclusive under S. 13 of the Act may have an indirect effect on the title to an area covered by the boundary; but strictly speaking this is not because the survey officer has any jurisdiction to determine the question of title and that it is the indirect result of the fixing of the boundary.

(3) The point here is whether the re-survey plot marked B in yellow colour in the commissioner's plan belongs to the Puthukudi illom under whom the plaintiffs claimed or is part of the defendants' land which is registered as R. S. No. 173/1. On the question of title and possession, both the lower courts have found that the yellow marked portion belongs to the plaintiffs' jenmi. But it is argued that since this land according to the survey is included within R. S. 173/1 it should be held that in the absence of a suit under S. 14 of the Madras Survey and Boundaries Act, the plaintiffs are debarred from claiming title or possession to that site. One thing has to be mentioned here and that is that the Jenmi of this disputed property viz., the Puthukudi Illom has not been made a party to the suit. Ex. D. 6 series are notices issued by the Survey Officer under S. 9 (2) of the Madras Survey and Boundaries Act VIII of 1923 intimating to the defendants the result of the survey and informing them that if they have any dispute regarding thereto they have to file an application regarding that dispute under S. 10 (1) of the said Act.

There is no evidence that there was any dispute at all; but even if there is no dispute as held by the Bench in — 'Krishnachandra v. Ramamurthi Pantulu', 1951-2 Mad L J 325 the decision of the Survey Officer might be final. But, in this case, it is not shown that any notice of the decision of the Survey Officer was given to the Puthukudi Illom. It is contended by Mr. Kuttikrishna Menon for the appellants that under S. 114 of the Evidence Act all official acts should be deemed to have been properly done and therefore in the absence of anything to show that no notice was given to the Puthukudi Illom it must be assumed that all the proper and necessary formalities had been complied with by the survey officer. But the question is whether any notice at all had been given to the Puthukudi Illom. What has happened is that the survey officer after demarcating the boundary of R. S. No. 173/1 gave notice to the registered holders of R. S. No. 173/1 intimating to them his decision and when the registered holders found that within their survey number has been included more land than what they are legitimately entitled to they naturally did not complain but the aggrieved party whose land has been included wrongly in R. S. No. 173/1 has not been given any notice. Such being the case, we feel that there has been no proper application of S. 13 of the Madras Survey and Boundaries Act. In such circumstances we feel that the Survey Officer's decision will not be binding upon the Puthukudi Illom under whom the plaintiffs claim. The second appeal fails and is dismissed with costs.

B/D.H. Appeal dismissed.

A. I. R. 1952 MADRAS 853

RAJAMANNAR C. J.
AND VENKATARAMA AIYAR J.

Jerome D'Silva, Petitioner v. The Regional Transport Authority, South Kanara and another, Respondents.

Civil Misc. Petn. No. 6503 of 1951, D/- 25-9-1951.

† Motor Vehicles Act (1939), S. 60 — Proceedings before Transport Authorities — Order of Criminal Court — Order is binding.

As primarily the criminal courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the criminal Courts should be treated as conclusive in proceedings before quasi-judicial tribunals like the Transport Authorities under the Motor Vehicles Act. If there is a conviction by a competent criminal court, that

would furnish conclusive ground for any penal action by the Transport Authorities. Equally, if the criminal prosecution ended in a discharge or acquittal of the accused and that event happened before the order of any Road Transport Tribunal, then such Tribunal would not have the power to go behind the final order of a competent criminal court. If, at the time the Road Transport Tribunal disposes of any application or before such tribunal passes an order no prosecution has been launched, then of course it is not incumbent on the tribunal to await a criminal prosecution. But if a prosecution has actually commenced and that prosecution is in respect of the same offence by reason of which the Transport Authority proposes to take drastic action against the accused in the criminal case, then it is desirable that the Transport Authority should await the decision of the criminal Court. This procedure would avoid the spectacle of two departments of the Government proceeding on contradictory lines to the annoyance and hardship of the citizen. (Paras 4 and 5)

M. C. Sridharan, for Petitioner; Advocate General, for the State Counsel, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('48) C. M. P. No. 3367 of 1948 (Mad) 4
('50) C. M. P. No. 8482 of 1950 (Mad) 3

RAJAMANNAR, C. J.: The petitioner is the owner of lorry No. MDX 1251. He had a public carrier permit granted by the Regional Transport Authority, South Kanara, and he was engaged in transporting milk, firewood, timber, stores and other materials from the neighbouring villages into Mangalore. On or about 14-4-1950, the lorry was detained on suspicion that it contained smuggled rice. The driver of the lorry was subsequently charged by the police under sec. 186 of the Indian Penal Code and section 7 of the Essential Supplies (Temporary Powers) Act in C. C. 602 of 1950 on the file of the Court of the Additional First Class Magistrate, Mangalore. After a full enquiry, the Magistrate discharged the accused driver holding that the accusation was groundless. This order was passed on 6-1-1951.

(2) Meanwhile, the Regional Transport Officer called upon the petitioner by a communication dated 3-11-1950 to show cause why his permit should not be cancelled or suspended as the lorry was engaged in smuggling food grains. The petitioner submitted his explanation, but the officer passed an order on 3-3-1951 suspending the permit for a period of three months from 1-4-1951 to 1-7-1951. Though the order of the Magistrate had been passed prior to the order of the Regional Transport Officer, evidently the Magistrate's order was not brought to the notice of the Transport authority. Subsequently, an application was filed by the petitioner to the Regional Transport Officer to reconsider his decision in view of the order of the Magistrate discharging him holding that the accusation was baseless. This application appears to have been treated as an appeal by the petitioner and was finally disposed of by the Regional Transport Authority by its order dated 31-3-1951. The appeal was dismissed. The order of the Magistrate was brought to the notice of the authority, but that tribunal thought that though the criminal court had held that there was no sufficient evidence against the accused, the circumstances of the case as found in the records of the subordinate officers of the Traffic Department showed that the owner had used the lorry for illicit smuggling of rice and therefore no interference with the orders of the Regional Transport Officer was called for. Thereupon the petitioner filed the above application praying that this Court might quash by a writ of certiorari the proceedings before the Regional Transport Authority and the order of the Regional Transport Officer abovementioned.

(3) The application came on originally before Subba Rao J. On similar facts he had expressed the view in C. M. P. No. 8482 of 1950 (Mad) that though the attitude of a quasi judicial tribunal like the Transport Authority in ignoring the judgment of a criminal Court may be regrettable, it did not affect the jurisdiction of the Tribunal. There was nothing to compel the tribunal to accept the judgment, though it was not proper for a quasi judicial tribunal to ignore the well considered judgments of courts, whether civil or criminal, without giving adequate reasons. After hearing arguments for some time, the learned Judge felt a doubt as to whether his prior view was correct. He was impressed by the other aspect, namely, that when a criminal court acquitted or discharged the driver of a public carriage on the ground that he did not commit an offence, and if the Regional Transport Authority had suspended the permit in respect of that vehicle on the basis of the very same offence, it must be held that the order of the Regional Transport Officer was based on a ground which must be deemed to be non-existent. The learned Judge therefore thought that it was a fit case for being heard by a Division Bench.

(4) We have no hesitation in making it clear that a quasi judicial tribunal like the Regional Transport Authority or the Appellate Tribunal therefrom cannot ignore the findings and orders of competent criminal courts in respect of an offence when the Tribunal proceeds to take any action on the basis of the commission of that offence. Let us take the instance before us. The offence consists in smuggling food grains. For that same offence, the petitioner was criminally prosecuted. He has also been punished by his permit being suspended for a period of three months. If the criminal case against him ends in discharge or acquittal, it means that the petitioner is not guilty of the offence and therefore did not merit any punishment. It would indeed be a strange predicament when in respect of the same offence, he should be punished by one tribunal on the footing that he was guilty of the offence and that he should be honourably acquitted by another Tribunal of the very same offence. As primarily the criminal courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the criminal courts should be treated as conclusive in proceedings before quasi judicial tribunals like the Transport Authorities under the Motor Vehicles Act. A similar view was expressed by a Division Bench of which one of us was a member in—'C. M. P. No. 3367 of 1948 (Mad)'. No doubt that case arose under the provisions of the Madras Rationing Order, but the principle of that decision applies to the facts of this case also. In that case the petitioner was an authorised dealer in rice. He was charged in the criminal court for having sold 30 measures to a person to whom he was not entitled to sell.

The Rationing Officer on the same ground purported to cancel the authorisation in his favour. The criminal case had not been disposed of when the Rationing Officer passed an order cancelling the authorisation, but he was aware that the case was pending. It eventually turned out that the petitioner in that case was discharged by the Magistrate, because on the evidence on record, no prima facie case was made out. There was a revision petition to this court, but this Court also took the view that there was no justification for setting aside the order of discharge. On these facts, it was held by this Court that the Rationing Officer should not have passed final orders till the disposal of the criminal case and as his order cancelling the authorisation of the petitioner was passed on the sole ground that the petitioner had sold 30 measures of rice to an unauthorised person and that ground was found to be wrong, the order cancelling the permit was also void. It was observed that the Rationing Officer had no power to hold contrary to the order of a competent Magistrate, that an offence which was held by the Magistrate not to have been proved had been established to his satisfaction.

(5) The position then would be this. If there is a conviction by a competent criminal court, that would furnish conclusive ground for any penal action by the Transport Authorities. Equally, if the criminal prosecution ended in a discharge or acquittal of the accused and that event happened before the order of any Road Transport Tribunal, then such Tribunal would not have the power to go behind the final order of a competent criminal court. If at the time the Road Transport Tribunal disposes of any application or before such tribunal passes an order no prosecution has been launched, then of course it is not incumbent on the tribunal to await a criminal prosecution. But if a prosecution has actually commenced and that prosecution is in respect of the same offence by reason of which the Transport Authority proposes to take drastic action against the accused in the criminal case, then, it is desirable that the Transport Authority should await the decision of the criminal Court. This procedure would avoid the spectacle of two departments of the Government proceeding on contradictory lines to the annoyance and hardship of the citizen.

(6) In the case before us, the order of the Regional Transport Officer cannot be sustained, especially as it was long after the order of the Magistrate discharging the petitioner. In any event, there is no justification for the Regional Transport Authority to disregard the order of the Magistrate in disposing of the application of the petitioner. The orders of both the Regional Transport Officer and the Regional Transport Authority are hereby quashed. The petitioner will be entitled to the costs of this petition which we fix at Rs. 150/-.

B/V.R.B. Orders quashed.

A. I. R. 1952 MADRAS 855

SUBBA RAO J.

Matalpudi Janardana Rao, Petitioner v. Yanduri Venkata Subba Rao and another, Respondents.

Civil Misc. Petn. No. 7405 of 1951, D/- 3-9-1951.

(a) Constitution of India, Art. 226(1) — Application for issue of writ of certiorari to quash order of Court — Particular objection not taken in Court nor in affidavit — Objection cannot be raised for first time in writ of certiorari. (Para 1)

Anno: C. P. C. Appendix III, Constitution of India, Art. 226 N. 13.

(b) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 (XXV) of 1949), S. 5(2) (added by Mad. Act 8 (VIII) of 1951) — Applicability.

S. 5(2) cannot apply to an application made prior to the introduction of the amendment. (Para 2)

(c) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 (XXV) of 1949), Ss. 4 and 5 — Second application for fixing fair rent — Maintainability.

Under the Act a tenant cannot file another application for the same relief for fixing the fair rent. (Para 2)

M. V. B. Shankar Rao, for Petitioner; A. Sambasiva Rao, for Respondents.

ORDER: This is an application for issuing a writ of certiorari to quash the order of the learned Subordinate Judge of Vijayawada made in appeal against the order of the Rent Controller. The petitioner had been a tenant of the respondents since 1940. He filed an application before the Rent Controller, H. R. C. No. 153 of 1947 in 1947 for fixation of a fair rent. That application was disposed of by an order dated 14-11-1947 and the Rent Controller held that the rent of Rs. 20 per month was a fair rent. He preferred an appeal against the said order in Misc. A. S. No. 216 of 1947. But that appeal was not pressed as the matter was settled between the parties.

In the present application, he asked the Rent Controller to fix a fair rent of about Rs. 4 or Rs. 5 per month on the ground that the rent paid by him was very excessive. When that application came up for disposal before the Rent Controller, the landlord did not appear and he was declared ex parte. After taking the evidence of the petitioner, the Rent Controller fixed the fair rent at a sum of Rs. 20 per month. The petitioner preferred an appeal to the learned Subordinate Judge of Vijayawada. The learned Subordinate Judge held that as the fair rent was fixed in the previous application, the present application was not maintainable. In case the application was maintainable, he thought that a sum not more than Rs. 6 per month would be the fair rent. The petitioner filed this writ to quash that order.

Mr. Shankar Rao raised before me two points, (1) that the appellate court had no jurisdiction to admit fresh evidence in the appeal and (2) that the second application was not maintainable. A perusal of the judgment discloses that in the appeal, the respondent filed Exs. B. 1 and B. 2. Ex. B. 1 is the order made by the Rent Controller and Ex. B. 2 is the certified copy of the memo of appeal against that order.

In the affidavit filed before me, the petitioner stated that the appellate court had no jurisdiction to admit additional evidence at the appellate stage and that no notice of the application was given to him. A perusal of the judgment does not show that either of these two objections were raised before the learned Subordinate Judge; nor does the affidavit state that

such objections were raised but the learned Subordinate Judge disallowed them. In the absence of such allegation in the affidavit and in the absence of any such contention having been raised before the learned Subordinate Judge I do not feel I am justified in allowing the petitioner to raise this question for the first time in a writ of certiorari.

(2) The next question is whether, when the Rent Controller fixed a fair rent on an application filed by the tenant, the tenant can file another application for the same relief. S. 4 of the Madras Buildings (Lease and Rent Control) Act of 1949 prescribes the procedure for fixing the fair rent. It also narrates the considerations, to which the Rent Controller will have due regard in fixing the fair rent. The Act gives an appeal to the Small Cause Judge against that order. It makes a provision for the increase of rent under certain contingencies viz., if the landlord made an addition, improvement or alteration to the building. S. 5 also provides an enquiry in case there is a dispute between the landlord and the tenant in respect of the reasonableness of enhancement; but no provision has been made either for filing a second application for fixing a fair rent or for reducing the rent already fixed by the Rent Controller. The Legislature realising this lacuna in the Act has added sub-sec. (2) to S. 5 which reads:

"Where after a fair rent of a building has been fixed under this Act there is a decrease or diminution in the accommodation or amenities provided the tenant may claim a reduction in the fair rent as so fixed."

This sub-section obviously cannot apply to an application that was made prior to the introduction of the amendment. Further the present application was not filed on the basis that there was a decrease or diminution in the accommodation or amenities provided by the landlord. This application was filed ignoring the previous application for the same relief. I am therefore of opinion on a fair reading of the provisions of the Act that under the Act a tenant cannot file another application for the same relief for fixing the fair rent. The order of the lower court is correct. This application is therefore dismissed with costs — Advocate's fee Rs. 50.

B/V.R.B. Application dismissed.

A. I. R. 1952 MADRAS 856

SUBBA RAO J.

Ayilavajjula Subbaraya Sarma, Appellant v. Chilakapati Subramanyam, Respondent.

Second Appeal No. 2212 of 1948, D/- 7-8-1951.

(a) Transfer of Property Act (1882), Ss. 58(d) and 67 and 68 — Usufructuary mortgagee — Right to sue for sale.

As the section 58 (d) now stands, if under the mortgage deed the mortgagor expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, the transaction is a usufructuary mortgage notwithstanding the fact that actual possession has not been delivered. Such a transaction being a usufructuary mortgage, S. 67 does not empower a mortgagee to institute a suit for sale. S. 68 only confers a right on the mortgagee to sue for the mortgage money when the mortgagor fails to deliver the property to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor. This does not either expressly or by necessary implication confer on him a right to realise the said amount by sale of the hypotheca. In the contingency contemplated by the section he will be able only to obtain a decree for money: AIR 1919 Mad 1164 (FB), held no longer good law. (Para 8)

Anno: T. P. Act, S. 58 N. 35; S. 67 N. 15; S. 68 N. 2, 12.

(b) Transfer of Property Act (1882), Ss. 58 and 67 and 68.

After stating the details of the consideration, a document proceeded to say that "the principal and interest shall be paid". The mode of payment was also pointed out, namely, the mortgagee who was put in possession was directed to credit the net profits towards the mortgage. In addition, the mortgagor specifically agreed to pay the principal and interest under the mortgage deed whenever the money was available:

Held that the mortgage deed was a combination of a simple mortgage and usufructuary mortgage because of the personal covenant contained therein. Because of that personal covenant a decree for sale could be made under S. 67: AIR 1929 PC 139, Foll.; 14 Mad 232; 17 Mad 131 (FB); 1937 Mad WN 81, Rel. on. (Paras 10, 11)

Anno: T. P. Act, S. 58 N. 40, 41; S. 67 N. 18; S. 68 N. 12.

P. Satyanarayana Raju and M. B. Rama Sarma, for Appellant; K. Umamaheswaram, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('30)	58 Mad LJ 401: (AIR 1929 PC 139)	9, 11
('06)	28 All 157: (1905 All WN 226)	11
('91)	14 Mad 232	11
('94)	17 Mad 131: (4 Mad LJ 50 FB)	11
('98)	21 Mad 476: (8 Mad LJ 154 FB)	8
('18)	41 Mad 259: (AIR 1919 Mad 1164 FB)	8, 9
('37)	1937 Mad WN 81	11

JUDGMENT: The only question in this second appeal is whether the mortgagee is entitled to sue for recovery of his money by sale of the hypotheca.

(2) One Venkatachelamayya executed a will dated 19-10-1926 whereunder he bequeathed the plaint scheduled properties along with others to the first defendant, his wife, to be enjoyed by her for her lifetime and the remainder to his daughter's son, the 2nd defendant. The 5th defendant is the daughter of the said Venkatachelamayya and defendants 2 to 4 are her sons. One Pitchireddi in whose favour Venkatachelamayya executed a promissory note filed O. S. No. 769 of 1932 on the file of the District Munsif, Nellore, against the first defendant to recover the money due thereunder, and he obtained a decree on 16-12-1932. Another creditor of Venkatachelamayya filed O. S. No. 1022 of 1932 and obtained a decree therein. On 17-8-1932, the first defendant executed a conveyance in favour of the 2nd defendant in respect of her life interest in the suit properties. In execution of the decree in O. S. No. 769 of 1932 the properties were brought to sale. When the 2nd defendant filed a claim petition it was dismissed. He filed O. S. No. 20 of 1934 on the file of the District Munsif's Court, Nellore, to set aside the order in the claim petition.

In execution of the other decree when the same properties were attached, the 2nd defen-

dant filed another claim petition but that was allowed. The 2nd defendant and the decree-holder in O. S. No. 1022 of 1932 filed two suits for setting aside the order in the claim petitions. It was held in those suits that the decrees could be executed against the estate of Venkatachelamayya. On 19-9-1942 the 1st defendant executed a usufructuary mortgage deed, Ex. P-3 in favour of the plaintiff for a sum of Rs. 600. The consideration amount went in discharge of the decree in O. S. No. 769 of 1932. The mortgagee was not able to obtain delivery of possession of the mortgaged property. He filed O. S. No. 808 of 1945 for recovery of the amount due under the mortgage deed by sale of the mortgaged properties.

(3) Various contentions were raised by the defendants; they denied that the mortgage deed, Ex, P-3 was supported by consideration. They questioned the validity and binding nature of the mortgage on the 2nd defendant. They also contended that the plaintiff was not entitled to sue for the recovery of the mortgage money by sale of the mortgaged property.

(4) The District Munsif, and in appeal the District Judge, held that the mortgage was supported by consideration and was binding upon the second defendant. They also held that the mortgage amount could be recovered by sale of the mortgaged properties.

(5) The only question raised in the appeal was whether Ex. P-3 could be enforced by sale of the hypotheca. As aforesaid, Ex. P-3 was executed on 19-9-1942 for a sum of Rs. 600. Under the document the interest accrued due for each year had to be paid in that year. In default of payment of interest, the interest so accruing should be included once a year with the principal and the total amount should be paid together with interest thereon. Till the amount of the principal and interest due was paid in full the mortgagee was put in possession and he was directed to take the net income towards the debt. The mortgagor also specifically agreed thereunder that when the money was available he would pay the amount of principal and interest accrued due by him to the mortgagee and get the mortgage deed cancelled and take back the document. Though the document purported to give possession to the mortgagee the 1st defendant did not give possession of the property to the plaintiff.

(6) On these facts the question that arises for consideration is whether the mortgagee was entitled to sue for the sale of the mortgaged property.

(7) The answer to the question turns upon the construction of some of the provisions of the Transfer of Property Act. The relevant provisions are:

"S. 58(d). Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, the transaction is called an usufructuary mortgage, and the mortgagee an usufructuary mortgagee."

(the words "expressly or by implication binds himself to deliver possession" were inserted by the Amending Act of 1929).

S. 67: "In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.....

Nothing in this section shall be deemed

(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale."

S. 68(1): The mortgagee has a right to sue for the mortgage money in the following cases and no others, namely;

(a) where the mortgagor binds himself to repay the same;

* * *

(d) where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor."

(8) The learned counsel for the appellant contended that the plaintiff is an usufructuary mortgagee within the meaning of S. 58(d) of the Act and therefore under S. 67(a) the remedy by judicial sale is denied to him. Before S. 58 of the Act was amended, the aforesaid sections were subject to judicial interpretation by two Full Bench decisions of this court. In — 'Arunachalam v. Ayyavayyan', 21 Mad 476 (FB) a Full Bench of this court consisting of Shephard O. C. J. and Davies and Moore JJ. held that a usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim in a suit for the money an order for the sale of such property. At page 481 the learned Judges say:

"The contention really is that at the option of the mortgagee or in the cases mentioned in S. 68, a usufructuary mortgagee is entitled to have his mortgage treated as a simple mortgage. The right to sue for sale is not provided for by the contract between the parties and is not to be found in S. 68 without doing violence to the language of the section."

The later Full Bench decision reported in — 'Subbamma v. Narayya', 41 Mad 259 (FB) overruled the earlier one. There the learned Judges held that where a mortgagor fails to deliver possession to his mortgagee, the mortgage is not a usufructuary mortgage within the meaning of S. 58(d) of the Transfer of Property Act, and the mortgagee is entitled to bring a suit for sale of the mortgaged property. At page 263 the learned Judges observed:

"A mortgagee to whom possession has not been given is not a usufructuary mortgagee. Consequently he does not come within the proviso & is entitled to sue for foreclosure or sale under the section in the absence of a contract to the contrary 'at any time after the mortgage money has become payable to him."

The basis of this judgment, namely, that a mortgagee to whom possession has not been given is not a usufructuary mortgagee is statutorily overruled by the amendment of S. 58 in the year 1929. Now as the section stands, if under the mortgage deed the mortgagor expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, the transaction is a usufructuary mortgage notwithstanding the fact that actual possession has not been delivered. If such a transaction is a usufructuary mortgage, S. 67 of the Act does not empower a mortgagee to institute a suit for sale. Section 68 only confers a right on the mortgagee to sue for the mortgage money when the mortgagor fails to deliver the property to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor. This does not either expressly or by necessary implication confer on him a right to realise the said amount by sale of the hypotheca. In the contingency contemplated by the section he will be able only to obtain a decree for money.

(9) The learned counsel for the respondents relied on the decision of the Judicial Committee in — 'Narsing Partab Bahadur Singh v. Mohammad Yakub Khan', 58 Mad L J 401 (PC). The facts in that case were that the mortgagors failed to discharge their obligation of making over possession to the mortgagee and thereby deprived the mortgagee of part of his security. The mortgage in that case was a combination of a simple and a usufructuary mortgage. The Judicial Committee held that the money became payable under S. 68 and that the mortgage could bring the property to sale under S. 67 of the Transfer of Property Act. The learned counsel relied upon the following observation at page 406:

".....In these circumstances their Lordships are of the opinion that under S. 68 the money has become payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable under S. 68 their Lordships are further of the opinion that under S. 67 a decree for sale can be made."

It is true that the aforesaid observations, divorced from the context and the facts of the case, may appear to lend support to the learned counsel's contention. But in my view those observations should be confined only to a case of a mortgage, which is a combination of a simple and an usufructuary mortgage, for in that case S. 67(1) will not exclude the mortgagee's right to realise the money by bringing the hypotheca to sale. I would, therefore, hold that the Full Bench decision — 'Subbamma v. Narayya', 41 Mad 259 (FB) is no longer good law; and it must be deemed to have been statutorily overruled by the amendment of S. 58 in the year 1929.

(10) Even so the learned counsel for the respondent contended that the mortgage in the instant case is a composite one, being a combination of a simple and a usufructuary mortgage; and, therefore, the Privy Council case would apply. His argument was that the document contains a personal covenant to pay and such a covenant confers upon the mortgagee a remedy by judicial sale. A perusal of the document discloses a clear and unambiguous personal covenant to pay. After stating the details of the consideration, the document proceeds to say that "the principal and interest shall be paid". The mode of payment is also pointed out, namely, the mortgagee who is put in possession is directed to credit the net profits towards the mortgage. In addition, the mortgagor specifically agrees to pay the principal and interest under the mortgage deed whenever the money is available. The words are:

"As soon as the amount is available, I shall pay the amount of principal and interest accrued due by them to you under the mortgage deed, get the mortgage cancelled and take back this document."

These words contain a clear personal covenant to pay. But the learned counsel for the appellant contended that a mere personal covenant to pay does not carry with it the right to bring the property to sale, particularly, when the document provided the method of discharge.

(11) There is a conflict of decisions on the question whether a personal covenant to pay will in itself confer a remedy by judicial sale. The learned counsel for the appellant relied upon a number of decisions of other High Courts in support of his argument. It is unnecessary to consider them as the Madras view is clearly expressed by Bench decisions binding on me. In — 'Ramayya v. Guruva', 14 Mad 232 there was a suit for sale by a mortgagee. The mortgage deed contained a covenant by the mortgagor for payment of the mortgage amount but otherwise it answered the definition of usufructuary mortgage contained in the Transfer of Property Act, S. 58(d). The document contained a covenant for payment of the amount within a particular date. The learned Judges Handley and Weir JJ. held that the mortgagee was not precluded by the Transfer of Property Act (Sec. 67) from bringing the property to sale under the mortgage. The fact that the mortgagee who has put in possession should take the produce towards the mortgage was not considered to be an obstacle in holding that there was a personal covenant and that such a covenant attracted the provisions of S. 67.

In — 'Sivakami Ammal v. Gopala Sevundram', 17 Mad 131 (FB), a Full Bench of this court held that a suit for sale by a mortgagee was maintainable as the bond contained a covenant to pay. The mortgage deed there contained the following covenant:

"I shall pay to you the said mortgage amount in Chitrai Kalavathi Year 1883 and take back this deed of mortgage with possession and the cancelled bonds mentioned above."

It was also recited in the document that the properties were put in the possession of the mortgagee for the debt. The learned Judges held that they were clearly of the opinion that the mortgage deed contained a covenant to pay and therefore a suit for sale would lie. In — 'Muhammad Naina Thambi Maracayar v. Siddhi Muhammad', 1937 Mad W N 81, where there was a personal covenant to pay the learned Judges held that the said covenant carried with it a right of the mortgagees to bring a suit for sale to recover the mortgage amount. There, the document after stating that the mortgaged property was put in the possession of the mortgagee so that he might enjoy the income, contained the following covenant:

"In default we shall in any year in which the holder make a demand (or require) pay the mortgage amount and redeem the mortgage."

The learned Judges construed the said covenant as a personal covenant to pay.

At page 82 they observed:

"The learned counsel for the appellant however has relied on the case reported in — 'Kashiram v. Sardar Singh', 28 All 157, where it was held that the insertion of personal covenant in a usufructuary mortgage did not alter the nature of the mortgage. The learned Judges in that case dissented from a series of Madras decisions to the contrary, one of the Madras decisions being the Full Bench decision reported in — 'Sivakami Ammal v. Gopala Savundram', 17 Mad 131 (FB). We however are unable to dissent from the current of authorities established in this court. We must, therefore, hold that this instrument Ex. A contains a personal covenant by the mortgagors to pay the mortgagees the mortgage amount and carries with it the right of the mortgagee to bring a suit for sale to repay the mortgage amount."

The decision of the Judicial Committee reported in — 'Narasingh Partab Bahadur Singh v. Mohammad Yakub Khan', 58 Mad L J 401 already considered by me in another connection also adopts the Madras view. In that case the mortgage deed was a combination of a simple mortgage and usufructuary mortgage. It was so held to be a composite mortgage because of the personal covenant contained therein. The Judicial Committee held that because of that personal covenant a decree for sale could be made under S. 67 of the Transfer of Property Act. I therefore hold that the decree of the lower court giving a preliminary mortgage decree for sale is correct.

(12) The appeal is dismissed with costs. No leave.

B/D.H. Appeal dismissed.

A. I. R. 1952 MADRAS 859

GOVINDA MENON J.

Abdul Kadir Haji, Appellant v. Muhammad and another, Respondents.

Second Appeal No. 1231 of 1948, D/- 10-12-1951.

Malabar Compensation for Tenants' Improvements Act, (1 (I) of 1900), Ss. 9, 10, 13 and 15(1)(b)(ii) — Cashew-nut trees are fruit-bearing trees.

The enumeration of fruit-bearing trees in S. 15(1)(b)(ii) is not exhaustive. It might be that no table showing the method of valuation of cashew-nut trees has been prepared under S. 15. But that would not exclude the possibility of the trees other than the three categories mentioned in that section from being fruit-bearing trees. In order to apply S. 9, all that is necessary is that the improvement should not be one to which S. 13 applies. There is no doubt whatever that S. 13 does not apply to cashew-nut trees. Therefore, the cashew-nut trees have to be valued on the basis of fruit-bearing trees: AIR 1929 Mad. 661 Disting. (Para 1)

N. K. Nambiar and M. Sekhara Menon, for Appellant; N. R. Sesha Iyer, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras
('29) AIR 1929 Mad 661: (118 Ind Cas 296) 1
('30) 58 Mad LJ Short Notes 31 1

JUDGMENT: The plaintiff who is the appellant in this second appeal was a mortgagor whose suit was for redemption of the mortgage in favour of the first defendant, and the lower courts in ordering redemption have directed him to pay the value of a large number of cashewnut trees planted on the mortgaged property by the first defendant. The basis of the calculation was on the footing that the cashewnut trees are fruit-bearing trees as understood according to S. 9 of the Malabar Compensation for Tenants Improvements' Act and not timber trees as contemplated by S. 10 of the same Act.

Mr. M. K. Nambiar for the appellant contends that in view of the fact that under S. 15 (1) (b) (ii) of the Act only cocoanut trees arecanut trees, jack trees and peppervines are mentioned for purposes of determining the amount of compensation to be awarded under the Act as fruit-bearing trees, it should be held that cashew-nut trees are not fruit-bearing trees. I am inclined to hold that the enumeration of the trees in S. 15 is not exhaustive. What is contemplated is that the Legislature in enacting the provisions of the Malabar Compensation for Tenants' Improvements Act laid down certain well known trees as fruit-bearing trees for the purpose of assessing the compensation. Such enumeration is certainly not exhaustive because in addition to the various kinds of trees mentioned above there are other trees which are admittedly fruit-bearing trees and which add to the value of the holding.

For example, a tamarind tree has been held to be such in '58 Mad L J Short Notes 31'. It has also been held by this court that graft mango trees which are not useful as timber but produce large quantities of fruit should be held as fruit-bearing trees. In addition, we have the provisions of S. 7(4) of the Malabar Tenancy Act as well as S. 18 of the Act which lay down that trees of this kind can be termed as fruit-bearing trees. Mr. Nambiar invited my attention to the decision in — 'Ambi v. Kunhikavamma', AIR 1929 Mad 661, where palmyra trees have been held to be non-fruit bearing trees. There can be little doubt that excepting a very limited category of palmyra trees the rest of them do not yield any fruit and the decision that a palmyra tree should be termed as a timber tree cannot be questioned on that score.

It might be that no table showing the method of valuation of cashew-nut trees has been prepared under S. 15 of the Malabar Compensation for Tenants' Improvements Act. But that would not exclude the possibility of the trees other than the three categories mentioned above from being fruit-bearing trees. In order to apply S. 9, all that is necessary is that the improvement should not be one to which S. 13 applies. There is no doubt whatever that S. 13 does not apply to cashew-nut trees. I therefore agree with the lower courts in holding that the cashew-nut trees have to be valued on the basis of fruit-bearing trees. The second appeal fails and is dismissed with costs.

(2) No leave.

B/V.R.B. Appeal dismissed.

A. I. R. 1952 MADRAS 860

SUBBA RAO J.

Khan Bahadur A. Abdul Karim Sahib, Petitioner v. The Accommodation Controller, Madras and another, Respondents.

Writ Petn. No. 48 of 1951, D/- 20-9-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XXV (25) of 1949), Ss. 11, 3 — Conversion of non-residential building into residential — Powers of controller.

Though it is true that under S. 11 an owner can convert a residential building into a non-residential building with the permission of the Accommodation Controller that section cannot affect the specific powers conferred upon the Accommodation Controller by S. 3 of the Act to requisition buildings for the purposes stated therein. Section 3 (3) also does not say that the Accommodation Controller can acquire a residential building only for residential purposes, and a non-residential building only for non-residential purposes. It can be acquired for any of the purposes mentioned in the sub-section. The Accommodation Controller therefore can acquire a non-residential building for the purpose of giving it for residential purposes and such an order does not contravene the spirit underlying S. 11.

((Paras 3, 4)

O. Radhakrishnan, for Petitioner; Vepa P. Sarathi, for State Counsel, for Respondents.

ORDER: This is an application for issuing a writ of certiorari and for quashing the order of the Accommodation Controller, dated 11th June 1951. The petitioner is the owner of premises No. 10, Stringers Street, George Town, Madras. Till May 1951 admittedly the premises were let out for non-residential purposes. As the tenant vacated the premises, the petitioner took possession of the same on 7th May 1951 and he intimated to the first respondent about the vacancy of the said premises. On 17th May 1951, he received a memo from the first respondent informing him that he had taken over the premises for allotment to Government officials, and that orders regarding the allotment would issue shortly. On 11th June 1951, the first respondent made an order allotting the said premises to Mr. S. A. Venkatesan, Assistant Engineer, P. W. D., Madras for residential purposes and directed the petitioner to hand over possession to the said Mr. Venkatesan. Learned counsel for the petitioner contends that the said order was made by the Accommodation Controller without jurisdiction, as under the Madras Buildings (Lease and Rent Control) Act, 1949, the Accommodation Controller has no power to convert a non-residential building into a residential building and 'vice versa'.

(2) To appreciate the contentions of the parties, I shall read the relevant sections of the Act.

Section 2 (1): " "Building" means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes....."

Section 3 (1) (a) "Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of the vacancy in writing to the officer authorised in that behalf by the State Government (hereinafter in this section referred to as the 'authorised officer')"

Section 3 (3) "If, within ten days of the receipt by the authorised officer of a notice under sub-s. (1) or sub-sec. (2), the State Government or the authorised officer does not intimate to the landlord in writing that the building is required for the purposes of the State or Central Government or of any local authority of or any public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself.

Section 3 (5) "If the building is required for any of the purposes, or for occupation by any of the officers, specified in sub-sec. (3), the landlord shall deliver possession of the building to the authorised officer and the State Government shall be deemed to be the tenant of the landlord, with retrospective effect from the "date on which the authorised officer received notice under Sub-section (1) or sub-sec. (2), the terms of the tenancy being such as may be agreed upon between the landlord and the tenant and in default of an agreement, as may be determined by the City Civil Court in the City of Madras and elsewhere by the Subordinate Judge's Court having original jurisdiction over the area in which the building is situated or if there is no such Court, by the District Court."

Section 3 (9) "Nothing contained in this section shall apply:

(a) to a residential building the monthly rent of which does not exceed twenty five rupees; or

(b) to a non-residential building the monthly rent of which does not exceed fifty rupees; or

(c) to any building or buildings in the same city, town or village, owned by any company, association or firm, whether incorporated or not, and bona fide intended solely for the occupation of its officers, servants or agents."

(3) Section 4 provides for fixing the fair rent, and the provisions indicate that different considerations will have to be borne in mind in fixing the rent for residential and non-residential buildings. Section 7 also prescribes various conditions which entitle the landlord to evict the tenant. Section 11 reads:

"No residential building shall be converted into a non-residential building except with the permission in writing of the Controller."

Mr. Radhakrishnan, the learned counsel for the petitioner, argues that under the provisions of the Act only the owner can convert a residential building into a non-residential building and 'vice versa', with the previous permission of the Accommodation Controller, and that the Accommodation Controller suo motu cannot convert one class of building into another. He also further emphasises that if a non-residential building is leased out for residential purposes, it will be impossible to apply the provisions of Ss. 4 and 7 of the Act. The Act does not define a residential building or a non-residential building. Under S. 2 (1) a building has been defined, which includes both the categories of buildings. It is true that the various sections of the Act make a distinction between residential and non-residential buildings and also provides different rents for the two categories of buildings. It may therefore be accepted that the character of the building will depend upon the purpose for which it is let. If it is let for residential purposes, it will be a residential building; if it is let for non-residential purposes, it will be a non-residential building. Once it is

let for one purpose or the other, the conversion of one into another can only be under S. 11. But S. 3 gives a very wide power to the Accommodation Controller to requisition the building for the purposes of the State or Central Government or of any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government. Section 3 (3) does not say that the Accommodation Controller can acquire a residential building only for residential purposes, and a non-residential building, only for non-residential purposes. It can be acquired for any of the purposes mentioned in sub-sec. (3). Under sub-sec. (5), if the building is required for any of such purposes the tenant shall deliver possession to the authorised officer. On a fair reading of the plain words used in S. 3, I find it very difficult to hold that the Accommodation Controller cannot acquire a non-residential building for the purpose of giving it for residential purposes. Once he made the requisition, he is certainly entitled under that section to allot it for the purposes for which he is authorised to take the building.

(4) Mr. Radhakrishnan has argued with some force that as no express power is conferred upon the Accommodation Controller to convert suo motu one building into another, the construction I adopt may lead to anomalies in the application of Ss. 4 and 7. It is true that under S. 11 an owner can convert a building with the permission of the Accommodation Controller; but that section cannot affect the specific powers conferred upon the Accommodation Controller under S. 3 of the Act. It does not also contravene the spirit underlying S. 11 either, as what the landlord can do with the permission of the Accommodation Controller, the Accommodation Controller can do suo motu under S. 3. If so understood, the character of the building can be ascertained by the manner in which the Accommodation Controller deals with the property after he takes over possession; if he gives it for residential purposes it will be a residential building; if he gives for non-residential purposes, it will be a non-residential building. If so understood, there will not be any difficulty in applying the provisions of Ss. 4 and 7.

(5) For the aforesaid reasons, I hold that the order of the Accommodation Controller is correct, and this petition is dismissed with costs, advocate's fee Rs. 50. Time for delivery fifteen days.

B/D.R. Petition dismissed.

A. I. R. 1952 MADRAS 861

SUBBA RAO J.

M. M. Muthuwappa, Petitioner v. The First Additional Income-tax Officer, Tuticorin and another, Respondents.

Civil Misc. Petn. No. 4299 of 1951, D/- 29-1-1952.

Income-tax Act (1922), S. 45, Proviso — Applicability.

The proviso applies not only to an absolute prohibition imposed by foreign authorities but also to permissive regulations. The proviso clearly speaks of prohibition as well as restriction of the remittance of money to the taxable territories. If an income is prohibited from being remitted to another territory, the prohibition is absolute. If the amount can be remitted only subject to certain conditions, such as permit etc., there is only a partial prohibition. The inability to remit the income to the taxable territories should have been by reason of such prohibition or restriction. If an assessee by negligence, collusion or fraud does not get the permit and, therefore is not able to remit money to the taxable territory, it cannot be said that his inability to bring money into the said territory is by reason of such prohibition or restriction.

The Government of Ceylon by their notification published in the Ceylon Government Gazette Extraordinary Part I at page 680 introduced prohibitions and restrictions with regard to transmitting any monies outside the territories of Ceylon from the said date. By the said notification, a person intending to transmit any monies out of Ceylon exceeding Rs. 140 per month, should obtain a permit from the Department of Exchange Control, Ceylon. In February 1951, the petitioner applied to the Controller of Exchange, Ceylon, for necessary permit to transmit monies to India for payment of Indian Income-tax. The petitioner's application for permit was rejected for the reason that the tax due for payment was much in excess of the Ceylon income.

Held that the aforesaid notification of the Government of Ceylon clearly imposed a restriction with regard to transmitting monies outside the territory of Ceylon. The petitioner was not able to remit his foreign income by reason of the restrictions imposed by the Ceylon authorities and, therefore, he was not a defaulter in respect of that part of the tax, which was due in respect of that foreign income. (Paras 6, 7, 8 and 9)

K. R. M. Abdul Karim, for Petitioner; Govt. Pleader and C. S. Rama Rao Sahib, for Respondents.

ORDER: This is an application for issuing a Writ of Prohibition against the respondents, prohibiting them from taking proceedings under S. 46 of the Indian Income-tax Act or under the Madras Revenue Recovery Act, against the petitioner for the recovery of arrears of income-tax.

(2) The petitioner is a merchant carrying on business at No. 79, Keyzer Street, Colombo and is now residing at Madras. On 30-12-1948, for the year of assessment 1948-49, the First Additional Income-tax Officer, Tuticorin made an order assessing him to a tax of Rs. 28,575-10-0. By the said order, his total income was fixed at the sum of Rs. 71484 which included his total foreign income of Rs. 69569. The foreign income was held to have been earned by him in Ceylon. The petitioner paid from time to time sums totalling Rs. 13000 towards the tax and penalty imposed for non-payment of the tax and the balance due from him is Rs. 15,153-5-0. For the assessment year 1949-50, he was again assessed to a large amount. In February 1949, the Income-tax Officer made a demand on the assessee for payment of the tax assessed.

As the amount was not paid, the first respondent, holding that the petitioner had committed default, forwarded to the Collector a certificate, specifying the amount of arrears due from the petitioner, for collecting the same, as if it were an arrear of land revenue. The Deputy Tahsildar issued a notice to the petitioner dated 5-3-1951 under S. 25 of the Madras Revenue Recovery Act, demanding payment of the tax of Rs. 15,153-5-3 for the year of assessment 1948-49 within ten days of the receipt thereof, failing

which, restraint and seizure proceedings would be taken against his properties.

(3) The Government of Ceylon by their notification published in the Ceylon Government Gazette Extraordinary Part I at page 680 introduced prohibitions and restrictions with regard to transmitting any monies outside the territories of Ceylon from the said date. By the said notification, a person intending to transmit any monies out of Ceylon exceeding Rs. 140 per month, should obtain a permit from the Department of Exchange Control, Ceylon. In February 1951, the petitioner applied to the Controller of Exchange, Ceylon, for necessary permit to transmit monies to India for payment of Indian Income-tax. He also approached the Controller of Exchange, Ceylon through his proctors and notaries for obtaining the necessary permit. The petitioner received through his proctors a letter Ref. No. GTX/639/M21, Department of Exchange Control, Colombo dated 23-2-51 as follows:

"Reference your letter dated 21st February 1951 and the interview you had with me today, I regret to inform you that exchange cannot be released for the above purpose in view of the fact that tax due for payment is much in excess of the Ceylon income. However, I am prepared to reconsider the application on production of the final order issued in respect of the appeal filed by your client."

(4) On 7-12-1951, I again directed the petitioner to apply to the authorities concerned in Ceylon for a permit to transmit his income or part of it to India for the purpose of discharging the arrears of income-tax. It is represented to me that though a petition was filed, the authorities refused to issue the permit. In the circumstances, the petitioner states that he cannot be deemed to be a defaulter under S. 45 of the Act in respect of that part of the tax, which is due in respect of his income in Ceylon and, therefore, neither the Income-tax Officer nor the 2nd respondent can initiate proceedings for recovery of the amount under S. 46 of the Act.

(5) The relevant provisions of the Indian Income-tax Act (1922) read as follows:

"45. Any amount specified as payable in a notice of demand under sub-sec. (3) of S. 23-A or under S. 29 or an order under S. 31 or S. 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under S. 30, the Income-tax Officer may, in his discretion, treat the assessee as not being in default as long as such appeal is undisposed of:

Provided further that where an assessee has been assessed in respect of income arising outside the taxable territories in a country the laws of which prohibit or restrict the remittance of money to the taxable territories, the Income-tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income, which by reason of such prohibition or restriction cannot be brought into the taxable territories and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

"Explanation: For the purposes of this section income shall be deemed to have been brought into the taxable territories if it has been utilised or could have been utilised for the purposes of any expenditure actually incurred by the assessee without the taxable territories or if the income whether capitalised or not has been brought into the taxable territories in any form.

"46 (1) When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be recovered from the assessee by way of penalty.

(2) The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue."

(6) The governing provision is the proviso to S. 45. The proviso applies, if three conditions are fulfilled:

(i) a part of the tax should be due in respect of an assessee's income in foreign territories.

(ii) that income could not be brought into the taxable territory and

(iii) the inability to bring into the taxable territory should have been by reason of a prohibition or restriction imposed by the laws of that foreign country.

If these conditions are fulfilled, in regard to that part of the tax which is due in respect of the said foreign income, the assessee cannot be treated as a defaulter. I cannot accept the contention of the learned counsel for the respondents that the proviso applies only to an absolute prohibition imposed by foreign authorities and not to permissive regulations. This argument is contrary to the express provisions of the proviso itself, for the proviso clearly speaks of prohibition as well as restriction of the remittance of money to the taxable territories. The dictionary meaning of the word "prohibit" is "forbid" or "debar" whereas "restrict" means "limit" or "confine".

If an income is prohibited from being remitted to another territory, the prohibition is absolute. If the amount can be remitted only subject to certain conditions, such as permit etc., there is only a partial prohibition. When the legislature used the words "prohibit" or "restrict" and when those words have a definite connotation, it is impossible to construe those words to mean only prohibition or to efface the distinction between prohibition and restriction. Accepting the plain meaning of the words used, I must hold that the proviso applies to the income wholly prohibited or restricted, subject to conditions, from being remitted to the taxable territories.

(7) I agree with the learned counsel for the inability to remit the income to the taxable territories should have been by reason of such prohibition or restriction. If an assessee by negligence, collusion or fraud does not get the permit and, therefore is not able to remit money to the taxable territory, it cannot be said that his inability to bring money into the said territory is by reason of such prohibition or restriction. It would be only by reason of his negligence, fraud or collusion. That is a fact to be established in each case.

(8) The next question is whether, in the circumstances of the case, the petitioner is not a defaulter in respect of that part of the tax, which is due in respect of his foreign income.

The aforesaid notification of the Government of Ceylon clearly imposes a restriction with regard to transmitting monies outside the territory of Ceylon. Though the petitioner made a belated application, it was rejected by the Controller of Exchange, Ceylon. There is no reason to assume that, if an application had been made earlier, he would have issued the permit. The petitioner's application for permit was rejected not on the ground that it was belated but for the reason that the tax due for payment was much in excess of the Ceylon income. When he filed another application for a permit, after I adjourned the matter on 7-12-1951, the Controller again rejected the application and refused to issue the permit.

(9) It is true that the transfer of properties effected by the petitioner on 6-9-1950, 9-9-1950 and 21-9-1950 were made under suspicious circumstances and may have been made to prevent or obstruct recovery of the tax by proceeding against the said properties. But I should not be understood to have expressed any final opinion on the fraudulent character of those transactions as that could only be decided in appropriate proceedings. Be it as it may, having regard to the aforesaid facts, I must hold that the petitioner was not able to remit his foreign income by reason of the restrictions imposed by the Ceylon authorities and, therefore, he is not a defaulter in respect of that part of the tax, which is due in respect of that foreign income. If so, the respondents have no power to collect that part of the tax by proceeding under Ss. 45 and 46 of the Act.

(10) I, therefore, issue a writ of prohibition, prohibiting the respondents from taking coercive proceedings to recover that part of the tax assessed for the year 1948-49 due in respect of the income earned in Ceylon. The respondents will pay the costs of the petitioner. Advocate's fee Rs. 100.

B/D.H. Application allowed.

A. I. R. 1952 MADRAS 863

SUBBA RAO J.

Sengayyan Chettiar, Petitioner v. M. Rasu Chettiar, Respondent.

Civil Misc. Petn. No. 11496 of 1950, D/- 21-8-1951.

Houses and Rents — Madras Buildings (Lease and Rent Control) Act (XV (15) of 1946), S. 7 (3) (a) (ii), Proviso — Tenancy for specified period agreed upon — Oral Lease — Transfer of Property Act (1882), S. 107.

Prima facie an agreement, which affords protection under the proviso, must be a valid agreement. A lease of immoveable property for more than one year can be created under S. 107 of the Transfer of Property Act only by a registered instrument. Without any express provisions in the Madras Act validating leases invalid under the Transfer of Property Act it cannot be held that the term fixed under an oral lease can be taken advantage of by a tenant in an application for eviction under S. 7. As oral lease relied on is invalid under the provisions of the Transfer of Property Act, the tenant cannot rely upon it in regard to the period of the tenancy. For the purpose of the Act a tenant includes a person continuing in possession on the termination of the tenancy in his favour but that definition cannot, by implication, legalise tenancies otherwise invalid under statutory law. AIR 1949 Mad 780 and AIR 1950 Mad 746, Disting. (Paras 3, 4)

Anno: T. P. Act, S. 107 N. 1, 5, 7.

K. S. Desikan, for Petitioner; R. Gopalaswami Iyengar, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('49) 1949-1 Mad LJ 412: (AIR 1949 Mad 780) 4
('50) 63 Mad LW 67(2): (AIR 1950 Mad 746) 4

ORDER: This is an application for issuing a writ of certiorari to quash the order of the Subordinate Judge of Kumbakonam made in an appeal against an order of the Rent Controller.

(2) The petitioner is the landlord. He filed an application No. 47 of 1950 before the Rent Controller for evicting the respondent from a non-residential building on the ground that he required the premises for his own trade. The respondent contended that the application was not bona fide and that the petitioner had another building in which he could carry on his business. The Rent Controller made an order of eviction. In appeal the learned Subordinate Judge set aside that order mainly on the ground that there was an agreement between the landlord and tenant for a period of five years within the meaning of the proviso to S. 7 (3) (a) (ii) of Madras Act XV of 1946. The agreement alleged was an oral contract of tenancy for a period of five years. The Subordinate Judge finds that there was such an agreement.

(3) Mr. Desikan, the learned counsel for the petitioner contended that an oral lease for a period of five years is invalid under S. 107 of the Transfer of Property Act and therefore any such alleged oral agreement, even if true, would not protect a tenant under the said proviso. Section 7 (3) (a) (ii) reads:

"A landlord may apply to the Rent Controller for an order directing the tenant to put the landlord, in possession

(ii) in the case of a non-residential building if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village, concerned which is his own or to the possession of which he is entitled;

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord would not be entitled to apply under this sub-section before the expiry of such period."

Prima facie an agreement, which affords protection under the said proviso, must be a valid agreement. A lease of immovable property for more than one year can be created under S. 107 of the Transfer of Property Act only by a registered instrument. It is true that under S. 116 of the Transfer of Property Act if a lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased. The rights of the lessee under this section are not derived under any agreement but by reason of the provisions of this section. As oral lease relied on is invalid under the provisions of the Transfer of Property Act, the tenant cannot rely upon it in regard to the period of the tenancy.

(4) The learned counsel for the respondent then broadly contended that Madras Act XXV of 1949 is a self-contained one and the provi-

sions of the Transfer of Property Act cannot be invoked for applying the provisions of the former Act. In support of this argument, he has relied upon two Bench decisions of this court. In — 'Krishnamurthi v. Parthasarathi', 1949-1 Mad LJ 412, Horwill and Rajagopalan JJ. held that S. 111 (h) of the Transfer of Property Act has no place in the scheme of procedure laid down in S. 7 of Madras Act XV of 1946 and that notice to quit is not necessary before filing an application for eviction under S. 7 of Madras Act XV of 1946. In — 'Kuppuswami Aiyar v. Mahadeva Chettiar', 63 Mad LW 67, Horwill and Balakrishna Aiyar JJ. held that the Transfer of Property Act can have no application to the state of affairs governed by the Rent Control Act and S. 116 of the Transfer of Property Act cannot be divorced from the other provisions of the Act.

In that case pending an appeal by the tenant against the order of eviction passed by the Rent Controller for default in the payment of rent, the landlord accepted, without prejudice to the order of eviction and as damages for use and occupation an amount sent to him as rent in pursuance of an order fixing fair rent passed by the Rent Controller. The learned Judges held that the acceptance of such an amount is no ground for holding that by virtue of the provisions of S. 116 of the Transfer of Property Act, the payer is to be regarded as a tenant of the land-holder, from month to month entitled under the Rent Control Act to continue in possession. The first judgment is based on the principle that if there is a conflict between the express provisions of Madras Act XXV of 1949 and that of the Transfer of Property Act, the provisions of the former Act shall prevail. The latter decision holds that S. 116 of the Transfer of Property Act refers only to a determination of tenancy as provided by S. 111 of the said Act and that cannot apply to a determination of a tenancy under any other Act. These judgments in my view have no bearing on the question to be decided in this case.

There is no provision in Madras Act XXV of 1949 which enacts that leases for more than a year could be executed without a registered document nor there is any provision indicating that the statutory provisions of the Transfer of Property Act in respect of leases are abrogated. Without any express provisions in Madras Act XXV of 1949 validating leases invalid under the Transfer of Property Act, I cannot hold that the term fixed under an oral lease can be taken advantage of by a tenant in an application for eviction under S. 7. The learned counsel's argument based upon the definition of landlord and tenant also does not carry the matter further. For the purpose of Act XXV of 1949, a tenant includes a person continuing in possession on the termination of the tenancy in his favour but that definition cannot by implication legalise tenancies otherwise invalid under statutory law. I therefore hold that there is no valid agreement between the parties fixing a specified period for the tenancy. In the view expressed by the learned Judge on the aforesaid question, he did not think fit to give specific findings on the other questions raised. The order of the Subordinate Judge is hereby quashed and he is directed to dispose of the appeal in accordance with law. The respondent will pay petitioner's costs. Advocate's fee Rs. 50/-.

B/D.H. Order accordingly.

A. I. R. 1952 MADRAS 864

SATYANARAYANA RAO
AND RAGHAVA RAO JJ.

Rao Bahadur R. Guruswamy Naidu Udumalpet, Applicant v. The Commissioner of Income-tax Madras, Respondent.

Case Referred No. 14 of 1949, D/- 19-9-1951.

Income-tax Act (1922), S. 10 (2) (XV) — Capital expenditure — Payment for purchase of interest in managing agency.

Where a partner of a managing agency firm purchased the interest of another partner in the firm for a certain amount:

Held that the payment could not be deducted as a revenue expenditure but should be treated as a capital expenditure. (Paras 1 and 3)

Anno: I. T. Act, S. 10 N. 13.

M. Subbaraya Aiyar, for Applicant; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: The Income-tax Appellate Tribunal, Madras Bench, have referred to us for decision under S. 66 of the Income-tax Act the following question:

"Whether on the facts and in the circumstances of the case, the payment of Rs. 1,14,000 by the assessee for the purchase of the interest of Palaniappa Chettiar in the managing agency firm of Bhagyalakshmi & Co. was properly treated as capital expenditure."

(2) The assessee is one of the partners of Bhagyalakshmi & Co. who are the managing agents of Palani Andavar Mills Ltd. The remuneration of these managing agents consisted of a monthly payment of Rs. 1000 and a percentage commission on various items. There were four partners, G. T. Venkataswami Naidu and Bros., Palaniappa Chettiar, the assessee and Venkatasubba Naidu. Their shares were six annas, five annas, two annas six pies and two annas six pies respectively. The assessee purchased the interest of Palaniappa Chettiar in the managing agency firm for a consideration of a sum of Rs. 1,14,000 paid by him to Palaniappa Chettiar. In the assessment year he claimed that that amount should be deducted as a revenue expenditure and should not be treated as a capital expenditure. This contention was negatived by the revenue authorities and at his instance the question stated above was referred to us.

(3) On the facts as stated above the answer that we should give to the question does not admit of any serious doubt. It is not a case where any fresh capital was put into the partnership with a view to increase its profits. The assessee purchased for its exclusive benefit the interest of Palaniappa Chettiar, one of the partners who owned a five annas interest in the partnership. For acquiring that asset which was a profit yielding one he had to expend this amount. It is in the nature of capital expenditure for acquiring a profit yielding asset. In such circumstances, it is impossible to accept the contention strenuously pressed on behalf of the assessee by Mr. Subbaraya Aiyar, his learned advocate, that it is really in the nature of a revenue expenditure. We think that the view taken by the revenue authorities is correct and that the question referred to us must be answered in the affirmative and against the assessee. The assessee should pay the costs of the Commissioner of Income-tax which we fix at Rs. 250.

B/V.R.B. Reference answered.

A. I. R. 1952 MADRAS 865

GOVINDA MENON AND KRISHNASWAMI NAYUDU JJ.

Makkena Sambayya, Appellant v. Makkena Tirupatayya and another, Respondents.

Appeal No. 268 of 1949, D/- 20-2-1952.

(a) Madras Hereditary Village Offices Act (3 of 1895), S. 10(6) Proviso — Restoration of the dismissed individual must be by legal order passed within statutory authority.

All that the proviso to sub-s. (6) of S. 10 contemplates is that if by legitimate means, that is, by an appeal or a second appeal, a person who has been dismissed or removed from office is allowed to come back by the order of dismissal or removal being cancelled, then the person who was appointed to fill in the vacancy shall vacate the office. The correct and proper way of reading the sub-section with its proviso is to interpret it as laying down that the order of appointment for filling up the vacancy caused by resignation, dismissal, removal or suspension, is subject to a defeasance in case the person who is removed, dismissed, or suspended, is permitted to resume duty by the cancellation of the embargo put upon him. It does not mean that a higher authority not vested with any power or jurisdiction can, without legal justification, cancel a perfectly valid order of dismissal, suspension, or removal and permit the return to duty of an officer who has been properly dismissed or removed from office. The words "for any reason" should receive a meaning in conformity with the provisions of the statute and not in derogation of the intent as well as the written provisions of law. Construed in this manner, it cannot be held that any illegal order passed without statutory authority restores the dismissed individual to the original office. (Para 8)

(b) Madras Hereditary Village Offices Act (3 of 1895), Ss. 13, 21 — Plaintiff ousted from office by order of Collector passed on orders of Government — Order without jurisdiction — Suit in Civil Court for declaration is not barred — (Civil P. C. (1908) S. 9).

Where the revenue authority though purporting to act under the provisions of Madras Hereditary Village Offices Act acted without jurisdiction, or in excess of jurisdiction, the right of the Civil Courts to declare such acts ultra vires has not been abrogated or removed by any of the provisions of the Act. Therefore, if the plaintiff, who has been lawfully appointed, is unlawfully tried to be ousted by the order of the Government. on which. the order ousting the plaintiff was passed by the Collector, then it is open to the plaintiff to sue for declaration. AIR 1933 Mad. 618 and AIR 1939 Mad. 648 Rel. on; AIR 1941 Mad. 857; AIR 1936 Mad. 852; AIR 1938 Mad. 483 and AIR 1947 PC 78 Disting; AIR 1931 Mad. 502. Ref. (Para 9)

Anno: Civil P.C., S. 9 N. 50.

(c) Madras Hereditary Village Offices Act (3 of 1895), S. 23 — Decision on appeal by District Collector or Board of Revenue is final — Government has no jurisdiction either to affirm or set aside the final order. (Para 11)

(d) Government of India Act (1935), S. 241 (5) — Order of Government overriding the final order of dismissal under Madras Hereditary Village Offices Act, defended as being under S. 241(5) — It must be shown that the order was passed upon a memorial addressed to Governor and that the order emanated from Governor. (Para 11)

(e) Government of India Act (1935), S. 240 — Person holding office in accordance with statute — Right of Government to dismiss, at pleasure — Interference by Government with final order of dismissal of village officer under Madras Hereditary Village Offices Act is ultra vires — (Constitution of India, Art. 311) — (Madras Hereditary Village Offices Act (3 of 1895), S 23.

According to the law, as it stood when Govt. of India Act, 1935 was in force an officer held his post during the continuance of the Government of India Act, 1935, at the pleasure of the Crown, and unless there were special statutes regulating the appointments and removals, he could be removed at pleasure. What the Crown could do independently of any enquiry and without the assignment of any reason, could not be questioned in a Court of law on the ground that the enquiry had not been satisfactory or in proper form, or that the reason assigned was unsound and open to criticism. (Para 12)

But where a person held his office not as a result of any contractual right or obligation but in accordance with the provisions of a statute and if the statute fixed certain modes and methods for appointment, dismissal, or removal, the same had to be complied with, and if according to the provisions of that statute, a person appointed or dismissed could not be removed or reappointed then the general principle that an officer held his post in the discretion of the Crown could not be invoked to justify an action not contemplated by the Statute. Case law discussed. (Para 13)

The Madras Hereditary Village Offices Act makes the Board of Revenue the final authority in regard to the appointment and removal of the Village officers and the law does not provide for interference by the Government in such matters. Consequently the interference by the Government with the final order would be ultra vires. (Para 13)

(f) Constitution of India, Art. 375 — Scope of.

Article 375 contemplates only officers who were validly holding their office and not those who could be said to hold office despite their removal. (Para 14)

M. S. Ramachandra Rao, for V. Subramaniam, for Appellant; V. Parthasarathi and J. Krishnamurthi, (for No. 1); Govt. Pleader and C. V. Mannadiar, (for No. 2) for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('37) ILR (1937) Mad 532: (AIR 1937 PC 31) 12
('47) 1947-2 Mad LJ 16: (AIR 1947 PC 78) 10
('48) 1948-2 Mad LJ 55: (AIR 1948 PC 121) 12, 13
('43) ILR (1943) Bom 411: (AIR 1943 Bom 268) 12
('13) 17 Cal LJ 75: (16 Ind Cas 922) 12
('31) 33 Mad LW 294: (AIR 1931 Mad 502) 9
('33) 56 Mad 749: (AIR 1933 Mad 618) 9
('36) AIR 1936 Mad 852: (164 Ind Cas 898) 9

('38) 1938-1 Mad LJ 539: (AIR 1938 Mad 483) 9
('39) 1939-2 Mad LJ 6: (AIR 1939 Mad 648) 9
('41) 1941-2 Mad LJ 439: (AIR 1941 Mad 857) 9
(1895) AC 229: (64 LJ PC 119) 12
(1896) AC 575: (65 LJ PC 82) 12

GOVINDA MENON J.: The appellant before us was the first defendant in the Court below, the second defendant being the Government of Madras represented by the District Collector, Guntur. The plaintiff brought a suit for a declaration that the order of the Revenue Divisional Officer, Guntur, dated 27th July 1947 is illegal, ultra vires, and not binding on him. The learned Judge decreed the suit as prayed for and hence this appeal by the first defendant.

(2) The first defendant was the permanent village munsif of Nandigama village in Sattenapalli taluk, Guntur district. On account of irregularities in official proceedings as well as charges of misappropriation he was dismissed by the Revenue Divisional Officer on 25th July 1944, which dismissal, on appeal to the Collector, was confirmed on 31st December 1944. On 15th January 1945, under Ex. A. 5 the Revenue Divisional Officer appointed the plaintiff as acting village munsif which appointment was confirmed on 31st January 1945 under Ex. A. 6. Against the confirmation of the order of dismissal the first defendant preferred a second appeal to the Revenue Board which was also dismissed on 4th May 1945 (Ex. A. 3). There was a further petition to the Government for interference in this matter in revision and on this the order under the signature of the Assistant Secretary to Government was that the law does not provide for interference by the Government in the matter and therefore the petition was rejected on 14th October 1946 (Ex. A. 4). Subsequently, the first defendant memorialised the Honourable Prime Minister, Government of Madras, under Ex. B. 1, and on that, orders were passed (Ex. B. 2) on 16th May 1947 by which the Government came to the following conclusion:

"Last year, the petitioner submitted a petition to the Government requesting reinstatement to the post. The petition was rejected in the Government endorsement read above. The Government have since re-examined the case, on a petition subsequently received from the dismissed headman. They consider that, in view of the fact that the petitioner is young, the punishment is too severe and this is a fit case in which they should exercise clemency and reduce the punishment. They accordingly direct that the petitioner should be restored to duty, the period between the date of his dismissal and the date of his restoration being treated as one of suspension and that he should be warned to behave himself in future. The petitioner is referred to the Board of Revenue for orders on his petition read above."

(3) The Board of Revenue to whom the petitioner was referred for orders by the Government, in its turn directed the Collector to enquire into the matter, who referred the petitioner to the Revenue Divisional Officer who on 27th July 1947, passed the following order:

"Sri Makkena Sambiah is hereby restored to office as headman of Nandigama village of Sattenapalle taluk in relief of Sri Makkena Tirupathiah whose appointment ordered in this office R. D. is No. 827 of 1945 dated 31st January 1945 is hereby superseded."

The plaintiff, whose appointment terminated as a result of the reinstatement of the present appellant, has brought the suit for a declaration that the order of the Revenue Divisional Officer was ultra vires, illegal and invalid and that the order by which he was appointed, viz., Ex. A. 6, should remain effective and that the first defendant cannot have any right to the office. The first defendant's contention in the court below was that the Government has complete jurisdiction and power to review the earlier order refusing to interfere and that according to the provisions of the Madras Hereditary Village Offices Act his restoration is valid and operative. There was a further question raised as to whether the suit was entertainable at all in a civil court. The State of Madras which have been impleaded as the second defendant in the suit supported the first defendant and asserted that they had ample powers to act in the manner they did. As stated already the Subordinate Judge agreed with the contentions urged on behalf of the plaintiff and decreed the suit. The State of Madras though a party respondent to this appeal, actively supports the case put forward on behalf of the appellant and contends that Ex. B. 2 by which the Government held, on a re-examination of the case, that the appellant was entitled to a reduction of punishment and clemency cannot be questioned by the plaintiff. It is further contended that under the provisions of the Government of India Act, 1935, Ss. 240 and 241, then in force, the subsequent order, Ex. A. 7, cancelling the earlier order has force and vitality and cannot be questioned at all.

(4) The first contention raised on behalf of the appellant has reference to provisions of the Madras Hereditary Village Offices Act, 1895, and the proper construction to be put upon certain sections of that statute. It is therefore necessary to refer to its provisions somewhat in detail. The Revenue Divisional Officer is ordinarily referred to as "The Collector" for purposes of this Act and the chief executive officer of the District, the Collector, is styled the "District Collector". Section 7 empowers the Collector to fine, suspend, dismiss or remove, the holder of any of the offices forming class (1) in S. 3 (village munsifs etc.) for misconduct or for neglect of duty or incapacity or for non-residence in the village or for any other sufficient cause, and to make a record of his reasons for passing an order under this provision and furnish a copy of the same to the village officer concerned. Section 10 enacts that when a vacancy occurs in any of the village offices forming class (1) in Sec. 3, the Collector shall fill up the vacancy in accordance with the provisions of the following sub-sections. The qualifications are enumerated therein and the prohibitions are also contained therein. Sub-section (4) reads as follows:

"Where an office has become vacant by the dismissal, removal or suspension of the last holder, the Collector may direct that, until the death, re-appointment or return to duty of such last holder, the duties of the office shall be performed by some person duly qualified under sub-sec. (i) who is not an undivided member of the family of the dismissed, removed or suspended officer; provided that when the officer who has been dismissed

or removed, dies, or if the officer who has been suspended dies while under suspension, the vacancy caused by such death shall be filled up in accordance with the provisions of sub-secs. (2) and (3), i.e., by observing the rule of primogeniture and in some cases persons other than the direct heir being appointed."

(5) Sub-section (6) is important in this way because it relates to the method of filling up a vacancy caused by resignation, dismissal, removal or suspension. It reads as follows:

"If a vacancy is caused by the resignation, dismissal, removal or suspension of the holder of an office and the Collector does not give the direction referred to in sub-sec. (4) he shall fill up the vacancy in accordance with the provisions of this section as if it had been caused by the death of the said holder; provided that, upon the expiry of the period of suspension of an officer who has been suspended, or if, for any reason, an officer who has been dismissed, removed or suspended is permitted to resume the office from which he has been dismissed, removed or suspended, the person appointed to fill the vacancy caused by the said suspension, dismissal or removal shall cease to hold office."

(6) Section 13 refers to a suit for offices, for recovery of emoluments and for registry as heir, i.e., that section allows persons who are entitled under sub-sec. (2) or sub-sec. (3) of Sec. 10 to sue for emoluments or to hold such office and enjoy the emoluments. This suit is not before a civil court but before the Collector. Section 23 provides for appeals from every order passed by a Collector under S. 6 or S. 7 and from every decree or order passed by a Collector in a suit preferred under S. 13 to be filed within one month to the District Collector, or, if the said order or decree was passed by the District Collector, an appeal shall lie, within three months to the Board of Revenue. The decision on appeal of the District Collector or the Board of Revenue, as the case may be, shall be final; provided that in respect of the offices of head of the village and village accountant, a second appeal shall lie, within three months to the Board of Revenue against the decision on appeal of the District Collector.

(7) It was under the provisions of S. 7 that the first defendant was removed from office and his appeal and second appeal were under S. 23 of the Act. It was in accordance with the powers conferred under S. 10 that the plaintiff was appointed and the contention is that the proviso to sub-sec. (6) of S. 10 would come into play when the dismissed or removed holder of the officer is, 'for any reason', permitted to return to duty.

(8) The first argument of the learned counsel for the appellant is that the proviso to sub-sec. (6) of Sec. 10 makes it obligatory, for the person appointed by the Collector, in the place of one who has been suspended, or removed, or dismissed, to give room to the officer whose dismissal, removal, or suspension is, for any reason, cancelled and he is permitted to resume the office from which he has been dismissed, removed, or suspended; and in that case the person appointed to fill the vacancy caused by the suspension, dismissal or removal shall cease to hold office. The first defendant contends that on account of the words "for any reason", even if his dismissal or removal, was not set aside by any legitimate right of appeal, the plaintiff, who was appointed to fill the vacancy, has to vacate for him and that he should be permitted to resume the office. What is urged is that ordinarily, where pending an appeal a person is appointed to fill an office, when that appeal is allowed he has to vacate it. In the present case, because of the very wide import of the words "for any reason" it should be held that since the order of the Government which is not one contemplated by the statute restores him to office, he cannot be denied the right to hold office and recover the same from the person appointed in his stead. It is further urged that the words "for any reason" contemplate the cancellation by the authority itself of the order of dismissal or suspension or by an appellate authority or by a revisional authority, and that it is not open to the person appointed to fill the vacancy to question the correctness or propriety of the order restoring the dismissed or the removed incumbent. We are not inclined to accept the contention which would lead to such a drastic result. In our opinion all that the proviso to sub-sec. (6) of S. 10 contemplates is that if by legitimate means, that is by an appeal or a second appeal, a person who has been dismissed or removed from office is allowed to come back by the order of dismissal or removal being cancelled, then the person who is appointed shall vacate the office. What is to be remembered is that the operative part of the section relates to the filling up of the vacancy and the method of doing it and the proviso is only in the nature of a restitution. The correct and proper way of reading the sub-section with its proviso is to interpret it as laying down that the order of appointment for filling up the vacancy caused by resignation, dismissal, removal or suspension, is subject to a defeasance in case the person who is removed, dismissed, or suspended, is permitted to resume duty by the cancellation of the embargo put upon him. It does not mean that a higher authority not vested with any power or jurisdiction can, without legal justification, cancel a perfectly valid order of dismissal, suspension, or removal and permit the return to duty of an officer who has been properly dismissed or removed from office. Sub-sections (4) and (6) have to be read together in conformity and harmony with each other. In our view, all that the proviso to sub-sec. (6) lays down is that the fact that a qualified person under sub-sec. (4) has been appointed to fill a vacancy caused by the dismissal, removal, or suspension, by an authority, should not prevent the legitimate holder, if he is later on permitted to resume duty, from reaping the fruits of the appellate order or the second appellate order. It seems to us therefore that the extreme contention put forward that any illegal order of cancellation restores the dismissed individual to the original office cannot be supported. The words "for any reason" should receive a meaning in conformity with the provisions of the statute and not in derogation of the intent as well as the written provisions of law. Construed in this manner, we cannot hold that even though the order under Ex. A. 7 was passed without any statutory authority, still the first defendant can be allowed to resume office. The above contention was based upon the supposition that the basis for Ex. A. 7, viz., the order of the Government restoring the first defendant to office was illegal.

(9) The next line of attack by the first defendant is with regard to the maintainability of the suit itself. The first defendant says that the present suit for a declaration is only a make believe and is in reality a suit for the recovery of the office of village munsif. That is, by getting the declaration, the plaintiff wants to get back the office from which he had been dismissed, and therefore in substance the claim is one for the recovery of office for which purpose the proper forum is not a civil court but the court of the Collector under S. 13 of the Act. Where a special machinery is constituted for dealing with certain disputes then it is not open to the parties to resort to the ordinary civil courts. In this case, according to the first defendant it is open to the plaintiff to sue for the recovery of the office under S. 13 before the Collector. Against the decree of the Collector an appeal will lie to the District Collector and since the office is one of the head of the village, a second appeal will also lie to the Board of Revenue. Without resorting to these remedies and availing himself of the provisions of Ss. 13 and 23 of the Madras Hereditary Village Offices Act the plaintiff has no justification to come before a civil court and sue for a declaration which in essence is one for the recovery of the office. In this connection S. 21 of the Act has also to be considered by which jurisdiction of civil courts is barred with regard to matters specially enacted in this statute.

That section lays down that no civil court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or, except as provided in proviso (ii) to sub-sec. (1) of S. 13, any claim to recover the emoluments of any such office. Claim to succeed to the office of headman is really what the plaintiff asks for, and therefore according to the defendant, a civil court will have no right to adjudicate on this claim. Great reliance is placed by the learned counsel for the appellant on a judgment of Somayya J. in — 'Narasimha Rao v. Venkataramana Rao', 1941-2 Mad L J 439, where the learned Judge held that where the plaintiff claimed a right of succession under the Madras Hereditary Village Offices Act and alleged that the defendant was appointed by the revenue authorities in violation of his right, his remedy is to sue under S. 13 of the Act in the Revenue Court for the recovery of his office from the person alleged to have been wrongfully appointed and therefore the plaintiff, by merely confining his relief as one for a declaration of the invalidity of the defendant's appointment, cannot be permitted to agitate the matter before a civil court. The learned Judge further held that S. 21 of the Act bars a civil court from entertaining such a suit.

In addition to this, the decision in — 'Kailasapathi v. Secretary of State', AIR 1936 Mad 852 was also brought to our notice. In that case Beasley C. J. held that where a person is registered as a minor karnam of village but later the Revenue Board cancelled the registration and directed the Revenue Divisional Officer to make a fresh appointment which is done, and the person deprived of his office files in the civil court a suit for declaration that the cancellation by the Revenue Board was ultra vires and for delivering the office of karnam to him, the remedy sought by plaintiff, being one which in effect he could have had by filing a suit in revenue court under S. 13 of the Act, the jurisdiction of the civil court is barred under S. 21.

Another case of the same variety is to be found in the judgment of Pandrang Row and King JJ. in — 'Venkatasubbiah v. Secretary of State', 1938-1-Mad L J 539 where the learned Judges negatived the contention that a civil court is competent to declare that the decision of the Board of Revenue in a suit under S. 13 of the Madras Hereditary Village Offices Act, where the Board had decided the matter in appeal to it, is contrary to law. Even assuming that the decision of the Board is contrary to law, it is not competent for a civil court to declare that such a decision was contrary to law, for then a party would be really attempting to obtain an adjudication by a civil court of a claim which has been excluded from the jurisdiction of a civil court. We are not prepared to hold that these authorities in any way preclude the civil court from entertaining the present suit.

In none of these cases was the question regarding the validity of an order of restoration by an appellate tribunal of a dismissed head of the village was ever considered. On the other hand — 'Secretary of State v. Subbarao', 56 Mad 749 and — 'Duraiswami Reddiar v. Secretary of State', 1939-2-Mad L J 6 are two pronouncements of this court where the right of a civil court to adjudicate upon the invalid or ultra vires nature of the orders passed by the Collector or the Board of Revenue was considered and decided in favour of upholding the court's jurisdiction. Where in a second appeal to it, the Board of Revenue set aside the order of the Collector and restored that of the Revenue Divisional Officer, on the ground that there was no right of second appeal to the Board of Revenue from an appellate order of the Collector modifying an order of dismissal and converting it into one of suspension, Beasley C. J. and Bardswell J. held in — 'Secretary of State v. Subba Rao', 56 Mad 749 in a suit filed by the karnam for a declaration that the order of the Board of Revenue was invalid and ultra vires, that the order was without jurisdiction and was ultra vires and that the suit, though for a mere declaration, was maintainable. The principle underlying this decision is where the revenue authority, though purporting to act under the provisions of the Madras Hereditary Village Offices Act, acted without jurisdiction, or in excess of jurisdiction, the right of the civil courts to declare such acts ultra vires has not been abrogated or removed by any of the provisions of the Madras Heriditary Village Offices Act. Since no second appeal lay to the Board of Revenue in a matter where the Collector imposed an order of suspension, it was held by this court that the order of the Revenue Board setting aside the order of suspension in second appeal was without jurisdiction. The learned Judges have referred to a large body of case law in support of their decision and it is unnecessary to refer to any of them now. Wadsworth J. in — 'Duraiswami Reddiar v. Secretary of State for India in Council', 1939-2-Mad L J 6 laid down that when a village munsif lawfully appointed has been unlawfully threatened with ejection by an official act, he can maintain a suit to protect his right of office and it is a suit which the civil courts have jurisdiction to entertain. Therefore if the plaintiff, who has been lawfully appointed,

is unlawfully tried to be ousted by the order of the Government on which Ex. A. 7 was passed by the Collector, then it is open to the plaintiff to sue for declaration. The learned Judge referred to an earlier decision of this court in — 'Venkataraghaviah v. Chenchu Subbia', 33 Mad L W 294.

(10) But it is contended by Mr. Ramachandra Rao for the appellant that even the question of the ultra vires nature of Ex. A. 7 based upon the Government's order can be agitated in a revenue court in view of the observations of the Judicial Committee in — 'Raleigh Investment Co. Ltd. v. Governor General in Council', 1947-2-Mad L J 16 (PC). But we do not think that any support can be got from that decision for the proposition which the learned counsel enunciates. What their Lordships held was that S. 67 of the Income-tax Act has to be construed in the setting that the Act gives an assessee the right effectively to raise in relation to an assessment made upon him the question whether or not a provision in the Act was ultra vires. That is, it was open to the assessee to contend before the Income-tax authorities themselves that a certain provision of the Act by which he was assessed is ultra vires. He need not proceed to a civil court for getting a declaration regarding the ultra vires nature of the statute, but it is open to him to raise it before the same tribunal which itself is the creator of that statute, to hold whether certain provisions of that statute are intra vires or not. Both these cases emphasise that the jurisdiction of the civil courts is not ousted except where the matters are specifically provided for in the special statute and where the act of the authorities under that statute can be brought within the confines of the power strictly conferred upon the authorities. We are therefore of opinion that the objection regarding the forum and the maintainability of the suit cannot be upheld.

(11) The question has now to be considered whether Ex. A. 7 based upon the Government's order Ex. B. 2 restoring the appellant to the office is ultra vires the powers of the Government. One thing is clear and that is that the provisions of the Madras Hereditary Village Offices Act do not confer any right upon the Government either to affirm or set aside the final orders made by any statutory body because S. 23 makes a decision on an appeal to the District Collector or the Board of Revenue, as the case may be, absolutely final. Here, in this case, the Board of Revenue, in second appeal under Ex. A. 3 upheld the order of dismissal made by the Revenue Divisional Officer. The statute does not confer upon the Government any power to interfere. But the learned Government Pleader contends that apart from the provisions of the statute there is a supervening and all pervading power in the Government of the State to interfere in all matters regarding appointments and dismissals made by subordinate authorities and therefore even if, in the first instance, the Government thought it had no power to interfere, the subsequent recantation of their order by Ex. B. 2 would be valid and such being the case the order of reappointment contained in Ex. A. 7 cannot be interfered with by the court. At the time Ex. B. 2 was passed, the Government of India Act, 1935, was in force, and the Government Pleader refers to various provisions of that Act justifying the action of the Government referred to in Ex. B. 2.

Sections 52, 59, 240 and 241 of the Government of India Act were specially stressed. Section 52 relates to the special responsibilities of the Governor with regard to the safeguarding of the legitimate interests of persons who are, or have been, members of the public services. Section 59 relates to the conduct of business by the Provincial Government and lays down that all executive actions of the Government of a Province shall be expressed to be taken in the name of the Governor. Sections 240 and 241 refer to the tenure of office of persons employed in civil capacities in India and contemplates that every person holding any civil post under the Crown in India holds it during His Majesty's pleasure. Section 241(5) was particularly relied upon and it runs as follows:

> "No rules made under this section and no Act of any Legislature in India shall be construed to limit or abridge the power of the Governor General or a Governor to deal with the case of any person serving His Majesty in a civil capacity in India in such manner as may appear to him to be just and equitable."

We shall first of all dispose of the contention based upon S. 241(5). No doubt under that provision, any rule made under the Government of India Act, or any Act of the Legislature, cannot deprive the Governor of the special responsibility vested in him under the Instrument of Instructions to safeguard the interests of the public servants in India and therefore it is open to the Governor to interfere in any matter with regard to the dismissal or restoration of a public servant even if orders made under statutes had become final. In accordance with the scheme of the Government in vogue at the time when the Government of India Act, 1935, was in force, there were rules for the guidance of the business of the Government of Madras framed under S. 59 of the Government of India Act and rule 11 stated that all orders shall be in the name of the Governor and cannot be called in question under S. 53. If Ex. B. 1 had been addressed as a memorial to the Governor, and the Governor in his discretion, has interfered in accordance with the powers conferred on him under sub-sec. (5) of S. 241, then it might have been said that whatever orders have been passed by the executive Government will be subject to revision at the instance of the Governor. But it has not been shown by the learned Government Pleader that the memorial Ex. B. 1 was disposed of as a petition for the redressal of grievance addressed to the Governor in accordance with the powers under S. 241(5). It is well known that rules had been framed when the governance of the country was under the authority conferred by the Government of India Act, 1935, for the Governor to safeguard the interests of the services and to receive and interfere in petitions against the order of the Government as such exercising his discretion. The result of such rules is that the Governor is made an appellate authority as it were over the Government of which he is the head; whereunder he acts under the advice of his ministers in matters relating to services.

We granted time to the learned Government Pleader to ascertain whether Ex. B. 1 was ever sent to the Governor in order that he might use his discretion and either confirm or set aside the order of the Government, Ex. A. 4, but the learned Government Pleader was not able to give us any information that Ex. B. 1 was either sent to the Governor or that Ex. B. 2 is

an order passed by the Governor in pursuance of his special responsibility and powers reserved in him under S. 241(5). Therefore we take it that Ex. B. 2 is, from what appears on the face of it, an order by the Government reviewing their earlier order, Ex. A. 4. The structure of the constitution of a Provincial Government during the existence of the Government of India Act, 1935, before its amendment by the Indian Independence Act, had vested in the Governor a general power of safeguarding and protecting the services and that power is derived from S. 241(5), and the Instrument of Instructions issued to him. Since we are not satisfied that Ex. B. 2 was issued in pursuance of the exercise of any such power, we cannot agree with the learned Government Pleader that the order Ex. B. 2 emanated from the Governor acting in accordance with his powers under S. 241(5) and therefore we are not prepared to accept his contention.

(12) The substantial argument next put forward by the learned Government Pleader to reinforce the point of view urged on behalf of the appellant is that firstly the Government of the Province has absolute discretion in the matter of retaining or removing servants of the Government under the authority derived from the Crown, because the Government of the province is the agent of the Crown and since the Crown has got absolute discretion in the matter of the retention of a member of the services, the order Ex. B. 2 whereby the first defendant was restored, resulting in the plaintiff being ousted, is valid and legal and cannot be called in question. Reference was made to S. 49(2) of the Government of India Act, 1935, where it is stated that the executive authority of each province extends to matters with respect to which the Legislature of the Province has power to make laws. This section corresponds to Art. 162 of the present Constitution. The executive and the legislative authorities of the province are derived from the powers conferred under the Parliamentary statutes then in force. So far as the services are concerned, the history of this power can be traced back to S. 96-B of the Government of India Act, 1919, which in a somewhat changed form was re-enacted as S. 240 of the Act of 1935 and the same idea is incorporated in Art. 311 of the Constitution. Whereas under S. 96-B of the Government of India Act, 1919, and S. 240 of the Act of 1935, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, under Art. 311 of the Constitution, on account of the republican nature of our Constitution, any person who holds a civil post under the Union or State shall not be dismissed or removed by any authority subordinate to that by which he was appointed. A similar provision is contained in sub-sec. (2) of S. 240 of the Act of 1935. But the question here is not with regard to the dismissal by a person subordinate to the authority who appointed the officer, but the question is whether his holding of the office can be terminated at the will and pleasure of the Government of the Province.

In — 'Venkatarao v. Secretary of State', ILR (1937) Mad 532, 537, the Privy Council had to consider the case of persons who had been removed from service by departmental authorities in this province, and their Lordships held that since S. 96-B of the Government of India Act, 1919, expressly states that persons in the civil service hold office during the pleasure of the Crown, the dismissal of a civil servant in utter disregard of the procedure prescribed by the rules framed under the section, will not give a right of action for wrongful dismissal. The Privy Council had to consider two cases, — 'Shenton v. Smith', (1895) A. C. 229 and — 'Gould v. Stuart', (1896) A. C. 575. Discussing these two cases, Lord Roche in delivering the judgment makes a distinction between the holding of an appointment under the rules and regulations of the service as well as an appointment under conditions expressly enacted by a statute and lays down that in cases where the appointments are under the provisions of a statute, they cannot be terminated except in accordance with the provisions contained in the statute. It is clear from — 'Shenton's case', (1895) A. C. 229 that any servant of the Crown in the absence of a special contract, holds his office during the pleasure of the Crown and that in the case of a dismissal of such an officer he has no special cause of action. At page 235, Lord Hobhouse states as follows:

> "If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind."

Later on he continues to observe:

> "The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down."

We have no doubt that according to the law, an officer holds his post during the continuance of the Government of India Act, 1935, at the pleasure of the Crown, and unless there are special statutes regulating the appointments and removals, he can be removed at pleasure. See — 'Ramdas Hajra v. Secretary of State', 17 Cal L J 75; — 'High Commr. for India v. I. M. Lall', 1948-2-Mad L J 55 (PC) and — 'District School Board of North Kanara, Karwar v. Parameswar Jattu', ILR (1943) Bom 411. This is clear from the judgment of Mookerjee J. in — 'Ramdas Hajra v. Secretary of State', 17 Cal L J 75, where the case law has been very exhaustively considered and discussed. Except when it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; and all, in general are subject to dismissal at any time without cause assigned. What the Crown can do independently of any enquiry and without the assignment of any reason, cannot be questioned in a court of law on the ground that the enquiry has not been satisfactory or in proper form, or that the reason assigned is unsound and open to criticism. Therefore a suit for damages for wrongful dismissal cannot be maintained against the Crown. As we have already stated, the Privy Council in — 'Venkatarao v. Secretary of State', ILR (1937) Mad 532 (PC) makes a distinction between two classes of cases, viz., the — 'Gould's case', (1896) A. C. 575 and — 'Shenton's case', (1895) A. C. 229. The general category is defined and illustrated by — 'Shenton's case', (1895) A. C. 229 and the exceptional category is defined and illustrated

in the — 'Gould's case', (1896) A. C. 575. It seems to us that the more appropriate category to be applied so far as our present case is concerned is that enunciated in — 'Gould's case', (1896) A. C. 575, viz., where the office is held under conditions expressly enacted by a statute.

(13) A statutory right as distinguished from an ordinary contractual right is clarified at page 62 in — 'High Commr. for India v. I. M. Lall', 1948-2-Mad L J 55 (PC) where their Lordships of the Judicial Committee observe as follows:

> "The respondent sought to establish a statutory right to recover arrears of pay by action in the civil court; he made reference to certain sections of the Government of India Act, 1935, viz., Ss. 179(9), 247(4), 249 and 250, but it is enough to state that their Lordships are unable to derive from them any statutory right to recover arrears of pay by action."

In the present case the village munsif holds his office not as a result of any contractual right or obligation but in accordance with the provisions of a statute and if the statute fixes certain modes and methods for appointment, dismissal, or removal, the same have to be complied with, and if according to the provisions of that statute, a person appointed or dismissed cannot be removed or re-appointed then the general principle that an officer holds his post in the discretion of the Crown cannot be invoked to justify an action not contemplated by the Statute. The Madras Hereditary Village Offices Act makes the Board of Revenue the final authority in regard to the appointment and removal of the village officers and the Government was perfectly right in the view which they took in Ex. A. 4 that the law does not provide for interference by the Government in such matters. Such being the case and since we are satisfied that Ex. B. 2 is not the result of the Governor exercising his discretion but the Government reviewing their earlier order, it cannot be said that the reinstatement of the first defendant can be validly acknowledged as proper and just. It has therefore to be held that the confirmation of the order of dismissal of the first defendant by the Board of Revenue in second appeal stands and that his restoration to office by the order of the Government contained in Ex. A. 7 is invalid and inoperative. We are fortified in this conclusion by the procedure adopted by the Government in passing Madras Act XVIII of 1939. That was an Act intended to validate the restoration of village officers who lost their offices by reason of their association or connection with political movements. It so happened that on account of their participation in the political movements of early twenties, certain village officers had been dismissed by the then British Government and they were restored after the popular Government came into existence as a result of the Government of India Act 1935. But it was felt that such restoration was against the provisions of the Madras Hereditary Village Offices Act and therefore the Provincial Government had to resort to special legislation to validate the reinstatement of those officers. If, as a matter of fact, it is open to the Provincial Government to appoint any one or terminate the services of any one, at their will and pleasure, despite the provisions of the Madras Hereditary Village Offices Act, we see no reason why the reinstatement of those village officers by the Government in 1937 or 1938 was considered invalid. As it was thought that such restorations were outside the authority conferred under the Madras Hereditary Village Offices Act, the Act of 1939 had to be passed.

(14) The last and final argument addressed to us was on the basis of Art. 375 of the Constitution which lays down that all officers, judicial, executive, and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of the Constitution. The argument is put in this way. On the 26th January 1950 when India became a republic and the Constitution came into being, the first defendant was holding the office of the village headman and therefore he continues to hold the post under this Article. How it came about was that even though the plaintiff was appointed as the village munsif, he could not get possession of the office and therefore the first defendant continued in that capacity on the date when the Constitution came into being. But the difficulty in accepting this argument is that Art. 375 contemplates only officers who were validly holding their office and not those who could be said to hold office despite their removal. As it has happened the final order of dismissal of the first defendant was confirmed by the Board of Revenue in second appeal as early as 4th May 1945 and since then the person who validly held the office must be the plaintiff and not the first defendant. Moreover, by the time the Constitution came into existence, the Subordinate Judge had already passed his decree declaring that the plaintiff cannot be removed from office and that he was the properly appointed village munsif of Nandigama village. The decree was passed on the 24th December 1948 and since an order of injunction had been passed in appeal by this court it cannot be said that the first defendant has obtained any valid right to hold office as a result of that interlocutory order. We therefore agree with the Subordinate Judge that the order, Ex. A. 7, is invalid and inoperative and that under that order the first defendant cannot assume the office of the village munsif of Nandigama village. The lower court was therefore perfectly justified in decreeing the suit and this appeal is dismissed but in the circumstances each party will bear his costs throughout.

A/R.G.D. Order accordingly.

A. I. R. 1952 MADRAS 871

SATYANARAYANA RAO J.

Arunachala Chettiar, Appellant v. Vadla Koundan and others, Respondents.

Second Appeal No. 1432 of 1948 D/- 10-12-1951

Civil P. C. (1908) O. 21 R. 92 (3) — Death of judgment-debtor after sale and before confirmation — Confirmation without impleading judgment-debtor — Effect.

Where after the sale but before confirmation, the judgment-debtor dies and the confirmation order is passed without impleading his legal representatives, the confirmation is a nullity and not binding. But the sale itself is not a nullity and cannot be set aside. AIR 1929 Oudh. 235 Dissent from. (Para 1)

Anno: C. P. C. O. 21 R. 92 N. 4.

M. S. Venkatarama Iyer for Appellant, T. S. Desikan and K. Raman, for Respondents.

REFERENCE: Para
('29) AIR 1929 Oudh 235: (4 Luck 635) 1

JUDGMENT: The only question of law which requires consideration in this second appeal by the unsuccessful plaintiff is whether the sale of the properties on the 9th November 1942 in execution of a small cause decree and the confirmation thereof on the 12th December 1942 is valid. The ground on which the confirmation was attacked is that after the date of sale and before confirmation, the judgment-debtor died on the 14th November 1942, and as the confirmation order was passed without impleading the legal representatives of the judgment-debtor the confirmation was not binding and was of no effect. This contention was accepted by the lower courts and the claim of the plaintiff to confirm his possession of the property which he purchased was negatived.

There is no direct case on the point in any of the courts except a decision of the Oudh Court in — 'Kamakshya Dutt Ram v. Shyam Lall', AIR 1929 Oudh 235 which is relied on, on behalf of the appellant and which seems to support his contention. The facts were similar and the judgment-debtor died there, as here, within thirty days from the date of sale. The learned Judges held that as there was no provision in the Civil Procedure Code requiring legal representatives of a judgment-debtor, when he dies after the sale, to be brought on record for the purpose of confirmation, there is no need to bring the legal representatives on record and that the confirmation after the death of the judgment-debtors without bringing the legal representatives on record even was valid.

The position of a purchaser after the sale and before the confirmation is that he has only a sort of inchoate interest which might become a vested interest in the property after confirmation. No doubt the confirmation in the absence of applications either under Or. XXI, rule 89, Order XXI, rule 90 or R. 91 Civil Procedure Code is automatic in the sense that there being no objection, confirmation of sale should follow as a matter of course. But that does not mean that an order for confirmation of sale can be made without the presence of the parties who are sought to be affected. Under Order XXI, rule 92 the sale is to be confirmed if no application is made under rule 89 or rule 90 or rule 91. In a case where the judgment-debtor or his legal representatives are parties to the proceedings they would undoubtedly be aware of the sale and within the period of limitation provided by law, namely, thirty days, they would be in a position to take steps to have the sale set aside either by deposit of the money, or if the sale was vitiated by irregularities, by an application under Order XXI, rule 90.

The position of others who are also entitled under rules 89 and 91 to apply for the relief provided under those rules would be different because it may be that they are not aware of the sale and they may have no means of knowing the same and therefore they may not have an opportunity to take proceedings under rule 89 or rule 91.

In my opinion an answer to the question raised by the learned advocate for the appellant that the judgment-debtor's legal representatives are not necessary parties to a confirmation of sale is met by the language of Order XXI rule 92 (3). Under that sub-clause a suit to set aside an order made under rule 92 shall not be questioned in a suit by any person against whom such an order is made is significant as indicating that if even an order of confirmation is made under rule 91 (1), it must be an order made against a person which implies that the confirmation order is made against the judgment-debtor or in case of his death, against his legal representatives. The very object of that rule is to prevent the judgment-debtor, and in case he dies, his legal representatives, from agitating the question of the finality of the sale in a later proceeding and to compel them to take proceedings under rules 89 or 90 in cases in which the money is deposited or the requirements of rule 90 are satisfied. The decision of the Oudh Court, overlooked, in my opinion, the language of clause (3) of rule 92.

It has been established by decisions that before confirmation the judgment-debtor's interest in the property could be attached and sold even by another creditor, i.e. his interest is not defeated and does not become vested in the auction-purchaser until there is a confirmation order. The confirmation order therefore has got a double operation of divesting the judgment-debtor of his title in the property and vesting it retrospectively in the auction purchaser to take effect from the date of the sale. I think therefore that the view taken by the courts below is correct.

But they were not justified in holding that the sale itself is a nullity. The only order which the judgment-debtor's legal representatives are entitled to attack is the order of confirmation of sale made behind their back. The sale therefore of 9th November 1942 cannot be set aside but the confirmation is a nullity. It therefore follows that the plaintiff-auction purchaser is not entitled to have the relief which he asked in the suit, namely, confirmation of his possession by virtue of the auction sale. It is unnecessary to indicate in this judgment whether or not the decree-holder is entitled now to bring the sale to completion by taking further steps in execution to bring any legal representatives on record and to have an order of confirmation made. That question does not arise for consideration in this second appeal and all that needs be stated is that the sale stands but the confirmation falls to the ground. The second appeal fails and is dismissed with costs. No leave.

A/V.B.B. Appeal dismissed.

A. I. R. 1952 MADRAS 872

GOVINDA MENON AND RAMASWAMI GOUNDAR JJ.

Buragada Venkatarao and another, Appellants v. Godavarti Venkatratnam and others, Respondents.

Appeal No. 98 of 1948, D/- 8-8-1951.

(a) Debt Laws — Usurious Loans Act (1918) (as amended by Mad. Act VIII (8) of 1937) S. 3 Explanation I — Excessive interest —Presumption.

The effect of Madras Act VIII of 1937 by which sub-sec. (1) of S. 3 of the Usurious Loans Act was amended and explanations and provisos were added is to make it obligatory upon the Court to find out whether there is excessive interest and when once that is done to presume that the transaction was unfair. Whatever might have been the rates prevailing prior to 1918, it should be deemed that the

enactment of the Usurious Loans Act was intended to cover cases which could not ordinarily be governed by S. 16 of the Contract Act. The transaction may not be subject to the infirmities contemplated by the provisions of the Contract Act, such as undue influence or coercion. But still where the rate of interest is excessive after the amendment it is possible for the court to presume that the transaction was unfair. Rs. 1-0-6 per cent per mensem compound interest with annual rests is excessive within the meaning of the explanation inserted by Madras Act VIII of 1937 and that being so, the transaction is unfair between the parties and the debtors are entitled to the benefit of the Usurious Loans Act as amended by the Madras Act VIII of 1937. The mere fact that in earlier transactions Rs. 1-0-6 per cent per mensem compound interest was charged would not make that rate of interest reasonable. 12 per cent per annum simple interest is fair, reasonable and just. Case Law discussed. (Para 11)

Anno: U. L. Act S. 3 N. 6.

(b) Debt Laws — Usurious Loans Act (1918) S. 3 (as amended by Mad. Act VIII (8) of 1937) — Effect of amendment.

According to the Central Act as it stood prior to the amendment, unless the court has reason to believe that the rate of interest is excessive and that the transaction as between the parties was unfair, no jurisdiction is conferred on the court to give relief by exercising the remedies enumerated therefor. It is not as if the two sub-clauses (a) and (b) are disjunctive. They are connected together by the conjunction and therefore both the criteria are necessary in order to attract the operation of the section. Not only should the interest be excessive but the transaction must be unfair between the parties. If only one of the necessary ingredients is present, the Act as it stood prior to the Madras amendment, could not be applied. But after the amendment in 1937, if the court is reasonably convinced that the transaction as between the parties was unfair, then the court shall exercise one or more of the powers. (Para 4)

Anno: U. L. Act S. 3 N. 14.

K. Venkatarama Raju, for Appellants; G. Chandrasekhara Sastri, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('18) 35 Mad LJ 614: (AIR 1918 PC 249)	5, 6
('22) 16 Mad LW 780: (AIR 1922 PC 347)	9
('23) 50 Ind App 14: (AIR 1923 PC 37)	10
('40) 1940-1 Mad LJ 68: (AIR 1940 PC 60)	6
('34) 56 All 263: (AIR 1933 All 913)	9
('39) AIR 1939 All 323: (182 Ind Cas 544)	10
('35) AIR 1935 Mad 468: (157 Ind Cas 232)	6, 11
('43) 1943-2 Mad LJ 504: (AIR 1944 Mad 105)	10
('45) 1945-1 Mad LJ 219: (AIR 1945 Mad 196)	10
('50) 1950-1 Mad LJ 181: (AIR 1950 Mad 654)	10
('51) 1951-2 Mad LJ 84: (AIR 1951 Mad 1013)	7
('39) 14 Luck 49: (AIR 1938 Oudh 156)	8
('39) 14 Luck 464: (AIR 1939 Oudh 223)	8
(1906) 1 KB 79: (75 LJ KB 49)	6
(1930) 1 KB 492: (99 LJ KB 186)	6

GOVINDA MENON J.: By Ex. P-1 dated 20th March 1926 the first defendant executed a mortgage for a sum of Rs. 2351-9-6 in favour of the undivided father of the plaintiffs. The consideration for that document was made up of sums due under a prior promissory note executed by the first defendant and moneys due under an account. It also included a sum of Rs. 50 being the costs of an insolvency petition which the plaintiffs' father and another had filed against the first defendant. The mortgage recited that compound interest would be paid at the rate of Rs. 1-0-6 per cent per mensem with annual rests. The relevant portions of the document are as follows:

".....This sum, from this date until it is paid up to you in full, shall carry compound interest at the rate of Rs. 1-0-6 (one rupee and six pies) per cent per mensem with annual rests calculated according to the Telugu calendar months and for Adhikamasams also, and the principal and interest so aggregating shall be paid up to you by me in instalments as fixed hereunder."

(2) In the lower Court, the first defendant raised various issues such as that the mortgage deed was invalid and unenforceable, that the suit was barred by limitation, that he was an agriculturist entitled to the benefits of the Madras Agriculturists' Relief Act, that the suit was barred under S. 67-A of the Transfer of Property Act, and that the rate of interest was exorbitant and usurious. The learned Judge found that the mortgage bond was fully and duly supported by consideration, and was enforceable. He further held that as a result of a payment of Rs. 10 towards the principal and Rs. 10 towards the interest due under the mortgage bond on 17-3-1938 and the endorsement thereof by the first defendant on the mortgage bond, limitation was saved as there was an acknowledgment of liability and hence the suit was in time. It was further found by the learned Judge that there is no evidence that the first defendant ever owned even a leasehold interest in agricultural lands and therefore he was not entitled to the benefits of the Madras Agriculturists' Relief Act.

On issue 4 as to whether the rate of interest was exorbitant, the learned Judge found that the principal amount of Rs. 2351-9-6 had swelled up as a result of compound interest with annual rests at the rate of Rs. 1-0-6 per cent per mensem to Rs. 24951-15-6. He further held that on the evidence the rate of interest was excessive and that the transaction was substantially unfair between the parties. Such being the case, it was decided to give relief to the first defendant under the provisions of the Usurious Loans Act. The plaintiffs were therefore given a decree for a sum of Rs. 6621-9-9 made up of the balance principal amount of Rs. 2341-9-6 with simple interest at 9 per cent per annum. Further interest and proportionate costs were also allowed.

There is no cross appeal by the first defendant against the decree passed for a sum of Rs. 6621-9-9 but he has filed an application for adducing additional evidence in appeal under O. XLI, R. 27, C. P. C. in order to prove that he was an agriculturist & therefore entitled to the benefits of the Madras Agriculturists' Relief Act. The affidavit in support of the application does not show any sufficient or justifiable material as to why we should exercise our discretion in favour of the first defendant and

allow the documents to be admitted as additional evidence. The conditions prescribed by O. XLI, R. 27, C. P. C. which have been recently explained in a judgment of the Supreme Court are conspicuous by their absence in tne present case. We therefore do not feel justified in admitting the documents as additional evidence.

(3) The appellants' argument is based mainly on the circumstance that there was no unfairness as between the parties at the time Ex. P-1 was executed. Both were Vysya merchants lending money to others and both knew the nature of the transaction. The evidence of the plaintiffs' clerk as P. W. 1 is to the effect that Rs. 1-0-6 per cent per mensem compound interest with annual rests was then the usual prevailing rate of interest. On this aspect of the case, it is urged by Mr. K. Venkatarama Raju for the appellants that there is no sufficient cross-examination of P. W. 1. The evidence on the side of the defendant consists chiefly of himself examined as D. W. 1 and he deposes that the usual rate of interest under mortgage bonds at that time was 12 annas 3 pies to 13 annas simple interest.

He further deposed that he used to execute promissory notes at simple interest of 13 annas and 14 annas. According to him, at the time the mortgage was executed he was indebted to the extent of nearly Rs. 6000 and therefore the plaintiffs' father and M. Subbayya filed an insolvency petition against him in the District Court because of a mortgage executed by him to one Jaldu Subbarao and that was considered to be an act of insolvency. After the filing of the insolvency petition, plaintiffs' father and Subbayya wanted the suit mortgage and another document to be executed and if that was done, they promised not to press the insolvency petition. Thereupon the first defendant was afraid and executed the suit mortgage. In cross-examination questions were put to him to show that the previous averments were incorrect and that he was fully aware of the nature of the transaction and that at present the hypotheca is worth Rs. 1,15,000. What we have to decide is whether the transaction was fair between the parties on the date of Ex. P-1.

(4) The learned counsel for the appellants invited our attention to the fact that the previous promissory note, Ex. P-2, dated 24-3-1923, also contained a provision for compound interest at the rate of Rs. 1-0-3 per cent per mensem. Further a mortgage bond, Ex. P-5, dated 21-7-1924, contained stipulations in various places that compound interest at the rate of Re. 1-0-0 per cent per mensem would be paid. It was also brought to our notice that Ex. P-3 of even date as Ex. P-1 also contains the same stipulation, viz., Rs. 1-0-6 per cent per mensem compound interest. Such being the rate of interest neither was the rate of interest excessive, nor was the transaction unfair between the parties. An earlier promissory note of 20th March 1917 also contained stipulations regarding interest in exactly the same way. The statutory provision relating to relief to be given where the transaction is considered to be an usurious loan of money is contained in the Usurious Loans Act of 1918 (Central Act X of 1918). Section 3, Sub-s. (1) is as follows:

"Notwithst nding anything in the Usury Laws Repeal Act, 1855, where in any suit to which this Act applies, whether heard ex parte or otherwise, the court (has reason to believe, (a) that the interest is excessive; and (b) that the transaction was, as between the parties thereto, substantially unfair, the court may exercise all or any of the following powers, namely.....)"

By Madras Act VIII of 1937, the portion within brackets has been amended by the insertion of the clause in the following terms:

"has reason to believe that the transaction was as between the parties thereto, substantially unfair, the court shall exercise one or more of the following powers, namely...."

According to the Central Act as it stood prior to the amendment, unless the court has reason to believe that the rate of interest is excessive and that the transaction as between the parties was unfair, no jurisdiction is conferred on the court to give relief by exercising the remedies enumerated therefor. It is not as if the two sub-clauses (a) and (b) are disjunctive. They are connected together by the conjunction and therefore both the criteria are necessary in order to attract the operation of the section. Not only should the interest be excessive but the transaction must be unfair between the parties. One can contemplate cases where interest alone is excessive but there was no unfairness in the transaction. Vice versa, it can be visualised that there was unfairness between the parties but the interest is not excessive. If, therefore, only one of the necessary ingredients is present, the Act as it stood prior to the Madras amendment could not be applied. But after the amendment in 1937, if the court is reasonably convinced that the transaction as between the parties was unfair, then the court shall exercise one or more of the powers.

The Madras amendment also introduced a new Explanation I to the following effect:

"If the interest is excessive, the court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest."

The explanation incorporates clause (a) of sub-sec. (1) of S. 3 by providing for the excessive nature of the interest. According to the explanation, if the interest is excessive, then the court is bound to presume that the transaction was substantially unfair. But it is open to the lender to rebut such presumption by proof of special circumstances justifying the rate of interest; that is, when once the court is satisfied that the interest is excessive, then it has necessarily to presume that the transaction was unfair and the presumption being rebuttable, it is open to the opposite party to let in sufficient evidence to show that the rate of interest was not excessive in the circumstances of the transaction.

There is a further proviso to clause (b) of sub-sec. (2) of S. 3 which says that in the case of loans to agriculturists, if compound interest is charged, the court shall presume that the interest is excessive. The question whether by merely charging compound interest, the rate of interest can be considered to be excessive, would arise if the defendant was an agriculturist. We have already expressed our opinion that on the material placed before the lower court there are no sufficient data to come to the conclusion that the defendant was an agriculturist. Therefore we have to decide, on the

footing of the defendant not being an agriculturist, whether, the rate of Rs. 1-0-6 per cent per mensem compound interest with annual rests is excessive in the circumstances of the case.

(5) Our attention was invited by learned counsel for the appellants to the observations of their Lordships of the Judicial Committee contained in — 'Lala Balla Mal v. Ahad Shah', 35 Mad L J 614 (PC) at p. 618, to substantiate his argument that in money lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding that the transaction was unconscionable. It must also appear that there is something unconscionable either in the original dealings or in the subsequent stages of the transaction. The mere fact that a sum of Rs. 2351 has swelled up to more than ten times that amount during the course of nearly twenty years should not influence us in holding that, at the initial stage of the transaction, there was any unconscionable bargain between the parties or that the transaction was unfair between the parties, so argues the learned counsel for the appellants.

The facts of that case were somewhat exceptionable and have no resemblance to the circumstances which we have to consider and moreover their Lordships were not considering the Usurious Loans Act or its amendment in Madras. There can be no difficulty whatever in agreeing with the learned counsel that what we have to decide is whether there was something unconscionable or unfair in the original transaction or at any subsequent stage of the transaction. We propose to consider this case only in that aspect. We guard ourselves from being understood as in any way being influenced by the fact that the original principal has now become augmented to the extent of ten times the sum at the time of filing the suit. That certainly is not a consideration which would weigh with us if we are convinced that at the time of the initial bargain there was nothing unconscionable or unfair between the parties.

(6) In the Usurious Loans Statute which was in force in the Federated Malaya States, there was a similar provision like S. 3(1) of Act X of 1918. It was enacted there that where, in any proceeding to which the enactment applies, whether ex parte or otherwise the court had reason to believe that the interest is excessive and that the transaction was between the parties thereto substantially unfair, the court may exercise all or any of the powers enumerated therefor. On a construction of that section, the Judicial Committee in — 'Chetambaram Chettiar v. Loo Than Poo', 1940-1-Mad LJ 68 (PC) held that where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt, this is not in principle open to any sound objection. Their Lordships further held that the charge of 24 per cent interest per annum should be presumed to be unfair and should be reduced to 15 per cent compound interest. In discussing the legal aspect of the case Lord Fairfield referred to the English decisions, chiefly to — 'Carringtons Ltd. v. Smith', (1906) 1 K. B. 79 as well as the decision of the Court of Appeal in — 'Reading Trust v. Spero', (1930) I K. B. 492 to which the learned Law Lord himself as Lord Justice Greer was a party.

Our attention was further invited to — 'Nageswara v. Ramanathan', AIR 1935 Mad 468, a judgment of Varadachariar and Burn JJ. where the learned Judges held that for a transaction to be regarded as unfair within the meaning of Sub-s. (d) of Cl. (2) of S. 3 of the Usurious Loans Act, it is not necessary that the court should be able to ascribe some moral blameworthiness to the creditor in the sense that he has tricked the debtor into entering into that bargain, though the terms of sub-clause (d) show that taking undue advantage of the position of the debtor is one category of issues falling under that clause. The learned counsel stressed chiefly one aspect of similar transactions referred to in the judgment, viz., that a debtor ought not to invoke the aid of the court in his favour merely because, by his own default in repaying the loan, the amount has swelled considerably. For that purpose, the learned Judges relied upon the observations of the Judicial Committee in — 'Lala Balla Mal v. Ahad Shah', 35 Mad L J 614 (PC) which we have already referred to.

(7) It has been strenuously argued before us that in this case both the parties knew what the rate of interest was, that there was no kind of undue influence being exercised upon the defendant by the plaintiffs' father, and that simply because, after having borrowed the money, the first defendant did not act according to the terms of the mortgage and pay the amount within the time fixed or for nearly twenty years, he could not, now come forward and plead that he should be relieved from the contractual obligation of paying the interest that is imposed upon him by invoking the provisions of the Usurious Loans Act. In matters like this, the learned counsel contends, sympathy ought not to play any part whatever and that where people with open eyes do not pay their legitimate debts, the courts should not help them unless, at the initial stage of the transaction there had been some kind of undue influence or unfairness or unconscionable bargain between the parties.

In this connection we may also refer to a very recent decision in — 'Venkataraju v. Venkataramana', 1951-2-Mad L J 84, where Panchapagesa Sastry J. had to consider a case in which the defendant purchased a property from its prior owner undertaking to discharge a mortgage for Rs. 2000 of the year 1922. After making some payments, ultimately the suit mortgage was executed in 1935 for Rs. 3344 with interest at 9 per cent compound. The question was whether the rate of interest was usurious, excessive and unconscionable. The learned Judge held that when the property had been purchased with a direction to pay off the mortgage and the defendant, instead of doing so, found it convenient to renew the mortgage and he could not make any payments till 1947 for want of money, the fact that the property had appreciated in value to a considerable extent mainly by unearned increment is not a ground to justify the defendant keeping the benefit of the increment to himself in respect of the mortgaged property as agreed to by him voluntarily and willingly in the deed of mortgage. It was held that there was therefore no case of any unconscionable nature of the transaction.

(8) We have to remark that in none of these cases the statute as it now obtains in Madras has been considered. We have already explained the effective nature of the amendment introduced by the Madras Act and the explanation which says that where the court is satisfied that the interest is excessive, then it has necessarily to hold that the transaction was unfair between the parties. There is a similar amendment to the Central Usurious Loans Act introduced in the United Provinces; and in — 'Ram Narain v. Chandrika Prasad', 14 Luck. 49 and — 'Sarsuit Prasad v. Baijnath Singh', 14 Luck. 464 the learned Judges of the Oudh Chief Court had to consider the effect of that amendment. They held that cases coming before courts after the passing of the local amending Act must be decided according to the principles laid by the Act and therefore the court can relieve the debtor of liability in respect of excessive interest not only when the interest is excessive and the transaction was substantially unfair, but also where either the interest is excessive or the transaction is substantially unfair. They discussed various cases of that court as well as of the Privy Council.

In the case reported in — 'Sasruit Prasad v. Baijnath Singh', 14 Luck. 464 the learned Judges were of opinion that if the stipulated rate of interest varies between 9 per cent and 24 per cent, the court has discretion, regard being had to all the circumstances, to hold that it is excessive.

(9) What we have therefore to decide is whether Rs. 1-0-6 per cent per mensem compound interest with annual rests is excessive. In a case where the mortgagor gave ample security for the loan and there were no encumbrances on or other claimants to the mortgaged property, it was held that prima facie and in the absence of special circumstances to the contrary, the rate of 12 per cent per annum simple interest may be taken as a fair and proper rate and that the condition for compounding it would make it an excessive rate and transform the transaction into substantially unfair one. See — 'Gajraj Singh v. Muhammad Mushtaq Ali', 56 All 263.

Lord Buckmaster in delivering the judgment of their Lordships of the Judicial Committee in — Narain Das v. Abinash Chandar', 16 Mad L W 780 (PC) observes at pages 783 and 784 as follows:

> "The final question with regard to the amount of interest that has been allowed against the appellant can be disposed of in a few sentences. The rate is 12 per cent. It appears, according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that having regard to the local conditions in India, it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount."

So their Lordships of the Judicial Committee take it that 12 per cent simple interest is a very reasonable and proper rate of interest in India. The decision of their Lordships referred to above has been discussed in — 'Gajraj Singh v. Muhammad Mushtaq Ali', 56 All 263 and the learned Judges point out that in the absence of special circumstances to the contrary, the rate of 12 per cent per annum simple interest may be taken as a fair and proper rate.

(10) In — 'Ram Bhujawan Prasad Singh v. Nathuram', 50 Ind. App. 14 (PC) the Privy Council held that one per cent per mensem simple interest is a fair commercial rate in the absence of special circumstances justifying a higher rate. After considering these and various other cases, Bennett and Verma JJ. in — 'Ziaul Rahman v. Gangadei', AIR 1939 All 323 at page 326 observe that in the United Provinces this rate is a proper rate. We are also of opinion that in the Madras State it has been long understood that 12 per cent simple interest is a fair, proper and reasonable rate.

In — 'Venkanna Chettiar and Sons v. Shaik Muhammad Rowther', 1943-2-Mad L J 504 Patanjali Sastri J. had to consider the proviso to the Explanation to S. 3 introduced with the object of relieving indebted agriculturists by laying down that if compound interest is charged, the court should presume that interest is excessive where the loan is to an agriculturist. The learned Judge considered the effect of the Madras amendment also. Though that was a case relating to agriculturists, we are of opinion that the observations there are of considerable help for deciding this case. In a case where the debtor was an agriculturist, Rajamannar C. J. and Krishnaswami Nayudu J. in — 'Sevugan Chettiar v. Chinnasami Reddiar', 1950-1-Mad L J 181 held that the rate of 12 per cent per annum simple interest was proper and that wherever there is compound interest the same should be deemed as excessive whatever the rate may be. We do not think that anything very useful can be gathered from the decision of Horwill J. in — 'Narasimham v. Premayya', 1945-1-Mad L J 219.

(11) The effect of Madras Act VIII of 1937 by which Sub-s. (1) of S. 3 of the Usurious Loans Act was amended and explanations and provisos were added is to make it obligatory upon the court to find out whether there is excessive interest and when once that is done to presume that the transaction was unfair. We have already expressed the opinion that anything above 12 per cent per annum simple interest is excessive, considering the nature of transactions in this State. In our opinion, whatever might have been the rates prevailing prior to 1918, it should be deemed as stated by Varadachariar J. in — 'Nageswara v. Ramanathan', AIR 1935 Mad 468. that the enactment of the Usurious Loans Act was intended to cover cases which could not ordinarily be governed by S. 16 of the Contract Act. The transaction may not be subject to the infirmities contemplated by the provisions of the Contract Act, such as undue influence or coercion. But still where the rate of interest is excessive after the amendment it is possible for the court to presume that the transaction was unfair. The mere fact that in earlier transactions Rs. 1-0-6 per cent per mensem compound interest was charged would not make that rate of interest reasonable.

Mr. Venkatarama Raju's argument that the mere fact that in Ex. P-2 and Ex. P-5 of 1923 and 1924 as well as in Ex. P-3 of even date as Ex. P-1, interest was charged at Rs. 1-0-6 per cent per mensem compound interest should make the present transaction also a proper transaction does not appeal to us because Ex. P-3 was executed in favour of Subbayya who was

one of the persons who initiated the insolvency proceedings. Exhibits P-5 and P-2 were in favour of the plaintiffs' father. These transactions themselves may be unconscionable and unfair and we cannot, by comparing those transactions, assume that the present transaction was fair and equitable. We therefore hold that Rs. 1-0-6 per cent per mensem compound interest with annual rests is excessive within the meaning of the explanation inserted by Madras Act VIII of 1937 and that being so, the transaction was unfair between the parties and the respondents are entitled to the benefit of the Usurious Loans Act as amended by the Madras Act VIII of 1937. The learned Judge has allowed 9 per cent simple interest. For the reasons which we have already given, especially in view of the observations of the Judicial Committee, it seems to us that 12 per cent simple interest is fair, reasonable and just.

(12) We, therefore, allow the appellants 12 per cent simple interest on the principal sum. The decree of the lower court will be modified accordingly. As the first defendant-first respondent by not paying any substantial amount for nearly 20 years has contributed to the swelling up of this principal sum, we feel that in the circumstances of the case he will have to pay the appellants' costs both in this court and in the court below and bear his own, and we order accordingly. Time for redemption 4 months.

B/D.H. Order accordingly.

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CHANDRA REDDY J.

Kuttyal and others, Appellants v. P. Sanjiva Rao, Respondent.

A. A. A. O. No. 55 of 1950, D/- 11-7-1952.

(a) Civil P.C. (1908) O. 34 R. 14 — Usufructuary mortgage and lease back — Test to determine whether they form one transaction —Decree for rent — Sale of mortgaged property — Bar of — (Transfer of Property Act (1882) S. 58).

There can be no single crucial test in determining whether the mortgage and the lease back form part and parcel of the same transaction, nor can any hard and fast rule be laid down for this purpose. In order to treat both the documents as one transaction it is not necessary either that both the mortgage and the lease back should have been embodied in one document or that they should have been executed on one and the same date. One essential condition is that at the time of the execution of the mortgage the lease back should have been in contemplation. (Paras 3 & 14)

Where the usufructuary mortgage and the lease back were simultaneous but were for varying periods of operation and on an earlier occasion there was a mortgage with possession by the same mortgagor in favour of the same mortgagee and a lease back in favour of the mortgagor and the arrears of rent in respect of that lease formed part of the consideration for the present mortgage, and the properties which were the subject-matter of the mortgage and the lease back were identical and lastly a charge was created for arrears of rent under the lease back on the properties which were the subject-matter of the mortgage and the lease back and the mortgagee obtained a decree for arrears of rent.

Held that the decree for rent was a claim arising under the mortgage and O. 34 R. 14 was a bar to bringing the mortgaged properties to sale. Case law discussed, AIR 1920 Cal. 363 (FB) held no longer good law. (Para 14)

Anno: C.P.C., O. 34 R. 14 N. 6 Pt. 1 N. 12 Pt. 7; T. P. Act S. 58 N. 35.

(b) Civil P.C. (1908) O. 34 R. 14 — Object of rule.

O. 34 R. 14 was enacted by the Legislature for the benefit of the mortgagor so that the mortgagee may not purchase the equity of redemption in enforcement of a money decree which he may obtain against the mortgagor, in respect of a claim arising under the mortgage. (Para 15)

Anno: C.P.C., O. 34 R. 14 N. 2 Pt. 1.

M. K. Nambiar, for Appellants; K. Vithalrao, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras
('05) 27 All 313: (1904 All WN 273) 13
('19) 41 All 399: (AIR 1919 All 435) 6, 9
('36) AIR 1936 All 708: (165 Ind Cas 402) 9
('20) 44 Bom 366: (AIR 1920 Bom 202) 6
('21) 45 Bom 174: (AIR 1921 Bom 285) 6, 8
('20) 47 Cal 377: (AIR 1920 Cal 363 FB) 10
('28) 55 Cal 104: (AIR 1927 Cal 884) 10
('24) 47 Mad LJ 798: (AIR 1925 Mad 127) 11, 12
('27) 50 Mad 180: (AIR 1927 PC 32) 5, 10, 14
('40) 1940-1 Mad LJ 143: (AIR 1940 Mad 59) 11, 12
('44) AIR 1944 Pat 5: (22 Pat 320) 4, 5, 14

JUDGMENT:— This civil miscellaneous second appeal raises an interesting question of law bearing on the provisions of Or. 34 R. 14, C. P. C. The following are the circumstances giving rise to this question. The appellants executed a usufructuary mortgage in favour of one Kodotha Ambu Nair on 7-9-1916 to secure a sum of Rs. 12500. This mortgage amount was made up of Rs. 8000 due in respect of an earlier mortgage in favour of the same mortgagee, Rs. 2000 being the sum in respect of a mortgage deed executed in favour of the mortgagee's elder brother, Rs. 1874 being the arrears of rent due under a lease back in respect of the earlier mortgage and the balance being the cash paid to the mortgagor for his necessities. The period of redemption fixed in the mortgage was 20 years.

It was also mentioned therein that in respect of this property the mortgagor had executed a 'geni chit' (a lease back) in favour of the mortgagee. But the 'geni chit' was actually executed only on the next day and this was for a period of one year. The rent stipulated under the 'geni chit' was 772½ 'paras' of paddy per year besides paying to the Government the assessment Rs. 166-10-0. The arrears of rent were charged on the property mortgaged. The mortgagor lessee did not pay the rent regularly & allowed it to fall into arrears with the consequence that the mortgagee filed a suit for the recovery of the arrears of rent and obtained a decree for Rs. 2455 inclusive of costs. As this decree was not satisfied, execution of it was sought and the properties, which were the subject matter of the mortgage and the lease, were attached. On notice the judgment debtors raised an objection to the attachment of their properties based on Or. 34 rule 14 C. P. C.

(2) The trial court overruled the objection holding that the provisions of Or. 34 rule 14 C.P.C. had no application and allowed the execution to proceed. The two grounds, on which he came to this conclusion, were that the mortgage and the lease back were not simultaneous and that both the documents did not cover the same period. The appeal filed by the judgment debtors to the District Judge did not prove successful as the appellate Judge agreed with the opinion of the trial court as regards the applicability of Or. 34 rule 14 to the present case. The judgment debtors who were aggrieved by this decision have preferred the second appeal.

(3) In support of this appeal, Mr. Nambiar contended that the view of the courts below that the circumstances that both the documents were not executed on the same date and that the periods fixed in both the documents are not co-extensive show that the mortgage and the lease back did not form part and parcel of the same transaction, is erroneous and that neither of these circumstances is an indication that they are two separate and severable transactions. I think I must give effect to this contention. That in order to treat both the documents as one transaction it is not necessary either that both the mortgage and the lease back should have been embodied in one document or that they should have been executed on one and the same date, is clear from a number of rulings. I do not think that proposition can admit of any controversy. One essential condition is that at the time of the execution of the mortgage the lease back should have been in contemplation.

(4) With regard to the other consideration namely that the two documents are for varying periods of operation Mr. Nambiar urged that it cannot determine the question whether in substance and in reality they formed one transaction. In support of this contention reliance is placed on the observations of a Bench of Patna High Court in — 'Umeshwar Prasad v. Dwarika Prasad', AIR 1944 Pat 5 where the learned Judges observed that,

> "such a transaction may be evidenced by more than one document which may have been executed on different dates with varying periods of their operation and possibly, even in the name of different parties, benami for the real mortgagor and mortgagee."

(5) These observations are based upon a decision of the Judicial Committee of the Privy Council in — 'Panaganti Ramarayaningar v. Maharaja of Venkatagiri', 50 Mad 180 (P. C.). There a mortgage with possession was executed in favour of the predecessor-in-interest of the first defendant by the predecessor-in-interest of the plaintiff to secure a sum of Rs. 11 lakhs; that contained a personal covenant to pay principal and interest. By a separate document of the same date mortgagee leased back a portion of the mortgaged properties to the mortgagor and the arrears of rent were made a charge on the properties included in the mortgage. As the mortgagor-lessee did not pay any of the instalments of rent payable under the lease, the lessor filed a suit and obtained a decree for the arrears of rent. The question arose whether the mortgagor could redeem the mortgage without paying the arrears of rent most of which matured into a decree.

In dealing with this question, their Lordships considered the point whether the two deeds namely the mortgage deed and the lease deed should be treated as forming parts of one transaction and held that the contention of the mortgagee that the mortgage & the lease should be read together as they formed parts of one transaction & that the lease was merely a device for realising interest should prevail. Although the question did not directly arise and was one coming under Ss. 61 and 62 of the Transfer of Property Act, the decision has a bearing on the question arising under Or. 34 rule 14 C. P. C. because there the point was considered whether the two documents formed the component parts of the same transaction.

No doubt their Lordships did not state that the fact that the two documents have varying periods in their operation did not make a difference in determining the question whether they formed part of the same transaction or not. But in view of the fact that though the two documents did not cover the same period yet their Lordships held that they should be treated as one transaction and were meant as a machinery for realising the collection of rent, the Division Bench of the Patna High Court thought that this ruling is an authority for the proposition that the mere fact that the periods fixed in both the documents are not co-extensive does not indicate that they do not form part of one and the same transaction. I may also observe that these observations in — 'Umeshwar Prasad v. Dwarika Prasad', AIR 1944 Pat 5 quoted above are obiter as in that case both the documents covered the same period. However they are entitled to much weight as the question was dealt with at some length.

(6) Mr. Nambiar next maintained that the fact that both the documents were executed almost simultaneously is a sure indication that they were treated not as two separate and severable transactions but as one and the same transaction; and in this context he relies upon the two decisions of the Bombay High Court in — 'Ibrahim v. Nihalchand', 44 Bom 366 and — 'Bhaichand Kirparam v. Ranchhoddas Mancharam', 45 Bom 174. In — 'Ibrahim v. Nihalchand', 44 Bom 366 after citing the following passage of Mr. Justice Piggott in — 'Kadma Pasin v. Muhammad Ali', 41 All 399.

> "In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage; but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which, if falling due on a contract of simple mortgage, become part of the mortgage money; in the second place it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage."

(7) The learned Judges stated that the remarks extracted above applied with greater force to the case before them as the lease back was executed on the same date as the mortgage.

(8) This was followed by another Division Bench of the Bombay High Court in — 'Bhaichand Kirparam v. Ranchhoddas Mancharam', 45 Bom 174.

(9) The same view as in—'Kadma Pasin v. Muhammad Ali', 41 All 399 was taken by Harries J. in — 'Piyare Lal v. Hasan Ahmed', AIR 1936 All 708.

(10) In addition to the fact that the two docu-

ments were simultaneous the other circumstances on which reliance was placed by Mr. Nambiar in support of the contention that the mortgage and lease back are not two distinct transactions and that they should be read as one, are that on an earlier occasion also when the mortgage was created in favour of the same mortgagee the same device was adopted namely creating a mortgage with possession and leasing back the same property to the mortgagor and that secondly for the arrears of rent, a charge was created on the property mortgaged. In my opinion, these two circumstances also furnish an indication as to the nature of the two transactions.

(10a) Mr. Vittal Rao on behalf of the respondent urged first that a decree for rent cannot be a claim arising under the mortgage within the mischief of Or. 34 rule 14 C. P. C. and in support of that proposition cited to me a decision in — 'Uttam Chandra Daw v. Rajkrishna Dalal', 47 Cal. 377 (F. B.). No doubt this case to some extent lends support to the contention of Mr. Vittal Rao. But I do not think that this proposition can be considered to be sound after the pronouncement of the Privy Council in — 'Panaganti Ramarayaningar v. Maharaja of Venkatagiri', 50 Mad 180 (P. C.). Apart from this, a Division Bench of Calcutta High Court in — 'Mahomed Yakub Miah Majumdar v. Namar Ali', 55 Cal 104 took the view that a decree for arrears of rent arising under a lease back in favour of the mortgagor by the mortgagee with possession was held to be a claim arising under Or. 34 rule 14 C. P. C. which could be only on the basis that the ruling in — 'Uttamchandra Daw v. Rajkrishna Dalal', 47 Cal 377 (F. B.) can no longer hold good. Further the view of the Allahabad and Bombay High Courts also is that such a claim would be a claim arising under the mortgage within the meaning of Or. 34 rule 14.

(11) Coming to our court both in — 'Lakshmi kutti Ammal v. Mariathummal', 47 Mad L. J. 798 and — 'Chinnapayan v. Narayana Pattar', 1940-1-Mad L. J. 143 it was held that a decree for rent under circumstances mentioned above is a claim arising under a mortgage so as to attract the provisions of Or. 34 R. 14 C. P. C. On these rulings the point sought to be made by Mr. Vittal Rao has no force and has to be rejected. As already pointed out by me, the circumstances that the lease back was executed a day after the execution of the mortgage does not make any difference in the consideration of the question whether they formed part of the same transaction or not. Furthermore in this case it is clear from the recitals in the mortgage deed that the lease back was in contemplation of the parties at the time when the mortgage was executed.

(12) Another point urged by Mr. Vittal Rao in opposition to the appeal is that the fact that the two documents do not cover the same period should be held to be decisive against the contention of the appellants that they form part of the same transaction & in support of it he relied upon the two decisions of our court in —'Lakshmikutti Ammal v. Mariathummal' 47 Mad L. J. 798 and —'Chinnapayan v. Narayana Pattar', 1940-1-Mad L. J.143. In — 'Lakshmikutti Ammal v. Mariathummal, 47 Mad L. J. 798 although the period both for redemption of the mortgage and for the lease was coextensive, the learned Judge who decided that case did not rely on this as a circumstance in coming to the conclusion that the transaction is governed by the provisions of Or 34 rule 14. He thought that the fact that the two documents could be read as one was sufficient to come to that conclusion. In — 'Chinnapayan v. Narayana Pattar', 1940-1-Mad L. J. 143 all that Wadsworth J. observed is that the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins is a clear indication that both the deeds form part of one and the same transaction. It is not stated therein that this is a crucial test. Therefore in my opinion neither of the two decisions affords any assistance to the respondent.

(13) Reliance was also placed by Mr. Vittal Rao on the observations in—'Khuda Baksh v. Alimunnissa', 27 All 313. There the learned Judges were dealing with the applicability of Ss. 61 and 62 Transfer of Property Act to the case before them. In considering whether the lease could be regarded as part of the mortgage transaction or not, Banerji J. one of the members of the Bench remarked thus:

> "The two documents were not registered at one and the same time, as they would have been had they formed one transaction. What is more important is that two documents do not cover the same period."

It is seen that the learned Judge thought that the fact that both the documents did not cover the same period is one of the important considerations although he did not treat it as the sole consideration. I think too much stress cannot be laid on this.

(14) In my opinion it should be one of the several circumstances that should be borne in mind in deciding the question whether the lease back is a part of the mortgage transaction or not, especially in view of the observations in— 'Umeshwar Prasad v. Dwarika Prasad'. AIR 1944 Pat 5 and the Judicial Committee in — 'Panaganti Ramarayaningar v. Maharaja of Venkatagiri' 50 Mad 180 (P. C.). There can be no single crucial test in determining whether the mortgage and the lease back form part and parcel of the same transaction; nor can any hard and fast rule be laid down for this purpose. My view is the circumstance that at the time of the execution of the mortgage the parties had in contemplation the leasing back of the properties to the mortgagor plays an important part in the decision of the question whether the two documents are parts of the same transaction.

Now reading the two documents together and bearing in mind the facts that they are simultaneous, that on an earlier occasion there was a mortgage with possession by the same mortgagor in favour of the same mortgagee and a lease back in favour of the mortgagor and the arrears of rent in respect of that lease formed part of the consideration for the present mortgage, that the properties which are the subject-matter of the mortgage and the lease back are identical and lastly that a charge was created for arrears of rent under the lease back on the properties which are the subject-matter of the mortgage and the lease back, I arrive at the conclusion that the decree for rent in this case is a claim arising under the mortgage and that O. 34 R. 14 C. P. C. is a bar to bringing the mortgaged properties to sale.

(15) Under O. 34 R. 14 a mortgagee cannot bring the properties to sale in enforcement of a claim arising under a mortgage except by instituting a suit for sale in enforcement of the mortgage. The provision was enacted by the Legislature for the benefit of the mortgagor so that the mortgagee may not purchase the equity of redemption in enforcement of a money decree which he may obtain against the mortgagor, in respect of a claim arising under the mortgage. The intention of the Legislature seems to be that all claims arising under the mortgage should be adjudicated by the court either at the time of the redemption of the mortgage or when the mortgagee brings a suit on his mortgage. In this view, I must hold that the decision of the courts below cannot be sustained and should be-

set aside and that the objection of the judgment-debtors would prevail.

(16) In the result, the second appeal is allowed but in the circumstances of the case I direct the parties to bear their costs throughout. No leave.

A/V. R. B. Appeal allowed.

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RAJAMANNAR C. J.
AND VENKATARAMA AYYAR J.

Nalluri Subbaiah, Petitioner v. Nalluri Raghavalu and others, Respondents.

Writ Petn. No. 343 of 1951, D/- 28-11-1951.

Constitution of India, Art. 226 — Writ of Certiorari — Matter not finally decided — Petitioner able to defend himself in lower Courts — Writ not to be issued.

A magistrate rejected an application under S. 144, Cr. P. C. on the ground that the applicant did not show any bona fide right on his part and directed the police to institute proceedings under S. 107, Criminal P. C. against the applicant, if he intended to exercise the right claimed by him. The applicant applied for a writ of certiorari quashing the direction;

Held that the High Court was not called upon to exercise its jurisdiction under Art. 226 simply on an executive direction given by the Magistrate which did not finally decide the right of the applicant. Moreover, the applicant had the right to defend himself fully if and when the proceedings under S. 107, Criminal P. C. were instituted. (Para 2)

D. Munikanniah and R. D. Indrasenan, for Petitioner; A. Raghaviah, for Respondents.

Order: This application is thoroughly misconceived. The petitioner himself filed an application before the Stationary Sub-Magistrate, Ongole, for an order under S. 144 of the Code of Criminal Procedure, basing it on an alleged right in him to perform a certain festival. The Magistrate considered that the petitioner had not shown any bona fide right on his part and therefore rejected his application. After he had disposed of that application, he directed a copy of his order to be sent to the Circle Inspector of Police who was requested to institute proceedings under S. 107 of the Code of Criminal Procedure against the petitioner, if he intended to exercise the right which was claimed by him.

(2) We do not understand how we can interfere at this stage under Art. 226 of the Constitution. If and when proceedings under S. 107 of the Code of Criminal Procedure are instituted against the petitioner, he will have the right to defend himself, and if, as the learned counsel for the petitioner says, he has clear authority for the position that S. 107 would not be applicable to the case, then he might be successful in the proceedings. We certainly cannot be called upon to exercise our jurisdiction under Art. 226 of the Constitution simply on an executive direction by the Stationary Sub-Magistrate to the police to take a particular action under S. 107, Criminal Procedure Code. The order of the Magistrate does not certainly purport to decide finally the right of the petitioner. That will be a matter to be ultimately decided by a civil court. The application is dismissed with costs. Advocate's fee is Rs. 50/- (fifty)

A/D.R.R. Application dismissed

END

ASHMIR UNIVERSITY
Acc. No 177325
Dated 26.11.80